No. 18-280

In the Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ET AL.,
Petitioners,

v.

CITY OF NEW YORK, NEW YORK, ET AL.,
Respondents.

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

BRIEF FOR THE STATES OF LOUISIANA, ALABAMA, ARIZONA, ARKANSAS, GEORGIA, IDAHO, KANSAS, THE COMMONWEALTH OF KENTUCKY BY AND THROUGH GOVERNOR MATT BEVIN, MICHIGAN, GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI, MONTANA, OKLAHOMA, SOUTH CAROLINA, TEXAS, UTAH, WEST VIRGINIA, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Jeff Landry
LOUISIANA ATTORNEY GENERAL

Elizabeth B. Murrill
Solicitor General
Counsel of Record
Michelle Ward Ghetti
Deputy Solicitor General
Shae McPhee
Colin Clark
Assistant Solicitors General
Louisiana Department of Justice
1885 North Third Street
Baton Rouge, LA 70802
(225) 326-6766
murrille@ag.louisiana.gov

Counsel for Amici Curiae

[Additional counsel listed on signature page]

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether the City's ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the Commerce Clause, and the constitutional right to travel.

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INTEREST OF *AMICI CURIAE*[1]

As chief legal officers of our states, *amici* protect the rights of our citizens, enforce laws, provide opinions on state and local legal matters, and offer guidance to our legislatures. The Second Amendment creates a right this Court has said "is exercised individually and belongs to all Americans." *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008). This is a fundamental guarantee afforded by the federal Constitution. But for ten years the Court has avoided defining the parameters of the right "to keep and bear Arms." This has left *amici* unsure of what rights the Second Amendment protects and to what degree. State and local officers, including *amici*, cannot confidently enforce gun laws, counsel state legislatures, or provide accurate legal advice if the courts cannot clearly articulate the legal standards applied to review such laws.

Amici also have an interest in protecting citizens and commerce in our states. *Amici* support and advocate for our states' right to experiment with different policy choices, but "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller,* 554 U.S. at 636. And the New York City ordinance threatens more than Second Amendment rights. When municipalities like New York City criminalize traveling with a personal handgun safely stored inside a vehicle, government threatens the rights of our citizens to travel throughout the United States without being subject to arrest and

[1] Consistent with Supreme Court Rule 37.2(a), *amici* provided notice to the parties' attorneys more than ten days in advance of filing.

prosecution. By forbidding its citizens to leave the state with their firearms, New York City's regulations—blessed by the Second Circuit—create a dissonance in the federal system that threatens not only the Second Amendment right but also free trade under the Commerce Clause. Wildlife tourism, which includes hunting, practicing, and competitive shooting, is a multibillion dollar industry in the United States. If New York's regulatory scheme is allowed to stand and is copied by cities around the United States, it could undercut state economies dependent upon those tourism dollars.

Amici have a profound interest in protecting the fundamental constitutional rights of our citizens. In the gap created by the Court's silence, a patchwork of conflicting opinions and burdensome local ordinances and state regulatory schemes continue to choke meaningful protection of the core right.

SUMMARY OF ARGUMENT

New York City restricts people with a "premises permit" from carrying their handgun outside of their home for any purpose other than to practice at one of the New York City shooting ranges. Pet'r's App. 88-90. Several circuit courts have held that the purpose of the Second Amendment is self-defense, "which is as important outside the home as inside." *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012). *Amici* agree. But the Second Circuit, similar to a number of other circuits, determined that a rule only implicates the core of the Second Amendment's protections by extending into the home. Pet'r's. App. 11, *see also id.* at 14, 17, 23, 24, 26. Although the Second Circuit claimed to apply "some form of heightened scrutiny" when evaluating Rule § 5-23, it did no such thing. It opted, instead, for a tortured test that resembles but is not quite rational basis scrutiny—requiring little evidence of a substantial interest by the city and no evidence of how the regulation relates to that interest. This cursory analysis renders the term "heightened scrutiny" virtually meaningless. The Second Circuit's approach is indicative of the lack of any uniformity among the circuits regarding the scope of the right and applicable standard of review.

This Court in *Heller* said "[t]here will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us." 554 U.S. at 635. Those exceptions have come before the Court time and again but the Court has remained silent. This petition provides an excellent vehicle for the Court to break its silence and ameliorate the deep division within the

circuit courts on two different but related issues: The scope or "core" of the Second Amendment right and the level of scrutiny courts should apply to laws limiting that right.

The case is also an excellent vehicle to address the scope of permissible restrictions on trade and travel when gun laws contravene the Commerce Clause. New York's regulatory scheme discriminates against interstate commerce because it "deprives out-of-state businesses of access to a local market" by forbidding its citizens from hunting and patronizing ranges outside the state with their own guns. *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 409 (1994). "[I]f not one, but many or every, State adopted similar legislation," *Healy v. Beer Inst.* 491 U.S. 324, 336 (1989), the result could significantly impact states whose economies depend on hunting and associated tourism involving the use of personal handguns.

ARGUMENT

I. THIS CASE IS A GOOD VEHICLE TO RESOLVE A DEEP DIVIDE.

A. The Court Should Resolve an Increasingly Deep Circuit Split.

In *Heller*, the Court announced that the Second Amendment codified a pre-existing "individual right to possess and carry weapons." 554 U.S. at 592. It further recognized that the right was not unlimited and protected only those weapons in common use by citizens for lawful purposes like self-defense. *Id*. at 624. Using these precepts, the Court concluded that the District of Columbia's ban on possession of handguns in the home, where the need for self-defense "is most acute," was unconstitutional. *Id*. at 635. Aside from these broad guidelines, *Heller* offered little future guidance. The Court accepted that, going forward, many applications of the Second Amendment would remain "in doubt." *Id*. at 635. That doubt persisted after *McDonald v. City of Chicago*, another case involving a rule banning handguns within the home. 561 U.S. 742 (2010). In *McDonald*, the Court held that the right to keep and bear arms was a fundamental right protected against state regulation under the Fourteenth Amendment but added no further guidance for resolving Second Amendment challenges.

Lacking direction, lower courts have chopped *Heller* and *McDonald* into fragments and strung them back together creating a patchwork of Frankensteinian rules of Second Amendment law.

Numerous courts have viewed any Second Amendment right to bear arms in public with skepticism but have chosen to "hew to a judicious course," *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013), and assume that public carry fell somewhere within the scope of the Amendment. Nevertheless, they have held that public carry is not a core Second Amendment right. The Second Circuit, for example, found that the New York City rule did not "substantially affect the exercise of core Second Amendment rights" and thus was not entitled to maximum protection. Pet'r's App. 29. The Second Circuit defines the core Second Amendment right as the liberty to possess a firearm in one's home, but not outside it. And the Second Circuit is not alone: At least two other circuits have found that the core Second Amendment right does not extend outside of the home and public possession is not entirely protected. *See Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013); *Woollard,* 712 F.3d at 874-76.

Had Petitioners lived in one of the three circuits that have determined that the right to bear arms outside of their home was a core right fully protected by the Second Amendment, their ability to carry their weapons to second homes, to gun ranges to practice or compete outside the City, or to take them out of state would have been protected. *See Young v. Hawaii*, 896 F.3d 1044, 1071 (9th Cir. 2018); *Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017); *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012).

Strong dissents in these courts, however, indicate a deep divide within the judges on each circuit court. *See, e.g., Drake*, 724 F.3d at 440 (Hardiman, J., dissenting);

Peruta v. Cty of San Diego, 824 F.3d 919 (9th Cir. 2016) (Callahan, J., dissenting with whom Bea, J., joined; Silverman, J., joined except section IV; and Smith, J., joined except as to II.B.)). The dissonance is also apparent at the state level. *Compare, e.g., People v. Aguilar*, 2 N.E. 3d 321, 327 (Ill. 2013) (Second Amendment applies outside the home) with *Williams v. State*, 10 A.3d 1167, 1169 (Md. 2011) (public carry falls outside the scope of the Second Amendment).

The divide infiltrates deeper. A majority of circuits have found that "a two-part approach to Second Amendment claims seems appropriate under *Heller*." *Woollard*, 712 F.3d at 874–75 (internal quotation marks omitted); *see Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Ezell v. City of Chicago*, 651 F.3d 684, 703–04 (7th Cir. 2011); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010). *But see Wrenn*, 864 F.3d at 664 (applying a more categorical approach). Under the two-part approach, the "first question is whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *Woollard,* 712 F.3d at 875. If so, courts "move to the second step of applying an appropriate form of [judicial] scrutiny." *Id*. (internal quotation marks omitted). However, the answers to those two questions vary widely among the circuits.

What constitutes the appropriate level of scrutiny is also the subject of continued disagreement. *See*, *e.g.*, *Heller*, 670 F.3d at 1271 (Kavanaugh, J., dissenting). In

Heller, this Court stated that the rational basis test is inappropriate in the Second Amendment context because the right to keep and bear arms is a specific, enumerated right. 554 U.S. at 628 n.27. The majority in *Heller* explicitly rejected a "judge-empowering free-standing interest-balancing approach." *Id*. at 634 (internal quotation marks omitted); *see also McDonald*, 561 U.S. at 790–91 (noting that the *Heller* Court specifically rejected an interest-balancing test). But, past that, the Court "left in its wake a morass of conflicting lower court opinions regarding the proper analysis to apply to challenged firearms regulations." *United States v. Chester*, 628 F.3d 673, 688–89 (4th Cir. 2010) (Davis, J., concurring).

Although most of the circuits that have dealt with the issue have generally applied intermediate scrutiny, the actual application is "less neat—and far less consistent—than that." *Tyler v. Hillsdale Cty Sheriff's Dep't*, 775 F.3d 308, 324 (6th Cir. 2014), *rev'd en banc*, 837 F.3d 678 (6th Cir. 2016). "The appropriate level of scrutiny that courts should apply in Second Amendment cases (assuming a scrutiny-based approach is appropriate at all) remains a difficult, highly contested question." *Id.* The circuit courts have "grappled with varying sliding-scale and tiered-scrutiny approaches." *Peruta v. County of San Diego*, 742 F.3d 1144, 1167 (9th Cir. 2014); *see also*, *Kachalsky v. County of Westchester*, 701 F.3d 81, 93–94 (2d Cir. 2012); *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011); *United States v. Masciandaro*, 638 F.3d 458, 470–71 (4th Cir. 2011); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010); *Reese*, 627 F.3d at 802.

A number of the circuits also have deep divides within their circuit so that the test used and the level of scrutiny may differ depending on the panel. *See, e.g., Nat'l Rifle Ass'n*, 700 F.3d 185, *reh'g en banc denied*, 714 F.3d 334 (5th Cir. 2013) (seven judges dissenting); *Mance v. Sessions*, 896 F.3d 699 (5th Cir.), *reh'g en banc denied*, 896 F.3d 390, 394 (5th Cir. 2018) (same); *Ezell*, 651 F.3d at 708.

It is difficult if not impossible to make sense of these varying approaches to a fundamental constitutional right. Circuit courts, state courts, legislatures, local government regulators, and *amici* need further guidance. *Amici* beseech the Court to end the confusion. As Justice Thomas and others have repeatedly urged, "the time has come to answer [these] important question[s] definitively." *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., dissenting from denial of writ; joined by Gorsuch, J.). The Court should grant certiorari.

B. The Second Circuit's Feeble Intermediate Scrutiny Analysis Furthers the Need for Clarity.

Although claiming to apply intermediate scrutiny, the Second Circuit actually applied a watered-down test more resembling rational basis scrutiny. This Court has clearly said rational basis cannot be the level of scrutiny "used to evaluate the extent to which a legislature may regulate a specific, enumerated right," such as the right to "keep and bear arms." *Heller*, 554 U.S. at 628 n.27. The Second Circuit rubber-stamped Rule 5-23's restriction preventing law-abiding gun owners from removing their guns from the City based upon a single affidavit suggesting that "premises

license holders 'are just as susceptible as anyone else to stressful situations,' including driving situations that can lead to road rage, 'crowd situations, demonstrations, family disputes,' and other situations." Pet'r's App. 26. The affidavit also suggested that the City, "in the past, had difficulty monitoring and enforcing the limits of the premises licenses." *Id*. at 27. If no more than this is required to prop up a law restricting a core right of the American people, intermediate scrutiny means very little.

In discussing Petitioner Colantone's interest in being able to take his handgun to his home in Delaware County, the Second Circuit suggested that he should just get an additional gun (and license) to keep at his second home. Pet'r's App. 15. "Colantone presents no evidence" that the cost of obtaining a license or a second gun "would be so high as to be exclusionary or prohibitive." *Id*. As to the remaining plaintiffs, "they offer[ed] no evidence that the burden imposed by having to use a range within the City [was] in any way substantial," *id*. at 20, because "guns could be rented or borrowed" at "gun ranges or competitions outside New York City." *Id*. at 22. Rather than placing the burden of proof on the government to show that the restriction was justified by a compelling (or even substantial) interest, the court put the burden on Petitioners to provide evidence showing that the ordinance burdened their Second Amendment right.

Although *amici* agree that city and state governments have compelling interests in public safety and crime prevention, New York City still must show how its firearm regulations bear a substantial relationship to the achievement of public safety and

crime prevention. The City made *no* showing that restricting its citizens' travel to inside the City and only for the purpose of practicing at firing ranges had *any* relationship, much less a substantial one, to public safety or crime prevention. Forty-nine other states and the federal government have laws governing carrying firearms in vehicles, and not one of them has determined that this level of restriction is necessary to public safety or to prevent crime.[2]

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[2] Ala. Code § 13A-11-73(a) (unloaded, locked container/compartment, inaccessible); Ariz. Rev. Stat. Ann. § 4-229 (>18 open carry; >21 concealed); Ark. Code Ann. § 5-73-120 (need carry permit or driving to hunting area); Alaska Stat. § 18.65.800 (open or in locked vehicle if parked); Cal. Penal Code § 25610 (unloaded, locked compartment or container); Colo. Rev. Stat. § 18-12-105(2) (concealed); Conn. Gen. Stat. § 529:29-38 (unloaded, locked container, inaccessible and to/from home, business, repair, competition, or transporting household goods); Del. Crim. Code § 5:1441 (open); Fla. Stat. § 790.251 (not accessible to driver, locked container or trunk); Ga. Code Ann. § 16-11-126 (unloaded, in a case); Haw. Rev. Stat. § 134-26 (unloaded, in container, between home/business and purchase/sale/repair, target range, show/exhibit, training/instruction); Idaho Code §§ 18-3302; 18-3302K (open or unloaded and in locked container); 430 Ill. Comp. Stat. Ann. §§ 65/2, 66/65 (unloaded, locked container, inaccessible); Ind. Code § 35-47-2-1 (unloaded, inaccessible, locked case); Iowa Code § 724.4 (unloaded in locked container or compartment not readily accessible); Kan. Stat. Ann. § 75-7c03 (concealed or open); Ky. Rev. Stat. Ann. § 527.010 (closed container/compartment); La. Stat. Ann. 32:292.1 (open or concealed carry with permit in locked vehicle); Me. Stat. tit. 12 § 11212 (open or concealed); Md. Code Ann., Crim. Law § 4-203 (to/from purchase/sale, repair, between homes, between home and business if unloaded and in a case/holster); Mass. Ann. Laws ch. 140 § 131C (must have license for loaded, no restriction on unloaded; non-residents can travel through for competition/hunting); Mich. Comp. Laws § 750.227(d) (unloaded, locked container, inaccessible); Minn. Stat. Ann. § 624.714 (unloaded in encasement or in closed trunk); Miss. Code

New York City's regulatory scheme imposes a substantial burden on its citizens and those visiting or

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Ann. § 45-9-55 (open or concealed); Mo. Rev. Stat. § 571.215 (unloaded, not readily accessible); Mont. Code Ann. § 45-3-111 (openly or concealed); Neb. Rev. Stat. § 69-2441 (open); Nev. Rev. Stat. § 503.165 (openly or concealed); N.H. Rev. Stat. Ann. §§ 159.4, 159.6 (unloaded, locked container, not readily accessible); N.J. Stat. Ann. §§ 23:4-24.1; 2C:39-6 (unloaded, locked container, locked trunk; without permit, only to & from place of purchase/repair, home, business, shooting range, hunting); N.M. Stat. Ann. § 30-7-2 (concealed, loaded); N.C. Gen. Stat. § 35:14-269; N.D. Cent. Code §§ 62.1-02-13; 62.1-02-10; 62.1-02-10.1 (openly or concealed, unloaded); Oh. Rev. Code § 2923.16 (if loaded, then inaccessible; unloaded, closed package or in trunk or open sight in holder); Okla. Stat. § 21-1289.13 (open or concealed if unloaded); Or. Rev. Stat. § 166.250 (openly in vehicle, concealed if not readily accessible); Pa. Cons. Stat. § 18-6106 (with permit or unloaded and transporting to and from place of purchase/repair, shooting range, hunting); R.I. Gen. Laws § 11-47-9 (disassembled, unloaded, open, secured in container, to or from purchase/repair, shooting range, moving from one home to another); S.C. Code Ann. § 16-23-20 (glove compartment, console, trunk); S.D. Codified Laws §§ 22-14-10; 22-14-9 (concealed if unloaded in trunk or other closed compartment or container); Tenn. Code Ann. § 39-17-1307 (open or concealed); Tex. Penal Code Ann. § 46.02 (concealed); Utah Code Ann. § 76-10-504 (unloaded, securely encased (including glove box/console), not readily accessible); Vt. Stat. Ann. § 10-4705 (open and concealed); Va. Code Ann. § 18.2-308 (locked container or compartment); Wash. Rev. Code § 9.41.050 (with permit on person, in vehicle with person, or vehicle locked/gun concealed); W. Va. Code § 61-7-7; § 20-2-5 (unloaded, open; sometimes must be in a container); Wis. Stat. § 167.31 (open); Wyo. Stat. Ann. § 6-8-104 (nonresidents required to carry open); D.C. Code § 22–4504.02 (unloaded, inaccessible from passenger compartment or in locked container). In all jurisdictions listed, the first requirement is that it be legal for the person to possess the gun. Additionally, many states have reciprocity statutes that allow for concealed carry by non-residents. *See generally*, Bryan L. Ciyou, Gun Laws By State (Peritus Holdings, Inc. 2018), goo.gl/cp3Szp.

passing through it because it eliminates the right to bear arms outside of one's home except in the most limited of circumstances. Rule 5-23 does nothing to enhance safety or prevent crime and, in fact, does the opposite by increasing the number of handguns within the City by not allowing citizens to leave with them. It is difficult to imagine how any law would fail such a watered-down test as this. Under the Second Circuit's test, the right is a privilege granted by government, not a right guaranteed by the Second Amendment.

II. SELF-DEFENSE IS NOT LIMITED TO THE HOME.

This Court should definitively affirm, at the very least, that self-defense is not limited to the home. "If the fundamental right of self-defense does not protect [citizens outside of their homes], then the safety of all Americans is left to the mercy of state authorities who may be more concerned about disarming the people than about keeping them safe." *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1033 (2016) (Alito, J. concurring). The premises permit that Petitioners possess allows them only to transport their guns outside of their home for the limited purpose of practice, only within New York City, and only if they are unloaded, in a locked container, with the ammunition carried separately. New York bans carrying handguns openly, *see Kachalsky*, 701 F.3d at 86, and strictly controls who may obtain a concealed carry permit. To have a concealed carry permit, one must show a need for self-defense greater than the average person's need. *Id*. at 86–87.

The Second Circuit notes that Petitioners could have obtained a "carry permit," but does not further explain that New York City has special requirements

to obtain such a permit that exceed New York state law. Pet'r's App. 13-14 n. 7; *see* 38 R.C.N.Y. § 5-03. An applicant must prove she has "proper cause" for the permit, which has been defined under the local law and New York law to include exposure by reason of employment to "extraordinary personal danger" or "documented by proof of recurrent threats to life or safety." *Id.* A "generalized desire to carry a concealed weapon to protect one's person and property does not constitute 'proper cause.'" *Kachalsky*, 701 F.3d at 86 (internal quotation marks omitted).

As *Heller* recognized, "[a] statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, [is] clearly unconstitutional." *Heller,* 554 U.S. at 629 (internal quotation marks omitted). The onerous restrictions placed on the premises permit neuter the right outside the premises. And in combination with other rules New York City unconstitutionally disarms its people and exposes visitors to arrest and prosecution for unwittingly violating its restrictive scheme. Pet'r's App. 78-79.

III. NEW YORK CITY'S REGULATORY SCHEME DISCRIMINATES AGAINST INTERSTATE COMMERCE.

Across the United States, more than $27 billion in spending, nearly 200,000 American jobs, and more than $7 billion in American salaries and wages can be attributed to the hunting industry. Outdoor Indus. Ass'n, *The Outdoor Recreation Economy* 18, goo.gl/gt4Etg. In the Gulf States, each year wildlife tourism—including recreational hunting and sport

shooting—creates 2.6 million jobs, generates $5.3 billion in tax revenue, and stimulates $19.4 billion in spending ($5 billion of which can be attributed to hunting). Shawn Stokes & Marcy Lowe, *Wildlife Tourism and the Gulf Coast Economy* 9, 13, 17, goo.gl/Ujyqkj. In Louisiana alone, tourists spend $2 billion per year on wildlife tourism, which creates 82,000 jobs and fills the state's coffers with over $200 million in tax revenues. *Id.* at 11, 14, 18. Approximately 277,000 visitors hunt in Louisiana annually. *Id.* at 8.

Hunting includes the use of handguns.[3] Shooting is even an Olympic sport.[4] Although individuals might be able to rent guns when engaging in wildlife tourism, most prefer using their own firearms. Using one's own gun is recommended for many reasons, but safety is primary among them. *See, e.g.,* The Well Armed Woman, *The Importance of Practicing With Your Gun,* goo.gl/xXGBdm. And New Yorkers, like Petitioners, desire to use their firearms to hunt, compete, or otherwise engage in the sort of wildlife or recreational tourism that fuels the economy of many states. But New York City forbids the tens of thousands of people with premises permits from removing their firearms from the address to which their guns are assigned.

Recognizing that "[t]he right to possess firearms for protection implies a corresponding right to acquire and

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[3] *See, e.g.*, Gun Carrier, *Considerations for Handgun Hunting*, goo.gl/D7p4iW; *see also* Brett Straton, *Delaware: Handgun Hunting Bill Headed to Governor's Desk*, goo.gl/EfB7zW

[4] The webpage for the Olympic shooting sport can be found at https://www.olympic.org/shooting.

maintain proficiency in their use," *Ezell*, 651 F.3d at 704, the City allows those with premises licenses to practice but only at one of the shooting ranges within the City and only if the gun is "unloaded, in a locked container, [and with] the ammunition . . . carried separately." Pet'r's App. 88. Only ranges within the City benefit from the large market of guns artificially tied to the City by this rule. The City does allow people with premises permits to remove their guns from the City to hunt if they secure an additional permission but even with the hunting permit, the handguns may not leave the state of New York. *Id*.

New York City's licensing scheme applies to millions of people and regulates tens of thousands of guns. The owners of those guns acquire ammunition and specialized parts for their guns and require ranges to learn to use them. These needs create a market that affects interstate commerce. *See Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928) (adopting an expansive view of interstate commerce that "embraces all the component parts of commercial intercourse among States"). Under the Court's precedent, because the City's ordinance "deprives out-of-state businesses of access to a local market," it falls "within the purview of the Commerce Clause." *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 389 (1994).

Isolating commerce locally, especially when it could occur better, safer, or cheaper elsewhere, "has been declared to be virtually *per se* illegal" because such laws blatantly discriminate against interstate commerce. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984)*; see also Maine v.*

Taylor, 477 U.S. 131, 148 (1986). Blatantly discriminatory ordinances will survive only if the "municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *C & A Carbone*, 511 U.S. at 392*; see also Dep't of Revenue v. Davis*, 553 U.S. 328, 338 (2008). Even when exercising "unquestioned power to protect the health and safety of its people," a state may not "erect[] an economic barrier protecting a major, local industry against competition from without the State" if reasonable and nondiscriminatory alternatives exist. *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951). State laws may still be invalid if they have "incidental" effects on interstate commerce. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). The Court will uphold such laws unless their burden on interstate commerce is "clearly excessive in relation to [their] putative local benefits." *Id.* The Court does not engage in this balancing, known as the "*Pike* test," when a state's law is discriminatory and so per se invalid. *See C & A Carbone*, 511 U.S. at 389–90.

Recognizing there is "no clear line separating the category of state regulation that is virtually per se invalid under the Commerce Clause, and the category subject to the *Pike* [test]," the Court has said "the critical consideration is the overall effect of the statute on both local and interstate activity." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986). To determine "the practical effect" of a statute, the Court in part considers how the statute "may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Healy v. Beer Inst.* 491 U.S. 324, 336 (1989).

There is little room for doubt that New York City's ordinance discriminates against interstate commerce both on its face and in practical effect and so is per se invalid. New York City is home to more than eight million people, nearly two and a half percent of all Americans. The City's regulations forbid most of those people from removing their guns from the City. And even those with a hunting license may not leave the state with their guns. Although those wishing to hunt, practice, or compete out of state may theoretically be able to rent firearms, this adds costs, diminishes safety, and discourages these activities in favor of local interests. The market of gun owners desiring to exercise their Second Amendment rights to learn to use and grow proficient in the use of their own firearms is totally restricted to the City or, with an additional authorization, New York State. There can be no dispute that New York City's rule "deprives out-of-state businesses of access to a local market," *C & A Carbone*, 511 U.S. at 389. The damage to interstate commerce and state economies dependent upon wildlife tourism would be great "if not one, but many or every, State" adopted similar legislation. *Healy*, 491 U.S. at 336.

The City claims it implemented its scheme to both "control the presence of firearms in public" and to enhance NYPD's ability to verify a licensee's statement that he is transporting his gun to or from an authorized range. *See* Pet'r's App. 26-27. Setting aside the faulty reasoning, there are undoubtedly other ways to further these interests. That other safe alternatives exist is clearly evident from the fact that the New York City regulatory scheme is an extreme outlier in the United

States.[5] And the existence of other safe possibilities sinks the ordinance under the rigorous scrutiny test. *C & A Carbone*, 511 U.S. at 392.

Even if the Court concluded that the City's ordinance was an even-handed regulation intended to effectuate a legitimate local public interest, the rule's incidental effects on interstate commerce "clearly are excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. A rule forbidding people from leaving New York City, and indeed, requiring them to use the City's ranges for practice, will not remove guns from crowded public places, deter road rage, or ameliorate stressful situations. The *Pike* scale tips heavily in favor of allowing commerce to thrive. The impact of this regulatory scheme on interstate commerce and the threat to commerce should it be copied elsewhere also support granting certiorari.

[5] *See* n.2, *infra*.

CONCLUSION

The Court should grant certiorari and reverse the court of appeals.

Respectfully submitted,

JEFF LANDRY
LOUISIANA ATTORNEY GENERAL

Elizabeth Murrill
Solicitor General
Counsel of Record
Michelle Ward Ghetti
Deputy Solicitor General
Shae McPhee
Colin Clark
Assistant Solicitors General
Louisiana Department of Justice
1885 North Third Street
Baton Rouge, LA 70802
(225) 326-6277
emurrill@ag.louisiana.gov

Counsel for Amici Curiae

ADDITIONAL COUNSEL FOR *AMICI*

STEVE MARSHALL
ATTORNEY GENERAL
STATE OF ALABAMA

MARK BRNOVICH
ATTORNEY GENERAL
STATE OF ARIZONA

LESLIE RUTLEDGE
ATTORNEY GENERAL
STATE OF ARKANSAS

CHRISTOPHER M. CARR
ATTORNEY GENERAL
STATE OF GEORGIA

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

DEREK SCHMIDT
ATTORNEY GENERAL
STATE OF KANSAS

M. STEPHEN PITT
GENERAL COUNSEL TO
GOVERNOR MATTHEW BEVIN
COMMONWEALTH OF
KENTUCKY

BILL SCHUETTE
ATTORNEY GENERAL
STATE OF MICHIGAN

WHITNEY LIPSCOMB
GENERAL COUNSEL TO
GOVERNOR PHIL BRYANT
STATE OF MISSISSIPPI

MIKE HUNTER
ATTORNEY GENERAL
STATE OF OKLAHOMA

TIM FOX
ATTORNEY GENERAL
STATE OF MONTANA

ALAN WILSON
ATTORNEY GENERAL
STATE OF SOUTH CAROLINA

KEN PAXTON
ATTORNEY GENERAL
STATE OF TEXAS

SEAN REYES
ATTORNEY GENERAL
STATE OF UTAH

PATRICK MORRISEY
ATTORNEY GENERAL
STATE OF WEST VIRGINIA

BRAD SCHIMEL
ATTORNEY GENERAL
STATE OF WISCONSIN