No. 18-280

In the
Supreme Court of the United States

NEW YORK STATE RIFLE & 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 OF AMICUS CURIAE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITIONERS

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May 14, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

CONSTITUTION AND STATUES

OTHER

INTEREST OF AMICUS CURIAE[1]

The National Rifle Association of America, Inc. ("NRA") is the oldest civil rights organization in America and the Nation's foremost defender of Second Amendment rights. Founded in 1871, the NRA has approximately five million members and is America's leading provider of firearms marksmanship and safety training for civilians. The NRA has a strong interest in this case because its outcome will affect the ability of the many NRA members who reside in New York City to safely and effectively exercise their fundamental right to use a firearm for self-defense.

INTRODUCTION

In *District of Columbia v. Heller*, this Court made clear that infringements on the individual right to keep and bear arms for self-defense are to be analyzed by comparing them against the Second Amendment's text and history—not under an "interest-balancing inquiry" like one of the so-called "tiers of scrutiny." 554 U.S. 570, 634 (2008). After all, the Second

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[1] Pursuant to SUP. CT. R. 37.3(a), amicus certifies that all parties have given blanket consent to the filing of amicus briefs in support of either party. Pursuant to SUP. CT. R. 37.6, amicus certifies that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amicus, its members, or its counsel made such a monetary contribution.

Amendment "is the very *product* of an interest balancing by the people," and the government—"even the Third Branch of Government"—has no warrant to *recalibrate* the balance the People struck because judges conclude that a sufficiently "important" or "compelling" governmental interest shows that the right is not "*really worth* insisting upon." *Id.* at 634, 635.

In the decade since this opinion was handed down, most lower federal courts have openly flouted these instructions. They have constructed a Second-Amendment jurisprudence based upon the very interest-balancing inquiry this Court rejected—an "intermediate scrutiny" analysis that routinely finds Second Amendment rights outweighed by little more than the government's say-so that the rights must be eclipsed in the name of public safety. The problem is not just that lower courts have *conducted* the "tiers of scrutiny" analysis in the wrong way—giving too much weight to the government's interest and too little to the enumerated constitutional rights at stake. The problem is with the decision to apply the tiers-of-scrutiny framework in the first place. This analysis is a subjective interest-balancing inquiry from beginning to end. Judges must subjectively weigh the value of the constitutional right and the importance of the governmental interests at stake in determining which level of scrutiny to apply, in assessing whether the government's interest is sufficiently "important" or "compelling," and in analyzing whether the challenged measure is properly tailored to advance it. This

approach is contrary to the text and purpose of the Second Amendment—which was enshrined in our Constitution because *the People already* weighed the competing interests at stake, and solemnly concluded that "the right of the people to keep and bear Arms, *shall not be infringed*." U.S. CONST. amend. II (emphasis added).

The case below illustrates the point. The Second Circuit held that New York City residents could be effectively banned from transporting their handguns outside city limits for most purposes based on nothing more than Respondents' conclusory assertion—unsupported by meaningful evidence and contrary to all sense—that allowing vetted, law-abiding citizens to transport firearms *unloaded and locked away* somehow poses a threat to public safety. That conclusion cannot survive any meaningful constitutional scrutiny. Indeed, the transport ban *threatens* public safety by forcing firearm owners to leave their unattended handguns in their homes whenever they leave the city. But more fundamentally, because Respondents' transport ban restricts both the right to keep and to bear arms, and because it is unsupported by any even remotely analogous restriction historically accepted by the People as consistent with the Second Amendment, this Court should strike it down categorically, like in *Heller*, without resorting to the interest-balancing "tiers of scrutiny."

SUMMARY OF THE ARGUMENT

I. This Court should reaffirm that Second Amendment challenges are governed by *Heller*'s text-and-history standard, not the "tiers of scrutiny" that are applied in the First Amendment and Equal Protection contexts. *Heller*'s categorical test is the only one faithful to the Second Amendment's text and purposes, since that provision itself embeds in the Constitution the People's judgment that the right of law-abiding citizens to keep and bear common arms for self-defense outweighs all countervailing Government interests—a judgment that would be nullified if the courts were permitted to strike the balance between these interests anew in every Second Amendment case that comes before them. Respondents' transport ban fails this text-and-history test because it infringes both the right to effective self-defense in the home and the right to carry firearms outside the home, and because it is unlike any historical restriction traditionally accepted by the People as consistent with the Second Amendment right.

II. If the Court declines to invalidate Respondents' prohibition categorically, it should strike it down under strict scrutiny. Because the Second Amendment is a fundamental, enumerated right, any lesser form of scrutiny would demote it to second-class status, creating the very hierarchy of constitutional values that this Court has condemned. And New York's transport ban cannot pass strict scrutiny, because the government has utterly failed to show that it

meaningfully advances public safety or that it is the least restrictive means of furthering that end.

III. Indeed, the link between Respondents' ban and public safety is so weak that the challenged prohibition cannot even satisfy intermediate scrutiny.

IV. The challenged ban also violates the Dormant Commerce Clause and the right to travel. It discriminates against out-of-state commerce on its face, triggering this Court's virtually *per se* rule of invalidity. And it unconstitutionally forces New York City residents to pick which of two fundamental rights they wish to retain: the right to bear arms or the right to travel. This bizarre, historically anomalous law simply cannot stand.

ARGUMENT

I. NEW YORK CITY'S BAN ON TRANSPORTING HANDGUNS IS UNCONSTITUTIONAL UNDER *HELLER*'S TEXT-AND-HISTORY APPROACH.

A. LAWS INFRINGING THE SECOND AMENDMENT MUST BE ANALYZED BASED ON THE CONSTITUTION'S TEXT AND HISTORY, NOT JUDICIAL INTEREST BALANCING.

In *Heller*, this Court struck down the District of Columbia's ban on handguns and operable long guns wholly apart from any application of the so-called "tiers of scrutiny," reasoning that the text and history of the Second Amendment took a measure like D.C.'s categorically "off the table" by "elevat[ing] above all

other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635, 636. One "need not squint to divine some hidden meaning from *Heller* about what tests to apply. *Heller* was up-front about the role of text, history, and tradition in Second Amendment analysis—and about the absence of a role for judicial interest balancing or assessment of costs and benefits of gun regulations." *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1285 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). This Court should reaffirm that this text-and-history test remains the governing analysis in Second Amendment cases, for it is the only doctrinal standard that is faithful to the provision's text, its purpose, and this Court's precedents.

While it is different in some ways from a straight cost-benefits analysis, the "tiers of scrutiny" framework is in essence nothing more than a structured balancing inquiry. Every step of its application involves subjective judicial weighing and balancing. Judges must engage in subjective balancing at the initial step of determining *which level of scrutiny applies*—selecting "strict," "intermediate," or "rational basis" scrutiny based on their assessment of the value of the constitutional right at stake. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 15, 20, 25, 44-45 (1976) (adopting "exacting scrutiny" for expenditure limits, which infringe "the very core of political speech," but merely "close" scrutiny for contribution limits, which "entail[] only a marginal restriction" on free expression).

Subjective balancing also inheres after the appropriate tier has been chosen, in determining whether the proffered "government interest" strikes the court as sufficiently "compelling" or "important" to pass muster. *Compare Regents of Univ. of California v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.) (government's interest in "the remedying of the effects of 'societal discrimination' " is not compelling), *with Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (government's interest in "obtaining 'the educational benefits that flow from a diverse student body' " is compelling). And the second step of assessing the degree of "fit" between the challenged law and the asserted interest also critically depends on subjective judicial balancing. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816, 826 (2000) (limit on broadcasting pornographic videos during certain hours unconstitutional because the government failed to show that alternative means was "ineffective to achieve its goals" or to establish "the comparative effectiveness of the two alternatives"); Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1330 (2007) ("In determining whether a particular degree of statutory under- or overinclusiveness is tolerable, a court must judge whether the damage or wrong attending an infringement on protected rights is constitutionally acceptable in light of the government's compelling aims, the probability that the challenged policy will achieve them, and available alternative means of pursuing the same goals.").

The tiers of scrutiny are thus shot through with judicial balancing and weighing of the subjective value of constitutional rights and the subjective importance of governmental interests. Whatever its role in other constitutional contexts, this weighing and balancing is antithetical to the very nature of the Second Amendment right. That amendment provides that "the right of the people to keep and bear Arms, shall not be infringed," not that the right may be infringed whenever the government has a good enough reason. U.S. CONST. amend. II. Those who adopted this provision were obviously not unaware that "gun violence is a serious problem," *Heller*, 554 U.S. at 636, or that the government has a compelling interest in protecting public safety, *see* THE FEDERALIST NO. 3, at 42 (John Jay) (Clinton Rossiter ed., 1961) ("Among the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their *safety* seems to be the first."). But they also knew the value of "individual self-defense," *Heller*, 554 U.S. at 599—the "first law of nature" and "true palladium of liberty," *id.* at 606 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES, at App. 300 (St. George Tucker ed., 1803)). And by ratifying the Second Amendment, the People *themselves* accommodated these various interests, concluding that the right to keep and bear arms for self-defense must be protected *notwithstanding* the importance of the government's goals. Allowing courts to conduct this balance anew flatly contradicts the constitutional text, and it would

drain the Second Amendment right of any force *as* a right.

This is not mere theoretical speculation. Today, we can clearly see the wreckage of a Second Amendment jurisprudence governed by the "tiers of scrutiny." Notwithstanding this Court's admonitions in *Heller* and *McDonald*, the lower courts have overwhelmingly embraced a tiers-of-scrutiny approach to the Second Amendment. The result is precisely as the Framers would have feared. Because the importance of the government's interest in public safety is beyond dispute, the only protection offered by the tiers of scrutiny lies in the judicial assessment of the means-ends relationship between this goal and the challenged restriction. And in case after case, the courts have deferred to the government's assertion that its restrictions on Second Amendment rights appropriately advance public safety, upholding every type of limit imaginable, from flat bans on the most popular rifle-type in the Nation, *e.g.*, *Heller II*, 670 F.3d at 1263-64, to licensing restrictions prohibiting ordinary citizens from carrying handguns outside the home, *e.g.*, *Drake v. Filko*, 724 F.3d 426, 437-40 (3d Cir. 2013), and laws banning whole classes of law-abiding adults from purchasing arms, *e.g.*, *National Rifle Ass'n of America, Inc. v. BATFE*, 700 F.3d 185, 207-11 (5th Cir. 2012). In the typical case, if the government can find an academic willing to support a challenged gun control law—which it almost always can—the court will throw up its hands and declare the law

constitutional. *See, e.g.*, *Drake*, 724 F.3d at 437-39 (concluding that New Jersey law banning ordinary citizens from carrying firearms was "reasonable" based solely on a 1968 legislative staff report and the "predictive judgment" from other States); *Shew v. Malloy*, 994 F. Supp. 2d 234, 249-50 (D. Conn. 2014), *aff'd in part sub nom. New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015) (concluding, after a single paragraph of analysis, that ban on common semi-automatic firearms and magazines furthered public safety, even though "the court cannot foretell how successful the legislation will be in preventing crime").

The problem is not merely that lower-court judges have conducted the tiers-of-scrutiny balancing inquiry incorrectly, giving insufficient weight to the values protected by the Second Amendment. The problem is with *the balancing inquiry itself*—and the fact that the tiers-of-scrutiny framework by its very nature *enables* judges, who in many cases do not weigh the values at stake in the same way as the People who adopted the Second Amendment, *to override* the balance the People struck and substitute their own.

Heller and *McDonald* already recognize all of this. As this Court said in *Heller*, "[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." 554 U.S. at 634.

And the Court *declined* the invitation to analyze the bans on the right to keep arms at issue there under an "interest-balancing inquiry," noting that the Second Amendment was itself "the very *product* of an interest balancing by the people," which the judicial branch has no power to "conduct for them anew." *Id.* at 634, 635. *McDonald* was even more emphatic, rejecting the assertion that incorporating the Second Amendment would "require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise"—an activity that a tiers of scrutiny analysis necessarily entails—because *Heller* "expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing," *McDonald v. City of Chicago*, 561 U.S. 742, 785, 790-91 (2010) (plurality opinion). Replacing *Heller*'s text-and-history standard with the "tiers of scrutiny"—an interest-balancing inquiry from top to bottom—would thus require the Court to repudiate the core reasoning of its Second Amendment precedents.

The lower court's embrace of an interest-balancing approach—in the teeth of *Heller*'s instructions—is perhaps understandable given the common misconception that this framework has near-universal application in the body of constitutional law. But in fact most constitutional adjudication *is not* governed by a uniform, trans-substantive tiers-of-scrutiny approach—just as one would expect of a constitutional

text that contains a wide variety of provisions adopted with different language for different purposes.

For example, this Court has established a number of categorical rules, derived from text, history, and tradition, to govern adjudication under the Takings Clause. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). And even where takings analysis is governed by a balancing test, the inquiry looks nothing like the tiers-of-scrutiny approach. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Likewise, unless suspended pursuant to Article I, Section 9, the Constitution protects "at the absolute minimum" the writ of habeas corpus "as it existed when the Constitution was drafted and ratified"—not the right to obtain habeas relief unless the government has a sufficiently "compelling" or "important" interest in your detention. *Boumediene v. Bush*, 553 U.S. 723, 746 (2008). The First Amendment Establishment Clause, too, is enforced through rules and standards that do not resemble strict or intermediate scrutiny. *See Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

Moving from the civil to the criminal context, the tiers-of-scrutiny approach has essentially *zero* purchase in this Court's constitutional criminal procedure case law. Whether the Double Jeopardy Clause has been violated depends on a variety of relatively categorical rules, not one of the tiers of scrutiny. *See,*

e.g., *Burks v. United States*, 437 U.S. 1 (1978) (appellate reversal for insufficient evidence bars retrial); *Fong Foo v. Unites States*, 369 U.S. 141 (1962) (formal acquittal bars retrial even if egregiously erroneous); *Blockburger v. United States*, 284 U.S. 299 (1932) (elements test governing which charges are for the same offense). The Sixth Amendment Confrontation Clause is governed by a categorical test, not a balancing inquiry. *Crawford v. Washington*, 541 U.S. 36 (2004). And the Fourth Amendment, despite its textual reference to "unreasonableness," is largely implemented in workaday criminal litigation through a wide variety of complex rules. *See, e.g.*, *Horton v. California*, 496 U.S. 128 (1990) (plain view); *Chambers v. Maroney*, 399 U.S. 42 (1970) (automobile exception); *Chimel v. California*, 395 U.S. 752 (1969) (search incident to arrest).

Even much First Amendment litigation is resolved through the application of categorical rules rather than the tiers of scrutiny. The limits the Free Speech Clause imposes on civil libel actions, for example, are categorical in nature. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Similarly, it has long been settled that certain categories of speech are simply *per se* unprotected by the First Amendment. *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942). Indeed, this Court recently emphasized that these classes of unprotected speech are defined categorically, not through "an ad hoc balancing of relative social costs and benefits. The First Amendment itself

reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *United States v. Stevens*, 559 U.S. 460, 470 (2010).

Where it *has* been adopted, the tiers-of-scrutiny approach applies more as a matter of contingent historical fact than fidelity to the original meaning of the constitutional provisions in question. The judiciary did not employ anything resembling the "tiers of scrutiny" to *any* provision of the Bill of Rights at the founding or for over a century thereafter. *See* G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 7-35 (2005). And when the courts did begin, in the aftermath of the Reconstruction Amendments, to inquire whether a challenged law substantially advances legitimate government interests, it was as part of the textually-unmoored substantive-due-process analysis that has long-since been repudiated by this Court. *See, e.g.*, *Lochner v. New York*, 198 U.S. 45, 57-58 (1905); *Coppage v. State of Kansas*, 236 U.S. 1, 18-19 (1915) ("[T]he 14th Amendment debars the states from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object ...."); *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540-41, 545 (2005); White, *Historicizing Judicial Scrutiny*, *supra*, at 57-59.

Later in the twentieth century, the courts refined this analysis into the modern tiers of scrutiny; this

development was driven by historical contingencies, not deep constitutional principle. This is nowhere more apparent than in the context of First Amendment rights. It was not until well into the 20th Century that the Court began to apply a tiers-of-scrutiny approach to adjudicate First Amendment claims. Even then, the inquiry emerged not because of some new insight into the original meaning of the First Amendment, or some breakthrough in free speech theory. Rather, "the Court appears to have adopted [the compelling-interest] formulation in First Amendment cases by accident rather than as the result of a considered judgment." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 125 (1991) (Kennedy, J., concurring in the judgment); *see also* Transcript of Oral Argument at 44, *Heller*, 554 U.S. 570 (2008) (No. 07-290) (Roberts, C.J.) ("[T]hese standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up.").

What is more, the Court's adoption of that approach has been criticized for its "capacity to weaken central protections of the First Amendment." *Simon & Schuster*, 502 U.S. at 128 (Kennedy, J., concurring in the judgment). Indeed, the compelling-interest test appears to have been first developed by First-Amendment minimalists as a way to *reject* Free-Speech claims by "balancing" the interest in free expression against the government's interest in suppressing it. Stephen A. Siegel, *The Origin of the Compelling State*

Interest Test and Strict Scrutiny, 48 AM. J. LEGAL HIST. 355, 364-75 (2006); *see also Barenblatt v. United States*, 360 U.S. 109, 127 (1959); *Uphaus v. Wyman*, 360 U.S. 72, 79-81 (1959). Whatever the merits of the application of the tiers of scrutiny in the First Amendment context, at the very least this history shows that the approach should be given no special gravitational pull, and that importing this framework into Second Amendment jurisprudence could have serious detrimental effects.

Indeed, the overall pattern of constitutional doctrine in fact suggests that interest-balancing would be particularly *inappropriate* in the Second Amendment context. The tiers of scrutiny are most commonly resorted to in contexts *not* involving public safety—areas of doctrine where the judiciary is not forced to adjudicate controversial and competing claims of public safety on both sides of the dispute. By contrast, with respect to those constitutional rights with "controversial public safety implications," *McDonald*, 561 U.S. at 783 (plurality opinion), the Court has learned that allowing courts to enforce these rights with a balancing test invariably leads to *balancing the right away*. *See Crawford*, 541 U.S. at 60 (replacing "malleable standard [that] often fails to protect against paradigmatic confrontation violations" for approach based in text and history). The criminal-procedure rights are thus predominantly enforced through categorical tests, not the tiers of scrutiny. *See supra*, pp. 11-12. Indeed, even under the First Amendment the Court

has found it necessary to establish clear, categorical rules in those contexts where free expression poses a risk of violent crime. *See Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (government may only limit express advocacy of imminent lawless action); *Virginia v. Black*, 538 U.S. 343, 359 (2003) (government may limit "true threats" only where "the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"). Rather than being some doctrinal outlier, then, *Heller*'s categorical approach to the Second Amendment fits nicely within the overall constellation of constitutional jurisprudence.

This Court should not allow the government—even the Third Branch of Government—to balance away the People's right to keep and bear arms. Instead, it should reaffirm that laws infringing the Second Amendment must be judged solely based on the text and history of that provision.

B. NEW YORK CITY'S TRANSPORT BAN IS CATEGORICALLY UNCONSTITUTIONAL UNDER THE SECOND AMENDMENT'S TEXT AND HISTORY.

New York City's transport ban is categorically unconstitutional under the proper, text-and-history-based test. It curtails both the right to keep and to carry firearms for effective self-defense. And what is more, the prohibition is a historical anomaly, not remotely analogous to any gun regulation that has been

traditionally accepted by the People as consistent with the right to keep and bear arms.

1. THE CITY'S PROHIBITION IMPINGES CONDUCT WITHIN THE HISTORICAL SCOPE OF THE SECOND AMENDMENT'S PROTECTIONS.

The Second Amendment protects the right of law-abiding citizens to keep and carry arms for self-defense. *See Heller*, 554 U.S. at 599. Respondents' ban infringes both of the Second Amendment's halves: the right to keep arms in the home and the right to bear them outside it.

1. Respondents' ban on transporting licensed firearms to nearly all practice ranges severely impedes the "right to possess a handgun in the home for the purpose of self-defense." *McDonald*, 561 U.S. at 791. As the Seventh Circuit has persuasively held, that "core right wouldn't mean much without the training and practice that make it effective." *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011); *see also Wesson v. Town of Salisbury*, 13 F. Supp. 3d 171, 178 (D. Mass. 2014). Allowing possession of a handgun in the home for purposes of self-defense but eliminating, as the City has, a reasonable opportunity to gain familiarity and proficiency in that firearm's use is akin to acknowledging that the First Amendment prohibits a ban on books but then outlawing literacy.

This conclusion follows directly from *Heller* and the historical record on which this Court drew. For

example, *Heller* cited an influential 1880 treatise by Thomas Cooley, which insisted that "to bear arms implies something more than the mere keeping; it 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 617-18 (quoting THOMAS COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 271 (1880)). And this right was equally important to the Founding generation. *See* Letters from The Federal Farmer, *Letter XVIII*, *in* 2 THE COMPLETE ANTI-FEDERALIST 339, 342 (Herbert J. Storing ed. 1981) ("[T]o preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them.").

For most citizens who reside in New York City, Respondents have effectively eliminated the opportunity to become proficient in the use of handguns. Section 5-23 allows firearm "training and practice" only at the seven authorized firing ranges that are within city limits. Seven ranges sprinkled throughout a city with over eight million residents are clearly inadequate to serve the needs of all of the City's lawful handgun owners.

The challenged ban also burdens the right of home-defense by prohibiting New Yorkers who only reside part-time within the City from taking their firearms with them from one residence to the other. The Second Amendment does not limit the right to keep arms to one home only, and this bizarre result of the City's transport ban infringes "the right of law-

abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635.

2. The Second Amendment protects not only the right to *keep* arms but also the right to *bear* them. Because the City's ban prevents law-abiding citizens from carrying their firearms outside of their homes—even if they are *unloaded* and *locked away* separately from the ammunition—the only conceivable way it can be squared with the Second Amendment is if that provision simply *does not apply* outside the home. But the text and history of the right conclusively show just the opposite.

The text of the Second Amendment leaves no doubt that it applies outside the home. The substance of the Second Amendment right reposes in the twin verbs of the operative clause: "the right of the people to keep *and bear* Arms, shall not be infringed." U.S. CONST. amend. II (emphasis added). This Court has defined the key term "bear" as to " 'wear, bear, or carry … upon the person or in the clothing or in a pocket, for the purpose … of being armed and ready for offensive or defensive action in a case of conflict with another person,' " *Heller*, 554 U.S. at 584 (alteration in original) (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). And it has held that the "keep and bear" phrase is not "some sort of term of art" with a "unitary meaning," but is rather a conjoining of two related guarantees. *Id.* at 591. Interpreting the protections of the Second Amendment as confined to the home would read the

second of these guarantees—the right to bear arms—out of the Constitution's text altogether, for the right to keep arms standing alone would be sufficient to protect the right to have arms in the home. Any such interpretation would directly contradict the fundamental canon that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 174 (1803).

Indeed, because "[t]o speak of 'bearing' arms within one's home would at all times have been an awkward usage," the Constitution's explicit inclusion of the "right to bear arms thus implies a right to carry a loaded gun outside the home." *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012). "[T]he idea of carrying a gun," after all, "does not exactly conjure up images of father stuffing a six-shooter in his pajama's pocket before heading downstairs to start the morning's coffee." *Peruta v. County of San Diego*, 742 F.3d 1144, 1152 (9th Cir. 2014), *vacated*, 781 F.3d 1106 (9th Cir. 2015) (en banc); *see also Wrenn v. District of Columbia*, 864 F.3d 650, 657-58 (D.C. Cir. 2017).

Confining the Second Amendment's reach to the home would also be at war with its "core lawful purpose" of safeguarding the right to "self-defense." *Heller*, 554 U.S. at 630. "[O]ne doesn't have to be a historian to realize that a right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home." *Moore*, 702 F.3d at 936. Indeed, according to the Bureau of

Justice Statistics, in 2017 only 36.4% of violent crimes occurred at or near the victim's home.[2]

Finally, the historical understanding of the right to keep and bear arms removes any remaining doubt that it extends outside the home. As *McDonald* explains, "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day." 561 U.S. at 767. Because the need for self-defense may arise in public, it was recognized in England long before the Revolution that the right to self-defense may be exercised in public. *See* 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 71 (1716) ("[T]he killing of a Wrong-doer … may be justified … where a Man kills one who assaults him in the Highway to rob or murder him."); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *180. And because the right to self-defense was understood to extend beyond the home, the right to *armed* self-defense naturally was as well. Accordingly, by the late seventeenth century the English courts recognized that it was the practice and privilege of "gentlemen to ride armed for their security." *Rex v. Knight*, 90 Eng. Rep. 330 (K.B. 1686).

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[2] *See NCVS Victimization Analysis Tool*, BUREAU OF JUSTICE STATISTICS, https://goo.gl/3d9o6V (Under "Custom Tables" tab, select "Personal Victimization" for years 1993-2017, victimization type "violent victimization," and first variable "location of incident").

On this side of the Atlantic, "about half the colonies had laws *requiring* arms-carrying in certain circumstances," such as when traveling or attending church. NICHOLAS J. JOHNSON & DAVID B. KOPEL ET AL., FIREARMS LAW & THE SECOND AMENDMENT 106-08 (2012) (emphasis added). As Judge St. George Tucker observed in 1803, "[i]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side." 5 WILLIAM BLACKSTONE, COMMENTARIES App. n.B, at 19 (St. George Tucker ed., 1803). And Tucker made clear that Congress would exceed its authority were it to "pass a law prohibiting any person from bearing arms." 1 *id.* at App. n.D, 289.

The Second Amendment's text, purposes, and history accordingly unite in demonstrating that that provision's protections are not confined to the home.

2. THE CITY'S PROHIBITION IS A HISTORICAL ANOMALY THAT IS NOT REMOTELY ANALOGOUS TO ANY LONGSTANDING HISTORICAL RESTRICTION ON THE RIGHT TO KEEP AND BEAR ARMS.

Because the Second Amendment protects the right to keep and to carry arms and the City's transport ban burdens both, that prohibition can be upheld under *Heller*'s text-and-history standard only if it is analogous to one of the historical "longstanding prohibitions" traditionally understood to be outside the "scope of the Second Amendment" and thus

"presumptively lawful." *Heller*, 554 U.S. at 626-27 & n.26. While the history and traditions of the Second Amendment provide support for limits on the *kinds* of firearms that are protected, or the *manner* in which they may be carried, we are aware of *no* historical restriction that is remotely analogous to the bizarre limits imposed by the City's transport ban.

As *Heller* recognized, the right to bear arms is not a right to "carry any weapon whatsoever … and for whatever purpose." *Id.* at 626. English courts had read the medieval Statute of Northampton as "prohibiting the carrying of 'dangerous and unusual weapons,' " *id.* at 627—weapons not protected by the right to keep and bear arms, *id.* at 623-24, 627—or otherwise with evil intent "go[ing] armed to terrify the King's subjects," *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1686). But while some have squinted to see in Northampton and its Yankee analogues a general prohibition on carrying firearms in public, in fact the statute was no more than a rule against "*riding* or *going armed*, with dangerous or unusual weapons" and thereby "terrifying the good people of the land." 4 WILLIAM BLACKSTONE, COMMENTARIES *148-49. Northampton was *not* understood as extending to the ordinary carrying of weapons "usually worne and borne," WILLIAM LAMBARD, EIRENARCHA 135 (1588), unless "accompanied with such [c]ircumstances as are apt to terrify the [p]eople," 1 HAWKINS, *supra*, at 136; *see also* 3 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON 79 (1804); *State v. Huntly*, 25

N.C. 418, 422-23 (1843); *Simpson v. State*, 13 Tenn. 356, 359-60 (1833). Accordingly, Northampton provides zero support for the law challenged here. There is little one can do with a firearm *less* likely to terrify the good people of the land than to carry it unloaded and locked away in a case.

Nor can the City find support for its ban in the series of nineteenth-century laws limiting the carrying of *concealed* weapons. While these historical laws limited citizens from carrying their firearms in a way especially disfavored by the social mores of the day, they did so against the background of *freely allowing* the *open* carrying of arms in common use, thus "le[aving] ample opportunities for bearing arms." *Wrenn*, 864 F.3d at 662. And the fact that they left these alternative manners of arms-bearing uninhibited was absolutely *critical* to most of the judicial opinions assessing their constitutionality. *See State v. Chandler*, 5 La. Ann. 489, 490 (1850); *Aymette v. State*, 21 Tenn. 154, 160-61 (1840); *State v. Reid*, 1 Ala. 612, 616-17 (1840); *Nunn v. State*, 1 Ga. 243, 251 (1846); *see also Bliss v. Commonwealth*, 12 Ky. 90, 91-94 (1822). The City's transport prohibition does not even resemble these laws; under Respondents' ban, law-abiding citizens may not carry their firearms *openly*, they may not carry them *concealed*, and they may not even carry them *unloaded and locked away*.

In short, neither Respondents nor the courts below have cited any historical restriction on the Second Amendment even remotely analogous to the City's

transport ban. Moreover, the ban remains an outlier today: to Amicus's knowledge, no other jurisdiction imposes restrictions on transporting unloaded firearms so bizarre and draconian as the ones challenged here. The Court should strike the City's ban down as categorically unconstitutional.

II. IN THE ALTERNATIVE, NEW YORK CITY'S TRANSPORT BAN IS UNCONSTITUTIONAL UNDER STRICT SCRUTINY.

For the reasons given above, this Court should reiterate that laws that infringe the rights protected by the Second Amendment must be analyzed based on the text and history of that provision. But even if this Court ultimately disagrees, the City's ban must still be invalidated.

A. IF THE COURT DOES ADOPT ONE OF THE TIERS OF SCRUTINY, IT SHOULD ADOPT STRICT SCRUTINY.

Where the Court employs the "tiers of scrutiny" approach, the rule is clear: for enumerated, fundamental rights, "strict scrutiny" is the default setting. "Strict judicial scrutiny" is required, this Court has emphasized, when governmental action "impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). Indeed, even rights that are *not* enumerated in the Constitution warrant strict scrutiny if they are fundamental, because the Due Process Clause "forbids the government

to infringe certain 'fundamental' liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993).

Application of any milder form of scrutiny to infringements of the right to keep and bear arms would make a mockery of the Second Amendment's promise. That right is expressly enumerated in the Constitution's text. And as this Court held in *McDonald*, the right is not only textually enumerated, it is also "among those fundamental rights necessary to our system of ordered liberty." 561 U.S. at 778. Applying anything less than strict scrutiny would "single[] out" the Second Amendment "for special—and specially unfavorable—treatment," a path this Court expressly rejected in *McDonald*. *Id.* at 778-79; *see also id.* at 780 (plurality) (refusing to treat Second Amendment "as a second-class right").

This conclusion is underscored by examining those restrictions that this Court *has* analyzed under a lesser, "intermediate" form of scrutiny of the kind the panel below purported to apply. For instance, the Court has applied this more-forgiving standard in the Equal Protection context to gender-based classifications. But such classifications are subjected to a less rigorous analysis precisely because, for reasons of history and biological fact, they are not inherently suspect in the way that race-based classifications are. *See Nguyen v. INS*, 533 U.S. 53, 62-63 (2001). Second, this

Court has applied intermediate scrutiny in some First Amendment cases, involving speech that lies at the periphery of the First Amendment's protective scope, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980), or involving neutral "time, place, and manner" rules that restrict speech for reasons "unrelated to the suppression of free expression," *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The rights at stake in this case are not peripheral rights that warrant "lesser protection." *Central Hudson*, 447 U.S. at 563. Accordingly, this Court should at a minimum apply strict scrutiny.

Indeed, that conclusion is compelled by *Heller* itself. Even if this Court strains to read that opinion as blessing *some* form of scrutiny analysis, the *Heller* Court plainly rejected merely intermediate scrutiny. In that case, Justice Breyer advocated the adoption of the "approach … the Court has applied … in various constitutional contexts, including election-law cases, speech cases, and due process cases." 554 U.S. at 689-90 (Breyer, J., dissenting). And Justice Breyer specifically pointed to the opinion in *Turner Broadcasting System, Inc. v. FCC,* 520 U.S. 180 (1997)—a clear intermediate scrutiny case—as exemplary of the type of analysis he favored. But the *Heller* majority expressly *rejected* Justice Breyer's invitation. 554 U.S. at 634 (majority).

The wisdom of that decision has been borne out by experience. As discussed above, we now have over a decade of experience with lower-court application of

just the kind of intermediate-scrutiny approach spurned by *Heller*, and the result is precisely what this Court predicted: Judges who think the Second Amendment's "scope too broad" have determined "on a case-by-case basis" that in most every case the Second Amendment right is not "*really worth* insisting upon," and under the guise of applying "intermediate scrutiny," they have gradually but inexorably *upended* the "interest balancing [conducted] by the people" when they adopted the Second Amendment, subordinating the right to keep and bear arms to even the most facially implausible claims of public-safety necessity. *Id.* at 634-35. *See* Allen Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 706-07 (2012) ("The lower courts … have effectively embraced the sort of interest-balancing approach that [*Heller*] condemned, adopting an intermediate scrutiny test and applying it in a way that is highly deferential to legislative determinations and that leads to all but the most drastic restrictions being upheld."). The "interest-balancing inquiry" rejected by this Court in *Heller* does not look better after 11 years of hindsight.

B. THE CITY'S PROHIBITION FAILS STRICT SCRUTINY.

Respondents' transport prohibition cannot survive strict scrutiny, for even granting the Government its compelling interest in public safety, the challenged ban is not narrowly tailored to advance that goal.

The sum total of "evidence" put forward by Respondents to establish a link between the challenged rule and its purported public-safety rationale was a single declaration submitted by Andrew Lunetta, the Commanding Officer of the License Division. One scours this declaration in vain in search of material that would satisfy the City's burden.

The declaration begins with the broad, conclusory assertion that "[c]learly, there is less public danger if … license holders do not bring their firearms into the public domain." JA 77. But *no support whatsoever* is offered for that claim. And far from "clear," this empirical question is in fact hotly contested. For instance, in 2004 the National Academy of Sciences' National Research Council ("NRC") conducted an exhaustive review of the entire body of social-scientific literature on firearms regulation and concluded that "with the current evidence it is not possible to determine that there is a causal link between the passage of right-to-carry laws and crime rates." NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 150 (Charles F. Wellford, John V. Pepper, & Carol V. Petrie eds., 2005), http://goo.gl/WO1ZNZ. Similarly, in 2003 a Task Force convened by the

Centers for Disease Control ("CDC") concluded, after exhaustive review, that the extant data were insufficient to support the hypothesis "that the presence of more firearms" being carried in public by licensed citizens "increases rates of unintended and intended injury in interpersonal confrontations." Robert Hahn et al., *Firearms Laws and the Reduction of Violence: A Systematic Review*, 28 AM. J. PREVENTATIVE MED. 40, 53 (2005), http://goo.gl/zOpJFL; *see also* Mark E. Hamill et al., *State Level Firearm Concealed-Carry Legislation & Rates of Homicide & Other Violent Crime*, 228 J. AM. C. SURGEONS 1 (2019).

Even if the City could help itself to the premise that "[t]he general government interest in … public safety … is maintained by limiting handgun access in public places," JA 78, it still failed to substantiate the claimed link between that premise and the specific restrictions imposed by the rule challenged here—a ban on transporting an *unloaded* handgun, in a *locked container*, *separate* from its ammunition, to a second residence or a firing range *other* than one the City has authorized. The City's theory, apparently, is that the copious limits on how and where handguns may be transported could be "easily ignored" if "ranges anywhere in the State were authorized," since licensees could carry their firearms at will and, if discovered, "create an explanation about traveling for target practice or shooting competition." *Id.* at 69, 70. Only by limiting transportation to authorized ranges (or

hunting locations), the theory goes, can "these restrictions be effectively monitored and enforced." *Id.* at 72.

But, again, the City submitted no evidence to back up these assertions. Though it vaguely references "myriad examples" of violations under the more-lenient licensing regime that predated the rule challenged here, *id.* at 77, the examples it cites nearly all involve violations of *other, independent* legal limits, violations the challenged transport ban can do nothing to curb. For example, it asserts that some licensees were found "travelling with loaded firearms," *id.*, but that conduct is unlawful under *both* regimes, and the limits challenged here, on *where* firearms may be transported, will do nothing to prevent it.

Even taking the City's transport prohibition on its own terms, the most likely effect of that ban is to *undermine* public safety. By forcing many law-abiding New Yorkers who wish to maintain proficiency with their home-defense firearms to travel *further* to in-city gun ranges, rather than to more-convenient ranges that happen to be located outside city limits, the transport ban in all likelihood leads to "Premises Residence license holders" spending *more* time transporting "their firearms in[ ] the public domain." JA 77. By the City's lights, that leads to *greater* "public danger," not less. Likewise, the public-safety impact of forcing New Yorkers to leave their firearms unattended in a vacant home for weeks or months at a time when they are staying at a second residence outside city limits is

pernicious. Over a third of firearms used in crime are obtained through theft, *see* JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS 184 (2d ed. 2008); and over two-thirds of stolen firearms are stolen *from the home*, *see* U. S. BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2008 — STATISTICAL TABLES tbl. 84 (2010), https://bit.ly/2xKEqV9.

Finally, the transport ban independently fails strict scrutiny because it is plainly not the least restrictive means of furthering Respondents' asserted public-safety goal. The City's treatment of the two narrow types of transportation it does allow—for hunting in designated areas and for training and practice at the handful of authorized firing ranges—underscores the availability of alternative and less restrictive means. Mr. Lunetta asserted that these exceptions do not pose an unacceptable public safety risk because it is relatively easy to "determine whether [a licensee] is transporting [his] handgun *directly* to or from an authorized range within the City," and "hunting is a highly regulated activity requiring specific authorizations" that are easily verified. JA 79-80. But there is nothing in the record to suggest that the License Division could not maintain—and make available to law enforcement—a list of active ranges outside the city, along with their locations. And the City could require the License Division to verify and list a licensee's *second* residence on the face of the license, just as it lists their first.

III. NEW YORK CITY'S TRANSPORT BAN FAILS EVEN INTERMEDIATE SCRUTINY.

Even if this Court were to apply merely intermediate scrutiny, however, the result would be the same, and the panel below was wrong to conclude otherwise.

As the cases applying intermediate scrutiny in the gender-discrimination context show, that form of scrutiny places a "demanding" burden on the Government to come up with an "exceedingly persuasive" justification for the challenged law or policy. *United States v. Virginia*, 518 U.S. 515, 533 (1996). In the VMI case, for instance, the Court sifted finely Virginia's assertion that the challenged discrimination was "substantially related" to its objectives and ultimately rejected the State's evidence on this score as "a judgment hardly proved." *Id.* at 542-45. Here, the City's unproved judgment that its transport ban substantially advances public safety falls even shorter from the mark: All the panel below had to go on in this case was a New York official's unsupported say-so. *See supra*, pp. 29-32.

Moreover, the First Amendment cases applying intermediate scrutiny further demonstrate that even under this mid-level standard, the challenged law "still must be narrowly tailored"—carefully limited so as not to "burden substantially more [protected conduct] than is necessary to further the government's legitimate interests." *McCullen v. Coakley*, 573 U.S.

464, 486 (2014). The City's prohibition cannot clear this hurdle.

As shown above, New York "has available to it a variety of approaches that appear capable of serving its interests" without burdening, or without burdening so substantially, the Second Amendment rights of its residents. *Id.* at 494. Respondents have presented no evidence that they even *considered* such less-burdensome alternatives as maintaining a list of active shooting ranges outside the City, or requiring licensees to list all part-time residences on the face of the permit, before effectively banning transportation of firearms outright. "In short, the [City] has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it. Nor has it shown that it considered different methods that other jurisdictions have found effective." *Id.* That is fatal to the challenged prohibition even under intermediate scrutiny.

The court below concluded otherwise only by applying a framework that it *called* "intermediate scrutiny" but that in reality is closer to the rational basis review explicitly *rejected* by *Heller*. As described by this Court's precedents, intermediate scrutiny requires the government to advance an "exceedingly persuasive" justification, *Virginia*, 518 U.S. at 533, and bars it from "regulating [constitutionally-protected conduct] in such a manner that a substantial portion of the burden on [the conduct] does not serve to advance its goals." *McCullen*, 573 U.S. at 486. The

toothless reasonable-fit test applied by the panel below—a test it expressly recognized was less robust than the analysis that applies to "analogous regulation of other constitutional rights" Pet.App.25—does not even come close to the intermediate scrutiny established by this Court.

IV. NEW YORK CITY'S TRANSPORT BAN IS ALSO UNCONSTITUTIONAL UNDER THE COMMERCE CLAUSE AND THE RIGHT TO TRAVEL.

Finally, the transport ban is independently unconstitutional under the "dormant" Commerce Clause analysis and the right to travel.

Where a state or local rule discriminates against interstate commerce "on its face and in its plain effect," it is subject to "a virtually *per se* rule of invalidity." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, 627 (1978). The transport ban is just such a rule, for by its clear terms it discriminates against interstate commerce by *entirely blocking* out-of-state firing ranges from competing for the business of handgun owners residing in the City. Section 5-23 itself allows licensees to "transport her/his handgun(s)" only to "an authorized small arms range/shooting club;" and the only way a range can become "authorized" is through the City Police Commissioner's authority under the New York City Administrative Code to designate certain "premises" "*in the city*" as areas where firearms may be lawfully discharged. 10 N.Y. CITY ADMIN. CODE § 10.131(c) (emphasis added). Accordingly, the City's prohibition "is *per se* invalid," unless it "can

demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994); *see also Dean Milk Co. v. City of Madison*, 340 U.S. 349, 350-51 (1951). For the reasons canvassed above, Respondents cannot meet this high standard.

The panel's reasons for upholding the transport ban are unpersuasive. It noted that the ban "does not prohibit a premises licensee from patronizing an out-of-state firing range." Pet.App.31. But that is utterly irrelevant, since the ban *does* prohibit licensees from *bringing their firearms* to out-of-state (but not in-the-City) ranges. That firearms "can be rented or borrowed" at out-of-state ranges does not change the analysis, Pet.App.22, since the inability to take *one's own* firearm to the practice range is obviously a substantial deterrent to going to an out-of-state range at all. Practicing with a rented gun is a poor substitute for gaining proficiency with one's *own* firearm, and *that* is the firearm that a law-abiding citizen will use should the need for self-defense arise. And as this Court has made clear, a marginal discriminatory burden on interstate commerce is just as unconstitutional as a flat ban. *Wyoming v. Oklahoma*, 502 U.S. 437, 455 (1992).

The Second Circuit also relied on the fact that Petitioners "present no evidence that the purpose of the New York City rule was to serve as a protectionist measure in favor of the City's firing-range industry."

Pet.App.31. But that is irrelevant too, for "the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory." *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 100 (1994). After all, "the evil of protectionism can reside in legislative means as well as legislative ends." *City of Philadelphia*, 437 U.S. at 626-27.

The transport ban also violates the constitutional right to travel. This Court has long made clear that the Constitution protects "the right to go from one place to another, including the right to cross state borders while en route." *Saenz v. Roe*, 526 U.S. 489, 500 (1999). A state law infringes this right when it "actually deters such travel" or "uses any classification which serves to penalize the exercise of that right." *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (quotation marks omitted).

Here, New York City's prohibition infringes the right to travel in the most invidious way: by forcing its residents to choose between exercising their constitutional right to travel or their constitutional right to keep and bear arms for self-defense. That is flatly contrary to this Court's precedents. As this Court has held, "[t]he right to travel is an unconditional personal right, a right whose exercise may not be conditioned," and a state may not "force a person who wishes to travel … to choose between travel and [another] basic right." *Dunn v. Blumstein*, 405 U.S. 330, 341-42 (1972) (striking down durational residence limit on the right to vote). The Second Circuit's reasons for concluding

otherwise do not withstand scrutiny. The court below understood New York City's transport ban to have a merely "incidental impact on travel," Pet.App.35, but that is not so. The City's prohibition does not "indirect[ly]" limit interstate travel in the manner of a ban on "the possession in one jurisdiction of items that may be more broadly permitted in another." Pet.App.35-36. No, Respondents' rules *expressly prohibit travelling* with constitutionally protected arms. The government may not directly "penalize the right to travel by imposing … prohibitions on only those persons [exercising] that right" unless it satisfies strict scrutiny, *Blumstein*, 405 U.S. at 342—a test that, as shown above, Respondents cannot pass.

CONCLUSION

For the foregoing reasons, the judgement of the Second Circuit should be reversed.

May 14, 2019

Respectfully submitted,

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