21-398-cv

United States Court of Appeals
for the
Second Circuit

ALAN TAVERAS,

Plaintiff-Appellant,

– v –

NEW YORK CITY, NEW YORK, JONATHAN DAVID, in his official capacity as Director, NYPD License Division, ASIF IQBAL, in his official capacity as Executive Director, License Division Rifle/Shotgun Section, DERMOT SHEA, in his official capacity as Police Commissioner, and all successors therein,

Defendants-Appellees,

JAMES O'NEILL, in his official capacity as Police Commissioner and all successors therein,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (FOLEY SQUARE)

BRIEF FOR PLAINTIFF/APPELLANT

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JURISDICTIONAL STATEMENT

Subject matter jurisdiction was proper in the district court pursuant to 28 U.S.C. § 1331, as the causes of action arose from violations of the U.S. Constitution. Final Judgment disposing of all claims was entered by the Clerk of the Court on January 19, 2021. Appellant filed a Notice of Appeal on February 17, 2021. Jurisdiction in this court is proper pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in upholding as constitutional, facially and as applied, New York City's regulations of the possession of rifles and shotguns under a discretionary and permissive licensing scheme that prevents individuals, who are not prohibited from purchasing and possessing firearms under federal or state law, from possessing and purchasing rifles, shotguns and ammunition based on factors that (i) do not constitute prohibitors to firearm possession under state or federal law; (ii) are not longstanding, historically accepted prohibitors to firearm possession; and (iii) are contrary to the holding in *Heller* and *McDonald*.

2. Whether the district court's application of a "law-abiding individual" standard for analyzing Second Amendment violations is unconstitutional.

3. Whether New York City's regulations for the possession of handguns, rifles, and shotguns, both of which empower the NYPD License Division with

discretionary authority over the possession of the same, relegates the possession of all firearms to a mere "privilege" and constitutes a *de facto* ban of the "preexisting individual right" to self-defense protected by the Second Amendment.

STATEMENT OF THE CASE

Alan Taveras ("Mr. Taveras") filed a complaint for injunctive, declaratory, and compensatory relief in the district court to strike as unconstitutional, both facially and as applied, New York City's rifle and shotgun licensing scheme under 38 RCNY 3-03 entitled, "Grounds for Denial" and NYC Administrative Code 10-303 entitled, "Permits for possession and purchase of rifles and shotguns." [see, the district court docket sheet at Appendix[1] p. A2].

Mr. Taveras' complaint was filed on February 11, 2020 in the United States District Court for the Southern District of New York and assigned to the Hon. Katherine Polk Failla. [A1-A2]. An amended complaint was filed on April 6, 2020. [see, First Amended Complaint (the "complaint") at A6].

The complaint sought, *inter alia*, a declaration that the challenged portions of 38 RCNY 3-03 and NYC Administrative Code 10-303 are unconstitutional, facially and as applied, an order striking such portions of the statute, and an injunction against their enforcement. [A6]. The complaint further sought statutory attorneys' fees under 42 U.S.C. § 1988, damages in at least a nominal amount,

[1] References to the Appendix are cited as "A__" with corresponding page number.

costs and disbursements associated with the litigation, and such further and alternative relief as the district court deemed just and proper. [A38-A39].

On July 22, 2020, the defendants (the "City") filed a motion to dismiss the complaint pursuant to Federal Rule 12(b)(6), which was opposed by Mr. Taveras. [A4 at Docket Entry No. 20-23].

By Opinion and Order dated January 19, 2021, the district court dismissed the complaint in its entirety. [A95]. Mr. Taveras filed a Notice of Appeal on February 17, 2021. [A121].

SUMMARY OF THE ARGUMENTS

The action below challenged as unconstitutional certain provisions of New York City's regulations for licensing rifles and shotguns, 38 RCNY §§ 3-03 (f) and (g) and New York Administrative Code §§ 10-303(a)(2) and (9).

The above regulations subject the purchase and possession of rifles and shotguns to permissive and discretionary licensing restrictions, like those applied to handguns under New York State's handgun licensing scheme, Penal Law § 400.00, *et seq*. The City's discretionary licensing requirements for all firearms[2] – handguns, rifles, and shotguns – reduces the possession of all firearms from a

[2] While the New York Penal Law limits the definition of "firearms" to handguns, the term "firearms" is given its common meaning as a reference to all types of guns – handguns, rifles and shotguns. When distinguishing between handguns and longarms (rifles and shotguns) herein, the specific references to the same shall be made.

"right" to a "privilege" and, as such, constitutes a *de facto* ban of the Second Amendment in the five boroughs of New York City.

New York City's Rifle/Shotgun Licensing Scheme

To place the following arguments in context, a brief discussion of how handguns and longarms (rifles and shotguns) are treated by New York State, and viewed by this Circuit, is warranted.

Handgun Possession in New York State

Penal Law § 400.00 is the exclusive statutory mechanism for the licensing of handguns in New York State. The possession of a handgun without a license anywhere in the state is a crime. See, Penal Law § 265.01; § 265.01-b; § 265.20(a)(3).

New York State's handgun licensing scheme is permissive; it provides licensing officers with "broad discretion" to determine whether an individual may possess a handgun. *Kachalsky v. County of Westchester*, 701 F.3d 81, 85-86 (2d Cir. 2012) (citation omitted); *Weinstein v. Krumpter*, 386 F. Supp. 3d 220, 231 (E.D.N.Y. 2019) (citation omitted).

In this Circuit, a handgun license – and by extension, the possession of a handgun - is deemed to be a "privilege" unprotected by the Second Amendment. *Toussaint v. City of N.Y.*, No. 17-CV-5576, 2018 U.S. Dist. LEXIS 152985, 2018 WL 4288637, at *7 (E.D.N.Y. Sept. 7, 2018) (dismissing plaintiff's complaint

because he could not show that he has a protected liberty or property interest in a possible future [handgun] license) (internal citations omitted); *Perros v. County of Nassau*, 238 F. Supp. 3d 395, 400 (E.D.N.Y. 2017) (holding that a New York plaintiff did not have a protected interest in a pistol permit) (internal citations omitted).

"Because New York law vests the [NYPD] License Division with broad discretion in determining whether to deny a handgun permit…[t]he presence of that discretion precludes any legitimate claim of entitlement." *Toussaint*, 2018 U.S. Dist. LEXIS 152985 (2018) (emphasis added); *Spanos v. City of New York*, No. 15-CV-6422, 2016 U.S. Dist. LEXIS 79797, 2016 WL 3448624, at *2 (S.D.N.Y. June 20, 2016).

Put differently, the "presence of discretion" to decide who can and cannot possess a handgun extinguishes the constitutional right to possess a handgun for self-defense, contrary to the holdings in *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010). See, *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (2005) (citation omitted) (A benefit is not a protected entitlement if government officials may grant or deny it in their discretion.).

Possession of Rifles and Shotguns in New York State

Although New York State requires a license for the lawful possession of handguns, the State does not require a license to possess or purchase rifles, shotguns, or ammunition. See, *Panzella v. Cnty. of Nassau*, No. 13-CV-5640, 2015 U.S. Dist. LEXIS 133475, 2015 WL 5607750, at *1 (E.D.N.Y. Aug. 26, 2015) (rifles and shotguns, are treated differently than handguns) citing *Razzano v. County of Nassau*, 765 F. Supp. 2d 176, 180 (E.D.N.Y. 2011)); *Weinstein v. Ryder*, 2021 U.S. Dist LEXIS 55410, at *3-4 (E.D.N.Y. Mar. 23, 2021) No. 19-cv-6236 (SJF)(AKT) ("longarms pose a unique legal issue because unlike other firearms there is no license requirement for the purchase or possession").

While the unlicensed possession of a handgun is a felony, the possession of rifles and shotguns by non-prohibited persons is not. See, Penal Law § 265.01-b; §265.20(a)(3).

New York City improperly regulates the possession and purchase of longarms. Unlike the rest of the state, the possession of rifles and shotguns in the five boroughs of New York City – even in one's home – requires the issuance of a license under New York City's discretionary regulations.

In New York City, rifles and shotguns are subject to a "broad discretionary" licensing scheme like that applied to handguns throughout the State, which resulted

in the state and Circuit courts' classification of handgun possession as a "privilege" unprotected by the scope of the Second Amendment.

New York City implemented laws to regulate and license the possession of rifles and shotguns in the absence of any authority from the New York State Legislature to do so.

Because New York City subjects longarms to a discretionary licensing scheme, the possession of rifles and shotguns in New York City, as with handguns throughout the state, is reduced to a "privilege" unprotected by the scope of Second Amendment.

Because the possession of *every type of firearm* in New York City is a discretionary "privilege", there is no "right" to possess *any* type of firearm. As such, the termination of the *right* to possess a firearm for self-protection has birthed a blackout of the Second Amendment in New York City.

Alan Taveras' Application for a Rifle/Shotgun License

Alan Taveras ("Mr. Taveras") is a resident of New York City. Mr. Taveras has no state or federal disqualifiers prohibiting his purchase or possession of firearms.

If Mr. Taveras resided in anywhere in New York State outside of New York City, he would be able to freely possess rifles and shotguns without seeking permission from the government.

Likewise, Mr. Taveras would be able to purchase rifles and shotguns from a federal firearms licensee ("FFL") because (i) a license is not required outside of New York City to purchase rifles and shotguns and (ii) a background check through the National Instant Background Check System ("NICS") would reveal that he has no prohibitors to the possession of firearms.

In 2018, Mr. Taveras applied for a rifle/shotgun license for home possession from the NYPD License Division, Rifle/Shotgun Section.

Mr. Taveras' application was denied under discretionary factors in 38 RCNY 3-303 and NYC Administrative Code 10-303 that (i) do not apply to the possession of rifles and shotguns anywhere else in the state; (ii) do not constitute prohibitors to the possession of firearms under state or federal law; and (iii) are contrary to the holdings in *Heller, McDonald,* and *Caetano v. Massachusetts*, 577 U.S. 411 (2016) (holding that the possession of any weapon in "common use" for lawful purposes, including a taser, is protected by the Second Amendment).

As rifles, shotguns and handguns are weapons in "common use" for lawful purposes, they fall within the protections of the Second Amendment.

The grounds used by the City to disapprove Mr. Taveras' application for a rifle/shotgun license were his "arrest history, summons history and violent domestic violence history and Order of Protection history."[3] (A11).

The Notice of Disapproval further provided, "You have shown poor moral judgment and an unwillingness to abide by the law.[4] The above circumstances reflect negatively upon your moral character and cast grave doubt upon your fitness to possess a firearm." (A11).

Mr. Taveras filed an internal appeal with the License Division, which affirmed the denial of Mr. Taveras' application under 38 RCNY 3-03 (f) and (g) and NYC Admin. Code 10-303 (a)(2) and (9). (A11-A12).

Under 38 RCNY 3-03, "Grounds for Denial of Permit": subsection (f) provides, "The applicant is the subject of an order of protection or a temporary

[3] As will be stated several times herein, Mr. Taveras has no criminal convictions and no prohibitors under state or federal law from possessing firearms. Mr. Taveras was arrested once and subject to an order of protection in August 2011 based on allegations from a woman who was an ex-girlfriend at the time of the allegations. The charge was dismissed on the merits and the order of protection against Mr. Taveras was vacated. In November 2011, the same ex-girlfriend made a complaint to the NYPD, which was investigated and never resulted in an arrest or any charges being filed against Mr. Taveras. [A13-A14].

[4] The allegations against Mr. Taveras were dismissed on the merits by the court and the order of protection was vacated. Mr. Taveras has not been convicted of any offense. There is nothing in the record ***establishing*** that Mr. Taveras lacks moral character or has an "unwillingness" to abide by the law. This abusively discretionary conduct mandates a "bright line" test based on statutory prohibitors, as in 18 U.S.C. 922(g), for the possession of handguns, rifles, and shotguns in New York State.

order of protection; subsection (g) provides, "the applicant has a history of one or more incidents of domestic violence".

Under NYC Admin. Code 10-303(a), "No person shall be denied a permit to purchase and possess a rifle or shotgun unless the applicant: (2) is not of good moral character…or (9) unless good cause exists for the denial of the permit."

Mr. Taveras has no criminal convictions and is not subject to any orders of protection, nor was he at the time of is application. (A10-A11).

After the License Division denied his internal appeal, Mr. Taveras filed the complaint below.

The district court dismissed the complaint finding that, *inter alia*, (i) the challenged portions of 38 RCNY 3-03 and NYC Administrative Code 10-303 are constitutional, both facially and as applied to Mr. Taveras; (ii) the Second Amendment does not fully apply to Mr. Taveras because he is not a "law-abiding person".

STANDARD OF REVIEW

The standard of reviewing a district court's decision to dismiss a complaint under Rule 12(b)(6) is *de novo*, construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002).

To survive a motion to dismiss, a complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 556.

Mr. Taveras' complaint states a plausible claim for the violation of his pre-existing rights as protected by the Second Amendment, warranting reversal of the district court's opinion and order.

I. POSSESSION OF FIREARMS IN THE HOME UNDER *HELLER*

In *Heller*, 554 U.S. 570, the Supreme Court held that the Second Amendment protects the individual right to keep and possess firearms in the home for self-protection.

II. HANDGUN POSSESSION IN NEW YORK STATE IS DEEMED TO BE A "PRIVILEGE"

By virtue of the discretionary licensing scheme for handguns in New York State, the courts in this Circuit and state deem the possession of a handgun license to be a "privilege" subject to the broad discretion of the statutory licensing officers, not a preexisting right protected by the Second Amendment.

A benefit is not a protected entitlement if government officials may grant or deny it in their discretion. *Oquendo v City of NY*, 2020 U.S. Dist LEXIS 184859, at

*8-9 (E.D.N.Y. Oct. 5, 2020, No. 19-cv-6352 (BMC) citing, *Town of Castle Rock*, 545 U.S. at 756, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (citation omitted).

"Under New York law, it is well settled that the possession of a handgun license is a privilege, not a right, which is subject to the broad discretion of the *Boss v. Kelly*, 306 F. App'x 649, 650 (2d Cir. 2009) (quoting *Papaioannou v. Kelly*, 14 A.D.3d 459, 460, 788 N.Y.S.2d 378 (1st Dep't 2005)).

III. NYC HAS UNLAWFULLY REDUCED THE POSSESSION OF RIFLES AND SHOTGUNS FROM A "RIGHT" TO A "PRIVILEGE"

A. Rifle/shotgun possession vs handgun licensing

The New York State Legislature does not require a license to possess rifles and shotguns anywhere in the State of New York, including New York City. Under New York State Law, an individual who is not prohibited by federal law [18 U.S.C. 922(g)] or state law [Penal Law §§ 265.00(16); 265.00(17); 265.01(4)] – the *per se* prohibitors to the possession of any type of gun - is freely able to purchase and possess rifles and shotguns without seeking permission from the government.

In stark contrast to the rest of the state, New York City requires a license to purchase and possess rifles, shotguns, and ammunition for the same. New York City improperly created a licensing scheme for rifles and shotguns absent any authority from the state legislature to regulate firearms.

The factors to determine an applicant's "eligibility" for the issuance of a handgun license are found in Penal Law § 400.00(1). With the exception of two subsections, (b) and (n), § 400.00(1) requires the denial of a license based on the *per se* prohibitors to firearm possession listed in 28 U.S.C. 922(g); § 265.00(16); § 265.00 (17); § 265.01(4), the presence of which preclude the possession of any type of gun – handguns, rifles, and shotguns.

Subsections (b) and (n) of § 400.00(1) allow the denial of a handgun license for subjective reasons that have no longstanding, historical roots in the founding era: (b) requires denial if the licensing officer feels the applicant does not possess "good moral character" (n) requires denial if the licensing officer has "good cause to deny the application.[5]

The City's licensing scheme for rifles and shotguns is likewise discretionary. Under the City's rifle/shotgun licensing scheme, the "grounds for denial", "moral character" and "good cause" factors for the possession of handguns and rifles/shotguns is the same.[6] [A40-A43].

[5] When holding that the government must allow Mr. Heller to register his handgun and issue him a license, the Supreme Court did not engage in a "moral character" or "good cause" analysis. So long as Mr. Heller was not "disqualified from exercising Second Amendment rights", meaning that he is "not a felon and is not insane". *Heller*, 554 U.S. at 573, 631.

[6] While the handgun licensing scheme that applies to the entire state, including New York City, is set forth in Penal Law § 400.00, New York City created its own regulation under 38 RCNY 5 which includes many of the provision of § 400.00 as well as additional restrictions.

In stark contrast, outside of New York City the purchase and possession of rifles and shotguns is only precluded by the existence of a *per se* prohibitor under state or federal law. Outside of New York City, there are no subjective determinations of "moral character" or "good cause" involved in the possession of rifles and shotguns, whether on a state or federal level.

Stated differently, the possession and purchase of rifles and shotguns outside of New York City is subject to "bright line" prohibitors under state and federal law, without subjective, discretionary interference from the government.

B. Penalties for Possessing a Rifle, Shotgun, or Ammunition in NYC Without a License

The penalties for possessing a rifle, shotgun or ammunition without a license are found in NYC Admin. Code § 10-310. [7] The first violation of the regulation is punishable by a conviction of a violation, a fine of up to $300, and 15 days in jail. Each subsequent violation results in a misdemeanor conviction, a fine of up to $1,000, and up to one year in jail.

In any scenario where an individual simply possesses a rifle or shotgun in their home in New York City, without more, the individual is subject to incarceration. Yet, possessing a rifle or shotgun in one's home in Nassau County,

[7] This section also penalizes possession of an ammunition feeding device designed for use in a rifle or shotgun and capable of holding more than five rounds of rifle or shotgun ammunition; more than 5 rounds, and the offense is a misdemeanor subject to a fine of $1,000 and one year in jail.

50 feet from the border of Queens or in Yonkers, just over the border from the Bronx – in the same state – requires no permission from the government, no license, and subjects the owner to no criminal or civil penalties.

C. Grounds for Denial, 38 RCNY 3-03 and NYC Admin. Code 10-303

Challenged below were, *inter alia*, sections of New York City's requirements and grounds to deny a resident a rifle/shotgun license, as codified in NYC Admin. Code 10-303(a)(2) and (9) and 38 RCNY 3-03(f) and (g). [A40-A41].

New York City's regulations for licensing rifles and shotguns (38 RCNY 3-10 and NYC Admin. Code 10-303) and its regulations for licensing handguns (38 RCNY 5-10) contain identical wording constituting "grounds for denial." [A40-A43].

Under the City's discretionary regulations, the purchase and possession of rifles and/or shotguns is subject to subjective opinions of "moral character" and "good cause", unproven allegations, and other events and conditions that do not rise to the level of disqualifiers to such possession under state or federal law.

IV. THE ABSENCE OF ANY ALTERNATIVES TO POSSESS A FIREARM FOR SELF-DEFENSE REQUIRES STRIKING THE CHALLENGED REGULATIONS

The City's discretion to prevent the possession of any type of firearm – handgun, rifles, shotguns, and ammunition - based on non-prohibiting factors,

which leaves New York City residents without any alternative means of acquiring a firearm for self-defense in the home, "substantially burdens the fundamental right to obtain a firearm sufficient for self-defense" and infringes the Second Amendment right to keep and bear arms. *United States v. Decastro*, 682 F.3d 160, 161 (2d Cir. 2012).

V. THE DISTRICT COURT IMPROPERLY CREATED A SUBCLASS OF CITIZENS AND DECLARED THEM INELIGIBLE TO BE PROTECTED BY THE SECOND AMENDMENT

A. The Government Has No Power to Exclude "The People" From the Protections of the Constitution

The Bill of Rights, codifies individual rights that preexist the document. *Heller*, 554 U.S. at 619, citing, J. Ordronaux, Constitutional Legislation in the United States 241-242 (1891) ("It was not necessary that the right to bear arms should be granted in the Constitution, for it had always existed.").

The "core" of the Second Amendment is the preexisting right to self-defense. "Individual self-defense is the central component of the Second Amendment right." *McDonald*, 561 U.S. at 767, citing, *Heller*, 554 U.S. at 599, 628 (internal quotations omitted).

The Supreme Court interpreted the word "people" as referring to "all Americans." *Heller,* 554 U.S. at 580-81 (asserting that "the people" "refers to a class of persons who are part of a national community or who have otherwise

developed sufficient connection with this country to be considered part of that community") (citation omitted)).

As we said in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990):

> " '[T]he people' seems to have been a term of art employed in select parts of the Constitution. . . . [Its uses] sugges[t] that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."

Heller, 554 U.S. at 580.

"Neither felons nor the mentally ill are categorically excluded from our national community. That does not mean that the government cannot prevent them from possessing firearms. Instead, it means that the question is whether the government has the power to disable the exercise of a right that they otherwise possess, rather than whether they possess the right at all." *Kanter v. Barr*, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting).

B. "Not Law Abiding" is Not the Measure for Forfeiting Firearm Rights

The district court's reliance on the phrase "law-abiding" is contrary to the context in which it was used by the Supreme Court in *Heller* and absent from both a historical analysis of the Second Amendment and the plain language of it.

The Second Amendment contains no limitations on the "people" entitled to the protections of the "right to keep and bear arms", which it further declared "shall not be infringed".

While certain weapons may not fall under the protections of the Second Amendment[8], "the people" are the very essence of the right.[9]

The ratifying conventions in New Hampshire, Massachusetts, and Pennsylvania raised the idea of including language limiting the classes of people eligible to be protected by the Second Amendment – as the district court did - most of which sought to exclude criminals and the violent, but each proposal was affirmatively rejected. See, *Kanter v Barr*, 919 F3d at 454 (Barret, J. dissenting) (extensive historical analysis). Even so, "similar limitations or exclusions do not appear in any of the four parallel state constitutional provisions enacted before ratification of the Second Amendment." *Id.* citing, Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191, 208 (2006) (North Carolina, Pennsylvania, Vermont, Massachusetts).

Because the rights protected by the Second Amendment exist for individuals from birth, the government has no power to take those rights away.

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[8] See, *Caetano v Massachusetts*, 577 U.S. 411 (2016) (The Second Amendment protects those weapons "in common use" by citizens "for lawful purposes like self-defense") citing, *United States v. Miller*, 307 U.S. 174, 179 (1939).

[9] The "right" of the "people" – the right of the individual – to "keep and bear arms", "shall not be infringed".

The application of legislatively created prohibitors to the rights protected by the Second Amendment disables, but does not terminate, the underlying preexisting right to keep and bear arms.[10] The truth of this clarification is borne out by the existence of a Certificate of Relief process whereby those prohibited from possessing firearms because of a conviction for a felony or "serious offense" may have the "civil disability" precluding their lawful possession of firearms removed. See, New York State Correction Law § 700, *et seq.* The individual's underlying preexisting "right" was not terminated by the prohibiting event; the "right" was constrained by a government imposed civil disability.

C. Neither Founding Era History Nor Supreme Court Jurisprudence Supports "Allegation Based" Prohibitors

In *Heller*, the Supreme Court identified felons and the mentally ill as presumptive prohibitors to gun possession, but the Court's declination to proceed through an historical analysis of longstanding, historically accepted disqualifiers to firearm possession was consistent with the facts before the Supreme Court.

To be sure, however, *Heller* did not intimate that, in the context of crime-related prohibitors (as compared to insanity-based prohibitors), mere allegations that never resulted in a conviction based prohibitor (i.e., a violent felony) could

[10] Whether such prohibitors have established roots as longstanding, historically accepted prohibitors is a separate inquiry.

ever be countenanced as a basis for preventing the exercise of the rights protected by the Second Amendment.

D. Federal and State Laws Do Not Prohibit Firearm Possession Based Solely on Allegations

Neither federal nor state laws prevent the possession of rifles and shotguns based on accusations and/or arrests that never culminated in a prohibiting conviction.

Under federal law, the enumerated statutory prohibitors to gun possession can be found in 18 U.S.C. § 922. Relevant to this discussion, gun possession by any individual who (i) has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year (§ 922(g)(1)); who has been convicted in any court of a misdemeanor crime of domestic violence (§ 922(g)(9)); or who is currently subject to a court order of protection "that was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate" (§ 922(g)(8)).[11] [12] (emphasis added).

[11] The individual is only prohibited from possessing firearms during the time period in which the order of protection was in effect. See, § 922(g)(8) ("subject to a court order…").

[12] 18 U.S.C. § 922(n) prohibits individuals who are under an indictment for a crime punishable by a term of imprisonment exceeding one year from possessing firearms. Unlike an arrest alone, the government's justification for such a prohibition is the underlying determination of 12 individuals who comprise the federal grand jury of the existence of probable cause to believe a felony has been committed by the individual. The disability is not permanent; if not convicted, the disability is extinguished upon dismissal of the indictment.

Likewise, under the New York State Penal Law, individuals convicted of a felony or convicted of a "serious offense" are prohibited from possessing firearms.[13] See, § 265.00(17); § 265.01; § 400.00(1)(c).

While not conceding the constitutionality of the federal and state statutory prohibitors, if neither the New York State Legislature nor Congress have classified an event or condition as a *per se* prohibitor to gun possession, a local government has no authority to preclude a non-prohibited person from exercising the right to keep and bear arms.[14] C.f., *Matter of Chwick v. Mulvey*, 81 A.D.3d 161, 171 (2d Dep't 2010) (striking a Nassau County ordinance criminalizing the possession of deceptively colored handguns because Penal Law § 400.00 preempts all local laws in the field of firearms; to find otherwise "would undermine the system of uniform firearm licensing" in the state).[15]

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[13] As noted previously, the firearm rights of an individual with a disabling conviction may be restored. See, New York State Correction Law § 700, *et seq.*

[14] In addition to his federal constitutional claims, Mr. Taveras' complaint sought a declaration that the challenged regulations are preempted by state law. [A16-A17]. In dismissing Mr. Taveras' federal claims, the district court dismissed the state law claim without prejudice to file in state court. To date, the preemption claim has not been pursued in state court.

[15] Indeed, the New York State Legislature's intention to preempt the field of firearms (handguns and longarms) regulation became even clearer with the passage of the New York State SAFE Act (New York Secure Ammunition and Firearms Enforcement Act) in 2013 – after the holding in *Chwick* - which enlarged the state's regulation of all firearms throughout the Penal Law, Criminal Procedure Law, Mental Hygiene Law, Civil Practice Law and Rules, and the Family Court Act. [See, Legislative Bill Jacket for the New York SAFE Act at A45-A99].

Had the New York State Legislature intended rifles and shotguns to be licensed or believed that the challenged New York City regulations were sufficient to warrant prohibiting the possession of *all* firearms, they would have enacted corresponding statewide legislation, which they did not.

VI. STRICT SCRUTINY SHOULD HAVE BEEN APPLIED BELOW

The district improperly applied intermediate scrutiny, rather than strict scrutiny[16], to Mr. Taveras' Second Amendment challenges in reliance on *United States v. Jimenez*, 895 F.3d 228 (2d Cir. 2018).

In *Jimenez,* this Circuit applied intermediate scrutiny to a Second Amendment challenge to 18 U.S.C. 922(g)(6), which prohibits the possession of firearms by individuals who have been dishonorably discharged from the Armed Forces.

While the felony-level conviction that prohibitor the plaintiff in *Jimenez* from lawfully possessing firearms may have support historically and in other circuits, the Second Circuit's holding in *Jimenez*, as with the language in *Heller*,

[16] Notably, it is the "practice of the Second Circuit" not to apply strict scrutiny to Second Amendment claims, a practice adhered to since the Supreme Court's holding in *Heller* – over 12 years ago. *Abekassis v. N.Y. City*, 477 F. Supp. 3d 139, 154 (S.D.N.Y. 2020) (citing *Mishtaku v. Espada*, 669 F. App'x 35 (2d Cir. 2016)) ("We apply intermediate scrutiny to laws implicating the Second Amendment."); *Doe No. 1 v. Putnam County*, 344 F. Supp. 3d 518, 537 (S.D.N.Y. 2018) ("This is in accord with the general practice in the Second Circuit of applying intermediate scrutiny to a wide variety of laws implicating the Second Amendment.").

has been extended in the district courts to apply to individuals with no historically recognized prohibitors to firearm possession, under federal or state law.

The phrase "law-abiding" is improperly applied in the district courts to individuals whose background contains nothing more than uncharged accusations, arrests (in the absence of any conviction), convictions of non-prohibiting offenses, and/or violations of *any* law, including traffic infractions as in *Abekassis*, supra where the district court held that the challenged NYC regulations "…are aimed at limiting gun possession to people who have such a right, by helping identify the 'law-abiding and responsible persons whose interests in possessing firearms are at the Amendment's core.'") [see, the district court's opinion and order at A118-A119, citing *Abekassis* quoting, *Jimenez*, 895 F.3d at 235].[17]

First, the plaintiff in *Jimenez* is distinguishable from Mr. Taveras. Unlike Mr. Taveras, the plaintiff in *Jimenez* was found guilty by a military tribunal of felony-equivalent conduct. **Mr. Taveras has no criminal convictions.**

As in *Jimenez*, rather than focus on the prohibitor as a justification for suspending the exercise of the Second Amendment right, the district courts are

[17] Under the discretionary handgun licensing scheme, 38 RCNY 5-10, the NYPD License Division denied a handgun license application filed by the plaintiff in *Abekassis*, filed when he was 34, based on traffic tickets and an allegation of arson at the age of 15, which was dismissed in favor of Mr. Abekassis after the City's own attorneys investigated and thereafter declined to prosecute. Mr. Abekassis, as with Mr. Taveras, is not a prohibited person under any "bright line" state or federal laws prohibitors to firearm possession.

eliminating the protected right before the analysis even begins. The district court refused to apply strict scrutiny based on what it perceived to be a prohibitor to firearm possession, instead of analyzing whether the challenged statute places a substantial burden on the core right to possess firearms for self-defense, which it does.

By determining the level of scrutiny to use based on *who* the statute is affecting, the courts are placing the cart before the horse. *See Jimenez*, 895 F.3d at 232.[18]

New York City's regulations warranted strict scrutiny by the district court, which would have led to an analysis of the longstanding, historically recognized prohibitors to firearm possession and whether the City's reasons for infringing upon that right are based on founding era history, state and federal laws, and/or Supreme Court precedent.

By starting the analysis with the premise that the plaintiff has no entitlement to the protections of the Second Amendment, the courts will never reach a strict scrutiny review, which this Circuit has held applies whenever a "core" Second

[18] *DeCastro* is also distinguishable in that this Circuit found no Second Amendment violation because the plaintiff had alternative means of acquiring firearms, to wit, purchasing firearms in his home state. Mr. Taveras cannot possess any type of firearm without the City's permission. Because the grounds under by New York City to deny a rifle/shotgun license are the same as those used to deny a handgun license, Mr. Taveras has no ability to lawfully possess any type of firearm in his home. [A40-A43].

Amendment right is implicated. *Id.* at 234 ("Laws that place substantial burdens on core rights are examined using strict scrutiny.")

Under this Circuit's two-step analysis for Second Amendment claims, "First, we consider whether the restriction burdens conduct protected by the Second Amendment. If the challenged restriction does not implicate conduct within the scope of the Second Amendment, our analysis ends and the legislation stands. Otherwise, we move to the second step of our inquiry, in which we must determine and apply the appropriate level of scrutiny." *NY State Rifle & Pistol Assn. v Cuomo*, 804 F.3d 242, 254 (2d Cir 2015).

Under this Circuit's own test, the first step requires an answer to the question: does the restriction burden conduct protected by the Second Amendment? The district court properly answered this inquiry in the affirmative. [A115].

The second step requires an inquiry to determine whether heightened scrutiny applies, which involves consideration of 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. "Laws that neither implicate the core protections of the Second Amendment nor substantially burden their exercise do not receive heightened scrutiny." *Id.* at 258.

The challenged regulations affect the "core" right to self-defense by imposing a discretionary licensing scheme on that right, which affects the possession of rifles and shotguns, which are in "common use for lawful purposes."

The district court erred by improperly deciding that the challenged provisions only impose a "modest burden" for "law-abiding, responsible individuals." [A115-A120].

Mr. Taveras is a "law-abiding, responsible person" and the challenged regulations have banned him from possessing any type of firearm – a substantial burden on his Second Amendment right.

The fatal flaw with the "law-abiding person" standard, apart from the inherent arbitrariness of the term itself, is that it insulates the challenged regulations from ***any*** judicial scrutiny.

Under the very regulation being challenged as unconstitutional for improperly preventing non-prohibited individuals from exercising their Second Amendment rights, a non-prohibited person is falsely identified as "non-law-abiding". The courts improperly and automatically adopt that false classification and proceed to endorse its constitutionality in the interest of an amorphous claim of "public safety" of which the City has yet to provide any evidence in admissible form.

A licensing scheme that allows discretionary factors, rather than "bright line prohibitors" to the possession of firearms, like those contained in 18 U.S.C. 922(g) and Penal Law § 265.00, *et seq.*, will continue to evade review under this misleading and fictitious "law-abiding person" standard.

The "law-abiding person" standard frustrates the constitutional analysis, insulates the statute from being analyzed from a constitutional viewpoint, and is contrary to the Supreme Court's historical analysis and holdings in *Heller*, *McDonald*, and *Caetano*, and their progeny.

The district court should have applied strict scrutiny because the challenged regulations affect, and severely burden, the core Second Amendment of self-defense.

IV. DISMISSAL AT THE 12(b)(6) STAGE INSULATES THE CHALLENGED REGULATIONS FROM JUDICIAL REVIEW

At the 12(b)(6) stage, the City was not required to provide any justification for its regulations or provide evidence in admissible form defining its "important governmental objective" and proving how the challenged regulations are "substantially related" to its achievement. The district court insulated the City from its burden and insulated the challenged regulation from being subject to meaningful review.

In practice, the district court applied the public safety "interest balancing" test, which was specifically rejected by the Supreme Court in *Heller*, in the absence of any proof in admissible form from the City. Dismissal based on "interest balancing" at the 12(b)(6) stage insulates unconstitutional statutes by rubber stamping regulations that claim, without more, that they "serve a government interest" in "public safety".

The district court improperly 'filled in the blanks' for the City, finding as a matter of law – at the 12(b)(6) stage – the existence of a factual and provable nexus between conduct that neither federal nor state legislative bodies deem prohibitors to the possession of firearms and "public dangerousness" sufficient to ban an individual from exercising the inherent right to possess firearms for self-protection.

The City's *ipsi dixit* justification of the challenged regulations based on speculative 'public safety' claims and 'balancing the interests' is improper in the context of a 12(b)(6) motion. By crediting the City's unsubstantiated justifications, the district court failed to accept the allegations in the complaint as true as required under 12(b)(6), warranting reversal of the district court's opinion and order.

V. THE CHALLENGED REGULATIONS ARE UNCONSTITUTIONAL AS APPLIED TO MR. TAVERAS

The district court's dismissal of Mr. Taveras' "as-applied" challenge should be reversed.

The district court found,

> "Defendants Iqbal and David determined that Plaintiff meets at least four of these negative criteria, as set forth in Admin. Code § 10-303(a)(2) & (9) and 38 RCNY § 3-03(f) & (g), based on his history of summonses, arrests, domestic violence, and orders of protection.[19] (See FAC ¶¶ 30-41). With that finding, Defendants were justified in concluding that "by [his] conduct, [Plaintiff] ha[s] shown [himself] to be lacking in the essential temperament or character which should be present in one entrusted with a dangerous instrument."

[A122].

First, Mr. Taveras has no prohibitors that bar his possession of firearms under state or federal law.

Second, the protected right preexists the Second Amendment. See, *Heller*, 554 U.S. at 619 (the Bill of Rights codifies individual rights that preexist the document), citing, J. Ordronaux, *Constitutional Legislation in the United States*, 241-242 (1891) ("It was not necessary that the right to bear arms should be granted in the Constitution, for it had always existed.").

[19] As stated above, Mr. Taveras had one arrest in August 2011 for one charge filed by an ex-girlfriend that resulted in the issuance of an order of protection. That charge was dismissed in court. In November 2011, the same ex-girlfriend attempted to have Mr. Taveras arrested a second time, but after an investigation, the NYPD refused to file charges against Mr. Taveras.

Many courts in this state and Circuit adopt the illusion that a government employee must first decide whether, in his or her opinion, an individual is or is not "lacking in the essential temperament or character which should be present in one entrusted with a dangerous instrument" [A122] *before* one can exercise their Second Amendment rights.

Our right to defend ourselves comes from our Creator, not the government.

Unless and until an event or condition enumerated in state or federal law and/or recognized to be a longstanding, historically accepted prohibitor to firearm possession, actually occurs, the right is absolute.

If a *sui generis* prohibiting event of condition exists, then the individual can no longer exercise that right – unless and until the disqualifier is removed.

The district court's leap from felony convictions to dismissed charges and vacated orders of protection "in the interest of public safety" - where the decision ban individuals from exercising the right to defend themselves rests with subjective opinions and false information - was erroneous and contrary to state and federal law, longstanding, historically accepted prohibitions, and Supreme Court precedent.

38 RCNY § 3-03(f)[20] and NYC Admin Code. § 10-303 (a)(2) and (9) violate Mr. Taveras' rights because he was no longer "the subject of an order of protection", yet the City's regulation is implemented to disqualify an applicant who has *ever* been the subject of an order of protection, despite the removal of the federally and state-recognized prohibitor.

Likewise, 38 RCNY § 3-03 (g) and NYC Admin Code. § 10-303 (a)(2) and (9) violate Mr. Taveras' rights because allegations alone are not among the *sui generis* class of prohibitors under state or federal law or contemplated by the Supreme Court when identifying as "presumptively lawful" the prohibitions on felons and the insane as "longstanding prohibitions" to the possession of firearms. *Heller*, 554 U.S. at 626-27 & n.26.

Even when applying intermediate scrutiny to Mr. Taveras' "as-applied" challenge, the complaint states a cause of action and should not have been dismissed. This is so because, as applied to Mr. Taveras, a criminal court adjudicated the August 2011 charge by a dismissal and the NYPD investigated the November 2011 complaint and refused to file any charges against Mr. Taveras.

[20] Worth noting, NYC Admin. Code § 10-303(7), which tracks the language of 18 U.S.C. § 922(g)(8) was not used to deny Mr. Taveras' application. Those regulations prohibit firearm possession where the individual is subject to a court order of protection that, *inter alia,* was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate. 38 RCNY § 3-03 (f) contains no such requirement.

As noted above, **Mr. Taveras has no convictions and is not prohibited under state or federal law from possessing firearms.** The severity of the challenged regulations' burden on Mr. Taveras' right to keep and bear arms is substantial as he is completely banned from possessing any type of firearm in his home for self-protection despite having no state or federal prohibitors to firearm possession.

Of importance, an individual who is prohibited from gun possession arising from a disqualifying conviction can have their Second Amendment rights restored by obtaining a Certificate of Relief from Civil Disabilities. See, Correction Law § 700, *et seq.* Prohibited individuals are not permanently deprived of the right to keep and bear arms.

To the contrary, Mr. Taveras is permanently deprived of the right to keep and bear arms because the City has declared him to be unfit to possess firearms, lacking "good moral character", and *de facto* a domestic abuser – all in the absence of a prohibiting conviction or, for that matter, any conviction at all.

Unlike a convicted felon, Mr. Taveras has no civil disabilities to restore, because he never lost them - yet his constitutional rights have been stripped nevertheless.

Only the Court can right this wrong. There is no other legally cognizable process for Mr. Taveras to regain the ability to exercise his Second Amendment

rights. Where the blanket prohibition of the exercise of civil rights continues to be shielded by application of the "law-abiding individuals" standard, individuals who fall into the subclass of the "non-law-abiding", like Mr. Taveras and similarly situated individuals, will never be able to exercise their Second Amendment rights.

VI. THE DISTRICT COURT ERRONEOUSLY ANALYZED THE CITY'S RIFLE/SHOTGUN LICENSING REGULATIONS UNDER THE NEW YORK STATE HANDGUN LICENSING SCHEME

As discussed in detail above, the possession of handguns in New York State is deemed not to be a "right" but a "privilege" because it is subject to a discretionary licensing scheme.

The district court erroneously relied on caselaw holding that the "moral character" and "good cause" eligibility factors for handgun licensing under NY Penal Law § 400.00(1) to likewise hold that the same discretionary "moral character" and "good cause" factors of NYC Admin. Code § 10-303(a)(2) and (9) were constitutional.

The district court ignored the distinction recognized by courts in this Circuit that rifles and shotguns are "treated differently" *precisely because* they are not subject to the State's discretionary licensing scheme. See, *Panzella v. Cnty. of Nassau*, No. 13-CV-5640, 2015 U.S. Dist. LEXIS 133475, 2015 WL 5607750, at *1 (E.D.N. Y. Aug. 26, 2015) (rifles and shotguns, are treated differently than handguns) citing *Razzano v. Cnty. of Nassau*, 765 F. Supp. 2d 176, 180 (E.D.N.Y.

2011)); *Weinstein v Ryder*, 2021 US Dist LEXIS 55410, at *3-4 (E.D.N.Y. Mar. 23, 2021, No. 19-cv-6236 (SJF)(AKT) ("longarms pose a unique legal issue because unlike other firearms there is no license requirement for the purchase or possession").

By upholding the City's discretionary licensing scheme for the purchase and possession of rifles, shotguns and ammunition, the district court erroneously endorsed the City's ban of the "right" protected by the Second Amendment because a benefit is not a protected right if government officials may grant or deny it in their discretion. See, *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (2005).

CONCLUSION

For the foregoing reasons, the opinion and order of the district court appealed from and dated January 19, 2021 should be reversed to the extent that Mr. Taveras' facial and "as-applied" challenges to NYC Admin. Code 10-303(a)(2) and (9), and 38 RCNY 3-03 (f) and (g) based on violations of his Second Amendment rights, the state law preemption claim, claims for injunctive, declaratory and compensatory relief for damages, and costs and attorney's fees, should be reinstated and the matter returned to the district court for further

proceedings.

Dated: Scarsdale, New York
April 6, 2021

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as it contains 7,174 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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April 7, 2021