No. 18-280

IN THE

Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ROMOLO COLANTONE, EFRAIN ALVAREZ, AND JOSE ANTHONY IRIZARRY,

Petitioners,

v.

THE CITY OF NEW YORK AND THE NEW YORK CITY POLICE DEPARTMENT-LICENSE DIVISION,

Respondents.

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

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

New York law recognizes two main kinds of handgun licenses: the premises license, which authorizes a person to possess a handgun for self-defense at a home or business, and the carry license, which authorizes a person to possess and carry a loaded handgun outside the home. N.Y. Penal Law § 400.00(2). The City of New York administers this two-tiered licensing scheme for city residents and has issued regulations regarding transport of licensed handguns by city premises licensees. Until July 2019, neither state law nor the City's rules permitted city premises licensees to transport handguns through the City to take them to shooting ranges or second homes located outside the City. But as a result of changes in state law and the City's rules, such licensees may now do both.

The questions presented are:

1. Whether petitioners' challenge to the City's former rule prohibiting transport of a licensed handgun through the City to a home or shooting range outside the City by persons holding a premises license is moot, because the challenged transport restrictions are no longer in effect and are precluded by state law?

2. Whether the City's former rule was consistent with (a) the Second Amendment, (b) the Commerce Clause, and (c) the constitutional right to travel?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes and Rules

Other Authorities

INTRODUCTION

On July 22, 2019, respondents the City of New York and the New York City Police Department-License Division (collectively, the City) filed a Suggestion of Mootness. The City explained that recent amendments to state law and its own rules now allow petitioners to do exactly what they have requested in this lawsuit: transport their handguns within New York City to take them to shooting ranges and second homes outside the City. At the same time, the City asked this Court to extend the case's underlying briefing schedule. The City did this to give the Court the opportunity to resolve the mootness issue without a need for further litigation—or to instruct the City, now that it no longer has any legal stake in the constitutional issues the Court granted certiorari to address, what the Court expected of it going forward. Petitioners opposed any extension and insisted that the City still had an obligation "to defend the decision that [it] procured below." Letter from Paul D. Clement, dated July 24, 2019. The Court denied the requested extension without elaboration. *See* Order of July 26, 2019.

In an abundance of caution, we interpret the Court's refusal to extend the briefing schedule as calling for substantive briefing on the constitutionality of the City's former rule. In our view, this requires the City to do what Article III's case-or-controversy requirement is designed to avoid: engage in litigation regarding the constitutionality of a law that no longer exists and that the defendant has no desire (or even ability) to

reenact. Consequently, we renew below our argument that this litigation is moot. But we also recognize that the Court may simply desire full briefing to ensure it has a full array of options. We therefore also offer a defense of the City's former rule, in the spirit of something a Court-appointed *amicus curiae* might do. But to avoid any possibility of confusion, we stress that the City's true position is that it has no view at all regarding the constitutional questions presented; as far as the City is concerned, petitioners are entirely free to engage in all of the conduct they have requested in this lawsuit.

STATEMENT OF THE CASE

1. Since the Founding Era, New York City has been the Nation's largest urban center and a primary locus of trade and travel.[1] Today, its 8.5 million residents make it far and away the most populous U.S. city.[2] Its 27,000 residents per square mile—almost sixty percent more than the next densest (San Francisco)—also rank it as the Nation's most densely populated major city.[3] Its

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[1] *See* U.S. Bureau of the Census, Table 2: Population of the 24 Urban Places: 1790 (June 15, 1998), *available at* https://perma.cc/WD8Y-RBLU; *see also* Eric Jaffe, Watch 210 Years of Manhattan Densification in 2 Minutes, Citylab (June 3, 2015), *available at* https://perma.cc/9KC2-35EN.

[2] N.Y.C. Dep't of City Planning, Population Facts, *available at* https://perma.cc/YSQ8-XDSB.

[3] Governing, Population Density for U.S. Cities Statistics, *available at* https://perma.cc/5KLW-KNAH; U.S. Bureau of the Census, Population Division Working Paper No. 27, Population of the 100 Largest Cities and Other Urban Places

center, the island of Manhattan, packs around 1.6 million residents into 23 square miles—almost the same number of people who inhabit Idaho's 83,000 square miles—and sees its population nearly double with commuters each weekday.[4] The City also hosts 65 million tourists annually.[5]

These people move through the City's crowded streets and fill its public-transportation system, taking 1.7 billion subway rides each year.[6] They also travel to, near, and around a staggering concentration of sensitive places such as schools, daycare centers, government buildings, playgrounds, and places of worship.[7] Persons in public in New York City are likely to find themselves

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in the United States: 1790 to 1990, Table A (June 1998), *available at* https://perma.cc/BZP2-ZA7T.

[4] World Population Review, Manhattan Population 2019, *available at* https://perma.cc/5PFM-A9F3; Brian McKenzie*, et al.*, Commuter-Adjusted Population Estimates: ACS 2006-10 (Journey to Work and Migration Statistics Branch, U.S. Census Bureau) 5 (2013), *available at* https://perma.cc/EC3F-YXDG.

[5] NYC & Co., Annual Report 2018-2019, Letter from the Chairman and CEO 4, *available at* https://perma.cc/W87S-5X3C.

[6] Metro. Transp. Auth., Introduction to Subway Ridership, Subway Ridership at a Glance, *available at* https://perma.cc/LQ5M-MKK2.

[7] For an illustrative map, *see* N.Y.C. Dep't of City Planning, Capital Planning Platform, Facilities and Program Sites, https://capitalplanning.nyc.gov/map#9/40.7128/-74.0807 (last visited Aug. 4, 2019).

at all times in close proximity to any number of these places.

The City's unique conditions have long coincided with close regulation of deadly weapons in public, including firearms. Indeed, the "efforts in regulating the possession and use of firearms predate the Constitution." *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 84 (2d Cir. 2012). By 1763, the City had forbidden discharge of firearms "in any street, lane or alley, or within any orchard, garden or other inclosure, or in any place where persons frequent to walk." Respondents' Supplemental Appendix (S.A.) 6, New York City, New York (1763); *see also* S.A. 7, New York City, New York (1786) (prohibiting discharge of firearms in the city). And by 1784, the State had regulated the storage and transport of gunpowder. S.A. 34, New York (1784). In the following century, the State began licensing the public carry of firearms. *See*, *e.g.*, S.A. 44, New York (1881), S.A. 45, New York (1905).

2. The contemporary scheme for licensing handgun possession in New York City derives from a New York State statute, N.Y. Penal Law § 400.00. The statute recognizes two main types of handgun licenses. First, a "premises" license allows a "householder" to possess a handgun "in his dwelling," or a "merchant or storekeeper" to possess a handgun "in his place of business." *Id.* § 400.00(2)(a), (b). Second, a "carry" license permits the licensee to have and carry a concealed handgun in public. *Id.* § 400.00(2)(c)–(f). The statute also sets forth requirements for obtaining a license. *Id.* § 400.00(1), (2)(f).

New York law charges local officials with implementing the state licensing regime and, as relevant here, specifies that individuals must apply for a license in the locality where they "reside[]." *Id.* §§ 265.00(10), 400.00(3)(a). In New York City, the designated licensing official is the Commissioner of the New York City Police Department (NYPD). *Id.* § 265.00(10); N.Y.C. Admin. Code § 10-131(a)(1). State law distinguishes firearm licensing in New York City from licensing in other New York localities in numerous ways. *See* N.Y. Penal Law §§ 400.00(3) (application format), 400.00(6) (validity of licenses), 400.00(7) (license format), 400.00(14) (renewal periods and licensing fees).

The NYPD Commissioner has promulgated rules regulating the possession of handguns by licensees, including the former transport rule at issue here. *See* 38 Rules of the City of New York (R.C.N.Y.), ch. 5. The City's rules recite that a handgun possessed under a premises license must generally be kept at "the premises which address is specified on the license." 38 R.C.N.Y. § 5-23(a)(2).

To ensure that premises licensees could make proper and effective use of their licenses, the City supplemented the rights of licensees by authorizing them to transport their handguns (unloaded and secured in a locked container) for certain specified purposes. When this lawsuit began, for example, licensees could transport a handgun to a gunsmith with the NYPD's authorization. 38 R.C.N.Y. § 5-22(a)(16) (2001). Further, licensees could transport a handgun directly to and from any shooting range or shooting club authorized by the NYPD for

purposes of achieving proficiency with their firearms. *Id.* § 5-23(a)(3).[8] The NYPD authorized eight civilian shooting ranges located within city limits, seven of which were open to anyone holding a valid handgun license. J.A. 92–94. Several of the ranges hosted frequent shooting competitions. J.A. 94, 144–88; *see also* J.A. 27 (alleging that New York State Rifle & Pistol Association members "participate in numerous rifle and pistol matches within and without the City of New York on an annual basis").

Though it is no longer true, at the time of this lawsuit's filing, the City's rules did not allow premises-license holders to transport their licensed handguns through the City for the purpose of taking them to shooting ranges or shooting competitions *outside* of city limits. Nor did the rules make any provision for transport to a second home.

3. Petitioners—three individuals with New York City premises licenses and the New York State Rifle & Pistol Association—sued the City of New York and the NYPD License Division in the U.S. District Court for the Southern District of New York to challenge two aspects of the City's transport rules for premises licenses. J.A. 26–48. First, the individual petitioners alleged that the transport

[8] With appropriate recreational licenses from the State and an amendment to their premises license from the NYPD, licensees may also transport a handgun to a state-government-recognized hunting area anywhere in the State. 38 R.C.N.Y § 5-23(a)(4). No such hunting areas are located in New York City. N.Y. Penal Law § 265.35(1).

rules prevented them from taking their handguns to shooting ranges and competitions outside the City. J.A. 32–33. Second, one petitioner also asserted that the transport rules prevented him from taking his handgun to a second home that he owns in upstate New York. J.A. 32. No petitioner alleged that he had applied for, but been wrongfully denied, a carry license. Pls.' Reply Mem. in Further Support of Prelim. Inj. 6, S.D.N.Y. ECF No. 20.

Petitioners claimed violations of the Second Amendment, the dormant Commerce Clause, the right to interstate travel, and the First Amendment. They also claimed that the NYPD's rules violated the Firearm Owners Protection Act, 18 U.S.C. § 926A; J.A. 39–41, though they later abandoned this claim on appeal. Petitioners requested declaratory and injunctive relief, but not any form of damages. J.A. 48.[9]

[9] Specifically, they sought to enjoin the City from enforcing its prohibition against transporting their licensed handguns beyond city limits to a shooting range, shooting competition, or second home. J.A. 48; *see also* Notice of Cross Mot. for Summ. J. 1, S.D.N.Y. ECF No. 43 (seeking order allowing them "to attend a shooting range or competition or to travel to a second home"); Pls.' Reply Mem. in Further Support of their Cross Mot. for Summ. J. and Prelim. Inj. 1, S.D.N.Y. ECF No. 53 (arguing that City's rule was unconstitutional in "its application to an individual who has a second home outside of New York City and its application to an individual who would like to travel to a shooting range or shooting competition outside of New York City").

The district court granted summary judgment against petitioners on all of their claims. Pet. App. 42–76.

4. The Second Circuit affirmed. Pet. App. 1–39. As relevant here, the court of appeals concluded that the rule did not violate petitioners' Second Amendment rights because it left open "adequate alternative" means to have a handgun for self-defense in a second home, *id.* at 14 (internal quotation marks omitted), and allowed access to "ample facilities" for training "within reasonable commuting distance" of a licensee's home, *id.* at 23. The court of appeals further held that both restrictions satisfied intermediate scrutiny. *Id.* at 24, 29. Finally, the court of appeals also rejected petitioners' challenges under the dormant Commerce Clause and constitutional right to interstate travel. *Id.* at 30–34.

5. Petitioners then sought certiorari, asking this Court to decide "[w]hether the City's ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the Commerce Clause, and the constitutional right to travel." Pet. for Cert. i. The Court granted the petition. 139 S. Ct. 939 (2019).

6. Following the grant of certiorari, the City and State both amended their laws governing the transport of handguns by premises licensees. After a statutory notice-and-comment period, the NYPD adopted an amended rule, effective July 21, 2019, allowing a premises licensee to transport a handgun

through the City directly to and from (1) another residence or place of business of the licensee where the licensee is authorized to have and possess a handgun, whether located within or outside New York City; and (2) a lawful small-arms range or shooting club, or a lawful shooting competition, whether located within or outside New York City. 38 R.C.N.Y. § 5-23(a)(3).[10]

Separate from the NYPD's amendments to its transport rules, on July 16, 2019, the Governor of New York signed a bill amending New York Penal Law § 400.00(6), effective immediately, to allow premises licensees throughout the state to transport their handguns. As specifically relevant here, the new law permits premises licensees to transport their pistol or revolver from one location where they may legally possess such weapon, directly to "any other location where [they are] lawfully authorized to have and possess" such weapon, and specifically references other dwellings or places of business, shooting ranges, and shooting competitions. N.Y. Penal Law § 400.00(6). This law overrides any inconsistent state or local law. *See id.*

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[10] The NYPD also codified various pre-existing practices to provide clarity for licensees, expressly authorizing transport from the place of purchase, 38 R.C.N.Y. § 5-23(a)(6); transport to the licensee's local precinct or the NYPD License Division, *id.* § 5-23(a)(5); and transport to a firearms dealer, with written permission, *id.* § 5-22(a)(16). The NYPD further clarified that the authorization for transport to another residence or place of business covers moves to a new premises. *See* Respondents' Suggestions of Mootness App. 6a.

SUMMARY OF ARGUMENT

As further explained in the City's Suggestion of Mootness, changes in state and city law have rendered this case moot. Petitioners have challenged the City's former rule to the extent that it prevented them from taking their handguns to shooting ranges and second homes. State and city law now allow them to do both. The Court should accordingly vacate the decision below and remand with instructions to dismiss—or at least with instructions to apply Article III principles in the first instance to the current situation.

If this Court nevertheless addresses the constitutionality of the City's former rule, it should hold that the rule did not offend the Second Amendment, the dormant Commerce Clause, or the constitutional right to travel.

The City's former rule did not violate the Second Amendment. Under the two-step framework prevailing in the courts of appeals, this Court should first consider text, history, and tradition to determine whether—or to what extent—the challenged restriction infringes conduct within the scope of the right. Such an analysis demonstrates that the former rule did not meaningfully infringe petitioners' rights. The location and manner of training have always been extensively regulated. And petitioners have not shown that the former rule's transport restrictions were inconsistent with that historical tradition or that the opportunities for training expressly afforded by the former rule were inadequate for them to maintain proficiency with

their handguns. Nor has petitioner Colantone shown that the former rule infringed his right to possess a handgun for self-defense in the home by effectively requiring him to keep a separate handgun in his second home outside the City.

If the former rule did burden conduct protected by the Second Amendment, it satisfied means-ends scrutiny. The rule did not substantially burden petitioners' Second Amendment rights, and it advanced the implementation and enforcement of the State's handgun-licensing regime as it existed at the time.

Petitioners' challenge to the City's former rule under the dormant Commerce Clause also lacks merit. To begin, petitioners' challenge is foreclosed by the Firearm Owners Protection Act of 1986 (FOPA). In FOPA's "safe-passage" provision, Congress expressly conditioned the federal right to interstate transportation with firearms on whether the states of origin and destination authorized the person to "lawfully possess and carry" a firearm there. The former rule did not grant such authorization to city residents who held premises licenses. Congress's express deference to such exercises of local police power eliminates any challenge to the former rule under the dormant Commerce Clause.

FOPA aside, the claim still fails. Petitioners' assertion that the former rule discriminated against out-of-state shooting ranges wrongly isolates one provision from the overall handgun–licensing regime established by state and local law. The

regime as a whole did not work to the benefit of in-city ranges at the expense of those out of state. Nor did the City's former rule impermissibly control transactions occurring outside of New York, because it did not regulate conduct at out-of-state ranges or impose sanctions for conduct that took place out of state.

Petitioners' right-to-travel claim likewise falls flat. The City's former rule did not prevent anyone from, or penalize anyone for, leaving the State.

ARGUMENT

As a result of changes in state and city law following this Court's grant of certiorari, New York City premises licensees are no longer prohibited from transporting licensed handguns through the City on the way to shooting ranges and second homes outside the City. For the reasons discussed below and elaborated in the City's Suggestion of Mootness, therefore, the City no longer has any stake in the constitutional questions regarding the former rule that the Court granted certiorari to address. But because the Court has not acted on the City's Suggestion of Mootness and has directed it to file a brief on the merits, the City also provides an argument that its former rule was valid under each of the constitutional provisions at issue here. Petitioners should not misunderstand anything in this brief as indicating any desire to revert to the former regulatory scheme. The City has no desire to do so, and state law now prohibits it anyway.

I. THIS CASE IS MOOT

The new state law, as well as the City's amendments to its rule, independently and together render this case moot. This Court should vacate the decision below and remand with instructions to dismiss—or at least with instructions directing the lower courts to apply Article III principles in the first instance to the current circumstances. *See, e.g.*, *United States v. Chesapeake & Potomac Tel. Co.*, 516 U.S. 415, 416 (1996) (per curiam).

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation," embedded in Article III, "of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (internal quotation marks omitted). "Throughout the litigation, the party seeking relief must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *United States v. Juvenile Male*, 564 U.S. 932, 936 (2011) (per curiam) (internal quotation marks omitted). Thus, when an intervening change in law entitles plaintiffs to everything they seek, the Court has long recognized that the litigation is rendered moot. *See, e.g.*, *U.S. Dep't of Treasury v. Galioto*, 477 U.S. 556, 559–60 (1986) (holding claim moot in light of new legislation); *Hall v. Beals*, 396 U.S. 45, 48, 50 (1969) (per curiam) (same); *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920) (same).

There is no longer an Article III case or controversy here because the new state law and city

rule give petitioners everything they have sought in this lawsuit. Petitioners seek declaratory and injunctive relief against the City's former rule, invoking several constitutional provisions to assert that a premises license must afford them the "modest ability" to transport their handguns through the City to two particular categories of places that, until recently, it did not: shooting ranges and second homes beyond the City's borders. Cert. Reply 1; *see also* J.A. 32–37; Pet. for Cert. i (question presented).[11]

The new state legislation unequivocally allows plaintiffs to do everything they ask for. That legislation amended the section of the New York Penal Law regulating handgun licenses. The amendment allows holders of premises licenses to transport their pistol or revolver directly to or from any other location where they may legally possess it, and specifically refers to shooting ranges, shooting competitions, and other dwellings or places of business where they are authorized to have the firearm. N.Y. Penal Law § 400.00(6). These new amendments operate notwithstanding any inconsistent state or local law. *Id.* They accordingly moot the case all on their own.

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[11] In their complaint, petitioners also alleged that the City's former rule was unconstitutional because it prohibited premises licensees from transporting their firearms to shooting competitions outside the City. But petitioners have stopped breaking out this challenge on appeal, *see* Petrs. Br. 1; Pet. for Cert. i; Pet. for Rehearing En Banc 1, 2d Cir. ECF No. 124, likely because the shooting competitions they have in mind are held at shooting ranges, *see* J.A. 34.

The City's new rule only confirms this case is moot. Just like the new state law, it allows people with premises licenses to transport their handguns, without geographic limitation, to shooting ranges, shooting competitions, or "[a]nother residence, or place of business, of the licensee, where the licensee is authorized to possess [his or her] handgun." 38 R.C.N.Y. § 5-23(a)(3)(i). Petitioners therefore have no ongoing injury, and the City has no ongoing interest in the constitutionality of prohibiting people licensed to possess handguns in their homes from taking their guns to second homes, shooting ranges, or shooting competitions outside city limits.

It does not matter under the applicable Article III principles whether this Court's grant of review contributed to the government's decision to take a fresh look at its legal regime. *See, e.g.*, *Fusari v. Steinberg*, 419 U.S. 379, 385 & n.9 (1979) (remanding case without reaching merits where "this Court's notation of jurisdiction" may have contributed to state legislature's decision to amend the law at issue). Nor does it matter whether the plaintiffs would like to keep litigating to obtain guidance from this Court regarding the meaning of one or more constitutional provisions. "However convenient" or tempting it might be, the Court lacks the power to declare "principles or rules of law which cannot affect the result" of the lawsuit before it. *Alaska S.S. Co.*, 253 U.S. at 116.

The operative principles are absolute: Article III jurisdiction must exist at all stages of appellate review, and "a dispute solely about the meaning of a law, abstracted from any concrete actual or

threatened harm, falls outside the scope of the constitutional words 'Cases' and 'Controversies.'" *Alvarez v. Smith*, 558 U.S. 87, 92–93 (2009). Put another way, "the federal courts exist to resolve real disputes, not to rule on a plaintiff's entitlement to relief" simply because it "won't take 'yes' for an answer." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 678, 683 (2016) (Roberts, C.J., dissenting). Accordingly, this Court should vacate the decision below and remand with instructions to dismiss—or at least with instructions directing the lower courts to apply Article III principles in the first instance to the current circumstances. *See Chesapeake & Potomac Tel. Co.*, 516 U.S. at 416; *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 22–23 (1994); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39–40 (1950).

II. THE CITY'S FORMER RULE DID NOT VIOLATE THE SECOND AMENDMENT

If the Court nevertheless reaches the merits of the question presented, it should reach the same conclusion the Second Circuit did. Like most states, New York regulates the possession of handguns for self-defense in the home separately from the possession of handguns for self-defense in public. *See* N.Y. Penal Law § 400.00(2).[12] Petitioners hold premises licenses that allow them to possess handguns in their New York City homes. They

[12] NRA-ILA, Right to Carry Laws, *available at* https://perma.cc/A4FD-JMNT; Giffords Law Ctr., Concealed Carry, *available at* https://perma.cc/T4EA-A77A; Giffords Law Ctr., Open Carry, *available at* https://perma.cc/R7X4-J3G3.

argue that the City's former rule restricting transport of their handguns through the City to shooting ranges or second homes outside the City violated their Second Amendment right to keep and bear arms in the home by impairing their ability to train with firearms and to protect themselves in second homes. J.A. 32–37, 51, 53, 56, 59; Pet. for Cert. 12–13; Petrs. Br. 22, 24–25.

As every circuit to decide the issue has concluded, a Second Amendment challenge should be evaluated under a two-part analysis. *See* Br. of Second Amend. Law Professors as *Amici Curiae* in Support of Neither Party (Law Professors' Br.) 4–12, 23–27. At the first step, this analysis looks to text, history, and tradition to determine the degree of infringement, if any, of conduct within the scope of the Second Amendment. At the second step, it considers the government's proffered justification, requiring a stronger interest and a closer fit from laws that more substantially burden protected conduct.

The former rule passed constitutional muster at each independent step. Text, history, and tradition show that the former rule did not impinge on conduct within the scope of the Second Amendment. But the rule also satisfied means-ends scrutiny because the burden on the right was not substantial, and the rule served the City's interests in maintaining the integrity of the State's handgun-licensing scheme as it existed at the time.

A. The former rule did not interfere with petitioners' Second Amendment rights.

1. Petitioners concede it is their initial burden to show that the former rule "interfere[d] with" rights protected by the Second Amendment. Petrs. Br. 43. But they have not carried that burden as to the former rule's restriction on transporting a handgun to a shooting range outside the City. Text, history, and tradition show that it is not significant to the Second Amendment where firearm training occurs, so long as the location readily allows gun owners sufficient opportunities to train. The former rule satisfied that standard: it made express provision for training, and petitioners have not come forward with any basis to conclude that they were unable to train sufficiently or effectively.

a. Petitioners assert that the former rule burdened a freestanding right to engage, without geographical limitation, in firearm training. Petrs. Br. 27–28; *see also* U.S. Br. 18 (asserting that the Second Amendment guarantees the right to train where one "wish[es]"). But it is common sense that any right to train cannot be absolute. *Cf. District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (Second Amendment does not protect a right "to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose"). Surely, for example, gun owners are not entitled to set up their own shooting ranges in Central Park or Times Square. And indeed, text, history, and tradition—the very considerations petitioners advance as the pillars of Second Amendment analysis—all confirm

that the ability to train may be subject to reasonable regulation as to location.

Take the text first. The Second Amendment protects the right to "keep and bear arms." In *Heller*, this Court explained that the right to "keep arms" is the right to "have weapons," and the right to "bear arms" is the right to "carry[] arms for a particular purpose—confrontation." 554 U.S. at 583–84. Neither phrase describes a right to engage in training.

To be sure, the right to "keep and bear arms" may, as petitioners suggest, imply the right to learn how to handle arms. *See* Petrs. Br. 24. But it does not follow that the Second Amendment therefore protects a standalone right to train where one wishes. Instead, training plays a supportive role with respect to express Second Amendment rights by enabling gun owners to use firearms effectively. *See Luis v. United States*, 136 S. Ct. 1083, 1097 (2016) (Thomas, J., concurring) (right to keep and bear arms implies a right "to acquire and maintain proficiency in their use" (internal quotation marks omitted)). Limitations on the location or manner of training therefore burden Second Amendment rights to the extent they meaningfully impair the ability to train.

Petitioners' and *amici*'s reliance on the Second Amendment's Militia Clause only confirms the point. Petrs. Br. 22; U.S. Br. 17–18. The value that clause expressly protects is a "well regulated militia" itself. Training is a means of accomplishing that objective.

The historical scope of militia training underscores that there was no traditional right to train anywhere one wished—let alone in another state. The training outlined by federal and state militia laws was limited: it typically occurred only several times a year at local muster grounds and was tightly controlled.[13] For example, members of the militia were often precluded from bringing loaded firearms to militia training and from discharging their weapons unless instructed to do so.[14]

More broadly, history and tradition confirm that training may properly be subject to extensive regulation. For centuries, governments have closely prescribed the location and manner of training in response to local conditions and public-safety concerns. In sixteenth-century England, for example, Parliament responded to a spate of violent crime by restricting residents of cities, boroughs, and market towns to discharging firearms only in defense of their homes or at specific locations designated for target practice. *See* S.A. 1–2, 4, England (1541) (requiring residents to shoot only "at a butt or bank of earth" and "only in place convenient for the same").

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[13] *See, e.g.*, S.A. 27, New Jersey (1778); S.A. 27–28, New York (1786); S.A. 28–29, North Carolina (1786); S.A. 29, South Carolina (1791); S.A. 30, New Hampshire (1792); S.A. 30, Connecticut (1792); S.A. 31, Massachusetts (1793); S.A. 31–32, Rhode Island (1794).

[14] *See, e.g.*, S.A. 31, Massachusetts (1793); S.A. 32, Maine (1840); S.A. 33, Massachusetts (1866).

From the colonial period onward, localities and states exercised the same authority. Some localities, like eighteenth-century Boston and New York City, limited target practice to specific locations for public-safety reasons. *See* S.A. 5, Boston, Massachusetts (1746) (limiting target practice to the lower end of the common and "the several batteries," with permission, to eliminate the danger and alarm caused by stray bullets); S.A. 6, New York City, New York (1763) (prohibiting target practice in the streets or in any garden or enclosure in the City to reduce the risks of fire). Others, like antebellum Tennessee and Ohio, precluded training within any town or in other area where it might endanger public safety. *See* S.A. 10, Tennessee (1821) (prohibiting target practice "within the bounds of any town, or within two-hundred yards of any public road of the first or second class"); S.A. 10, Ohio (1831) (prohibiting target practice in "any recorded town plat").[15]

Localities and states also exercised strict licensing authority over training. Eighteenth-century Newburyport, Massachusetts, for example, entirely prohibited target practice, except "as from time to time shall be approved of the licensed by the town, or the select-men thereof." S.A. 14,

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[15] *See also* S.A. 7–9, Ohio (1790) (prohibiting target practice within "one quarter of a mile from the nearest building of any such city, town, village or station"); S.A. 18–19, Denver, Colorado (1875) (precluding competitive target practice in the city); S.A. 11, Columbus, Ohio (1879) (prohibiting target practice in town).

Newburyport, Massachusetts (1785).[16] Dozens more localities required persons seeking to discharge firearms for any purpose, including for training, to obtain a license or written permission from local officials.[17] And yet other localities provided for the licensing and construction of shooting galleries, and then restricted target practice to those galleries.[18] There is thus overwhelming historical evidence that there has never been a right to train wherever one wishes, and that governments have instead had

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[16] *See also* S.A. 19–20, Salem, North Carolina (1896) (prohibiting target practice, absent written consent by the mayor); S.A. 20–21, Prince George's County, Maryland (1904) (requiring any individual or group intending to engage in target practice to obtain the written consent of all local residents, and of the relevant county).

[17] *E.g.*, S.A. 13, Philadelphia, Pennsylvania (1750) ("Governor's special license"); S.A. 14–15, Portsmouth, New Hampshire (1823) (police); S.A. 15, Quincy, Illinois (1841) (mayor, marshal, or aldermen); S.A. 15–16, New Haven, Connecticut (1845) (mayor); S.A. 16, Detroit, Michigan (1848) (city council); S.A. 17, Chicago, Illinois (1855) (mayor or common council); S.A. 17, St. Joseph, Missouri (1869) (mayor or city council); S.A. 18, New Orleans, Louisiana (1870) (common council); S.A. 19, Montgomery, Alabama (1879) (mayor).

[18] S.A. 22, Schenectady, New York (1863) (prohibiting target practice "except in a shooting gallery, within the lamp district of this city"); S.A. 22–23, Memphis, Tennessee (1863) (exempting only licensed shooting galleries from restrictions on discharge of firearms); S.A. 24–25, Fort Worth, Texas (1880) (prohibiting discharge of any firearm, except in a licensed shooting gallery); S.A. 25, Ogden, Utah (1881) (prohibiting all discharge of firearms except at a "lawful breastwork"); S.A. 26, Indianapolis, Indiana (1895) (prohibiting unlicensed shooting galleries).

extensive authority to regulate the location and manner of training.

What is more, some laws, much like the City's former rule, required that training occur close to home. In the nineteenth century, several localities restricted target practice to one's own premises, absent permission to train elsewhere in the municipality. S.A. 12, Northfield, Vermont (1894); *see also* S.A. 11, Indianapolis, Indiana (1869); S.A. 12, Council Bluffs, Iowa (1880). And militia training—which petitioners repeatedly point to in support of a right to train without geographical limitation—occurred at local muster grounds, not at muster grounds far from home or in another state.[19]

Nothing in petitioners' brief supports a contrary conclusion. The only Founding-era sources petitioners cite addressed training in the context of the militia, not as an unfettered right to train. Petrs. Br. 21 (citing the Second Militia Act of 1792, 1 Stat. 271 (1792)); *id.* at 25 (citing the Virginia Declaration of Rights § 13 (1776)). And petitioners include no eighteenth-century sources, let alone any materials from the debates surrounding the Bill of Rights, supporting the conclusion that there is a right to train anywhere one wishes.

The historical sources cited by petitioners and *amici* instead show the opposite. Petitioners rely on

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[19] *E.g.*, S.A. 27–28, New York (1786) (providing for parades "at some convenient place as nearly central as may be" within the regimental district); S.A. 29, South Carolina (1791) (providing for militia training "within their respective regimental districts").

the post-Civil War commentaries cited in *Heller*, but those treatises state that "learning to handle" arms "for their efficient use" is a necessary incident of a well-regulated militia, not that the Second Amendment protects training as an end in itself. Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America 271 (1880); *see also* J. Pomeroy, An Introduction to the Constitutional Law of the United States § 239, at 152–153 (1868) ("But a militia would be useless unless the citizens were enabled to exercise themselves in the use of warlike weapons."). And the post-Civil War judicial opinions on the issue cited by the Solicitor General stand for the same proposition. U.S. Br. 17 n.1. These cases define training in functional terms, as a "necessary incident[]" of the need to ensure "the efficiency of the citizen as a soldier." *Andrews v. State*, 50 Tenn. 165, 179–80 (1871). At the same time, they emphasize that states and localities may properly regulate the keeping and bearing of arms, so long as the regulations do not "materially interfere" with the exercise of protected rights. *Haile v. State*, 38 Ark. 564, 567 (1882).[20]

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[20] *Compare Andrews*, 50 Tenn. at 187–88 (striking down law banning public and private carry of certain weapons, to the extent that it applied to weapons used by the militia), *with Haile*, 38 Ark. at 567 (upholding law restricting wearing or carrying a firearm outside the home to carrying a firearm "uncovered, and in the hand" because it did not prevent the defendant from, among other things, "render[ing] himself skillful"), *and Hill v. State*, 53 Ga. 472, 480 (1874) (upholding law banning public carry of firearms in certain locations and times because it did not "infringe that use of them which is

b. On this record, the former rule did not impinge upon constitutionally protected conduct. In *Heller*, the Court focused on the degree to which the District of Columbia's handgun ban burdened the right to self-defense in the home, ultimately striking down the law because few historical laws had "come close" to such a "severe restriction." 554 U.S. at 629; *see also id.* (reliance on long guns for self-defense would meaningfully burden the right to self-defense); *id.* at 632 (Court's analysis not meant to "suggest the invalidity" of historical laws imposing lesser burdens); Eugene Volokh, "Implementing the Right to Keep and Bear Arms for Self-Defense," 56 UCLA L. Rev. 1443, 1454–57 (2009) (arguing that *Heller*'s burden analysis accords with the Court's approach to other rights). Here, by contrast, the former rule did not meaningfully impair petitioners' ability to train. Instead, it made express provision for training in the most logical location—the City where petitioners live and are licensed—and petitioners did not produce a shred of evidence that their ability to train was impaired.

At summary judgment, the City demonstrated that petitioners had ample opportunity to maintain proficiency with their licensed handguns. At the time, there were at least seven ranges in the City open to anyone possessing a valid license, including one or more in each of the City's five boroughs. J.A. 92–94. And although petitioners claimed that there were no shooting competitions held in the City

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necessary to fit the owner of them for a ready and skillful use of them as a militiaman").

on a regular basis, *e.g.*, J.A. 51, at least several of the ranges—including a range operated by a club where one of the petitioners was president—in fact hosted frequent competitions, J.A. 94. The organizational petitioner, moreover, pleaded that its members "participate in numerous rifle and pistol matches within and without the City … on an annual basis." J.A. 27. And the former rule did not limit opportunities to rent handguns for use at shooting ranges and competitions, wherever located.

In opposition to summary judgment, petitioners did not argue, let alone offer any evidence, that the rule meaningfully impaired their ability to train. They did not contend that they had insufficient access to training within the City, or that they were training with insufficient frequency. They did not contend even that out-of-city ranges were more convenient. Instead, their declarations merely repeated boilerplate text to the effect that attending out-of-city events with their handguns would present a good opportunity to practice, J.A. 51–54, 56–58, 59–61—which is not the same as representing that they had insufficient in-city opportunities to maintain proficiency.

Nor does the single case petitioners cite that squarely addresses training under the Second Amendment support their position. Petrs. Br. 22. In *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011), the court of appeals enjoined a Chicago law that required range training as a prerequisite to lawful gun ownership, but banned *all* range training within Chicago. *Id.* at 689–90. The City's former rule did not come close to imposing such a severe burden.

On the contrary, it allowed licensees to train in the city where they lived.

Apparently recognizing the weakness of the record they created, petitioners repeatedly fall back on the assertion that seven ranges in the City obviously cannot satisfy the training demands of the 8.5 million people who live there. Petrs. Br. 1, 6, 45. But petitioners make no attempt to prove that the number of the ranges in the City is insufficient to satisfy licensees' demand for training, nor contend that the number "is anything more than the result of market forces." Pet. App. 20 n.11. And indeed, there are good reasons to doubt petitioners' unsupported contentions. The City's total population notwithstanding, there are about 40,000 active handgun licensees in the City, J.A. 82, and before the recent amendments, only those licensees could fire handguns at in-city ranges, *see* N.Y. Penal Law § 265.20(a)(3), (7-a) (generally restricting handgun possession at ranges to persons with valid handgun licenses); *id.* § 400.00(6) (denying out-of-city licenses validity within New York City absent a permit from NYPD). Petitioners have come forward with no proof—whether rooted in their own experiences or a more general analysis—that the training facilities available in the City are insufficient to accommodate all those who want to train.[21]

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[21] Petitioners' *amici* contend that it is important to train with one's own gun and that certain types of training are helpful in maintaining proficiency. *See, e.g.*, Br. of *Amici Curiae* Professors of Second Amendment Law, Second Amendment Foundation, *et al.*, 9–13. But *amici* ignore that the City's

In an analogous case, the en banc Ninth Circuit upheld a challenged ordinance at the first step of the inquiry based on a similar failure to show a burden on protected Second Amendment rights. *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 690 (9th Cir. 2017) (en banc). Although the court recognized that the right to purchase arms was a necessary incident of the right to keep and bear arms, it concluded that the plaintiffs had insufficiently pleaded that these rights were burdened by the denial of a zoning variance to a gun store. *See id.* at 678–81. Emphasizing that there were ten gun stores in the county, including one near the intended site of an eleventh gun store, the court reasoned that "gun buyers have no right to have a gun store in a particular location" if "their access [to firearms] is not meaningfully constrained." *Id.* at 680. The same analysis would apply to the former rule. There is no right to train in a specific location, and the record contains no evidence that the City's former rule constrained petitioners' ability to train effectively. At the first step of the two-step inquiry, that is sufficient.

c. Petitioners object that the City has not identified an exact historical analogue for its law. Petrs. Br. 28–29. But as the Solicitor General recognizes, U.S. Br. 14, *Heller* does not require such a direct line from historical precedent. The Court

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former rule expressly made provision for training with one's own gun, and they fail to show that the various types of training they list—including idiosyncratic activities like "shoot houses," *id.* at 9—are unavailable in the City, let alone necessary for effective training.

stated that laws "fairly supported" by a "historical tradition" are "presumptively lawful"—not that there must be a specific law precisely on point. 554 U.S. at 626–27 & n.26; *see Heller v. District of Columbia*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (for "new gun regulations" responding to "conditions that have not traditionally existed," "the proper interpretive approach is to reason by analogy from history and tradition"). The lack of an exact historical analogue for a law does not prove that the law burdens conduct protected by the Second Amendment. Instead, it may simply mean that new problems in society have required the government to respond with new solutions.[22]

This lawsuit illustrates the point. Petitioners' claims would likely not have arisen prior to the advent of the automobile, which enabled easy transport of firearms over distance. Indeed, petitioners do not demonstrate any historical tradition of traveling significant distances from one's own property or locality to a place of one's choosing to engage in training, as they seek to do in this lawsuit. Instead, petitioners resort to analogies to other activities—like militia training—to support

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[22] *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 835 n.2 (2011) (Thomas, J., dissenting) ("To note that there may not be precedent for such state control is not to establish that there is a constitutional right." (internal quotation marks, citation, and brackets omitted)); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 373 (1995) (Scalia, J., dissenting) ("[N]ot every restriction upon expression that did not exist in 1791 or in 1868 is *ipso facto* unconstitutional ….").

the premise that an unfettered right to train exists. But it makes little sense to demand that the City come forward with a direct analogue to its law when there is no evidence of a history of individuals engaging in the specific conduct at issue that could have created the need for regulation in the first place.

More broadly, adopting a strict view of the role of history and tradition could have disastrous consequences, hamstringing the ability of government to adapt to new circumstances, in contravention of this Court's assurance that "state and local experimentation with reasonable firearms regulations will continue under the Second Amendment." *McDonald v. City of Chicago*, 561 U.S. 742, 785 (2010) (plurality opinion). It would also be inconsistent with fundamental principles of federalism, which preserve space for states under the Second Amendment "to devise solutions to social problems that suit local needs and values." *Id.*; *see also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (denying states the right to experiment "may be fraught with serious consequences to the Nation"); *see also* Br. for Giffords Law Ctr. to Prevent Gun Violence as *Amicus Curiae* (Giffords Br.) in Support of Neither Party 22–24.[23] At the time the Second Amendment

[23] Application of a strict historical approach would also endanger a number of federal firearms laws, which have generally been upheld under means-ends scrutiny, not based on historical precedent alone. *See, e.g.*, *United States v. Masciandaro*, 638 F.3d 458, 469–74 (4th Cir. 2011) (ban on carrying or possessing a loaded weapon in a motor vehicle in a

was adopted, urban gun culture and private violence involving firearms were minimal in the United States, and firearms technology was quite limited.[24] Since that time, governments have been required to respond to massive changes on all these fronts. They should not be restricted to only the exact types of laws that were in effect in 1791 or 1868.

2. The former rule also did not infringe petitioner Colantone's right to possess a handgun for self-defense in his second home outside the City. *See* Petrs. Br. 21–22. At the outset, Colantone has not established that the former rule was the reason he could not take his New York City-licensed handgun to his second home. Under state law, Colantone's ability to lawfully possess a handgun in Hancock, New York, where his second home is located, depends on a license issued by the local licensing officer for Delaware County, New York. *See* N.Y. Penal Law § 400.00(3)(a) (requiring person seeking

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national park); *United States v. Reese*, 627 F.3d 792, 801–05 (10th Cir. 2010) (ban on possession of firearms while subject to domestic-violence protection order); *United States v. Chester*, 628 F.3d 673, 680–83 (4th Cir. 2010) (ban on possession of firearm after conviction for misdemeanor domestic-violence conviction); *United States v. Marzzarella*, 614 F.3d 85, 96–101 (3d Cir. 2010) (ban on possession of a firearm with an obliterated serial number).

[24] *See* Joseph Blocher, "Firearm Localism," 123 Yale L.J. 82, 91, 103, 115 & n.172 (2013); Saul Cornell, "The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities," 39 Fordham Urb. L.J. 1695, 1713–14 (2012); Eric M. Ruben & Darrell A. H. Miller, "The Second Generation of Second Amendment Law & Policy: Preface," 80 Law & Contemp. Probs. 1, 1–2 (2017).

a premises license to apply to the local licensing authority). But Colantone has never suggested that he applied for, let alone obtained, a handgun license from Delaware County, or that he refrained from doing so because of the City's former rule. Nor has he addressed whether that license, if issued, would have permitted the transport he seeks prior to the recent change in state law. As a result, he has not shown that it was just the City's former rule that prevented him from transporting his licensed handgun to his second home.

Petitioners also offer no basis to conclude that the former rule imposed more than an incidental burden on the right. Although Colantone complains that he must pay a fee to the licensing authority that has jurisdiction over his second home, Petrs. Br. 5, 44, that obligation stems from the State's licensing framework and the other locality's laws, not the City's rule. And the rule did not constrain Colantone from keeping a separate handgun at his second home. Two-thirds of gun owners, in fact, do own more than one gun, and the average gun-owning household has more than six firearms.[25]

Nor do history and tradition yield much insight on this question of transport. Petitioners have not come forward with evidence of any established

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[25] Kim Parker, *et al.*, "The Demographics of Gun Ownership," Pew Research Center (June 22, 2017), *available at* https://perma.cc/D9EX-VRQG; L. Hepburn & M. Miller, "The US Gun Stock: Results from the 2004 National Firearms Survey," *Injury Prevention* (2017), *available at* https://perma.cc/VS87-V7P9.

historical tradition of transporting firearms, let alone of transporting firearms to second homes.[26] That is probably because widespread ownership of second homes is a trend of recent vintage, its emergence beginning in the post-war era.[27] This point is confirmed by what history does tell us about transport: the first attempts to codify transport rights were apparently made in the twentieth century, following the emergence of car travel. Br. of *Amicus Curiae* Patrick J. Charles in Support of Neither Party 16–17. And even these laws did not

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[26] In one of the few sources to address the issue at the time of the Founding, Thomas Jefferson proposed an anti-poaching bill that would have restricted Virginians from traveling with a musket outside the context of militia activity. *See* Cornell, *supra* note 24, at 1707. Although one *amicus* states that nineteenth-century laws protected a right to transport firearms between residences, *see* Br. of *Amicus Curiae* Patrick J. Charles in Support of Neither Party 13, the cited laws do not appear to contain such a protection. The same *amicus* points to a subset of laws that excepted travelers from public carry bans, *see id.* at 13–14, but those exceptions address the carry of a loaded weapon for self-defense on nineteenth-century highways, *see Carr v. State*, 34 Ark. 448, 449 (1879), which is not at issue here.

[27] Dallen J. Timothy, "Recreational Second Homes in the United States: Developmental Issues and Contemporary Patterns," *in* Tourism, Mobility and Second Homes: Between Elite Landscape and Common Ground 137 (Colin Michael Hall & Dieter K. Müller eds. 2004); Matthew Chambers, *et. al*, "The Post-War Boom in Homeownership: An Exercise in Quantitative History" 2–4 (Jan. 2011), *available at* https://perma.cc/A237-EF3R (charting primary home ownership rates from 1900 through the present).

protect transport between a primary residence and a second home. *Id.*

Moreover, transport between homes, to the extent it occurred or was permissible, has always been subject to incidental burdens like those imposed by the City's former rule. From the colonial period onward, states and localities closely regulated the transport of gunpowder, which was necessary for the use of firearms.[28] And for most of the twentieth century, a patchwork of state and local licensing laws would have prevented many individuals from transporting their guns without restriction.[29] As late as 1986, when Congress passed the Firearm Owners Protection Act, 21 states had laws that would have burdened the ability of

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[28] *See, e.g.*, S.A. 34, Massachusetts (1651) (prohibiting the transport of gunpowder out of the jurisdiction without a license, except in self-defense); S.A. 34–38, New York City, New York (1784) (regulating the transport and storage of gunpowder in New York City); S.A. 38, Connecticut (1836) (empowering Hartford, New Haven, New London, Norwich, and Middletown to enact ordinances "prohibiting and regulating the bringing in, and conveying out, or storing of gun-powder"); S.A. 38–40, Chicago, Illinois (1851) (requiring permission of common council or mayor to keep, sell, or give away gunpowder "in any quantity," and providing for the mode of storage and transport in the City); S.A. 40–42, St. Paul, Minnesota (1858) (same).

[29] *See, e.g.*, S.A. 46–47, New York (1911); S.A. 47–49, Montana (1918) (requiring registration of all firearms possessed in the jurisdiction); S.A. 49–50, Arkansas (1923) (same).

travelers to transport guns (unloaded and locked) to second homes in those states.[30]

3. Petitioners also contend that they should be able to transport their handguns outside the home for any lawful use because the Second Amendment guarantees a right to carry firearms for self-defense in public. Petrs. Br. 20. But that issue is entirely distinct from the issues before this Court. New York State has a separate licensing regime expressly dedicated to bearing arms for self-defense outside the home. Petitioners, however, have never challenged the standards for issuance of such a license. Nor have petitioners ever asserted that they wish to transport their handguns to shooting ranges and second homes to protect themselves *while in transit*.

Rather, petitioners have consistently limited their challenge to "the right to keep arms in the home and the right to hone their safe and effective use." Pet. for Cert. 12; *see also id.* at i (question presented); Pet. for Reh'g En Banc 1, 2d Cir. ECF No. 124 (stating that "the only places [petitioners] seek to transport" their licensed handguns are "shooting ranges or second homes"); Br. for Appellants 19, 2d Cir. ECF No. 34 (asserting that the City's former rule "burden[ed] the 'core' right to keep and bear arms for self-defense in the home"). And they have emphasized they have "no desire to carry their handguns on their person in the City."

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[30] 131 Cong. Rec. S 9117–18 (daily ed. July 9, 1985) (Metzenbaum Stmt.); Appendix: State-by-State Analysis of Impact of Section 107 of McClure-Volkmer Bill (1985).

Br. for Appellants 38, 2d Cir. ECF No. 34; *see also* Pls.' Reply Mem. in Further Supp. of Prelim. Inj. 6, S.D.N.Y. ECF No. 20 ("No plaintiff is complaining that they've applied for, but have been wrongfully denied, a Conceal Carry permit."). It would make no sense to recognize a generalized right to carry rooted in a right to bear arms outside the home where petitioners have never challenged the State's separate licensing regime that regulates carrying handguns in public.

B. In any event, the former rule satisfied means-end scrutiny.

1. If the Court concludes that the City's former rule meaningfully burdened conduct protected by the Second Amendment, it should proceed to the second step of the two-step analysis and conclude that the rule satisfied means-ends scrutiny.

To the extent petitioners object that it is never proper to evaluate Second Amendment rights under means-ends scrutiny, Petrs. Br. 29–30, that contention cannot be squared with this Court's longstanding practice. Some of the most vital constitutional protections—from the Free Speech Clause to the Equal Protection Clause—are subject to means-end scrutiny when they implicate countervailing public interests. *See* Law Professors' Br. 13–18. Applying such scrutiny here would ensure that the Second Amendment is not "subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald*, 561 U.S. at 780 (plurality opinion). And indeed, *Heller* suggested that means-ends scrutiny should apply in

appropriate cases when it noted that the law challenged there so severely burdened core Second Amendment rights that it "would fail constitutional muster" under any of the standards of scrutiny "applied to enumerated constitutional rights." *Heller*, 554 U.S. at 628–29.[31]

And there is good reason to apply means-ends scrutiny. History and tradition are of course initial touchstones of the analysis, but they will not resolve every challenge. Courts must have analytical tools available where history does not "speak with one voice," *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012),[32] or where they are required to respond to novel challenges, *McDonald*, 561 U.S. at 785.[33]

Petitioners are similarly wrong that subjecting the rule to anything less than strict scrutiny creates a "hierarchy of constitutional rights." Petrs. Br. 30–31. A host of rights, including rights held fundamental, are subject to varying levels of scrutiny depending on such factors as the challenged

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[31] The Court also criticized Justice Breyer's proposal, in dissent, to adopt an "interest-balancing inquiry" that did not track "the traditionally expressed levels" of means-end scrutiny. *Heller*, 554 U.S. at 634.

[32] *See also* Giffords Br. at 18–22; Blocher, *supra* note 24; Eric M. Ruben & Saul Cornell, "Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context," 125 Yale L.J. Forum 121 (2015).

[33] For examples of novel questions, see Law Professors' Br. 30–32 (discussing "ghost guns," printed guns, and gun bans at mass spectator events and airports).

law's level of interference with protected conduct and the degree to which the motivations behind the law are inherently suspect.[34] Treating the Second Amendment differently would render *other* rights "second class." And indeed, after *Heller*, every circuit to decide the issue has adopted a two-step analysis that applies varying levels of heightened means-end scrutiny at the second step. Law Professors' Br. 8–9 (collecting cases).

2. Here, as the Second Circuit held, Pet. App. 10–24, the former rule should at most be subject to intermediate scrutiny. As discussed above, petitioners have failed to show that the former rule substantially burdened Second Amendment rights because it neither meaningfully impaired their ability to train nor prevented them from having a handgun at a second home. Moreover, with respect to training, the rule was at most analogous to a time, place, and manner regulation. In the context of First Amendment speech rights, which are undoubtedly fundamental, such laws are subject to intermediate scrutiny. *See Clark v. Cmty. for Creative Non-*

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[34] *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (applying exacting scrutiny to "core" political speech); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293–94 (1984) (restrictions on speech that are not content-based may properly be subject to intermediate scrutiny); *United States v. Virginia*, 518 U.S. 515, 534 (1996) (gender discrimination subject to intermediate scrutiny because it is not inherently suspect); *see generally* Adam Winkler, "Fundamentally Wrong About Fundamental Rights," 23 Const. Comment. 227 (2006) (refuting, entirely apart from the Second Amendment context, the assertion that burdens on fundamental rights always trigger strict scrutiny).

Violence, 468 U.S. 288, 293–94 (1984) (National Park Service could properly prohibit protestors engaging in symbolic speech of pitching tents on the National Mall).

3. Because the former rule was "substantially related to an important government objective," *Clark v. Jeter*, 486 U.S. 456, 461 (1988), the Second Circuit correctly held that it passed intermediate scrutiny, Pet. App. 24. Where a regulation is a reasonable means of safeguarding the integrity of another law that the plaintiffs do not challenge (and thus must be presumed valid), it satisfies intermediate scrutiny. For instance, in *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 426 (1993), the Court considered a First Amendment challenge to a federal law that banned certain lottery advertisements from airing in states that barred lotteries. Applying intermediate scrutiny, the Court held that the federal law was a legitimate means of "supporting the policy of nonlottery States" that lotteries should be limited. *Id.* at 426.

The same logic would apply to the former rule. The State's framework allows premises licensees like the petitioners "to have and possess" a handgun "in [their] dwelling," and separately licenses the public carry of a handgun. N.Y. Penal Law § 400.00(2). This distinction reflects the understanding that the possession and use of firearms in public presents a greater public danger than the possession of firearms in the home. *See Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015) ("The right to carry weapons in public for self-defense poses inherent risks to

others."). The State accordingly made a judgment—one that petitioners have not challenged here—to offer different licenses, with different standards for issuance, for self-defense in public and in the home. And, at the relevant time, the state statute did not expressly authorize premises licensees to transport their handguns to shooting ranges or second homes.

The former rule implemented this state-created framework as it then existed—and the home-based nature of the premises license—by limiting premises licensees' ability to remove their handguns from their homes except to the extent necessary for such activities as training or repair. When police officers encountered a licensee transporting a licensed handgun through the City, they could confirm that the licensee was traveling along a plausible route to an in-city shooting range, or that the visit was reflected in the range's records, to which the NYPD had access. J.A. 79–80, 91–92. This kind of verification was necessarily somewhat more difficult for destinations outside the City. The range of those possible destinations was significantly greater, and access to records significantly limited.

Even on its own terms, public safety is a compelling interest. *Schall v. Martin*, 467 U.S. 253, 264 (1984). And this Court traditionally affords some deference to the judgments of policymakers and law-enforcement agencies like the NYPD, who have experience in these matters. *See, e.g.*, *Colorado v. Bertine*, 479 U.S. 367, 372 (1987) (deferring to "police caretaking procedures designed to secure and protect vehicles and their contents within police custody" in concluding that inventory searches were

permissible under the Fourth Amendment); *United States v. Watson*, 423 U.S. 411, 429 (1976) (deferring to the historical experience of law enforcement in upholding the longstanding tradition of allowing police to effectuate warrantless arrests of felons in public). Here, the NYPD had a basis to conclude that its former rule was a valid way to effectuate the State's licensing scheme.

Regulation of firearms has long varied in response to local conditions. *See generally* Blocher, *supra* note 24.[35] New York City is both by far the Nation's largest city and among its most crowded. The potential for violent conflict, accidents, or thefts involving firearms is higher in such close quarters, and presents particularly serious risks considering the density of sensitive places in the City.[36]

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[35] Unlike the former rule, many such laws imposed substantial burdens on training with firearms. For example, the City has identified over five dozen state and municipal laws, enacted throughout the country from the colonial period to the present, banning the discharge of firearms in city limits. And because of fears of gun violence, a host of frontier towns like Dodge City, Kansas, banned all public carry. *See* S.A. 43, Dodge City, Kansas (1876). And the same was true of established cities like Syracuse, New York. *See* S.A. 44–45, Syracuse, New York (1885).

[36] Research suggests that most firearms used in firearms-involved crimes were stolen at some point from lawful owners—a significant proportion of them out of vehicles. *See* Megan E. Collins, *et al.*, "A Comparative Analysis of Crime Guns," RSF: The Russell Sage Foundation Journal of the Social Sciences, vol. 3, no. 5, Oct. 2007, *available at* https://www.jstor.org/stable/10.7758/rsf.2017.3.5.05; Lisa Stolzenberg & Stewart J. D'Alessio, "Gun Availability and Violent Crime: New Evidence from the National Incident-

Enforcing the state-law restrictions on public possession of handguns thus had heightened urgency in New York City.

There is no merit to petitioners' suggestion that the City's former rule increased the risk to public safety by requiring licensees to spend a longer time in their vehicles transporting their firearms to authorized ranges. Petrs. Br. 36–37. This argument seems to imagine licensees who live, for instance, at the foot of a bridge or mouth of a tunnel, such that travel to an out-of-city range through those notorious traffic chokepoints might be more efficient than transport to an in-city range. But the NYPD was permitted to regulate based on the typical case rather than the outlier.

Similarly unpersuasive is petitioners' assertion that requiring licensees with second homes to leave a handgun behind in their residence when going out of town increased the risk of theft of unattended firearms. *Id.* Gun owners, who on average own more than six firearms, do not necessarily take all of their guns with them every time they leave their homes. Petitioners' argument also ignores the substantial countervailing threat of gun theft from vehicles.[37]

Based Reporting System," Social Forces, vol. 78, no. 4, June 2000, at 1461–82, *available at* www.jstor.org/stable/3006181.

[37] *See* Brian Freskos, "Up to 600,000 guns are stolen every year in the US – that's one every minute," The Guardian (Sept. 21, 2016), *available at* https://perma.cc/K5DL-W9QB; David Hemenway, *et al.*, "Whose guns are stolen? The epidemiology of Gun theft victims," Injury Epidemiology, vol. 4, Dec. 2017, at 11, *available at* https://perma.cc/849M-REWV.

The NYPD could thus reasonably conclude that the former rule effectively implemented the State's licensing scheme as it then stood.

III. THE FORMER RULE ACCORDED WITH THE DORMANT COMMERCE CLAUSE

A. Congress expressly authorized state and local regulation of residents' firearm possession and transport.

The City's former rule did not implicate the dormant Commerce Clause because Congress expressly authorized states and localities to regulate residents' firearm possession and transport.

1. The Court's doctrine under the dormant Commerce Clause holds that the Constitution's affirmative grant of authority to Congress to regulate interstate commerce, U.S. Const. art. I, § 8, implicitly limits the regulatory power of the states. A corollary recognizes, however, that Congress itself may "redefine the distribution of power over interstate commerce." *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945).

Congress did just that in enacting FOPA's "safe-passage" provision. Wielding its Commerce Clause power, *United States v. Rybar*, 103 F.3d 273, 281 (3d Cir. 1996), Congress created a federal statutory right to transport firearms across state lines, but expressly conditioned that right on regulatory determinations made by the states where the trip begins and ends. Congress's express decision to tie federal transport rights to such traditional exercises of state and local police power means that a resident

may not challenge them under the dormant Commerce Clause.

The Court has required clear congressional intent to remove state or local regulation from the dormant Commerce Clause's reach. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 90–91 (1984). It has found such clear intent where a federal statute piggybacks on a state-level determination. Thus, for example, state laws selectively authorizing interstate banking acquisitions on a regional basis were "invulnerable to constitutional attack under the Commerce Clause" because Congress had expressly conditioned federal authorization for such acquisitions on whether they were authorized by the laws of the acquired bank's home state. *Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 171, 174 (1985) (internal quotation marks omitted).

Congress can likewise make its intent clear by allocating power to the states to regulate an area of interstate commerce. Thus, a federal statute declaring the regulation and taxation of "the business of insurance"—an area squarely within the realm of interstate commerce—to be "subject to" state laws eliminated any dormant Commerce Clause challenge to state statutes imposing discriminatory taxes on out-of-state insurers. *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 654 (1981) (internal quotation marks omitted).

Similar to these federal statutes, FOPA's safe-passage provision expressly looks to the regulatory

determinations of the states as to whether an individual may begin or end an interstate trip with a firearm there, thereby leaving key aspects of regulation of interstate transport of firearms to the states. The provision reads:

> Notwithstanding any other provision of law or any rule or regulation of a State or any political subdivision thereof, any person who is not otherwise prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to transport a firearm for any lawful purpose *from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm* if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition … is readily accessible.

18 U.S.C. § 926A (emphasis added).

Thus, Congress exercised its commerce power to define a federal right to transport firearms across state lines and to preempt the laws of states that a journey merely passes through to the extent they would prevent it. *See Torraco v. Port Auth.*, 615 F.3d 129, 143–44 (2d Cir. 2010) (Wesley, J., concurring). But rather than federalizing interstate transport entirely, Congress explicitly conditioned the transport right on whether the states where a trip begins and ends authorize the individual to

"lawfully possess and carry" the firearm in those jurisdictions. By doing so, Congress "alter[ed] the limits of state power otherwise imposed by the Commerce Clause." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982).

FOPA's enactment history confirms the point. Less than two months before enacting the current safe-passage provision, Congress passed and the President signed a different version that wholly federalized interstate transport. That version provided:

> Any person not prohibited by this chapter from transporting … a firearm shall be entitled to transport an unloaded, not readily accessible firearm in interstate commerce notwithstanding any provision … prescribed by any State or political subdivision thereof.

Pub. L. No. 99-308, 100 Stat. 449, 460 (1986). The effect was to preempt local law "if the person was traveling 'in interstate commerce' even if their possession of the firearm was in violation of the law of the State in which they lived." 132 Cong. Rec. H 4102 (June 24, 1986) (McCollum Stmt.). Congress quickly replaced the provision with the present language deferring to and incorporating state regulation in the jurisdictions where a trip begins and ends.[38] This sequence confirms that Congress

[38] As a bill sponsor explained, the revised provision kicks in "only after [travelers] leave the boundaries of their State or local jurisdiction," and does not "modify the State or local laws

made the deliberate decision not to encroach on such regulation in its exercise of the commerce power.

FOPA's safe-passage provision shows that Congress recognized the tension between national uniformity and local interests. Thus, it expressly relinquished some control over interstate commerce to defer to the states in an area of core local interest: determining whether a resident is authorized to "lawfully possess and carry" a firearm in his home state. The text and history of FOPA's safe-passage rule make it unmistakably clear that the dormant Commerce Clause cannot nullify local rules regarding whether residents may "lawfully possess and carry" handguns.[39]

2. The City's former rule did not afford premises licensees authorization to, as FOPA puts it, "lawfully possess and carry" their handguns through the jurisdiction sufficient to qualify them for safe-passage rights. The plain text of the phrase means that the individual must not only hold the right to "possess" the gun (for example, at home), but also the right to "carry" it through the jurisdiction. The legislative history suggests that "carry," as used

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at the place of origin or the jurisdiction where the trip ends in any way." 132 Cong. Rec. H 4102 (June 24, 1986) (McCollum Stmt.). The provision thus leaves untouched "local law as it applie[s] to residents of [a] State or local jurisdiction." *Id.*

[39] FOPA's express authorization might not reach an economic protectionist measure unrelated to genuine local safety objectives. *Cf. Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019). But petitioners have never suggested such pretext existed here, and indeed it did not.

here, does not necessarily entail authorization to carry a concealed weapon on the person and can be satisfied by having "the ability to put the firearm in a vehicle and transport it to the place of destination." 132 Cong. Rec. H 4102 (June 24, 1986) (McCollum Stmt.). The term "carry" thus, at a minimum, connotes a general transport authorization far broader than what premises licensees were granted under the City's former rule.

The former rule entitled petitioners principally to possess their handguns in their New York City homes, and, attendant to that right, to transport them on a limited basis within the City to train (or for repair). The licenses did not afford petitioners any general authorization to transport their firearms through the jurisdiction. Consequently, the former rule did not afford premises licensees the local authorization required for FOPA's safe-passage right to attach. *See Matter of Beach v. Kelly*, 860 N.Y.S.2d 112, 113–14 (App. Div. 1st Dep't) (so holding), *lv. denied*, 11 N.Y.3d 711 (2008). The dormant Commerce Clause cannot give petitioners what Congress, exercising its commerce power, refused to grant.[40]

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[40] Although petitioners previously argued that all the transport they sought in this case—interstate and intrastate—qualified for FOPA safe-passage protection, J.A. 41; Pls.' Mem. in Supp. of Prelim. Inj. 21, S.D.N.Y ECF No. 10 (May 7, 2013), they abandoned that position entirely on appeal. An amicus has taken up the charge. *See* Br. of Robert Leider as *Amicus Curiae* 25–26. Because this Court generally "avoid[s] unwarranted determination of federal constitutional questions," *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987), if the Court perceives

B. The former rule did not violate the dormant Commerce Clause in any event.

Even if Congress had not acted, petitioners' dormant Commerce Clause challenge would fail.

1. Petitioners mistakenly assert that the former rule discriminated "in favor of in-city ranges and against interstate commerce." Petrs. Br. 50. Their main error is to assess the rule divorced from the broader system of state and local regulation of which it was part. When that context is restored, it becomes clear that petitioners have not demonstrated any discrimination against interstate commerce.

For the purpose of the dormant Commerce Clause, discrimination means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (internal quotation marks omitted). The inquiry "eschew[s] formalism for a sensitive, case-by-case analysis." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994).

Petitioners complain that the former rule prevented premises licensees from attending out-of-state shooting ranges (for example, in New Jersey) using their own licensed handguns, while allowing

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any substantial question whether the former rule triggered FOPA protection, it should remand for the court of appeals to perform a preemption analysis as to the former rule.

those licensees to take their guns to in-city ranges. But they ignore two countervailing points. First, under then-existing state law, *only* New York City licensees (totaling around 40,000 people, the majority of them carry licensees) could shoot handguns at all at in-city civilian ranges, subject to defined exceptions. *See supra* 27.[41] Second, and by contrast, the City in no way restricted any of its 8.5 million residents and 65 million annual visitors from patronizing out-of-state ranges using rented handguns, so long as the other states themselves allowed it. In this way, the regulatory scheme *disadvantaged* New York City ranges vis-à-vis out-of-state ranges. At the very least, petitioners have not shown that this regulatory system, considered overall, worked to benefit in-city ranges at the expense of those out of state.

That is a problem for petitioners, because a claim of discrimination under the dormant Commerce Clause requires more than supposition. A challenger is required "empirically to demonstrate the existence of a burdensome or discriminatory impact upon interstate [commerce]." *Am. Trucking Ass'ns v. Michigan PSC*, 545 U.S. 429, 436 (2005). Petitioners did not attempt to establish the relative economic impact of state and city licensing rules, overall, on interstate commerce. And no out-of-state range—i.e., the type of commercial actor who

[41] The exceptions include, among others, that persons who have applied for a license may possess handguns at ranges (in accordance with rules of the local police department) and qualifying nonresidents may travel to and participate in shooting competitions. N.Y. Penal Law § 265.20(7-b), (13).

ostensibly would be injured by a dormant Commerce Clause violation of the type petitioners allege—has come forward to complain that the rules as a whole hurt their business relative to that of in-city ranges.

There is good reason that out-of-state ranges have not objected: the limitation of use of handguns at in-city ranges to city licensees created a substantial commercial opportunity for out-of-state ranges. New Jersey law, for example, not only allows New York licensees to shoot handguns at ranges, but allows essentially any adult to rent and shoot handguns there. N.J.R.S. §2C:58-3.1. Indeed, ranges in New Jersey aggressively market their rentals to people in the City. One range's website touts its location just "4 miles from the Lincoln Tunnel," while also highlighting its rental offerings.[42] Another claims it is only "15 minutes from New York City," and offers a "free gun rental valued at $25" to visitors who take "an Uber or Lyft from New York City!"[43]

Because petitioners could not—indeed, did not even try—to show that out-of-state ranges were disadvantaged overall, they instead complain that the former rule made it less attractive for *them*, personally, to patronize those ranges. Petrs Br. 51–52. But the dormant Commerce Clause is not a

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[42] Long Shot Pistol & Rifle, *available at* https://perma.cc/6JPK-N6KJ.

[43] Gun for Hire, *available at* https://perma.cc/E45M-R2GQ; *see also* Gun for Hire, "Monthly Rental Menu," *available at* https://perma.cc/QF65-98U2 (promoting a selection of "over 200" firearms for rental).

means for residents to attack the wisdom of their own jurisdictions' laws, where there is no disadvantaged out-of-state competitor in an interstate market. *See Goldberg v. Sweet*, 488 U.S. 252, 266 (1989) ("It is not a purpose of the Commerce Clause to protect state residents from their own state [laws]."); *United Haulers*, 550 U.S. at 345 (doctrine does not invalidate laws whose harms primarily "fall upon the very people who voted for the[m]"); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978) (doctrine does not protect a "particular structure or methods of operation in a retail market").[44]

2. Petitioners extraterritoriality argument looks to expand the "most dormant" branch of the dormant Commerce Clause jurisprudence. *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1170 (10th Cir. 2015) (Gorsuch, J.). The Court's extraterritoriality rulings hold that the Constitution does not allow states to pass "price control and price affirmation laws that control 'extraterritorial' conduct." *Id.* at 1172; *see Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003) (rejecting extraterritoriality challenge because state was not regulating "the price of any out-of-state transaction" (internal quotation marks omitted)). When a law does not set prices for out-of-state transactions, or tie in-state prices to out-of-state prices, the dormant

[44] Petitioners do not argue here (and did not claim in the court of appeals) that they could prevail under the balancing test set out in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). And they could not, essentially for the reasons given by the district court, Pet. App. 75; *see also id.* at 32–33, and discussed above.

Commerce Clause's extraterritoriality principle does not apply. And here, neither the former rule nor any other provision of local law regulated prices at shooting ranges outside the City in any way.

Even under petitioners' overbroad conception of the extraterritoriality principle, however, the former rule was valid. It did not regulate conduct at out-of-city ranges or impose any sanction for conduct that took place out of state "with the intent of changing … lawful conduct in other States," *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996)—let alone "directly," *Healy v. Beer Inst. Inc.*, 491 U.S. 324, 336–37 (1989). Out-of-state ranges were free to offer New Yorkers the opportunity to shoot guns, borrow guns, or store guns at whatever price they wanted. And under the former rule, the petitioners were equally prevented from crossing the George Washington Bridge to bring a firearm to an out-of-city range as to an out-of-city picnic. The restriction applied to transporting the firearm through the city beyond what was authorized by their premises licenses, not engaging in some prohibited out-of-city transaction.[45]

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[45] The extraterritoriality branch of dormant Commerce Clause doctrine is "a relic of the old world." *Am. Bev. Ass'n v. Snyder*, 735 F.3d 362, 378 (6th Cir. 2013) (Sutton, J., concurring). It asks judges to "weigh apples[]and[]oranges" in deciding whether interstate effects are "direct" enough to implicate the doctrine. *Id.* at 379–80. But rather than restrict its reach, petitioners ask the Court to expand it, pursuing "the decidedly awkward result of striking down as an improper burden on interstate commerce a law that may not disadvantage out-of-state businesses." *Energy & Env't Legal Inst.*, 793 F.3d at 1174.

Finally, petitioners' dormant Commerce Clause claim fails for a more fundamental reason: For the reasons that Justice Thomas has explained at length (and the City therefore does not repeat here), the doctrine finds no footing in the original understanding of the Constitution. *See Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 610–20 (1997) (Thomas, J., dissenting); *United Haulers*, 550 U.S. at 349–55 (Thomas, J., concurring). At the very least, therefore, the doctrine should not be extended here.

IV. THE FORMER RULE DID NOT OFFEND THE RIGHT TO TRAVEL

Petitioners are also mistaken in claiming that the former rule violated the constitutional right to travel insofar as it prevented premises licensees from traveling with their licensed handguns to out-of-state shooting ranges or competitions.

The right to travel has three distinct components: (1) an implied right "to enter and to leave [a] State"; (2) an express right, protected by the Privileges and Immunities Clause of Article IV, "to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State," and (3) an express right, protected by the Privileges or Immunities Clause of the Fourteenth Amendment, "for those travelers who elect to become permanent residents, … to be treated like other citizens of that State." *Saenz v. Roe*, 526 U.S. 489, 500–03 (1999).

Only the first aspect—the implied right to cross state borders—is even potentially implicated here.

And as the Solicitor General correctly observes, U.S. Br. 31, under *Saenz*, the City's former rule did not violate that right because it did not "directly impair" the right to cross state borders, *Saenz*, 526 U.S. at 501; *see id.* (noting that the challenged law imposed "no obstacle" to the challengers' entry into the state). The former rule neither directly nor indirectly targeted interstate travel: it authorized only limited transport of a handgun within the City by premises licensees and prevented intrastate transport and interstate transport outside the City by those licensees on equal terms. The rule was thus a far cry from those restrictions found to have infringed the right to interstate travel, such as laws imposing a tax on persons leaving the state, *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 43–45 (1868), or criminalizing the act of bringing certain persons into the State, *Edwards v. California*, 314 U.S. 160 (1941).

Petitioners' argument rests on a misreading of a snippet from this Court's decision in *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986), referring to laws that "actually deter[]" interstate travel. That statement did not imply that any measure that may have the incidental effect of reducing the number of interstate trips someone makes violates the Constitution. To the contrary, it cited *Crandall*'s invalidation of a tax on persons leaving the state. The statement is thus fully consistent with the Court's later decision in *Saenz*, focusing on laws that directly burden egress (or ingress) without necessarily prohibiting it.

Petitioners' purely effects-based approach finds no support in precedent. It would hold that a city impermissibly burdens its own citizens' implied right to travel by restricting what items they can transport within its borders—whether fireworks or firearms—if one effect is to limit what residents can pack on a trip out of town to an in-state or out-of-state destination. This would represent a significant and unwarranted expansion of the right.

CONCLUSION

For the reasons explained here and in the City's Suggestion of Mootness, the Court should vacate and remand with instructions to dismiss, or with instructions to apply Article III principles in the first instance. If the Court nevertheless reaches the question presented, it should hold that the City's former rule was constitutional.

Respectfully submitted,

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