No. __-____

In the
Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ROMOLO COLANTONE, EFRAIN ALVAREZ, and JOSE ANTHONY IRIZARRY,

Petitioners,

v.

THE CITY OF NEW YORK and THE NEW YORK CITY POLICE DEPARTMENT-LICENSE DIVISION,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

New York City prohibits its residents from possessing a handgun without a license, and the only license the City makes available to most residents allows its holder to possess her handgun only in her home or en route to one of seven shooting ranges within the city. The City thus bans its residents from transporting a handgun to any place outside city limits—even if the handgun is unloaded and locked in a container separate from its ammunition, and even if the owner seeks to transport it only to a second home for the core constitutionally protected purpose of self-defense, or to a more convenient out-of-city shooting range to hone its safe and effective use.

The City asserts that its transport ban promotes public safety by limiting the presence of handguns on city streets. But the City put forth no empirical evidence that transporting an unloaded handgun, locked in a container separate from its ammunition, poses a meaningful risk to public safety. Moreover, even if there were such a risk, the City's restriction poses greater safety risks by encouraging residents who are leaving town to leave their handguns behind in vacant homes, and it serves only to increase the frequency of handgun transport within city limits by forcing many residents to use an in-city range rather than more convenient ranges elsewhere.

The question presented is:

Whether the City's ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the Commerce Clause, and the constitutional right to travel.

PARTIES TO THE PROCEEDING

Petitioners are the New York State Rifle & Pistol Association, Inc., Romolo Colantone, Efrain Alvarez, and Jose Anthony Irizarry. They were plaintiffs in the district court and plaintiffs-appellants in the court of appeals.

Respondents are the City of New York and the New York City Police Department – License Division. They were defendants in the district court and defendants-appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners state as follows:

Petitioner New York State Rifle & Pistol Association has no parent corporation and no publicly held company owns 10 percent or more of its stock. The remaining petitioners are individuals.

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PETITION FOR WRIT OF CERTIORARI

Ten years ago, this Court held that the Second Amendment "confer[s] an individual right to keep and bear arms." *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). Two years later, the Court held that this individual right is fundamental, applicable against state and local governments, and entitled to the same robust protections as other fundamental rights enshrined in the Constitution. *McDonald v. City of Chicago*, 561 U.S. 742 (2010). The news has not yet reached New York City. Instead, it is business as usual for draconian restrictions in New York, and this Court's transformational rulings remain theoretical for the City's 8.5 million residents.

This is a case in point. Years before *Heller* recognized an individual and fundamental right to keep and bear arms, New York City put in place a prohibition on transporting handguns anywhere beyond city limits—even when they are unloaded and locked up in a container separate from their ammunition. Under that novel restriction, a New Yorker cannot transport his handgun to his second home for the core constitutional purpose of self-defense, to an upstate county to participate in a shooting competition, or even across the bridge to a neighboring city for target practice. While the City could have been excused for imposing such draconian restrictions in an era when the "collective rights" view of the Second Amendment remained viable, nothing changed when this Court recognized an individual right in *Heller*, or when this Court made clear that this right applies against state and local governments in *McDonald*. Instead, New York left this perverse one-

of-a-kind prohibition on its books, and the Second Circuit has now given that prohibition its blessing in a decision that perfectly embodies how lower courts have applied heightened scrutiny in name only to laws restricting Second Amendment rights, notwithstanding this Court's express rejection of such an approach in *Heller*.

Indeed, despite bearing the burden under heightened scrutiny, the City has presented precisely zero empirical evidence that transporting an *unloaded* handgun *locked up* in a container *separate from* its ammunition (an activity that federal law affirmatively protects) poses any material safety risk. Moreover, the City's transport ban only undermines its professed public safety concerns, as the ban has the perverse effects of forcing residents to keep handguns in their vacant New York residences, and to transport their handguns all around the city—the very activity the City claims is dangerous—in search of one of seven in-city shooting ranges tucked into the boroughs. If this kind of showing satisfies heightened scrutiny, then this Court did not mean what it said in *Heller*. And if that is truly the case, the word that *Heller* and *McDonald* amount to no more than rational basis or apply to nothing beyond flat bans should come from this Court, not the Second Circuit.

Making matters worse, the City's ill-conceived transport ban not only disregards any meaningful conception of the Second Amendment, but suffers two other constitutional infirmities. By restricting the use of lawfully purchased handguns to in-city shooting ranges, the ban violates the Commerce Clause, for the law clearly "deprive[s] citizens of their right to have

access to the markets of other States on equal terms." *Granholm v. Heald*, 544 U.S. 460, 473 (2005). And the ban violates the fundamental right to travel by conditioning such travel on the forfeiture of a separate, but equally important, constitutional right.

This case is thus an extreme outlier three times over, as the Second Circuit managed to uphold the City's novel ban only by distorting beyond recognition (at least) three separate strands of this Court's jurisprudence. Simply put, the City's transport ban lacks even a rational basis, much less the heightened showing necessary to justify burdens on constitutional rights. This Court should not let either that novel ban or the Second Circuit's indefensible version of "heightened scrutiny" stand.

OPINIONS BELOW

The Second Circuit's opinion is reported at 883 F.3d 45 and reproduced at App.1-39. The order denying rehearing en banc is reprinted at App.40-41. The district court's opinion is reported at 86 F. Supp. 3d 249 and reproduced at App.42-76.

JURISDICTION

The Second Circuit issued its opinion on February 23, 2018. Petitioners filed a timely petition for rehearing en banc, which the court denied on April 5, 2018. On June 21, 2018, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to and including August 3, 2018. On July 19, 2018, Justice Ginsburg further extended the time for filing a petition for a writ of certiorari to and including September 2, 2018. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause, U.S. Const. art. I, §8, cl. 3; the Privileges and Immunities Clause, art. IV, §2, cl. 1; the Second Amendment; the Fourteenth Amendment; and the relevant portions of the New York Penal Law and the Rules of the City of New York are reproduced at App.77-93.

STATEMENT OF THE CASE

A. Factual Background

As a matter of state law, New York forbids its residents to possess handguns in their homes without a license. N.Y. Penal Law §§265.01, 265.20(a)(3). To exercise this core Second Amendment right, residents must apply for a license "to the licensing officer in the city or county … where [he or she] resides." *Id.* §400.00(3)(a). In New York City, the Police Commissioner ("Commissioner") administers the handgun licensing system. *Id.* §265.00(10), §§400.00(1), (3); 38 R.C.N.Y. §1-03(d). It is no mean feat for a New York resident to get a license to "have and possess" a handgun "in his dwelling." N.Y. Penal Law §400.00(2)(a). The application evaluation process includes, among other things, an assessment of the applicant's mental health, a crosscheck of the applicant's statements on his or her license application, a criminal records check—and, of course, a hefty fee. JA178-79.[1] The Commissioner may deny an application for "good cause." JA179.

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[1] "JA" refers to the joint appendix petitioners filed with the Second Circuit.

But even getting such a license, known as a "premises license," 38 R.C.N.Y. §5-01(a), does not do a license holder any good if she wants to transport the handgun to a weekend home or take it to a convenient range outside city limits. Instead, under a restriction that pre-dates this Court's landmark decision in *Heller*, a premises license limits the holder's possession to the address listed on the license, with the sole exception being that the license holder "may transport her/his handgun(s) directly to and from an authorized small arms range/shooting club, unloaded, in a locked container, the ammunition to be carried separately." *Id.* §5-23(a)(3). The Commissioner's rules prohibit a New York City premises license holder from transporting her handgun to a separate residence. And the rules do not deem any range or shooting club outside of city limits "authorized," meaning a license holder is limited to using shooting ranges inside city limits. There are only seven target shooting ranges, exclusive of police or military ranges, in the entirety of New York City, a city with a population of 8.5 million people. App.6; JA81 ¶40; JA122; JA148 ¶27-28; JA163-64 ¶27-28.

Petitioners Romolo Colantone, Jose Anthony Irizarry, and Efrain Alvarez hold premises licenses in New York City. App.7. Colantone is a resident of Staten Island and has held a premises license for nearly 50 years. He owns a second home in Hancock, New York, in Delaware County, and he wishes to transport his handgun to his second home and use it when he is in residence there to defend himself and his family. App.7; JA33 ¶11. He has declined to take his handgun from the city to Hancock, however, for fear of prosecution under §5-23. JA33-34 ¶¶12, 14.

Irizarry and Alvarez are residents of the Bronx and have held premises licenses for more than a decade. JA41 ¶¶2, 3; JA45 ¶¶2, 3. Colantone, Irizarry, and Alvarez all seek to transport their handguns to target ranges and shooting competitions outside New York City to hone their shooting skills. App.7. The same is true for members of petitioner the New York State Rifle and Pistol Association. JA9. Because of §5-23, however, petitioners and/or their members have declined to participate in any shooting competitions or events outside the borders of the city for fear of revocation of their premises licenses and of criminal prosecution. JA33-34 ¶¶10, 13; JA42-43 ¶¶9-10; JA46-47 ¶¶9-10.

B. Procedural History

Petitioners brought suit against the City of New York and the City's license division alleging, as relevant here, that the City's ban on transporting handguns outside city limits violates the Second Amendment, the Commerce Clause, and the fundamental right to travel. The district court entered summary judgment in the City's favor on all claims, in an opinion that lifted long passages verbatim from the City's summary judgment papers.

Purporting to apply "intermediate scrutiny" but, in fact, applying something recognizable only as rational-basis review, the court held that the transport ban is reasonably related to the City's interest in public safety and crime prevention. App.62. The court rejected petitioners' right-to-travel argument on the theory that the transport ban is a "reasonable … time, place, and manner restriction[] on the possession and use of a firearm." App.67. Finally,

the court held that even though the transport ban does not allow petitioners to use out-of-city ranges to practice using their own firearms, it does not violate the Commerce Clause because "[t]he rule does not prohibit persons from purchasing firearms or attending shooting competitions" outside the city *without* their firearms. App.74.

Petitioners appealed, and the Second Circuit affirmed. As to petitioners' Second Amendment claim, the court acknowledged that "the ownership and possession of firearms in [one's] residence[]" is "where Second Amendment guarantees are at their zenith," and that "the[] lawful use of those weapons in defense of hearth and home" is "the core protection of the Second Amendment." App.13-14 (quotation marks omitted). The court nevertheless concluded that the inability to transport firearms from one residence to another "does nothing to limit the[] lawful use of those weapons" for that core purpose. App.14. With respect to Colantone, the court held that the regulation "does not substantially burden" his ability to defend himself in his second residence because "an adequate alternative remains for Colantone to acquire a firearm for self-defense." App.14 (quotation marks omitted). That alternative, the court explained, is that he could purchase a second handgun and obtain a license from a different county to keep that second handgun there. App.14-15.

As for petitioners' desire to practice with their own handguns at nearby target ranges and in shooting competitions outside the city, the Second Circuit acknowledged that the right "to bear arms … implies the learning to handle and use them," App.16 n.9, but

concluded that the transport ban does not "impede[]" petitioners' "ability to engage in sufficient practice to acquire and maintain the skills necessary to keep firearms safely and use them effectively," App.18. That is so, the court concluded, because residents can take their firearms to one of the seven target ranges that serve the entirety of New York City, App.18-19, and because the court assumed (albeit without identifying any record evidence on the issue) that other "guns can be rented or borrowed at most such venues for practice purposes," App.22. In light of these conclusions, the Second Circuit held that petitioners' Second Amendment rights were not substantially burdened and therefore declined to apply strict scrutiny.

Purporting to apply intermediate scrutiny, the court then held that the City had carried its burden to justify the encroachment on protected Second Amendment activity. The court identified the City's interest as protecting public safety and concluded that the City had presented sufficient "evidence supporting its contention" that the regulation protects that interest. App.26. The sole evidence on which the court relied in reaching that conclusion was a single affidavit from the former commander of the state licensing division hypothesizing, without any evidentiary support, that transporting an unloaded handgun, locked in a container separate from its ammunition, may pose a public safety risk in "road rage" or other "stressful" situations. App.26-28. The court did not explain how requiring city residents to spend *more* time transporting their handguns to inconvenient in-city ranges furthers the City's

professed interest in reducing the in-city transport of unloaded, locked-up handguns.

The Second Circuit also rejected petitioners' claims that the transport ban violates the Commerce Clause and the fundamental right to travel. As to the Commerce Clause, the court concluded that the regulation does not facially discriminate against interstate commerce because petitioners can "patronize firing ranges outside of" the city and state, even though they "cannot do so with their premises-licensed firearm." App.31. And the court rejected the argument that the transport ban has an impermissible extraterritorial effect, insisting that it "directly governs only activity within New York City," notwithstanding its total prohibition on transporting lawfully acquired firearms outside the city. App.31-34. As for the right to travel, the court concluded that the "Constitution protects the right to travel, not the right to travel armed." App.35.

REASONS FOR GRANTING THE PETITION

In the ten years since this Court held that the Second Amendment "confer[s] an individual right to keep and bear arms," *Heller*, 554 U.S. at 595, the City of New York has doubled down on draconian laws enacted in the collective-rights era with no analog in any other jurisdiction. Only New York City maintained a prohibition on loading more than seven rounds of ammunition into a ten-round magazine—a nonsensical restriction that could not even survive rational-basis review. And only New York City flatly prohibits its residents from removing their lawfully purchased and duly registered handguns from the city limits, even to transport them (unloaded, and locked

up) to second homes at which they are constitutionally entitled to possess them, or to out-of-city shooting ranges or competitions at which they are constitutionally entitled to hone their safe and effective use.

That prohibition does not even make sense on its own terms. It has the perverse consequences of forcing New Yorkers to leave their handguns behind in their vacant residences whenever they leave the city for an extended period of time. And far from achieving the City's professed interest in decreasing the amount of time that its residents spend transporting their locked and unloaded firearms to and from shooting ranges (an activity that the City made no serious effort to demonstrate poses any meaningful safety risk), the ban actually forces New Yorkers to spend *more* time traveling to the paucity of inconvenient in-city shooting ranges.

Indeed, the only plausible theory under which the City's novel transport ban could be understood to further its professed public safety interest in decreasing the transport of unloaded, locked-up firearms is if the ban discourages people from transporting their handguns to shooting ranges at all. But it would be utterly irrational for the City to enact a restriction for the express purpose of making it harder for individuals to gain proficiency in the use of the handguns that the Constitution entitles them to possess. More to the point, a restriction that is expressly designed to make it harder to exercise core Second Amendment rights cannot plausibly withstand any level of constitutional scrutiny. Courts would not countenance for one moment a prohibition on leaving

city limits to get an abortion—and certainly not if there were only seven locations in a city of 8.5 million people at which to obtain one. A prohibition on leaving city limits to exercise core Second Amendment rights should fare no better.

Both the City's transport ban and the Second Circuit's decision sanctioning it are extreme outliers even among Second Amendment decisions. Indeed, if the Second Circuit's version of heightened scrutiny is what this Court had in mind in *Heller* and *McDonald*, there was little point to recognizing a fundamental, individual right and making it applicable against state and local governments. In fact, upholding laws like this under the guise of applying heightened scrutiny threatens to dilute heightened scrutiny in other contexts and undermines respect for the rule of law. This Court recognized an individual right in *Heller* because the constitutional text plainly conferred such a right, and because ignoring that reality disrespected the founders' judgment and the reality that we are nation of laws. But there is little difference between denying a fundamental individual right by applying a collective-rights gloss on the text, and denying a fundamental individual right by applying a version of heightened scrutiny unrecognizable in any other constitutional context. The decision below plainly does the latter and calls out for this Court's review.

I. The City's Ban On Transporting Handguns Outside City Limits Is An Extreme, Unjustified, And Irrational Restriction On Second Amendment Rights.

Heller made clear that self-defense in the home is at the core of the Second Amendment right to keep and bear arms. And "[t]he right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective." *Ezell v. City of Chicago* (*Ezell I*), 651 F.3d 684, 704 (7th Cir. 2011). Indeed, as *Heller* itself noted, scholars have long recognized that "to bear arms … implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use." 554 U.S. at 616, 617-18 (quoting Thomas Cooley, *Treatise on Constitutional Limitations* 271 (1868)).

That should have made this an easy case, no matter what mode of constitutional analysis one applies to Second Amendment rights. Starting (as most lower courts presently do) with the severity of the burden imposed on Second Amendment rights, the City's transport ban plainly imposes a severe burden on both the right to keep arms in the home and the right to hone their safe and effective use. As to the former, the ban flatly precludes residents from transporting their handguns to and from secondary residences outside the city—even though there is no question that they are entitled to possess them in both locations. *See, e.g.*, *Osterweil v. Bartlett*, 21 N.Y.3d 580, 584 (2013). As to the latter, the ban restricts residents to honing the safe and effective use of their

firearms in a mere seven in-city shooting ranges in a city of 8.5 million. *Cf. Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2316 (2016) (noting district court's conclusion that "the proposition that … seven or eight providers could meet the demand of the entire State stretches credulity").

The City's transport ban just as plainly cannot withstand strict, intermediate—or even rational-basis—scrutiny. At the outset, it bears repeating that the ban prohibits the transport of handguns even when they are *unloaded* and *locked up* in a container *separate from* their ammunition. The City submitted precisely zero empirical evidence—no studies, no expert opinions, nothing—to support the dubious proposition that the transport of unloaded, locked-up firearms to shooting ranges, shooting competitions, or second homes (the only places petitioners seek to transport them) poses some meaningful public safety risk. Instead, the best the City could muster was a completely unsubstantiated affidavit hypothesizing that unloaded, locked-up firearms might pose some risk in "road rage" or other "stressful" situations. App.26-28. Suffice it to say, the Constitution requires stronger stuff than such "cursory rationales." *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1259 (D.C. Cir. 2011); *see also, e.g.*, *Ezell v. City of Chicago* (*Ezell II*), 846 F.3d 888, 896 (7th Cir. 2017) ("the City cannot defend its regulatory scheme 'with shoddy data or reasoning'") (quoting *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002)); *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 822 (2000) (requiring "more than anecdote and supposition").

The City's complete failure of proof is understandable, as any claim that transporting an unloaded firearm locked in a container separate from its ammunition poses a meaningful public safety risk is at considerable odds with the fact that the federal government treats those conditions as sufficient to alleviate *all* material public safety risks with the transport of firearms. *See* 18 U.S.C. §926A (entitling individuals to transport unloaded, locked-up firearms across state lines to places where their possession is lawful); *cf. Holt v. Hobbs*, 135 S. Ct. 853 (2015) (invalidating Arkansas policy perceiving safety risk where federal Bureau of Prisons found none). The City's defense of its novel transport ban thus should have failed at the outset, as the City could not even identify any "important governmental objective" to which the ban might be "substantially related." *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

And things only get worse for the City from there. Even assuming the transport of unloaded, locked-up firearms posed some material safety risk, the City's ban does not even make sense on its own terms, let alone "in fact alleviate" the City's professed public safety concerns "in a direct and material way." *Turner Broad. Sys. v. Fed. Commc'ns Comm'n*, 512 U.S. 622, 664 (1994) (plurality opinion). The City claims, and the Second Circuit agreed, that prohibiting its residents from transporting their unloaded and locked-up handguns outside of city limits will *increase* public safety because it will *decrease* the amount of firearms being transported across the City. But the City also claims, and the Second Circuit again agreed, that the ban does not burden Second Amendment rights because city residents can still transport their

unloaded and locked-up firearms to the seven shooting ranges spread all across the five boroughs.

By the City's (and the Second Circuit's) own telling, then, the ban actually *increases* the amount of time city residents will spend transporting their firearms throughout the city—the very activity that the City says is dangerous and that it claims to want to decrease—because it forces city residents to use only in-city ranges even when ranges outside city limits are more convenient and involve less time spent on city streets. The transport ban thus either affirmatively undermines the City's objectives by forcing people to spend *more* time transporting firearms to get to inconvenient in-city ranges, in which case it cannot even pass rational-basis review, or it achieves its intended end only by substantially deterring people from gaining proficiency in the use of their own firearms (because if forced to use only in-city ranges, they will use no ranges at all), in which case it imposes severe and unjustifiable burdens on Second Amendment rights.

The transport ban is every bit as nonsensical as applied to individuals who want to transport a handgun from one home in which they are constitutionally entitled to keep it for self-defense to another home across city lines in which they are constitutionality entitled to do the same. That restriction just guarantees that handguns that would otherwise be removed from the jurisdiction (to a second home) will instead be in a residence that lies vacant for weeks, if not months, at a time. The City has never even tried to explain how that bizarre result

could possibly further its professed public safety interests.

At bottom, then, the City's transport ban either substantially burdens Second Amendment rights or perversely proliferates both the number and the transportation of handguns within city limits. Either way, the transport ban comes nowhere close to satisfying any recognizable form of heightened scrutiny or complying with the Second Amendment.

The Second Circuit's contrary conclusion is inexplicable. According to the Second Circuit, prohibiting people from transporting an unloaded, locked-up handgun from one residence to another for the core purpose of self-defense in the home is not burdensome because people can just buy two handguns instead of one. App.14-15. The court likewise reasoned that prohibiting the transport of handguns to out-of-city shooting ranges for target practice is not burdensome because New York City has seven ranges to serve its 8.5 million residents, and because the (theoretical) ability to rent a different firearm for out-of-city target practice is a meaningful substitute for gaining proficiency in the use of their own handguns. App.22. Those conclusions reflect not only a profound disrespect for Second Amendment rights, but a profound disregard for the very public safety concerns that the court purported to be advancing. It does not begin to advance public safety to force individuals to buy multiple handguns and leave them in vacant homes. And it does not begin to advance public safety to make it harder for individuals to hone the safe and effective use of the particular

handguns that they will actually use should the need for self-defense arise.

At bottom, the City's ban is not even rational, let alone meaningfully tailored in a way that takes seriously the notion that the Second Amendment protects a fundamental individual right. That the Second Circuit could conclude otherwise underscores how far courts have strayed even from the teachings of this Court's intermediate scrutiny cases. It is difficult to fathom courts finding such purported "alternative avenues" sufficient to render a ban on purchasing books or procuring an abortion outside city limits constitutional. *See, e.g., Hellerstedt*, 136 S. Ct. at 2316. This Court should not countenance such a brazen attempt to "treat the right recognized in *Heller* as a second-class right." *McDonald*, 561 U.S. at 780.

II. The Transport Ban Also Violates The Commerce Clause And Unconstitutionally Burdens The Right To Travel.

In its eagerness to uphold the City's restriction on traveling with a handgun to an out-of-state shooting range, the Second Circuit turned a blind eye not only to this Court's Second Amendment jurisprudence, but to this Court's Commerce Clause jurisprudence as well. This Court has made clear time and again that "local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities." *C&A Carbone Inc. v. Town of Clarkstown*, 511 U.S. 383, 394 (1994). Yet that is precisely what the City's transport ban accomplishes. Any city resident who wishes to patronize a shooting range to train with her handgun can do so at one of the few

ranges located in the city, but is forbidden from doing so at an out-of-state competitor.

The decision below does not even mention *C&A Carbone* in its nearly 50 pages, despite that case's prominent role in petitioners' Commerce Clause arguments below. And the court's conclusory observation that the City's handgun transport ban is not discriminatory because "it does not prohibit a premises licensee from patronizing an out-of-state firing range or going to out-of-state shooting competitions" misses the point. App.31. Much legislation implicating Commerce Clause concerns will focus on commercial items and instrumentalities of commerce, rather than directly regulating individuals. The fact that individuals may have alternative means to engage in commerce (or travel) would not mean that New York could limit access to certain highways to New Yorkers or command citizens to use articles of commerce only within city limits and nowhere else. The fact that state law discriminates in favor of or against state residents or in-state enterprises is enough to condemn such laws.

The handgun transport ban clearly prohibits city residents from patronizing out-of-state ranges and competitions in some circumstances, as it forbids law-abiding premises license holders from transporting their lawfully acquired, lawfully possessed handguns to engage in constitutionally protected commercial activity in another state, instead requiring that activity to take place within New York City. By any measure, then, the transport ban "deprive[s] citizens of their right to have access to the markets of other

States on equal terms." *Granholm v. Heald*, 544 U.S. 460, 473 (2005).

The transport ban also impermissibly controls economic activity taking place entirely outside of New York City, in contravention of *Healy v. Beer Institute, Inc.*, which provides that "the 'Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'" 491 U.S. 324, 336 (1989) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642-643 (1982) (plurality opinion)). The Second Circuit resisted that conclusion by claiming that the ban "directly governs only activity within New York City," App.34, but that is beside the point. Petitioners do not reside on the very boundary of New York City, so they cannot transport their handguns outside New York City without transporting them within city limits first. And it is not a defense to a violation of a permit condition within the city to claim that the permit holder was on the shortest route to a New Jersey range or beachhouse. Petitioners' complaint is that the City's in-city restrictions have the necessary effect of prohibiting them from transporting their handguns to places where they would put them to constitutionally protected uses outside the city. As this Court has long held, regulation of out-of-city conduct—not to mention a wholesale prohibition on certain out-of-state transactions—is a straightforward violation of the Commerce Clause. *See Healy*, 491 U.S. at 332.

The transport ban is all the more problematic because it impedes not just out-of-state commerce, but out-of-state travel as well. A regulation "implicates

the right to travel when it actually deters such travel" or "when it uses any classification which serves to penalize the exercise of that right." *Att'y Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (quotation marks omitted). There can be no doubt that the transport ban "deters" travel, as petitioners have represented that they would travel out of the city and state but for this regulation. *See* JA33-34 ¶¶11, 13; JA42-43 ¶¶9-10; JA46-47 ¶¶9-10. Indeed, the only thing standing between petitioners and participating in a shooting competition in New Jersey, practicing at a licensed shooting range in Yonkers, or traveling to a second residence with their licensed firearm is the handgun transport ban.

At bottom, then, the decision below forces petitioners to choose which constitutional right they would rather exercise: their right to travel or their right to keep and bear arms. If petitioners attempt to exercise both of these rights at the same time, they run the risk of having their licenses revoked, which would completely deprive them of their Second Amendment rights. *See Harman v. Forssenius*, 380 U.S. 528, 540 (1965) ("It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution."). The Constitution does not allow the government to put citizens to that choice.

Again, it is difficult to fathom courts overlooking these obvious constitutional violations in any other context. If the City had banned its golfers from taking their clubs to out-of-state courses or its professional musicians from taking their instruments to out-of-state concert halls, it is hard to imagine that those

restrictions on interstate commerce and travel would be tolerated. That this case involves a restriction on constitutionally protected activity should have made the constitutional violations all the more obvious. Instead, the Second Circuit refused to apply directly on-point precedent, for no apparent reason other than because this case instead involves handguns. Neither the Commerce Clause nor the Privileges and Immunities Clause contains any handguns exception. That the Second Circuit twisted three separate strands of jurisprudence beyond recognition, all in the name of avoiding enforcing the expressly enumerated right to keep and bear arms, only underscores what an outlier the decision below truly is.

III. This Case Is An Ideal Vehicle For Halting The Spread Of Irrational And Draconian Restrictions On Second Amendment Rights.

While this Court has declared that the right to bear arms is not "a second-class right," many local governments and lower courts continue to treat it as such. Indeed, though the City's bizarre transport ban is one of a kind, it is exemplary of a broader push by local governments to restrict Second Amendment rights through means that would never fly in any other constitutional context. Unable to flatly ban the possession of handguns in the home, many local governments have responded by erecting obstacles to acquiring them. Others have effectively banned the ability to practice using handguns. And others still have imposed exorbitant "licensing" fees or even flat taxes on the right to acquire a firearm. The decision upholding this draconian law is exemplary of decisions diluting heightened scrutiny in the Second

Amendment context beyond all recognition. Both these trends—governments disregarding Second Amendment rights and courts endorsing such efforts while purporting to apply heightened scrutiny—drain *Heller* and *McDonald* of meaning and cry out for this Court's review.

True to one of its nicknames, the City of Chicago has been second only to New York in its dogged attempts to nullify the Second Amendment within its borders. The city initially imposed an outright ban on the possession of handguns. *See McDonald*, 561 U.S. at 750. When the Court rejected the city's attempt to immunize that ban from the Second Amendment, Chicago responded "by mandat[ing] one hour of range training as a prerequisite to lawful gun ownership, yet at the same time prohibit[ing] all firing ranges in the city." *Ezell I*, 651 F.3d at 689-90 (citations omitted). And when the Seventh Circuit struck down the range ban as unsupported by any empirical evidence, Chicago replaced it "with an elaborate scheme of regulations governing shooting ranges," which had the effect of "dramatically limit[ing] the ability to site a shooting range within city limits." *Ezell II*, 846 F.3d at 890. Again, Chicago supported the restrictions with "only speculative claims of harm to public health and safety"—and again the Seventh Circuit struck down the city's law. *Id*.

Unfortunately, other lower courts have not been nearly so willing to enforce Second Amendment rights. California, for example, imposes a Second Amendment tax by forcing every lawful firearms purchaser in the state to pay a $5 fee that is used to fund a police force

tasked with hunting down those who unlawfully possess a firearm—even though virtually no lawful purchasers ever unlawfully possess a firearm. *Bauer v. Becerra*, 858 F.3d 1216, 1225 (9th Cir. 2017) (noting that "only a small subset of DROS fee payers will later become illegal possessors"), *cert denied*, 138 S. Ct. 982 (2018). When firearms purchasers challenged this regime, the Ninth Circuit held that the tax was actually a regulatory fee to offset the costs of firearms purchases, on the offensive ground that criminal activity is an "'expense incident'" to an individual's acquisition a firearm. *Id.* at 1226 (quoting *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941)). Thus, while the government could never force newspapers to pay into libel funds, or force court-filers to fund those held in contempt, no one in California can lawfully acquire a firearm without covering costs attributable to wholly unrelated criminal activity by third parties.

Other jurisdictions have gone even further. Cook County, Illinois, for example, has levied a $25 tax on the purchase of firearms and a smaller tax on the purchase of ammunition. *See Firearm and Firearm Ammunition Tax*, Cook Cty. Gov't, goo.gl/SjExB6 (last visited Aug, 31, 2018). The County has abandoned any pretext that it seeks only to offset the costs of regulating firearms and ammunition purchases, and instead openly acknowledged that it imposed these taxes for the express purpose of deterring citizens from exercising their Second Amendment rights. *See Official Proposes Bullet Tax to Curb Chicago Crime*, USA Today (Oct. 18, 2012), goo.gl/f9gzJ7. The City of Seattle has also levied a $25 tax on all firearm sales to fund gun-violence studies and anti-gun-violence initiatives. Seattle, Wash., Ordinance 124833 (Aug.

21, 2015). Courts would never countenance "a state law requiring purchasers of religious books … to pay a nominal additional tax of 1¢," much less a tax openly designed to deter exercise of a First Amendment right. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 988 (1992) (Scalia, J., concurring in part, dissenting in part). But according to most lower courts, it remains an open question whether such taxes can be imposed on the exercise of Second Amendment rights.

New York City is also not alone in ignoring longstanding Commerce Clause jurisprudence when it comes to Second Amendment rights. California recently passed a law that bans out-of-state vendors from selling ammunition to California residents via mail order or selling ammunition directly to California residents who intend to return to California with the ammunition. *See* Cal. Penal Code §§30312, 30314, 30370, 30385. Instead, the out-of-state vendor must send the ammunition to an in-state vendor, who processes the transaction and may charge a fee. *Id.* §30312(b)-(c). Such blatant "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter" should clearly fail under clear Commerce Clause doctrine, *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 99 (1994), but California enacted the law anyway. And if the Ninth Circuit adopts the Second Circuit's firearms exception to the Commerce Clause, the restriction will likely stand.

Court decisions upholding such draconian regulations while purporting to apply heightened scrutiny are unfaithful to *Heller* and *McDonald* and pose dangers that extend beyond the Second

Amendment context. Much of the debate in *Heller* was over the proper mode of analysis for Second Amendment rights. While the Court did not definitively resolve the "level-of-scrutiny" debate because the District's law flunked any form of scrutiny, the Court did definitely reject both rational basis and an interest-balancing approach. *Heller*, 554 U.S. at 634. As the Court pointedly concluded, "[t]he very enumeration of the right takes 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.* But the decision below applies a form of intermediate scrutiny that would make the rejected interest-balancing approach look demanding. As this Court already concluded, such a diluted form of scrutiny is simply inconsistent with the inclusion of the Second Amendment in the Bill of Rights. *Id.*

But the threat to constitutional values posed by the decision below is not limited to the Second Amendment. A number of constitutional rights depend on heightened scrutiny for their protection. If courts get in the habit of applying heightened scrutiny in name only to the Second Amendment, only one of two outcomes is possible. Either courts will cabin that mistaken approach to the Second Amendment, or "watering it down here w[ill] subvert its rigor in the other fields in which it is applied." *Employment Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872, 888 (1990). The former is utterly inconsistent with this Court's insistence in *McDonald* that the Second Amendment is not a second-class right. The latter is a threat to the entirety of the Bill of Rights.

And either threatens respect for the rule of law and this Court's decisions.

This Court should grant review to restore the rigor of the test that secures numerous individual rights and to underscore that it meant what it said in *Heller* and *McDonald*.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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