No. 18-280

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

BRIEF OF *AMICUS CURIAE* THE LIBERAL GUN CLUB IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Liberal Gun Club provides a pro-Second Amendment voice for gun-owning liberals and moderates in the national conversation on gun rights, gun legislation, firearms safety, and the shooting sports. The Club serves as a voice for gun owners who seek an alternative perspective on the difficult conversations that can surround firearm ownership. It serves as an alternative to other Second Amendment forums, allowing liberal and moderate views to be expressed and actively debated. In the Club, gun owners and enthusiasts discuss firearms ownership, firearms use, and the enjoyment of firearms-related activities, free from the destructive elements of political extremism that sometimes dominate this subject on the national scale. The Club actively develops and fosters a variety of firearms training, safety, and education programs, for both gun owners and non-gun owners alike.

While the Club is geared towards typical "liberals" who also happen to enjoy owning and using firearms, its members come from every political ideology, including, for example, Libertarian, Independent, Democratic, Republican,

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

and Green. The Club's main focus is on root cause mitigation addressing the root causes of violence, rather than looking at the symptoms of violence, which can result in errantly embracing blanket bans and other window dressings at the expense of real solutions. While there is debate about whether and to what extent various gun restrictions will impact the number of crimes that ultimately take place in society, what is sadly clear is that any such impacts are very small when compared with the gains that would attend achieving a more just society—one that does a better job ensuring that all of its citizens have access to healthcare, housing, and meaningful opportunities.

Given this focus, the Club speaks out on political issues when its unique perspective can bring value to the conversation. For example, Club members in Oregon recently met with "liberal" elected officials to discuss their concerns about a proposed firearms-storage law. The Club was the only voice that both came from a liberal perspective and also embraced the right of the people to keep and bear arms.

New York City's prohibition on transporting handguns to locations outside the City has directly impacted the Club and its members. Notably, the Club's New York chapter—which is based out of New York City and includes members living in New Jersey, New York State, and Connecticut—has tried on several occasions to organize shooting and training activities. This has only been possible to a

limited extent because the Club's New York City members cannot bring their handguns to New Jersey or Long Island, and the members who do not live in New York City cannot bring their guns into the City. The transport ban has also prevented members of the Club from bringing their handguns with them when they come to Club events in other locations. So, for example, if a Club member wants to participate in training provided at one of the Club's meetings, then they need to rent or borrow a gun—which is a plainly inferior alternative to practicing with one's own gun.

SUMMARY OF THE ARGUMENT

The requirement of narrow tailoring—that a burden, otherwise valid, may go no further than is necessary to address the government's interest—has historical antecedents that run back close to this country's founding, well before the modern framework of means-end scrutiny ever developed. Indeed, the requirement of narrow tailoring is an intrinsic aspect—literally half—of today's modern means-end tests of scrutiny, regardless of how (or if) that standard is articulated. Tailoring requires the consideration of alternative means to achieve the purported governmental ends. In the case of strict scrutiny, the means must be the "least restrictive," and in the case of (true) intermediate scrutiny the government must consider "less restrictive" means. Thus, any form of heightened scrutiny requires tailoring and the consideration of alternatives.

However, the purportedly "intermediate" standard of "heightened" scrutiny that has developed in the lower courts to review gun law restrictions under the Second Amendment is *not* in fact heightened scrutiny. Indeed, this so-called "intermediate scrutiny" is incompatible with any individual right the Constitution protects—because it fails to even consider the narrow tailoring requirements that underlie all forms of heightened scrutiny review. While the standard of scrutiny here should obviously be strict, the reality is that it does not matter. Any standard of heightened scrutiny,

properly applied, requires the application of narrow tailoring requirements and the consideration of alternatives. And any good faith application of those requirements leads inescapably to the conclusion that the City of New York has not—and almost certainly, cannot—save the transport ban from any sort of narrow tailoring analysis that is even remotely faithful to this Court's requirements.

The City's transportation rule hopelessly fails scrutiny, because every available example of a regulatory alternative is less restrictive. There is absolutely nothing in the record that would support the conclusion that the City achieves any advantage for its citizens by taking this unduly restrictive approach—aside from the apparent "advantage" of making Second Amendment rights that much more difficult to exercise from within the five boroughs. To the contrary, even highly restrictive jurisdictions have not found any reason to take the extreme approach the City of New York has taken here. The City—having engaged in no amount of tailoring and having failed to consider less restrictive alternatives—has adopted a highly restrictive approach that burdens vast amounts of otherwise lawful conduct. This cannot survive any level of heightened scrutiny.

ARGUMENT

New York City's Transport Ban Fails All Heightened Scrutiny Because it Reflects no Tailoring and Fails to Consider Alternatives, Thereby Burdening Substantial Lawful Conduct

A. Labels Aside, Narrow Tailoring and the Consideration of Alternative Means is a Fundamental Component of All Heightened Judicial Review

While the modern articulations of "intermediate" and "strict" scrutiny date to the 1960s and 70s, their roots go much deeper. An examination of those roots shows that concerns regarding the narrow tailoring of governmental restrictions—that is, the basic question of whether a burden, otherwise valid, goes further than necessary and leaves too little conduct open, *see McCullen v. Coakley*, 573 U.S. 464, 486 (2014)—are fundamental to the Court's review of laws that burden the exercise of constitutional rights. This is true whether the standard of review is stated to be "strict" or "intermediate," or whether (as in *McCullen*) the Court has declined to use a label at all.

The genesis of the framework of intermediate and strict scrutiny of individual rights is the Court's "very famous footnote," Erwin Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 414

(1997), in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). *See generally, e.g.*, Matthew D. Bunker, et al., *Strict in Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL'Y 349, 352-53 (2011); Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1288 (2007). In that case, the Court ended the *Lochner* era when it ruled that ordinary regulations would enjoy a presumption of "rest[ing] upon some rational basis within the knowledge and experience of the legislators." *Carolene Products*, 304 U.S. at 152. The Court appended a footnote to this statement in which it admonished that the presumption of constitutionality might have a "narrower scope" when a law fell "within a specific prohibition of the Constitution." *See id.* at 152 n.4. But whether a "more exacting" or "more asserting" judicial scrutiny" might be needed in the future was not an issue that case presented. *See id.*

Shortly thereafter, in a pair of decisions handed down in 1940, this Court began to more expressly look at whether laws that burdened constitutional rights were "narrowly drawn." The basic idea of considering less restrictive means dates back much, much further— as far as the early Nineteenth Century. *See* Matthew D. Bunker & Emily Erickson, *The Jurisprudence of Precision: Contrast Space and Narrow Tailoring in First Amendment Doctrine*, 6 COMM. L. & POL'Y 259, 263 (2001) (citing Note, *The Less Restrictive Alternative in Constitutional*

Adjudication: An Analysis, a Justification and Some Criteria, 27 VAND L. REV. 971, 1017 (1974)). In any event, the Court's decision in *Thornhill v. Alabama*, 310 U.S. 88 (1940), invalidated a state law that prohibited picketing; in doing so, it drew a contrast with a hypothetical "statute [that was] narrowly drawn to cover the precise situation giving rise to the danger." *Id.* at 105; *see also Cantwell v. Connecticut*, 310 U.S. 296 (1940). The next year, the Court upheld a law that restricted picketing on the rationale that it was indeed "narrowly drawn to cover the precise situation giving rise to the danger." *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 297 (1941) (quoting *Thornhill*, 310 U.S. at 105). By 1960, in a case concerning the right of free association, this Court considered it well established "that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

The other components of the modern means-ends tests developed at the same time. In 1945, this Court ruled that "any attempt to restrict [constitutional] liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger." *See Thomas v. Collins*, 323 U.S. 516, 530 (1945). Twelve years after that, this Court first began to articulate a requirement that the "public interest" would need to be "compelling."

See Sweezy v. New Hampshire, 354 U.S. 234, 262, 265 (1957) (Frankfurter, J., concurring).

It was in *Shapiro v. Thompson*, 394 U.S. 618 (1969), *overruled on other grounds, Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974), that "the modern version of strict scrutiny made its first unambiguous appearance in a Supreme Court majority opinion," Fallon, *supra*, at 1282. As articulated in *Shapiro*, a law that restricted the right to move to new states was unconstitutional "unless shown to be necessary to promote a compelling governmental interest." *Shapiro*, 394 U.S. at 634. The Court used the phrase "narrow tailoring" for the first time in *Grayned v. City of Rockford*, 408 U.S. 104, 116-17 (1972). By the early 1970s, the Court was articulating the strict scrutiny test using the same language it uses today—as a requirement that burdens be "necessary" to advance interests that are "compelling," coupled with a requirement that those burdens be "narrowly tailored" or less restrictive when possible. *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973). Narrow tailoring is "[t]he second defining requirement of the modern strict scrutiny test." Fallon, *supra*, at 1267 (2007).

Narrow tailoring is also a defining requirement of intermediate scrutiny tests. The intermediate scrutiny framework traces to *United States v. O'Brien*, 391 U.S. 367 (1968), where this Court upheld a law prohibiting the burning of draft cards

on the rationale that there was "a sufficiently important governmental interest," *id.* at 376. *See generally* Nancy J. Whitmore, *The Evolution of the Intermediate Scrutiny Standard and the Rise of the Bottleneck "Rule" in the Turner Decisions*, 8 COMM. L & POL'Y 25, 25-26 (2003). But even so, the Court emphasized that the law was "an appropriately narrow means of protecting th[e governmental] interest and condemns only the independent noncommunicative impact[.]" *O'Brien*, 391 U.S. at 382.

When this Court then articulated a standard of intermediate scrutiny for burdens on commercial speech, it required only that the law "directly advance" a governmental interest that was "substantial"—but it also mandated that the restriction be "not more extensive than is necessary to serve that interest." *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980). Likewise, the standard of intermediate scrutiny that governs content-neutral restrictions on time, place, and manner requires not only that restrictions be "designed to serve" an interest that is "substantial"—but also mandates that those restrictions "do not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986). Restrictions on political spending similarly need only serve a "sufficiently important interest"—but they must be "closely drawn" to "match" that

interest. *FEC v. Beaumont*, 539 U.S. 146, 162 (2003) (quotations and citations omitted).

This Court's relatively recent decision in *McCullen v. Coakley*, 573 U.S. 464 (2014), shows the ongoing importance of the narrow tailoring considerations. There, the Court declined to apply strict scrutiny to a Massachusetts law that created a 35 foot perimeter around the entrances of clinics performing abortions because the restriction was content-neutral. *See id.* at 478-85. But even though strict scrutiny did not apply, and the government thus did not need to use the "'least restrictive or least intrusive means of' serving the government's interests," the restriction still needed to be "narrowly tailored." *Id.* at 486 (*quoting Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989)). And specifically, the requirement of narrow tailoring meant that the law could not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* (*quoting Ward*, 491 U.S. at 799).

The decision in *McCullen* is also instructive for how it answered the narrow tailoring question. To determine whether the law went too far, the Court looked first to the scheme that had previously been in place and compared the extent that either approach impacted both individuals' rights (free expression) and the governmental interests (public safety and access to healthcare). *See id.* at 487-90. The Court then considered other states' laws,

finding it significant that "no other State [had] a law that creates fixed buffer zones around abortion clinics," although there were some localities that did. *See id*. at 490 & n.6. The Court next looked at other Massachusetts laws, as well as federal laws and some local laws, to find additional regulatory alternatives. *See id*. at 490-93. Notably, New York City's restriction was both smaller (15 feet) and more circumscribed in that it prohibited "follow[ing] and harass[ing]" within the perimeter, not just "standing." *See id*. at 491 (quoting N.Y.C. ADMIN. CODE §8-803(a)(3)). All of this led to the conclusion that the 35 foot buffer was unconstitutional because it "burden[ed] substantially more speech than necessary to achieve the Commonwealth's asserted interests." *Id*. at 490.

We thus see that in the framework of means-end scrutiny, the question of tailoring—whether the government's action, otherwise justifiable, goes further than necessary—is literally half of the analysis. Indeed, this Court has imposed narrow drawing and tailoring requirements since well before it began requiring "important" and "compelling" governmental interests. Yet, the court below, as well as several other Courts of Appeals, have utterly failed to consider it when the Second Amendment was at issue.

B. By Failing to Apply Narrow Tailoring and Alternative Means Requirements to Gun Laws, Lower Courts Effectively Remove Heightened Scrutiny from Second Amendment Jurisprudence

While the consideration of narrow tailoring and alternative means is literally half of the means-end analysis, the court below, as well as several other Courts of Appeals, have utterly failed to consider it when it is the Second Amendment that is at issue. While strict scrutiny should apply—since the transport rule is a substantial burden on the exercise of an enumerated, fundamental right—the reality is that the transport ban would plainly fail any form of heightened review, whether denominated "intermediate" or "strict." The real problem is that by failing to even "ask this second question"—whether the law fails narrow tailoring because it "'burden[s] substantially more . . . than is necessary'"—courts are converting what should be heightened scrutiny into what is effectively rational basis review. *See Silvester v. Becerra*, 138 S. Ct. 945, 950 (2018) (Thomas, J., dissenting from denial of certiorari) (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 214 (1997)). The review that results is nothing but a "deferential analysis [that is] indistinguishable from rational-basis review." *Id.* at 945.

Indeed, shortly after *Heller* was decided, Mark Tushnet predicted the next ten years of Second

Amendment jurisprudence. The approach that Justice Breyer had advocated in his dissent—that of considering whether "the legislature 'has drawn reasonable inferences based on substantial evidence,'" and if so, "defer[ing] to legislative judgment", *District of Columbia v. Heller*, 554 U.S. 570, 704-05 (2008) (Breyer, J., dissenting)—would in application be "rather weak tea," Mark Tushnet, *Heller and the Critique of Judgment*, 2009 SUP. CT. REV. 61, 66 (2009). [2] It is obvious that the protection of public safety is a compelling interest, and guns are weapons—devices intrinsically suited to endanger safety, for better or worse—so the mere requirement that a gun law have a reasonable (if disputed) connection to public safety would amount to almost nothing. *See id.* at 66-67. "Under this analysis, courts would approach the determination of a gun regulation's constitutionality with a presumption one would think difficult to overcome." *Id.* at 67. The difference is the absence of tailoring. *See Heller v. District of Columbia*, 670 F.3d 1244, 1264-65 (D.C. Cir. 2011) (quoting *Heller*, 554 U.S. at 689-706 (Breyer, J., dissenting)).

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[2] Indeed, Professor Allen Rostron has argued that, notwithstanding that it was explicitly rejected by the majority in *Heller*, the approach set forth in Justice Breyer's dissenting opinion emphasizing deference to the legislature has, in fact, won the day, as the lower courts systematically resist the Court's actual holding. *See* Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703 (2012).

Yet, in many of the Courts of Appeals, including the court below, this is just about exactly how things have worked out: Courts have used a framework of scrutiny that begins and ends with the question of whether a burden appears to have some connection to public safety, without any consideration of whether it is tailored or unduly restrictive, and without the required consideration of alternative means. This untailored approach results in the rubber-stamp approval of virtually any and every restriction on guns.

The court below, for example, had little difficulty concluding that the transport ban "seeks to protect public safety and prevent crime, and 'New York has substantial, indeed compelling, governmental interests in public safety and crime prevention.'" Pet. App. 25-26 (quoting *Kachalsky v. County of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012)). Anecdotal supposition about road rage and "stressful situations" was a sufficient public harm. *See id.* at 26. The transport ban served the City's interest in "regulating and minimizing the instances of unlicensed transport of firearms on city streets." *Id.* at 28. And was it narrowly tailored? Quoting Second Circuit precedent, the court below expressly rejected that requirement, holding, "we need not ensure that the statute is narrowly tailored or the least restrictive available means to serve the stated governmental interest." *Id. at 25.* (quoting *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 261 (2d Cir. 2015)). And in ostensibly applying even

intermediate scrutiny, the court entirely ignored the question of whether there is any *less* restrictive means available, even if it is not the *least* restrictive, as is required by strict scrutiny. Fundamentally, by requiring no tailoring at all, the Second Circuit effectively applied only rational basis review, as tailoring is one of the lynchpins of any level of heightened scrutiny.

The Second Circuit is hardly alone on this key point. Rather, in the context of the Second Amendment, most of the Courts of Appeals to consider the issue have simply ignored narrow-tailoring and alternative means requirements. This results in an empty judicial review, one that is nothing but a mechanical and predictable determination that, yes, the legislature could have reasonably found that this or that burden could possibly have done something to decrease the likelihood that someone would negligently or criminally misuse a firearm—so the law is constitutional.

From the earliest post-*Heller* days, many courts purported to apply intermediate scrutiny, but they just ignored the narrow-tailoring issue altogether. When the Third Circuit used "intermediate scrutiny" to uphold the federal law prohibiting alterations to serial numbers, it described narrow tailoring as a requirement that only arose in the context of strict scrutiny. *See United States v. Marzzarella*, 614 F.3d 85, 99 (3d Cir. 2009); *see also*

Drake v. Filko, 724 F.3d 426, 439 (3d Cir. 2013) (citing *Kachalsky*, 701 F.3d at 97). This is also how the First, Second, and Fourth Circuits characterized the issue—as a non-issue that did not even arise. *See Gould v. Morgan*, 907 F.3d 659, 674 (1st Cir. 2018) ("a legislature's chosen means need not be narrowly tailored to achieve its ends" (citing *Kachalsky*, 701 F.3d at 97)); *Kolbe v. Hogan*, 849 F.3d 114, 133 (4th Cir. 2017); *N.Y. State Rifle & Pistol*, 804 F.3d at 261; *see also Kachalsky*, 701 F.3d at 97.

According to these Circuits, "we are not required to ensure that the legislature's chosen means is 'narrowly tailored' or the least restrictive available means," but instead, "the fit between the challenged regulation need only be substantial, 'not perfect.'" *Kachalsky*, 701 F.3d at 97 (quoting *Marzzarella*, 614 F.3d at 97). Indeed, some decisions from these courts have decided large-scale issues—like the permissibility of making the right to bear arms in any manner contingent on a highly restrictive licensing scheme—without even addressing the question of whether the scheme is narrowly tailored at all. *See Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013).

The problems with this errant approach go beyond the facts and litigants involved in the individual cases. Decisional law does not occur in a vacuum. Rather, through the process of "rule-ification," legal standards begin as case-by-case determinations of principles and develop into

mechanical results that attach to capsulized sets of facts. *See* Mark Tushnet, *The First Amendment and Political Risk*, 4 J. LEGAL STUD. 103 (2012); *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). The judicial inquiry begins as, "is this gun restriction sufficiently related to public safety?" But it then becomes, simply, "gun laws serve public safety and are accordingly constitutional under 'intermediate scrutiny,'" – a broad-brush result that makes it difficult or impossible for future litigants to vindicate their rights, even when they present much different facts and circumstances.

The failure of the First, Second, Third, and Fourth Circuits to impose any sort of narrow-tailoring or alternative means requirements (under *any* form of heightened scrutiny) should be called out for what it is: a deliberate attempt to subject the protections of the Second Amendment to a death by a thousand cuts by failing to give it the judicial treatment accorded to other rights. *But see McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (the Second Amendment is not "subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause").

C. In Imposing the Transport Ban, New York City Failed to Consider Unloaded and Secured Transport, Which is Widely Employed by Other Jurisdictions, and Which Could Have Been Readily Implemented.

"At the core of the narrow tailoring inquiry regardless of what level of scrutiny is chosen the Court must envision alternatives to the challenged regulation and analyze whether those alternatives would constitute a lesser burden on speech." Bunker & Erickson, *supra*, at 266. The larger question is about the size and boundaries of what can be called the "contrast space," that is, the sphere of other regulations that the Court chooses to deem "alternatives" of the burden at issue. By defining that contrast space broadly, or narrowly, a reviewing court largely dictates the result of its narrow tailoring analysis. *See id.* at 266-77. "[T]he Supreme Court might be better off making clear what potential range of alternatives is under consideration in various classes of case." *Id.* at 277.

Like this Court did in *McCullen*, we look to other potential regulatory means of addressing the City's claimed interest. The transport ban is ostensibly designed to promote public safety by limiting the presence of handguns on city streets. Yet, a variety of jurisdictions, including some of the most restrictive ones in the nation, address this problem, not by banning transport entirely, but by imposing

requirements to transport guns unloaded and in a secure location, like a locked box.

Importantly, whether or not these alternative means are themselves valid and constitutional approaches under the Second Amendment, the fact that the City did not even consider them as potential alternatives says all the Court needs to know about the transportation ban's failure under any form of heightened scrutiny. We now consider some of the alternatives that the City did not.

18 U.S.C. §926A, known as the Firearm Owners Protection Act ("FOPA"), protects gun owners from conflicting state and local laws when they transport firearms across state lines in accordance with certain requirements. To qualify for protection, a person must ensure that:

> the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle: Provided, That in the case of a vehicle without a compartment separate from the driver's compartment the firearm or ammunition shall be contained in a locked container other than the glove compartment or console.

18 U.S.C. §926A. This provision effectively serves to allow transport of a traveler's legal firearms while

reassuring the states being traversed during the course of travel with regard to any fear of misuse of the firearm while the traveler is within those jurisdictions.[3]

Just across the Hudson River from New York City is New Jersey, which also stands as one of the most restrictive jurisdictions in the nation regarding firearms possession. New Jersey law imposes requirements that are similar to FOPA by requiring that firearms being transported "unloaded and contained in a closed and fastened case, gunbox, securely tied package, or locked in the trunk of the automobile in which it is being transported[.]" N.J. STAT. §2C:39-6(g). The individual's "course of travel shall include only deviations as are reasonably necessary under the circumstances." *Id*. While restrictive, this is surely not a ban.

Maryland is another highly restrictive state for firearms owners. Yet, it also manages to address its transportation-related concerns by requiring just that firearms be transported "unloaded and carried in an enclosed case or an enclosed holster." MD. CRIM. LAW CODE §4-203(b)(3)-(5).

Hawaii, also among the most highly restrictive of all the states, also allows its residents to transport

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[3] New York courts have interpreted the transport ban to preclude City residents from relying on FOPA to transport guns to other states. *See Beach v. Kelly*, 860 N.Y.S.2d 112, 113-14, 52 A.D.3d 436, 437 (1st Dep't 2008).

"unloaded firearms in an enclosed container," with an "enclosed container" being "a rigidly constructed receptacle, or a commercially manufactured gun case, or the equivalent thereof that completely encloses the firearm." *See* HAW. REV. STAT. §134-25.

On the other side of the country, California law allows an individual to transport his or her gun so long as it "is within a motor vehicle and it is locked in the vehicle's trunk or in a locked container in the vehicle" or "is carried by the person directly to or from any motor vehicle for any lawful purpose and, while carrying the firearm, the firearm is contained within a locked container." *See* CAL. PENAL CODE §25610(1)-(2).

And finally, Rhode Island allows people to transport firearms "unloaded and secured in a separate container suitable for the purpose." R.I. GEN. LAWS §11-47-10.

So, even among those places that have the most restrictive gun laws, the common denominator for all is that, in each instance, the transported firearm must be (1) unloaded and (2) secured in some way, by being locked up, placed in separate secure container, and/or located in a separate part of the vehicle.

Telling, even New York City itself recognizes unloaded and secured transport as a valid means of providing for public safety. In those limited

circumstances in which the City *does* allow the transport of licensed handguns within the City, it directs those handguns to be "unloaded, in a locked container, the ammunition to be carried separately" 38 R.C.N.Y. §5-23(a)(3)-(4). The City has made no serious attempt to explain why unloaded and secured transport cannot provide an appropriate level of public safety when all other restrictive jurisdictions in the nation (and Congress) have concluded that it does.

The City's rank speculation about "road rage" or other "stressful situations" cannot possibly offset the least restrictive means requirement under strict scrutiny. Pet.App.26. Nor has the City provided any basis to conclude that such speculations about "road rage" represent any serious attempt to address narrow tailoring or to consider less restrictive alternatives under intermediate scrutiny. Even if mere speculation could constitute a valid record under heightened scrutiny, the City does not attempt to show how unloaded and secured transport fails in those situations.

Thus, the City's selection of an outright ban on travel, in lieu of permitting at least unloaded and secured transport, cannot satisfy any level of heightened scrutiny.

D. By Ignoring the Alternative Means of Unloaded and Secured Transport, New York Prohibits Substantial Lawful Out-of-State Conduct

1. But for the Transport Ban, New York City Residents Could Carry a Handgun for Lawful Self-Defense in Approximately 38 States

Petitioners have identified a series of basic and fundamental activities that the City's transport ban wrongfully precludes: transport to a second home, practice at a range outside the City, and competition outside the City. Yet, the transport ban actually reaches and burdens an even broader range of otherwise lawful activities, vividly illustrating the City's failure to engage in proper tailoring and consideration of alternatives, and making it a perfect example of invalid and unconstitutional law making.

Although both New York City and New York State impose severe limitations on the law abiding individual's ability to carry a handgun for self-defense, most states generally allow law abiding adults to do so as long as they meet a series of objective criteria aimed at addressing bona fide public safety concerns. These criteria typically relate to training, lack of criminal convictions, mental fitness, and the like. *See, e.g.,* CONN. GEN.

STAT. §29-28(B); FLA. STAT. ANN. §790.06; UTAH CODE ANN. §53-5-704; VA. CODE ANN. §18.2-308.09.

Some states issue handgun carry permits to qualified non-residents, including Connecticut, New Hampshire, Maine, Virginia, Florida, Utah, and Arizona. *See* CONN. GEN. STAT. §29-28(f). *See also* ARIZ. REV. STAT. §13-3112(E)(1); FLA. STAT. CH. §790.06(2)(a); ME. REV. STAT. ANN. TIT. 25, §2003(1)(E)(4)(b); N.H. REV. STAT. ANN. §159:6; UTAH CODE ANN. §53-5-704(4)(b); VA. CODE ANN. §18.2-308.06. Furthermore, some states recognize handgun carry permits from other states through reciprocity agreements or by unilateral recognition. *See, e.g,*
https://www.nh.gov/safety/divisions/nhsp/jib/permitslicensing/plupr.html;
https://www.maine.gov/dps/msp/licenses-permits/concealed-carry-maine/reciprocity;
https://www.freshfromflorida.com/Consumer-Resources/Concealed-Weapon-License/Concealed-Weapon-License-Reciprocity;
https://bci.utah.gov/concealed-firearm/reciprocity-with-other-states/;
https://www.azdps.gov/services/public/cwp.

This means that a person living in New York City can obtain a number of non-resident permits and can be ultimately entitled to carry a handgun for self-defense in at least 38 states. Thus, notwithstanding that a New York City resident will most likely be unable to obtain a license to carry a handgun within

the City, that resident could nevertheless obtain multiple non-resident permits from other states. Accordingly, a qualified New York City resident could lawfully carry a handgun for self-defense under the laws of approximately 38 other states—if that resident could get her gun out of the City.

But, of course, this is not actually possible—because the transport ban precludes it. While one can obtain the permits that would authorize carry in all of these other states, the transport ban makes it unlawful to bring one's gun there in the first place. The transport ban effectively renders the rights that would exist in those 38 other states null and void, including in Connecticut, which is less than a 25 minute car ride from the City.

Thus, by failing to narrowly tailor its law and to consider alternative means to achieve its public safety goals, New York City precludes its residents from enjoying the benefits of handgun carry laws in most other States, effectively nixing those jurisdictions' policy decisions from within the City's borders.

2. But for the Transport Ban, New York City Residents Could Obtain Training at Nationally Renowned Firearms Schools Throughout the United States

Separate and apart from wishing to travel outside of the City to *practice* with their handguns at an out-of-state target range, New York City residents may wish to obtain training at some of the well-known and highly regarded specialty firearms training schools and events around the United States. *See, e,g*, https://www.ammoland.com/2016/06/top-4-firearms-training-schools-video/#axzz5nowjHeBN.

Obtaining high quality training advances the goal of public safety by ensuring that individuals are safe and effective if they possess firearms for self-defense. *See, e.g.*, *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2012) ("The 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."). Yet, New York City residents are entirely precluded from attending classes with their handguns outside of the City. None of these premium out-of-state schools are, as a practical matter, available to a New York City resident. These schools typically require that students bring their own handguns, and in any event, training at a high level with a borrowed gun

is a poor approach to become safe and proficient with one's own gun.

To see how absurd this is, one need only imagine how this restriction would apply in any other context. Suppose law students were restricted by statute to attending only law schools within their own state. A qualified Wyoming resident who was accepted to and wished to attend Harvard or Yale would be prohibited by law from doing so. And it would be no answer to say that she could simply attend law school at the University of Wyoming. Notwithstanding that the University of Wyoming Law School certainly produces fine lawyers, the idea that a person could be prohibited by law from attending the top law schools in the nation merely because of where she lives would not be taken seriously in any courtroom.

But that is precisely what the transport ban does with respect to firearms training. Thus, by failing to narrowly tailor its law and consider alternative means to achieve its public safety goals, New York City precludes its residents from enjoying the benefits of premium training with their handguns at any of the top firearms schools around the United States.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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