No. _____

In The
Supreme Court of the United States

RALPH ABEKASSIS,

Petitioner,

v.

NEW YORK CITY, NEW YORK, ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *New York State Rifle & Pistol Ass'n, Inc. v. City of New York, New York*, 140 S. Ct. 1525 (2020), this Court held that New York City's postcertiorari amendment to the challenged handgun regulations mooted the petitioners' claims.

Emboldened, the City continues to orchestrate the manipulation of judicial review of unconstitutional firearm regulations, in violation of the Second Amendment. The City's repeated and wrongful conduct, and the Second Circuit's disregard of it, give rise to this petition, which cries out for an exercise of this Court's supervisory power.

The questions presented are:

Whether, based on this Court's jurisprudence as articulated in *City of Mesquite* and *Honig*, the Second Circuit erred in dismissing this case as moot where New York City's calculated and repetitive actions were designed to evade appellate review.

Whether New York City's post-filing unsolicited issuance of a firearm license moots the live controversy where the licensee remains subject to the challenged regulations.

PARTIES TO THE PROCEEDING

Petitioner is Ralph Abekassis, a resident of New York City, New York. He was the plaintiff in the district court and plaintiff-appellant in the court of appeals. Petitioner is an individual.

Respondents are the City of New York, Police Commissioner James O'Neill, Jonathan David, and Michael Barreto - the NYPD Licensing Division. They were defendants in the district court and defendants-appellees in the court of appeals.

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PETITION FOR WRIT OF CERTIORARI

Ralph Abekassis ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the Second Circuit of Appeals.

LIST OF ALL PROCEEDINGS

United States Court of Appeals for the Second Circuit, No. 20-3038, *Abekassis v. New York City, New York*, judgment entered March 4, 2021, and motion for reconsideration denied March 26, 2021. App-1; App-3. The Second Circuit order is unreported, but is available at 2021 WL 852081, at *1 (2d Cir. Mar. 4, 2021) and reproduced at App-1.

United States District Court for the Southern District of New York, No. 1:19-cv-08004-PAE, *Abekassis v. New York City,* final judgment was entered August 7, 2020. App-4-17. The district court opinion is reported at *Abekassis v. New York City, New York*, 477 F. Supp. 3d 139 (S.D.N.Y. 2020), judgment vacated, appeal dismissed, No. 20-3038, 2021 WL 852081 (2d Cir. Mar. 4, 2021) and reproduced at App-4.

STATEMENT OF JURISDICTION

The Second Circuit issued its judgment on March 4, 2021. Petitioner filed a timely motion to reconsider on March 18, 2021, which the court denied on March 26, 2021. On March 19, 2020, this Court extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment to the United States Constitution, and the relevant portions of the New York State Penal Law and the Rules of the City of New York are reproduced at App-47.

STATEMENT OF THE CASE

Thirteen years ago, the Court held that the Second Amendment "conferred an individual right to keep and bear arms" and that "self-defense…was the central component of the right itself." *District of Columbia v. Heller*, 554 U.S. 570, 595, 599 (2008). In June 2010, the Court held that the Second Amendment applies in full force and effect to state and local governments. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

Rather than bring its regulations into constitutional compliance, just four months later[1] New York City

[1] *See,* "§ 5-10 Grounds for Denial of Handgun License", *The City Record*, Michael R. Bloomberg, Mayor, October 29, 2010 at

further restricted the Second Amendment right to self-defense by expanding the grounds under which a handgun license (home and carry) can be denied to include, *inter alia*, dismissed charges; poor driving history, driver's license suspensions, being declared a scofflaw; failing to pay legally required debts such as child support, taxes, fines or penalties imposed by governmental authorities; and/or any other 'information demonstrating an unwillingness to abide by the law, lack of candor toward lawful authorities, lack of concern for safety, or other good cause for the denial of the license'. 38 RCNY 5-10(a), (h), (l), (n). App-49.

A license is not required to lawfully possess rifles and shotguns outside of New York City. In the City, however, not only is a permit required, but the City employs the same "grounds for denial" to bar the possession of rifles and shotguns for self-defense, as it uses for handguns. 38 RCNY § 3-03. App-49.

The historically rooted, constitutionally guaranteed individual "right" to self-defense does not exist in New York City but languishes as a mere "privilege" in a pre-*Heller* world. When its unconstitutional firearm restrictions are challenged, the City manipulates appellate review by attempting to moot the live controversy.

Petitioner, age 34, is a resident of New York City. Petitioner has no criminal convictions and no historically recognized prohibitors to the purchase or

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p. 3060.
https://www1.nyc.gov/assets/dcas/downloads/pdf/cityrecord/cityrecord-10-29-10.pdf

possession of firearms. App-9-11. In 2018, Petitioner applied to the NYPD License Division for a license to possess a handgun in his home for self-defense. [2] App-9.

Notwithstanding this Court's holding in *Heller*, that the right to possess handguns for self-defense is absolute, barring the existence a longstanding and accepted disqualifier to firearm possession (i.e., felons and the insane), the License Division denied his application. The License Division determined that Petitioner was 'ineligible' to possess handguns due to (i) his lack of good moral character and (ii) other 'good cause' to deny the application under Penal Law §§ 400.00(1)(b), (n). App-9-10.

In New York City, lack of good moral character and/or 'good cause' to deny a handgun license application is determined by the enumerated "Grounds for Denial" found in the Rules of the City of New York, Title 38 at § 5-10. App-51-53.

Relying on 38 RCNY 5-10(a), (h), (l), and (n), Petitioner was deemed ineligible and unfit to possess a handgun in his home for self-defense based on an arrest at the age of 15, which the N.Y. City Law Department declined to prosecute, untimely-paid

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[2] Mere possession of a loaded handgun in New York without a license, whether at home or in public, is a felony offense, punishable by incarceration, fines, and the forfeiture of one's Second Amendment rights. N.Y. Penal Law § 265.01-b. The lawful possession of a handgun requires applying for and obtaining a pistol license from a statutory licensing officer. N.Y. Penal Law § 400.00. App-48.

fines, non-criminal infractions, and his driving history. App-9-12.

Petitioner filed an administrative appeal with the Appeals Unit of the License Division, which was also denied. App-10-12.

Petitioner filed an action in the Southern District of New York challenging 38 RCNY § 5-10 (a), (h), (l), and (n)[3] as unconstitutional, both facially and as applied. App-12-13. Mere arrests, driving histories, non-payment of fines, and general, subjective determinations that an individual lacks a 'concern for safety' have no support in either the text or history of the Second Amendment as disqualifiers to the possession of firearms.

The district court granted the City's motion to dismiss for failure to state a claim. Appendix C. Rather than analyze whether the § 5-10 factors violate the Second Amendment, the court erroneously accepted the factors as legitimate disqualifiers to firearm possession in the first instance. From there, the district court reasoned that, because Petitioner fell into the category of individuals affected by the § 5-10 factors – an arrest with no resulting conviction; poor driving history; and untimely payment of government-imposed fines – Petitioner is not a "law-abiding" individual. As a "non-law-abiding" individual, Petitioner was thus unentitled to the full protections of the Second Amendment. App-22-25. Applying a rational basis test, labeled as "intermediate scrutiny"[4] [5], the court held that the § 5-

[3] Hereinafter, the "§ 5-10 factors".
[4] App.25-31.

10 factors are reasonably related to the City's interest in public safety and crime prevention – despite *Heller*'s flat rejection of interest balancing tests. App.32-46.

After Petitioner's brief was fully submitted, detailing the unconstitutional analysis conducted by the district court, and just days before the City's brief was due, the License Division emailed Petitioner directly and instructed him to pick up his handgun license at Police Headquarters. App-57. At the time of the email, there was no handgun license application pending, as Petitioner did not reapply after the City found him ineligible and unfit to possess handguns in 2019.

After sending an [unsolicited] handgun license to the same Petitioner it deemed unfit to possess handguns and dangerous, the City moved to dismiss the appeal as moot. In opposing the City's motion dismiss the appeal on mootness grounds, Petitioner argued that the regulations remain unchanged - the City did not cease the challenged conduct. Petitioner remains subject to the regulations. NYC handgun licenses are temporary and required to be renewed every three

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[5] New York's federal courts characterize Second Amendment analysis as 'intermediate scrutiny' to bring their analysis in line with a few other circuits depending on the Second Amendment implications raised. In its *application*, however, the scrutiny is the same 'rational basis' review conducted by the New York state courts. See, e.g., *Gulotta v. Hart*, 119 N.Y.S.3d 830 (N.Y. Sup. Ct. 2019) ("Court's function is limited to ascertaining whether there is a rational basis for the agency"s determination" to deny handgun license application") citing cases decided pre-*Heller* and *McDonald* - *Papaioannou v. Kelly*, 14 A.D.3d 459 (1st Dep't 2005); *Kaplan v. Bratton*, 249 A.D.2d 199 (1st Dep't 1998); *Sewell v. City of New York*, 182 A.D.2d 469 (1st Dept 1992).

years. 38 RCNY 5-28, App-53. Petitioner will be subject to the same challenged "grounds for denial" three years from now and every three years thereafter. Handgun licenses are also revocable for "any disqualification under this section". 38 RCNY 5-11, App-53. Repetition of the harm is likely any time Petitioner violates any rule or regulation, including traffic infractions and failing to pay fines on time. If Petitioner is merely 'accused' of violating a statute or regulation while under the discretionary control of the License Division, his handgun license can be suspended or revoked.

In a three-sentence order, the Second Circuit summarily granted the City's motion to dismiss the appeal as moot, without explanation, citing *Libertarian Party of Erie County v. Cuomo*, 70 F.3d 106, 122 (2d Cir. 2020). The district court decision was vacated and remanded with instructions to dismiss the complaint. App-1.

Petitioner promptly filed a motion to reconsider. *Libertarian Party* is an inapposite case in which the actions of three of the *plaintiffs,* not the *defendants'* actions, mooted the controversy. For two of the plaintiffs, death and relocation out of state mooted the controversy. The third plaintiff both applied for and was issued a handgun license during the pendency of the case. Unlike *Libertarian Party*, Petitioner neither died, relocated, nor reapplied for a handgun license.[6]

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[6] In *Libertarian Party*, one plaintiff applied for a New York State handgun license during the litigation to avoid a dismissal on standing grounds because he had not subjected himself to the licensing scheme he was challenging nor did he claim futility in that regard. The judicial licensing officer issued the handgun

Rather, in an effort to forestall appellate review of its unconstitutional policies, the City spontaneously and unilaterally issued a handgun license to Petitioner *in order to* moot the controversy.

Unlike *Libertarian Party*, the City's post-filing conduct had no effect on the live controversy; Petitioner received none of the relief sought in his complaint and continues to be subject to the challenged regulations.

With even less content than its summary grant of the City's motion to dismiss the appeal as moot, the circuit denied Petitioner's motion to reconsider without addressing the distinction between this case and *Libertarian Party*. App-3.

The City's conduct is not just capable of repetition and likely to evade review, the City's intentional orchestration of conduct designed to evade review all but guarantees it.

REASONS FOR GRANTING THE PETITION

The Second Circuit's dismissal of Petitioner's appeal sanctions the City's intentional interference with the judicial system, shields the City's "grounds for denial" from review, and saves the City from having to articulate a defense for its egregious Second

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license to the plaintiff in response to the plaintiff's application – not *sua sponte* and in the absence of a pending application like the City did here.

Amendment violations in the face of *Heller*, *McDonald*, and *Caetano*[7].

Without a reversal of the court's determination of mootness, the City's unconstitutional infringements will evade review *ad infinitum*. Every time a challenge arises, the City need only mail a license to the challenger and declare the controversy moot. This case cries out for an exercise of this Court's supervisory power.

The controversy is capable of repetition because Petitioner is required to renew his handgun license every three years[8] under the same discretionary scenario the City relied on to deny his right to possess a handgun at home in the first instance. There is nothing to prevent the City from denying Petitioner's renewal three years from now.

Second, Petitioner remains subject to the § 5-10 factors as long as he has a license, which means that "at disqualification" under the broad "grounds for denial" of 5-10 creates a basis for suspending or revoking Petitioner's license – dismissed charges, arrests with no disqualifying conviction, vehicle and traffic infractions, another summons related to his ownership/operation of his boat, failure to pay a fine on time, and the like. Even jaywalking arguably constitutes an "unwillingness to abide by the law" giving rise to the denial of his renewal application, suspension, or the revocation of his handgun license. 38 RCNY 5-10, App-51; 38 RCNY 5-11, App-53.

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[7] *Caetano v. Massachusetts*, 577 U.S. 411 (2016).
[8] 38 RCNY 28, App-53.

Third, it is clear from this case that the City issued a handgun license to Petitioner to evade review of its unconstitutional policies, as nothing has changed relevant to Petitioner's background and history since the time of his original application.

As of the drafting of this petition, the City is attempting to avoid review of a substantially similar matter pending in the Second Circuit, *Taveras v. New York City, et al. Taveras* challenges 38 RCNY 3-03 in the context of the denial of a rifle/shotgun permit for home possession. App. As noted above, if the City merely mails Mr. Taveras a license, particularly where the Second Circuit has already held such conduct moots a live controversy, a controversy capable of repetition will also evade review.

The Second Circuit's tolerance of the City's intentional manipulation of the review process insulates the City's unconstitutional "grounds for denial" from *bona fide* review by this Court.

Unlike *NYSRPA v. City*, where the City at least amended its unconstitutional regulations, the City has neither amended nor rescinded 38 RCNY 5, which was the relief Petitioner sought in his complaint. Petitioner received a handgun license, but he did not receive *any* of the relief he sought in his complaint.
There has been no "voluntary cessation of the challenged practice". The § 5-10 factors – mere arrests (even for non-criminal violations), poor driving history, suspensions, inability to pay legally required debts, or any "unwillingness to abide by the law, a lack of candor towards lawful authorities, lack of concern for the safety of oneself and/or other persons"

or any "other good cause" - remain in full force and effect to deny the right to possess firearms for self-defense and will continue to evade review if the Second Circuit's decision stands.

Despite the historically sound findings and precedent of *Heller, McDonald,* and *Caetano*, courts in the Second Circuit continue to perpetuate a rational basis "public interest" analyses to Second Amendment challenges to New York's discretionary licensing statutes. Seizing on this Court's use of the phrase "law-abiding" in *Heller*, the courts in the Second Circuit continue to uphold the denial of the right to possess firearm for self-defense – whether inside the home or in public - based on mere arrests, unproven accusations, violations of vehicle and traffic laws, and similar events and conditions lacking any historical roots as disqualifiers to gun possession. Even with the benefit of Justice Thomas' detailed and instructive dissenting opinion in *Rogers v. Grewal*, 140 S. Ct. 1865 (2020) courts in the Second Circuit remain entrenched in their pre-*Heller* analysis of the Second Amendment - or are simply tone deaf.

Although the district court's decision was vacated, the district courts' reference to and/or reliance on its analysis and misapplication of the term "law-abiding" will continue. See, *Taveras v. New York City, New York*, No. 20 CIV. 1200 (KPF), 2021 WL 185212, at *7 (S.D.N.Y. Jan. 17, 2021) (citing *Abekassis* in upholding City's denial of rifle/shotgun permit for home possession under 38 RCNY 3-03 "Grounds for Denial"); *Fusco v. Cty. of Nassau*, 492 F. Supp. 3d 71, 75 (E.D.N.Y. 2020) (dismissing case where Nassau County revoked handgun license and barred long gun

possession for five years in absence of criminal conviction); *Sibley v. Watches*, 501 F. Supp. 3d 210, 229 (W.D.N.Y. 2020) (citing *Abekassis* for the proposition that, *inter alia,* mere allegations of domestic violence are "paradigmatic 'red flags' often cited as a basis for denying a firearms license"); and *Winters v. New York*, No. 20-CV-8128 (LLS), 2020 WL 6586364, at *4 (S.D.N.Y. Nov. 9, 2020) (in a Second Amendment challenge to the issuance of an Extreme Risk Protection Order, the court cited *Abekassis* for the proposition that the "moral character" factors in New York State's licensing scheme "do not implicate the Second Amendment's core, because they deny such possession only to persons who are found not to be 'law-abiding and responsible' ").

Abekassis is further cited in at least 1 treatise: § 7. Generally, 5B Ordinance Law Annotations Weapons § 7 (Provision of city's gun licensing law that required consideration of whether a license applicant had a poor driving history, multiple driver license suspensions, or had been declared a scofflaw was a reasonable fit between the goals of public safety and reduction of crime, on the one hand, and the regulatory scheme, on the other, and thus did not violate Second Amendment on its face; such data had capacity, including when viewed alongside other factors in other provisions of the law, to reveal whether the applicant had complied with, or disobeyed and disrespected, another state licensing scheme aimed at assuring public safety.).

Petitioner is law abiding and responsible within the meaning intended by the majority in *Heller* and consistent with all historically accepted disqualifiers

to firearm possession, yet he and numerous untold others will continue to be subject to unconstitutional regulations if the City is not brought to heel.

I. The Case In Controversy Is Not Moot

The standard for establishing mootness is "demanding" and this Court has been "particularly wary of attempts by parties to manufacture mootness in order to evade review, as the City has done in this case. *NYSRPA v. City*, 140 S. Ct. at 1533 (cases cited).

First, the case was not moot because Petitioner has not been provided with *any* of the relief sought in the complaint. Petitioner's complaint did not seek the issuance of a discretionary handgun license. Rather, it sought to strike and enjoin the challenged portions of § 5-10 and a declaration from the court that the regulations violate the Second Amendment and Petitioner's rights thereunder.

The § 5-10 factors remain unscathed by the City's issuance of a handgun license to Petitioner.[9] In

[9] The complaint also sought to enjoin certain N.Y. Penal Law statutes criminalizing non-prohibited individuals for the 'mere possession' of a handgun for self-defense in the home because the exercise of a preexisting and protected right does not require prior permission from the government. Rather than bring its regulations into compliance after this Court's decisions in *Heller* and *McDonald*, the City and New York State became more restrictive of their residents' Second Amendment rights. Indeed, even California does not criminalize the mere possession of a firearm in the home for self-defense. The complaint below also sought statutory attorney's fees, costs, disbursements, and such further and alternative relief as the court deemed just and proper.

issuing Petitioner a license, Petitioner remains subject to the same discretionary licensing scheme he has challenged – a discretionary license over which the licensing officer has "broad discretion". Indeed, the City has as much "broad discretion" to revoke the license or deny its renewal as it had in granting the license in the first instance. See, e.g., *Aron v. Becker*, 48 F. Supp. 3d 347, 371 (N.D.N.Y. 2014) citing, *O'Brien v. Keegan*, 87 N.Y.2d 436, 439–40, 639 N.Y.S.2d 1004, 663 N.E.2d 316 (1996) ("A licensing officer's decision will not be disturbed unless it is arbitrary and capricious.).

The controversy is not moot because, relative to a handgun license, the City can take or give as it sees fit. "All that matters for present purposes is that the City still withholds from petitioners something that they have claimed from the beginning is their constitutional right." *NYSRPA v. City,* 140 S. Ct. at 1534 (Alito, J. dissenting). The City is withholding Petitioner's ability to exercise his preexisting right to self-defense.

Second, this controversy is capable of repetition yet evading review. *Honig v. Doe*, 484 U.S. 305, 318 (1988) citing, *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). There is a "demonstrated probability" that the same controversy will recur when Petitioner applies for renewal of his license. *Id.*

Under N.Y. Penal Law § 400.00(1), "[n]o license shall be issued or renewed" if the individual is ineligible under the statute. App-47. Petitioner's handgun license application was denied because the License Division deemed him 'unfit' to possess handguns.

Under the § 5-10 factors, the City deemed Petitioner unfit to possess a handgun in his home for self-defense because, *inter alia*, he was accused of a crime close to 20 years ago that the City itself declined to prosecute, vehicle and traffic violations, paying traffic tickets late, driver's license suspensions for late payment of tickets. Because of his history, the City feels that Petitioner has "an unwillingness to abide by the law", "lacks concern for the safety of other persons and/or for public safety". 38 RCNY 5-10(n), App-53.

Nothing has changed since the License Division's denial of his application – Petitioner is the same person he was when the City [wrongfully] deemed him 'dangerous' and 'unfit' to possess guns. The same factors will still be present when it is time for Petitioner to renew his license. Nothing will prevent the same licensing officer or a new licensing officer from denying his renewal application. In fact, given the original denial the case law that has flown from this litigation and its progeny, it is very likely that Petitioner's renewal will be denied. Even if Petitioner is not denied based on his past, any similar indiscretion between each renewal period forms the basis for the City to deny his renewal. 38 RCNY 5-11, App-51.

Yet, when the City's disingenuous and generalized 'public safety' arguments, adopted without question by the courts in the Second Circuit, are at risk of being exposed and rejected, the City cuts and runs. The City's sole motivation for issuing Petitioner a handgun license at the appellate level was to protect its unconstitutional licensing scheme.

It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). In *City of Mesquite*, this Court wisely recognized that, where the city of Mesquite repealed the objectionable language, nothing prevented it from "reenacting precisely the same provision if the District Court's judgment were vacated." *Ibid.*

The City has not "ceased the challenged practice" – voluntarily or otherwise. In three years, Petitioner will be subject to the same "grounds for denial" when his license expires and he is required to renew it; nothing prevents the City from denying that renewal and each future renewal every three years thereafter under the same objectionable regulations.

Petitioner is continuously subjugated to the § 5-10 factors so long as he is a licensee. The City may use the § 5-10 factors to suspend or revoke Petitioner's handgun license through the "broad discretion"[10]

[10] In New York, possession of a handgun is a "privilege", subject to the "broad discretion" of a licensing officer, that can be suspended or revoked at "any time". *Toussaint v. City of New York*, No. 17-CV-5576, 2018 U.S. Dist. LEXIS 152985, 2018 WL 4288637, at *7 (E.D.N.Y. Sept. 7, 2018) (dismissing case because the plaintiff "cannot show that he has a protected liberty or property interest in a handgun license; *Perros v. Cty. of Nassau*, 238 F. Supp. 3d 395, 401 (E.D.N.Y. 2017) ("Under New York law, it is well-settled that the possession of a handgun license is a privilege, not a right." (internal citations omitted)); c.f., *Kuck v. Danaher*, 600 F.3d 159, 165 (2d Cir. 2010) (suggesting that, while a Connecticut plaintiff has a liberty interest in a firearm permit, a New York plaintiff may not have one because New York licensing officers have broader discretion in issuing firearm licenses).

afforded licensing officers [*Boss v. Kelly*, 306 F. App'x 649, 650 (2d Cir. 2009) (quoting *Papaioannou v. Kelly*, 14 A.D.3d 459, 460 (1st Dep't 2005)); *Nash v. Nassau Cty.*, 150 A.D.3d 1120, 1121, 52 N.Y.S.3d 670 (2017) (affirming revocation of handgun license after acquittal of criminal charges, which was supported by a "rational basis")], which New York courts routinely, in cult-like fashion, affirm under a rational basis review.

If the 5-10 factors are left intact, any violation of the Vehicle and Traffic Law, unpaid government imposed fine, and/or non-criminal summons Petitioner experiences within the next three years, and at any time thereafter, places him at risk of having his license suspended, revoked, or not renewed because he will be deemed 'unfit' and a 'public danger' for not being 'law-abiding'. See, e.g., *Aron*, 48 F. Supp. at 371 quoting *Pelose v. County Court of Westchester County*, 53 A.D.2d 645 (2d Dept.1976), appeal dismissed 41 N.Y.2d 1008 (N.Y.1977) (New York State "has a substantial and legitimate interest and indeed, a grave responsibility, in insuring the safety of the general public from individuals who, by their conduct, have shown themselves to be lacking the essential temperament or character which should be present in one entrusted with a dangerous instrument.").

What the City giveth, the City remains free to taketh away. This case is not moot. Petitioner's 'concrete interest in the outcome of the litigation' [*Chafin v. Chafin*, 568 U.S. 165, 172 (2013)] remains unaltered.

II. The City's Practice of Preventing Review Continues, and Will Continue

The public policy ramifications of a denial of certiorari are vast and exceed the harms to Petitioner. The § 5-10 factors continue to deprive hundreds of New York residents of the right to self-defense. Not only is the City likely to repeat its behavior relative to Petitioner, if left unchecked the City will continue to engage in its pattern and practice of enforcing unconstitutional regulations, making public policy arguments in defense of its regulations, and then abandoning such arguments by issuing a license rather than risking a bona fide appellate review.

As an example, the undersigned represents the appellant in *Taveras v. New York City*, supra, which is scheduled for oral argument in October 2021. In *Taveras*, appellant applied to the City for a rifle/shotgun permit to possess rifles and/or shotguns in his home.[11]

Mr. Taveras, who has no criminal convictions, was denied a rifle/shotgun permit[12] under the "Grounds for Denial" of a rifle/shotgun permit in 38 RCNY 3-03,

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[11] In New York City *all firearms* – handguns, rifles, and shotguns – are subject to discretionary licensing, and the same "grounds for denial". Compare, 38 RCNY 5-10 and 38 RCNY 3-03. App-51; App-49.

[12] Mr. Taveras was arrested once and subject to an order of protection in August 2011 based on allegations from a woman who was his ex-girlfriend at the time the allegations were made. The charge was dismissed on the merits and the order of protection was vacated. In November 2011, the same ex-girlfriend attempted to file a second complaint, which was investigated by the NYPD and never resulted in an arrest or charges being filed.

which are the same factors enumerated in § 5-10. App-49; 51. In denying his rifle/shotgun permit, the City claimed Mr. Taveras was 'dangerous' and noted the City's strong interest in 'public safety', notwithstanding the lack of a conviction or other longstanding, historically recognized disqualifying event.

Citing the district court's decision in *Abekassis* and implementing the same rational basis analysis applied in *Abekassis*, the district court dismissed Mr. Taveras' complaint.[13] Mr. Taveras' appeal to the Second Circuit followed.

Seeking to prevent review of its rifle/shotgun regulations, on August 9, 2021 the City sent the undersigned an email offer to issue Mr. Taveras – previously deemed by the NYPD License Division a

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[13] The district court seemingly mocked Mr. Taveras for "rel[ying] almost entirely on a dissenting opinion written by Justice Thomas, joined by Justice Kavanaugh, in *Rogers v. Grewal*, 140 S. Ct. 1865 (2020)" when arguing that tiers of scrutiny and 'interest balancing' was 'inappropriate' therein because the § 3-03 factors could not survive any level of scrutiny. *Taveras*, at *8. The court reiterated, "the Second Circuit has consistently held that the Second Amendment's core protections apply only to those who are "law-abiding and responsible... heightened scrutiny is triggered only by those restrictions that...operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense…although the challenged rifle/shotgun licensing provisions apply to rifle/shotgun ownership in the home, they do not implicate the general populace. Instead, they are explicitly aimed at identifying those applicants who, in the eyes of City lawmakers, are not law-abiding or responsible." (emphasis added). *Ibid.*

'dangerous' domestic abuser[14] - a rifle/shotgun permit 'in settlement of the case'. App-58.[15] Once again, the City attempts to manipulate the judicial process, appellate review, and prolong the inevitable finding that its regulations are unconstitutional. As with the § 5-10 factors, the City has neither amended nor rescinded the "grounds for denial" under 38 RCNY 3-03.

While the possession of rifles and shotguns in New York State does not require a license, a resident of the City must obtain a license to possess *any type of firearm* – handgun, rifle, or shotgun. All firearms are subject to the same discretionary standards.

In *Heller*, this Court declared that there is an absolute right of individuals with no longstanding, historically recognized prohibitors to firearm possession to keep and carry any weapon in common use for self-defense.

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[14] As with the plaintiff, Alan Taveras has no criminal convictions and no disqualifiers to firearm possession.

[15] The City's email offering what is characterized as a 'settlement' of the appeal through the issuance of a rifle/shotgun permit to Mr. Taveras was unsolicited, as was the City's issuance of a license to Petitioner herein. Intending that the City's 'public safety' defense – utterly transparent at this point - not be outed as the pretext that it is, at the top of the City's email was the phrase "Confidential Communication under FRE 408." Apart from the inapplicability of Federal Rule of Evidence 408 outside of trial, the issuance of a gun license does nothing to resolve the unconstitutionality of the City's firearm regulations in settlement of the complaint. The City is plainly unwilling to comply with the Constitution and this Court's precedent and will continue to take action to evade review. Indeed, all that is necessary for the City to continue to evade review well into the future is to mail a license to anyone seeking appellate review of a decision that might result in an adverse ruling.

Heller, 554 U.S. at 626. The application of this Court's ruling to the states was confirmed in *McDonald* in June 2010.

Just four months later, in October 2010, the City created the § 5-10 factors to further restrict the ability of its residents to exercise the right to self-defense. [16] At the same time that the City restricted access to handguns, it also amended the rifle/shotgun regulations, subjecting access to rifles and shotguns to the same "moral character" and "good cause" determinations that apply to handguns.[17] As with handgun licenses in the City, rifle/shotgun permits may also be suspended or revoked at any time and are subject to renewal every three years.[18]

There is no Second Amendment "right" in New York City. The possession of *any type* of firearm – handgun, rifle, or shotgun –is a "mere privilege" subject to the discretion of the City to grant or refuse to issue at will. The City stripped Petitioner and Mr. Taveras of the Second Amendment right to self-defense based a pretextual 'public safety' claim – the same claim it made to this Court in *NYSRPA* v. *City of New York*, until review was imminent.

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[16] See, amendments to "§ 5-10 Grounds for Denial of Handgun License", The City Record, Michael R. Bloomberg, Mayor, October 29, 2010 at p. 3060. https://www1.nyc.gov/assets/dcas/downloads/pdf/cityrecord/cityrecord-10-29-10.pdf

[17] See, amendments to "§ 3-03 Grounds for Denial of Permit"; § 3-05, The City Record, Michael R. Bloomberg, Mayor, October 29, 2010 at p. 3060. https://www1.nyc.gov/assets/dcas/downloads/pdf/cityrecord/cityrecord-10-29-10.pdf

[18] 38 RCNY 3-05; 38 RCNY 3-06.

Apart from the fact that *Heller* flatly rejected public safety "interest balancing", whatever credibility the City may have had at one point to make such an argument, like the boy who cried wolf, their claims fall on deaf ears. New York City's policies and practices require this Court's review.

III. Disregard for Supreme Court Precedent Extends Past the Second Amendment

The landscape of New York's federal jurisprudence for firearms-related issues exists under a dome through which the Constitution and Supreme Court precedent cannot penetrate. But the City's disregard for the rule of law is not limited to firearms-related issues.

In the areas of education law, the City engages in the same type of manipulation that it does in this case and the Second Circuit's jurisprudence is similar.

For example, in *Honig v Doe*, 484 U.S. 305, 318 (1988), this Court found that the educational claims of respondent Jack Smith, then age 20, were not moot despite the fact that he was not imminently faced with expulsion or suspension proceedings and no longer lived in the district, because the conduct he originally complained of was capable of repetition, yet evading review because he would remain subject to a unilateral change in placement for conduct related to his disabilities.

Notwithstanding *Honig*, in *Fiallos v. New York City Dep't of Education*, No. 19-CV-00334 (JGK) (S.D.N.Y. September 17, 2019), the City Department of Education ("DOE") "stayed" its own obligations under

the IDEA to fund pendency placement, without applying to any court for a stay, by disregarding a valid administrative order to fund pendency under the "stay put" provision of the IDEA.[19]

Only after the plaintiff filed a lawsuit to enforce the administrative order did the City begin payment. Upon the City's motion, the district court dismissed the case as moot, leaving open and unadjudicated the issue of whether the City's self-granted "stay" violated the "stay-put" provision of the IDEA. The Second Circuit affirmed the view that the controversy was moot and not capable of repetition.

> "for the injury in this case to recur, [Fiallos] would have to unilaterally remove her child from iBRAIN, transfer her child to a new placement without a showing that the new placement was substantially similar, ... pursue another due process proceeding seeking funding for the new placement ... receive a favorable IHO order directing [DOE] to provide funding for the new placement [,] and [DOE] would have to decline to implement the order while contemplating an appeal…The district court concluded that the

[19] When IDEA proceedings are pending, the statutory "stay-put" or pendency provision provides that the "child is entitled to remain in his or her placement at public expense." *Ventura de Paulino v. New York City Dep't of Educ.*, 959 F.3d 519, 531 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 1075 (2021), reh'g denied, 141 S. Ct. 1530 (2021).

> possibility of all these steps occurring was too remote to show a certainly impending future injury. For the reasons in the district court's well-reasoned order, we affirm."[20]

Fiallos 840 F. at 664.[21]

Without delving into the unusually narrow scope of the events required to constitute 'repetition' of the controversy, *Fiallos* represents another example of the City's *modus operandi*: ignore the rule of law until a lawsuit is filed, then take whatever measures required to avoid legitimate judicial review of its conduct, then move to dismiss the action as moot.[22]

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[20] The Second Circuit's holding in *Fiallos* signifies the Circuit's unreasonable view of the exception to the mootness doctrine, which seems to require the repetition of the exact same factors, events, which is rare or non-existent. This view creates a burden that essentially eliminates the exception to the mootness doctrine. As with Petitioner, in *Fiallos* the Circuit also made no mention of the wrongdoer's actions relevant to the dismissal of the case as moot.

[21] The student in *Fiallos* had unilaterally changed placement from public school to iHOPE, from iHOPE to iBRAIN (the subject of the pendency placement) and, after the Circuit's affirmance of the district court's finding of mootness, the student unilaterally changed placement back to iHOPE. With each move, the parent filed a due process complaint and the issue of the City's funding of pendency placement under the "stay put" provision of the IDEA was alive and well. Pendency placement funding continues every year until the IDEA claim is finally resolved and every time a child experiences a change in placement. 20 U.S.C. 115(j).

[22] See also, *F.O v. New York City Dept. of Educ.*, 899 F. Supp. 2d 251, 254 (2012) (finding the plaintiffs' claim to be moot because the DOE provided the requested relief); *Ramos v. New York City Dep't of Educ.*, 447 F. Supp. 3d 153, 157 (S.D.N.Y. 2020)

The Circuit courts' swift dismissal of cases upon the City's post-filing conduct signals the federal courts' endorsement of future harms and frustrates the administration of justice. The City will continue to act with impunity because it relies on the courts' unwillingness to hold it accountable.

Without a decision censuring the City's actions, its conduct will continue. Conversely, the Second Circuit should be required to hold the City accountable for its conduct, particularly the City's enforcement of unconstitutional firearm regulations. Most importantly, the Second Circuit must be forced to adhere to this Court's precedent.

IV. New York Federal and State Courts Reinforce Their Respective Disregard of Second Amendment Jurisprudence

Within the confines of New York State's echo chamber, its federal and state courts perpetuate analyses and holdings that contravene this Court's precedent, specifically in order to preserve New York's pre-*Heller* Second Amendment landscape.

The New York State handgun licensing scheme under N.Y. Penal Law § 400.00, *et seq.*, to which the City's licensing officer must adhere and upon which 38 RCNY 3 and 38 RCNY 5 are modeled, is a permissive

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(granting City's cross-motion to dismiss case as moot because DOE agreed to fund pendency placement).

and discretionary scheme created in 1911.[23] The factors determining "eligibility" before a license may issue contain both *per se* disqualifiers (i.e., felony convictions, adjudication as mentally defective) and two subjective "catch-all" factors: "good moral character" and "any good cause" to deny the application (or suspend/revoke). § 400.00(1)(b), (n).

The § 5-10 factors are specific, enumerated examples of events and/or conditions that constitute a "lack of good moral character" or "good cause" to deny the issuance of a handgun license. These factors are the embodiment of a practice that existed before *Heller* and continues today.

Citing the "moral character" and "any good cause" factors of N.Y. Penal Law § 400.00(1)(b) and (n), New York State courts[24] have long held that mere arrests,

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[23] The Sullivan Law was enacted under the belief that the Second Amendment (i) does not apply to the states and (ii) is a collective right related to service in a militia, not an individual right. *Peterson v. Kavanagh*, 21 A.D.3d 617, 618 (3d Dep't 2005) ("Absent evidence that possession of the pistol bears some reasonable relationship to the preservation or efficiency of a well-regulated militia, no individual right to possess it is conferred"). By refusing to accept and adopt Supreme Court jurisprudence that the individual right to self-defense is protected by Second Amendment, the courts in New York State continue to regard the rights of the individual as subordinate to state rights. The view expressed in *People ex rel. Darling v. Warden of City Prison*, 154 A.D. 413, 423 (1st Dep't 1913), remains in full force and effect today: "The rights of the individual are subordinate to the welfare of the State."

[24] Under New York State's handgun licensing scheme, superior court judges are the statutory licensing officers outside of New York City and Long Island. As part of the judicial branch of government, judicial licensing officers interpret and apply the law in the course of their duties and responsibilities as licensing

dismissed charges, and traffic offenses are sufficient grounds to preclude handgun possession. See, *Velez v. DiBella*, 77 A.D.3d 670 (2d Dep't 2010) (under New York's state's "arbitrary and capricious" standard of reviewing the denial of a handgun license, applicant's prior arrests, despite the dismissal of all but one charge and the absence of a criminal conviction, constituted "good cause" to deny a handgun license and were not arbitrary and capricious); *Tate v. O'Neill*, 187 A.D.3d 684 (1st Dep't 2020) (denial of license to allow concealed carry for N.Y. State licensed security guard upheld based on driving history, and

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officers. In the five boroughs of New York City, the handgun licensing officer is the New York City Police Commissioner. The NYPD Police Commissioner, who is appointed by and serves at the pleasure of the New York City Mayor, is the enforcer of the Mayor's political agenda. As noted above, § 5-10 and the amendments to 38 RCNY 3 relative to the possession of rifles and shotguns, were amended 4 months after this Court decided *McDonald*. The restrictions for all firearms tightened under the administration of Michael Bloomberg [FN 12, 13, supra], at or about the height of its "stop-and-frisk" policy, later declared unconstitutional. See, *Floyd v. City of New York*, 959 F. Supp. 2d 540, 589 (S.D.N.Y. 2013) (declaring the City's "stop-and-frisk" policy unconstitutional, accepting statistical evidence that "the NYPD carries out more stops in areas with more black and Hispanic residents…[t]hese findings are "robust," in the sense that the results persist even when the units of analysis are changed from precincts to census tracts, or from calendar quarters to months."). Taken in conjunction with the then-Mayor's public disdain for the Second Amendment (see, e.g., "*Commentary: Michael Bloomberg: NRA appeal to Supreme Court puts gun laws at risk",* Chicago Tribune, December 1, 2019 https://www.chicagotribune.com/opinion/commentary/ct-opinion-michael-bloomberg-president-gun-control-nra-20191201-gz3j52jzdff4xnmc6e6v5zalim-story.html), the § 5-10 and § 3-03 factors, the City's regulations bear out the calculated intention to erect a wide barrier to exercise the protected and individual right to self-defense.

'arrest history', including a dismissed charge for injury he caused to a Rottweiler while defending himself from being attacked by the dog); *Gonzalez v. Lawrence*, 36 A.D.3d 807 (2d Dep't 2007) (where criminal charges were dismissed, denial of handgun license deemed not arbitrary and capricious); *Peric v. New York City Police Dep't*, 5 A.D.3d 142 (1st Dep't 2004) (where criminal charges were dismissed, denial of rifle/shotgun license deemed not arbitrary and capricious).

In line with the City's § 5-10 factors, judges outside of New York City have begun to require individuals applying for a handgun license to provide their driving history for use in determining whether to grant or deny the application for a handgun license, including applications for home possession only.

If the § 5-10 factors are shielded from a bona fide constitutional review that comports with the Second Amendment and this Court's findings in *Heller, McDonald,* and *Caetano*, then "mere accusations", dismissed charges, traffic tickets, and other unconstitutional barriers[25] will continue to be used to

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[25] For example, the following information required to be disclosed, which provides a basis to deny a handgun license: https://suffolkpd.org/Portals/59/scpd_pdfs/formsandreports/PDCS-4406n.pdf (Suffolk County: "Has anyone in your household ever been arrested for a crime?; "Have you received a traffic summons, or been arrested or convicted for any traffic infraction in the last five (5) years?"; "Have you, or any member of your household, ever been evaluated or treated for any mental health issues?"); https://putnamsheriff.com/sites/default/files/pistolpermit.pdf (Putnam County: "You must indicate all arrests (including DWI and DWAI) whether convicted or not, sealed or adjourned contemplating dismissal."); https://www.pdcn.org/

DocumentCenter/View/112 (Nassau County: "You must obtain and submit a NYS driving record history also called a "lifetime abstract"; "Has anyone in your household been arrested for a felony or serious offense?"; "If you have ever been arrested or received a Field Appearance Ticket or Criminal Summons from any law enforcement agency, you must…[a]nswer "Yes" on the Pistol License Questionnaire, and…[s]ubmit a detailed statement describing the circumstances surrounding each arrest and its disposition... even if the case was dismissed, the record sealed, or the case nullified by operation of law. The NYS Division of Criminal Justice Services will report to us every instance involving the arrest of an applicant"); https://publicsafety.westchestergov.com/images/stories/pdfs/2019wcpdPistolLicense.pdf (Westchester County: "List ALL arrests and criminal charges that occurred at any time during your lifetime, including cases that were sealed, dismissed by the courts or adjudicated youthful offender" (emphasis supplied); "Has anyone in your household ever…[b]een arrested for a felony or serious offense...[s]ought or undergone treatment for drug or alcohol use…[s]ought or undergone treatment for any form of mental illness, stress-related disorder or condition involving emotion or behavior control…[h]ad an Order of Protection issued for them or against them?"); https://www.dutchessny.gov/Departments/Sheriff/Docs/Pistol-Permit-ApplicationCounty.pdf (Dutchess County: applicant must provide "NYS DMV Abstract"; "Copies of all police reports related to applicant arrests or any report related to an appearance in criminal court. This report must include a narrative detailing what occurred"; "All arrests regardless of disposition must be disclosed in this application. This includes arrests that were dismissed" (emphasis omitted); character references are required to answer "Do you know of any contacts that the applicant may have had with the criminal justice system or of any unfavorable incident(s) involving the applicant? Please explain (attachment if required)"); https://www.monroecounty.gov/files/clerk/pistol-permit-apps/City%20Pistol%20Permit%20Application%202021.pdf (Monroe County: "You must state all arrests regardless of whether or not you were convicted. Sealed charges must also be listed"; "Have you ever been interviewed by any police officer, sheriff's deputy, or any Law Enforcement official in relationship to any crime (if so, state when, where and the circumstances why you were questioned)"; "Do you consume alcohol (if so, provide the type of

prevent individuals from exercising their right to self-defense based on events and conditions that have no longstanding, historical basis as disqualifiers to firearm possession - not only in New York City, but throughout New York State.

The people of New York desperately seek an exercise of this Court's supervisory power.

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alcoholic drink you consume, and how often you consume alcohol)"; "Within the past 10 years did you have a significant relationship (if so, list the name, DOB, and contact information of that person)"; https://www2.erie.gov/ clerk/sites/www2.erie.gov.clerk/files/uploads/pdfs/Full%20Application%20Packet%20for%20Printing%2012172020.pdf (Erie County: "You must state all arrests regardless of whether or not you were convicted. SEALED charges must also be listed. Failure to disclose any criminal charges including a dismissed or sealed charge will be sufficient cause to deny this application."); https://www.albanycounty.com/home/showpublisheddocument/13462/637466617906470000 (Albany County: "Ex-spouse(s) or significant other(s)", including contact information"); https://www.cayugacounty.us/DocumentCenter/View/15036/2021-Pistol-Permit-Application-Printable (Cayuga County: "Arrests:... You must disclose any and all arrests…including DWI/DWAI/Driving While Impaired by Drugs or other forms of arrest for operating while intoxicated/impaired (boating, snowmobiling, ATV), juvenile arrests handled by Family Court, adjudicated as a Youthful Offender, charges that were dismissed and sealed arrests. Arrests can be in many different forms including summary arrests/warrant arrests (taken into custody), and arrest by appearance ticket or criminal summons directing you to appear in court at a specified date. Failure to disclose will most likely result in the denial of your application.").

CONCLUSION

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

Respectfully submitted,

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