

No. 18-280

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**In the  
Supreme Court of the United States**

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New York State Rifle & Pistol Association, *et al.*,  
*Petitioners,*

v.

The City of New York, *et al.*,  
*Respondents.*

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

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**BRIEF OF *AMICI CURIAE* WESTERN STATES  
SHERIFFS' ASSOCIATION, INTERNATIONAL  
ASSOCIATION OF LAW ENFORCEMENT FIREARMS  
INSTRUCTORS, LAW ENFORCEMENT LEGAL  
DEFENSE FUND, LAW ENFORCEMENT ACTION  
NETWORK, LAW ENFORCEMENT ALLIANCE OF  
AMERICA, AND INTERNATIONAL LAW  
ENFORCEMENT EDUCATORS AND TRAINERS  
ASSOCIATION IN SUPPORT OF PETITIONERS**

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**INTEREST OF *AMICI CURIAE*<sup>1</sup>****Western States Sheriffs' Association**

The Western States Sheriffs' Association ("WSSA") was established in 1993, and consists of more than three hundred members from sixteen member states (Arizona, California, Colorado, Idaho, Montana, North Dakota, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming). Most of these states have "shall issue" concealed carry permit systems, and WSSA members thus have observed first hand that individuals who voluntarily obtain a license or permit tend to be strongly law-abiding and do not endanger public safety when transporting their firearms.

**International Association of Law Enforcement  
Firearms Instructors**

The International Association of Law Enforcement Firearms Instructors ("IALEFI") is a non-profit association formed in 1981 whose 3,000-plus members come from local, state, and federal law enforcement agencies nationwide. It conducts approximately 20 police firearms training events annually, and publishes authoritative training

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<sup>1</sup>No party's counsel authored this brief in whole or in part. No party or party's counsel, and no person other than *amici*, their members, or their counsel contributed money that was intended to fund preparation or submission of this brief, except for funding expected to be provided by the NRA Civil Rights Defense Fund. Counsel of record for all parties received timely notice of intent to file this brief under Rule 37.2(a) and consent was granted by all parties.



standards and guidelines.

### **Law Enforcement Legal Defense Fund**

Law Enforcement Legal Defense Fund (“LELDF”) is a 501(c)(3) non-profit organization, headquartered in Alexandria, Virginia, that provides legal assistance to law enforcement officers. LELDF has aided nearly one hundred officers, many of whom have been acquitted, mostly in cases where officers have faced legal action for otherwise authorized and legal activity in the line of duty. While LELDF supports measures that will further legitimate public safety interests, it does not support provisions that are ill-conceived and violate the constitutional rights of citizens.

### **Law Enforcement Action Network**

Law Enforcement Action Network (“LEAN”) is a sister organization of LELDF that has 501(c)(4) status. LEAN promotes policies that protect law enforcement officers’ personal and professional safety.

### **Law Enforcement Alliance of America, Inc.**

Law Enforcement Alliance of America, Inc. (“LEAA”) is a non-profit, non-partisan advocacy and public education organization founded in 1992 and made up of thousands of law enforcement professionals, crime victims, and concerned citizens. LEAA assists law enforcement professionals and seeks criminal justice reforms that target violent criminals, not law-abiding citizens. LEAA has been an *amicus curiae* in numerous cases in the federal courts, and on the prevailing side in two cases in this Court.

### **International Law Enforcement Educators and Trainers Association**

The International Law Enforcement Educators and Trainers Association (“ILEETA”) is an association of 4,000 professional law enforcement instructors committed to the reduction of law enforcement risk, and to saving lives of police officers and the general citizenry through the provision of training enhancements for criminal justice practitioners. ILEETA’s *amicus* briefs were cited in *District of Columbia v. Heller* and in *McDonald v. Chicago*.

Thus, *amici* are all organizations with members who are law enforcement officers or that support law enforcement officers and agencies. *Amici* believe that the perspective of front line law enforcement personnel and law enforcement organizations should be of assistance to this Court in evaluating whether any interest in public safety is served by New York City’s rule prohibiting premises license holders from transporting their handguns in a locked, unloaded condition outside the city for lawful purposes.

### **INTRODUCTION**

The principal argument in this *amicus* brief is that from a law enforcement perspective New York City’s interpretation of R.C.N.Y. § 5-23 does not advance any public safety interest but instead restricts the important Second Amendment rights of premises licensees to obtain needed training and practice with their handguns. But certiorari should be granted not just because the courts below erred in weighing the balance under intermediate scrutiny. This case is a demonstration of the dangers of applying watered-

down interest balancing to a fundamental, enumerated constitutional right.

Critical Second Amendment rights affecting broad swaths of the citizenry have been sacrificed since *Heller* and *McDonald*<sup>2</sup> because of widespread disagreement in the lower courts regarding the proper constitutional standard to be applied in Second Amendment cases. As stated by Judge Kavanaugh, dissenting in *Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011):

Are gun bans and regulations to be analyzed based on the Second Amendment’s text, history, and tradition [and appropriate analogues]? Or may judges re-calibrate the scope of the Second Amendment right based on judicial assessment of whether the law advances a sufficiently compelling or important government interest to override the individual right?<sup>3</sup>

Instead of *Heller*’s “text, history, and tradition” standard for determining the scope and effect of the Second Amendment’s protections, the default position

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<sup>2</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

<sup>3</sup> *Heller* itself answered that question by expressly rejecting any balancing test. “The 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. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.” *Heller* at 634-35.

of the Courts of Appeals seems to be intermediate scrutiny, at least in name, and often less than that in practice.

Applying intermediate scrutiny, the opinion below cites an interest in “public safety” that is supported by no evidence at all, and uses that interest to eliminate yet another stick in the small bundle of Second Amendment rights remaining to law-abiding, licensed residents of New York City. Looked at from a law enforcement perspective, a careful examination of whether New York City’s Rule actually promotes public safety shows that any such effects are illusory. Instead, that Rule impairs the ability of firearms owners to maintain proficiency and obtain needed training for self-defense and safety, both of which are important in the exercise of Second Amendment rights.

### SUMMARY OF ARGUMENT

The centerpiece of Respondents’ case, expressly relied on by the Court of Appeals, is that premises license holders are “just as susceptible as anyone else to stressful situations” and may be expected to misuse their handguns on the streets when transporting them, locked and unloaded with ammunition separate, to a shooting range. But license holders undergo exhaustive screening before obtaining a license. Under state law and city provisions, individuals are disqualified from obtaining a license not only for felony convictions, but for a host of other disqualifiers. To see how broad-ranging those disqualifiers are, *amici* have set forth some of the relevant provisions at length in this brief. While most jurisdictions do not find it necessary or desirable to

subject their citizens to such an exhaustive process in order to exercise their constitutional right to own a handgun, license holders are unlikely to start shooting up the streets when transporting a handgun to a range for practice or training.

Carry permit holders from other jurisdictions who have undergone a similar but generally less searching process have been shown empirically to be far more law-abiding than the population in general. Texas and Florida have the largest populations with carry licenses. In Texas, the crime rate for licensees is one-sixteenth that of the general population. In Florida, licenses must be revoked for serious crimes, but the revocation rate is extremely low. Over a more than twenty year period, only 168 licenses out of millions issued were revoked for a crime with a "Firearm Utilized." Other states show similar low rates of crime or firearm misuse by carry permit holders.

Instead, most homicides and non-fatal shootings are committed by individuals with criminal records, which make them ineligible to obtain a license. In New York City, police department data show that roughly 90% of homicides are committed by persons with criminal records. Data from other cities confirm this pattern.

The alleged threat to public safety cited by the Court below is based entirely on speculation, not evidence. The NYPD requires all incidents involving license holders to be reported immediately to the License Department, including whether the licensee claims to have been traveling to or from a range. Thus, the License Department has the data to determine if there has been a problem with licensees

turning violent while transporting their handguns to a range, but did not introduce that data into evidence. Neither Respondents nor the Court identified even one instance of such misuse of a firearm by a licensee during transportation.

Finally, although the Second Circuit recognized in theory that practice and training are important, it “balanced away” Petitioners’ Second Amendment rights by asserting that the burdens on training and practice imposed by New York City’s Rule are “insignificant” and “trivial.” Such training and practice must be engaged in frequently both by law enforcement officers and civilians. The Court’s speculation that licensees can participate in out-of-city competitions by using rented firearms is unsupported in the record and untenable in any event. Similarly, it is vital that training and practice take place with the individual’s own handgun for a host of reasons, which is why police agencies require officers to qualify periodically with their own duty handguns.

## ARGUMENT

### **I. PREMISES LICENSEES, LIKE CARRY PERMIT HOLDERS AROUND THE COUNTRY, ARE EXCEPTIONALLY LAW-ABIDING.**

The centerpiece of Respondents’ argument is a declaration from a police official which states that “license holders in a public setting are just as susceptible as anyone else to stressful situations” including “driving situations that sometimes lead to or have the potential to lead to road rage incidents, the stress and injury of traffic accidents, crowd

situations, demonstrations, family disputes, all other types of disputes between individuals, being a victim of a crime or harassment, and any other stress-inducing circumstance outside of the home.” Declaration of Andrew Lunetta (“Lunetta Declaration”). JA68. The implication is that a licensee who is transporting his locked, unloaded handgun to a range outside the city is likely to snap and start shooting at the least provocation.

But the statement that premises licensees are “just as susceptible as anyone else” to losing control and committing violent crimes is untrue. As shown below, licensees undergo searching scrutiny before obtaining a license, comparable groups of permit holders from other jurisdictions have repeatedly been shown to be far more law-abiding than the population as a whole, and most violent crime is committed by individuals with a criminal history who are ineligible to obtain a license.

**A. Licensees undergo exhaustive screening before obtaining a license.**

The New York State requirements for a premises license are quite restrictive, and the relevant portion of N.Y. Penal Law § 400.00(1) is worth setting forth at length:

Eligibility. No license shall be issued or renewed pursuant to this section except by the licensing officer, and then only after investigation and finding that all statements in a proper application for a license are true. No license shall be issued or renewed except for an applicant

(a) twenty-one years of age or older [except for honorably discharged veterans];

(b) of good moral character;

(c) who has not been convicted anywhere of a felony or a serious offense or who is not the subject of an outstanding warrant of arrest issued upon the alleged commission of a felony or serious offense;

(d) who is not a fugitive from justice;

(e) who is not an unlawful user of or addicted to any controlled substance as defined in section 21 U.S.C. 802;

(f) who being an alien (i) is not illegally or unlawfully in the United States or (ii) has not been admitted to the United States under a nonimmigrant visa subject to the exception in 18 U.S.C. 922(y)(2);

(g) who has not been discharged from the Armed Forces under dishonorable conditions;

(h) who, having been a citizen of the United States, has not renounced his or her citizenship;

(i) who has stated whether he or she has ever suffered any mental illness;

(j) who has not been involuntarily committed to a facility under the jurisdiction of an office of the department of mental hygiene pursuant to article nine [hospitalization of mentally ill] or fifteen [admission of the mentally retarded to schools] of the mental hygiene law, article



seven hundred thirty [mental disease or defect excluding fitness to proceed] or section 330.20 [verdict or plea of not responsible by reason of mental disease or defect] of the criminal procedure law, section four hundred two [commitment of mentally ill inmates] or five hundred eight [removal of sick persons from jail including involuntary hospitalizations] of the correction law, section 322.2 [proceeding to determine capacity] or 353.4 [transfer of certain juvenile delinquents: mentally ill, mentally retarded or developmentally disabled] of the family court act, or has not been civilly confined in a secure treatment facility pursuant to article ten [sex offenders requiring civil commitment or supervision] of the mental hygiene law;

(k) who has not had a license revoked or who is not under a suspension or ineligibility order issued pursuant to [laws relating to suspension and revocation of licenses and orders to surrender firearms upon issuance of protective orders];

(l) in the county of Westchester, who has successfully completed a firearms safety course and test as evidenced by a certificate of completion issued in his or her name and endorsed and affirmed under the penalties of perjury by a duly authorized instructor [with certain exceptions];

(m) who has not had a guardian appointed for him or her pursuant to any provision of state law, based on a determination that as a

result of marked subnormal intelligence, mental illness, incapacity, condition or disease, he or she lacks the mental capacity to contract or manage his or her own affairs; and

(n) concerning whom no good cause exists for the denial of the license.

Besides all felonies, § 400.00(1)(c) references “serious offenses” that make an individual ineligible for a license. These include:

any of the following offenses defined in the penal law: illegally using, carrying or possessing a pistol or other dangerous weapon; possession of burglar’s tools; criminal possession of stolen property in the third degree; escape in the third degree; jostling; fraudulent accosting; endangering the welfare of a child; the offenses defined in article two hundred thirty-five [obscenity, disseminating indecent material to a minor]; issuing abortifacient articles; permitting prostitution; promoting prostitution in the third degree; stalking in the third degree; stalking in the fourth degree; the offenses defined in article one hundred thirty [sex offenses, sexual misconduct, rape, forcible touching, sexual abuse, female genital mutilation, sexually motivated felony, facilitating a sex offense with a controlled substance, sexual abuse, course of conduct against a child, predatory sexual assault, predatory sexual assault against a child]; the offenses defined in article two hundred

twenty [criminal sale or possession of a controlled substance, use of child to commit controlled substance offense, criminal sale, or manufacture of methamphetamine, operating as a major trafficker].

N.Y. Penal Law § 265.00(17)(b).<sup>4</sup>

New York State is already among the most restrictive states for mere possession of a handgun. Only four states besides New York require that an individual be licensed (or the equivalent) merely to own a handgun: Connecticut, Illinois, Massachusetts, and New Jersey.<sup>5</sup>

New York City imposes additional restrictions that go far beyond these state restrictions. An individual may be denied a license on grounds the “applicant has been arrested, indicted, convicted for a crime or violation except minor traffic violations, in any federal, state or local jurisdiction.” R.C.N.Y. § 5-10(a). There is no limitation on the severity of the violation; failing to obtain a dog license or spitting on the sidewalk could suffice. A license may also be denied if the applicant “has a poor driving history, has multiple driver license suspensions or has been declared a scofflaw by the New York State

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<sup>4</sup> Thirteen more serious offenses were added in the most recent legislative session as N.Y. Penal Law § 265.00(17)(c).

<sup>5</sup> NRA-ILA, State Gun Laws, <https://www.nraila.org/gun-laws/state-gun-laws/>. A handful of states require a permit to purchase a handgun. Nearly three quarters of the states require neither that the individual be licensed nor that a permit to purchase be obtained. *Id.* Most states require that a permit or license be obtained to carry a concealed handgun. *See* discussion below regarding concealed carry permit holders.

Department of Motor Vehicles,” *id.*, § 5-10(h); “has been terminated from employment under circumstances that demonstrate lack of good judgment or lack of good moral character,” *id.*, § 5-10(j); or “has failed to pay legally required debts such as child support, taxes, fines or penalties imposed by governmental authorities,” *id.*, § 5-10(l). In addition, the application may be denied if “[o]ther information demonstrates an unwillingness to abide by the law, a lack of candor towards lawful authorities, a lack of concern for the safety of oneself and/or other persons and/or for public safety, and/or other good cause for the denial of the license.” *Id.*, § 5-10(n).

According to instructions posted by the NYPD, other factors to be considered include “summonses” and “any medications taken in connection with” mental or physical conditions.<sup>6</sup> Respondents’ evidence showed that applicants are also asked questions about their name change history, outstanding warrants, residence history, and history of lost or stolen firearms. JA73-74.

In other words, under the combination of New York State law and New York City rules, a license must be denied for a long list of disqualifiers, and may be denied for trivial violations or even perceived attitudes on the part of the applicant.

After the application and all required documents/forms have been received and reviewed, the applicant is scheduled for an in-person interview. JA74. Co-habitants must sign a consent to the

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<sup>6</sup> NYPD, New Application Instructions, <https://licensing.nypdonline.org/new-app-instruction/>.

applicant having a handgun. JA98. Third parties may be interviewed as well. JA74. It takes approximately six months for the process to be completed. New Application Instructions, *supra* n.6.

While most jurisdictions do not find it necessary or desirable to put their citizens through such an exhaustive, discretionary process in order to exercise their constitutional rights to own a handgun, license holders cannot have criminal records and are not the sort who are likely to start shooting up the public streets when transporting a handgun to a range for practice or training. That evaluation is confirmed by data from other jurisdictions regarding carry permit holders.

**B. Data from other jurisdictions show that individuals with carry licenses are exceptionally law-abiding.**

The requirements that must be met to obtain a premises license in New York City are at least as restrictive, and generally more restrictive, than the requirements for a concealed carry license in most states.

New York State does not publish data on violent crimes committed by licensees. But many states do publish data on crimes committed by carry permit holders and/or the number of permit revocations. Most of these states are “shall issue” states, meaning that objective criteria are utilized, and that the state must issue the permit if no objective, disqualifying criteria are present. Accordingly, the issuance rates are higher than in New York City.

Texas and Florida have the largest numbers of

carry permit holders. The data show that carry permit holders in these and other states are an extraordinarily law-abiding group.

In Texas, official state data for 2017 show total convictions of a long list of serious crimes, and the number of those crimes committed by carry license holders. Carry license holders were convicted of 170 out of a total of 44,608 such crimes, or 0.3811%.<sup>7</sup> There were 1,244,944 active license holders in 2017.<sup>8</sup> The population 18 and older is estimated by the Census Bureau to be 20,938,557.<sup>9</sup> Thus, carry license holders constituted 5.95% of the population 18 and older, but committed only 0.38% of the crimes. The conviction rate of license holders is therefore 6.4%, or about 1/16<sup>th</sup>, of the conviction rate for the adult population as a whole.

In Florida, carry licenses must be revoked when the licensee commits any disqualifying crime (all felonies plus others) or is disqualified because of mental health, substance abuse, domestic violence, or

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<sup>7</sup> Texas Department of Public Safety, Conviction Rates for Handgun License Holders Reporting Period : 01/01/2017 - 12/31/2017, <https://www.dps.texas.gov/rsd/LTC/reports/convrates.htm>.

<sup>8</sup> Texas Department of Public Safety, Active License/Certified Instructor Counts As of December 31, 2017, <https://www.dps.texas.gov/rsd/LTC/reports/ActLicAndInstr/ActiveLicandInstr2017.pdf>.

<sup>9</sup> United States Census Bureau, Estimates of the Total Resident Population and Resident Population Age 18 Years and Older for the United States, States, and Puerto Rico: July 1, 2017, <https://www.census.gov/data/datasets/2017/demo/popest/nation-detail.html>.

other reasons. Fla. Stat. § 790.06. 4,026,565 licenses have been issued over the period October 1, 1987 through September 30, 2018.<sup>10</sup> Over that same period, 14,146 licenses have been revoked for all reasons, a rate of 0.35%.<sup>11</sup> As of June 30, 2018, the number of valid licenses statewide was 1,927,724.<sup>12</sup> In the preceding year (July 1, 2017 through June 30, 2018), 1,860 licenses were revoked, an annual revocation rate of .0096%.<sup>13</sup> From 1987 through 2010, when the state stopped publishing this breakdown of the data, only 168 revocations were for a crime with a “Firearm Utilized.” Summary Report, *supra*, n.10.

Data from other states confirm that individuals who obtain carry licenses or permits are extremely law-abiding. For example, Colorado issued 154,434 concealed handgun carry permits between 2009 and 2013.<sup>14</sup> During that same period, only 1,390 were

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<sup>10</sup> Florida Department of Agriculture and Consumer Services, Summary Report October 1, 1987-September 30, 2018, [https://www.freshfromflorida.com/content/download/7499/118851/cw\\_monthly.pdf](https://www.freshfromflorida.com/content/download/7499/118851/cw_monthly.pdf) (“Summary Report”). Florida licenses are valid for seven years.

<sup>11</sup> *Id.*

<sup>12</sup> Florida Department of Agriculture and Consumer Services, Number of Valid Florida Concealed Weapon Licenses As Reported at the End of Each Fiscal Year (June 30) Since Program Inception in October 1987, [https://www.freshfromflorida.com/content/download/7504/118881/NumberOfValidCWLicenses\\_FiscalYearEndSince1987-1988.pdf](https://www.freshfromflorida.com/content/download/7504/118881/NumberOfValidCWLicenses_FiscalYearEndSince1987-1988.pdf).

<sup>13</sup> Florida Department of Agriculture and Consumer Services, Applications and Dispositions by County July 1, 2017–June 30, 2018, [https://www.freshfromflorida.com/content/download/76929/2217458/07012017\\_06302018\\_cw\\_annual.pdf](https://www.freshfromflorida.com/content/download/76929/2217458/07012017_06302018_cw_annual.pdf).

<sup>14</sup> David Kopel, *Guns on University Campuses: The Colorado*

revoked, of which 931 (.6% of permits issued) were due to an arrest. Contrast this with the arrests of more than 230,000 individuals in Colorado *in the year 2013 alone*,<sup>15</sup> constituting 4.4% of the population.<sup>16</sup> Data from other states are consistent:

*Minnesota:* One handgun crime (broadly defined, such as driving while under the influence if a handgun is in the car) per 1,423 licensees.<sup>17</sup>

*Michigan:* 161 charges of misdemeanors involving handguns (including duplicate charges for one event, and charges which did not result in a conviction) in 2007 and 2008 out of an approximate Michigan population of 190,000 licensees.

*Ohio:* 142,732 permanent licenses issued since 2004, and 637 revocations for any reason, including moving out of state.

*Louisiana:* Licensee gun misuse rate, all reasons, of less than 1 in 1,000.

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*Experience*, THE WASHINGTON POST (Apr. 20, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/04/20/guns-on-university-campuses-the-colorado-experience/?utm\\_term=.98ec9def0fa7](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/04/20/guns-on-university-campuses-the-colorado-experience/?utm_term=.98ec9def0fa7).

<sup>15</sup> FBI UCR, Crime in the United States: Table 69, Arrests by State, 2013, [https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-9/table\\_69\\_arrest\\_by\\_state\\_2013.xls](https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-9/table_69_arrest_by_state_2013.xls).

<sup>16</sup> Colorado had an estimated population of 5,262,556 in 2013. [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP\\_2017\\_PEPANNRES&src=pt](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2017_PEPANNRES&src=pt).

<sup>17</sup> The full data and details for Minnesota, Michigan, Ohio, and Louisiana are presented in David B. Kopel, *Pretend “Gun-Free” School Zones*, 42 CONN. L. REV. 515, 564-69 (2009).



**C. Most homicides and violent crimes are committed by individuals with criminal records who are ineligible for premises licenses.**

Instead of license holders being the problem, evidence and law enforcement experience confirm that most violent crimes are committed by repeat offenders, who are ineligible to receive a premises license (assuming they would apply for one, which they would not). For example, an analysis of three years of homicide data by the New York Times revealed a compelling fact. According to the NYPD's Deputy Commissioner for Strategic Initiatives, more than 90% of the killers in New York City had criminal records, and of those who were killed, more than half had them. Jo Craven McGinty, *New York Killers, and Those Killed, by Numbers*, NEW YORK TIMES (Apr. 28, 2006).

A report produced by the NYPD showed similar results for the year 2012, the last year for which such a study was produced. In that year, 87% of homicide suspects had at least one prior arrest. POLICE DEPARTMENT CITY OF NEW YORK, MURDER IN NEW YORK CITY 2012 10.<sup>18</sup> Seven out of ten victims had prior arrests. *Id.* at 6.

Data from other cities confirm this pattern. In Baltimore, for the year 2015, police data showed that of all homicide suspects, “76.5 percent had prior criminal records,” and those homicide suspects averaged over nine arrests apiece. Kevin Rector, *Statistical snapshots from Baltimore's deadliest year:*

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<sup>18</sup> <https://www1.nyc.gov/site/nypd/stats/reports-analysis/archive.page>.

*suspects, victims, and cops*, BALTIMORE SUN (Jan. 7, 2016).

The most recent annual report for Milwaukee homicides states that “Almost 100% of the 2015 known suspects had a criminal history” and adds that “The overwhelming majority of suspects have criminal histories going back to 2005.” MILWAUKEE HOMICIDE REVIEW COMMISSION, ANNUAL REPORT 2015, HOMICIDE AND NON-FATAL SHOOTINGS 48.<sup>19</sup> Moreover, 83% of the homicide victims had prior arrest histories. *Id.* at 42.

This was true not only of homicides. In Milwaukee in 2015, 235 out of 242 (97%) non-fatal shooting suspects had a criminal history. *Id.* at 49. As with homicides, the vast majority of non-fatal shooting victims (77%) had criminal histories. *Id.* at 43.

Premises license holders, by contrast, do not have criminal histories and have undergone extensive background checks. Experienced law enforcement officers know very well that these are not the people who pose a public safety risk, and a law or rule imposing burdens on them rather than criminals is not only unjustified but irrational.

**II. THE ALLEGED THREAT TO PUBLIC SAFETY CITED BY THE COURT BELOW IS BASED ENTIRELY ON SPECULATION, NOT EVIDENCE.**

As noted above, the Lunetta Declaration relies on “road rage incidents, the stress and injury of traffic

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<sup>19</sup> <http://city.milwaukee.gov/ImageLibrary/Groups/cityHRC/reports/2015AnnualReportFINAL.pdf>.

accidents, crowd situations, demonstrations, family disputes, all other types of disputes between individuals, being a victim of a crime or harassment, and any other stress-inducing circumstance outside of the home” to try to justify prohibitions on licensees transporting their unloaded, locked firearms to places outside the city. JA68. The Second Circuit expressly relied on that declaration for purposes of intermediate scrutiny interest balancing. App-26.

If this is indeed a threat, then there should be some evidence that such violence by premises licensees has actually occurred when transporting their unloaded, locked firearms to a range. But the record is devoid of even a single incident of that occurring.

Respondents possess the data regarding incidents (if any) in which a premises licensee unlocked his or her firearm, retrieved the separately carried ammunition, and started shooting while transporting a handgun to a range. There is a specific Patrol Guide Procedure, attached as Exhibit B to the Lunetta Declaration, which requires an investigation and immediate report to the License Division, Incident Section, whenever “a holder of a handgun license or rifle/shotgun permit is involved in an incident coming to the attention of the Department.” JA102.

According to Inspector Lunetta, “[i]f the licensee claims to have been traveling to or from an authorized range, the investigating supervisor must ascertain whether the handgun was unloaded in a locked container with ammunition carried separately, and whether the licensee was traveling directly to or from the range.” JA76; *see also* JA103.

However, Respondents have not seen fit to provide the courts with the data in their possession—namely, any violent crimes committed by premises licensees while transporting a handgun to a range—preferring to rely on speculation.

The closest thing to a factual assertion to attempt to justify R.C.N.Y § 5-23 as promoting public safety is Inspector Lunetta’s assertion that:

Since the elimination of the Target license in 2001, investigations have revealed a large volume and pattern of premises license holders who are found in possession of their handguns in violation of the restrictions on their license.

JA72. There are two problems with this statement.

First, what constitutes a “large volume and pattern” over those years? Surely the License Division keeps records of what it does and finds. Respondents could have provided some actual data to show the number and nature of these purported violations, but did not.

Second, improper transportation does not mean that public safety has been harmed. The Lunetta Declaration provides not one shred of evidence that these licensees committed violent crimes while transporting handguns. The Declaration does not say whether these handguns were merely being transported in a locked and unloaded condition to some unauthorized place, whether they were loaded or uncased, or whether they were used in actual crimes of violence.

The rationale is circular. Respondents attempt to

justify the regulation by noting that people sometimes violate it. But neither Respondents' evidence nor the Second Circuit's opinion contains a single factual instance that any violation of the Rule has caused actual harm or injury to public safety.

### **III. THE RULE'S RESTRICTION ON LICENSE HOLDERS' SECOND AMENDMENT RIGHTS IS SUBSTANTIAL.**

Although the Second Circuit opinion recognizes in theory that the ability to engage in practice and training are important in exercising the right to self-defense, it contends that only regulations that "sharply restrict" that ability could lead to a substantial burden on Second Amendment rights. App-16-17. It characterizes the restrictions imposed by the Rule as "insignificant and indirect" and "trivial." App-13, App-29.

Training and practice are essential to safe firearm handling, to speed and accuracy in shooting in defense situations, and to develop and maintain skills needed to identify threats correctly and to respond to them properly under stress. The restrictions imposed by the Rule on premises license holders are neither insignificant nor trivial.

Training is not a "one-time" endeavor, but must be engaged in continually. That is why law enforcement agencies require periodic training and qualification by officers with their duty weapons. Qualification is the firing of a course for score, to establish a minimum competency threshold. Training can take a number of forms, including practice on a wide variety of targets, participation in tactical drills, and the like in order to maintain and further develop competency.

The International Association of Law Enforcement Firearms Instructors (“IALEFI”), one of this brief’s *amici*, recommends qualification with a handgun not less than twice per year, dim light qualification not less than once per year, and training not less than quarterly. E. KAPELSOHN, PRINCIPAL AUTHOR, IALEFI, FIREARMS TRAINING STANDARDS FOR LAW ENFORCEMENT PERSONNEL, §§ 14.9, 14.10 (2004).

For non-law enforcement personnel such as premises licensees, training is also essential. A respected manual for civilians on defensive shooting has a chapter appropriately entitled “Practice: Your Life Depends on It.” CHRIS BIRD, THE CONCEALED HANDGUN MANUAL 423 (6<sup>th</sup> ed. 2011). In that book, former U.S. Customs special agent, competition shooter, and firearms instructor Robert Butler is quoted as saying, “I really can’t stress enough on training.” *Id.* at 428. “Butler recommends a civilian gun carrier should practice at least once a month for the first year and a minimum of once a quarter after that.” *Id.* at 429.

The Second Circuit opinion contends that practice and training are not significantly curtailed because “nothing in the Rule precludes the Plaintiffs from utilizing gun ranges or attending competitions outside New York City, since guns can be rented or borrowed at most such venues for practice purposes.” App-28. But the principle that the exercise of a constitutional right may not be “abridged on the plea that it may be exercised in some other place,” applies in the Second Amendment context. *Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011) (quoting *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76–77

(1981)). Furthermore, there is nothing in the record to substantiate the claim that guns can be rented or borrowed at most such venues, and indeed that claim is very likely incorrect.

The Court's statement that Petitioners are "free to participate in [out-of-city] shooting competitions with a rented firearm" is unrealistic. App. 28. Even if some type of rental gun was available, the assumption that anyone would shoot in a competition with a rented firearm is on the same level as assuming that someone would engage in competitive skiing events with rented skis or participate in off-road motorcycle competition with a rental motorcycle. Shooting competitions also have rules regarding the types and features of handguns that can be used, and to suppose that ranges keep those specific firearms available for rental is at the very least unsubstantiated. Additionally, most competitions are held at gun clubs, and clubs rarely rent guns.

In claiming that the seven shooting ranges in New York City are sufficient to satisfy all license holders' needs for practice and training, the Second Circuit seems to consider range facilities as essentially fungible. But they are not. Some ranges are set up only for paper target shooting from designated stations. Others can be set up as a course, usually timed, where the competitor or trainee moves from position to position, with varying targets, cover, barriers, lighting conditions, and the like, to more realistically simulate defensive firing under stress. *See* BIRD, CONCEALED CARRY MANUAL 423-27. Experts generally agree that competition builds and maintains skills that are useful and perhaps critical

in defense situations.<sup>20</sup>

The Court's opinion asserts that Petitioners "still need to demonstrate that practicing with one's own handgun provides better training than practicing with a rented gun *of like model...*" App-28-29 (emphasis added). There are literally thousands of different models of handguns, and to suppose that a range would keep such a selection on hand for rental is a further flight of imagination.

More importantly, "practicing with one's own handgun" is overwhelmingly recognized as vitally important among police and civilian instructors. Every handgun is different, even among similar models. There are nearly infinite combinations of barrel lengths, sights, grips, weight of trigger pulls, calibers, and other features. Even among identical models, the point of impact on the target may vary between particular handguns. The shooter must regularly confirm that the gun, and its magazines if a semi-automatic, are functioning properly with the exact same ammunition the shooter intends to use for self-defense. A shooter cannot do this if he has to use a rented gun at a range outside the city. In addition, many ranges that do rent guns require that these be used only with the range's own ammunition, not ammunition the shooter brings. Ammunition varies

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<sup>20</sup> John Scott, *10 Experts: Can Competitive Shooting Help Real-World Defensive Shooting?*, BALLISTIC MAGAZINE (Apr. 8, 2016), <https://www.ballisticmag.com/2016/04/08/10-experts-can-competitive-shooting-help-real-world-defensive-shooting/>; OFFICER.COM, *IDPA: Training or Just a Game?* (Jul. 14, 2008), <https://www.officer.com/home/article/10248759/idpa-training-or-just-a-game>.



by type of powder, amount of powder, and bullet weight and type, among other factors. Different kinds will often shoot to a different point of aim on the target. Some kinds of ammunition may not function well in particular semi-automatics, causing jams.

Reasons like these are why virtually every police department in the country requires its officers to qualify with their own issued handguns, not just another handgun of the same model.

The same principle holds for civilians who own handguns for self-defense. “[Y]ou should definitely practice self-defense shooting with the gun you normally carry....” BIRD, THE CONCEALED HANDGUN MANUAL at 428. According to expert Robert Butler, quoted above, “I would stay with one gun, because in a stress situation you’ll know how to use it.” *Id.* at 429.

Even in intermediate scrutiny cases, courts must consider whether the “provisions were designed to address a real harm, and whether those provisions will alleviate it in a material way.” *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 195 (1997). Here there is no showing at all of a real harm. The courts below have balanced away an important part of the rights of New York City residents to travel with their handguns for lawful and even critical purposes, by relying on speculative threats to public safety. The Court should clarify that the principles of *Heller* and *McDonald* must be followed instead.

### CONCLUSION

The petition for certiorari should be granted.

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