

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JOHN DISALVO, JOSE TORRES,
ALEXANDRA GOTTLIEB ,
PETER CAIRNEY and
CHRISTOPHER BIANCANIELLO,

Plaintiffs,

CIVIL ACTION NO: 26-CV-00274

v.

THE CITY OF NEW YORK, Jessica S. Tisch,
Police Commissioner, in her official capacity,
and JOHN AND JANE DOES 1-3 who are
THE COMMANDING OFFICER OF THE
NYPD LICENSE DIVISION and other supervisors
related to gun permits, in his or her official capacity,

Defendants.

PLAINTIFFS' REPLY MEMORANDUM OF LAW
SUPPORTING MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

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I. INTRODUCTION

Defendants offer a series of hollow excuses to justify prolonged delays that burden the Second Amendment while misstating both the record and controlling law. They even blame *Bruen* for an increase in applications. *Bruen* is not the problem or cause of disorder; it was the solution to Defendants' prior unconstitutional denial of firearms to law-abiding citizens that kept them from applying until recently. Now Defendants advance a new variation of the same misconduct: they claim to be overwhelmed and understaffed, yet simultaneously assert that they "adjusted policies and procedures" to improve efficiency. That assertion is fiction as there is no proof of any corrected policies and procedures. The fact that Defendants simultaneously admit the delay in Mr. Berkovich's declaration proves nothing is corrected and any policy or procedure is fictional. Nevertheless, administrative delay is not a defense to constitutional infringement. see DE 8-7 Memo pp 13-15.

More critically, Defendants entirely ignore their burden under *Bruen* to identify a historical analogue for the delays they impose. Their table of contents shows *Bruen* is not even listed. This proves that there is no historical tradition of leaving citizens in indefinite administrative limbo before allowing possession of arms. Plaintiffs are now left in limbo at the City's licensing regime of the purchase and appeal stages with no fixed deadlines, ensuring that the deprivation can persist without a temporal limit.

Most revealing is Defendants' conduct in this case. After leaving Plaintiffs in extended delay for years, the NYPD issued determinations within twenty-four hours of being served with this federal action. The sudden compliance demonstrates that the delay was not inevitable but manufactured. A regime that can resolve applications overnight when faced with judicial scrutiny cannot plausibly claim helpless backlog. That episode alone confirms the ongoing

constitutional injury. Further, Defendants repeated misrepresentations that Plaintiffs DiSalvo and Gottlieb were dishonest on their applications and filing appeal notice letters repeating that are disturbing. Plaintiffs were not dishonest on their applications in any way.

This Court has the authority to remedy the ongoing delay of having Plaintiffs possess firearms as intended by the Second Amendment by ordering Defendants make decisions on the gun purchase and appeal applications within seven days of Plaintiffs submitting those applications to end this never-ending license regime.

II. ARGUMENT

A. Defendants Misstate the Law Governing Preliminary Injunctive Relief

Defendants' characterization of Plaintiffs' request as a writ of mandamus and as a clearly improper mandatory injunction is legally unsupported. The "status quo" is the last actual, peaceable, uncontested status preceding the controversy. *Mastrovincenzo v. City of New York*, 435 F.3d 78, 89 (2d Cir. 2006). Further, a heightened standard that Defendants raise applies only where relief grants substantially all the ultimate relief sought or fundamentally alters existing relationships. *Tom Doherty Assocs., Inc. v. Saban Ent., Inc.*, 60 F.3d 27, 34–35 (2d Cir. 1995). An order requiring Defendants to adhere to their own governing statute under Penal Law § 400 to comply within six-months restores, rather than alters, the lawful status quo. The status quo is Plaintiffs right to bear arms, not an unlawful administrative delay that Defendants claim as their excuse for burdening that right.

Defendants other claim that Plaintiffs are proceeding under 28 U.S.C. § 1361 is legally unfounded. They do not seek mandamus; they seek prospective equitable relief under 42 U.S.C. § 1983 to enjoin state actors from continuing unconstitutional conduct, which federal courts are

expressly authorized to grant. *Ex parte Young*, 209 U.S. 123 (1908); *Heckler v. Ringer*, 466 U.S. 602, 616 (1984). That form of relief is well within this Court’s equitable authority.

Plaintiffs’ relief is constitutionally grounded. Where a plaintiff asserts deprivation of a constitutional right, irreparable harm is presumed. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The relief requested here enforces the constitutional principle recognized in *Bruen* and further in *Ortega v. Grisham*, 148 F.4th 1134, 1143–45 (10th Cir. 2025) that the right to keep and bear arms necessarily includes the right to possess them, and that government-manufactured delays burden that right.

An order preventing ongoing constitutional injury is not extraordinary; it is the ordinary function of equitable jurisdiction, which is all that Plaintiffs ask for here

B. Adjudication Does Not End the Constitutional Injury Because Possession Remains Withheld

The Second Amendment states that the “right of the people to keep and bear Arms, *shall not be infringed.*” U.S. Const. amend. II. (emphasis added). It protects more than the abstract right to hold a license; the Second Amendment protects the ability to possess arms, and a government that “manufactures” delay in acquisition burdens the right itself. *Bruen*, 597 U.S. 1, 17–19, 24–26; *Ortega at* 1143–45 (10th Cir. 2025) (acquiring firearms is a necessary predicate to keeping and bearing them and that government-imposed delay burdens the right).

Here, the constitutional injury is not limited to the absence of an initial determination. As Plaintiffs Cairney and Bianciello demonstrate, years can pass in this post-license stage of the gun purchase process. FAC ¶¶ 33–41. Now we have an appeal process too with no limits, and Now, Plaintiffs face an appeal process with no limits and no deadlines. Defendants actually admit delay in the licensing process and admit they lack manpower, so there is no reason to believe the delays will cease. DE 15-2/27/26 Berkovich Dec. Hence, the complaint alleges that

Plaintiffs “reasonably fear that these post-license procedures will be delayed as well.” FAC ¶ 44. The Complaint alleges Plaintiffs “reasonably fear that these post-license procedures will be delayed as well.” FAC ¶ 44. Plaintiffs are now at that precise stage that defendants admit they lack resources to handle-which as shown in the opening memorandum and herein below, that is no excuse to infringing on Constitutional rights. Indeed, as earlier shown, Defendants have extraordinary financial resources of 6.14 Billion Dollars and millions more from the licensing application fees alone-just a fraction of those billions can be dedicated to hiring more employees to handle the licensing regime delays.

The originalists of the second amendment had no intent to withhold the right to bear arms by further steps of processing the actual gun purchased or appeals by an indefinite period to complete those processes that prevent possession. As the Tenth Circuit explains:

“Common sense dictates that the right to bear arms requires a right to acquire arms, just as the right to free press necessarily includes the right to acquire a printing press, or the right to freely practice religion necessarily rests on a right to acquire a sacred text. Legal interpretation follows that common sense.

When “a text authorizes a certain act, it implicitly authorizes whatever is a necessary predicate of that act.” Antonin Scalia & Bryan A. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 96, 192–94 (2012) (explaining Predicate-act canon); *see also Luis v. United States*, 578 U.S. 5, 26, 136 S.Ct. 1083, 194 L.Ed.2d 256 (2016) (Thomas, J., concurring) (“Constitutional rights ... implicitly protect those closely related acts necessary to their exercise.”). The Constitution has carried such a construction throughout our nation's history. *See* Scalia & Garner, *READING LAW*, 192 (“[W]here a general power is conferred or duty enjoined, every particular power necessary for the exercise of the one or the performance of the other, is also conferred.” (quoting Thomas M. Cooley, *LEGISLATIVE POWER ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 63 (1868))); *THE FEDERALIST* No. 44, at 285 (James Madison) (Clinton Rossiter ed., 1961) (“No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it, is included.”).

Ortega 148 F.4th at 1143.

The Ninth Circuit likewise recognized that the ability to acquire firearms through purchase without meaningful constraints is protected by the Second Amendment. *Nguyen v. Bonta*, 140 F.4th 1237, 1240 (9th Cir. 2025). In *McRorey v. Garland*, 99 F. 4th 831 (5th Cir. 2024), the Fifth Circuit observed that the right to “keep and bear” can “implicate the right to purchase” and cautioned against “shoehorning restrictions on purchase into functional prohibitions” against firearms possession. A continuous processing delay in the gun purchase stage becomes exactly such a functional prohibition to the Second Amendment.

As the District Court in *Beckwith v. Frey* explained:

“If a citizen cannot take possession of a firearm then his or her right to possess a firearm or to carry it away is indeed curtailed, even if, as [the State] claims, the curtailment is modest. However, the threshold inquiry is whether the Second Amendment covers the conduct curtailed by the Act, not a qualitative assessment of how modest the imposition on the right happens to be.... That is indiscriminate dispossession, plain and simple.”

Beckwith v. Frey, 766 F. Supp. 3d 123 (D. Me. 2025)

The reasoning applies with equal force here. Approval does not end the NYPD’s process. Approved applicants must next purchase a firearm and submit photographs and documentation under 38 RCNY § 5-25(d) before possession is authorized. That rule contains no defined deadline. Additionally, denied applicants are placed into an appeal process under 38 RCNY § 5-07(f) with no adjudicatory timeline. During these indefinite stages, possession remains prohibited. The practical effect is an ongoing, state-imposed waiting period of indefinite duration - an indiscriminate dispossession embedded in the City’s licensing regime.

Plaintiffs stand where they began: unable to possess firearms while trapped in deadline-free administrative loops. Because possession remains withheld through undefined administrative stages, Plaintiffs’ request for preliminary relief of this important constitutional right is not moot.

C. Defendants Have Not Carried Their Heavy Burden to Establish Mootness, While Plaintiffs Injury Continues

The FAC and TRO challenge the entire licensing regime - pre-approval, post-approval, and appeal - that delays possession. FAC ¶¶ 10–12, 15, 18, 20, 23. Plaintiffs’ preliminary injunction memorandum made clear that the challenge is “applied to Defendant’s administration of the licensing process” and that delay in that process denies possession. DE 8-7 at 1, 3, 5–6.

Issuing paper determinations did not solve the constitutional problem.

When a defendant claims mootness based on its own mid-litigation conduct, voluntary cessation governs. Defendants bear a “heavy” burden to show it is “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189–90 (2000).

Defendants do not even attempt to meet that burden. They have not:

- Imposed deadlines on post-approval processing;
- Imposed deadlines on appeals;
- Modified RCNY § 5-25(d) or § 5-07(f);
- Disclaimed future delay.

Instead, they assert that adjudication alone moots the relief. It does not.

Plaintiffs still cannot exercise their rights to possession, now a year after their original application. Plaintiff Torres remains in post-approval processing under 38 RCNY § 5-25(d), which has no deadline. Plaintiffs DiSalvo and Gottlieb are in an appeal process with no adjudicatory time limit. This is not a separate controversy. It is the continuing operation of the same licensing regime, and it is precisely the kind of ongoing injury for which prospective equitable relief remains available under § 1983.

A case becomes moot “only when it is impossible for a court to grant any effectual relief whatever” to Plaintiffs. *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161 (2016). This Court’s

inherent equitable authority includes molding the relief “to meet the exigencies of the particular case.” *Trump*, supra 582 U.S. 571; *Brinkman*, supra 433 U.S. 406. DE 8-7 Memo pp 5-6. The Second Circuit in *Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 496 (2d Cir. 2009) reiterates that “federal courts have leeway to fashion appropriate relief,” and district courts have “broad discretion to frame equitable remedies for [constitutional violations] so long as the relief granted is commensurate with the scope of the constitutional infraction.”

Effectual relief is plainly available. The Court may impose defined deadlines on post-approval and appeal stages. A seven-day deadline is equitable where Plaintiffs waited a year despite a statutory six-month mandate and now face additional deadline-free loops. Plaintiff Cairney’s two-year post-approval delay demonstrates recurrence (FAC ¶¶ 33–34) and Defendants’ own declaration by Ms. Berkovich admits delay. DE 15.

D. The Controversy is Not Moot Because Defendants Cannot Avoid Review by Issuing Last-Minute Determinations While Leaving the Deadline-Free Regime Intact

Defendants contend that this case became moot once they issued determinations on Plaintiffs’ applications. That argument fails under settled Second Circuit law.

A defendant cannot automatically moot a case simply by ending its allegedly unlawful conduct once sued.” *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). The Second Circuit has emphasized that the voluntary-cessation doctrine is rooted in the principle that a party should not be able “to evade judicial review ... by temporarily altering questionable behavior.” *Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 603–04 (2d Cir. 2016) (quoting *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001)). The doctrine exists precisely to prevent a government actor from terminating challenged conduct at the moment litigation ripens while preserving the underlying unlawful practice only to be repeated again. That is precisely what occurred here.

Plaintiffs waited years without determinations despite a statutory six-month mandate under Penal Law § 400.00(4-b). Only after the TRO motion and expedited scheduling order did Defendants issue determinations - within twenty-four hours. That timing demonstrates the ability to terminate delay at will once judicial scrutiny becomes imminent.

Voluntary cessation does not moot a case unless Defendants meet a “formidable burden” of showing both (1) there is no reasonable expectation that the alleged violation will recur, and (2) interim relief has completely and irrevocably eradicated the effects of the alleged violation. *Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 603–04 (2d Cir. 2016); *Granite State Outdoor Advert., Inc. v. Town of Orange*, 303 F.3d 450, 451 (2d Cir. 2002); see also *Lamar Advert. of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365, 377–78 (2d Cir. 2004).

Defendants cannot satisfy either prong, nor did they even attempt to.

First, the challenged feature of the regime delaying possession still exists by the absence of defined deadlines in post-approval firearm registration under 38 RCNY § 5-25(d) and in administrative appeals under 38 RCNY § 5-07(f). Plaintiffs Cairney and Biancianiello have already experienced extended post-approval delay. The structure that permitted that delay has not changed. Where “the same policy remains in place,” recurrence is reasonably expected. *Mhany*, 819 F.3d at 604. Nor does Defendants’ declaration by Ms. Berkovich help as it only makes a bald statement that some sort of change occurred without any proof of that change. Nevertheless, the proof is in the RCNY rules showing no deadline to the next process of the regime Plaintiffs face. All of this prolongs possession of a firearm without any finite time.

Second, the effects of the violation have not been eradicated. The constitutional injury alleged is not merely the absence of a decision letter. It is the prolonged suspension of the right to possess and carry firearms. Even after adjudication, approved Plaintiffs must submit purchase

documentation and photographs before lawful possession is authorized, and the Rules impose no defined time limit for that review. Denied Plaintiffs also are relegated to an appeal process with no adjudicatory deadline. The deprivation therefore continues.

This case also falls squarely within the “capable of repetition yet evading review” exception. The Second Circuit applies that exception where (1) the challenged action is in duration too short to be fully litigated prior to cessation, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again. *Van Wie v. Pataki*, 267 F.3d 109, 113 (2d Cir. 2001). The relevant duration here is not the year-long delay Plaintiffs endured. It is the brief interval between the filing of the TRO motion and Defendants’ abrupt issuance of determinations. When a defendant can terminate challenged conduct immediately upon being sued, thereby preventing adjudication, the action evades review. *Already, LLC v. Nike*, supra. To hold otherwise would create a perverse incentive: the License Division could delay indefinitely, then “moot” any challenge by issuing a last-minute determination once a TRO is filed, while preserving the very absence of deadlines that produced the injury. Accordingly, Defendants’ mootness argument fails.

Defendants’ immigration-delay decisions, such as *Chen* and *Shaibi*, do not control this case because Plaintiffs’ relief is not limited to a one-time adjudication of a single application; Plaintiffs remain subject to post-approval and post-denial processes without binding timelines, and the Court can still grant concrete, prospective relief addressing that ongoing constitutional burden.

Finally, Defendants’ attempt to reframe Plaintiffs’ live injury as “third-party standing” is a non sequitur. Plaintiffs do not need unidentified applicants to establish jurisdiction; the named Plaintiffs themselves remain unable to complete the acquisition and licensing process without

indefinite government delay, which is a continuing injury that keeps this controversy live and squarely within the Court's remedial authority.

E. Plaintiffs Are Entitled to a Temporary Restraining Order

As Plaintiff's opening memorandum explains, this is an irreparable issue at bar. When a constitutional right is violated, irreparable harm is presumed. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). It further explains that when a challenged regulation addresses the Second Amendment, that shifts the burden to Defendants to prove a distinctly similar historical analogue that their licensing regime delays are lawful. *Bruen*, 597 U.S. at 26. Although Defendants attempt to undermine review by issuing papers explaining what Plaintiff was accepted and denied, as shown above that fails to solve the problem of the delays that Defendants even prove are continuing by placing Plaintiffs in the next process of their regime that still withholds possession and is based on unlimited time when Defendants can indiscriminately decide when to review this next process.

Defendants complain they have administrative inconvenience, workload, or public safety balancing but none of that is part of the Bruen test. Interest balancing was expressly rejected. *Heller*, 554 U.S. at 634; *Bruen*, 597 U.S. at 26. Defendants' reliance on processing burdens does not satisfy the historical inquiry.

Defendants have not so much as mentioned *Bruen* in this equation because they cannot meet their burden. They have not identified any historical practice authorizing an indefinite post-approval delay in firearm possession. Because possession is a necessary predicate to keeping and bearing arms, and because the City's regime artificially withholds possession without a defined temporal limit, the constitutional injury remains ongoing.

III. CONCLUSION

The case is not moot. Plaintiffs' injury persists. Adjudication without possession does not terminate the constitutional deprivation. The loop remains open, and the burden on Plaintiffs' Second Amendment rights continues. Even if cessation were assumed, the voluntary cessation and capable-of-repetition exceptions apply. On the merits, Plaintiffs have demonstrated a likelihood of success under *Bruen*, irreparable harm under *Elrod*, and that the equities and public interest favor relief. The Court should deny any mootness argument and grant temporary restraining relief directing Defendants to complete all remaining licensing and appeal processes within a fixed seven-day deadline from receiving those applications as Plaintiffs still do not possess their firearms and Defendants licensing processes have no fixed deadlines.

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Respectfully submitted,

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