No. _____

In The
Supreme Court of the United States

Libertarian Party of Erie County, Michael Kuzma, Richard Cooper, Ginny Rober, Philip M. Mayor, Michael Rebmann, Edward L. Garrett, David Mongielo, John Murtari, William Cuthbert,

Petitioners,

v.

Andrew M. Cuomo, individually and as Governor of the State of New York, Letitia James, individually and as Attorney General of the State of New York, Joseph A. D'Amico, individually and as Superintendent of the New York State Police, 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 FOR REVIEW

This case presents one big issue that necessarily requires the resolution of a number of critical subsidiary issues.

1. Should the State of New York, in all of its three branches of government, working in unison, be allowed to continue to blatantly violate the right to bear arms as recognized by this Court in the landmark decisions of *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago,* 561 U.S. 742 (2010), through its arbitrary, complex and onerous pistol permit process which forces citizens to seek the permission of neighbors, police officers and licensing officials to exercise a fundamental right and which vests in licensing officials virtually unlimited discretion to deny, suspend or revoke handgun permits while ignoring due process, and which forces citizens to endure a lengthy, expensive and complex permit application process? Resolving this question requires the resolution of the following additional questions:

2. Is intermediate scrutiny a proper standard for reviewing statutes that burden the Second Amendment?

3. Can courts apply a balancing test such as intermediate scrutiny which effectively gives zero weight to the interests protected by the Second Amendment?

4. Can courts properly evaluate Second Amendment claims without acknowledging the true purpose of the right to bear arms, *to deter government tyranny* in all its multifarious forms?

5. Does New York's discretionary "may-issue" licensing law to purchase and possess handguns in the home for self-defense violate the Second Amendment to the United States Constitution.

6. Does New York's discretionary "proper cause" licensing law to purchase and possess handguns outside the home for self-defense violate the Second Amendment to the United States Constitution.

7. Are pistol permit licensing officers immune from suit merely because they also happen to be judges?

8. Do citizens who have not applied for a pistol permit lack standing to challenge the need for a pistol permit?

LIST OF PARTIES

Petitioners.

Libertarian Party of Erie County, Michael Kuzma, Richard Cooper, Ginny Rober, Philip M. Mayor, Michael Rebmann, Edward L. Garrett, David Mongielo, John Murtari, William Cuthbert.

Respondents.

Andrew M. Cuomo, individually and as Governor of the State of New York, Letitia James, individually and as Attorney General of the State of New York, Joseph A. D'Amico, individually and as Superintendent of the New York State Police, Matthew J. Murphy, III, individually and as Niagara County pistol permit licensing officer, Dennis M. Kehoe, individually and as Wayne County pistol permit licensing officer, and M. William Boller, individually and as Erie County pistol permit licensing officer.

CORPORATE DISCLOSURE STATEMENT

No party is a corporation.

RELATED CASES

This case arises from the following proceedings:

- *Libertarian Party of Erie County v. Andrew M. Cuomo,* No. 18-386 (2d Cir.), judgment entered on October 8, 2020.
- *Libertarian Party of Erie County v. Andrew M. Cuomo,* No. 15-CV-654-FPG (W. D. N. Y.), judgment entered on January 11, 2018.

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- *Libertarian Party of Erie County v. Cuomo*, 970 F.3d 106 (2nd Cir. 2020).
- *Libertarian Party of Erie County v. Cuomo*, 300 F.Supp.3d 424 (2018) (W. D. N. Y. 2018).

JURISDICTION

The United States Court of Appeals for the Second Circuit affirmed the trial court's dismissal of the amended complaint against the petitioners on August 11, 2020. Petitioners filed a timely petition for rehearing en banc, which the Court denied on October 1, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1). Jurisdiction in the trial court was based on 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343 and 1367. Due to this Court's COVID-19 Order dated March 31, 2020, the time for filing a petition for a writ of certiorari was extended to February 28, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . "

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Penal Law Section 265.00(3): As used in this article and in article four hundred, the following terms shall mean and include:

. . . 3. "Firearm" means (a) any pistol or revolver . . . "

Penal Law Section 265.01 is reprinted at App. 125.

Penal Law Section 265.01-B is reprinted at App. 127.

Penal Law Section 265.02 is reprinted at App. 127.

Penal Law Section 265.03 is reprinted at App. 129.

Penal Law Section 265.04 is reprinted at App. 130.

Penal Law Section 265.20 is reprinted at App. 130.

Penal Law Section 400.00 is reprinted at App. 132.

STATEMENT OF THE CASE

This lawsuit is a true, grass roots, shoestring effort to challenge the New York Pistol Permit law, which so glaringly violates the right to bear arms as enunciated by this Court in *Heller* and *McDonald*. We asked each plaintiff to ante up $200 to get the case rolling. We are not affiliated with and received no funding from any national gun rights organization. The plaintiff's lawyer in the courts below is a public interest lawyer who works out of his house. The case has been funded by small donations throughout. We are opposed by three gigantic and well-funded law firms, the New York Attorney General and two amicus curiae, Everytown for Gun Safety (Michael Bloomberg) and Gifford's Law Center (also funded by billionaires).

We filed a comprehensive challenge to many aspects of the regime, including several that have so far been ignored by the courts below. All this enormous effort over many years was for the sole purpose of getting answers to the following questions:

1. Is the right to bear arms *inferior* to the other rights spelled out in the Bill of Rights?
2. Can the courts impose a *licensing* requirement on citizens who would exercise a fundamental natural right, that is, can judges make a *right* into a *privilege*?
3. Will the courts ever acknowledge the true purpose of the Second Amendment, to deter *government tyranny*?

The courts below *did* answer the first two questions. The right to bear arms *is* an

inferior right and, yes, judges can turn a right into a privilege that can only be exercised by getting permission from a "judge" who is then somehow conveniently immune from all liability for damages. However, the main purpose of this classic citizens' petition to redress grievances has been frustrated. See Point V, below. The courts below simply ignored *the government tyranny argument*, the alleged burdens of the licensing scheme regarding delay, expense and invasion of privacy, and the violation of plaintiff Mongielo's rights in having his license suspended *for two and a half years* without any *due* process.

The plaintiffs' challenge to the New York pistol permit regime involves several questions where the Second Circuit is in conflict with decisions of this Court or other circuits.

The Panel decision dated August 11, 2020, conflicts with the two Supreme Court decisions that have dealt with the Second Amendment on the merits in recent years, *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010). Consideration by this Court is therefore necessary to secure and maintain uniformity of the Court's decisions.

This petition also involves questions of exceptional importance and alleges conflicts with at least three other Courts of Appeal. *Duncan v. Becerra,* 970 F3d 1133 (9th Cir. 2020) (applying strict scrutiny standard to a statute barring large capacity magazines), *Wrenn v. District of Columbia*, 864 F.3d 650, 666 (D.C. Cir. 2017); and *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) (holding proper cause for carry permits unconstitutional). The Ninth Circuit agrees with the Second Circuit with

respect to the right to carry outside the home. See, *Young v. Hawaii,* 896 F. 3d 1044 (9th Cir. 2018), vacated, reh'g en banc granted, 915 F3d 681 (9th Cir. 2019).

The Supreme Court has held that the right to bear arms is a "fundamental right." *McDonald v. Chicago*, 561 U.S. 742, 778 (2010). This right is threatened by New York State laws and their enforcement by the respondents.

The right to bear arms is entitled to at least the same amount of respect, protection and enforcement that is provided to the other fundamental rights such as free speech, petition, assembly and due process.

If there is to be any disparate treatment of the right to bear arms due to its unique nature, it should be given even *greater* respect, protection and enforcement than the other rights because, logically, historically and empirically, *it is the most important right enumerated in the Bill of Rights; it is the right that protects and guarantees all the others.*

Unlike when violations of the rights to free speech, religion, assembly and petition occur, being deprived of the right to bear arms can result in immediate death at the hands of a criminal or a tyrannical government (see, e.g., Wounded Knee Massacre, 1890), such death rendering the entire remainder of the Bill of Rights moot and meaningless at that point.

Presently, in the State of New York, the plaintiffs cannot lawfully purchase, possess, carry, keep or bear a "firearm" as that term is defined in the New York without the permission of local officials. N.Y. PEN. LAW § 265.00(3).

Plaintiffs can only keep and bear a pistol or revolver or handgun with the prior permission of the state—a license--after meeting, in the subjective opinion of a state licensing officer, a number of different criteria the imposition of which violates the Second Amendment.

The United States Court of Appeals described the latitude provided state judges in denying licenses as being "vested with considerable discretion." *Kachalsky v. County of Westchester*, 701 F.3d 81, 87 (2d Cir. 2012).

Such unlicensed possession would constitute a crime under the Penal Law and subject the petitioners to the risk of prosecution and imprisonment merely for exercising their natural and constitutional right to bear arms for noble purposes.

Thus, New York State explicitly treats the right to bear arms as a "privilege," not a right, and ***boasts*** *of this unconstitutional policy* in numerous court decisions. E.g., *Guddemi v. Rozzi,* 210 AD2d 479 (2nd Dept. 1994); *Shapiro v. New York City Police Dept.,* 201 AD2d 333 (1st Dept. 1994).

For example, applicants must prove they have "good moral character." The state may not condition the exercise of a fundamental right on prior proof of "good moral character." The term "good moral character" is undefined in the statute and is not susceptible of any precise definition or any rational definition whatsoever. In our society, there is no general agreement about what "good moral character" means. Some behavior that years ago would have been considered proof of the lack of good moral character is no longer considered to be such.

The statute also conditions the issuing of a permit on the absence of "good cause . . . for the denial of the license," yet, provides no definition of "good cause," thus placing the recognition of constitutional rights into the hands of bureaucrats and their arbitrary and subjective judgments. Penal Law 400(1)(g). The imposition of such conditions that are impossible to define violates both the Second Amendment right to bear arms and the due process clauses of the Fifth and Fourteenth Amendments.

In most counties in the state, it can take a year or more to obtain a permit. If the permit is denied, judicial intervention can take an additional year and a half including one appeal as of right to the Appellate Division and cost as much as $5000 for legal fees and costs.

The permit process involves a massive invasion of privacy, forcing the applicant to identify his or her closest friends who are then subjected to a criminal record check themselves. The permit process can be expensive, thus preventing many low-income persons from applying for a permit. The permit process can also be time-consuming, constituting a burden not imposed for the exercise of numerous other fundamental constitutional rights.

In the case of an application for a carrier permit, the applicant must prove "proper cause" in order to exercise a fundamental right. This requirement had previously been ruled constitutional by the United States Court of Appeals for the Second Circuit. *Kachalsky v. County of Westchester*, 701 F.3d 81. (2d Cir. 2012).

A right that can only be exercised by seeking prior permission of the government, which permission can be withheld at the government's subjective discretion, is a right that has ceased to exist.

The complaint raises numerous objections to the New York pistol permit law (Penal Law Section 400.00), as violative of the Second Amendment and Fourteenth Amendment rights of the petitioner to keep and bear firearms, on its face and as applied (Amended Complaint, par. 56) for the following reasons:

a. The requirement of an applicant for a carrier permit to show "proper cause," a determination ultimately based on the virtually unfettered discretion of licensing officials and reviewing judges, violates the Second Amendment.

b. A state may not license or impose a prior restraint on a fundamental right. See, e.g., the 1st, 3rd, 4th, 5th, 6th, 7th, 8th and 14th Amendments; *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

c. The requirements of proving "good moral character," integrity and the absence of "good cause" to deny a license violate the Second Amendment. See, *Schneider v. New Jersey*, 308 U.S. 147 (1939).

d. The apparently unrestrained grant of authority to licensing officials to revoke licenses "at any time" violates the petitioners' right to bear arms.

e. The costs of obtaining a permit are unduly burdensome for poor persons and persons of modest means.

f. The amount of time permit applicants are required to wait for approval is unduly burdensome, particularly for people who are elderly, terminally ill and who have an urgent need for firearms for self-defense because they live in a high crime area or have been threatened.

g. In the case of the terminally ill or the elderly, the waiting period could exceed their actual lifespan or a large portion of their lifespan.

h. The statute's requirement that an applicant prove he has not been convicted of a "serious offense" is unconstitutionally overbroad.

i. The mandatory disclosure of close friends for references, together with the imposition on them of a criminal background check and the imposition upon the applicant of the burden of confessing to one's close friends all of one's sins and shortcomings that a licensing official might conceivably deem significant (see, *Novick v. Hillery,* 183 AD2d 1007 (3rd Dept. 1992)), violates the privacy of all concerned, is unduly burdensome and invites retaliation against political activists and their closest friends.

j. The mandate to provide references in the county where the application is processed violates the rights of those who recently moved into an area.

k. Applicants bear the burden of proof of their entitlement to the "right" to bear arms; receive no hearing before their entitlement to this right

is initially determined, and receive post-deprivation judicial review that presumes the licensing officer's decision is correct and applies a deferential standard of review and imposes the burden of proving error upon the alleged "right"-holder.

l. Because the requirement of "good moral character" and absence of a "serious offense" are essential parts of the statutory scheme, the entire statute should be vacated.

The fact that the respondents and both courts below ignored many of these complaints speaks for itself.

All plaintiffs challenged the statutory regime on its face and as applied to them.

A. Factual Background

New York State has for many years led the nation in violating the right to bear arms and flouting this Court's rulings. This arises out of its status as a leading progressive state as gun control is rooted, not in logic or evidence, but in a political ideology, progressivism, whose essence is to use aggressive state action as a form of therapy to make people feel better, as opposed to solving any actual problems. It therefore tends to generate new and major problems.[1] As alleged in the complaint, handguns are necessary to deter and defend against street crime in a state known for its dangerous streets. Amended complaint, pars. 105-112.

Handgun laws are particularly strict in New York City, resulting in muggings

[1] J. Ostrowski, *Progressivism: A Primer on the Idea Destroying America* (2014).

being so common there that they became the staple of late-night comedians. Crime tends to be highest where civilian gun ownership is lowest as the citizens in those areas are more likely to lack the resources or political connections to obtain a permit.

Pursuant to this irrational ideology and probably for nefarious reasons, the Sullivan Act was passed in 1911. This act imposed for the first time the requirement of obtaining a permit to possess a handgun. The statute challenged herein, Penal Law 400.00, is the current version of the Sullivan Act. It has never been established that this law was based on facts or logic or has produced a net good to society by any rational formula or analysis.

Prior to *Heller* (2008), the predominant view of the legal profession was that the Second Amendment did *not* protect an individual right to bear arms. (Plaintiff's counsel in the courts below, dissented from that view as early as 1994.[2]) This explains why the law was rarely challenged and never successfully challenged in the run-up to *Heller*. After *Heller*, it became obvious that New York law violated the Second Amendment. A narrow and legalistic challenge only to the "proper cause" to carry aspect, failed in 2012. *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012). In 2015, the present group of Second Amendment advocates combined to file the present, broad-based challenge relying primarily on the government tyranny argument. The amended complaint objected to at least *twelve* elements of the regime

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[2] J. Ostrowski, "Guns and Drugs," *The Free Market* (Feb. 1994); https://www.scribd.com/document/421444576/Guns-and-Drugs-by-James-Ostrowski; J. Ostrowski, "The Why of Gun Ownership," May 9, 2003. https://mises.org/library/why-gun-ownership

as noted above.

Several kinds of challenges were made. All plaintiffs challenged the actual text of the statute (as interpreted by the New York courts) on its face for the elements noted above including:

1. The requirement of an applicant for a carrier permit to show "proper cause."
2. A state may not license or impose a prior restraint on a fundamental right.
3. The requirements of proving "good moral character," integrity and the absence of "good cause" to deny a license violate the Second Amendment.
4. The ability of licensing officials to revoke licenses "at any time."
5. The statute's requirement that an applicant prove he has not been convicted of a "serious offense."
6. Applicants bear the burden of proof of their entitlement to the "right" to bear arms; receive no hearing before their entitlement to this right is initially determined, and receive post-deprivation judicial review that presumes the licensing officer's decision is correct and applies a deferential standard of review and imposes the burden of proving error upon the alleged "right"-holder.

In addition, the amended complaint alleges certain obnoxious features of how the regime is implemented in actual practice that apply essentially to any citizen. The

plaintiffs' challenges to these features may lie in the gray area between facial and "as applied" challenges:

1. The costs of obtaining a permit are unduly burdensome for poor persons and persons of modest means.
2. The amount of time permit applicants are required to wait for approval is unduly burdensome, particularly for people who are elderly, terminally ill and who have an urgent need for firearms for self-defense because they live in a high crime area or have been threatened.
3. In the case of the terminally ill or the elderly, the waiting period could exceed their actual lifespan or a large portion of their lifespan.
4. The mandate to provide references which violates the right to privacy as noted above.
5. The mandate to provide references in the county where the application is processed violates the rights of those who recently moved into an area.

Additionally, several plaintiffs alleged classic "as applied" challenges. John Murtari was denied a permit and the courts properly held that he had standing to challenge the statute. Murtari is an Air Force veteran who became a family rights/non-violent resistance advocate in Family Court who was charged with a number of non-violent family offenses none of which led to a felony conviction and who was therefore eligible to possess a handgun under *Heller*. See, Amended

Complaint, pars. 96-103. "[L]egislatures have the power to prohibit dangerous people from possessing guns. But that power extends only to people who are dangerous." *Kantor v. Barr,* 919 F.3d 437 (2019) (Barrett, J., dissenting).

Philip Mayor and William Cuthbert had already obtained permits but challenged the need to have one. Both plaintiffs have moved out of state, however, in our view they each have standing to seek past money damages if the Court reverses the courts below on judicial immunity. See, Point VII, below. Cuthbert also alleged that he was denied a carrier permit for lack of "proper cause" shown. See, Point III, below. Michael Kuzma, counsel of record in this Court, obtained a permit after the case was filed, but in our view has standing to challenge the need to have a permit under the current onerous regime's standards and procedures. David Mongielo complained of having his permit arbitrarily suspended without due process and continues to complain of his need to have a permit at all.

The courts held erroneously that Richard Cooper, Michael Rebmann and Edward Garrett could not challenge the statute at all without applying for a permit. This is absurd and a misapplication of precedent. See Point VIII below. All plaintiffs asserted their right "to keep and bear arms for the defense of self and family and for other lawful purposes" including to deter government tyranny. Amended complaint, pars. 1, 32, 34.

Ginny Rober has since passed away and the plaintiffs did not contest on appeal the District Court's dismissal of the Libertarian Party of Erie County from the case.

B. Procedural History

Plaintiffs filed suit in the Western District of New York on July 22, 2015. They amended the complaint on December 23, 2015. The court dismissed the amended complaint on January 10, 2018. The plaintiffs appealed on February 8, 2018.

The Second Circuit affirmed on August 11, 2020. Petitioners filed a timely petition for rehearing en banc, which the Court denied on October 1, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1). Jurisdiction in the trial court was based on 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343 and 1367. Due to this Court's COVID-19 Order dated March 31, 2020, the time for filing a petition for a writ of certiorari was extended to February 28, 2021.

ARGUMENT

The casual manner in which New York state and federal courts have tossed aside very serious constitutional challenges to the New York Pistol Permit Law evidences a more general and pervasive attitude of utter hostility to the fundamental individual right to bear arms recognized in the Second Amendment and by this Court's landmark decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008). The legislature has enacted, and the executive gleefully enforces statutes that treat the right to bear arms as a privilege, in open revolt against this Court's jurisprudence. All three levels of New York's courts likewise refuse to protect the right to bear arms and consistently reject any and all well-founded challenges to New York laws on that ground. In fact, counsel are not aware of a single court case in New York that struck down any law, regulation or administrative determination based on *Heller* and *McDonald*.

This dismissive attitude toward the Second Amendment is exemplified in *Chomyn v. Boller*, 137 AD3d 1706 (2015), where the Fourth Department summarily rejected petitioner's contentions without any discussion, citing cases which themselves did not address the issues raised in that case, *Matter of Cuda v Dwyer*, 107 AD3d 1409 (4th Dept. 2013); or that give them only a cursory review. *Matter of Kelly v Klein*, 96 AD3d 846 (2nd Dept. 2012). Incredibly, *Cuda* cites a 1985 case decided *before Heller* and *McDonald.* This perfectly exemplifies the casual attitude toward a fundament right mentioned above. *Matter of Demyan v Monroe*, 108 AD2d

1004, 1005 [1985]). See also, *Matter of Gurnett v. Bargnesi,* 147 A.D.3d 1319 (4th Dept. 2017).

Out of all the states, New York has exhibited the most hostility and the most brazen and *open defiance* of this Court's decisions. It will continue to do so until this Court acts. See *Peruta v. California*, 137 S. Ct. 1995, 1997, 1999 (2017) (Thomas, J., dissenting from denial of cert.) ("The Court's decision to deny certiorari in this case reflects a distressing trend: the treatment of the Second Amendment as a disfavored right."); *Voisine v. United States*, 136 S. Ct. 2272, 2291 (2016) (Thomas, J., dissenting) ("We treat no other constitutional right so cavalierly."); *Friedman v. Highland Park*, 136 S. Ct. 447 (2015) (Thomas, J., dissenting from denial of certiorari) ("Because noncompliance with our Second Amendment precedents warrants this Court's attention as much as any of our precedents, I would grant certiorari in this case.").

The Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), held that the right to bear arms is an individual right binding on the states. This was contrary to the prior treatment of bearing arms in New York as a privilege granted by the State at its whim. Under that prior understanding, a loose set of practices and procedures developed with judges acting as licensing officials operating in a cavalier and informal fashion in granting or denying permits for handguns.

In recent litigation such judges, when sued for money damages, have asserted judicial immunity. Plaintiffs' lawyers have argued to the contrary, that they are not immune as they are not acting in a judicial capacity. If the courts hold that they are

immune, that raises even more questions. Are judges allowed to have ex parte communications? This is standard procedure in pistol permit cases.

Are judges allowed to act as prosecutor and judge in the same case? This is a fair description of many pistol permit cases. As noted, before *Heller* and *McDonald*, possessing a handgun was a privilege in New York State. The problem is this: New York officials and lower courts are continuing to treat it as such, essentially ignoring the revolution in the law these cases unleashed. Before these cases, it was the consensus of legal scholars that there was no right to bear arms now that militias are obsolete.

A number of practical problems ensue from the widespread attitude of officials that *Heller* and *McDonald* do not apply in New York. First, the loose practices described above will continue, causing consternation among millions of citizens who believe, as the Supreme Court believes, that the right to bear arms applies in New York State. Second, the widespread practice in pistol permit offices and among the police of ignoring the Second Amendment is opening New York up to tremendous potential civil liability under 42 U.S.C. 1983. Liability in such cases, if a wave of them hits the federal courts, could reach hundreds of millions of dollars in damages.

Third, a house divided against itself cannot stand. New York courts cannot long continue to have a separate but unequal legal system, at odds with the rest of the states, without a serious risk of a loss of public confidence in New York courts and their willingness to abide by the laws of the land.

REASONS FOR GRANTING THE PETITION

I. THE INTERMEDIATE SCRUTINY STANDARD IS CONTRARY TO SUPREME COURT PRECEDENT.

The lower courts' and appellees' response to the plaintiffs' Second Amendment arguments typified the casual attitude of many lawyers and judges towards the right to bear arms since the revolutionary and controversial *Heller* and *McDonald* decisions were issued: they basically ignore them. The predominant opinion in the legal community for many years had been that the Second Amendment was a dead letter that had some vague relationship to the militia and colonial times and that, militias having passed from the scene, the Amendment was essentially a meaningless vestige of primitive times and primitive minds.

Specifically:

1. The appellees and both courts below ignored the primary purpose of the Second Amendment, to allow the people to defend themselves against government tyranny;
2. The courts below used an intermediate scrutiny balancing test rejected by *Heller* and *McDonald*.
3. The appellees relied on biased and tendentious academic studies which are flawed for many reasons.
4. The courts below completely ignored plaintiffs' detailed allegations about the numerous burdens involved in the permit process.

As for why opponents of the right to bear arms ignore the actual purpose behind the right—protection against government tyranny—we submit it is because they simply have no rebuttal to it! The historical and textual evidence for this proposition is undeniable. The United States was born in a revolutionary war precipitated by a British gun control mission at Lexington and Concord.

The right has worked exactly as intended. See, J. Ostrowski, *The Second Amendment Works* (2020).[3] While the United States government has badly mistreated or tolerated the mistreatment of a variety of persons not considered to be citizens at the time, including African slaves and Native Americans, while aggressively making efforts to ensure that both were *disarmed,* that same government has *not* done what at least twenty other modern regimes and an infinite number of early modern, premodern and ancient regimes have done: engaged in the mass killing of its own citizens. See, R. J. Rummel, *Death by Government: Genocide and Mass Murder in the Twentieth Century,* New Jersey: Transaction Publishers, 1994.[4] Nor has the United States government yet installed a totalitarian police state or cancelled elections or had coups d'etat or other political instability commonly seen in other countries where the right to bear arms does not exist. (Countries that have many coups d'état such as Haiti and Thailand have low levels of gun ownership.) The *Second Amendment has worked* and those who have an ideological urge to disarm

[3] https://www.2anys.com/2AWORKS/

[4] Hawaii.edu/powerkills

Americans have no rebuttal to that undeniable fact. Hence, they *pretend* that this line of argument does not even exist, thereby declaring their intellectual bankruptcy.

Under a proper understanding of the Second Amendment, any proposal to ban or restrict law-abiding, competent adults from owning weapons useful for every kind of self-defense and that have been in common use in America would be presumptively unconstitutional. Yet, this is an academic point as no proponent of any gun control law has even constructed an argument for how their proposal does not violate the Second Amendment's core purpose.

Dealing then with the utterly disingenuous line of argument advanced by proponents of gun control—that the right to bear arms relates only to self-defense against street crime--the first problem is that their argument for a very lenient interest balancing test contradicts the holdings of *Heller* and *McDonald*. The Panel relied on the intermediate scrutiny test adopted by *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 252 (2d Cir. 2015):

> "In making this determination, we afford 'substantial deference to the predictive judgments of the legislature.'[109] We remain mindful that, '[i]n the context of firearm regulation, the legislature is `far better equipped than the judiciary' to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks.'[110] Our role, therefore, is only to assure ourselves that, in formulating their respective laws, New York and Connecticut have 'drawn reasonable inferences based on substantial 262*262 evidence.'[111]"

In his dissent in *Heller*, Justice Breyer proposed a balancing test very much like the one subsequently adopted by New York courts and by the Panel:

> "I would simply adopt . . . an interest- balancing inquiry explicitly. . . . In applying this kind of standard the Court normally defers to a

> legislature's empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional factfinding capacity."

Justice Scalia ingeniously responded that the Second Amendment had already done all the interest balancing the right to bear arms needed:

> "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. 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. The Second Amendment is . . . is the very *product* of an interest-balancing by the people—which Justice Breyer would now conduct for them anew."

The Supreme Court in *McDonald* reiterated its rejection of the balancing of interests approach proposed by the appellees:

> "In Heller, however, we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing. . . "

Since the Second Circuit relied on an analytical approach explicitly rejected by the Supreme Court, the petition should be granted, and that approach rejected.

II. THE PANEL'S DECISION ADOPTS, SUB SILENTIO, JUSTICE BREYER'S DISSENT IN HELLER.

The intermediate scrutiny/balancing of interests test was originally developed by and has been applied by opponents of the Second Amendment to negate the right to bear arms in actual practice. The test was essentially the creation of Justice Breyer in *Heller* as a fallback position to his initial opposition to *any* individual right to bear arms.

Justice Breyer endorsed Justice Stevens' dissent, in which he set forth the legal establishment's view that the right to bear arms is a dead letter as it only protects collective rights related to the now defunct militia. As a fallback position, Justice Breyer set forth an interest-balancing test that, in effect, allows judges hostile to the right to bear arms to provide a constitutional gloss to the pro forma endorsement of any and all gun control legislation.

The actual, historical purpose of the Second Amendment was to protect the natural, pre-existing right of the people to self-defense in the broadest possible sense, meaning, primarily, self-defense against government tyranny but also self-defense against possible foreign invasion, terrorism, and domestic unrest, and secondarily against run of the mill street crime. However, the test developed by those who do not agree in the slightest with the right to bear arms, naturally fails to incorporate in its contrived balancing test any room for "weighing" the "interests" protected by the right! ("Timeo Danaos et dona ferentes" from Aeneid (II, 49), "Beware of Greeks bearing gifts".)

Rather, as explained in appellees' brief, courts will uphold a challenged regulation where it is "substantially related to the achievement of an important governmental interest." Doc. No. 71, p. 48, 18-386 (Sept. 13, 2018). Thus, in that test, *zero weight* is given to the values protected by the right and nearly absolute weight is given to the interest of the government. Yet, the purpose of the right is either to allow the people to protect themselves *against the government* or protect themselves when the government fails to do so. Thus, the intermediate scrutiny test was developed by opponents of the right to bear arms whose main purpose is to negate the right to bear arms and it therefore contradicts *Heller, McDonald* and *Duncan*.

III. THE COURT SHOULD RESOLVE A MAJOR SPLIT AMONG THE CIRCUITS ABOUT THE RIGHT TO CARRY OUTSIDE THE HOME.

There is a serious split among the circuits on a key issue raised in this case, the right to carry outside the home. The Seventh Circuit and the D.C. Circuit have held that the Second Amendment protects the right to carry firearms outside the home. *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012); *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017). The Ninth Circuit held to the contrary in *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1167 (9th Cir. 2014), vacated, rev'd on reh'g en banc, 824 F.3d 919, 942 (9th Cir. 2016) and *Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018), vacated, reh'g en banc granted, 915 F.3d 681 (9th Cir. 2019).

In addition to the sound analysis of the courts that have rejected "proper cause" type standards for the right to carry arms outside the home, it is worth noting that the government tyranny argument compels this result as well. The Minutemen were

not in their homes on April 19, 1775. Limiting the right to bear arms to the home only fallaciously and implicitly adopts the silly notion that protection against burglars is the main purpose of the Second Amendment, an absurdity. This illustrates the critical importance of recognizing the government tyranny argument precisely in order to resolve the numerous outstanding and contentious issues concerning the scope of the right to bear arms. The government tyranny argument will provide both liberty and clarity.

IV. THE PANEL'S DECISION CONTRADICTS THE NINTH CIRCUIT'S RECENT HOLDING IN *DUNCAN V. BECERRA*.

The Ninth Circuit recently held that California's ban on high-capacity magazines violated the Second Amendment. *Duncan v. Becerra,* 970 F3d 1133 (9th Cir. 2020). The court, based on an extensive discussion of the background of the Second Amendment, held that the ban was a significant burden on the right to bear arms. Arguably, the onerous licensing regime in New York State, which excludes the poor and often those with minor criminal records and forces even successful applicants to spend as much as two years and $5,000 to obtain a license, is arguably more burdensome on the right to bear arms.

The Ninth Circuit then applied strict scrutiny, which the Second Circuit has never applied to our knowledge in a Second Amendment case. Unlike the Second Circuit's decision, *Duncan v. Becerra* does *not* treat the right to bear arms as an inferior right and is consistent with *Heller's* holding that the right to bear arms is a fundamental natural right.

V. THE PANEL'S DECISION IGNORES THE PURPOSE OF THE SECOND AMENDMENT.

As previously noted, the central purpose of this lawsuit was to obtain judicial recognition of the true purpose of the Second Amendment and incorporation of that purpose into any and all tests or formulas for determining whether a law or regulation has violated the right to bear arms. However, the courts below simply ignored our exhortations.

In the amended complaint, we made the government tyranny argument in lurid terms at paragraphs 34-54. It was repeated in plaintiffs' appellate brief, at oral argument and in a letter requesting re-briefing. However, the argument was then studiously ignored by the defendants, the trial court, and the Panel. The defendants briefly mention it in their trial court brief (Doc. No. 26, p. 26, WDNY 15-CV-654-FPG), calling it a "fantastical fear." Interestingly enough, the Attorney General once called President Trump a "tyrant" and an "illegitimate president," and implied that he was trying to become a "dictator." A. Edelman, "Public Advocate Letitia James calls Trump a 'tyrant' and an 'illegitimate' President," *New York Daily News* (Feb. 5, 2017); L. Eustachewich, "NY AG Letitia James threatens to sue Trump over military deployment," New York Post (June 2, 2020). Just a few weeks ago, the Attorney General doubled down on her previous remarks, accusing the President of leading "an attempt to overthrow our government." Press Release, Jan. 7, 2021.

Why does everybody ignore the government tyranny argument? The defendants,

and all proponents of gun control, ignore the argument because they have no rebuttal to it. The argument is true and sound and the task of constructing a formula for existing gun control laws that takes account of the government tyranny argument is formidable.

We urge the full Court to *see* and acknowledge the elephant in the room, *the government tyranny argument*, and reverse the Second Circuit for its failure to issue a ruling that takes account of the actual purpose of the Second Amendment.

VI. THE PANEL'S DECISION WITH RESPECT TO THE BURDEN OF THE PISTOL PERMIT REGIME AND ITS ALLEGED BENEFITS RESOLVES DISPUTED ISSUES OF FACT IN FAVOR OF THE DEFENDANTS, CONTRARY TO RULE 12.

Both the trial court and the Panel erred in finding that the New York pistol permit regime does not substantially burden the right to bear arms. In so doing, they resolved a disputed issue of fact against the plaintiffs and failed to accept as true all well-pled facts and draw all reasonable inferences in favor of the plaintiffs.

Contrary to the assertions of the defendants, which, at this stage, carry zero evidentiary value, the pistol permit law does substantially burden the right to bear arms. The Amended Complaint is very specific and detailed on this point. For example:

> "In most counties in the state, it can take a year or more to obtain a permit. If the permit is denied, judicial intervention can take an additional year and a half including one appeal as of right to the Appellate Division and cost as much as $5000 for legal fees and costs. The permit process involves a massive invasion of privacy, forcing the

> applicant to identify his or her closest friends who are then subjected to a criminal record check themselves. The permit process can be expensive, thus preventing many low-income persons from applying for a permit. The permit process can also be time-consuming, constituting a burden not imposed for the exercise of numerous other fundamental constitutional rights. . . . The plaintiffs [who have permits] . . . remain under constant threat of having their licenses revoked based on application of the arbitrary and subjective criteria set forth in the statute. Further, they are unlawfully restricted in the firearms they can purchase and carry and are forced by the risk of immediate arrest to carry their permits on them at all times. Permit holders also face a cumbersome process for adding firearms onto their permits, often involving several trips to the licensing office and gun store and delays of several weeks before being allowed [to] carry newly purchased firearms." Amended Complaint, pars. 68, et seq.

The appellees touted the Sullivan Act as a well-intentioned response to "the rising tide of gun violence in New York City and elsewhere" and claim it was well-founded and has worked. Doc. No. 71, p. 1, 18-386 (Sept. 13, 2018). On the contrary, the origins of the statute are a matter of dispute and like much progressive legislation, *its justification is the unproven assertion that its goals were achievable and achieved*. See, M. Walsh, "The Strange Birth of NY's Gun Laws," *NewYorkPost.com*, Jan. 16, 2012. "At least part of the motivation behind the Sullivan Act was a desire to keep firearms out of the hands of recent immigrants from Italy and Southern Europe — perceived to be prone to violence — by giving the New York Police Department (NYPD) the power to grant or deny permits."[5] No scientific proof of the overall efficacy of the law was produced in the appellees' brief. Nor is there any mention of *why* there

[5] M. Bridge, "Exit, Pursued by a "Bear"? New York City's Handgun Laws in the Wake of Heller and McDonald," 46 *Columbia Journal of Law and Social Problems* 145, 151 (2012).

was a rising tide of gun violence at that time as a scientific, evidence-based approach would require. Rather, it appears that guns (inert pieces of metal) and law-abiding gun owners were simply made the scapegoats for a problem the state legislature apparently was unable to solve. It appears that the murder rate operates almost entirely independently of gun laws which is pretty much what common sense would suggest. The data show for example, that the illegal trade in alcohol, heroin or cocaine seems to be correlated with a rise in murders. See, R. King, "217 years of homicide in New York," December 31, 2013; qz.com/162289/217-years-of-homicide- in-new-york/; see also, J. Ostrowski, "Thinking About Drug Legalization," Cato Institute Policy Analysis No. 121 (May 25, 1989), Figure No. 1 (showing violent crime increasing after alcohol Prohibition and declining after repeal).

A test that properly takes account of the true purposes of the Second Amendment would look something like this: No gun control law would be justified unless there was firm evidence that the value of the reduction in crime it would cause [A] would be greater than the harm it would do to (1) the right of the people to retain their sovereignty, (2) deterring government tyranny, (3) deterring mass murder by the government and (4) deterring the political instability seen in many countries without a well-armed citizenry [B], PLUS the increased crime caused by the direct and indirect effects of reduced availability of firearms to law-abiding citizens [C]. Thus, it would need to be proven that A > (B + C). No pro-gun control advocate has ever proven this or even conceived of it or tried to prove it. Further, there is no known methodology available to prove this which is why we stated in our primary brief in the Second

Circuit, sneered at by the Appellees, that it is very difficult to prove anything in the social sciences by statistics. Apropos of that is the fact that Appellees' own brief which proves nothing of relevance to this lawsuit by the methodologically flawed studies they cite. They have proven nothing of value and their studies should be disregarded by this Court.

Even assuming that the intermediate scrutiny balancing test is valid and assuming there is some scientific way to balance costs and benefits among individual human beings with separate lives whose lives cannot be added together or subtracted like so many pennies or apples, at a minimum, the proper test would have to somehow measure *all of the harm caused by a gun control law against all of the benefits*. Thus, a limited study of a small number of years of murder rates in Missouri would not remotely qualify. What about robbery, rape, assault and burglaries? These are totally ignored by the study cited by the Appellees.

Contrary to appellees' contentions, there is no "substantial evidence" that the Sullivan Act has accomplished a net good for society, even if social net good was a scientifically valid category. That is, since it is undisputed that guns are used in self-defense many thousands of times each year, reducing their availability no doubt increases the criminal victimization of law-abiding individuals and there does not appear to be any scientific way to prove that the costs of that increased crime are somehow outweighed by any speculative crime reduction legislation restricting gun use might cause in the future.

Robert Nozick explains:

> "[T]here is no *social entity* with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits the others. Nothing more. What happens is that something is done to him for the sake of others. Talk of an overall social good covers this up. (Intentionally?) To use a person this way does not sufficiently respect and take account of the fact that he is a separate person, that his life is the only life he has. *He* does not get some overbalancing good from his sacrifice, and no one is entitled to force this upon him-least of all a state or government that claims his allegiance (as other individuals do not) and that therefore scrupulously must be *neutral* between its citizens." *Anarchy, State and Utopia* (Basic Books, 1977), pp. 32-33.

In any event, there are *no* studies that scientifically prove that the benefits of handgun licensing and other gun control measures outweigh all the numerous costs since those costs are never fully delineated by the result-oriented producers of such studies.

Thus, even if logic would allow the rights of vast numbers of law-abiding citizens to be sacrificed with a resulting increased rate of criminal victimization as a consequence if it was proven that gun control would be a net benefit to society, the proponents of gun control have failed to make that case.

VII. THE COURT SHOULD REJECT THE EXTENSION OF JUDICIAL IMMUNITY TO LICENSING OFFICERS WHO VIOLATE THE SECOND AMENDMENT.

The defendants raised the defense of judicial immunity in their answer. Obviously, judges are immune from suit for money damages for judicial acts. The mere fact that a statute confers upon a judge a licensing function does not convert that function into a judicial act. That argument obviously begs the question.

Licensing is an administrative function generally performed by non-judges. The appellees have failed to demonstrate that licensing is a judicial function. If it were, the courts would also have to immunize from suit hundreds of other officials who issue licenses and permits. Eliminating immunity is critical to protecting the Second Amendment rights of New Yorkers as the blatant violation of their rights is facilitated by the fallacious application of judicial immunity to non-judicial acts. Rejection of this fallacy would revive the claims of David Mongielo, John Murtari and William Cuthbert for past money damages.

VIII. THE PLAINTIFFS DID NOT NEED TO APPLY FOR A PERMIT TO CHALLENGE THE REQUIREMENT TO DO SO.

The complaint clearly challenges the right of the State to require a license to exercise a fundamental constitutional right. Thus, it would be absurd to force the plaintiffs to ask for a license when it is *the asking* that they object to. Thus, the "futility" exception stated by *United States v. Decastro*, 682 F.3d 160, 164 (2d Cir. 2012) applies here. The plaintiffs Michael Kuzma, Richard Cooper, Philip Mayor, Michael Rebmann, Edward L. Garrett and David Mongielo, complain not about being unable to obtain a permit but about the need to do so and about the time, energy and expense of doing so. Actually applying for a permit accomplishes nothing concrete in furtherance of the goal of facially challenging the statute on the myriad grounds cited in the complaint. Amended Complaint, pars. 137-138. Imposing this requirement here becomes merely a nasty legalism of the type that makes people cynical about the

law. "Woe to you lawyers as well! For you weigh men down with burdens hard to bear, while you yourselves will not even touch the burdens with one of your fingers." Luke 11:46. Surely, as Javert would argue, had they applied for a permit and been approved, then sued, their action would be dismissed as moot. Indeed, this type of whipsawing is precisely what happened to Michael Kuzma! The trial court held that he lacked standing as he had not applied for a permit. The Second Circuit dismissed his claim after he obtained a permit prior to the appeal!

CONCLUSION

We urge the Court to grant this petition for the reasons stated above but also because of the unprecedented events of the last several months, all of which demonstrate that the plaintiffs' complaint was correct if not prophetic. Not only have we seen New York State adopt rule by executive decree, erasing the state and federal constitutions in New York[6] (see, *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 141 S. Ct. 63 (2020)), but an incident of police brutality, an issue addressed at paragraphs 51-53 of our amended complaint, metastasized into a virtual uprising in all our major cities that the police were unable to control, resulting in death and destruction not seen since the 1960's. Neighborhoods a few blocks from the Thurgood Marshall United States Courthouse in Manhattan were trashed.

For the following reasons, the petition should be granted:

1. The State of New York seized virtual dictatorial powers by executive decree and initially restricted access to their courts to make a redress of

[6] See, Complaint in *Brandon Lewis, et al. v. Andrew M. Cuomo,* W. D. N. Y., 6:20-CV-6316, May 15, 2020, Doc. 1.

grievances more difficult to achieve.

2. The State of New York closed their pistol permit offices and gun stores at a time when they were releasing prisoners and reducing arrests.
3. Public concern about police abuse continued, arising from the killing of George Floyd in broad daylight and the injury to Martin Gugino in Buffalo while the police were enforcing an illegal curfew order of Mayor Byron Brown.
4. Riots across the United States plagued law-abiding citizens while the police were nowhere to be found. They were busy protecting *government* property but could not prevent a pane of Constitution-embossed glass from being cracked at the Robert H. Jackson Courthouse in Buffalo, New York. Note that riots and looting were rare in areas where the civilian population is known to be heavily armed.
5. Now, the same forces that want to violate the right to bear arms want to abolish the police and leave us doubly defenseless.

These events confirm the central arguments of the amended complaint.

The Court should grant the petition, and upon hearing the matter, the order dismissing the amended complaint should be reversed in all respects, with the exception of the dismissal of the Libertarian Party of Erie County and Ginny Rober (all claims) and William Cuthbert and Philp Mayor (regarding prospective injunctive relief and future money damages only), and the case remanded for further proceedings.

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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February 9, 2021

APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LIBERTARIAN PARTY OF ERIE COUNTY, et al.,

Plaintiffs,

Case # 15-CV-654-FPG

v.

DECISION AND ORDER

ANDREW M. CUOMO, et al.,

Defendants.

INTRODUCTION

On July 22, 2015, Plaintiffs filed a Complaint alleging that New York State's firearms licensing laws are unconstitutional. *See* ECF No. 1. After several Defendants moved to dismiss the Complaint, Plaintiffs filed an Amended Complaint on December 23, 2015. ECF Nos. 6, 14, 17, 18. The Amended Complaint alleges that Defendants violated Plaintiffs' Second and Fourteenth Amendment rights by enforcing New York State's firearms licensing laws. ECF No.

17, ¶¶ 55-57, 137. Specifically, Plaintiffs claim that N.Y. Penal Law §§ 265.00(3), 265.01-265.04, 265.20(a)(3), and 400.00 violate the Second and Fourteenth Amendments on their face and as applied to Plaintiffs. *See id.*

All Plaintiffs[1] bring three claims (the "constitutional claims") against Defendants[2]: (1) NYS's firearms licensing laws on their face and as applied to Plaintiffs violate their Fourteenth and Second Amendment rights to possess firearms in their homes; (2) NYS's firearms licensing [**page 1 (original page numbers are in brackets**] laws on their face violate Plaintiffs' Fourteenth and Second Amendment rights to possess firearms in public; and (3) the standards of "good moral character," "proper cause," and "good cause" outlined in N.Y. Penal Law § 400.00 are vague and violate the Due Process Clause of the Fourteenth Amendment. *See* ECF No. 17, ¶¶ 137-41. These claims seek relief pursuant to 28 U.S.C. §§ 2201-2202 and 42 U.S.C. § 1983. ECF No. 17, ¶ 30. Finally, Plaintiff Murtari wishes to institute an N.Y. C.P.L.R. Article 78 proceeding to determine whether Defendant Judge Kehoe failed to perform a duty enjoined on him by law when he rejected Murtari's application for a firearms license. *See* ECF No. 17, ¶¶ 142-44. Plaintiffs sue all Defendants individually and in their official capacities.

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[1] The Libertarian Party of Erie County, Michael Kuzma, Richard Cooper, Ginny Rober, Philip M. Mayor, Michael Rebmann, Edward L. Garrett, David Mongielo, John Murtari, and William A. Cuthbert.

[2] Andrew M. Cuomo, Governor of NYS; Eric T. Schneiderman, NYS Attorney General; Joseph D'Amico, Superintendent of the NYS Police; Hon. Matthew J. Murphy, III, Niagara County Court Judge; Hon. Dennis M. Kehoe, Wayne County Court Judge and Acting NYS Supreme Court Justice; and Hon. M. William Boller, Judge of the NYS Court of Claims and Acting NYS Supreme Court Justice.

ECF No. 17, ¶ 27. Aside from the Article 78 claim, all Plaintiffs seek monetary damages and declaratory and injunctive relief. ECF No. 17, at 20, 25-26.

Currently before the Court is Defendants' Motion to Dismiss for Failure to State a Claim and for Lack of Subject-Matter Jurisdiction. ECF No. 25. For the reasons that follow, Defendants' Motion to Dismiss is GRANTED and Plaintiffs' Amended Complaint is DISMISSED.

BACKGROUND 1. NYS's Firearms Licensing Laws

NYS regulates the possession of firearms through a licensing scheme (N.Y. Penal Law § 400.00) and several criminal statutes (N.Y. Penal Law §§ 265.01-265.04, 265.20(a)(3)). *See Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 85-86 (2d Cir. 2012). Section 400.00 "is the exclusive statutory mechanism for the licensing of firearms in New York State." *Id.* at 85 (citing *O'Connor v. Scarpino*, 83 N.Y.2d 919, 920 (1994)). Generally, NYS prohibits possession of a firearm[3] without a license. *Id.* **[2]**

[3] "A 'firearm' is defined to include pistols and revolvers; shotguns with barrels less than eighteen inches in length; rifles with barrels less than sixteen inches in length; 'any weapon made from a shotgun or rifle' with an overall length of less than twenty-six inches; and assault weapons." *Kachalsky*, 701 F.3d at 85 (citing N.Y. Penal Law § 265.00(3)). The statute does not regulate the possession of rifles and shotguns. *Id.* After NYS passed the Secure Ammunition and Firearms Enforcement Act (SAFE Act), the

To obtain a firearms license under Section 400.00, applicants must be over 21 years old, have "good moral character," have no history of crime or mental illness, and demonstrate no "good cause" to deny the license. *Id.* at 86 (citing N.Y. Penal Law § 400.00(1)(a)-(d), (g)). An applicant must receive a concealed carry license when they show "proper cause" for it. N.Y. Penal Law § 400.00(2)(f). Individuals may obtain a license for at-home possession and/or concealed carry in public. *See id.* § 400.00(2)(a), (f).

2. Allegations in the Amended Complaint[4]

Plaintiffs make a series of general factual allegations for all Plaintiffs followed by specific factual allegations for some of the Plaintiffs. The Amended Complaint contains no factual allegations as to Plaintiffs Libertarian Party of Erie County, Kuzma, Cooper, Rober, Rebmann, or Garrett.

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possession of specifically defined, semi-automatic "assault weapons" was banned, with few exceptions. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 249-50 (2d Cir. 2015) ("*NYSRPA*").

[4] The following allegations are taken from Plaintiffs' Amended Complaint (ECF No. 17) and are accepted as true for the purpose of evaluating Defendants' Motion to Dismiss (ECF No. 25). *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 572 (2007).

a. General Allegations

Plaintiffs make two sets of general allegations. First, they allege that the terms "good moral character," "good cause," and "proper cause" in Section 400.00 are undefinable and therefore violate the Second and Fourteenth Amendments. Second, they assert that the licensing process is expensive, time-consuming, and unnecessarily invades an individual's privacy.

b. Plaintiff Philip M. Mayor

Plaintiff Mayor alleges that, although he is licensed to own a firearm, he remains "under constant threat of having [his] license revoked . . . ." ECF No. 17, ¶ 77. **[3]**

c. Plaintiff David Mongielo

Plaintiff Mongielo alleges that Defendant Judge Murphy suspended his concealed carry license on July 3, 2013, without notice or due process after police officers falsely arrested him. Mongielo was later acquitted of all charges, except a minor cell phone violation. Despite the acquittal, Judge Murphy did not schedule a hearing regarding Mongielo's license until February 18, 2016, over two-and-a-half years after Mongielo's arrest.[5]

[5] Plaintiffs do not address whether Mongielo's license was reinstated in their Amended Complaint. In their Motion to Dismiss, however, Defendants explain that Judge Murphy reinstated Mongielo's license on February 18, 2016, after Mongielo's hearing. ECF No. 26, at 26; ECF No. 27, Ex. C.

d. Plaintiff William A. Cuthbert

Plaintiff Cuthbert also maintains that he is under constant threat of having his license revoked. Moreover, Cuthbert applied for his license on July 19, 2013, but did not receive it until May 18, 2015. Finally, Cuthbert alleges that Defendant Judge Boller violated his Second Amendment rights when he limited Cuthbert's license to hunting and target shooting.

e. Plaintiff John Murtari

On November 24, 2015, Defendant Judge Kehoe sent a letter to Plaintiff Murtari explaining his denial of Murtari's firearms license application.[5] Judge Kehoe found "good cause" to deny the application because Murtari was arrested approximately fifty times, had received four jail sentences totaling over four months in jail, and repeatedly refused to make child support payments.

ECF No. 17, ¶ 98.

LEGAL STANDARD

A complaint will survive a motion to dismiss when it states a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (citing *Bell Atl. Corp.*

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[5] Plaintiffs quote the letter in full in their Amended Complaint. ECF No. 17, ¶ 98. Defendants provide a copy of the letter. ECF No. 27, Ex. E.

v. Twombly, 550 U.S. 544, 555-**[4]**56 (2007)). A claim for relief is plausible when the plaintiff pleads sufficient facts that allow the Court to draw reasonable inferences that the defendant is liable for the alleged conduct. *Id.* In considering the plausibility of a claim, the Court must accept all factual allegations as true and draw all reasonable inferences in the plaintiff's favor. *Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011). At the same time, the Court is not required to accord "[l]egal conclusions, deductions, or opinions couched as factual allegations . . . a presumption of truthfulness." *In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 95 (2d Cir. 2007) (quotation marks omitted).

DISCUSSION

After outlining standing and mootness, the Court addresses whether Plaintiff Libertarian Party of Erie County has standing to maintain this action. The Court next considers standing for Plaintiffs Kuzma, Cooper, Rober, Rebmann, and Garrett. Finally, the Court analyzes standing for Plaintiffs Mayor, Mongielo, Cuthbert, and Murtari individually.

1. Standing

Article III of the Constitution limits the subject-matter jurisdiction of the federal courts to "cases" and "controversies." U.S. CONST. art. III, § 2; *see Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 62 (2d Cir. 2012). Courts require plaintiffs to establish standing to meet the case-or controversy requirement. *W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 106 (2d Cir. 2008). Standing is

"the threshold question in every federal case," *Ross v. Bank of America, N.A.*, 524 F.3d 217, 222 (2d Cir. 2008), and must exist "throughout the course of the proceedings" to maintain jurisdiction, *Etuk v. Slattery*, 936 F.2d 1433, 1441 (2d Cir. 1991).

To establish standing, the plaintiff must demonstrate three elements:

> (1) *injury-in-fact*, which is a "concrete and particularized" harm to a "legally protected interest"; (2) *causation* in the form of a "fairly traceable" connection between the asserted injury-in-fact and the alleged actions of the defendant; and (3) **[5]** *redressability*, or a non-speculative likelihood that the injury can be remedied by the requested relief.

W.R. Huff, 549 F.3d at 106-07 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)) (emphasis in original). The mootness doctrine ensures that the plaintiff's standing "persists throughout the life of a lawsuit." *Amador v. Andrews*, 655 F.3d 89, 99 (2d Cir. 2011).

The plaintiff must establish standing for each claim asserted and for each type of relief sought, *Carver v. City of New York*, 621 F.3d 221, 225 (2d Cir. 2010), "by a preponderance of the evidence," *Giammatteo v. Newton*, 452 F. App'x 24, 27 (2d Cir. 2011) (summary order) (citing *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)).

A plaintiff lacks standing to challenge NYS's licensing laws if he fails to apply for a firearms license in NYS. *United States v. Decastro*, 682 F.3d 160, 164 (2d Cir. 2012). There is an exception to this rule: a plaintiff who fails to apply for a firearms license in NYS has standing if he makes a "substantial showing" that his application "would have been futile." *Id.* (citing *Jackson–Bey v. Hanslmaier*, 115 F.3d 1091, 1096 (2d Cir. 1997)). An unsupported claim of futility, however, is insufficient to excuse a failure to apply. *Jackson–Bey*, 115 F.3d at 1096.

a. Plaintiff Libertarian Party of Erie County Abandoned Its Claims

Defendants argue that Plaintiff Libertarian Party of Erie County lacks standing to bring this action. ECF No. 26, at 24-25. Plaintiffs did not respond to Defendants' argument. *See* ECF No. 29; ECF No. 30, at 9. The Court finds that Plaintiff Libertarian Party of Erie County thus abandoned its claims and they are hereby DISMISSED. *See Moreau v. Peterson*, No. 7:14-cv0201 (NSR), 2015 WL 4272024, at *4 (S.D.N.Y. July 13, 2015) (noting that "[P]laintiff's failure to respond to contentions raised in a motion to dismiss . . . constitutes an abandonment of those claims" (citations omitted)). **[6]**

b. Plaintiffs Kuzma, Cooper, Rober, Rebmann, and Garrett Lack Standing

Defendants argue that Plaintiffs Kuzma, Cooper, Rober, Rebmann, and Garrett do not have standing because (1) the Amended Complaint does not allege that the named Plaintiffs applied for a NYS firearms license; and (2) the named Plaintiffs

made no claim of futility as outlined in *Decastro*. ECF No. 26, at 23-24; ECF No. 30, at 7-8. In response, the named Plaintiffs argue that they object to NYS's firearms licensing laws, and, thus, the futility exception in *Decastro* applies. The Second Circuit rejected a similar argument in *Decastro*. There, Decastro argued that NYS's firearms licensing laws were constitutionally defective. *Decastro*, 682 F.3d at 164. The Second Circuit held that Decastro lacked standing to challenge the licensing laws because he did not apply for a firearms license. *Id.* When Decastro alleged that any firearms application license would be futile, the Second Circuit weighed his argument and rejected it. *Id.*

The named Plaintiffs suffer the same fate. They may object to the licensing laws, but the named Plaintiffs must apply for a firearms license in NYS to have standing to challenge the laws' constitutionality. *Decastro*, 682 F.3d at 164. Of course, the named Plaintiffs may avoid that requirement by making a substantial showing that their applications would be futile. *Id.* Here, however, they do not allege futility in the Amended Complaint. As noted above, unsupported claims of futility are insufficient to excuse a failure to apply. *Jackson-Bey*, 115 F.3d at 1096.

Accordingly, the named Plaintiffs' arguments fail and their claims are DISMISSED.

c. Plaintiff Philip A. Mayor Lacks Standing

Defendants argue that Plaintiff Mayor also lacks standing because he currently holds an unrestricted NYS firearms license. ECF No. 26, at 25. Mayor argues that he has standing for several reasons: (1) he is under constant threat of having his license revoked and of being arrested if he does not carry his permit at all times; (2) the process to add firearms onto his license is **[7]** cumbersome; and (3) he disagrees with the existence of NYS's firearms licensing laws. ECF No. 29, at 4.

No court has held that an individual who applied for and received a firearms license has standing to challenge the constitutional validity of the licensing laws; indeed, courts have only found standing where the individual applied for a license and was denied. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 575 (2008) (Respondent applied for a handgun registration certificate and was denied); *Decastro*, 682 F.3d at 164; *Kachalsky*, 701 F.3d at 84-84 (all plaintiffs applied for a concealed carry license and were denied). Moreover, based on the standing precedent discussed above, Mayor cannot have an injury when the licensing laws do not prevent him from owning firearms.

Mayor's remaining arguments are meritless. The constant threat of revocation and arrest is the "possible future injury" the Supreme Court has found insufficient to establish standing. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013); *see also Whitmore v. Arkansas*, 495 U.S. 149, 157-58 (1990).

Those alleged threats take the Court into "the area of speculation and conjecture," which is beyond its jurisdiction. *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974). Furthermore, while the process of adding firearms onto Mayor's license may be cumbersome, mere inconvenience does not establish standing. *Lee v. Va. State Bd. of Elections*, 155 F. Supp. 3d 572, 579 (E.D. Va. 2015). Finally, as explained in *Decastro*, Mayor does not have standing to challenge NYS's firearms licensing laws merely because he disagrees with them. *Decastro*, 682 F.3d at 164. He must have some other injury to establish standing, which he does not.

Accordingly, Mayor's claims are DISMISSED. **[8]**

d. Plaintiff David Mongielo's Claims Are Moot

Defendants argue that Plaintiff Mongielo also lacks standing because he currently holds an unrestricted NYS firearms license. ECF No. 26, at 25. Defendant Judge Murphy suspended Mongielo's firearms license on July 3, 2013, but reinstated it on February 18, 2016. ECF No. 26, at 26. Defendants thus challenge Mongielo's standing under the mootness doctrine. Mongielo contends that (1) NYS's firearms licensing laws are constitutionally invalid pursuant to the Supreme Court's decisions in *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742, 748 (2010); and (2) Mongielo is under constant threat of having his license suspended again. ECF No. 29, at 5.

Mongielo's arguments are meritless. First, his conclusion that NYS's firearms licensing laws are unconstitutional under *Heller* and *McDonald* is unfounded.

Heller, like *McDonald*, makes clear that the Second Amendment right to bear arms is limited and does not grant American citizens "the right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626; *McDonald*, 561 U.S. at 786. Moreover, *Heller* and *McDonald* struck down complete bans of handgun possession at home. *Heller*, 554 U.S. at 635; *McDonald*, 561 U.S. at 791. Those cases did not hold that a state's firearms licensing laws were unconstitutional, which is what Mongielo and his co-Plaintiffs argue here. Finally, the *Heller* court declined to address a possible licensing requirement for handguns in the District of Columbia.

Heller, 554 U.S. at 631. Thus, holding that NYS's firearms licensing law is unconstitutional under *Heller* and *McDonald* would stretch the conclusions of both decisions well beyond their scope.

The Court declines to do so.

Second, Mongielo's argument that he is under constant threat of having his license suspended again is also meritless. As discussed above, Mongielo does not have standing to **[9]** challenge NYS's firearms licensing laws when he has an unrestricted NYS firearms license. The very licensing laws that Mongielo seeks to challenge allow him to own firearms. Furthermore, while Mongielo has had his license suspended, the possibility that it will be suspended again is speculative. Mongielo asks this Court to hold NYS's licensing laws invalid because a licensing officer *may*, at an unknown time in the future, decide to suspend Mongielo's

firearms license. This alleged threat takes the Court into "the area of speculation and conjecture," which is beyond its jurisdiction. *O'Shea*, 414 U.S. at 497. Accordingly, Mongielo's claims are DISMISSED.

e. Plaintiff Cuthbert Has Established an Injury as to the Second and Third Claims

Defendants argue that Plaintiff Cuthbert lacks standing to challenge NYS's firearms licensing laws regarding at-home possession because he has a limited NYS firearms license that allows him to possess a firearm at home and carry a firearm outside his home for target shooting and hunting. ECF No. 26, at 27-28. Defendants, however, concede that Cuthbert "may" have standing to challenge the "proper cause" requirement for a concealed carry license. *Id.* Cuthbert contends that he has standing to challenge at-home possession for the same reasons Plaintiffs Kuzma, Cooper, Rober, Rebmann, Garrett, and Mayor have standing. ECF No. 29, at 5. Cuthbert also asserts that he has standing to challenge the "proper cause" requirement. *Id.*

The Court agrees with Defendants, and partially with Cuthbert. Just as Plaintiffs Kuzma, Cooper, Rober, Rebmann, Garrett, and Mayor lack standing to challenge the standards for at-home possession, so too does Cuthbert. Cuthbert cannot challenge a statute that allows him to exercise his right to possess a firearm in his home. *See Decastro*, 682 F.3d at 164. *Decastro* also dictates that Cuthbert does not

have standing to challenge NYS's firearms licensing laws regarding at home possession merely because he disagrees with them. *Id.* **[10]**

Cuthbert, however, does have standing[7] to challenge the "proper cause" requirement for a concealed carry license because he established an injury: he applied for the license and was denied. *Kachalsky v. Cacace*, 817 F. Supp. 2d 235, 248-50 (S.D.N.Y. 2011). Accordingly, only the first claim is DISMISSED as to him.

f. Plaintiff Murtari Has Established an Injury for All Claims

Defendants concede that Murtari has alleged an injury for all claims in the Amended Complaint. ECF No. 26, at 28-29. The Court agrees.

[7] Defendants argue that no Plaintiff, including Cuthbert and Murtari, has standing to bring the constitutional claims because the Amended Complaint does not challenge N.Y. Penal Law provisions that criminalize possession of a firearm without a license. ECF No. 26, at 29 n.14. The Court disagrees. A plaintiff's claims challenging the constitutional validity of any statutes criminalizing possession of a firearm without a license are subsumed into a plaintiff's claims challenging a firearms licensing law where the plaintiff applied for the license and was denied. *Young v. Hawaii*, 911 F. Supp. 2d 972, 987 (D. Haw. 2012) (citing *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007), *aff'd sub nom.*, *Heller*, 554 U.S. at 570). The plaintiff also has standing to sue on both grounds. *Id.* Accordingly, here, any Plaintiff who applied for a license and was denied is also challenging N.Y. Penal Law provisions that criminalize possession of a firearm without a license, and those Plaintiffs have standing to challenge those laws.

g. Plaintiffs Murtari and Cuthbert Have Established Causation as to Defendant Judges Kehoe and Boller, Respectively

Defendants argue that Murtari has not established the causation requirement for standing for any Defendant except Judge Kehoe. ECF No. 26, at 29. Murtari appears to concede the point, since he does not address the argument in his response. *See* ECF No. 30, at 9.

Regardless of whether Murtari concedes, the Court agrees with Defendants. Murtari's injury—the denial of his firearms license application—is "fairly traceable" only to Judge Kehoe. None of the other Defendants caused Murtari's injury. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (noting that "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant" (quotation marks omitted) (alterations in original)); *Kuck v. Danaher*, 822 F. **[11]** Supp. 2d 109, 138 (D. Conn. 2011) (finding that plaintiffs did not have standing to challenge a defendant's actions who did not cause plaintiffs' injury).

Defendants do not make the same argument for Cuthbert's claims. The Court, however, may analyze subject-matter jurisdiction *sua sponte*, since it is not waivable. *Lyndonville Sav. Bank & Tr. Co. v. Lussier*, 211 F.3d 697, 700 (2d Cir. 2000); *see also Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 250 (2d

Cir. 2008). The Court finds that Cuthbert's injury is "fairly traceable" only to Judge Boller because none of the other Defendants were involved with Cuthbert's injury.

h. Plaintiffs Murtari and Cuthbert Have Established Redressability as to Defendant Judges Kehoe and Boller, Respectively, and Thus Have Standing

Finally, Murtari and Cuthbert have established a "non-speculative likelihood" that their injuries will be remedied by the requested relief. Finding NYS's firearms licensing laws unconstitutional will allow them to possess firearms without restraint. Consequently, Murtari has standing to bring all four claims against Judge Kehoe, while Cuthbert has standing to bring the second and third claims against Judge Boller.

Accordingly, all claims against Defendants Cuomo, Schneiderman, D'Amico, and Judge Murphy are DISMISSED. The Court next analyzes judicial immunity for Judges Kehoe and Boller.

2. Defendant Judges Kehoe and Boller Are Entitled to Judicial Immunity from Suit for Money Damages and Injunctive Relief in Their Individual Capacities

"[J]udges generally have absolute immunity from suits for money damages for their judicial actions." *Bliven v. Hunt*, 579 F.3d 204, 209 (2d Cir. 2009) (citations omitted). The immunity is from *suit*, not damages. *Mireles v. Waco*, 502 U.S. 9, 11 (1991). Moreover, "[t]he 1996 Congressional amendments to § 1983 bar injunctive relief, unless a declaratory decree was **[12]** violated or declaratory relief was unavailable." *Neroni v. Coccoma*, No. 3:13-cv-1340 (GLS/DEP), 2014 WL 2532482, at *6 (N.D.N.Y. June 5, 2014) (citing *Montero v. Travis*, 171 F.3d 757, 761 (2d Cir. 1999)). Therefore, a judge is immune from all lawsuits unless she "has acted either beyond [her] judicial capacity or 'in the complete absence of all jurisdiction.'" *Id.* (quoting *Mireles*, 502 U.S. at 12). Importantly, "the scope of [a] judge's jurisdiction must be construed broadly where the issue is" judicial immunity. *Aron v. Becker*, 48 F. Supp. 3d 347, 363 (N.D.N.Y. 2014) (quoting *Stump v. Sparkman*, 435 U.S. 349, 356 (1978)).

To determine whether an act is "judicial," the Court examines the act itself, and not the actor. *Bliven*, 579 F.3d at 209-10. An act is "judicial" when a judge normally performs that act and the parties interact with the judge in her judicial capacity. *Mireles*, 502 U.S. at 12. The Supreme Court has "generally concluded that acts arising out of, or related to, individual cases before the judge are considered judicial in nature." *Bliven*, 579 F.3d at 210. Examples include "issuing a search warrant; directing court officers to bring a particular attorney before the judge for a judicial proceeding; granting a petition for sterilization; and disbarring an attorney." *Id.* (citations omitted). "The fact that a proceeding is

'informal and *ex parte* . . . has not been thought to imply that an act otherwise within a judge's lawful jurisdiction was deprived of its judicial character.'" *Id.* (quoting *Forrester v. White*, 484 U.S. 219, 225-26 (1988)). "The Second Circuit has noted that '[t]he principal hallmark of the judicial function is a decision in relation to a particular case.'" *Aron*, 48 F. Supp. 3d at 365 (quoting *Bliven*, 579 F.3d at 211).

Defendants argue that Judges Kehoe and Boller are immune from suit for money damages in their judicial capacities.[8] ECF No. 26, at 50. Plaintiffs Cuthbert and Murtari concede **[13]** that judges are immune from suit for money damages for judicial acts. ECF No. 29, at 13. They argue, however, that deciding firearms license applications is an administrative act, not a judicial one. *Id.* Plaintiffs incorrectly analyze Defendants' acts. Based on well-established law, Judges Kehoe and Boller were acting in their judicial capacities when they ruled on Cuthbert and Murtari's firearms license applications. First, Judges Kehoe and Boller are authorized to evaluate firearms license applications because they are judges. *See Aron*, 48 F. Supp. 3d at 365; *see also* N.Y. Penal Law §§ 265.00(10), 400.00. Of course, as noted above, an act is not judicial simply because the actor is a judge. Here, however, Judges Kehoe and Boller may evaluate firearms

[8] Plaintiffs use the phrase "judicial capacities." ECF No. 26, at 50. For clarity, the law states that judges are immune from suits in law and equity in their individual capacities for judicial acts. *See Aron v. Becker*, 48 F. Supp. 3d 347, 363 (N.D.N.Y. 2014).

license applications because they are judges *and* the relevant law grants that authority to judges specifically. Consequently, it would be illogical to find that Judges Kehoe and Boller were acting outside of their judicial capacity. *Aron*, 48 F. Supp. 3d at 365.

Moreover, Judges Kehoe and Boller's acts carry all the hallmarks of judicial acts: their determinations arose out of an individual case before them, which is the "principal hallmark" of a judicial act; a judge normally[9] performs those acts; and Cuthbert and Murtari were dealing with Judges Kehoe and Boller in their capacity as judges.

Murtari and Cuthbert argue that Judges Kehoe and Boller received *ex parte* communications in their role as licensing officers in violation of the Judicial Code of Conduct, and they therefore could not be acting in their judicial capacity when deciding firearms license applications. ECF No. 29, at 14. As noted above, however, an informal or *ex parte* proceeding does not strip an act of its judicial character. *Bliven*, 579 F.3d at 210 (quoting *Forrester*, 484 U.S. at 225-26). Based on this precedent, the Court declines to change its analysis of Judges Kehoe and Boller's acts. **[14]**

Finally, Plaintiffs attack the *Aron* court's reasoning and argue that the *Aron* court "basically said that the defendant was immune from suit because he was

[9] With the exception of judges in New York City, Nassau County, and some towns in Suffolk County, all state judges in NYS determine firearms license applications. *See* N.Y. Penal Law § 265.00(10)

called a 'judge' by statute" and "judges are not immune from suit for administrative activities even though those who perform them are *called* judges and even though those functions are statutorily prescribed or bestowed ex officio." ECF No. 29, at 14 (emphasis in original). However, the court's analysis in *Aron* is thorough and based on well-established Supreme Court and Second Circuit precedent. Plaintiffs, on the other hand, provide little or no legal authority to support their arguments. Plaintiffs are correct that the *Aron* court, based on Northern District of New York precedent, reasoned that a judge authorized to act because she is a judge is therefore acting in her judicial capacity. What Plaintiffs fail to grasp, however, is that this analysis is based on both NYS's firearms licensing laws and the functional analysis framework for judicial acts handed down by the Supreme Court and the Second Circuit. Without their own legal authority to counter the substantial case law that Defendants and the *Aron* court provide, Plaintiffs' arguments must fail. Accordingly, the Court finds that Judges Kehoe and Boller are immune from suit for money damages and injunctive relief[10] in their individual capacities, and all claims against them in their individual capacities are

DISMISSED.

[10] Plaintiffs do not argue that Judges Kehoe and Boller should not be immune from suit in their individual capacities for injunctive relief. Consequently, the Court rules in Defendants' favor.

3. Defendant Judges Kehoe and Boller Are Entitled to Sovereign Immunity from Suit for Money Damages in Their Official Capacities

Next, Defendants challenge Plaintiffs' claims for damages against Defendants in their official capacity under the Eleventh Amendment. ECF No. 26, at 51. Notably, they do not challenge Plaintiffs' claims for injunctive relief. Plaintiffs did not respond to Defendants' arguments. Judges Kehoe and Boller are state officials who enjoy immunity from suits for **[15]** damages in their official capacities. *Aron*, 48 F. Supp. 3d at 366-67. Accordingly, the Court finds that Plaintiffs' claims for damages against Judges Kehoe and Boller in their official capacities are DISMISSED.

Cuthbert is left with the second and third claims in the Amended Complaint for injunctive relief against Judge Boller, while Murtari has the three constitutional claims for injunctive relief, and the Article 78 claim, against Judge Kehoe. ECF No. 17, ¶¶ 139-41. The Court addresses each in turn below, beginning with the void-for-vagueness claim.

4. The Third Claim Fails as to Plaintiffs Cuthbert and Murtari Because the Standards in N.Y. Penal Law § 400.00 Are Not Unconstitutionally Vague

Cuthbert and Murtari allege that Section 400.00 is unconstitutionally vague.[11] ECF No. 17, ¶¶ 139-41. Specifically, they contend that the terms "good moral character," "proper cause," and "good cause" in Section 400.00[12] are "not capable of definition in such a way that puts an applicant, a licensing officer, or a reviewing court on notice of the meaning of the terms." *Id.* Before the Court analyzes Plaintiffs' claim, the Court must determine whether Plaintiffs challenge Section 400.00 facially or as applied to them. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010); *see also N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 249-50 (2d Cir. 2015) ("*NYSRPA*"). To determine whether a claim is facial or as-applied, "[t]he label is not what matters." *Doe*, 561 U.S. at 194. Rather, it is the plaintiff's claim and the relief that follows. *Id.* A claim is facial if it "challenges application of

[11] While unclear, it appears that Plaintiffs allege a claim that the "serious offense" standard in Section 400.00 is overbroad and thus violates the Constitution. ECF No. 17, ¶¶ 137-38. As the Second Circuit pointed out, however, there is no overbreadth argument in the Second Amendment context. *Decastro*, 682 F.3d 169. Consequently, Plaintiffs' overbreadth claim fails to the extent they allege it.

[12] As explained above, Cuthbert only has standing to challenge the "proper cause" standard, while Murtari has standing to challenge all three standards. The Court addresses the vagueness claims for both Plaintiffs in one section for the sake of brevity.

the law more broadly." *Id.* A claim is as applied if it is limited to a plaintiff's particular case. *See id.* **[16]**

Here, Defendants argue that Plaintiffs challenge Section 400.00 facially, and not as applied to them. ECF No. 26, at 47 n.26. Specifically, they state that Plaintiffs have not alleged factual or legal arguments to support an as-applied vagueness claim. *Id.* The Court agrees.

First, neither the Amended Complaint nor Plaintiffs' response to the Motion to Dismiss state that the standards were unconstitutional as applied to Plaintiffs. Plaintiffs argue only that the standards are unconstitutional because they cannot be defined. ECF No. 17, ¶¶ 139-141; ECF No. 29, at 12-13.

Second, while Cuthbert and Murtari allege that they were denied unlimited firearms licenses, they do not assert that their applications were denied due to the allegedly undefinable standards.

Neither the Amended Complaint nor Plaintiffs' response to the Motion to Dismiss contain any language limiting Plaintiffs' vagueness claim to the particular cases of Cuthbert and Murtari. Instead, Plaintiffs challenge the application of the standards more broadly. Accordingly, the Court finds that Cuthbert and Murtari allege a facial vagueness claim against the standards in Section 400.00.

"[T]o succeed on a facial challenge, the challenger must establish that *no set of circumstances* exists under which the [laws] would be valid." *NYSRPA*, 804 F.3d at 265 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (quotation

marks omitted) (emphasis in quotation).[13] Consequently, a facial challenge is "the most difficult challenge to mount successfully." *Id.* **[17]**

Here, Defendants argue that there are "innumerable factual circumstances" in which the standards outlined in Section 400.00 are constitutionally valid. ECF No. 26, at 48. They give one example: an individual who develops dementia and paranoid schizophrenia threatens to harm others, shoots himself, has an alcohol or drug addiction, and repeatedly engages in reckless activity with his firearm while intoxicated. ECF No. 26, at 47-48 (quoting *Kuck*, 822 F. Supp. 2d at 13033). In response, Plaintiffs maintain that the standards in Section 400.00 are not defined. ECF No. 29, at 12-13.

Whether Section 400.00 defines the standards is irrelevant. As noted above, Plaintiffs must show that there are no set of circumstances under which the standards in Section 400.00 would be valid. They have failed to do so. Defendants provide one of many sets of circumstances in which the Section 400.00 standards would be valid if applied. Indeed, under *Heller*, which Plaintiffs mention favorably many times in their response to the Motion to Dismiss,

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[13] The *Kuck* court expressed some uncertainty over whether to apply the Supreme Court's standard for vagueness from *Salerno* or from *City of Chicago v. Morales*, 527 U.S. 41, 119 (1999). *Kuck*, 822 F. Supp. 2d at 130-33. As the *Kuck* court noted, however, only a plurality of the Supreme Court agreed to the *Morales* standard, while a majority endorsed the standard in *Salerno*. *Kuck*, 822 F. Supp. 2d at 132. Moreover, the Second Circuit recently used the *Salerno* standard in a context similar to this case. *NYSRPA*, 804 F.3d at 265.

prohibiting felons and the mentally ill from possessing firearms is "presumptively lawful." *NYSRPA*, 804 F.3d at 253. *Heller* thus provides a set of circumstances in which Section 400.00 would be valid: prohibiting a felon or mentally ill person from obtaining a firearms license. Accordingly, the third claim is DISMISSED.

5. The Second Claim Fails as to Plaintiffs Cuthbert and Murtari Because the "Proper Cause" Standard Is Constitutional Pursuant to Binding Precedent

Defendants argue that Cuthbert's challenge against the "proper cause" standard for a concealed carry firearms license in NYS fails because binding precedent found the "proper clause" requirement constitutional. ECF No. 26, at 34. In their Amended Complaint, Plaintiffs acknowledge that "this requirement has been ruled constitutional by the . . . Second Circuit," but they intend to preserve the issue for Second Circuit or Supreme Court review. ECF No. 17, ¶¶ 7374. Plaintiffs do not respond to Defendants' argument. As Plaintiffs and Defendants have noted, **[18]** the Second Circuit recently found the "proper clause" requirement constitutional. *See Kachalsky*, 701 F.3d at 101. *Kachalsky* is still good law in this Circuit. Accordingly, the second claim is DISMISSED as to Cuthbert.

The Court is left with the first and fourth claims as to Murtari. The first claim contains both facial and as-applied challenges to NYS's licensing laws. The Court addresses each below.

6. Plaintiff John Murtari's As-Applied and Facial Challenges to NYS's Firearms Licensing Laws under the First Claim Fail Because the Licensing Laws Satisfy Intermediate Scrutiny and Would Be Valid under Numerous Circumstances

a. As-Applied Challenge

Under the Second Amendment, "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. In *Heller*, the Supreme Court announced that the Second Amendment codified an individual right to possess and carry weapons "in common use" by citizens for "lawful purposes like self-defense." *Heller*, 554 U.S. at 624. This right is at its "zenith within the home." *Kachalsky*, 701 F.3d at 89; *see Heller*, 554 U.S. at 628-29, 635 ("The Second Amendment . . . surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.").

Simultaneously, *Heller* described limits on the Second Amendment right that are "presumptively lawful." Namely, States may prohibit "possession of firearms by felons and the mentally ill, . . . [possession] of firearms in sensitive places such as schools and government buildings, [and may impose] conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626-27. **[19]**

Outside of these explicit limits, however, *Heller* provides "little guidance for resolving future Second Amendment challenges." *NYSRPA*, 804 F.3d at 253. The Supreme Court's subsequent decision in *McDonald* provides no further direction. *Id.* at 254.

The Second Circuit filled this void with its decisions in *Decastro*, *Kachalsky*, and *NYSRPA*. In these cases, the Second Circuit announced a two-step inquiry for laws challenged under the Second Amendment. The Court must consider (1) whether the law burdens conduct protected by the Second Amendment, and then (2) the appropriate level of scrutiny. *See NYSRPA*, 804 F.3d at 254. Of course, if the law does not burden conduct protected by the Second Amendment, it stands. *Id.*

i. NYS's Firearms Licensing Laws Burden Conduct Protected by the Second Amendment

Under the first step, the Court looks to conduct the Second Amendment protects, namely, possession of weapons that are (1) in common use and (2) typically possessed by law-abiding citizens for lawful purposes. *Id.* (quoting *Heller*, 554 U.S. at 625-27). Handguns satisfy both criteria, but all "bearable arms" enjoy prima facie protection by the Second Amendment. *See NYSRPA*, 804 F.3d at 255-56 (quoting *Heller*, 554 U.S. at 582, 629).

Here, NYS's firearms licensing laws burden conduct protected by the Second Amendment. First, the licensing laws unquestionably places restrictions on the

possession of firearms "in common use." Individuals in NYS may not possess any firearms without a license, except rifles and shotguns. *See* N.Y. Penal Law §§ 265.00(3), 400.00. Included in that category are handguns, which the *Heller* court noted are "the most popular weapon chosen by Americans for self-defense in the home. *Heller*, 554 U.S. at 629.

For the same reasons, NYS's firearms licensing laws restrict the possession of weapons that are typically possessed by law-abiding citizens for lawful purposes. Indeed, under *Heller*, **[20]** handguns are the most commonly possessed firearm for the ultimate lawful purpose—defending the home.

In a footnote, Defendants urge the Court to find that NYS's firearms licensing laws do not burden conduct protected by the Second Amendment. In support, they note that the *Kachalsky* court *assumed*, but did not decide, that NYS's concealed carry requirements burdened conduct protected by the Second Amendment. ECF No. 26, at 39 n.22. Moreover, they argue that NYS's licensing laws qualify as a "longstanding" regulation that the *Heller* court determined is "presumptively lawful." *Id.*

The Court is not persuaded. First, Defendants' characterization of the *Kachalsky* decision is incorrect. The Second Circuit assumed that Second Amendment protections, and the *Heller* decision, had "*some* application in the very different context of the public possession of firearms." *Kachalsky*, 701 F.3d at 89 (emphasis

in original). The Second Circuit did not reach the question of whether NYS's concealed carry requirements burdened Second Amendment protections.

Even if Defendants' characterization were correct, requirements for possession of firearms at home carry the highest level of protection under the Second Amendment, a fact noted repeatedly in *Kachalsky* and *Heller*. Therefore, the context in this case is completely different from the concealed carry requirements analyzed in *Kachalsky*.

Finally, given the framework outlined in *NYSRPA*, whether NYS's firearms licensing laws are "longstanding" or "presumptively lawful" is irrelevant at this stage of this analysis.[14] The Court is required to determine whether the licensing laws burden possession of weapons that are **[21]** in common use and typically possessed by law-abiding citizens for lawful purposes. The Court finds that it does.

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[14] The Court again disagrees with Defendants' characterization of the *Kachalsky* decision. The *Kachalsky* court did not determine that "New York's firearms licensing [laws are] 'longstanding,'" as Defendants contend. ECF No. 26, at 39 n.22. It concluded that the "proper cause" requirement is longstanding. *Kachalsky*, 701 F.3d at 90 n.11. More importantly, the *Kachalsky* court noted that the "longstanding" and "presumptively lawful" language in *Heller* is not "a talismanic formula for determining whether a law regulating firearms is consistent with the Second Amendment." *Id.* While the language is informative, "it simply makes clear that the Second Amendment right is not unlimited."

Id.

The Court now must consider what level of scrutiny to apply to NYS's firearms licensing laws. *NYSRPA*, 804 F.3d at 257. While *Heller* provided no guidance on the level of scrutiny applicable to firearms regulations, the Second Circuit has determined that heightened scrutiny is not always appropriate. *Id.* at 258. The Court must, therefore, determine whether heightened scrutiny applies. *Id.*

ii. Intermediate Scrutiny Is Appropriate

To determine whether heightened scrutiny applies, the Court considers two factors: (1) how close the law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on the right. *Id.* (citing *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011)). As to the second factor, heightened scrutiny is appropriate only where the law "substantially burdens" Second Amendment protections. *NYSRPA*, 804 F.3d at 259. There is no substantial burden "if adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense." *Id.* (quoting *Decastro*, 682 F.3d at 168). Indeed, where a law does not prevent law-abiding, responsible citizens from possessing firearms "in defense of hearth and home," it does not substantially burden the core Second Amendment right. *See Aron*, 48 F. Supp. 3d at 371.

First, NYS's firearms licensing laws implicate the core of the Second Amendment right to possess handguns in "defense of hearth and home." *Heller*, 554 U.S. at 628-29, 635. Although NYS's licensing laws do not ban firearm possession outright as the laws in *Heller* and *McDonald* did, they still place limits on the

ability of law-abiding citizens to own firearms for self-defense in the home, where Second Amendment protections are at their "zenith." *Kachalsky*, 701 F.3d at 89; *see also NYSRPA*, 804 F.3d at 258 (concluding that a ban on semiautomatic assault weapons and **[22]** large-capacity magazines in the home implicates the core of the Second Amendment's protections).

While NYS's firearms licensing laws implicate the core Second Amendment right, they do not substantially burden it. The licensing laws place no more than "marginal, incremental, or even appreciable restraint on the right to keep and bear arms." *NYSRPA*, 804 F.3d at 259 (quoting *Decastro*, 682 F.3d at 166). As Plaintiffs note, law-abiding, responsible citizens face nothing more than time, expense, and questioning of close friends or relatives. ECF No. 17, ¶¶ 68-72. It is only "the narrow class of persons who are adjudged to lack the characteristics necessary for the safe possession of a handgun" that face a substantial burden on the core Second Amendment protection via NYS's firearms licensing laws. *Aron*, 48 F. Supp. 3d at 371.

Plaintiffs' own experiences support the Court's conclusion. It is only Murtari who was denied a license to possess a firearm in his home. *See* ECF No. 17, ¶ 97. Murtari plainly fits into the "narrow class of persons" noted in *Aron*—he has shown repeated indifference for laws at the state and federal level. *See* ECF No. 27, Ex. E (letter from Judge Kehoe denying Murtari's application for a firearms license in full because he was arrested approximately fifty times, had received

four jail sentences totaling over four months in jail, and repeatedly refused to make child support payments).

Accordingly, because the licensing laws implicate the core Second Amendment right, but does not substantially burden it, the Court applies intermediate scrutiny. *See, e.g., Aron*, 438 F. Supp. 3d at 371; *United States v. Chovan*, 753 F.3d 1127, 1139 (9th Cir. 2013) (applying intermediate scrutiny where the law did not implicate the core Second Amendment right, but did substantially burden it); *Kachalsky*, 701 F.3d at 96 (applying intermediate scrutiny to the "proper cause" standard). **[23]**

iii. NYS's Firearms Licensing Laws Satisfy Intermediate Scrutiny

In the context of the Second Amendment, the question is whether the laws are "substantially related to the achievement of an important government interest." *NYSRPA*, 804 F.3d at 261 (quoting *Kachalsky*, 701 F.3d at 96). Unquestionably, NYS has "substantial, indeed compelling, governmental interests in public safety and crime prevention." *Id.* Consequently, this Court need only determine "whether the challenged laws are 'substantially related' to the achievement of that governmental interest." *Id.*

As the Second Circuit explained, the "fit between the challenged regulation [and the government interest] need only be substantial, not perfect." *Id.* "So long as the [D]efendants produce evidence that 'fairly support[s]' their rationale, the laws

will pass constitutional muster. *NYSRPA*, 804 F.3d at 261 (quoting *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002) (plurality)).

The Court also affords "substantial deference to the predictive judgments of the legislature." *NYSRPA*, 804 F.3d at 261 (quoting *Kachalsky*, 701 F.3d at 97). "In the context of firearm regulation, the legislature is 'far better equipped than the judiciary' to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks." *Id.* The Court must only ensure that NYS has "drawn reasonable inferences based on substantial evidence." *Id.* at 262 (quoting *TBS v. FCC*, 520 U.S. 180, 195 (1997)).

Here, NYS's firearms licensing laws are substantially related to NYS's governmental interest. The prior decisions within this Circuit are clear: the licensing laws are designed to ensure that "only law-abiding, responsible citizens are allowed to possess" a firearm. *Aron*, 438 F. Supp. 3d at 372. Moreover, the laws "promote[] public safety and prevent gun violence" by ensuring **[24]** that classes of individuals who do not have the necessary character and qualities to possess firearms are not able to do so. *See Kwong v. Bloomberg*, 723 F.3d 160, 168 (2d Cir. 2013). Murtari provides nothing in the Amended Complaint to counter the substantial body of law that favors Defendants.

Consequently, he has not alleged a plausible claim for relief.

b. Facial Challenge

Finally, Murtari's facial challenge to the licensing laws must also fail. In order to succeed in his facial challenge, Murtari would need to show that "*no set of circumstances* exists under which the [laws] would be valid." *NYSRPA*, 804 F.3d at 265 (quoting *Salerno*, 481 U.S. at 745) (quotation marks omitted) (emphasis in quotation). Because the licensing laws do not substantially burden the core Second Amendment right, they do not infringe the Second Amendment right to keep and bear arms, and numerous circumstances exist under which the act would be valid. *See Decastro*, 682 F.3d at 168. Accordingly, Murtari's as-applied and facial challenges to NYS's firearms licensing laws fail, and the second claim is DISMISSED.

7. The Court Declines to Institute an Article 78 Proceeding Against Defendant Judge Kehoe

Defendants argue that federal courts in NYS have universally declined to exercise supplemental jurisdiction over Article 78 claims. ECF No. 26, at 54. Plaintiffs contend that an Article 78 proceeding in this Court would be "faster" than one in state court and appropriate because Defendants are required to "produce a complete record" for the Court. ECF No. 29, at 16-17. Plaintiffs' response is unclear and fails to address Defendants' argument. In any case, Defendants are correct—"[t]he overwhelming majority of district courts confronted with the question of whether to exercise supplemental jurisdiction over Article 78 claims have found that they are

without power to do so or have declined to do so." *Coastal Commc'ns Serv., Inc. v. City of New York*, 658 F. Supp. 2d 425, 459 (E.D.N.Y. 2009). The Court joins the vast majority of our **[25]** sister courts and declines to exercise jurisdiction over Murtari's Article 78 claim. Consequently, it is DISMISSED.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss (ECF No. 25) is GRANTED and Plaintiffs' Amended Complaint (ECF No. 17) is DISMISSED. The Clerk of Court is directed to close this case.

IT IS SO ORDERED.

Dated: January 10, 2018

Rochester, New York

HON. FRANK P. GERACI, JR.

Chief Judge

United States District Court

Judgment in a Civil Case

United States District Court

WESTERN DISTRICT OF NEW YORK

LIBERTARIAN PARTY OF

ERIE COUNTY, et al

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 15-CV-654-G

v.

ANDREW M. CUOMO, et al

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: that the Defendants' motion to dismiss is granted and the Plaintiffs' amended complaint is dismissed. The Clerk of Court is directed to close this case.

Date: January 11, 2018 MARY C. LOEWENGUTH

CLERK OF COURT

By: s/K.McMillan

Deputy Clerk

18-386

Libertarian Party of Erie County v. Cuomo

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

- - - - - -

August Term, 2018

(Argued: February 20, 2019 Decided: August 11, 2020)

Docket No. 18-386

LIBERTARIAN PARTY OF ERIE COUNTY, MICHAEL KUZMA, RICHARD COOPER, GINNY ROBER, PHILIP M. MAYOR, MICHAEL REBMANN, EDWARD L. GARRETT, DAVID MONGIELO, JOHN MURTARI, and WILLIAM A. CUTHBERT,

Plaintiffs-Appellants,

- v. -

ANDREW M. CUOMO, individually and as Governor of the State of New York, LETITIA JAMES, individually and as Attorney General of the State of New York*, JOSEPH A. D'AMICO, individually and as Superintendent of the New York State Police, MATTHEW J. MURPHY, III, individually and as Niagara County pistol permit licensing officer, DENNIS M. KEHOE, individually and as Wayne County pistol permit **[page 1—original page numbers are in brackets]**

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* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Letitia James is automatically substituted for former Attorney General Eric T. Schneiderman as a defendant in this case.

licensing officer, and M. WILLIAM BOLLER, individually and as Erie County pistol permit licensing officer,

Defendants-Appellees.**

Before: KEARSE, WALKER, and JACOBS, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the Western District of New York, Frank P. Geraci, Jr., *Chief Judge*, dismissing, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), plaintiffs' amended complaint brought under 42 U.S.C. ' 1983 against various state officials, alleging that New York State's firearm licensing laws, *see* N.Y. Penal Law ' 400.00, violate plaintiffs' rights under the Second and Fourteenth Amendments to the Constitution. The district court dismissed on grounds of mootness or lack of standing the claims of all but two plaintiffs, against all but two defendants, for failure to plead injury-in-fact or traceability of injury to other defendants; dismissed claims for money damages against the two remaining defendants on grounds of judicial and Eleventh Amendment immunity; dismissed individual-capacity claims against those defendants for injunctive relief as barred by 42 U.S.C. ' 1983; and dismissed the surviving claims on the grounds that the '400.00 licensing criteria of "good **[2]**

** The Clerk of Court is instructed to amend the official caption to conform with the above.

moral character," "good cause," and "proper cause" are not unconstitutionally vague, and that the statutory scheme, while impacting Second Amendment rights, does not

burden those rights substantially, closely relates to the State's interests in public safety, and thus survives intermediate scrutiny. On appeal, plaintiffs, while expressly not seeking reversal of the dismissal as to Libertarian Party, principally contend that in dismissing the claims of the individual plaintiffs, the district court erred in its rulings on standing, mootness, and judicial immunity; in applying intermediate scrutiny to the challenged licensing scheme; and in concluding that the challenged statutory criteria for licensing are not impermissibly vague. We have been informed by the parties of events that have rendered the claims of certain plaintiffs moot, requiring dismissal of so much of the appeal as concerns those claims; we otherwise affirm the rulings of the district court principally for the reasons stated by that court, *see* 300 F.Supp.3d 424 (2018).

Appeal dismissed in part and affirmed in part.

JAMES OSTROWSKI, Buffalo, New York, *for Plaintiffs-Appellants*.

ANISHA S. DASGUPTA, Deputy Solicitor General, New York, New York (Barbara D. Underwood, Attorney General of the State of New York, Amit **[3]** R. Vora, Assistant Solicitor General, New York, New York, on the brief), *for Defendants-Appellees*.

Morrison & Foerster, New York, New York (Jamie A. Levitt, Jayson L. Cohen, Rhiannon N. Batchelder, New York, New York; Hannah Shearer, San Francisco, California, J. Adam Skaggs, David M. Pucino, Giffords Law Center to Prevent Gun Violence, New York, New York, of counsel), *filed a brief for Amicus Curiae Giffords Law Center to Prevent Gun Violence, in support of Defendants-Appellees and Affirmance.*

Clarick Gueron Reisbaum, New York, New York (Nicole Gueron, Ashleigh Hunt, New York, New York, of counsel), *filed a brief for Amicus Curiae Everytown for Gun Safety, in support of Defendants-Appellees and Affirmance.*

KEARSE, *Circuit Judge*:

Plaintiffs Libertarian Party of Erie County ("Libertarian Party") *et al*. appeal from a judgment of the United States District Court for the Western District of New York, Frank P. Geraci, Jr., *Chief Judge*, dismissing, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), their amended complaint brought under 42 U.S.C. ' 1983 against several state officials, alleging that the firearm licensing laws of New York **[4]** State (the "State" or "New York"), *see* N.Y. Penal Law ' 400.00, violate plaintiffs' rights under the Second and Fourteenth Amendments to the Constitution. The district court dismissed on grounds of mootness or lack of standing the claims of all but two plaintiffs, against all but two defendants, for failure to plead injury-in-fact or traceability of injury to other defendants; dismissed claims for money damages against the two remaining defendants on grounds of judicial and Eleventh Amendment immunity; dismissed the individual-capacity claims against those defendants for injunctive relief as barred by 42 U.S.C. ' 1983; and dismissed the surviving claims on the grounds that the ' 400.00 licensing criteria of "good moral character," "good cause," and "proper cause" are not unconstitutionally vague, and that the statutory scheme, while impacting Second Amendment rights, relates substantially to the State's interests in public safety and thus survives intermediate scrutiny. On appeal, plaintiffs, while expressly not seeking reversal of the dismissal as to Libertarian Party, principally contend that in dismissing the claims of the individual

plaintiffs, the district court erred in its rulings on standing, mootness, and judicial immunity; in applying intermediate scrutiny to the challenged licensing scheme; and in concluding that the challenged statutory **[5]** criteria for licensing are not impermissibly vague. For the reasons that follow, we conclude that claims of certain plaintiffs have become moot, requiring dismissal of so much of the appeal as pursues those claims; we otherwise affirm the challenged rulings of the district court, principally for the reasons stated by that court.

I. BACKGROUND

The Second Amendment, which applies to the States through the Fourteenth Amendment, *see McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010), provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed," U.S. Const. amend. II. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment codified a pre-existing "individual right to possess and carry weapons in case of confrontation," *id.* at 592.

New York State "maintains a general prohibition on the possession of 'firearms' absent a license." *Kachalsky v. County of Westchester*, 701 F.3d 81, 85 (2d Cir. 2012) ("*Kachalsky*"). Section 400.00 of New York's Penal Law is the State's **[6]** "exclusive statutory mechanism for the licensing of firearms," *id.*

(internal quotation marks omitted); other sections of the Penal Law provide criminal penalties for possession of a firearm without a license, *see* N.Y. Penal Law ''265.00(3), 265.01 *et seq*., and 265.20(a)(3).

The State allows an application for a firearm license by a person who resides in the State or whose principal place of business is in the State. *See* N.Y. Penal Law '400.00(3)(a). The "[t]ypes of licenses" that may be issued include "[a] license for a pistol or revolver" for "a householder" "to . . . have and possess in his dwelling," N.Y. Penal Law ' 400.00(2)(a), and a license to "have and carry concealed [a pistol or revolver], without regard to employment or place of possession, by any person when proper cause exists for the issuance thereof," *id*. 400.00(2)(f). To be granted a license for at-home possession of a firearm, an applicant principally must show "good moral character" and show that "*no good cause* exists for denial of the license." N.Y. Penal Law '' 400.00(1)(b) and (n) (emphasis added); *id*. ' 400.00(2)(a). To obtain a license to carry a concealed firearm in public ("concealed-carry"), one must show, in addition, that "proper **[7]** cause" exists for issuance of that license. *Id*. '400.00(2)(f). A concealed-carry permit encompasses an at-home license. *See id*.

A. The Parties

The present action was brought by plaintiffs Libertarian Party and several New York residents. According to the amended complaint ("Complaint" or "Comp."), Libertarian Party is an association "whose platform includes support for the right to bear arms" (Comp. & 3). The Complaint contains no other allegations about Libertarian Party. The individual plaintiffs (collectively "Plaintiffs") are Michael Kuzma, Richard Cooper, Ginny Rober, Philip M. Mayor, Michael Rebmann, Edward L. Garrett, David Mongielo, John Murtari, and William A. Cuthbert, who claim that various aspects of New York's firearm licensing regime violate their rights under the Second and Fourteenth Amendments to bear arms.

The defendants are Andrew M. Cuomo, Governor of the State; Letitia James, the State's Attorney General; Joseph A. D'Amico, Superintendent of the State Police; Matthew J. Murphy III, a judge who is the pistol permit licensing **[8]** officer for Niagara County; Dennis M. Kehoe, a judge who is the pistol permit licensing officer for Wayne County; and M. William Boller, an Acting State Supreme Court Justice who is the pistol permit licensing officer for Erie County. (*See*, *e.g.*, Comp. && 14-22.)

B. The Complaint

Plaintiffs contend that the right to bear and carry firearms is a "fundamental" Second Amendment right that the State has no authority to license (Comp. && 33-62). The Complaint alleged principally that the New York licensing scheme on its face (1) violates Plaintiffs' rights to possess firearms in their homes (*see id*. & 137), (2) violates their rights to possess firearms in public (*see id*. & 138), and (3) uses standards of "good moral character," "proper cause," and "good cause" that are so vague as to violate the Due Process Clause of the Fourteenth Amendment (*id*. && 139-141).

As to individual plaintiffs, the Complaint alleged that Mayor and Cuthbert "have obtained . . . pistol permits but remain under constant threat of having their licenses revoked based on application of the arbitrary and subjective **[9]** criteria set forth in the statute." (Comp. & 77.) The license granted to Cuthbert by Justice Boller was an at-home permit that allowed him to use the firearm for hunting and target shooting; but Cuthbert was denied a concealed-carry permit. (*See id*. & 94.) The Complaint alleged that Mongielo held a concealed-carry permit which, after his arrest, was suspended by Judge Murphy. It alleged that the suspension was "temporar[y]." (*Id*. & 81; *see also* Declaration of New York State Assistant Attorney General William J. Taylor, Jr., dated April 29, 2016 ("Taylor Decl."), Exhibit C (Niagara County Court Order signed by Judge Murphy, ordering reinstatement of Mongielo's permit)).

The Complaint alleged that Murtari applied for a pistol permit (Comp. & 96), but that his application was denied by Judge Kehoe (*id.* & 97). The 10-paragraph letter of denial stated, *inter alia*, that Murtari's record showed that from 1998 through 2010 he had been arrested "approximately 50 times" and that Murtari's "prior conduct in failing to obey lawful orders issued in the Federal Court System, as well as in the State Family Court System, constitutes 'good cause' for this Court to deny [his] application for a pistol permit at this time." (*Id.* & 98.) **[10]**

As to plaintiffs Kuzma, Cooper, Rober, Rebmann, and Garrett, the Complaint contained no allegation that any of them had ever applied for a pistol permit.

The Complaint principally sought "injunctive and declaratory relief" (Comp. & 76) and "compensatory and punitive damages" (*id.* & 135). Murtari also requested an order, pursuant to N.Y. C.P.L.R. Article 78, directing Judge Kehoe to issue him a pistol permit. (*See id.* && 142-144.)

C. The District Court's Dismissal of the Action

Defendants moved pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) to dismiss the Complaint for lack of subject matter jurisdiction and failure to state a claim. Under Rule 12(b)(1) they argued, *inter alia*, (1) that Libertarian Party, Kuzma, Cooper, Rober, Rebmann, and Garrett

lack standing, having failed to apply for a firearm license or to allege that applying would have been futile; (2) that Mayor and Mongielo lack standing because they hold licenses, and that any fear of revocation is speculative; and (3) that Cuthbert **[11]** lacks standing to challenge provisions governing at-home possession, because he has a license for such possession.

Under Rules 12(b)(1) and 12(b)(6), defendants argued that Plaintiffs could not obtain relief against Cuomo, James, and D'Amico because the Complaint did not show that those defendants had any direct involvement in administering the challenged statutory provisions. And under Rule 12(b)(6), defendants argued that Cuthbert's claim with respect to the denial of his request for a concealed-carry permit, and all of Murtari's claims, fail because the statutory criteria governing the granting of permits are not impermissibly vague, and the New York firearm licensing provisions substantially relate to the State's interests in public safety, thus surviving intermediate scrutiny. Defendants also argued that Justice Boller and Judges Murphy and Kehoe, as sued in their official capacities, are entitled to Eleventh Amendment immunity from claims for damages; and that because they act in a judicial capacity in ruling on firearm license applications, they are, insofar as they are sued in their individual capacities, entitled to judicial immunity from Plaintiffs' claims for damages or injunctive relief. **[12]**

In a thorough opinion dated January 10, 2018 ("D. Ct. Opinion"), reported at 300 F.Supp.3d 424, relying principally on the Supreme Court's decision in *Heller*

and this Court's decisions in *New York State Rifle & Pistol Association, Inc. Cuomo*, 804 F.3d 242 (2d Cir. 2015) ("*NYSRPA*"); *Kachalsky*, 701 F.3d 81; *United States v. Decastro*, 682 F.3d 160 (2d Cir. 2012) ("*Decastro*"); and *Jackson-Bey v. Hanslmaier*, 115 F.3d 1091 (2d Cir. 1997) ("*Jackson-Bey*"), the district court granted defendants' motion in its entirety.

Because plaintiffs' response to defendants' motion to dismiss made no argument with respect to Libertarian Party, the district court dismissed any claims on behalf of Libertarian Party on the ground that they had been abandoned. With respect to the three federal claims asserted in the Complaint, the court found that most of the plaintiffs lacked standing to sue, either in general because of their own inaction, or with respect to certain defendants to whom their asserted injuries were not traceable. As to the plaintiffs who had standing, the court found that the Complaint failed to state a claim on which relief can be granted. **[13]**

1. Standing

The court noted that, in order to have standing to sue in federal court, a plaintiff must show

> (1) *injury-in-fact*, which is a "concrete and particularized" harm to a "legally protected interest"; (2) *causation* in the form of a "fairly traceable" connection between the asserted injury-in-fact and the alleged actions of the defendant; and (3) *redressability*, or a non-speculative likelihood that the

injury can be remedied by the requested relief.

D. Ct. Opinion, 300 F.Supp.3d at 432 (quoting *W.R. Huff Asset Management Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 106-07 (2d Cir. 2008) (emphasis in *W.R. Huff*)); *see*, *e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Further, each plaintiff must establish standing with respect to each claim he or she asserts, *see* D. Ct. Opinion, 300 F.Supp.3d at 432; and standing must be maintained throughout the proceeding, *see*, *e.g.*, *id*. A federal court loses jurisdiction to entertain a claim that has become moot. *See*, *e.g.*, *id*. **[14]**

In order to challenge the New York firearm licensing laws, a person must either have applied for and been denied a license or make a "'substantial showing'" that his or her application "'would have been futile,'" *Decastro*, 682 F.3d at 164 (quoting *Jackson-Bey*, 115 F.3d at 1096). Mere objection or antipathy to the law does not constitute a showing of futility. *See*, *e.g.*, *Decastro*, 682 F.3d at 164; D. Ct. Opinion, 300 F.Supp.3d at 433.

The district court noted that the Complaint "contain[ed] no factual allegations as to . . . Kuzma, Cooper, Rober, Rebmann, or Garrett." D. Ct. Opinion, 300 F.Supp.3d at 431. There being neither allegations that they had applied for a license nor allegations to show futility, the court dismissed the claims of those plaintiffs for lack of any alleged injury-in-fact. *See id*. at 433.

The court also found that Mayor, who had applied for and received the permit for which he applied, lacked an injury-in-fact. Although the Complaint alleged that Mayor was afraid his license would be arbitrarily

revoked, the court found such speculation insufficient to show injury-in-fact. *See id*. at 434. Similarly, Mongielo, who was alleged to have been granted a license but had it **[15]** "temporarily" suspended following his arrest, lacked standing because his license had subsequently been reinstated. *See id*. at 434-35.

The court found that Cuthbert, who had applied for a concealed-carry permit but had been granted only an at-home permit, lacked standing to complain of the New York licensing scheme with respect to at-home licenses. His alleged fear that his at-home permit would be revoked was merely speculative, failing to show injury-in-fact. *See id*. at 435. However, Cuthbert sufficiently alleged injury-in-fact as to his request for a concealed-carry permit, which had been denied. *See id*.

Finally, as to Murtari, the court found that he had alleged injury-in-fact because he had applied for a license and his application had been denied. *See id*. at 436.

Although the court found that the Complaint was sufficient to show that Cuthbert and Murtari asserted claims of injury-in-fact, it found that there was no allegation that their claimed injuries had been inflicted by any persons other than the defendants who had denied their respective license requests. Cuthbert's request for a concealed-carry permit had been denied by Justice Boller; Murtari's **[16]** license application had been denied by Judge Kehoe. Accordingly, the court found that the claims of Cuthbert and Murtari--the only plaintiffs who asserted injury-in-fact--were traceable only to Justice Boller and

Judge Kehoe, respectively. *See id*. The court therefore dismissed the Complaint against Cuomo, James, D'Amico, and Murphy. *See id*.

2. Judicial Immunity

As to Boller and Kehoe, the remaining defendants, the district court noted that judges performing judicial duties, when sued in their individual capacities, are entitled to immunity both from claims for damages, *see* D. Ct. Opinion, 300 F.Supp.3d at 436-37 (citing *Bliven v. Hunt*, 579 F.3d 204, 209 (2d Cir. 2009) ("*Bliven*")), and, by reason of the 1996 amendments to ' 1983, from claims for "injunctive relief, unless a declaratory decree was violated or declaratory relief was unavailable," D. Ct. Opinion, 300 F.Supp.3d at 436 (internal quotation marks omitted); *see* Pub.L. 104-317, Title III, ' 309(c), Oct. 19, 1996, 110 Stat. 3853; 42 U.S.C. ' 1983 ("in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be **[17]** granted unless a declaratory decree was violated or declaratory relief was unavailable").

Although Plaintiffs challenged the applicability of these principles, contending that deciding firearms license applications is an administrative act, not a judicial one, the court rejected that contention. It pointed out that except as to New York City and Long Island, the State's statutory scheme places the authority to decide "firearms license applications" in "state judges," D. Ct. Opinion, 300 F.Supp.3d at 437 n.9; that "[t]he principal hallmark of the judicial function is a decision in relation to a particular case," *id*. at 437 (internal

quotation marks omitted); *see Bliven*, 579 F.3d at 211; and that each of the decisions by Justice Boller and Judge Kehoe "arose out of an individual case before them," D. Ct. Opinion, 300 F.Supp.3d at 437. Concluding that those rulings had "all the hallmarks of judicial acts," *id.*, the court dismissed all claims asserted against Boller and Kehoe in their individual capacities on the ground of judicial immunity. **[18]**

3. Eleventh Amendment Immunity

Finally as to the claims of Cuthbert and Murtari against Justice Boller and Judge Kehoe in their official capacities, defendants moved to dismiss the claims for damages, contending that those claims are barred by the Eleventh Amendment. The court, noting that Plaintiffs had made no response to that contention, dismissed those claims against Boller and Kehoe. *See* D. Ct. Opinion, 300 F.Supp.3d at 438. Noting that defendants had made no similar Eleventh Amendment motion to dismiss official-capacity claims against the judges for injunctive relief, the court concluded that those claims by Cuthbert and Murtari against Boller and Kehoe remained pending for consideration of whether the Complaint stated a claim on which relief can be granted. *See id.*

4. The Due Process Vagueness Contention

Finding that Cuthbert and Murtari had standing to bring one or all of their claims, the court turned to their claims of denial of due process. The Complaint alleged that the New York licensing scheme is unconstitutionally vague principally because ' 400.00 premises the grant of

licenses on "good moral **[19]** character" and on the absence of "good cause" for denial, and that those terms are "not capable of definition in such a way that puts an applicant, a licensing officer or a reviewing court on notice of the meaning of the terms." (Comp. && 139-141.) The district court, stating that "[a] claim is as-applied if it is limited to a plaintiff's particular case," but "is facial if it 'challenges application of the law more broadly,'"

D. Ct. Opinion, 300 F.Supp.3d at 439 (quoting *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010)); *see also NYSRPA*, 804 F.3d at 249-50, found that the Complaint painted with a broad brush and did not allege any facts to support an as-applied vagueness claim. Thus, the court read the Complaint to assert that the statute is facially invalid.

The court stated that "'[t]o succeed on a facial challenge, the challenger must establish that *no set of circumstances* exists under which the [laws] would be valid.'" D. Ct. Opinion, 300 F.Supp.3d at 439 (quoting *NYSRPA*, 804 F.3d at 265 (emphasis in *NYSRPA*), and citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). The district court noted that defendants here provided compelling examples of circumstances that would show an applicant's lack of "good moral character," show "good cause" for the denial of a license, or show lack of "proper **[20]** cause" for approval to carry a concealed firearm in public--to wit, an individual suffers from dementia and paranoid schizophrenia; or an individual threatens to harm others, or shoots himself, or has an alcohol or drug

addiction and repeatedly engages in reckless activity with his firearm while intoxicated. *See* D. Ct. Opinion, 300 F.Supp.3d at 440.

Referring to the observation in *Heller* that longstanding restrictions such as "prohibitions on the possession of firearms by felons and the mentally ill" are "presumptively lawful regulatory measures," 554 U.S. at 626 & n.26, the district court concluded that Cuthbert and Murtari had obviously failed to show that no set of circumstances exists under which the conditions imposed in ' 400.00 would be valid. *See generally Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982) (in order to succeed in "challeng[ing a law] on its face as unduly vague, in violation of due process," the plaintiff "must demonstrate that the law is impermissibly vague in all of its applications"). **[21]**

5. The Second Amendment Burden

As to Plaintiffs' claims that the New York licensing scheme is unconstitutional under the Second Amendment purely because it limits their rights to possess and carry firearms, the court noted that *Heller* established that the Second Amendment codified an individual's right to possess and carry weapons "in common use" by citizens for "lawful purposes like self-defense," *Heller*, 554 U.S. at 624. *See* D. Ct. Opinion, 300 F.Supp.3d at 440. While *Heller* neither purported to make that right immune from all regulation nor attempted to lay out the permissible scope of such regulation, the district court noted that

a two-step framework for analysis in this Circuit had been established by *Decastro*, *Kachalsky*, and *NYSRPA*:

> The Court must consider (1) whether the law burdens conduct protected by the Second Amendment, and then (2) the appropriate level of scrutiny. *See NYSRPA*, 804 F.3d at 254. Of course, if the law does not burden conduct protected by the Second Amendment, it stands. *Id*.

D. Ct. Opinion, 300 F.Supp.3d at 441.

Finding, at step one, that New York's licensing laws unquestionably place restrictions on the possession of firearms "in common use," as individuals in **[22]** New York may not possess handguns, even in their own homes, without a license, the court concluded that these laws burden law-abiding citizens' possession of weapons typically kept for lawful purposes. *Id*. at 441-42.

In determining what level of scrutiny to apply to New York's firearms licensing laws, the court considered (a) how close the law comes to the core of the Second Amendment right, and (b) the severity of the law's burden on the right. *Id*. at 442-43. In considering the latter factor, the court noted that heightened scrutiny is appropriate only where the law burdens Second Amendment protections "substantially," *NYSRPA*, 804 F.3d at 259, and that the burden is not substantial "if adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense," *id*. (quoting *Decastro*, 682 F.3d at 168). D. Ct. Opinion, 300 F.Supp.3d at 442.

Accordingly, the district court inferred that "where a law does not prevent law-abiding, responsible citizens from possessing firearms in defense of hearth and home, it does not substantially burden the core Second Amendment right." *Id*. (internal quotation marks omitted). The court concluded that "[w]hile [the State's] firearms licensing laws implicate the core Second Amendment right, **[23]** they do not substantially burden it. The licensing laws place no more than 'marginal[or] incremental . . . restraint on the right to keep and bear arms.'" *Id*. at 442-43 (quoting *NYSRPA*, 804 F.3d at 259; *Decastro*, 682 F.3d at 166). The district court pointed out that, here,

> [a]s Plaintiffs note, law-abiding, responsible citizens face nothing more than time, expense, and questioning of close friends or relatives. [Complaint] && 68-72. It is only the narrow class of persons who are adjudged to lack the characteristics necessary for the safe possession of a handgun that face a substantial burden on the core Second Amendment protection via [New York's] firearms licensing laws.

D. Ct. Opinion, 300 F.Supp.3d at 443 (internal quotation marks omitted). The court stated that

> Plaintiffs' own experiences support the Court's conclusion. It is only Murtari who was denied a license to possess a firearm in his home. . . . Murtari plainly fits into the narrow class of persons . . . [who have] shown repeated indifference for laws at the state and federal level. *See* [Complaint & 98 quoting] (letter from Judge Kehoe denying Murtari's application for a firearms license in full because he was arrested approximately fifty times, had received four jail sentences totaling over four months in jail, and repeatedly refused to make child support payments).

Id. at 443 (internal quotation marks omitted). **[24]**

Concluding that the New York licensing scheme does not impose a burden that is substantial, the court determined that an intermediate level of scrutiny was appropriate. Under that level of scrutiny, the question is whether the laws are "substantially related to the achievement of an important government interest." *Id*. (quoting *NYSRPA*, 804 F.3d at 261; *Kachalsky*, 701 F.3d at 96).

The district court found that New York "[u]nquestionably" has "'substantial, indeed compelling, governmental interests in public safety and crime prevention,'" D. Ct. Opinion, 300 F.Supp.3d at 443 (quoting *NYSRPA*, 804 F.3d at 261), and that the State's firearms licensing laws are substantially related to that governmental interest. They are designed to allow only law-abiding, responsible citizens to possess a firearm, and to ensure that classes of individuals who do not have the necessary character and qualities are not. *See* D. Ct. Opinion, 300 F.Supp.3d at 443-44.

6. Murtari's State-Law Claim

Finally, the district court noted that Murtari asked the court to conduct a proceeding under New York law, N.Y. C.P.L.R. Article 78, and rule that **[25]** Judge Kehoe was required to grant his application for a firearm license. Having dismissed all of Plaintiffs' federal claims, and noting that it was questionable whether federal courts had authority to conduct such a proceeding,

the court declined to exercise supplemental jurisdiction to entertain Murtari's Article 78 claim. *See* D. Ct. Opinion, 300 F.Supp.3d at 444.

D. *Post-Dismissal Developments*

Shortly before oral argument of this appeal, Plaintiffs' counsel informed this Court of developments since the inception of the action. Plaintiff Rober has died; plaintiff Kuzma has obtained a firearm license; and plaintiff Cuthbert has "moved out of New York State and now resides in Colorado" (Letter from James Ostrowski dated February 15, 2019, at 1).

In light of the fact that, neither in this Court nor in the district court, has any successor or representative sought to be substituted for Rober, we deem it appropriate to dismiss as moot so much of this appeal as purports to pursue her claims. *See* Fed. R. App. P. 43(a)(1) and (2); Fed. R. Civ. P. 25(a)(1). As to so much of the appeal as pursues claims of Kuzma and Cuthbert, we conclude that **[26]** their claims have become moot or untenable largely for reasons found applicable to other plaintiffs, as discussed in Parts II.B. and C. below.

II. DISCUSSION

On appeal, the individual plaintiffs principally contend that the district court erred in its rulings on standing, mootness, judicial immunity, and traceability of their claims to the nonjudicial defendants; in concluding that the

challenged statutory criteria for licensing are not impermissibly vague; in applying intermediate scrutiny to the challenged licensing scheme; and in concluding that the statute survives such scrutiny. For the reasons that follow, we conclude that these rulings of the district court were correct.

A. Standard of Review

To survive a motion to dismiss under Rule 12(b)(6) for failure to state a claim, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, **[27]** 678 (2009) (internal quotation marks omitted). A written instrument that is incorporated in the complaint by reference is deemed part of the complaint, *see*, *e.g.*, *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991), *cert. denied*, 503 U.S. 960 (1992); *Goldman v. Belden*, 754 F.2d 1059 (2d Cir. 1985); 5 C. Wright & A. Miller, *Federal Practice and Procedure* ' 1327 (4th ed. 2020), and thus may properly be considered by the district court in ruling on a Rule 12(b)(6) motion. Further, "when a plaintiff chooses not to attach to the complaint or incorporate by reference a [document] upon which it solely relies and which is integral to the complaint, the defendant may produce the [document] when attacking the complaint for its failure to state a claim." *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d at 47; *see*, *e.g.*, *Rothman v. Gregor*, 220 F.3d 81, 88 (2d Cir. 2000).

In ruling on a motion to dismiss under Rule 12(b)(1) for lack of statutory or constitutional power to adjudicate the action, the district court "may refer to evidence outside the pleadings." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). The burden of proving subject matter jurisdiction is on the plaintiff. *Id*. **[28]**

We review grants of Rule 12(b)(6) and 12(b)(1) motions to dismiss *de novo*. *See Elias v. Rolling Stone LLC*, 872 F.3d 97, 104 (2d Cir. 2017); *Katz v. Donna Karan Co.*, 872 F.3d 114, 118 (2d Cir. 2017). To the extent that the Complaint was dismissed for lack of subject matter jurisdiction, we may consider matters outside the Complaint that were presented to the district court. *See*, *e.g.*, *Mitchell v. Fishbein*, 377 F.3d 157, 167-68 (2d Cir. 2004) ("*Mitchell*").

We review a district court's decision declining to exercise supplemental jurisdiction over a state-law claim for abuse of discretion. *See*, *e.g.*, *Klein & Co. Futures v. Board of Trade of City of New York*, 464 F.3d 255, 262 (2d Cir. 2006). In this case--without need for discussion--we see no abuse of discretion in the district court's decision to decline to conduct a State-law Article 78 proceeding.

B. Subject Matter Jurisdiction: Standing,

Mootness, and Traceability

> No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to

> actual cases or controversies. . . . The concept of standing is part of this limitation. **[29]**

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 37 (1976). As recognized by the district court,

> the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, *not conjectural* or hypothetical . . . . *Second*, there must be a causal connection between the injury and the conduct complained of--*the injury has to be fairly . . . trace[able] to the challenged action of the defendant* .....Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 504 U.S. at 560-61 (other internal quotation marks omitted) (emphases ours). If, as to a claim, any of these three elements is missing, the federal court lacks jurisdiction to entertain the claim. *See*, *e.g.*, *id.* at 561.

Further, "[t]he usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe v. Wade*, 410 U.S. 113, 125 (1973). Thus, a plaintiff must show a "personal stake" in the outcome "throughout the life of the lawsuit." *Cook v. Colgate University*, 992 F.2d 17, 19 (2d Cir. 1993). A matter that has become moot is no longer a case or controversy, and a federal court loses jurisdiction to entertain it. *See*, *e.g.*, *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974). **[30]** "'As a general matter, to establish standing to challenge an allegedly unconstitutional policy, a plaintiff must submit to the challenged

policy.'" *Decastro*, 682 F.3d at 164 (quoting *Jackson-Bey*, 115 F.3d at 1096; and citing *Allen v. Wright*, 468 U.S. 737, 746 (1984), and *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-68 (1972)). Accordingly, we have held that, absent a showing of futility, a person who has "failed to apply for a gun license in New York . . . lacks standing to challenge the licensing laws of the state," *Decastro*, 682 F.3d at 164.

Within this legal framework, the district court properly dismissed for lack of standing (a) the claims of all plaintiffs who were not alleged to have applied for a New York State firearm license, including Cooper, Rebmann, and Garrett, and (b) the claims of Mayor who received a license. None of these plaintiffs showed that they suffered injury-in-fact.

The court also properly dismissed the claims of Mongielo, who received a license, which had been temporarily suspended when he was arrested but then had been reinstated after all but one of the charges against him were dismissed. Having had his license restored, Mongielo's challenges to the licensing system were moot. Assertions that Mongielo, Mayor, and Cuthbert **[31]** feared their licenses would be revoked were speculative, such apprehensions being insufficiently concrete to constitute injury-in-fact.

In addition, while the district court also dismissed the claims of Kuzma on the ground that he had failed to apply for a license, we have been informed, as indicated in Part I.D. above, that Kuzma has now obtained a license. Kuzma's claims--nonexistent at the start of this action--have become

moot, and we dismiss so much of the appeal as challenges the district court's dismissal of his claims.

Although the district court found that Cuthbert had standing to challenge the denial of his application for a concealed-carry license, we are informed that Cuthbert has moved out of New York and become a resident of Colorado. As a nonresident of New York whose principal place of employment is not in New York, he has thereby become ineligible to apply for a firearm license, *see* N.Y. Penal Law 400.00(3)(a). Accordingly, any request by Cuthbert for injunctive relief has become moot. To the extent that he asserted claims for money damages with respect to the denial of a concealed-carry license, those claims were properly dismissed for reasons discussed in Part II.C. below. **[32]**

Finally, we see no error in the district court's determination that as to the surviving claims of Cuthbert and the claims of Murtari--the only two plaintiffs as to whom there was any showing of injury-in-fact--the only defendants to whom their alleged injuries were fairly traceable were the judges who denied their respective applications. None of the other defendants was alleged to have had any role in the licensing process or in the consideration of the applications of Cuthbert or Murtari. The district court thus properly dismissed the claims asserted against defendants Cuomo, James, D'Amico, and Murphy.

C. Eleventh Amendment and Judicial Immunities

An action against a state official in his official capacity is deemed an action against the state itself, *see*, *e.g.*, *Hafer v. Melo*, 502 U.S. 21, 25 (1991), which possesses sovereign immunity under the Eleventh Amendment, *see* U.S. Const. amend. XI. While the immunity conferred by that Amendment "is not coextensive with the limitations on judicial power in Article III," it places "a limitation on the federal court's judicial power." *Calderon v. Ashmus*, 523 U.S. 740, 745 n.2 (1998). Although the Eleventh Amendment does not bar a federal court, **[33]** in adjudicating federal claims against state officials in any capacity, from granting prospective injunctive relief, *see Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 105 (1984); *Ex parte Young*, 209 U.S. 123, 159-60 (1908), a state official sued in his official capacity is entitled to invoke Eleventh Amendment immunity from a claim for damages, *see*, *e.g.*, *Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985); *Hafer*, 502 U.S. at 25.

In the present case, defendants invoked the Eleventh Amendment in moving to dismiss, *inter alia*, the claims against Justice Boller and Judge Kehoe in their official capacities for money damages. Given the above principles, the district court properly granted that motion.

The court also dismissed the claims of Cuthbert and Murtari against Justice Boller and Judge Kehoe in their individual capacities for damages or for equitable relief on the ground that judges are entitled to absolute immunity for performance of judicial functions. *See*, *e.g.*, *Mireles v. Waco*, 502

U.S. 9, 9-10 (1991) (damages); 42 U.S.C. ' 1983 (injunctive relief). The court rejected Plaintiffs' contention that, in ruling on firearm license applications, Boller and Kehoe **[34]** performed only an administrative function, not a judicial one. Plaintiffs pursue this contention on appeal. We are not persuaded.

Absolute immunity for a judge performing his or her judicial functions

> is conferred in order to insure "that a judicial officer, in exercising the authority vested in him shall be free to act upon his own convictions, without apprehension of personal consequences to himself."

Bliven, 579 F.3d at 209 (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871)).

Entitlement to absolute immunity does not depend on the individual's title or on the office itself. *See*, *e.g.*, *Forrester v. White*, 484 U.S. 219, 228 (1988). A judge may perform tasks that are not essentially judicial, such as supervising and managing court employees, which do not warrant absolute immunity, *see*, *e.g.*, *id.* at 228-29; on the other hand, such immunity may be warranted for a person who is not a judge but whose duties are quasi-judicial, *see*, *e.g.*, *Butz v. Economou*, 438 U.S. 478, 513-14 (1978). Further, other considerations may prevent even persons who are deciding disputes from being accorded absolute immunity. *See*, *e.g.*, *Cleavinger v. Saxner*, 474 U.S. 193, 202-06 (1985) (prison disciplinary committee, though adjudicating disciplinary accusations, held **[35]** not entitled to absolute immunity as quasi-judicial officers

where, *inter alia*, the committee members were prison officials who had an intertangled relationship with the accusing prison officials, and, at the time of the events at issue, there were few procedural safeguards for the accused). Nor does a determination as to whether a proceeding is judicial in nature depend on the formality or informality with it was conducted, or on whether the proceeding was adversary or *ex parte*. *See*, *e.g.*, *Stump v. Sparkman*, 435 U.S. 349, 363 & n.12 (1978).

Rather, the entitlement of a judge to absolute immunity depends on the nature of the function being performed. Judges are entitled not to absolute immunity, but to at most a qualified immunity, with respect to acts that are administrative, such as employment decisions, *see*, *e.g.*, *Forrester*, 484 U.S. at 228-29. "Administrative decisions, even though they may be essential to the very functioning of the courts, have not . . . been regarded as judicial acts." *Id*. at 228.

Judicial acts principally involve adjudication of particularized, existing issues. Thus, some functions may be viewed as judicial acts when performed in the context of a particular case but as administrative when performed for the purpose of overall management in anticipation of future cases. **[36]** For example, empaneling a jury in a particular criminal trial is a quintessentially judicial act, *see White v. Bloom*, 621 F.2d 276, 279-80 (8th Cir.), *cert. denied*, 449 U.S. 995 (1980) (judge held to have absolute immunity from a claim of conspiracy to empanel an all-white trial jury), whereas compilation of an annual list of county residents believed to be qualified for jury duty is an act

that is ministerial, *see Ex parte Virginia*, 100 U.S. (10 Otto) 339, 348 (1879) (no absolute immunity from claim of racial discrimination in the compilation).

Similarly, the act of disbarring an attorney as a sanction for the attorney's contumacious conduct in connection with a particular case is a judicial act, *see Bradley v. Fisher*, 80 U.S. (13 Wall.) at 354-57 (judge entitled to absolute immunity), whereas a committee, in making decisions as to additions to or deletions from a roster of attorneys deemed qualified to represent indigent defendants accused of crimes, unconnected to any particular criminal prosecution, is not performing a quasi-judicial function, *see*, *e.g.*, *Mitchell*, 377 F.3d at 172-74 (no absolute immunity).

In determining a jurisdictional issue that depended on "whether a particular proceeding before another tribunal was *truly judicial*," *District of* **[37]** *Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 n.13 (1983) (internal quotation marks omitted) (emphasis ours), the Supreme Court stated that the form of the proceeding is less significant than the proceeding's nature and effect, *see id.* at 478. It concluded that where there was a petition for "a declaration on rights as they stand," and in that context the court had "taken cognizance of the petition," had "considered the petitioner's petition on its merits," and had issued "an order which [was] validated by the signature of the presiding officer," there was a decision that was truly judicial. *Id.* (internal quotation marks omitted).

Here, the applications of those plaintiffs who requested a firearm license were ruled on by the judge who was the licensing officer for the

applicant's county of residence. Actual rulings on such applications--referred to in the Complaint, some of which have been submitted by defendants in support of the motion to dismiss--directly addressed the specific applications, referred to relevant requirements of ' 400.00, and decided the merits of the applicants' requests. For example, in ruling on the application of Cuthbert, Justice Boller caused to be entered a signed order of the "State of New York, Supreme Court: County of Erie" (*see* Appendix hereto), stating as follows: **[38]**

> After a full review of the application for an unrestricted firearms license pursuant to Section 400.00 of the New York State Penal Law, the Court has determined that the applicant has sufficient basis to be granted a firearms license for hunting and target shooting. Applicant has not demonstrated sufficient *proper cause* to be granted an unrestricted firearms license as required by section 400.00-2(f) of the New York State Penal Law.
>
> A firearms license restricted to hunting and target shooting as set forth above is therefore GRANTED to the applicant.
>
> SO ORDERED.

(Taylor Decl. Exh. D (emphasis added); *see also id*. Exh. C ("Order" of the "State of New York, County of Niagara, Niagara County Court, In the Matter of the Pistol Permit of David J. Mongielo," signed by Judge Murphy, stating that, "this Court . . . having determined that *no good cause* exists to continue the suspension of said Pistol Permit license; it is now ORDERED, that the Pistol Permit in question be reinstated " (emphasis added) (reproduced in Appendix hereto)).)

While Judge Kehoe informed Murtari of the decision to deny his application by way of a letter on a State of New York, Wayne County Court

letterhead rather than in an order (*see* Taylor Decl. Exh. E), the 10-paragraph letter directly ruled on the application, referring in detail to the factual and statutory basis for the denial. It recounted, *inter alia*, the Judge's examination of the **[39]** documents submitted by Murtari in support of the application and the Judge's communicating with the United States Attorney for the Northern District of New York pursuant to Murtari's request, along with the Judge's consideration of Murtari's approximately 50 arrests, including four for trespasses in violation of a federal court order, resulting in Murtari's being sentenced to a total of 142 days in jail, and his six months of incarceration "on at least one occasion" for nonpayment of child support--all leading to the conclusion that Murtari's prior conduct provided "'*good cause*' for this Court to deny your application for a pistol permit at this time." (Comp. & 98 (emphasis added).)

We conclude that the district court did not err in determining that the rulings on firearm license applications were judicial decisions and that Justice Boller and Judge Kehoe--the only defendants against whom traceable claims were asserted by plaintiffs with standing to sue--are entitled to absolute immunity from the claims asserted against them in their individual capacities.

The judicial-immunity-based dismissal of all of the individual-capacity claims, along with the Eleventh Amendment dismissal of official-capacity claims for damages, left pending only the official-capacity claims **[40]** of Murtari for injunctive relief against Judge Kehoe for the denial of any license

and the official-capacity claim of Cuthbert for injunctive relief against Justice Boller for the denial of a concealed-carry license (Cuthbert having been granted an at-home permit). However, while Cuthbert may have had standing at the time of the district court's decision to pursue such injunctive relief against Justice Boller in his official capacity, the fact that Cuthbert has now moved out of New York and become a resident of Colorado, *see* Part I.D. above, makes him ineligible for a New York firearm license, *see* N.Y. Penal Law ' 400.00(3)(a). Thus that claim has become moot, and we accordingly dismiss so much of this appeal as pursues it.

The only remaining claims in the Complaint are those of Murtari against Judge Kehoe in his official capacity seeking injunctive relief for denial of Murtari's license application, on the grounds that ' 400.00 is facially void for vagueness or unduly impinges on Murtari's Second Amendment rights.

D. The Due Process Void-for-Vagueness Claim

The Complaint alleged that New York Penal Law ' 400.00's uses of the terms "good moral character" as a prerequisite for approval of a firearm **[41]** license, "proper cause" for the issuance of a concealed-carry permit, and "good cause" for the denial of a license violate due process, arguing that "these terms are not capable of definition in such a way that puts an applicant,

a licensing officer or a reviewing court on notice of the meaning of the terms" (Comp. && 139-140). The district court correctly rejected this claim.

The "void-for-vagueness doctrine provides that no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *NYSRPA*, 804 F.3d at 265 (internal quotation marks and alterations omitted). It requires that statutes define regulated conduct with "sufficient definiteness that ordinary people can understand"; but it does not demand "meticulous specificity . . . , recognizing that language is necessarily marked by a degree of imprecision." *Id.* (internal quotation marks omitted).

To sustain a facial vagueness challenge, a plaintiff "'must establish that *no set of circumstances* exists under which the Act would be valid.'" *NYSRPA*, 804 F.3d at 265 (quoting *Salerno*, 481 U.S. at 745 (emphasis in *NYSRPA*)). Given this standard, a "facial challenge . . . is 'the most difficult challenge to mount successfully.'" *NYSRPA*, 804 F.3d at 265 (quoting *Salerno*, 481 U.S. at 745). **[42]**

Plaintiffs' contention that ' 400.00 is unconstitutionally vague is based on their argument that the Supreme Court in *Heller* ruled that a limitation on the right to bear arms could properly be grounded "only [on] the commission of felonies or an adjudication of mental disability" (Plaintiffs' brief on appeal at 34), and that the ' 400.00 statutory phrases "'good moral character,'" "'proper cause,'" and "'good cause'" go "beyond" those two grounds (*id.*). But *Heller* did not purport to impose that limitation. The *Heller* Court stated that "nothing in

> our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," 554 U.S. at 626; and it added that it was "identify[ing] these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive," *id*. at 627 n.26. Indeed, Plaintiffs' brief itself states that the Supreme Court set forth "grounds for denying" the Second Amendment right to bear arms, "*including* mental illness and felonious criminality" (Plaintiffs' brief on appeal at 34 (emphasis added)). **[43]**

As the district court pointed out, defendants proffered examples of several sound bases--in addition to mental illness and felony convictions--for denying an applicant's request to possess a firearm, such as his threats to harm others, or his addiction to drugs, or his repeatedly reckless conduct with a weapon while intoxicated. Such examples are not beyond an ordinary person's comprehension; nor are they rare, *see*, *e.g.*, *Robertson v. Kerik*, 300 A.D.2d 90, 90-91, 751 N.Y.S.2d 469, 469-70 (1st Dep't 2002) (upholding firearm license revocation for lack of "good moral character" due to the holder's "poor judgment and inability to manage his anger" as shown by his "assault[ing] his girlfriend"); *Broadus v. City of New York Police Department (License Division)*, 62 A.D.3d 527, 528, 878 N.Y.S.2d 738, 739 (1st Dep't 2009) (determination of lack of "good moral character" was supported by applicant's arrest for "driving while intoxicated" and possessing "a loaded firearm when arrested").

That such circumstances have direct implications for determinations of "good moral character," "proper cause," and "good cause" is easily understandable. Indeed, despite the presence of those challenged terms in New York's licensing regime for more than a century, *see*, *e.g.*, *Kachalsky*, 701 F.3d at 85, **[44]** Plaintiffs have identified no "evidence of confusion"; and the "repeated use for decades, without evidence of mischief or misunderstanding . . . suggests that the language is comprehensible," *NYSRPA*, 804 F.3d at 267, 268.

The district court did not err in concluding that the Complaint failed to set forth a plausible claim that ' 400.00 is impermissibly vague.

E. The Second Amendment Claim

Finally, the Complaint alleged that New York Penal Law '' 400.00 and 265.00 violate the Second Amendment (1) by conditioning the right to obtain an at-home permit on "'good moral character,' integrity and the absence of 'good cause' to deny a license" (Comp. & 137(b)); and (2) by requiring those conditions plus a showing of "'proper cause'" in order to obtain a concealed-carry permit (*id.* && 138(a) and (c)). The challenge to the "'proper cause'" prerequisite for obtaining a concealed-carry permit is foreclosed by this Court's decision in *Kachalsky*, 701 F.3d at 97-101. Although Plaintiffs contend that *Kachalsky* was wrongly decided, it remains binding precedent. **[45]**

The challenge to the "good moral character" and "good cause" requirements for obtaining an at-home permit, on analysis, fares no better. As indicated in Part II.D. above, the Supreme Court in *Heller* did not purport to find that the Second Amendment right to bear arms was unlimited; rather, it noted that certain longstanding restrictions on the right are "presumptively lawful," and that its list of examples "d[id] not purport to be exhaustive," 554 U.S. at 626-27 & n.26. As the district court noted, because *Heller* also did not attempt to define the standard for assessing challenged restrictions on the right, this Court has adopted a two-step analysis in which we first consider whether the challenged law burdens the right and, if it does, we then determine the appropriate level of scrutiny. *See*, *e.g.*, *NYSRPA*, 804 F.3d at 254; *Kachalsky*, 701 F.3d at 93; *Decastro*, 682 F.3d at 165-68.

> As to the first step of the analysis, we have interpreted the core Second Amendment right identified in *Heller* to be the "'right of *law-abiding, responsible citizens*,'" *United States v. Jimenez*, 895 F.3d 228, 234 (2d Cir. 2018) ("*Jimenez*") (quoting *Heller*, 554 U.S. at 635 (emphasis in *Jimenez*)), to use "'handguns . . . for self-defense in the home,'" *NYSRPA*, 804 F.3d at 254 (quoting *Heller*, 554 U.S. at 628-29). "The Supreme Court . . . identified the core . . . protections by **[46]** reference not only to particular uses and particular weapons but also to particular persons, namely, those who are law-abiding and responsible." *Jimenez*, 895 F.3d at 234-35 (internal quotation marks omitted).

New York's at-home license regime, while affecting the core Second Amendment right, imposes nowhere near the burden that was at issue in *Heller*. In contrast to that "total[] ban[]" on "handgun possession in the home," which was held to violate the Second Amendment, *Heller*, 554 U.S. at 628-29, the New York regime allows at-home licenses for applicants who show "good moral character" and show that "good cause" does not exist for denying a license, N.Y. Penal Law '' 400.00(1)(b) and (n). The New York scheme further specifies that no firearm license is to be allowed for *inter alios*, persons convicted of "serious offense[s]," *id.* ' 400.00(c), drug addicts, *see id.* ' 400.00(e), and "fugitive[s] from justice," *id*. 400.00(d). But the statute does not burden the ability of "*law-abiding*, *responsible* citizens to use arms in defense of hearth and home," *Heller*, 554 U.S. at 635 (emphases added). Thus, the conditions placed on the core Second Amendment right are not onerous, and the Complaint does not allege that any law-abiding, **[47]** responsible citizen who applied for a New York firearm license had been denied an at-home permit.

As for the second step of the Second Amendment analysis, we have not interpreted *Heller* as requiring that every

> marginal, incremental or even appreciable restraint on the right to keep and bear arms be subject to heightened scrutiny. Rather, *heightened scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in Heller*) operate as a substantial

> burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or other lawful purposes).

Decastro, 682 F.3d at 166 (emphasis added); *accord New York State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45, 56 (2d Cir. 2018). Laws that "place substantial burdens on core rights are examined using strict scrutiny"; but laws that "place either insubstantial burdens on conduct at the core of the Second Amendment or substantial burdens [only] on conduct outside the core . . . can be examined using intermediate scrutiny." *Jimenez*, 895 F.3d at 234. Given that the impact of the New York licensing regime on law-abiding, responsible citizens is modest, we conclude that intermediate scrutiny is the highest level of review potentially appropriate in this case. **[48]**

In applying intermediate scrutiny, we ask "whether the statutes at issue are substantially related to the achievement of an important governmental interest." *NYSRPA*, 804 F.3d at 261 (internal quotation marks omitted). As it is "beyond cavil that . . . states have substantial, indeed compelling, governmental interests in public safety and crime prevention," we consider only "whether the challenged laws are substantially related to the achievement of that governmental interest." *Id.* (internal quotation marks omitted). "To survive intermediate scrutiny, the fit between the challenged regulation" and the government interest "need only be substantial, not perfect." *Kachalsky*, 701 F.3d at 97 (internal quotation marks omitted).

The Complaint's allegations with regard to Murtari reveal regulation that easily meets--and surpasses--this standard. The Complaint

quotes Judge Kehoe's decision denying Murtari a pistol permit and does not dispute the accuracy of any part of it. The decision stated that Murtari was being denied a firearm license as a person who, for more than a decade, had not demonstrated law-abiding temperament, given, *inter alia*, his frequently violating court orders, his being arrested some 50 times, and his being jailed several times. (*See* Comp. **[49]** & 98.) Nonetheless, the letter informed Murtari that if he proceeded, "for an extended period of time," to "remain compliant in the future with all lawful court orders, as well as Federal and State statutory law," he could "make a new application" for a license. (*Id*.)

The Complaint itself thus reveals a close relationship between the licensing regime and the State's interests in public safety and crime prevention--as well as solicitude for the Second Amendment rights of citizens who are responsible and law abiding. The district court made no error in determining that the New York licensing regime survives intermediate scrutiny and does not unduly burden Murtari's Second Amendment right to bear arms.

CONCLUSION

For the reasons discussed above, we conclude that the appeal is dismissed as to Libertarian Party, which expressly disclaimed any request for appellate relief; is dismissed as moot insofar as it pursues relief on behalf of plaintiff Rober, who is deceased with no successor or representative having been **[50]** substituted for her; is dismissed insofar as it pursues relief on behalf of plaintiff Kuzma, whose acquisition of a firearm license has made moot any claim that was pursued for him;

and is dismissed insofar as it pursues injunctive relief on behalf of plaintiff Cuthbert, whose relocation to Colorado has made him ineligible to apply for a New York concealed-carry permit. We have considered all of the other arguments that are properly before us and have found them to be without merit.

For the above reasons, the appeal is dismissed in part; the judgment of the district court is otherwise affirmed. **[51]**

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UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of October, two thousand twenty.

Libertarian Party of Erie County, Michael Kuzma,

Richard Cooper, Ginny Rober, Philip M. Mayor, Michael

Rebmann, Edward L. Garrett, David Mongielo, John **ORDER**

Murtari, and William A. Cuthbert, Docket No: 18-386

Plaintiffs-Appellants,

v.

Andrew M. Cuomo, individually and as Governor of the State of New York, Letitia James, individually and as Attorney General of the State of New York, Joseph A. D'Amico, individually and as Superintendent of the New York State Police, Matthew J. Murphy, III, individually and as Niagara County pistol permit licensing officer, Dennis M. Kehoe, individually and as Wayne County pistol permit licensing officer, and M. William Boller, individually and as Erie County pistol permit licensing officer,

Defendants-Appellees.

Appellants filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the

request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

MANDATE

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of August, two thousand twenty.

Before: Amalya L. Kearse,

John M. Walker, Jr.,

Dennis Jacobs,

Libertarian Party of Erie County, Michael Kuzma, **JUDGMENT**

Richard

Cooper, Ginny Rober, Philip M. Mayor, Michael Rebmann,
Edward L. Garrett, David Mongielo, John Murtari, and William A. Cuthbert,

Circuit Judges.

Docket No. 18-386

Plaintiffs-Appellants,

v.

Andrew M. Cuomo, individually and as Governor of the State of New York, Letitia James, individually and as Attorney General of the State of New York, Joseph A. D'Amico, individually and as Superintendent of the New York State Police, Matthew J. Murphy, III, individually and as Niagara County pistol permit licensing officer, Dennis M. Kehoe, individually and as Wayne County pistol permit licensing officer, and M. William Boller, individually and as Erie County pistol permit licensing officer,

Defendants-Appellees.

The appeal in the above captioned case from a judgment of the United States District Court for the Western District of New York was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the appeal is DISMISSED in part; the judgment of the district court is otherwise AFFIRMED.

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

MANDATE ISSUED ON 10/08/2020

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

Penal Law Section 265.01

Criminal possession of a weapon in the fourth degree

A person is guilty of criminal possession of a weapon in the fourth degree when:

(1) He or she possesses any firearm, electronic dart gun, electronic stun gun, switchblade knife, pilum ballistic knife, metal knuckle knife, cane sword, billy, blackjack, bludgeon, plastic knuckles, metal knuckles, chuka stick, sand bag, sandclub, wrist-brace type slingshot or slungshot, shirken, or "Kung Fu star";

(2) He or she possesses any dagger, dangerous knife, dirk, machete, razor, stiletto, imitation pistol, undetectable knife or any other dangerous or deadly instrument or weapon with intent to use the same unlawfully against another; or

(3); or

(4) He possesses a rifle, shotgun, antique firearm, black powder rifle, black powder shotgun, or any muzzle-loading firearm, and has been convicted of a felony or serious offense; or

(5) He possesses any dangerous or deadly weapon and is not a citizen of the United States; or

(6) He is a person who has been certified not suitable to possess a rifle or shotgun, as defined in subdivision sixteen of section 265.00, and refuses to yield possession of such rifle or shotgun upon the demand of a police officer. Whenever a person is certified not suitable to possess a rifle or shotgun, a member of the police department to which such certification is made, or of the state police, shall

forthwith seize any rifle or shotgun possessed by such person. A rifle or shotgun seized as herein provided shall not be destroyed, but shall be delivered to the headquarters of such police department, or state police, and there retained until the aforesaid certificate has been rescinded by the director or physician in charge, or other disposition of such rifle or shotgun has been ordered or authorized by a court of competent jurisdiction.

(7) He knowingly possesses a bullet containing an explosive substance designed to detonate upon impact.

(8) He possesses any armor piercing ammunition with intent to use the same unlawfully against another.

Criminal possession of a weapon in the fourth degree is a class A misdemeanor.

Penal Law Section 265.01-B

Criminal possession of a firearm

A person is guilty of criminal possession of a firearm when he or she: (1) possesses any firearm or; (2) lawfully possesses a firearm prior to the effective date of the chapter of the laws of two thousand thirteen which added this section subject to the registration requirements of subdivision sixteen-a of section 400.00 of this chapter and knowingly fails to register such firearm pursuant to such subdivision.

Criminal possession of a firearm is a class E felony.

Penal Section 265.02

Criminal possession of a weapon in the third degree

A person is guilty of criminal possession of a weapon in the third degree when:

(1) Such person commits the crime of criminal possession of a weapon in the fourth degree as defined in subdivision one, two, three or five of section 265.01, and has been previously convicted of any crime; or

(2) Such person possesses any explosive or incendiary bomb, bombshell, firearm silencer, machine-gun or any other firearm or weapon simulating a machine-gun and which is adaptable for such use; or

(3) Such person knowingly possesses a machine-gun, firearm, rifle or shotgun which has been defaced for the purpose of concealment or prevention of the

detection of a crime or misrepresenting the identity of such machine-gun, firearm, rifle or shotgun; or

(5) (i) Such person possesses three or more firearms; or (ii) such person possesses a firearm and has been previously convicted of a felony or a class A misdemeanor defined in this chapter within the five years immediately preceding the commission of the offense and such possession did not take place in the person's home or place of business; or

(6) Such person knowingly possesses any disguised gun; or

(7) Such person possesses an assault weapon; or

(8) Such person possesses a large capacity ammunition feeding device. For purposes of this subdivision, a large capacity ammunition feeding device shall not include an ammunition feeding device lawfully possessed by such person before the effective date of the chapter of the laws of two thousand thirteen which amended this subdivision, that has a capacity of, or that can be readily restored or converted to accept more than seven but less than eleven rounds of ammunition, or that was manufactured before September thirteenth, nineteen hundred ninety-four, that has a capacity of, or that can be readily restored or converted to accept, more than ten rounds of ammunition; or

(9) Such person possesses an unloaded firearm and also commits a drug trafficking felony as defined in subdivision twenty-one of section 10.00 of this chapter as part of the same criminal transaction; or

(10) Such person possesses an unloaded firearm and also commits any violent felony offense as defined in subdivision one of section 70.02 of this chapter as part of the same criminal transaction.

Criminal possession of a weapon in the third degree is a class D felony.

Penal Law Section 265.03

Criminal possession of a weapon in the second degree

A person is guilty of criminal possession of a weapon in the second degree when:

(1) with intent to use the same unlawfully against another, such person:

(a) possesses a machine-gun; or

(b) possesses a loaded firearm; or

(c) possesses a disguised gun; or

(2) such person possesses five or more firearms; or

(3) such person possesses any loaded firearm. Such possession shall not, except as provided in subdivision one or seven of section 265.02 of this article, constitute a violation of this subdivision if such possession takes place in such person's home or place of business.

Criminal possession of a weapon in the second degree is a class C felony.

Penal Law Section 265.04

Criminal possession of a weapon in the first degree

A person is guilty of criminal possession of a weapon in the first degree when such person:

(1) possesses any explosive substance with intent to use the same unlawfully against the person or property of another; or

(2) possesses ten or more firearms.

Criminal possession of a weapon in the first degree is a class B felony.

Penal Law Section 265.20

Exemptions

a. Paragraph (h) of subdivision twenty-two of section 265.00 and sections 265.01, 265.01-a, 265.01-b, 265.01-c, 265.02, 265.03, 265.04, 265.05, 265.10, 265.11, 265.12, 265.13, 265.15, 265.36, 265.37, 265.50, 265.55 and 270.05 shall not apply to:

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3. Possession of a pistol or revolver by a person to whom a license therefor has been issued as provided under section 400.00 or 400.01 of this chapter or possession of a weapon as defined in paragraph (e) or (f) of subdivision twenty-two of section 265.00 of this article which is registered pursuant to paragraph (a) of

subdivision sixteen-a of section 400.00 of this chapter or is included on an amended license issued pursuant to section 400.00 of this chapter. In the event such license is revoked, other than because such licensee is no longer permitted to possess a firearm, rifle or shotgun under federal or state law, information sufficient to satisfy the requirements of subdivision sixteen-a of section 400.00 of this chapter, shall be transmitted by the licensing officer to the state police, in a form as determined by the superintendent of state police. Such transmission shall constitute a valid registration under such section. Further provided, notwithstanding any other section of this title, a failure to register such weapon by an individual who possesses such weapon before the enactment of the chapter of the laws of two thousand thirteen which amended this paragraph and may so lawfully possess it thereafter upon registration, shall only be subject to punishment pursuant to paragraph (c) of subdivision sixteen-a of section 400.00 of this chapter; provided, that such a license or registration shall not preclude a conviction for the offense defined in subdivision three of section 265.01 of this article or section 265.01-a of this article.

Penal Law Section 400.00

Licenses to carry, possess, repair and dispose of firearms.

1. 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, provided, however, that where such applicant has been honorably discharged from the
2. United States army, navy, marine corps, air force or coast guard, or the national guard of the state of New York, no such age restriction shall apply; (b) of good moral character; (c) who has not been convicted anywhere of a felony or a 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 or fifteen of the mental hygiene law, article seven hundred thirty or section 330.20 of the criminal procedure law, section four hundred two or five hundred eight of the correction law, section 322.2 or 353.4 of the family court act, or has not been civilly confined in a secure treatment facility pursuant to article ten 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 the provisions of section 530.14 of the criminal procedure law or section eight hundred forty-two-a of the family court act; (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, except that: (i) persons who are honorably discharged from the United States army, navy, marine corps or coast guard, or of the national guard of the state of New York, and produce evidence of official qualification in firearms during the term of service are not required to have completed those hours of a firearms safety course pertaining to the safe use, carrying, possession, maintenance and storage of a firearm; and (ii) persons who were licensed to possess a pistol or revolver prior to the effective date of this paragraph are not required to have completed a firearms safety course and test; (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. No person shall engage in the business of gunsmith or dealer in firearms unless licensed pursuant to this section. An applicant to engage in such business shall also be a citizen of the United States, more than twenty-one years of age and maintain a place of business in the city or county where the license is issued. For such business, if the applicant is a firm or partnership, each member thereof shall comply with all of the requirements set forth in this subdivision and if the applicant is a corporation, each officer thereof shall so comply.

2. Types of licenses. A license for gunsmith or dealer in firearms shall be issued to engage in such business. A license for a pistol or revolver, other than an assault weapon or a disguised gun, shall be issued to (a) have and possess in his dwelling by a householder; (b) have and possess in his place of business by a merchant or storekeeper; (c) have and carry concealed while so employed by a messenger employed by a banking institution or express company; (d) have and carry concealed by a justice of the supreme court in the first or second judicial departments, or by a judge of the New York city civil court or the New York city criminal court; (e) have and carry concealed while so employed by a regular employee of an institution of the state, or of any county, city, town or village, under control of a commissioner of

correction of the city or any warden, superintendent or head keeper of any state prison, penitentiary, workhouse, county jail or other institution for the detention of persons convicted or accused of crime or held as witnesses in criminal cases, provided that application is made therefor by such commissioner, warden, superintendent or head keeper; (f) have and carry concealed, without regard to employment or place of possession, by any person when proper cause exists for the issuance thereof; and (g) have, possess, collect and carry antique pistols which are defined as follows: (i) any single shot, muzzle loading pistol with a matchlock, flintlock, percussion cap, or similar type of ignition system manufactured in or before l898, which is not designed for using rimfire or conventional centerfire fixed ammunition; and (ii) any replica of any pistol described in clause (i) hereof if such replica--(1) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or (2) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade.

3. Applications. (a) Applications shall be made and renewed, in the case of a license to carry or possess a pistol or revolver, to the licensing officer in the city or county, as the case may be, where the applicant resides, is principally employed or has his or her principal place of business as merchant or storekeeper; and, in the case of a license as gunsmith or dealer in firearms, to the licensing officer where such place of business is located. Blank applications shall, except in the city of New York, be approved as to form by the superintendent of state police.

An application shall state the full name, date of birth, residence, present occupation of each person or individual signing the same, whether or not he or she is a citizen of the United States, whether or not he or she complies with each requirement for eligibility specified in subdivision one of this section and such other facts as may be required to show the good character, competency and integrity of each person or individual signing the application. An application shall be signed and verified by the applicant. Each individual signing an application shall submit one photograph of himself or herself and a duplicate for each required copy of the application. Such photographs shall have been taken within thirty days prior to filing the application. In case of a license as gunsmith or dealer in firearms, the photographs submitted shall be two inches square, and the application shall also state the previous occupation of each individual signing the same and the location of the place of such business, or of the bureau, agency, subagency, office or branch office for which the license is sought, specifying the name of the city, town or village, indicating the street and number and otherwise giving such apt description as to point out reasonably the location thereof. In such case, if the applicant is a firm, partnership or corporation, its name, date and place of formation, and principal place of business shall be stated. For such firm or partnership, the application shall be signed and verified by each individual composing or intending to compose the same, and for such corporation, by each officer thereof.

(b) Application for an exemption under paragraph seven-b of subdivision a of section 265.20 of this chapter. Each applicant desiring to obtain the exemption set

forth in paragraph seven-b of subdivision a of section 265.20 of this chapter shall make such request in writing of the licensing officer with whom his application for a license is filed, at the time of filing such application. Such request shall include a signed and verified statement by the person authorized to instruct and supervise the applicant, that has met with the applicant and that he has determined that, in his judgment, said applicant does not appear to be or poses a threat to be, a danger to himself or to others. He shall include a copy of his certificate as an instructor in small arms, if he is required to be certified, and state his address and telephone number. He shall specify the exact location by name, address and telephone number where such instruction will take place. Such licensing officer shall, no later than ten business days after such filing, request the duly constituted police authorities of the locality where such application is made to investigate and ascertain any previous criminal record of the applicant pursuant to subdivision four of this section.

Upon completion of this investigation, the police authority shall report the results to the licensing officer without unnecessary delay. The licensing officer shall no later than ten business days after the receipt of such investigation, determine if the applicant has been previously denied a license, been convicted of a felony, or been convicted of a serious offense, and either approve or disapprove the applicant for exemption purposes based upon such determinations. If the applicant is approved for the exemption, the licensing officer shall notify the appropriate duly constituted police authorities and the applicant. Such exemption shall

terminate if the application for the license is denied, or at any earlier time based upon any information obtained by the licensing officer or the appropriate police authorities which would cause the license to be denied. The applicant and appropriate police authorities shall be notified of any such terminations.

4. Investigation. Before a license is issued or renewed, there shall be an investigation of all statements required in the application by the duly constituted police authorities of the locality where such application is made, including but not limited to such records as may be accessible to the division of state police or division of criminal justice services pursuant to section 400.02 of this article. For that purpose, the records of the appropriate office of the department of mental hygiene concerning previous or present mental illness of the applicant shall be available for inspection by the investigating officer of the police authority. In order to ascertain any previous criminal record, the investigating officer shall take the fingerprints and physical descriptive data in quadruplicate of each individual by whom the application is signed and verified. Two copies of such fingerprints shall be taken on standard fingerprint cards eight inches square, and one copy may be taken on a card supplied for that purpose by the federal bureau of investigation; provided, however, that in the case of a corporate applicant that has already been issued a dealer in firearms license and seeks to operate a firearm dealership at a second or subsequent location, the original fingerprints on file may be used to ascertain any criminal record in the second or subsequent application unless any of the corporate officers have changed since the prior application, in which case the new corporate

officer shall comply with procedures governing an initial application for such license. When completed, one standard card shall be forwarded to and retained by the division of criminal justice services in the executive department, at Albany. A search of the files of such division and written notification of the results of the search to the investigating officer shall be made without unnecessary delay. Thereafter, such division shall notify the licensing officer and the executive department, division of state police, Albany, of any criminal record of the applicant filed therein subsequent to the search of its files. A second standard card, or the one supplied by the federal bureau of investigation, as the case may be, shall be forwarded to that bureau at Washington with a request that the files of the bureau be searched and notification of the results of the search be made to the investigating police authority. Of the remaining two fingerprint cards, one shall be filed with the executive department, division of state police, Albany, within ten days after issuance of the license, and the other remain on file with the investigating police authority. No such fingerprints may be inspected by any person other than a peace officer, who is acting pursuant to his special duties, or a police officer, except on order of a judge or justice of a court of record either upon notice to the licensee or without notice, as the judge or justice may deem appropriate. Upon completion of the investigation, the police authority shall report the results to the licensing officer without unnecessary delay.

4-a. Processing of license applications. Applications for licenses shall be accepted for processing by the licensing officer at the time of presentment. Except upon written

notice to the applicant specifically stating the reasons for any delay, in each case the licensing officer shall act upon any application for a license pursuant to this section within six months of the date of presentment of such an application to the appropriate authority. Such delay may only be for good cause and with respect to the applicant. In acting upon an application, the licensing officer shall either deny the application for reasons specifically and concisely stated in writing or grant the application and issue the license applied for.

4-b. [Omitted.]

5. Filing of approved applications. (a) The application for any license, if granted, shall be filed by the licensing officer with the clerk of the county of issuance, except that in the city of New York and, in the counties of Nassau and Suffolk, the licensing officer shall designate the place of filing in the appropriate division, bureau or unit of the police department thereof, and in the county of Suffolk the county clerk is hereby authorized to transfer all records or applications relating to firearms to the licensing authority of that county. Except as provided in paragraphs (b) through (f) of this subdivision, the name and address of any person to whom an application for any license has been granted shall be a public record. Upon application by a licensee who has changed his place of residence such records or applications shall be transferred to the appropriate officer at the licensee's new place of residence. A duplicate copy of such application shall be filed by the licensing officer in the executive department, division of state police, Albany, within ten days after issuance of the license. The superintendent of state police may

designate that such application shall be transmitted to the division of state police electronically. In the event the superintendent of the division of state police determines that it lacks any of the records required to be filed with the division, it may request that such records be provided to it by the appropriate clerk, department or authority and such clerk, department or authority shall provide the division with such records. In the event such clerk, department or authority lacks such records, the division may request the license holder provide information sufficient to constitute such record and such license holder shall provide the division with such information. Such information shall be limited to the license holder's name, date of birth, gender, race, residential address, social security number and firearms possessed by said license holder. Nothing in this subdivision shall be construed to change the expiration date or term of such licenses if otherwise provided for in law. Records assembled or collected for purposes of inclusion in the database established by this section shall be released pursuant to a court order. Records assembled or collected for purposes of inclusion in the database created pursuant to section 400.02 of this chapter shall not be subject to disclosure pursuant to article six of the public officers law.

(b-g) [Omitted.]

6. License: validity. Any license issued pursuant to this section shall be valid notwithstanding the provisions of any local law or ordinance. No license shall be transferable to any other person or premises. A license to carry or possess a pistol or revolver, not otherwise limited as to place or time of possession, shall be

effective throughout the state, except that the same shall not be valid within the city of New York unless a special permit granting validity is issued by the police commissioner of that city. Such license to carry or possess shall be valid within the city of New York in the absence of a permit issued by the police commissioner of that city, provided that (a) the firearms covered by such license have been purchased from a licensed dealer within the city of New York and are being transported out of said city forthwith and immediately from said dealer by the licensee in a locked container during a continuous and uninterrupted trip; or provided that (b) the firearms covered by such license are being transported by the licensee in a locked container and the trip through the city of New York is continuous and uninterrupted; or provided that (c) the firearms covered by such license are carried by armored car security guards transporting money or other valuables, in, to, or from motor vehicles commonly known as armored cars, during the course of their employment; or provided that (d) the licensee is a retired police officer as police officer is defined pursuant to subdivision thirty-four of section 1.20 of the criminal procedure law or a retired federal law enforcement officer, as defined in section 2.15 of the criminal procedure law, who has been issued a license by an authorized licensing officer as defined in subdivision ten of section 265.00 of this chapter; provided, further, however, that if such license was not issued in the city of New York it must be marked "Retired Police Officer" or "Retired Federal Law Enforcement Officer", as the case may be, and, in the case of a retired officer the license shall be deemed to permit only police or federal law enforcement regulations weapons; or provided that

(e) the licensee is a peace officer described in subdivision four of section 2.10 of the criminal procedure law and the license, if issued by other than the city of New York, is marked "New York State Tax Department Peace Officer" and in such case the exemption shall apply only to the firearm issued to such licensee by the department of taxation and finance. A license as gunsmith or dealer in firearms shall not be valid outside the city or county, as the case may be, where issued.

7. License: form. Any license issued pursuant to this section shall, except in the city of New York, be approved as to form by the superintendent of state police. A license to carry or possess a pistol or revolver shall have attached the licensee's photograph, and a coupon which shall be removed and retained by any person disposing of a firearm to the licensee. Such license shall specify the weapon covered by calibre, make, model, manufacturer's name and serial number, or if none, by any other distinguishing number or identification mark, and shall indicate whether issued to carry on the person or possess on the premises, and if on the premises shall also specify the place where the licensee shall possess the same. If such license is issued to an alien, or to a person not a citizen of and usually a resident in the state, the licensing officer shall state in the license the particular reason for the issuance and the names of the persons certifying to the good character of the applicant. Any license as gunsmith or dealer in firearms shall mention and describe the premises for which it is issued and shall be valid only for such premises.

8. License: exhibition and display. Every licensee while carrying a pistol or revolver shall have on his or her person a license to carry the same. Every person

licensed to possess a pistol or revolver on particular premises shall have the license for the same on such premises. Upon demand, the license shall be exhibited for inspection to any peace officer, who is acting pursuant to his or her special duties, or police officer. A license as gunsmith or dealer in firearms shall be prominently displayed on the licensed premises. A gunsmith or dealer of firearms may conduct business temporarily at a location other than the location specified on the license if such temporary location is the location for a gun show or event sponsored by any national, state, or local organization, or any affiliate of any such organization devoted to the collection, competitive use or other sporting use of firearms. Any sale or transfer at a gun show must also comply with the provisions of article thirty-nine-DD of the general business law. Records of receipt and disposition of firearms transactions conducted at such temporary location shall include the location of the sale or other disposition and shall be entered in the permanent records of the gunsmith or dealer of firearms and retained on the location specified on the license. Nothing in this section shall authorize any licensee to conduct business from any motorized or towed vehicle. A separate fee shall not be required of a licensee with respect to business conducted under this subdivision. Any inspection or examination of inventory or records under this section at such temporary location shall be limited to inventory consisting of, or records related to, firearms held or disposed at such temporary locations. Failure of any licensee to so exhibit or display his or her license, as the case may be, shall be presumptive evidence that he or she is not duly licensed.

9. License: amendment. Elsewhere than in the city of New York, a person licensed to carry or possess a pistol or revolver may apply at any time to his or her licensing officer for amendment of his or her license to include one or more such weapons or to cancel weapons held under license. If granted, a record of the amendment describing the weapons involved shall be filed by the licensing officer in the executive department, division of state police, Albany. The superintendent of state police may authorize that such amendment be completed and transmitted to the state police in electronic form.

Notification of any change of residence shall be made in writing by any licensee within ten days after such change occurs, and a record of such change shall be inscribed by such licensee on the reverse side of his or her license. Elsewhere than in the city of New York, and in the counties of Nassau and Suffolk, such notification shall be made to the executive department, division of state police, Albany, and in the city of New York to the police commissioner of that city, and in the county of Nassau to the police commissioner of that county, and in the county of Suffolk to the licensing officer of that county, who shall, within ten days after such notification shall be received by him or her, give notice in writing of such change to the executive department, division of state police, at Albany.

10. License: expiration, certification and renewal. (a) Any license for gunsmith or dealer in firearms and, in the city of New York, any license to carry or possess a pistol or revolver, issued at any time pursuant to this section or prior to the first day of July, nineteen hundred sixty-three and not limited to expire on an earlier date

fixed in the license, shall expire not more than three years after the date of issuance. In the counties of Nassau, Suffolk and Westchester, any license to carry or possess a pistol or revolver, issued at any time pursuant to this section or prior to the first day of July, nineteen hundred sixty-three and not limited to expire on an earlier date fixed in the license, shall expire not more than five years after the date of issuance; however, in the county of Westchester, any such license shall be certified prior to the first day of April, two thousand, in accordance with a schedule to be contained in regulations promulgated by the commissioner of the division of criminal justice services, and every such license shall be recertified every five years thereafter. For purposes of this section certification shall mean that the licensee shall provide to the licensing officer the following information only: current name, date of birth, current address, and the make, model, caliber and serial number of all firearms currently possessed. Such certification information shall be filed by the licensing officer in the same manner as an amendment. Elsewhere than in the city of New York and the counties of Nassau, Suffolk and Westchester, any license to carry or possess a pistol or revolver, issued at any time pursuant to this section or prior to the first day of July, nineteen hundred sixty-three and not previously revoked or cancelled, shall be in force and effect until revoked as herein provided. Any license not previously cancelled or revoked shall remain in full force and effect for thirty days beyond the stated expiration date on such license. Any application to renew a license that has not previously expired, been revoked or cancelled shall thereby extend the term of the license until disposition of the application by the

licensing officer. In the case of a license for gunsmith or dealer in firearms, in counties having a population of less than two hundred thousand inhabitants, photographs and fingerprints shall be submitted on original applications and upon renewal thereafter only at six year intervals. Upon satisfactory proof that a currently valid original license has been despoiled, lost or otherwise removed from the possession of the licensee and upon application containing an additional photograph of the licensee, the licensing officer shall issue a duplicate license.

(b) All licensees shall be recertified to the division of state police every five years thereafter. Any license issued before the effective date of the chapter of the laws of two thousand thirteen which added this paragraph shall be recertified by the licensee on or before January thirty-first, two thousand eighteen, and not less than one year prior to such date, the state police shall send a notice to all license holders who have not recertified by such time. Such recertification shall be in a form as approved by the superintendent of state police, which shall request the license holder's name, date of birth, gender, race, residential address, social security number, firearms possessed by such license holder, email address at the option of the license holder and an affirmation that such license holder is not prohibited from possessing firearms. The form may be in an electronic form if so designated by the superintendent of state police. Failure to recertify shall act as a revocation of such license. If the New York state police discover as a result of the recertification process that a licensee failed to provide a change of address, the New York state police shall not require the licensing officer to revoke such license.

11. License: revocation and suspension. (a) The conviction of a licensee anywhere of a felony or serious offense or a licensee at any time becoming ineligible to obtain a license under this section shall operate as a revocation of the license. A license may be revoked or suspended as provided for in section 530.14 of the criminal procedure law or section eight hundred forty-two-a of the family court act. Except for a license issued pursuant to section 400.01 of this article, a license may be revoked and cancelled at any time in the city of New York, and in the counties of Nassau and Suffolk, by the licensing officer, and elsewhere than in the city of New York by any judge or justice of a court of record; a license issued pursuant to section 400.01 of this article may be revoked and cancelled at any time by the licensing officer or any judge or justice of a court of record. The official revoking a license shall give written notice thereof without unnecessary delay to the executive department, division of state police, Albany, and shall also notify immediately the duly constituted police authorities of the locality.

(b) Whenever the director of community services or his or her designee makes a report pursuant to section 9.46 of the mental hygiene law, the division of criminal justice services shall convey such information, whenever it determines that the person named in the report possesses a license issued pursuant to this section, to the appropriate licensing official, who shall issue an order suspending or revoking such license.

(c) In any instance in which a person's license is suspended or revoked under paragraph (a) or (b) of this subdivision, such person shall surrender such license to

the appropriate licensing official and any and all firearms, rifles, or shotguns owned or possessed by such person shall be surrendered to an appropriate law enforcement agency as provided in subparagraph (f) of paragraph one of subdivision a of section 265.20 of this chapter. In the event such license, firearm, shotgun, or rifle is not surrendered, such items shall be removed and declared a nuisance and any police officer or peace officer acting pursuant to his or her special duties is authorized to remove any and all such weapons.

12, 12-a., 12-c., 13. [Omitted.]

14. Fees. In the city of New York and the county of Nassau, the annual license fee shall be twenty-five dollars for gunsmiths and fifty dollars for dealers in firearms. In such city, the city council and in the county of Nassau the Board of Supervisors shall fix the fee to be charged for a license to carry or possess a pistol or revolver and provide for the disposition of such fees. Elsewhere in the state, the licensing officer shall collect and pay into the county treasury the following fees: for each license to carry or possess a pistol or revolver, not less than three dollars nor more than ten dollars as may be determined by the legislative body of the county; for each amendment thereto, three dollars, and five dollars in the county of Suffolk; and for each license issued to a gunsmith or dealer in firearms, ten dollars. The fee for a duplicate license shall be five dollars. The fee for processing a license transfer between counties shall be five dollars. The fee for processing a license or renewal thereof for a qualified retired police officer as defined under subdivision thirty-four of section 1.20 of the criminal procedure law, or a qualified retired

sheriff, undersheriff, or deputy sheriff of the city of New York as defined under subdivision two of section 2.10 of the criminal procedure law, or a qualified retired bridge and tunnel officer, sergeant or lieutenant of the triborough bridge and tunnel authority as defined under subdivision twenty of section 2.10 of the criminal procedure law, or a qualified retired uniformed court officer in the unified court system, or a qualified retired court clerk in the unified court system in the first and second judicial departments, as defined in paragraphs a and b of subdivision twenty-one of section 2.10 of the criminal procedure law or a retired correction officer as defined in subdivision twenty-five of section 2.10 of the criminal procedure law shall be waived in all counties throughout the state.

15. Any violation by any person of any provision of this section is a class A misdemeanor.

16. [Omitted.]

16-a-c. [Omitted.]

17. Applicability of section. The provisions of article two hundred sixty-five of this chapter relating to illegal possession of a firearm, shall not apply to an offense which also constitutes a violation of this section by a person holding an otherwise valid license under the provisions of this section and such offense shall only be punishable as a class A misdemeanor pursuant to this section. In addition, the provisions of such article two hundred sixty-five of this chapter shall not apply to the possession of a firearm in a place not authorized by law, by a person who holds an otherwise valid license or possession of a firearm by a person within a one year period after the

stated expiration date of an otherwise valid license which has not been previously cancelled or revoked shall only be punishable as a class A misdemeanor pursuant to this section.