STATE OF NEW YORK
COUNTY COURT: COUNTY OF ALLEGANY

IN THE MATTER OF THE SUSPENSION OF THE FIREARMS LICENSE OF

BRIDGETTE A. TOJEK Firearms License CW 10693

, **BRIEF OF RESPONDENT**

I. THE NEW YORK PISTOL PERMIT LAW IS UNCONSTITUTIONAL.

The respondent would like to exercise her natural right to keep and bears arms, a right the existence of which is acknowledged by and protected by the Second Amendment to the United States Constitution, applicable to the States pursuant to the Fourteenth Amendment to the United States Constitution. *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. Chicago*, 561 U.S. 742 (2010). This right is threatened by New York State laws and their enforcement in this proceeding.

The respondent would like to exercise such right for all the reasons underlying the Second Amendment, including but not limited to self-defense and the defense of their families against criminals and defense and deterrence against the prospect of tyrannical government.

In Federalist No. 46, James Madison argued that there is no reason to be concerned about the federal government becoming tyrannical in part because of "the advantage of being armed, which the Americans possess over the people of almost every other nation. . ."

Madison, in effect, argued that the armed populace would defeat the Federal Government's "standing army" in battle!

The Supreme Court has held that the right to bear arms is a "fundamental right." *McDonald v. Chicago*, 561 U.S. 742, 778 (2010). The right to bear arms is entitled to at least the same amount of respect, protection and enforcement that is provided to the other fundamental rights such as free speech, petition, assembly and due process.

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

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

Each year in the United States, there are numerous reports of police misconduct and many fatalities associated with those complaints.[1]

At the same time when New York State is aggressively attacking the people's right to bear arms, law enforcement is rapidly escalating its own firepower.

New York Gun Laws

Presently, in the State of New York, the respondent cannot lawfully purchase, possess, carry, keep or bear a "firearm" in their home as that term is defined in the New York without the permission of local officials. N.Y. PEN. LAW §§ 265.00(3), 265.01-265.04,

[1] L. Dane, "500 Innocent Americans Killed by Cops Each Year," *LewRockwell.com* (Dec. 16, 2013).

265.20(a)(3), 400.00. These statutes are challenged on their face, as applied herein and based on their widely varying customary applications from county to county.

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

The United States Court of Appeals described the latitude provided state judges in denying licenses as being "vested with considerable discretion." *Kachalsky v. County of Westchester*, 701 F.3d 81, 87 (2d Cir. 2012). Such unlicensed possession would constitute a crime under the Penal Law and subject the respondent to the risk of prosecution and imprisonment merely for exercising their natural and constitutional right to bear arms in their own homes for noble purposes. See, N.Y. PEN. LAW §§ 265.00(3), 265.01-265.04, 265.20(a)(3), 400.00.

Thus, New York State explicitly treats the right to bear arms as a "privilege," not a right, and *boasts of this unconstitutional policy* in numerous court decisions. E.g., *Guddemi v. Rozzi*, 210 AD2d 479 (2nd Dept. 1994); *Shapiro v. New York City Police Dept.*, 201 AD2d 333 (1st Dept. 1994). For example, applicants must prove they have "good moral character." The state may not condition the exercise of a fundamental right on prior proof of "good moral character." The term "good moral character" is undefined in the statute and is not susceptible of any precise definition or any rational definition whatsoever.

In our society, there is no general agreement of what "good moral character" means. Some behavior that years ago would have been considered proof of the lack of good moral character is no longer considered to be such.

The statute also conditions the issuing of a permit on the absence of "good cause . . . for the denial of the license," yet, provides no definition of "good cause," thus placing the recognition of constitutional rights in the hands of bureaucrats and their arbitrary and subjective judgments. Penal Law 400(1)(g).

The imposition of such conditions that are impossible to define violates both the Second Amendment right to bear arms and the due process clauses of the Fifth and Fourteenth Amendments. In most counties in the state, it can take a year or more to obtain a permit. If the permit is denied, judicial intervention can take an additional year and a half including one appeal as of right to the Appellate Division and cost as much as $5000 for legal fees and costs.

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

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

New York pistol permit law (Penal Law Sections §§ 400.00 and 265.00) on their face and as it is applied by state and local officials, violates the Second Amendment and

Fourteenth Amendment rights of the respondent to possess firearms in their homes for the following reasons:

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

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

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

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

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

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

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

The mandatory disclosure of close friends for references, together with the imposition on them of a criminal background check and the imposition upon the applicant of the burden of confessing to one's close friends all of one's sins and shortcomings that a licensing official

might conceivably deem significant (see, *Novick v. Hillery*, 183 AD2d 1007 (3rd Dept. 1992)), violates the privacy of all concerned, is unduly burdensome and invites retaliation against political activists and their closest friends.

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

Applicants bear the burden of proof of their entitlement to the "right" to bear arms; receive no hearing before their entitlement to this right is initially determined, and receive post-deprivation judicial review that presumes the licensing officer's decision is correct and applies a deferential standard of review and imposes the burden of proving error upon the alleged "right"-holder.

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

The requirements that an applicant prove:

that he has "good moral character;"

"proper cause" for the issuance of a carrier permit, and

the absence of "good cause" to deny a license—

violate due process.

That is, these terms are not capable of definition in such a way that puts an applicant, a licensing officer or a reviewing court on notice of the meaning of the terms. Therefore, the state, its licensing officers and reviewing judges, are given unfettered discretion in denying an application based on their own whimsical notion of what these terms mean.

II. THE SULLIVAN ACT WAS NOT BASED ON ACTUAL EVIDENCE OR LOGIC AND DID NOT REDUCE THE HOMICIDE RATE IN NEW YORK CITY.

Proponents of the Sullivan Act claim it was well-founded and has worked. On the contrary, the origins of the statute are a matter of dispute and like much progressive legislation, its justification is the unproven assertion that its goals were achievable and achieved. See, M. Walsh, "The Strange Birth of NY's Gun Laws," NewYorkPost.com, Jan. 16, 2012.[2] "At least part of the motivation behind the Sullivan Act was a desire to keep firearms out of the hands of recent immigrants from Italy and Southern Europe — perceived to be prone to violence — by

[2] "The father of New York gun control was Democratic city pol "Big Tim "Sullivan — a state senator and Tammany Hall crook, a criminal overseer of the gangs of New York.
"In 1911 — in the wake of a notorious Gramercy Park blueblood murder-suicide — Sullivan sponsored the Sullivan Act, which mandated police-issued licenses for handguns and made it a felony to carry an unlicensed concealed weapon.
"This was the heyday of the pre-Prohibition gangs, roving bands of violent toughs who terrorized ethnic neighborhoods and often fought pitched battles with police. In 1903, the Battle of Rivington Street pitted a Jewish gang, the Eastmans, against the Italian Five Pointers. When the cops showed up, the two underworld armies joined forces and blasted away, resulting in three deaths and scores of injuries. The public was clamoring for action against the gangs.
"Problem was the gangs worked for Tammany. The Democratic machine used them as **shtarkers** (sluggers), enforcing discipline at the polls and intimidating the opposition. Gang leaders like Monk Eastman were even employed as informal "sheriffs," keeping their turf under Tammany control.
"The Tammany Tiger needed to rein in the gangs without completely crippling them. Enter Big Tim with the perfect solution: Ostensibly disarm the gangs — and ordinary citizens, too — while still keeping them on the streets.
"In fact, he gave the game away during the debate on the bill, which flew through Albany: "I want to make it so the young thugs in my district will get three years for carrying dangerous weapons instead of getting a sentence in the electric chair a year from now."
"Sullivan knew the gangs would flout the law, but appearances were more important than results. Young toughs took to sewing the pockets of their coats shut, so that cops couldn't plant firearms on them, and many gangsters stashed their weapons inside their girlfriends' "bird cages" — wire-mesh fashion contraptions around which women would wind their hair.
"Ordinary citizens, on the other hand, were disarmed, which solved another problem: Gangsters had been bitterly complaining to Tammany that their victims sometimes shot back at them.
"So gang violence didn't drop under the Sullivan Act — and really took off after the passage of Prohibition in 1920. Spectacular gangland rubouts — like the 1932 machine-gunning of "Mad Dog" Coll in a drugstore phone booth on 23rd Street — became the norm."

giving the New York Police Department (NYPD) the power to grant or deny permits."[3] No scientific proof of the overall efficacy of the law has been produced. Nor is there any mention of *why* there was a rising tide of gun violence at that time as a scientific, evidence-based approach would require. Rather, it appears that guns (inert pieces of metal) and law-abiding gun owners were simply made the scapegoats for a problem the state legislature apparently was unable to solve.

The evidence shows that the Sullivan Act did not in fact measurably reduce gun violence in New York City, which continued to slowly rise through Alcohol Prohibition and only declined at the precise time when Prohibition was repealed. Then the murder rate ballooned up in the 1960's before declining in the 1990's. See, R. King, "217 years of homicide in New York," December 31, 2013; qz.com/162289/217-years-of-homicide-in-new-york/.

Thus, it appears that the murder rate operates almost entirely independently of gun laws which is pretty much what common sense would suggest. The data show for example, that the illegal trade in alcohol, heroin or cocaine seems to be correlated with a rise in murders. *Id.;* see also, J. Ostrowski, "Thinking About Drug Legalization," Cato Institute Policy Analysis No. 121 (May 25, 1989), Figure No. 1 (showing violent crime increasing after alcohol Prohibition and declining after repeal).

Proponents of the Sullivan Act argue that under the intermediate scrutiny test (see Point III below), a gun law will be upheld "'so long as the government produces evidence that fairly supports its rationale.'" As pointed out below, this test gives zero weight to the value of the right to bear arms, but that is not its only defect. Obviously, since this case was dismissed on the pleadings, the government has submitted no "evidence" here at all, meaning, testimony, expert

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

testimony and documents or data tested under cross-examination. Rather, supporters of the Sullivan Act reply primarily on three studies.

The first problem with the studies is that there is no agreement on the ground rules: what are the criteria of a study that would justify a gun control law? The question is not even broached! What are the rules for the debate? A proper understanding of the purposes of the right to bear arms would yield a set of criteria for evaluating the so-called "evidence" that is entirely different from the ones set up by judicial and non-judicial opponents of the right to bear arms which appear to be: the slightest bit of so-called evidence, consisting of even one tendentious, flawed and jerry-rigged so-called "academic" study, that shows that at least one life might be saved by a gun control law, is sufficient to justify the law under the intermediate scrutiny test rejected by the Supreme Court. See, Point III, below.

In sharp contrast, a test that properly takes account of the true purposes of the Second Amendment would look something like this: No gun control law would be justified unless there was firm evidence that the reduction in crime it would cause [A] would be greater than the harm it would do to the right of the people to retain their right to sovereignty, deter government tyranny, deter mass murder by the government and deter the political instability seen in many countries without a well-armed citizenry [B], PLUS the increased crime caused by the direct and indirect effects of reduced availability of firearms to law-abiding citizens [C]. Thus, it would need to be proven that $A > (B + C)$. No pro-gun control advocate has ever proven this or even conceived of it or tried to prove it. Further, there is no known methodology available to prove this because it is very difficult to prove *anything* in the social sciences by statistics. As Brian Doherty wrote:

> "Given the amazingly complicated set of causes and incentives feeding into any human decision—and every gun homicide is the result of a human decision—

> establishing that the change in background check laws that "led to" a reduction in gun homicides "caused" them (even in that one Connecticut case, much less concluding that such laws can be relied on to have that effect in other places and times) is likely beyond any final authoritative conclusion via the usual methods of the social sciences." "5 Problems with the New Study 'Proving' that More Background Checks Lowered Connecticut's Gun Murder Rate by 40 Percent," *Reason.com* (Jun. 24, 2015).

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

A quick look at Missouri crime rates since the repeal of the licensing law shows, not only a drastic overall decline in violent crime but an apparent reduction in many categories of violent crime. See, http://www.disastercenter.com/crime/mocrimn.htm (based on Uniform Crime Reports). For example the violent crime rate per 100,000 was 545.6 the last full year of licensing (2006) but only 519.4 in 2016 and *under 500* every year from 2008 (the first full year of freedom from licensing) through 2015. Robberies, aggravated assaults, burglaries, larcenies and vehicle thefts were all way down. Thus, the study cited is junk science.

Gun control advocates often cite a study alleging that Connecticut's licensing law was responsible for a 40% reduction in the state's *firearm* homicide rate. Even if true, that would prove nothing of importance in the debate as what matters is the overall rate of all violent crime in the state which the study does not address. The study was funded by an uber-progressive gun

control organization known as the Joyce Foundation. One of their goals is to reduce "gun violence through state policy reform, research, education, and legal strategies." That of course means legal gun restrictions as opposed to dealing with the innumerable factors that lead to violence but are either not amenable to classic progressive (coercive) solutions, e.g., broken homes,[4] or which may in fact be caused by prior progressive policies such as the war on drugs. Additionally, all four authors work for the Bloomberg School of Public Health, named after the notorious opponent of the right to bear arms Michael Bloomberg in honor of his large contributions to the school. Two of the four authors are associated with the Center for Gun Policy, a think tank opposed to the right to bear arms. Bottom line: "Whose bread I eat, his song I must sing."

As for the study itself, John Lott attacked the methodology and conclusions of the study in great detail:

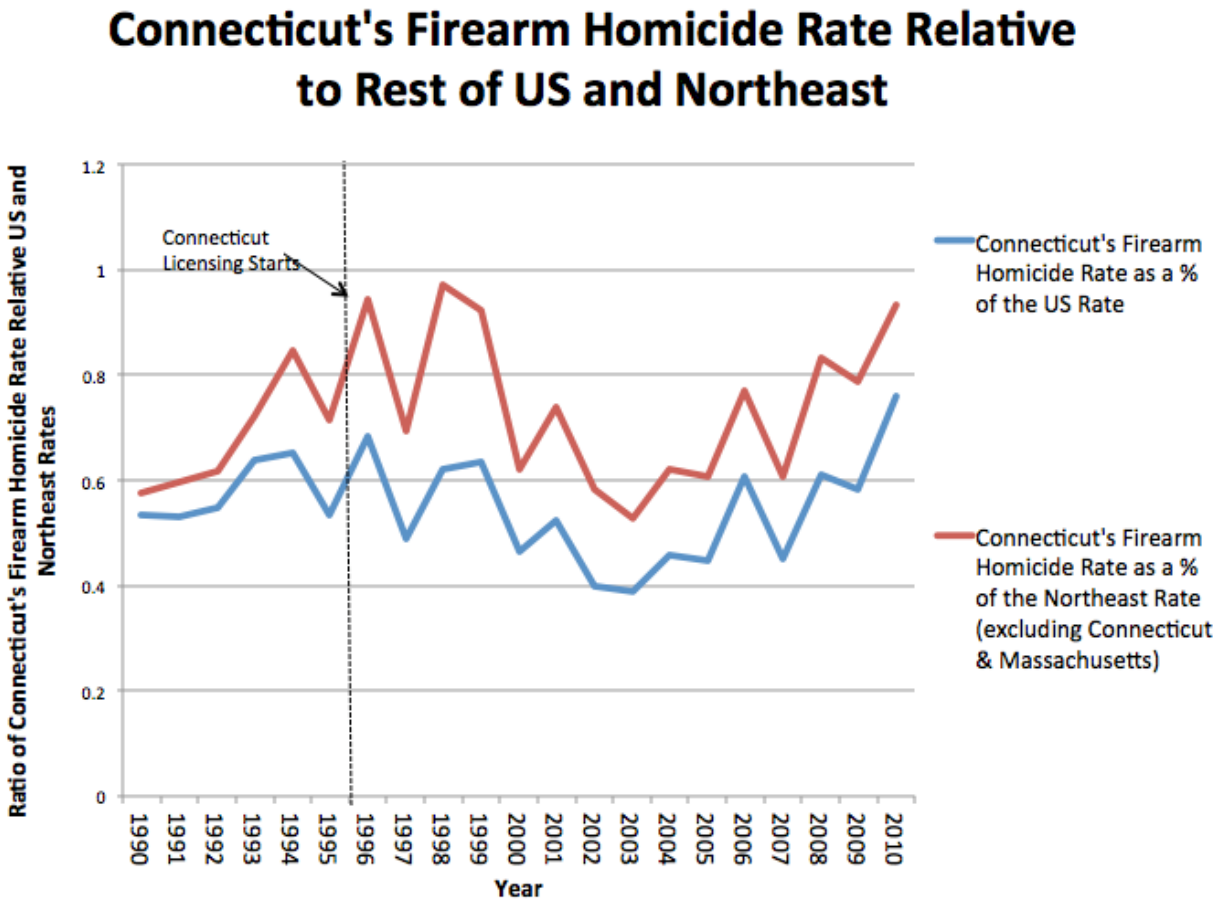
> "It makes little sense to examine one state when ten states had have laws at least at some time requiring licensing (Hawaii, Illinois, Iowa, Missouri, Massachusetts, Michigan, Nebraska, New Jersey, New York, North Carolina, and the District of Columbia) and others have expanded background checks. Missouri and now Connecticut involves cherry picking. The Missouri study is discussed here. And Massachusetts serves as a strong example of why not all states are examined. Connecticut serves as the strongest evidence that gun control advocates can point to but, as we will see, this evidence is very weak.
>
> "As the authors of the study note, from 1995 to 2005 the firearm homicide rate in Connecticut indeed fell from 3.13 to 1.88 per 100,000 people, representing a 40% drop over a ten-year period ("We estimate that the law was associated with a 40% reduction in Connecticut's firearm homicide rates during the first 10 years that the law was in place"). However, unexplained is that the firearms homicide rate was falling even faster immediately prior to the licensing law. From 1993 to 1995, the Connecticut firearms homicide rate fell from 4.5 to 3.13 per 100,000 residents, which means more than a 30% drop in just two years. This represented a greater decline than the 17% national decline over those two years. Of course, Rudolph

[4] E. Kao, "The Crisis of Fatherless Shooters," *Heritage.org* (March 14, 2018).

and his co-authors do not address this inconvenient fact (though if one looks at their Figure 1 on page 3 this preceding drop is clearly visible).

"Their results are also extremely sensitive to the last year that they pick. While it is true that Connecticut's firearm homicide rate fell by 40% from 1995 to 2005, it only fell by 16% between 1995 and 2006 and 12.5% between 1995 and 2010. Meanwhile the drops for the US and the rest of the Northeast are much greater. From 1995 and 2006, the firearm homicide rates for the US and the rest of the Northeast fell respectively by 27% and 22%. From 1995 and 2010, the drops were 39% and 31%. The longer samples show a ***relative increase*** in Connecticut's firearm homicide rate whether Rudolph et al. had looked at one additional year or five additional years.

"The authors say that they limit the data to 2005 because one paper that they cite looked at only 10 years after a law that they were investigating (p. 4: "We conclude the post-law period in 2005 to limit extrapolation in our predictions of the counterfactual to 10 years, as has been done previously"). But just because a study on to cigarette smoking looks at 12 years (not 10 as claimed (Proposition 99 went into effect on January 1, 1989 and their sample went until 2000)) after the law was in effect, doesn't explain why a study on crime would do the same thing. Indeed, the reason given by the authors that Rudolph et al. cite isn't applicable to the current paper (p. 16: "It ends in 2000 because at about this time anti-tobacco measures were implemented across many states, invalidating them as potential control units"). There was no similar adoption across the states of handgun licensing laws. Yet, if Rudolph et al. had gone for this 12th year as the study that they cite does, it would have dramatically altered their results.
In three of the four years immediately after the law was passed in 1995, Connecticut's firearm homicide rate rose relative to the firearm homicides in Northeastern States. But there is no theory offered for why Connecticut's firearm homicide rate would first rise relative to other Northeastern states, then fall relative to them for six years, and then rise relative to them for four of the next five years.



> "The same graph for next door Massachusetts shows how bad things were after their 1998 gun licensing law went into effect and why they picked Connecticut with all the arbitrary years that they examined.
>
> "The Webster study also cherry-picks what crime rates to look at. For over all violent crimes as well as robbery and aggravated assault, Connecticut's crime rate was falling relative to the rest of the US in the years prior to the licensing law and rising afterwards."[5]

Lastly, supporters of the law often cite a study that allegedly shows an association between a loosening of Missouri's licensing law and a rise in its suicide rate. It is not at all clear why suicides enter the calculus for infringing upon the right to bear arms. Was suicide discussed

[5] "Bloomberg's School of Public Health Cherry Picked Claim that firearm homicides in Connecticut fell 40% because of a gun licensing law," *CrimeResearch.org* (June 11, 2015).

at the Constitutional Convention? The philosophical justification for depriving millions of the means to protect their lives to allegedly deter a few people from choosing to end theirs is elusive to say the least. Nevertheless, the evidence on this point is not persuasive as explained in an article by Professor R. Douglas Fields:

> "There is no relation between suicide rate and gun ownership rates around the world. According to the 2016 World Health Statistics report, (2) suicide rates in the four countries cited as having restrictive gun control laws have suicide rates that are comparable to that in the U. S.: Australia, 11.6, Canada, 11.4, France, 15.8, UK, 7.0, and USA 13.7 suicides/100,000. By comparison, Japan has among the highest suicide rates in the world, 23.1/100,000, but gun ownership is extremely rare, 0.6 guns/100 people. . . .
> Secondly, gun ownership rates in France and Canada are not low . . . The rate of gun ownership in the U. S. is indeed high at 88.8 guns/100 residents, but gun ownership rates are also among the world's highest in the other countries cited. Gun ownership rates in these countries are as follows: Australia, 15, Canada, 30.8, France, 31.2, and UK 6.2 per 100 residents. (3,4) Gun ownership rates in Saudia Arabia are comparable to that in Canada and France, with 37.8 guns per 100 Saudi residents, yet the lowest suicide rate in the world is in Saudi Arabia (0.3 suicides per 100,000).
> Third, recent statistics in the state of Florida show that nearly one third of the guns used in suicides are obtained illegally, putting these firearm deaths beyond control through gun laws.(5)
> Fourth, the primary factors affecting suicide rates are personal stresses, cultural, economic, religious factors and demographics. According to the WHO statistics, the highest rates of suicide in the world are in the Republic of Korea, with 36.8 suicides per 100,000, but India, Japan, Russia, and Hungary all have rates above 20 per 100,000; roughly twice as high as the U.S. and the four countries that are the basis for the Post's calculation that gun control would reduce U.S. suicide rates by 20 to 38 percent. Lebanon, Oman, and Iraq all have suicide rates below 1.1 per 100,000 people--less than 1/10 the suicide rate in the U. S., and Afghanistan, Algeria, Jamaica, Haiti, and Egypt have low suicide rates that are below 4 per 100,000 in contrast to 13.7 suicides/100,000 in the U. S."[6]

The *political* motive for interjecting the tragedy of suicide into Second Amendment policy debates is, however, crystal clear. It allows gun controllers to confuse the public with

[6] "Fact Check, Gun Control and Suicide: Statistics do not support a connection between gun control and US suicide rates," *PsychologyToday.com* (Jul 24, 2016).

misleading statistics on "gun homicides," discretely including suicides to exaggerate the number of crime victims. Most "gun homicides" are suicides.[7]

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

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

Specifically:

1. supporters of the Sullivan Act completely ignore the primary purpose of the Second Amendment, to allow the people to defense themselves against government tyranny;
2. they use an intermediate scrutiny balancing test rejected by *Heller* and *McDonald*; and,
3. they rely on biased and tendentious academic studies which are flawed for many reasons. See Point I, above.

[7] G. Kessler, "Obama's claim that 'states with the most gun laws tend to have the fewest gun deaths'", *Washington Post*, Oct. 5, 2015.

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

The right has worked exactly as intended. While the United States government has badly mistreated or tolerated the mistreatment of a variety of persons not considered to be citizens at the time including African slaves and Native Americans, while aggressively making efforts to ensure that both were *disarmed,* that same government has *not* done what at least twenty other modern regimes and an infinite number of early modern, pre-modern and ancient regimes have done: engaged in the mass killing of its own citizens. See, R. J. Rummel, *Death by Government: Genocide and Mass Murder in the Twentieth Century*, New Jersey: Transaction Publishers, 1994; hawaii.edu/powerkills. Nor has the United States government yet installed a totalitarian police state or cancelled elections or had coups d'etat or other political instability commonly seen in other countries where the right to bear arms does not exist. (Countries that have many coups d'état such as Haiti and Thailand have low levels of gun ownership.) The fact is that *the Second Amendment has worked* and those who have an ideological urge to disarm Americans have no rebuttal to that undeniable fact. Hence, they pretend that this line of argument does not even exist, thereby declaring their intellectual bankruptcy.

Under a proper understanding of the Second Amendment, any proposal to ban or restrict law-abiding, competent adults from owning weapons useful for every kind of self-defense and that have been in common use in America would be presumptively unconstitutional. Yet, this is

an academic point as no proponent of any gun control law has even constructed an argument for how their proposal does not violate the Second Amendment's core purpose.

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

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

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

> "Indeed, adoption of a true strict-scrutiny standard for evaluating gun regulations would be impossible. That is because almost every gun-control regulation will seek to advance (as the one here does) a "primary concern of every government—a concern for the safety and indeed the lives of its citizens." United States v. Salerno, 481 U. S. 739, 755 (1987). The Court has deemed that interest, as well as "the Government's general interest in preventing crime," to be "compelling," see id., at 750, 754, and the Court has in a wide variety of constitutional contexts found such public-safety concerns sufficiently forceful to justify restrictions on individual liberties, see e.g., Brandenburg v. Ohio, 395 U. S. 444, 447 (1969) (per curiam) (First Amendment free speech rights); Sherbert v. Verner, 374 U. S. 398, 403 (1963) (First Amendment religious rights); Brigham City v. Stuart, 547 U. S. 398, 403–404 (2006) (Fourth Amendment protection of the home); New York v. Quarles, 467 U. S. 649, 655 (1984) (Fifth Amendment rights under Miranda v. Arizona, 384 U. S. 436 (1966)); Salerno, supra, at755 (Eighth Amendment bail rights). Thus, any attempt in theory to apply strict scrutiny to gun regulations will in practice turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns

on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.

"I would simply adopt such an interest-balancing inquiry explicitly. The fact that important interests lie on both sides of the constitutional equation suggests that review of gun-control regulation is not a context in which a court should effectively presume either constitutionality (as in rational-basis review) or unconstitutionality (as in strict scrutiny). Rather, "where a law significantly implicates competing constitutionally protected interests in complex ways," the Court generally asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests. See Nixon v. Shrink Missouri Government PAC, 528 U. S. 377, 402 (2000) (Breyer, J., concurring). Any answer would take account both of the statute's effects upon the competing interests and the existence of any clearly superior less restrictive alternative. See ibid. Contrary to the majority's unsupported suggestion that this sort of "proportionality" approach is unprecedented, see ante, at 62, the Court has applied it in various constitutional contexts, including election-law cases, speech cases, and due process cases. See 528 U. S., at 403 (citing examples where the Court has taken such an approach); see also, e.g., Thompson v. Western States Medical Center, 535 U. S. 357, 388 (2002) (Breyer, J., dissenting) (commercial speech); Burdick v. Takushi, 504 U. S. 428, 433 (1992) (election regulation); Mathews v. Eldridge, 424 U. S. 319, 339–349 (1976) (procedural due process); Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty., 391 U. S. 563, 568 (1968) (government employee speech).

"In applying this kind of standard the Court normally defers to a legislature's empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional factfinding capacity. See Turner Broadcasting System, Inc. v. FCC, 520 U. S. 180, 195–196 (1997) ; see also Nixon, supra, at 403(Breyer, J., concurring). Nonetheless, a court, not a legislature, must make the ultimate constitutional conclusion, exercising its "independent judicial judgment" in light of the whole record to determine whether a law exceeds constitutional boundaries. Randall v. Sorrell, 548 U. S. 230, 249 (2006) (opinion of Breyer, J.) (citing Bose Corp. v. Consumers Union of United States, Inc., 466 U. S. 485, 499 (1984))."

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

"Justice Breyer moves on to make a broad jurisprudential point: He criticizes us for declining to establish a level of scrutiny for evaluating Second Amendment restrictions. He proposes, explicitly at least, none of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis), but rather a judge-empowering "interest-balancing inquiry" that "asks whether the statute

burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." *Post*, at 10. After an exhaustive discussion of the arguments for and against gun control, Justice Breyer arrives at his interest-balanced answer: because handgun violence is a problem, because the law is limited to an urban area, and because there were somewhat similar restrictions in the founding period (a false proposition that we have already discussed), the interest-balancing inquiry results in the constitutionality of the handgun ban. QED.

"We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an "interest-balancing" approach to the prohibition of a peaceful neo-Nazi march through Skokie. See *National Socialist Party of America* v. *Skokie*,432 U. S. 43 (1977) *(per curiam)*. The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. Like the First, it is the very *product* of an interest-balancing by the people—which Justice Breyer would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."

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

"Municipal respondents assert that, although most state constitutions protect firearms rights, state courts have held that these rights are subject to "interest-balancing" and have sustained a variety of restrictions. Brief for Municipal Respondents 23-31. In Heller, however, we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing, 554 U.S., at ___ - ___, 128 S.Ct., at 2820-2821, and this Court decades ago abandoned "the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights," Malloy, supra, at 10-11, 84 S. Ct. 1489 (internal quotation marks omitted)."

Since the supporters of the Sullivan Act rely on an analytical approach explicitly rejected by the Supreme Court in its only two relevant Second Amendment cases, this entire line of argument must be rejected by this Court.

At this point in the continuing evolution of Second Amendment doctrine, with the Supreme Court having recently accepted only its third case involving the right to bear arms (*New York State Rifle & Pistol Association, Inc., et al., Petitioners v. City of New York, New York, et al.,* 18-280) and reviewing New York law, this fact must be clearly understood by all: the intermediate scrutiny, balancing of interests test, was originally developed by opponents of the Second Amendment to negate the right to bear arms in actual practice. The test was essentially the creation of Justice Breyer in *Heller* as a fall-back position to his initial opposition to any individual right to bear arms.

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

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

the right! ("Timeo Danaos et dona ferentes" from Aeneid (II, 49), "Beware of Greeks bearing gifts".)

Rather, courts will uphold a challenged regulation where it is "substantially related to the achievement of an important governmental interest." Thus, in that test, *zero weight* is given to the values protected by the right and nearly absolute weight is given to the interest of the government. Yet, the purpose of the right is either to allow the people to protect themselves against the government or protect themselves when the government fails to do so. Thus, we have shown that the intermediate scrutiny test was developed by opponents of the right to bear arms whose main purpose is to negate the right to bear arms.

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

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

New York City through the decades was a laboratory experiment in what happens when the government makes it extremely difficult for citizens to obtain a pistol permit. Muggings became a cultural institution in the mid-60's as described by the New York Times:

> "'It was so easy to get mugged in those days,' said Mr. Buggy [an undercover officer], now retired and living in Middle Village, Queens. 'I couldn't stagger down the street and not have 10 muggers come after me.' . . .
> "As vast parts of the city -- Times Square, Central Park, Upper Broadway -- became danger zones, normally intrepid New Yorkers reacted with paranoia and fear. Restaurant business fell off. Errands were made in the light of day. If people did venture out at night, they walked in the middle of the street so nobody could jump them from behind a building. Even children carried 'mugger's money,' and sharing mugging stories became fodder for dinner party conversation." S. Kurutz, "The Age of the Mugger," *New York Times* (Oct. 24, 2004).

Henny Youngman joked about it: "Guy walks up to a fellow and says, 'Do you know where Central Park is?' Fellow says no, guy says, 'Then I'll mug you right here.'" R. Shepard, "Do Jokes About the Big Apple Cut to the Core?," *New York Times* (June 19, 1975).

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

Nevertheless, the following general facts about guns, crime and gun control can be stated with confidence:

1. Many high crime cities have strict gun control laws.
2. In many of those high-crime cities, the rate of gun ownership is low compared to national rates.
3. While law-abiding citizens do generally comply with gun control laws, criminals do not.

4. Many states with lax gun laws and heavy gun ownership have low crime rates. Ryan McMaken, "With Few Gun Laws, New Hampshire Is Safer Than Canada," *Mises.org* (Dec. 15, 2015).

5. From 1995 through 2012, the murder rate declined while gun ownership increased. Ryan McMaken, "Pew: Homicide Rates Cut in Half Over Past 20 Years (While New Gun Ownership Soared)," *Mises.org*, (Oct. 27, 2015).

6. Gun control advocates misuse statistics to make the case for gun control stronger than it is. For example, they speak of "gun homicides" as opposed to overall homicides. Ryan McMaken, "5 Tricks Gun-Control Advocates Play," *Mises.org*, (Nov. 1, 2016).

7. The crime problem in the United States is often exaggerated by arbitrary and unscientific comparisons with other countries entirely dissimilar to the United States. *Id.*

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

CONCLUSION

Because the New York State Pistol Permit law and legal regime is unconstitutional in its entirety and in its several parts, the proceeding against the petitioner to revoke her permit should be dismissed and her license restored.

Respectfully submitted,

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