21-398

United States Court of Appeals
for the Second Circuit

ALAN TAVERAS,

Plaintiff-Appellant,

against

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,

(Caption Continued on Inside Cover)

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR APPELLEES

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May 12, 2021

and

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

Defendant.

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PRELIMINARY STATEMENT

Plaintiff Alan Taveras asserts Second Amendment claims challenging the City of New York's decision to deny him a longarm (rifle or shotgun) permit based on his history of domestic violence and his having been subject to and violated an order of protection. The United States District Court for the Southern District of New York (Katherine Polk Failla, J.) granted the City's motion to dismiss, rejecting Taveras's facial and as-applied challenges to the relevant City licensing provisions and declining to exercise supplemental jurisdiction over Taveras's pendent state-law preemption claim. This Court should affirm.

To start, Taveras's allegations fail to sustain the heavy burden required to facially invalidate the licensing provisions. The district court rightly applied intermediate scrutiny because denying longarm permits to individuals who have committed acts of domestic violence and been subject to an order of protection does not substantially burden the core Second Amendment rights of law-abiding, responsible citizens.

Furthermore, these licensing provisions easily satisfy intermediate scrutiny. Denying longarm permits to those with a history of domestic violence substantially relates to the City's compelling

interest in public safety. Indeed, domestic abusers recidivate at high rates, and the presence of a gun greatly increases the likelihood that they will kill either their domestic victims or responding police officers.

Similarly, Taveras's as-applied challenge fails because his allegedly violent background directly implicates these concerns about denying longarms to dangerous people. As reflected in Taveras's criminal records, his ex-girlfriend complained to police that he punched her in the eye, resulting in his arrest and an order of protection issuing against him. In violation of that order, Taveras then allegedly threatened to physically attack her and her family. While Taveras denies these incidents, the City's licensing officials reasonably relied on this information to determine that he had a history of domestic violence and would pose a threat to the public if awarded a longarm permit.

Accordingly, the district court correctly dismissed Taveras's Second Amendment claims. And having dismissed all federal claims on a motion to dismiss, the court did not abuse its discretion in declining to exercise supplemental jurisdiction over his state-law preemption claim.

ISSUES PRESENTED FOR REVIEW

1. Did the district court correctly dismiss Taveras's Second Amendment claims, where the relevant licensing provisions focus on denying longarm permits only to those individuals who have committed domestic violence or been subject to an order of protection, where denying such individuals longarm permits substantially relates to the City's important interest in public safety, and where Taveras's ex-girlfriend twice named him as a domestic abuser, with the first incident resulting in his arrest and an order of protection issuing against him?

2. After dismissing all of Taveras's federal claims, did the district court providently exercise its discretion in declining to take jurisdiction over his state-law claim?

STATEMENT OF THE CASE

For purposes of defendants' motion to dismiss, the following statement rests on the factual allegations in Taveras's amended complaint, documents relied on in the complaint, and matters of public record subject to judicial notice. *See Halebian v. Berv*, 644 F.3d 122, 130 n.7 (2d Cir. 2011); *Taylor v. Vt. Dep't of Educ.*, 313 F.3d 768, 776 (2d Cir. 2002).

A. Statutory and regulatory background

1. The City of New York's licensing of longarms

New York State has established a framework for licensing "firearms," defined as pistols, revolvers, and other short-barrel guns (Appendix ("A") 101). *See* N.Y. Penal Law § 265.00(3); *Libertarian Party v. Cuomo*, 970 F.3d 106, 113 (2d Cir. 2020). The City, meanwhile, has set up a regime for licensing rifles and shotguns that fall outside the State's definition of "firearm" (A10, 102). *See* N.Y.C. Admin. Code §§ 10-301(2)–(3), 10-303; *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 85 (2d Cir. 2012).

These licensing regimes do not make it difficult for a law-abiding New Yorker to obtain a permit to possess a handgun or longarm in the home (A119). *See People v. Hughes*, 22 N.Y.3d 44, 50 (2013); *see also United States v. Decastro*, 682 F.3d 160, 164 (2d Cir. 2012) (noting that the City granted between 2/3 and 3/4 of handgun-license applications during period there in question). Under the City's regime, the New York City Police Department must grant a person a permit for home possession of a longarm unless the person falls within certain restrictions (A40, 119). *See* N.Y.C. Admin. Code § 10-303(a). Consistent

with standards in the State dating back more than a century, the licensing regime has for more than fifty years authorized the NYPD to deny a permit if, as relevant here, the applicant "is not of good moral character" or "good cause exists for the denial of the permit" (A20–21, 40). N.Y.C. Admin. Code § 10-303(a)(2), (9); *see Kachalsky*, 701 F.3d at 85; *Bach v. Pataki*, 408 F.3d 75, 78 (2d Cir. 2005), *overruled on other grounds by McDonald v. City of Chicago*, 561 U.S. 742 (2010).

When making these determinations, the NYPD considers a number of factors, including the applicant's history of arrests, indictments, and convictions; any mental conditions that impair the applicant's ability to safely possess a longarm; any drug addictions; whether the applicant made a false statement on the application; and whether the applicant previously violated rules governing the possession of guns. *See* 38 Rules of the City of New York (R.C.N.Y.) § 3-03(a), (c), (d), (e), (i). As relevant here, the NYPD may also consider whether the applicant "has a history of one or more incidents of domestic violence" and whether the applicant "is the subject of an order

of protection or a temporary order of protection" (A20). 38 R.C.N.Y. § 3-03(f), (g).[1]

If the NYPD denies a longarm-permit application, the applicant may file an administrative appeal (A9, 11). *See* N.Y.C. Admin. Code § 10-303(e)(1). If that appeal still results in a denial, the applicant may then challenge the NYPD's decision in New York state court under Article 78 of the New York Civil Practice Law and Rules. *See Kachalsky*, 701 F.3d at 87; *Aron v. Becker*, 48 F. Supp. 3d 347, 370 (N.D.N.Y. 2014). This case involves an application for a longarm permit in the home (A14).[2]

2. The link between domestic violence and gun violence

The NYPD's authority to consider an applicant's domestic-violence and order-of-protection history reflects the harms of domestic violence

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[1] In this case, the NYPD applied the latter factor to encompass a past order of protection, and Taveras does not challenge that application (A12; Brief for Appellant ("App. Br.") 31). *See* 38 R.C.N.Y. § 3-03(f); *see also* 38 R.C.N.Y. § 3-03(n) (noting that NYPD may consider additional information that "demonstrates an unwillingness to abide by the law[or] a lack of concern for the safety of oneself and/or other persons and/or for public safety").

[2] A separate provision from those at issue here prohibits carrying a loaded or unenclosed longarm in public. *See* N.Y.C. Admin. Code § 10-131(h).

and, in particular, the dangers posed by domestic violence committed in the presence of a firearm. As the Supreme Court has recognized, "firearms and domestic strife are a potentially deadly combination." *United States v. Castleman*, 572 U.S. 157, 159 (2014) (quoting *United States v. Hayes*, 555 U.S. 415, 427 (2009) (alteration omitted)). The United States sees more than a million acts of domestic violence each year, with more than one thousand of them resulting in death. *See id.* at 159–60 & n.1; *Georgia v. Randolph*, 547 U.S. 103, 117 (2006) (citing U.S. Dep't. of Health & Human Servs., Centers for Disease Control & Prevention, Nat'l Ctr. for Injury Prevention & Control, Costs of Intimate Partner Violence Against Women in the United States 19 (2003)); *United States v. Staten*, 666 F.3d 154, 164 (4th Cir. 2011).

All too frequently, genuine acts of domestic violence do not lead to arrest or conviction. *See United States v. Chovan*, 735 F.3d 1127, 1141 (9th Cir. 2013); *United States v. Skoien*, 614 F.3d 638, 643 (7th Cir. 2010) (en banc); Nat'l Inst. of Justice, U.S. Dep't of Justice, Office of Justice Programs, Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges 5–6 (June 2009), *available at* https://perma.cc/AZ8Q-E658 (captured May 6, 2021).

As the U.S. Department of Justice's National Institute of Justice put it in a summary of domestic-violence research, "Judges typically see only a small minority of domestic violence cases that actually occur." Nat'l Inst. of Justice, *supra*, at 6. Indeed, by the time victims first contact authorities, they generally have already suffered multiple incidents of domestic violence. *See id.* at 6–7. And those who abuse one intimate partner often go on to abuse another one. *See id.* at 18–19.

Including acts that do not result in arrest, individuals who commit domestic violence recidivate at a rate of at least 33% and potentially as high as 80%. *See Staten*, 666 F.3d at 164–66; *Skoien*, 614 F.3d at 644; Nat'l Inst. of Justice, *supra*, at 19–20. And abusers with just one prior arrest for any crime recidivate at a higher rate than those with no criminal record. *See* Nat'l Inst. of Justice, *supra*, at 22–23. Furthermore, these repeat acts of domestic violence frequently escalate in severity over time. *See Castleman*, 572 U.S. at 160; *Stimmel v. Sessions*, 879 F.3d 198, 209 (6th Cir. 2018).

Even among those whose first act of domestic violence did not lead to conviction, the presence of a gun increases the likelihood that the next incident will be a homicide. *See Castleman*, 572 U.S. at 160;

Stimmel, 879 F.3d at 209–10 (citing Arthur L. Kellermann, et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 New Eng. J. Med. 1084, 1087 (1993)); *Staten*, 666 F.3d at 166–67; *United States v. Booker*, 644 F.3d 12, 26 (1st Cir. 2011); *Torcivia v. Suffolk Cnty.*, 409 F. Supp. 3d 19, 32 (E.D.N.Y. 2019); Nat'l Inst. of Justice, *supra*, at 26.

For example, one study found that abusers with a gun are twelve times more likely to kill the victim than those with a knife or no weapon. *Stimmel*, 879 F.3d at 209 (citing Linda E. Saltzman, et al., *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 JAMA 3043, 3044 (1992)); *Staten*, 666 F.3d at 166; *Skoien*, 614 F.3d at 643. And this risk of death extends not only to victims of domestic violence but also to police officers responding to domestic-disturbance calls, with that activity among officers' "most risky" responsibilities. *Stimmel*, 879 F.3d at 210; *Booker*, 644 F.3d at 26 n.18; *Skoien*, 614 F.3d at 644.

As the National Institute of Justice report explains, "One of the most crucial steps to prevent lethal violence is to disarm abusers and keep them disarmed." Nat'l Inst. of Justice, *supra*, at 27; *see Booker*, 644 F.3d at 26. Research has shown that "[l]aws limiting the ability of those

involved in domestic disputes or domestic violence to possess firearms are effective in reducing homicide rates." *Torcivia*, 409 F. Supp. 3d at 33 (citing Carolina Diez, et al., *State Intimate Partner Violence-Related Firearm Laws and Intimate Partner Homicide Rates in the United States, 1991 to 2015*, 167 Annals Internal Med. 536 (Oct. 17, 2017)). For these reasons, the federal government advises police agencies involved in gun licensing to "aggressively screen for domestic violence," even if they do not discover any issues through initial inquiries in the National Instant Criminal Background Check System. Nat'l Inst. of Justice, *supra*, at 27.

B. Factual background

1. Taveras's alleged acts of domestic violence

In May 2011, Taveras's ex-girlfriend complained to police that Taveras had committed an act of domestic violence against her (A12). In particular, she asserted that he had punched her in the left eye, causing swelling and bruising (A12). As a result, she received treatment at the hospital (A12).

The NYPD arrested Taveras and charged him with third-degree assault. In addition, the court issued a full order of protection against

him (A12). This order required Taveras to stay away from the victim and refrain from any communication with her, including by telephone (A12–13). It also directed him to surrender any firearms (A13).

Just three months later, even as the order of protection remained in effect, the ex-girlfriend complained to police that Taveras had perpetrated another act of domestic violence (A13). According to her, Taveras had called her on the phone while she was at a nightclub and threatened to "pull her out of [the club] by her hair if she did not leave" (A13). He further threatened that if she called the police, he would hurt her and her family (A13). This alleged conduct directly violated the active order of protection (A13).

Police elected not to pursue charges on this second incident (A11). The charges involving the first incident were ultimately dropped, and the order of protection expired in February 2012 (A13).[3] According to Taveras, he has no convictions related to domestic violence and has had

[3] While Taveras asserts in his brief that the court dismissed these charges "on the merits" (App. Br. 9 nn.3–4), his complaint says no such thing (A13–14). To the contrary, his complaint simply denies the merit of these charges in conclusory terms (A11).

no subsequent issues with law enforcement other than minor traffic violations (A11, 13).

2. The NYPD's denial of Taveras's application for a longarm permit based on his alleged previous acts of domestic violence

In 2018, Taveras applied to the NYPD License Division for a longarm permit (A10). As part of the permitting process, the License Division conducted an investigation into Taveras's background and learned of the allegations that he engaged in domestic violence (A10, 12–13). In response, Taveras submitted a notarized statement in which he denied the two allegations (A10–11).

In April 2018, the License Division Executive Officer, who has authority to consider longarm-permits in the first instance, denied Taveras's application (A8–9, 11). As he explained, the denial rested on Taveras's "arrest history, summons history[,] violent domestic violence history and Order of Protection history" (A11). Based on this history, the Executive Director concluded that Taveras had "shown poor judgment and an unwillingness to abide by the law" (A11). In particular, the history "reflect[ed] negatively on [Taveras's] moral

character and cast grave doubt upon [his] fitness to possess a firearm" (A11). Taveras appealed the denial to the NYPD Appeals Unit (A11).

Later that year, the Appeals Unit's Director issued a decision affirming the denial based on Taveras's lack of good moral character and the good cause for the denial, as reflected by Taveras's history of domestic violence and his having been the subject of an order of protection (A8, 12 (citing N.Y.C. Admin. Code § 10-303(a)(2), (9); 38 R.C.N.Y. § 3-03(f), (g))). The Director emphasized that "Taveras was named as a perpetrator in two separate domestic incidents" (A12). After recounting that domestic-violence history in detail, the Director explained that "[a]lthough time has elapsed and the arrest charges were dismissed, the serious nature of these incidents raise safety concerns" and therefore constituted grounds for denying the permit (A12–13).

Taveras declined to pursue his recourse of challenging this decision in New York state court pursuant to Article 78 of the New York Civil Practice Law and Rules. *See Kachalsky*, 701 F.3d at 87; *Aron*, 48 F. Supp. 3d at 370.

C. The district court's dismissal of this lawsuit

Instead of going to state court, Taveras filed this lawsuit against the City and various City officials (collectively, "the City") in the United States District Court for the Southern District of New York (A2, 6). He sought declaratory and injunctive relief against the provisions of the City's licensing regime upon which his permit denial had relied, as well other provisions of state and city law (A6–7, 37–38). He claimed that these provisions violated the Second Amendment, both facially and as applied, and were preempted by state law (A6–7, 33–37). The City moved to dismiss Taveras's claims (A4).

In a thorough, 26-page opinion, the district court granted the City's motion in its entirety (A100–25). To start, the court held that Taveras lacked standing to challenge the various provisions of state and city law that played no role in denying him a longarm permit (A108–12).

Next, the court dismissed on the merits Taveras's Second Amendment facial and as-applied challenges to the remaining provisions that formed the basis of his license denial—N.Y.C. Admin. Code § 10-303(a)(2) and (9) and 38 R.C.N.Y. § 3-03(f) and (g) (A112,

116). Starting with the facial challenge and assuming that the challenged provisions impinged on a protected interest, the court applied intermediate scrutiny because the provisions comprised part of a licensing regime rather than an outright ban on longarms and affected only a subset of individuals who did not qualify as law-abiding and responsible (A115, 118–20). Furthermore, the court explained, these provisions "easily satisfy" intermediate scrutiny because the City has a compelling interest in public safety, and the provisions are "clearly aimed" at denying longarms to those who would pose a risk to that safety (A120–22). Similarly, the court rejected Taveras's as-applied challenge because the City justifiably denied him a permit based on his summons, arrest, order of protection, and domestic-violence history (A122–23).

Finally, the court declined to exercise supplemental jurisdiction over Taveras's state-law preemption claim (A123). It concluded that "no circumstances" warranted taking jurisdiction over that claim because the court had already dismissed Taveras's federal claims, and the state-law claim raised novel or complex issues "better suited for a state court in the first instance" (124).

This appeal followed (A126). As reflected by Taveras's Appellant's Brief, he has now limited his challenge only to the provisions of the City's licensing regime upon which his permit denial actually relied (App. Br. 3).

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

On *de novo* review with respect to Taveras's Second Amendment claims and abuse-of-discretion review with respect to his state-law claim, this Court should affirm the district court's dismissal of the complaint. *See Libertarian Party*, 970 F.3d at 121. In considering the complaint, the Court should ignore Taveras's legal conclusions, labels, and "naked assertions devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (alteration, citation, and quotation marks omitted). Putting such statements aside, Taveras has failed to plausibly allege any claim for relief. *See id.* at 678–79; *Libertarian Party*, 970 F.3d at 120.

As the district court recognized, the licensing provisions here fully accord with the Second Amendment, both facially and as applied to Taveras. Starting with Taveras's facial challenge, his allegations do not support the heavy burden required to facially invalidate such

government regulations. Even assuming that these provisions burden Second Amendment rights and that some form of heightened scrutiny applies, the district court rightly followed this Court's precedent assessing such licensing provisions under intermediate scrutiny. In this regard, by allowing licensing officials to deny longarm permits only to those individuals who have committed an act of domestic violence or been subject to an order of protection, these provisions do not substantially burden the Second Amendment's core protection of law-abiding, responsible citizens. In any event, Taveras has waived any argument for applying strict scrutiny by taking the position below that *no* form of means-ends scrutiny may apply.

Moreover, these licensing provisions easily satisfy intermediate scrutiny. The City has an undisputedly compelling interest in ensuring the public's safety from individuals whose past conduct marks them as dangerous. And both common sense and well-recognized data establish that these licensing provisions substantially relate to that interest. Specifically, persons with a history of domestic violence recidivate at high rates, and the presence of a gun greatly increases the likelihood that the next act of domestic violence will be a homicide. Permitting

licensing officials to deny a longarm permit to an individual with such a history therefore directly furthers the City's compelling interest in public safety.

Taveras's arguments to the contrary are meritless. That these licensing provisions come from city, rather than federal or state, law has no bearing on their federal constitutionality. And as this Court has recognized, the Second Amendment does not bar licensing officials from determining an applicant's dangerousness based on evidence other than prior convictions.

Similarly, Taveras's as-applied challenge fares no better. Indeed, his background implicates the exact same concerns about denying longarms to dangerous people. As reflected in Taveras's criminal records, his ex-girlfriend complained to police that Taveras punched her in the eye, resulting in his arrest, her receipt of hospital treatment, and issuance of an order of protection against him. In direct violation of that order, Taveras then allegedly threatened to physically attack her and her family. While those alleged acts did not result in a conviction and Taveras denies them, the NYPD's licensing officials reasonably determined that Taveras had a history of domestic violence and had

shown a willingness to violate the law, and thus would pose a safety risk if awarded a longarm permit. And Taveras declined to challenge that determination through the ordinary state judicial process.

Under these circumstances, the district court correctly dismissed Taveras's Second Amendment claims. Furthermore, having dismissed all federal claims on a motion to dismiss, the district court did not abuse its discretion in declining to exercise supplemental jurisdiction over his state-law preemption claim.

ARGUMENT

POINT I

THE DISTRICT COURT CORRECTLY DISMISSED TAVERAS'S FEDERAL CLAIMS

The district court rightly dismissed Taveras's Second Amendment claims. The Supreme Court has made clear that the Second Amendment right to bear arms "is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); *see McDonald*, 561 U.S. at 786 (plurality opinion). That right does not imperil every municipal regulation of guns. *See McDonald*, 561 U.S. at 786. For example, the Supreme Court has identified bans on the possession of guns by felons and the mentally ill as "presumptively lawful." *Heller*, 554 U.S. at 626–27 & n.26. And it

emphasized that it did not intend these examples of presumptively lawful measures to be exhaustive. *See id.* at 627 n.26; *Libertarian Party*, 970 F.3d at 127. Furthermore, because these bans did not exist until the twentieth century, the Supreme Court's recognition of them establishes that "the legislative role did not end in 1791." *Skoien*, 614 F.3d at 640; *see Kachalsky*, 701 F.3d at 90 n.11.

To assess the lawfulness of individual measures, this Court has adopted a two-step approach, under which courts first consider whether the measure burdens the Second Amendment right and then, if it does, selects and applies the appropriate level of scrutiny for reviewing that measure. *See Libertarian Party*, 970 F.3d at 127; *United States v. Jimenez*, 895 F.3d 228, 232 (2d Cir. 2018); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 253 (2d Cir. 2015). At the second step, the Court has noted that not all measures that burden Second Amendment rights receive heightened scrutiny. *See Kwong v. Bloomberg*, 723 F.3d 160, 167 (2d Cir. 2013); *Decastro*, 682 F.3d at 164. Here, though, even assuming both that the licensing provisions at issue burden Second Amendment rights and that some form of heightened scrutiny applies,

the district court correctly rejected Taveras's facial and as-applied challenges under intermediate scrutiny (A118–23).

A. Taveras's facial challenge fails given the significant danger that a person with a history of domestic violence will misuse a gun.

In raising a facial challenge, Taveras faces a "heavy burden." *Amidon v. Student Ass'n*, 508 F.3d 94, 98 (2d Cir. 2007) (quoting *Nat'l Endowment of the Arts v. Finley*, 524 U.S. 569, 580 (1998)). Such a challenge is "the most difficult" to mount successfully. *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Libertarian Party*, 970 F.3d at 126; *United States v. Cheng Le*, 902 F.3d 104, 117 n.12 (2d Cir. 2018). To prevail, Taveras must show that "*no set of circumstances* exists" under which the challenged licensing measures could constitutionally apply. *Libertarian Party*, 970 F.3d at 126 (quoting *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d. at 265); *accord Salerno*, 481 U.S. at 745. In assessing such facial validity, courts must refrain from bounding beyond the measures' facial requirements and the situation at hand to speculate about hypothetical or imaginary cases. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449–50 (2008); *Jimenez*, 895 F.3d at 232; *Kachalsky*, 701 F.3d at 101. And courts facially invalidate laws

only "sparingly and as a last resort." *Amidon*, 508 F.3d at 98 (quoting *Finley*, 524 U.S. at 580). Taveras's allegations fail to carry this heavy burden here, and the licensing provisions pass muster under intermediate scrutiny.

1. Intermediate scrutiny applies to these licensing provisions focused on restricting longarms for people who are not law-abiding and responsible.

a. The district court rightly applied intermediate scrutiny.

The district court correctly applied intermediate scrutiny to the licensing provisions here (A120). To determine the appropriate level of scrutiny, courts consider (1) how close the challenged measure comes to the core of the Second Amendment right and (2) how severely it burdens that right. *See Jimenez*, 895 F.3d at 234; *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d. at 258. Assuming that some form of heightened scrutiny applies, courts apply intermediate scrutiny if the measure either substantially burdens conduct outside the core of the right or insubstantially burdens conduct at the core. *See Libertarian Party*, 970 F.3d at 128; *Jimenez*, 895 F.3d at 234. Courts employ strict scrutiny

only if the measure substantially burdens the core right. *See Libertarian Party*, 970 F.3d at 128; *Jimenez*, 895 F.3d at 234.

The licensing provisions here do not substantially burden the Second Amendment's core right. As this Court has repeatedly recognized, the Supreme Court's decision in *Heller* defined that core as "the right of *law-abiding, responsible citizens* to use arms in defense of hearth and home." *Jimenez*, 895 F.3d at 234 (quoting *Heller*, 554 U.S. at 635); *see Libertarian Party*, 970 F.3d at 127; *United States v. Bryant*, 711 F.3d 364, 369 (2d Cir. 2013) (per curiam); *Kachalsky*, 701 F.3d at 85. In other words, regulations avoid the core of the right if they do not burden law-abiding, responsible citizens. *See Libertarian Party*, 970 F.3d at 127; *Jimenez*, 895 F.3d at 235; *Bryant*, 711 F.3d at 369.

Other circuits have recognized this same point. *See, e.g.*, *United States v. Torres*, 911 F.3d 1253, 1262–63 (9th Cir. 2019); *Stimmel*, 879 F.3d at 203; *Berron v. Ill. Concealed Carry Licensing Review Bd.*, 825 F.3d 843, 847 (7th Cir. 2016); *NRA of Am. v. Bureau of Alcohol*, 700 F.3d 185, 206 (5th Cir. 2012); *United States v. Chapman*, 666 F.3d 220, 226 (4th Cir. 2012). And even at the Founding, restrictions on gun ownership existed for those who failed to abide by the law or were

otherwise "unvirtuous." *See Jimenez*, 895 F.3d at 235; *NRA of Am.*, 700 F.3d at 200–01.

The licensing provisions at issue here fall outside the core of the Second Amendment right because they focus on denying longarm permits only to individuals who are not law-abiding and responsible. Far from burdening the public at large, they target "only a narrow class of individuals who are not at the core of the Second Amendment." *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 691 (6th Cir. 2016); *NRA of Am.*, 700 F.3d at 205; *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010). Indeed, this Court has already determined as much with respect to parallel state-law handgun-licensing provisions under which officials may similarly deny a license based on lack of "good moral character" or "good cause." *See Libertarian Party*, 970 F.3d at 127–28.

As the district court pointed out, rather than an outright ban on longarms, the provisions here merely comprise part of a licensing regime under which the NYPD must presumptively grant the license (A40, 119). *See* N.Y.C. Admin. Code § 10-303(a); *Libertarian Party*, 970 F.3d at 127; *Kachalsky*, 701 F.3d at 91. The NYPD has authority to deny the license only if, as relevant here, the applicant has a history of

domestic violence or has been subject to an order of protection (A20). *See* 38 R.C.N.Y. § 3-03(f), (g), (n); *see also Libertarian Party*, 970 F.3d at 127 (emphasizing that parallel "good moral character" and "good cause" provisions did not create a total ban); *Abekassis v. New York City*, 477 F. Supp. 3d 139, 153 (S.D.N.Y. 2020) (same); *Torcivia*, 409 F. Supp. 3d at 36 n.12 (same with respect to guidelines for revoking handgun licenses).

These provisions merely serve to identify individuals who are not law abiding and responsible. Like federal prohibitions on gun possession, they focus on individuals who, "based on their past behavior, are more likely to engage in domestic violence." *Reese*, 627 F.3d at 802. Having committed one or more acts of domestic violence and having been subject to an order of protection cast doubt on a person's ability to abide by the law and certainly on the person's responsibleness. *See Chapman*, 666 F.3d at 226 (explaining that person was not responsible where he had likely committed domestic abuse and had been subject to order of protection); *Toussaint v. City of N.Y.*, No. 17-CV-5576, 2018 U.S. Dist. LEXIS 152985, at *2–3, 13 (E.D.N.Y. Sep.

6, 2018) (holding that plaintiff was not law-abiding where he had previously been arrested and been subject to order of protection).

Accordingly, these provisions do not encumber the Second Amendment's core protection of law-abiding, responsible people. *See Libertarian Party*, 970 F.3d at 127; *Jimenez*, 895 F.3d at 235; *Bryant*, 711 F.3d at 369. Therefore, as this Court has done in addressing previous challenges to parallel gun-licensing rules and as other courts have done in the other cases cited above, this Court should apply intermediate scrutiny to the licensing provisions here. *See, e.g.*, *Libertarian Party*, 970 F.3d at 127–28 (applying intermediate scrutiny to state "good moral character" and "good cause" provisions); *N.Y. State Rifle & Pistol Ass'n v. City of N.Y.*, 883 F.3d 45, 61–62 (2d Cir. 2018) (same with respect to other provision of the City's regime), *vacated on mootness grounds*, 140 S. Ct. 1525 (2020) (per curiam); *Kwong*, 723 F.3d at 168 (same); *Kachalsky*, 701 F.3d at 96 (same with respect to provision of state regime).

b. Taveras has failed to provide any basis for applying strict scrutiny.

Against this overwhelming authority, Taveras has rightly abandoned his argument below that courts may not apply the ordinary tiers of scrutiny in Second Amendment challenges (A117). Even at the time Taveras made that argument, this Court had already considered and rejected it. *See Kachalsky*, 701 F.3d at 89 n.9. As the Court explained, *Heller* did not require courts to apply an alternative test based solely upon the Second Amendment's text, history, and tradition. *See id.* Indeed, by contrasting the traditional tiers of scrutiny from the "interest-balancing inquiry" proposed by one of the dissents, *Heller* itself made clear that these tiers of scrutiny were not the gestalt interest-balancing test that the Supreme Court rejected. 554 U.S. at 634; *see Kachalsky*, 701 F.3d at 89 n.9; *NRA of Am.*, 700 F.3d at 197; *Heller v. District of Columbia*, 670 F.3d 1244, 1264–65 (2011).

Instead, even while admitting that he lacks precedent for his position, Taveras now argues that the Court should apply strict scrutiny (App. Br. 22 & n.16). Yet despite referencing strict scrutiny in his complaint, he waived that argument by not presenting it in his opposition papers and contending that no tier of scrutiny may apply

(A117; SDNY ECF No. 22 at 7–11). *See, e.g.*, *United States ex rel. Keshner v. Nursing Pers. Home Care*, 794 F.3d 232, 234–35 (2d Cir. 2015); *Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 373 n.7 (2d Cir. 2004).

In any event, Taveras's arguments for applying strict scrutiny lack merit. To the extent Taveras attempts to define the Second Amendment's core without reference to whether a person is "law-abiding and responsible" (App. Br. 16–17, 26), he disregards the express language of both *Heller* and this Court's precedent. *See Heller*, 554 U.S. at 635; *Libertarian Party*, 970 F.3d at 127; *Jimenez*, 895 F.3d at 234; *Bryant*, 711 F.3d at 369; *Kachalsky*, 701 F.3d at 85. Taveras misunderstands the entire analysis in asserting that the law-abiding inquiry "insulates the challenged regulations from *any* judicial scrutiny" (App. Br. 26). To the contrary, the analysis still results in applying intermediate scrutiny—a form of "heightened scrutiny" that not all regulations can satisfy. *Kwong*, 723 F.3d at 168; *see, e.g.*, *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d. at 264 (upholding invalidation of state firearm load limit under intermediate scrutiny).

Similarly, contrary to another of his suggestions (App. Br. 16–18), the Second Amendment's reference to "the people" does not preclude

even outright bans on gun possession for subclasses of individuals who do not qualify as law-abiding and responsible. *See Heller*, 554 U.S. at 626–27 & n.26, 635; *Jimenez*, 895 F.3d at 234–35 (upholding "categorical ban" on gun possession by persons dishonorably discharged from military); *NRA of Am.*, 700 F.3d at 205 (same with respect to persons under age 21); *Booker*, 644 F.3d at 23 (same with respect to domestic-violence misdemeanants); *Skoien*, 614 F.3d at 640–41 (same).

Rather, "*Heller*'s observation that longstanding prohibitions on firearm possession by felons and the mentally ill are presumptively valid entails that the Second Amendment permits categorical regulation of gun possession by classes of persons." *NRA of Am.*, 700 F.3d at 205 (quoting *Booker*, 644 F.3d at 23 (quotation marks and citation omitted)). Indeed, "[t]hat *some* categorical limits are proper is part of the original meaning, leaving to the people's elected representatives the filling in of details." *Skoien*, 614 F.3d at 640. Even the lone opinion—in dissent—upon which Taveras relies (App. Br. 17–18) recognized that legislatures may rest on "present-day judgments" to "disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety," including "dangerous

people who have not been convicted of felonies." *Kanter v. Barr*, 919 F.3d 437, 454, 464 (7th Cir. 2019) (Barrett, J., dissenting).

Regardless, the licensing provisions here do not constitute categorical bans. As mentioned, they merely authorize the NYPD to deny a permit based on certain factors. *See* 38 R.C.N.Y. § 3-03. Demanding "bright line prohibitors" like those under federal and state law, Taveras complains about this discretion (App. Br. 14, 27). But as the district court and other courts in this Circuit have recognized, this discretion actually enables "the government to more narrowly prescribe the circumstances under which an individual's Second Amendment rights may be burdened" (A119). *Fusco v. Cnty. of Nassau*, No. 19-CV-04771, 2020 U.S. Dist. LEXIS 181133, at *22 (E.D.N.Y. Sept. 30, 2020); *Henry v. Cnty. of Nassau*, 444 F. Supp. 3d 437, 448 (E.D.N.Y. 2020); *Torcivia*, 409 F. Supp. 3d at 38.

Nor do the provisions here substantially burden the right of law-abiding, responsible people simply because they do not require a conviction (App. Br. 23). As *Heller* itself suggests, mentally ill people may not have the capacity for responsibility to possess a gun even if they have never committed a crime. *See* 554 U.S. at 626–27 & n.26.

Similarly, this Court has recognized that drug addicts do not qualify as law-abiding and responsible even though people with that condition may not have been convicted of—or even have committed—a crime. *See Libertarian Party*, 970 F.3d at 127. And this Court has described an individual as "no longer a law-abiding citizen" "once" he engaged in illegal conduct, even prior to conviction. *Bryant*, 711 F.3d at 370.

Likewise, committing one or more acts of domestic violence violates the law even if the abuser evades conviction. *See, e.g.*, N.Y. Penal Law §§ 120.05(1), 120.15, 240.30(4). A court's issuance of an order of protection follows from evidence that the subject committed a crime. *See* N.Y. C.P.L. §§ 530.12–.13. And both of these factors certainly bear on the person's responsibleness. *See Chapman*, 666 F.3d at 226; *see also Libertarian Party*, 970 F.3d at 126 (recognizing "several sound bases" beyond felony convictions and mental illness for denying firearm applications).

Taveras has not pleaded or otherwise identified any pattern of the NYPD denying permits to law-abiding, responsible people based on these licensing provisions. *See Libertarian Party*, 970 F.3d at 128; *Abekassis*, 477 F. Supp. 3d at 154. To the contrary, as with the parallel

regime for handgun licenses for home protection, these provisions do not make it difficult for law-abiding, responsible applicants to obtain a permit. *See Hughes*, 22 N.Y.3d at 50; *see also Decastro*, 682 F.3d at 164 (noting that the City granted between 2/3 and 3/4 of handgun-license applications during period there in question). Thus, at most, these provisions place only a "modest" burden on law-abiding, responsible people, and intermediate scrutiny applies. *Libertarian Party*, 970 F.3d at 128.

2. The licensing provisions satisfy intermediate scrutiny as substantially related to public safety.

a. The district court rightly upheld these licensing provisions under intermediate scrutiny.

Having insisted in the district court that no tier of scrutiny may apply, Taveras waived any argument that the licensing provisions here do not satisfy intermediate scrutiny. *See, e.g.*, *Keshner*, 794 F.3d at 234–35; *Ehrlich*, 360 F.3d at 373 n.7. Yet even considering that argument, the district court correctly determined that these licensing provisions "easily satisfy" that test (A121).

Under intermediate scrutiny, gun regulations pass constitutional muster so long as they are "substantially related to the achievement of an important governmental interest." *Libertarian Party*, 970 F.3d at 128 (quotation marks and citation omitted); *Jimenez*, 895 F.3d at 236. The City, "beyond cavil," has a "substantial, indeed compelling," interest in public safety and crime prevention. *Libertarian Party*, 970 F.3d at 128 (quotation marks and citation omitted); *accord Jimenez*, 895 F.3d at 236; *Kwong*, 723 F.3d at 168. Specifically, it has a significant interest "in insuring the safety of the general public from individuals who, by their conduct, have shown themselves to be lacking the essential temperament or character which should be present in one entrusted with a dangerous instrument." *Kwong*, 723 F.3d at 169 (quoting *Bach*, 408 F.3d at 91); *see also United States v. McGinnis*, 956 F.3d 747, 758 (5th Cir. 2020) (recognizing government's "compelling" interest in reducing domestic gun violence); *Stimmel*, 879 F.3d at 207 (same); *Reese*, 627 F.3d at 804 n.4 (same).

Furthermore, the licensing provisions here are substantially related to that interest. This fit "need only be substantial, not perfect." *Libertarian Party*, 970 F.3d at 128 (quoting *Kachalsky*, 701 F.3d at 97);

N.Y. State Rifle & Pistol Ass'n, 804 F.3d. at 261. The provisions need not be "narrowly tailored" or "the least restrictive available means" to serve the interest. *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d. at 261 (quoting *Kachalsky*, 701 F.3d at 97). And this Court affords "substantial deference" in this area to the people's representatives. *Id.* (quoting *Kachalsky*, 701 F.3d at 97). As the Court has explained, such parties are "far better equipped than the judiciary to make sensitive public policy judgments … concerning the dangers of carrying firearms and the manner to combat those risks." *Jimenez*, 895 F.3d at 238 (quoting *Kachalsky*, 701 F.3d at 97); *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d. at 261. The Second Amendment does not require such governmental representatives to first establish their grounds for disqualifying certain categories of dangerous individuals through "admissible evidence." *Skoien*, 614 F.3d at 641.

With respect to the NYPD's authority to deny a longarm permit based on an applicant's lack of "good moral character" or "good cause," this Court has already held that the identical provisions for handgun licenses "easily meet[]—and surpass[]—this standard." *Libertarian Party*, 970 F.3d at 128; *see* N.Y.C. Admin. Code § 10-303(a)(2), (9).

While Taveras contends that those licensing provisions come from state law whereas the ones here come from local law, he concedes that they are substantively "the same" (App. Br. 33). And the cases that he cites for not holding longarms to the State's licensing framework all arose from circumstances outside the City that were not subject to the City's parallel longarm-permitting regime (App. Br. 33–34). *See Weinstein v. Ryder*, No. 19-cv-6236, 2021 U.S. Dist. LEXIS 55410, at *2, 4 (E.D.N.Y. Mar. 23, 2021); *Panzella v. Cnty. of Nassau*, No. 13-CV-5640, 2015 U.S. Dist. LEXIS 133475, at *2 (E.D.N.Y. Aug. 26, 2015), *aff'd in part, dismissed in part*, 863 F.3d 210 (2d Cir. 2017); *Razzano v. Cnty. of Nassau*, 765 F. Supp. 2d 176, 179–80 (E.D.N.Y. 2011).

Likewise, just as the "good moral character" and "good cause" provisions readily pass muster, so too do the provisions authorizing the NYPD to determine lack of good moral character and good cause based on an applicant's history of domestic violence or having been subject to an order of protection. *See* 38 R.C.N.Y. § 3-03(f), (g), (n). Specifically, a substantial relationship clearly exists between denying longarm permits to individuals with such a history of domestic violence and the City's compelling interest in reducing gun violence (A121). *See Fusco*,

2020 U.S. Dist. LEXIS 181133, at *24; *Henry*, 444 F. Supp. 3d at 448–49. Courts nationwide have repeatedly recognized the indisputable link between a history of domestic violence and future gun violence. *See, e.g.*, *Stimmel*, 879 F.3d at 211; *Staten*, 666 F.3d at 167; *Booker*, 644 F.3d at 25–26; *Reese*, 627 F.3d at 802–03; *Skoien*, 614 F.3d at 643–44.

As the Supreme Court has explained, domestic disputes and guns make for "a potentially deadly combination." *Castleman*, 572 U.S. at 159. Those who have committed domestic violence recidivate at significant rates. *See Staten*, 666 F.3d at 164–66; *Skoien*, 614 F.3d at 644; Nat'l Inst. of Justice, *supra*, at 19–20. Even among people whose first act of domestic violence did not lead to a criminal conviction, the presence of a gun—far more even than other weapons—greatly increases the probability that the next one will be a homicide. *See Castleman*, 572 U.S. at 160; *Stimmel*, 879 F.3d at 209–10; *Staten*, 666 F.3d at 166–67; *Booker*, 644 F.3d at 26; *Torcivia*, 409 F. Supp. 3d at 32; Nat'l Inst. of Justice, *supra*, at 26. And this risk of death extends not only to domestic-violence victims but also to police officers responding to domestic incidents. *See Stimmel*, 879 F.3d at 210; *Booker*, 644 F.3d at 26 n.18; *Skoien*, 614 F.3d at 644.

For these reasons, the federal government has recognized that "[o]ne of the most crucial steps to prevent lethal violence is to disarm abusers and keep them disarmed." Nat'l Inst. of Justice, *supra*, at 27; *see Booker*, 644 F.3d at 26; *Torcivia*, 409 F. Supp. 3d at 33. Denying longarm permits to those with a history of domestic violence therefore directly furthers the City's interest in public safety. *See Stimmel*, 879 F.3d at 201, 211 (upholding gun ban for domestic-violence misdemeanants); *Staten*, 666 F.3d at 167 (same); *Booker*, 644 F.3d at 26 (same); *Skoien*, 614 F.3d at 642 (same).

b. Taveras's facial arguments lack merit.

Taveras's arguments in support of his facial challenge all lack merit. To the extent he suggests that the government may restrict gun possession only by felons and the mentally ill (App. Br. 13 n.5, 19–20), this Court rejected that argument just last year. *See Libertarian Party*, 970 F.3d at 126. Rather than recognizing any such limitation, the Supreme Court specifically emphasized that it did not intend those examples of lawful restrictions to be exhaustive. *See Heller*, 554 U.S. at 627 n.26; *Libertarian Party*, 970 F.3d at 127.

Taveras fares no better in challenging the licensing provisions here on the ground that they go beyond federal and state restrictions (App. Br. 15, 20–22). The Supreme Court has made clear that the Second Amendment does not imperil all municipal regulations of guns. *See McDonald*, 561 U.S. at 786. In line with that point, this Court and others have already upheld municipal requirements that go beyond federal or state law. *See, e.g.*, *Kwong*, 723 F.3d at 168–69; *Mahoney v. Sessions*, 871 F.3d 873, 883 (9th Cir. 2017).

Furthermore, Taveras has provided no reason why the governmental source of a restriction should carry any significance for its validity under the Second Amendment. His state-law preemption argument has no bearing on his federal constitutional claim (App. Br. 21–22). And the Supreme Court has already decided that the Second Amendment applies equally to all governmental restrictions regardless of their source. *See McDonald*, 561 U.S. at 750, 791.

Here in particular, the City's longarm-permitting regime has existed for just as long as the federal prohibitions upon which Taveras relies (App. Br. 20). *See Jimenez*, 895 F.3d at 237 (describing history of 18 U.S.C. § 922); *People v. Simmons*, 125 Misc. 2d 118, 120–21 (N.Y.

Crim. Ct., Bronx Cnty. 1984) (describing history of City's longarm-permitting regime). In this case, the City could justifiably enact additional licensing requirements to account for the unique needs of the nation's largest urban center. *See Kwong*, 723 F.3d at 168–69 (dismissing challenge to other provision of the City's licensing regime); *Mahoney*, 871 F.3d at 883 (granting motion to dismiss Second Amendment challenge to Seattle policy).[4]

Nor has Taveras demonstrated that the licensing provisions violate the Second Amendment by not requiring a conviction (App. Br. 19–20). As discussed, the Supreme Court and this Court have recognized that the government may deny guns to irresponsible people who may never have even engaged in criminal conduct, such as those experiencing mental illness or drug addiction. *See Heller*, 554 U.S. at 626–27 & n.26; *Libertarian Party*, 970 F.3d at 127. All the more so, the Second Amendment permits the government to deny guns to persons

[4] Similarly, contrary to Taveras's suggestion (App. Br. 11–12), the fact that a couple of cases, outside of the Second Amendment context, referred to a handgun license under New York law as a "privilege" has no bearing on whether the longarm-permitting provisions here violate Second Amendment rights. *See Boss v. Kelly*, 306 F. App'x 649, 650 (2d Cir. 2009); *Oquendo v. City of N.Y.*, No. 19-cv-6352, 2020 U.S. Dist. LEXIS 184859, at *9 (E.D.N.Y. Oct. 5, 2020).

who have engaged in criminal conduct. *See Libertarian Party*, 970 F.3d at 128; *Jimenez*, 895 F.3d at 237; *Kwong*, 723 F.3d at 169 (citing *Bach*, 408 F.3d at 91); *Bryant*, 711 F.3d at 370.

Such individuals cease to be law-abiding the moment that they engage in such conduct, even prior to any opportunity for a conviction. *See Bryant*, 711 F.3d at 370. Nor does the absence of a subsequent conviction prove that the individual did not commit the unlawful acts. *See One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 235 (1972) (per curiam); *Neaderland v. Commissioner*, 424 F.2d 639, 641 (2d Cir. 1970). Rather, the government can choose to rely on other evidence of the person's conduct. *See Libertarian Party*, 970 F.3d at 128 (holding that licensing authority could rely on prior arrests); *Mishtaku v. Espada*, 669 F. App'x 35, 36 (2d Cir. 2016) (same); *Berron*, 825 F.3d at 846 (suggesting that licensing officials could rely on applicant's "history of arrests, domestic disturbances, threats of violence," and other factors suggesting dangerousness); *Chovan*, 735 F.3d at 1141–42 (relying on domestic-violence complaint that did not result in any arrest or charge).

Even Founding-era sources recognize the government's power to rely on evidence of dangerousness other than a criminal conviction. *See Kanter*, 919 F.3d at 454 (Barrett, J., dissenting); *NRA of Am.*, 700 F.3d at 200–01. And Taveras concedes that the City could rely on a felony indictment or an order of protection issued after a hearing (App. Br. 20 & n.12).

The licensing provisions' underlying concern here about domestic violence particularly illustrates the need for such flexibility. As the National Institute of Justice report explained, "Judges typically see only a small minority of domestic violence cases that actually occur." Nat'l Inst. of Justice, *supra*, at 6. Domestic-violence victims frequently do not report those crimes to police. *See Chovan*, 735 F.3d at 1141; *Skoien*, 614 F.3d at 643; Nat'l Inst. of Justice, *supra*, at 5–6. By the time victims first contact authorities, they generally have already suffered multiple incidents of domestic violence. *See* Nat'l Inst. of Justice, *supra*, at 6–7. And even then, acts of domestic violence "often do not lead to arrest or conviction." *Chovan*, 735 F.3d at 1141; *see Skoien*, 614 F.3d at 643; Nat'l Inst. of Justice, *supra*, at 5. For that reason, the Ninth Circuit had no compunction about relying on the victim's allegedly "unsubstantiated

allegations" in *Chovan*. *See* 735 F.3d at 1141; *see also Libertarian Party*, 970 F.3d at 128 (upholding law enforcement's authority to rely on applicant's arrest history as part of licensing process); *Mishtaku*, 669 F. App'x at 36 (same).

Moreover, gun regulations can satisfy intermediate scrutiny "despite being overinclusive in nature." *Harley v. Wilkinson*, 988 F.3d 766, 769 (4th Cir. 2021); *see Torres*, 911 F.3d at 1264 n.6; *Stimmel*, 879 F.3d at 211; *Chapman*, 666 F.3d at 231. Even if considering evidence of criminal conduct other than a conviction resulted in the denial of a longarm permit to a person who had not actually engaged in such conduct, that possibility would only show that the licensing provisions were not perfect, not that they lack a substantial relationship to the City's compelling interest in public safety. *See Libertarian Party*, 970 F.3d at 128; *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d. at 261. Furthermore, as the district court noted, by authorizing the NYPD "to make a case-by-case, individualized determination," the licensing provisions here once again enable it "to more narrowly prescribe the circumstances under which an individual's Second Amendment rights

may be burdened" (A119). *Fusco*, 2020 U.S. Dist. LEXIS 181133, at *22; *Henry*, 444 F. Supp. 3d at 448; *Torcivia*, 409 F. Supp. 3d at 38.

At bottom, Taveras cannot carry the "heavy burden" required to facially invalidate these provisions. *Salerno*, 481 U.S. at 745; *Amidon*, 508 F.3d at 98. As this Court has emphasized, "Proper respect for a coordinate branch of government requires that [the court] strike down [licensing provisions] only if the lack of constitutional authority to pass [them] is clearly demonstrated." *Kachalsky*, 701 F.3d at 97 (quoting *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012) (quotation marks and alterations omitted)). Accordingly, this Court should follow the district court in rejecting Taveras's facial challenge (A121–22). *See Libertarian Party*, 970 F.3d at 128; *Abekassis*, 477 F. Supp. 3d at 157 (dismissing facial challenge to City's handgun-licensing regime).

B. Taveras's as-applied challenge fails given the evidence that he previously committed multiple acts of domestic violence.

As the district court recognized, Taveras's as-applied challenge "fares no better" (A122). Just as in general, applying the licensing provisions to Taveras in particular bears a substantial relationship to

the City's compelling interest in public safety. *See Libertarian Party*, 970 F.3d at 128; *Jimenez*, 895 F.3d at 236–37. Indeed, Taveras's allegedly violent background implicates precisely the concerns about denying longarms to dangerous people that these provisions seek to address.

Here, the NYPD denied Taveras's permit application based on his history of domestic violence and his having been the subject of an order of protection (A11–12, 122). As the Appeals Unit's Director recounted, "Taveras was named as a perpetrator in two separate domestic incidents" (A12). In the first, Taveras's ex-girlfriend complained to police that Taveras had punched her in the eye, forcing her to receive hospital treatment (A12). As a result of this incident, the NYPD arrested and charged Taveras with assault, and a court issued an order of protection prohibiting him from in any way communicating with the victim (A12–13).

Nevertheless, just three months later—in direct violation of that order of protection, and bearing out the studies showing the high frequency at which domestic abusers recidivate—Taveras reportedly threatened the same ex-girlfriend that he would "pull her out of a

nightclub by her hair if she did not leave" and would hurt her and her family if she contacted the police (A13). *See Chovan*, 735 F.3d at 1142 (holding that evidence of subsequent domestic-abuse call supported conclusion that defendant was "at risk of recidivism for domestic violence" and "might use a gun to commit future domestic violence").

Based on this serious evidence, the NYPD's licensing officials concluded that Taveras had demonstrated "an unwillingness to abide by the law" and would pose a safety concern to the public if granted a longarm permit (A11, 13). As the district court recognized (A122), he had shown himself "to be lacking the essential temperament or character which should be present in one entrusted with a dangerous instrument." *Kwong*, 723 F.3d at 169 (quoting *Bach*, 408 F.3d at 91). Thus, denying him a longarm permit directly furthered the City's compelling interest in safety. *See Libertarian Party*, 970 F.3d at 128; *Jimenez*, 895 F.3d at 237; *Bryant*, 711 F.3d at 370.

Mirroring his facial challenge, Taveras presses the same meritless arguments with respect to his as-applied challenge (App. Br. 29–33). Once again, the licensing provisions do not violate the Second Amendment simply because they go beyond federal and state

restrictions (App. Br. 29–32). *See, e.g.*, *Kwong*, 723 F.3d at 168–69; *Mahoney*, 871 F.3d at 883.

Nor can he prevail on the ground that he denies his alleged violent conduct and was not convicted (App. Br. 30–32). As discussed at length above, the Second Amendment does not limit the government to only considering those elements of a person's background that resulted in a conviction. *See Heller*, 554 U.S. at 626–27 & n.26; *Libertarian Party*, 970 F.3d at 127–28; *Mishtaku*, 669 F. App'x at 36; *Kanter*, 919 F.3d at 454 (Barrett, J., dissenting); *Berron*, 825 F.3d at 846; *Chovan*, 735 F.3d at 1141–42; *NRA of Am.*, 700 F.3d at 200–01. To the contrary, this Court has already recognized that licensing officials may consider, among other things, prior arrests that did not result in any conviction. *See Libertarian Party*, 970 F.3d at 127–28; *Mishtaku*, 669 F. App'x at 36; *see also Berron*, 825 F.3d at 846 (suggesting that licensing officials could rely on applicant's "history of arrests, domestic disturbances, threats of violence," and other factors suggesting dangerousness).

Indeed, the research linking domestic violence to gun violence illustrates the logic of this approach. As discussed, genuine acts of domestic violence all too frequently produce no arrest, let alone a

conviction. *See Chovan*, 735 F.3d at 1141; Nat'l Inst. of Justice, *supra*, at 5–6. In the words of the National Institute of Justice report, "Judges typically see only a small minority of domestic violence cases that actually occur." Nat'l Inst. of Justice, *supra*, at 6. Moreover, individuals like Taveras with even "just *one* prior arrest" recidivate at even higher rates than the already significant rates at which other domestic abusers recidivate. *Id.* at 22; *see Staten*, 666 F.3d at 164–66; *Skoien*, 614 F.3d at 644. And even among those whose first act of domestic violence did not lead to conviction, the presence of a gun greatly increases the likelihood that the next incident will be a homicide. *See Castleman*, 572 U.S. at 160; *Stimmel*, 879 F.3d at 209–10; *Staten*, 666 F.3d at 166–67; *Booker*, 644 F.3d at 26; *Torcivia*, 409 F. Supp. 3d at 32; Nat'l Inst. of Justice, *supra*, at 26.

Furthermore, other courts of appeals have rejected similar attempts to deny underlying conduct. *See Chovan*, 735 F.3d at 1141–42; *Reese*, 627 F.3d at 795, 804. Responding to the identical argument that Taveras makes here, the Ninth Circuit in *Chovan* refused to disregard a domestic-violence complaint as a mere "unsubstantiated allegation[]" that did not result in an arrest, particularly given the frequency at

which genuine acts of domestic violence escape arrest or conviction. 735 F.3d at 1141–42. Similarly, in *Reese*, the Tenth Circuit rejected an as-applied challenge to the defendant's prohibition on possessing firearms, even though he had never previously been convicted of a felony or domestic-violence misdemeanor; he denied the underlying allegations of domestic abuse; and the court that had issued an order of protection against him never heard evidence or made any finding as to the legitimacy of those allegations. *See* 627 F.3d at 795, 798, 804; *see also Moreno v. N.Y.C. Police Dep't*, No. 10 Civ. 6269, 2011 U.S. Dist. LEXIS 76129, at *13–14 (S.D.N.Y. May 6, 2011) (holding that NYPD licensing officials could rely on applicant's domestic-violence history, even though he claimed that history rested on "false accusations").

Here, having investigated Taveras's background and considered both his ex-girlfriend's complaints and his denial of those complaints, the NYPD's licensing officials determined that Taveras had previously committed acts of domestic violence and would pose a safety risk if awarded a longarm permit (A10–13, 122). These officials did not need to credit Taveras's mere assertion that the victim's complaints were

"false," particular given that he offered no alternative explanation for how she ended up in the hospital with a black eye (A11).

Contrary to Taveras's contention that he had no other legal means to challenge the NYPD's determination (App. Br. 32–33), he could have done so through the ordinary state administrative-review process. *See Kachalsky*, 701 F.3d at 87; *Aron*, 48 F. Supp. 3d at 370. He simply declined to do so. And executive officials are better equipped than the federal judiciary to conduct such individualized investigations into a person's background and fitness to possess a gun. *See United States v. Bean*, 537 U.S. 71, 77 (2002); *Stimmel*, 879 F.3d at 210 ("[W]e have declined to read *Heller* to require an individualized hearing to determine whether the government has made an improper categorization." (quoting *Tyler*, 837 F.3d at 698 n.18 (quotation marks omitted))).

Given this final administrative finding that Taveras was not a law-abiding, responsible person, he cannot plead a Second Amendment violation merely because the permit denial applies to his home (App. Br. 32). *See Libertarian Party*, 970 F.3d at 127–28 (granting motion to dismiss Second Amendment challenge to denial of at-home handgun

license); *Jimenez*, 895 F.3d at 234–35 (upholding categorical ban on firearm possession that extended to home); *Bryant*, 711 F.3d at 365–66, 370 (affirming conviction for unlawfully possessing shotgun in home).

Nor can Taveras buttress his as-applied challenge by asserting that the permit denial "permanently deprived" him of access to longarms (App. Br. 32). For one thing, courts have repeatedly rejected similar as-applied challenges even to lifetime gun bans. *See Harley*, 988 F.3d at 767, 771–72 (rejecting as-applied challenge premised on plaintiff's 27 years of good behavior since his act of domestic violence); *Mai v. United States*, 952 F.3d 1106, 1119 (9th Cir. 2020) (rejecting as-applied challenge premised on plaintiff's two decades of peaceful conduct since his release from mental institution); *Stimmel*, 879 F.3d at 210–11 (denying plaintiff's request "for a chance to demonstrate in court that he no longer poses a risk of future violence"); *Chovan*, 735 F.3d at 1141–42 (rejecting as-applied challenge premised on defendant's 15 years of allegedly good behavior since his act of domestic violence).

Moreover, unlike the categorical bans in those cases, the NYPD's discretion under the present licensing provisions would enable it to revisit a person's dangerousness on a subsequent application. *See*

Fusco, 2020 U.S. Dist. LEXIS 181133, at *22; *Henry*, 444 F. Supp. 3d at 448; *Torcivia*, 409 F. Supp. 3d at 38. Thus, as with his facial challenge, the district court correctly dismissed Taveras's as-applied challenge (A123). *See Libertarian Party*, 970 F.3d at 128.

POINT II

THE DISTRICT COURT PROVIDENTLY DISMISSED TAVERAS'S STATE-LAW CLAIM

Finally, although Taveras makes no independent argument regarding the dismissal of his state-law preemption claim, the district court acted well within its discretion in declining to exercise supplemental jurisdiction over it (A123–25). *See Libertarian Party*, 970 F.3d at 121; *Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 726–27 (2d Cir. 2013). As this Court has often reiterated, "if a plaintiff's federal claims are dismissed before trial, the state claims should be dismissed as well." *Oneida Indian Nation v. Madison Cnty.*, 665 F.3d 408, 437 (2d Cir. 2011) (quoting *Brzak v. United Nations*, 597 F.3d 107, 113–14 (2d Cir. 2010) (quotation marks omitted)); *see Kolari v. N.Y.-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006). Therefore, because the district court dismissed Taveras's federal claims at the

beginning of the case, the court properly declined to exercise supplemental jurisdiction over his state-law claim (A124–25). *See Kolari*, 455 F.3d at 122–24; *Valencia v. Sung M. Lee*, 316 F.3d 299, 300–01 (2d Cir. 2003).

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's dismissal of the complaint.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2010, and according to that software, it contains 10,112 words, not including the table of contents, table of authorities, this certificate, and the cover.

/s/ Zachary S. Shapiro
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