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 FOR PETITIONERS

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QUESTION PRESENTED

New York City prohibits its residents from possessing a handgun without a license, and the only license the City makes available to most residents allows its holder to possess her handgun only in her home or en route to one of seven shooting ranges within the city. The City thus bans its residents from transporting a handgun to any place outside city limits—even if the handgun is unloaded and locked in a container separate from its ammunition, and even if the owner seeks to transport it only to a second home for the core constitutionally protected purpose of self-defense, or to a more convenient out-of-city shooting range to hone its safe and effective use.

The City asserts that its transport ban promotes public safety by limiting the presence of handguns on city streets. But the City put forth no empirical evidence that transporting an unloaded handgun, locked in a container separate from its ammunition, poses a meaningful risk to public safety. Moreover, even if there were such a risk, the City's restriction poses greater safety risks by encouraging residents who are leaving town to leave their handguns behind in vacant homes, and it serves only to increase the frequency of handgun transport within city limits by forcing many residents to use an in-city range rather than more convenient ranges elsewhere.

The question presented is:

Whether 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.

PARTIES TO THE PROCEEDING

Petitioners are the New York State Rifle & Pistol Association, Inc., Romolo Colantone, Efrain Alvarez, and Jose Anthony Irizarry. They were plaintiffs in the district court and plaintiffs-appellants in the court of appeals.

Respondents are the City of New York and the New York City Police Department – License Division. They were defendants in the district court and defendants-appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner New York State Rifle & Pistol Association has no parent corporation and no publicly held company owns 10 percent or more of its stock. The remaining petitioners are individuals.

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INTRODUCTION

It has been more than ten years since this Court held in its landmark decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment protects an individual right to keep and bear arms. The message has yet to reach New York City. Since *Heller*, the City has made no effort to revise its restrictive pre-existing regime in light of the reality that possession of a handgun is not a privilege granted as a matter of municipal grace, but a constitutional right. Instead, the City maintains one of the most restrictive firearms regimes in the country. The typical, law-abiding New Yorker cannot keep a handgun in her home for self-defense without first running a veritable gauntlet of requirements—and paying more than $400 in fees—to obtain a license to do so. And that license is strictly limited to the premises. Its holder has no right to carry and cannot transport his handgun, even unloaded and locked-up, except to seven in-city ranges that must serve 8.5 million New Yorkers. Transportation of the licensed handgun for use at a second home or a range outside the city is strictly forbidden.

The City's premises-only license and accompanying transport ban are flatly irreconcilable with the Second Amendment. The City's regime is unabashedly based on the notion that the Second Amendment is a homebound right that does not extend beyond the premises. Indeed, the City would not concede that its policy even *implicates* the Second Amendment because its restrictions apply only outside the home. But the Second Amendment protects the right to keep *and bear* arms, and the

framers plainly envisioned that the citizenry would be able to transport their firearms to the training ground. Moreover, the history and tradition of the Second Amendment, much of which was surveyed and relied upon in *Heller*, confirm that Second Amendment rights were never understood as confined to the home. That is sufficient to render the City's regime unconstitutional. The Second Circuit's contrary conclusion, while purporting to apply heightened scrutiny, is both remarkable and emblematic of lower court decisions applying heightened scrutiny in name only when it comes to the Second Amendment. If means-end scrutiny has a role to play in Second Amendment cases, this Court should clarify that strict scrutiny applies and that the various stratagems the Second Circuit employed to dilute the right are fundamentally incompatible with the proper analysis of government infringements of a fundamental right.

The City's effort to restrict licensed handguns to the premises and seven in-city ranges is so extraordinary that it violates basic constitutional provisions, wholly apart from the Second Amendment. The City would have no power to limit its residents to in-city mechanics, or to direct them to leave their cell phones at home whenever they traveled elsewhere. Doing so would run afoul of the Commerce Clause, the right to travel, and the more basic constitutional principle that the framers formed an integrated national republic. The City certainly has no greater power when it comes to an article inextricably intertwined with a fundamental constitutional right. That the City was undeterred underscores the importance of making sure that the promise of *Heller* is fulfilled in New York City.

OPINIONS BELOW

The Second Circuit's opinion is reported at 883 F.3d 45 and reproduced at Pet.App.1-39. The order denying rehearing en banc is reprinted at Pet.App.40-41. The district court's opinion is reported at 86 F. Supp. 3d 249 and reproduced at Pet.App.42-76.

JURISDICTION

The Second Circuit issued its opinion on February 23, 2018, and denied rehearing en banc on April 5, 2018. A petition thereafter was timely filed. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second and Fourteenth Amendments to the U.S. Constitution are reproduced at Pet.App.77, as are the Commerce Clause, U.S. Const. Art. I, §8, cl. 3, and the Privileges and Immunities Clause, U.S. Const. Art. IV, §2, cl. 1. The relevant portions of the New York Penal Law and the Rules of the City of New York are reproduced at Pet.App.77-93.

STATEMENT OF THE CASE

A. Regulatory Background

Although the Constitution expressly protects "the right of the people to keep and bear Arms," U.S. Const. amend. II, residents of New York State are prohibited from "hav[ing] and possess[ing]" a handgun "in [their] dwelling" without a license. N.Y. Penal Law §400.00(2)(a); *see id.* §§265.01(1), 265.20(a)(3). The state leaves it to each municipality to decide how to administer the licensing process for these "premises licenses." *Id.* §400.00(3)(a).

In New York City, where the Police Commissioner administers the local licensing system, *id.* §265.00(10), obtaining the government's permission to exercise the most basic component of the right to keep and bear arms requires running a veritable gauntlet. The application's evaluation process includes, among other things, various background checks, a crosscheck of the applicant's statements on his or her license application, and, of course, a hefty fee. Pet.App.47; *see* 38 R.C.N.Y. §1-03(d). Moreover, the Commissioner may deny an application for "good cause." Pet.App.47. Acquiring a premises license is thus no mean feat.

While New York's restrictive licensing regime predates this Court's decisions in *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the City has made no effort to loosen its restrictions to reflect the reality that it is regulating the exercise of a fundamental, individual constitutional right. To the contrary, the City continues to maintain—and robustly enforce—one of the most constrictive licensing regimes in the country. If an individual succeeds in obtaining a premises license, without which mere possession of a handgun for self-defense within the home is unlawful, she must confine her handgun "to the inside of the premises" listed on the license at all times, 38 R.C.N.Y. §5-23(a)(2), save in two narrow circumstances: First, "[t]o maintain proficiency in the use of the handgun, the licensee may transport her/his handgun(s) directly to and from an authorized small arms range/shooting club, unloaded, in a locked container, the ammunition to be carried separately." *Id.* §5-23(a)(3). Second, "[a] licensee may transport her/his handgun(s) directly to and from an authorized area designated by the New York State

Fish and Wildlife Law and in compliance with all pertinent hunting regulations, unloaded, in a locked container, the ammunition to be carried separately," but only if "the licensee has requested and received a 'Police Department–City of New York Hunting Authorization' Amendment attached to her/his license." *Id.* §5-23(a)(4).

These restrictions are not confined to the city—or even to the state. Instead, they prohibit a license-holder from transporting a lawfully owned handgun even to places outside the jurisdiction, where other cities or states allow their possession. For example, the City has expressly confirmed that its restrictions prohibit a premises licensee from taking her handgun to a second residence outside the five boroughs. JA49. And because the only "authorized" ranges under city law are ranges within city limits, JA63, a license-holder is prohibited from taking a lawfully owned handgun to a range or shooting club outside city limits. These restrictions likewise impose significant constraints inside the city. A premises licensee may not even transport his handgun to a gunsmith for servicing without first obtaining written permission from a city official. *See* 38 R.C.N.Y. §5-22(16).

These restrictions are no minor inconvenience. Because a city resident cannot remove her handgun from the jurisdiction, she cannot exercise her right to keep and bear arms for self-defense at a second home unless she pays a second licensing fee and purchases a second handgun—costs that can easily run several hundred dollars. *See, e.g.*, *Kwong v. Bloomberg*, 723 F.3d 160, 168-69 (2d Cir. 2013) (upholding New York City's $340 licensing fee). And even then, she cannot

have her weapon of choice with her in the home at all times, but rather must obtain and maintain proficiency in two firearms, and ensure that each remains in working order at all times. She also will have no choice but to leave her New-York-City-licensed handgun unattended in her vacant city residence when she leaves town, for she is prohibited from taking it anywhere else.

As for the "authorized ranges" restriction, there are a grand total of *seven* target-shooting ranges, exclusive of police or military ranges, in all of New York City—the largest city in America, with a population of 8.5 million people. Pet.App.6; JA92-93 ¶40. Most of those ranges are clubs that are open only to members, which may require payment of a fee. JA35-36 ¶37. City residents thus have only exceedingly limited and costly options to ensure that they obtain and maintain proficiency in the use of their firearms—something that law enforcement instructors and officials uniformly urge as essential to the safe and effective exercise of the right to keep and bear arms for self-defense. *See, e.g.*, Br. of *Amici Curiae* Western States Sheriffs' Association et al. 22-23 (Oct. 9, 2018); Chris Bird, *The Concealed Handgun Manual* 423 (6th ed. 2011) (recommending that "a civilian gun carrier should practice at least once a month for the first year and a minimum of once a quarter after that").

Indeed, many jurisdictions—including some in New York State—make training not just a right, but an obligation, for firearm owners. *See, e.g.*, N.Y. Penal Law §400.00(1)(*l*). The City itself encourages all license-holders to "endeavor to engage in periodic

handgun practice at an authorized small arms range/shooting club." 38 R.C.N.Y. §5-22(a)(14). Yet the City nonetheless makes accepting its advice exceptionally difficult, prohibiting residents from traveling to New Jersey or Long Island to use a range—even if that range may be closer, less expensive, and more convenient than any range in the city.

The City does not claim that its exceedingly restrictive transport ban is of a piece with any historical or even modern-day regulatory tradition. Nor could it, for its transport ban appears to be unique. Petitioners are aware of no other jurisdiction in the entire country, now or ever, that prohibits its residents from transporting unloaded, locked-up firearms outside the jurisdiction. Instead, most jurisdictions not only freely allow transport, but affirmatively protect the right to *carry* arms. *See Concealed Carry | Right-to-Carry*, NRA-ILA, https://bit.ly/2JPCRfB (last visited May 6, 2019) ("There are 42 [right-to-carry] states, accounting for about three-quarters of the U.S. population. Forty of these states and the District of Columbia have 'shall issue' laws, requiring that concealed carry permits be issued to qualified applicants."). And even the handful that prohibit carry and restrict transport typically follow the federal government's lead of entitling an individual "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," so long as "the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger

compartment of such transporting vehicle." 18 U.S.C. §926A; *see, e.g.*, Cal. Penal Code §25505; Conn. Gen. Stat. Ann. §29-35; N.J. Stat. Ann. §23:4-24.1a.

B. Factual and Procedural Background

1. Petitioners Romolo Colantone, Jose Anthony Irizarry, and Efrain Alvarez are law-abiding residents of New York City who have held premises licenses for more than a decade. Pet.App.7. To maintain proficiency in the use of their handguns, petitioners used to participate in competitive shooting events beyond the city's borders and outside the state. JA28-29 ¶¶11-17. Competitive shooting is a critical part of training and practice, for it typically involves conditions that more realistically simulate the conditions under which someone would need to exercise the right to self-defense. As one expert marksman explained, "[c]ompetitive shooting teaches you how to manipulate your firearm efficiently and effectively at high rates of speed under certain levels of stress not encountered during normal training sessions." John Scott, *10 Experts: Can Competitive Shooting Help Real-World Defensive Shooting?*, Ballistic Mag. (Apr. 8, 2016), https://bit.ly/2vJirz6; *see also, e.g.*, *id.* ("Shooting competitions will definitely improve the following skills: firearms safety, your ability to shoot well under stress, drawing and presenting a firearm, overall shooting skills such as accuracy and speed, reloading under pressure, shooting from cover and on the move, and controlling recoil during rapid fire.").

Consistent with their interest in honing their skills, Colantone, Irizarry, and Alvarez sought to attend a regional shooting competition in Old Bridge,

New Jersey, in June 2012. JA28-29 ¶¶12, 15, 17. But the organizers informed them that they could not participate because §5-23 prohibits city residents from bringing their handguns to Old Bridge. JA52 ¶6; JA56-57 ¶7; JA59-60 ¶7. Colantone and Alvarez wrote letters to the licensing division to clarify whether §5-23 would permit them to transport their unloaded handguns outside the city solely for target shooting. JA55; JA60 ¶8. The City replied: "The Rules of the City of New York contemplate that an authorized small arms range/shooting club is one authorized by the Police Commissioner. Therefore the only permissible ranges for target practice or competitive shooting matches by NYC Premises Residence license holders are those located in New York City." JA31 ¶20. Petitioners have refrained from participating in any shooting competitions or events outside the borders of the city since June 2012, for fear of revocation of their premises licenses and of criminal prosecution. JA53 ¶¶9-10; JA57 ¶¶9-10; JA60-61 ¶¶9-10.

Colantone, who is a resident of Staten Island and has held a premises license for nearly 50 years, owns a second home in Hancock, New York, in Delaware County, and wishes to transport his handgun to his second home to use it to defend himself and his family there. Pet.App.7; JA53 ¶11. He has declined to take his handgun from the city to his home in Hancock, however, for fear of revocation of his premises license and of criminal prosecution. JA54 ¶¶12, 14.

Like Colantone, Irizarry, and Alvarez, many members of petitioner the New York State Rifle and Pistol Association are city residents who wish to take

their handguns outside the jurisdiction to ranges, competitions, or second homes. JA26-27. Because of §5-23, however, they have declined to participate in any shooting competitions or otherwise take their handguns outside the city, for fear of revocation of their premises licenses and of criminal prosecution. *See* JA53-54 ¶¶10, 13; JA57 ¶¶9-10; JA60-61 ¶¶9-10.

2. Petitioners brought suit against the City and its licensing division alleging, as relevant here, that the ban on transporting handguns outside city limits violates the Second Amendment, the Commerce Clause, and the fundamental right to travel. The district court, in an opinion that lifted long passages verbatim from the City's briefing, entered summary judgment for the City on all claims. Purporting to apply "intermediate scrutiny," the court held that the transport ban is reasonably related to the City's interests in public safety and crime prevention. Pet.App.62. The court rejected petitioners' right-to-travel argument on the theory that the transport ban is a "reasonable … time, place, and manner restriction[] on the possession and use of a firearm." Pet.App.67. And the court rejected petitioners' Commerce Clause argument, reasoning that it is enough that the transport ban "does not prohibit persons from purchasing firearms or attending shooting competitions" outside the city *without* their firearms. Pet.App.74.

3. The Second Circuit affirmed across the board. Like many lower courts, when analyzing Second Amendment challenges, the Second Circuit employs a two-part test under which it first asks whether the challenged law "impinges upon conduct protected by

the Second Amendment." Pet.App.9-10. If the answer is yes, then the court "next determine[s]," and finally "appl[ies,] the appropriate level of scrutiny." Pet.App.10. Applying that test, the Second Circuit first declined to decide whether the transport ban even *implicates* the Second Amendment. Pet.App.10. It instead assumed for the sake of argument that the answer is yes. The court then expressed skepticism that *any* level of heightened scrutiny should apply, and it definitively ruled out strict scrutiny because the transport ban purportedly "impose[s] at most trivial limitations on the ability of law-abiding citizens to possess and use firearms for self-defense." Pet.App.13. But the court ultimately "assume[d], *arguendo*," that intermediate, rather than rational-basis, scrutiny should apply. Pet.App.24.

In rejecting strict scrutiny, the court declined to decide whether a law that prohibits law-abiding individuals from transporting their handguns to their second homes "relates to 'core' rights under the Second Amendment." Pet.App.14. Instead, again assuming for the sake of argument that it does, the court concluded that the transport ban "does not substantially burden" any "core" right because petitioners did not prove that it is impossible for them to acquire a second handgun and a license to keep that handgun at their second homes. Pet.App.14-15.

As for the prohibition on transport to out-of-city ranges and competitions, the court affirmatively rejected the "argu[ment] that firearms practice is itself a core Second Amendment right," Pet.App.16, but assumed for the sake of argument that "[s]ome form of heightened scrutiny" may be appropriate if

"regulations amounting to a ban (either explicit or functional) on obtaining firearms training and practice substantially burden the core right to keep and use firearms in self-defense in the home," Pet.App.17. But because the transport ban does not "functionally bar [petitioners'] use of firing ranges or their attendance at shooting competitions," Pet.App.19, the court concluded that "strict scrutiny is not triggered," Pet.App.23.

Assuming without deciding that intermediate scrutiny would apply, the court concluded that the transport ban would pass muster. The court identified the City's interest as protecting public safety and concluded that the City had presented sufficient "evidence supporting its contention" that the regulation protects that interest. Pet.App.26. The sole evidence on which the court relied was an affidavit from the former commander of the state licensing division hypothesizing, without any evidentiary support, that transporting an unloaded handgun, locked in a container separate from its ammunition, may pose a public-safety risk in "road rage" or other "stressful" situations. Pet.App.26-28. The court did not explain how requiring city residents to spend more time transporting their handguns to inconvenient in-city ranges could plausibly further any claimed interest in reducing the in-city transport of unloaded, locked-up handguns. Instead, it simply declared that the ban "makes a contribution to an important state interest in public safety substantial enough to easily justify the insignificant and indirect costs it imposes on Second Amendment interests." Pet.App.29.

As to petitioners' Commerce Clause claim, the court held that the transport ban "does not facially discriminate against interstate commerce" because it does not prohibit city residents from "patronizing an out-of-state firing range or going to out-of-state shooting competitions" if they use a "rented or borrowed" firearm. Pet.App.31. The court also held that "the [ban] is designed to protect the health and safety of the City's residents," and thus was not "a protectionist measure" designed to favor "the City's firing-range industry" at the expense of out-of-state competitors. Pet.App.31. And while the court did not dispute that "a law requiring New York City residents to use their tennis rackets only at in-City tennis courts" would have "a discriminatory effect" on interstate commerce, it held that whatever effect the transport ban here has is insufficient to overcome the City's purportedly "legitimate interest in protecting" New Yorkers from "the public safety risks that firearms [present]." Pet.App.32.

Turning to this Court's cases invalidating state and local laws that "regulate[] commerce that takes place fully outside [their] borders," the court again did not dispute that the ban has "an[] effect on conduct occurring outside the City." Pet.App.34. Instead, the court declared that the ban "directly governs only activity within New York City," notwithstanding its total prohibition on transporting lawfully acquired handguns outside the city. Pet.App.34. The court accordingly concluded that "[a]ny extraterritorial impact" the ban may have "is incidental to th[e] purpose" of "protect[ing] the safety of the City's residents," "and thus 'is of no judicial significance.'"

Pet.App.34 (quoting *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940)).

Finally, the court rejected petitioners' right-to-travel claim on the ground that the transport ban does not wholly "prevent[] the[m] from engaging in intrastate or interstate travel." Pet.App.35. According to the court, the "Constitution protects the right to travel, not the right to travel armed." Pet.App.35.

SUMMARY OF ARGUMENT

New York City's draconian restrictions on the possession and transport of handguns are unconstitutional three times over. First and foremost, the City's restrictive premises-only license and accompanying transport ban are wholly incompatible with the fundamental right to keep and bear arms. The City's regime is premised on the notion that Second Amendment rights do not extend beyond the curtilage and that any ability to transport firearms for use elsewhere is a matter of privilege, not right. That notion cannot be squared with the text, history, or tradition of the Second Amendment.

The text of the Second Amendment guarantees a right to "keep *and bear* arms," and the prefatory clause makes clear beyond cavil that the framers anticipated that citizens would be able to transport their firearms from their homes to the training ground. The tradition and history of the Second Amendment likewise confirm that the framers did not protect merely a homebound right. Indeed, many of the historical sources surveyed in *Heller* make plain that the right protected by the Second Amendment is not just an individual right but one that extends

beyond the home and encompasses a right to carry firearms, not just to transport them unloaded. But whatever the precise metes and bounds of the right to keep *and bear* arms may be, text, history, and tradition confirm that the right is not confined to the "the inside of the premises" in which one lives. 38 R.C.N.Y. §5-23(a)(2).

That alone suffices to doom the City's novel regime, for it is antithetical to the text, history, and tradition of the Second Amendment and cannot survive any mode of scrutiny appropriate for a fundamental constitutional right. The fact that the Second Circuit upheld the policy while purporting to apply *heightened* scrutiny underscores all that is wrong with means-end scrutiny in the lower courts. This Court's teaching is clear that when it comes to fundamental rights, strict scrutiny applies. And whether the scrutiny is strict or intermediate, the hallmark of heightened scrutiny is that it is the government's burden to demonstrate narrow tailoring. The Second Circuit evaded that fundamental requirement by positing that there is some "core" of the Second Amendment (essentially guaranteeing that rights deemed non-core will be under-protected), and that the challenger must show that the core was substantially burdened, by which it means effectively banned (shifting the burden and guaranteeing that serious restrictions short of bans are permitted). None of that is remotely consistent with this Court's cases. If means-end scrutiny has a role to play in Second Amendment cases, then this Court must make clear that courts may not apply heightened scrutiny in name only.

The problems with the City's regime do not end with the Second Amendment. By limiting licensed handguns to the home and seven in-city ranges, the City violates the Commerce Clause and the fundamental right to travel. This Court's Commerce Clause jurisprudence establishes two fundamental precepts: States and localities may neither regulate extraterritorially nor discriminate against interstate commerce. The City's policy does both. It prohibits (and thereby regulates) the use of licensed handguns outside the city. And it confines their use to seven in-city ranges, thereby favoring those ranges over commercial ventures outside the city. The City cannot begin to justify its policy, as it has no legitimate interest in regulating conduct outside its borders, and its purported safety rationale would appear to favor getting the handguns across the nearest bridge or tunnel, rather than transported cross-town. The policy thus runs afoul not just of the Commerce Clause but of more basic constitutional principles that do not allow localities to regulate extraterritorially or to confine an article of commerce to the boundaries of the home or the municipality. It is therefore no surprise that the City's "don't-leave-home-with-it" policy violates the right to travel. The City could not force someone to leave her cell phone or laptop at home. It has no greater power when it comes to the article necessary to exercise the right enshrined in the Second Amendment.

In the end, the City's regime reflects a misguided view that it has greater latitude to regulate handguns than other articles of commerce. This Court has already squarely rejected the proposition that "state and local governments [may] enact any gun control

law that they deem to be reasonable." *McDonald*, 561 U.S. at 783 (plurality op.). The Court should do so again here and hold the City's regime unconstitutional.

ARGUMENT

I. New York City's Restrictive Premises License And Transport Ban Violate The Second Amendment.

As this Court affirmed a decade ago in *Heller*, "both text and history" leave "no doubt" "that the Second Amendment confer[s] an individual right to keep and bear arms," not a collective right reserved only to those in the "Militia." 554 U.S. at 595. And as the Court confirmed in *McDonald*, that individual right is "fundamental" and applies with full force against state and local governments. 561 U.S. at 750, 778. New York City's restrictive licensing regime for possessing a handgun and accompanying ban on transporting lawfully owned, locked-up, and unloaded handguns beyond city limits both pre-date those watershed decisions and are fundamentally incompatible with them. The City's regulatory regime is irreconcilable with the text of the Second Amendment, which protects the right to keep *and bear* arms; it is unprecedented in our history; and it cannot survive any level of scrutiny appropriate for a constitutional right that is both individual (*Heller*) and fundamental (*McDonald*). Indeed, the City's regime does not even meaningfully further its proffered interests, let alone do so in ways that are carefully tailored to minimize the burden on constitutionally protected conduct.

A. New York City's Restrictive Premises License and Transport Ban Are Inconsistent With the Text, History, and Tradition of the Second Amendment.

Both historically and today, the City of New York has the most draconian restrictions in the country when it comes to the possession and transport of handguns. New Yorkers may exercise their constitutional right to keep a handgun in the home if (but only if) they succeed in securing from the City a license to do so. Even if they succeed in obtaining a "premises license," they are subject to a host of restrictions, and their Second Amendment rights are strictly limited to the premises. A combination of state and city law prevents holders of premises licenses from carrying their handguns outside the home. *See Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012). City law generally prevents them from removing their handguns from "the inside of the premises" unless they are "unloaded, in a locked container, the ammunition to be carried separately." 38 R.C.N.Y. §5-23(a)(2), (3). The City then layers on top of those prohibitions the unprecedented restriction that a law-abiding resident may remove her unloaded, locked-up handgun from her home only to transport it "directly to and from an authorized small arms range/shooting club" within city limits, of which there are presently a grand total of seven. *Id.*

The City has not been coy about its justification for that restriction. By its own telling, the transport ban is inextricably linked to the restrictive conditions of the premises license and is designed to help law enforcement "monitor and enforce the limited

circumstances under which premises licensees can possess a handgun in public." BIO.22. In other words, the ban ensures that a premises license is strictly limited to the premises, and that people remove their handguns from their homes only under the exceedingly "limited circumstances" that the City deems appropriate. The City's regime thus rests on the premise that the right protected by the Second Amendment is a homebound right, and that any ability to keep and bear firearms beyond the curtilage is a matter of government grace. That view is incompatible with the text of the Second Amendment and with the history and traditions that inform the scope of the right it protects.

1. Text, history, and tradition confirm that the Second Amendment is not confined to the home.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. As this Court concluded in *Heller*, text, history, and tradition confirm that the right enshrined in the Second Amendment is "an individual right to keep and bear arms." 554 U.S. at 595. That same text, history, and tradition confirm that the individual right to keep and bear arms is not confined to the home.

1. To start with the text, the Second Amendment protects a right "to keep *and bear* arms." U.S. Const. amend. II (emphasis added). By its plain terms, then, the Amendment protects both the right to "have weapons," *Heller*, 554 U.S. at 583, and the right to "wear, bear, or carry" firearms "upon the person or in

the clothing or in a pocket, for the purpose … of being armed and ready for offensive or defensive action in a case of conflict with another person," *id.* at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). While one certainly may "keep" arms in the home, "[t]o speak of 'bearing' arms within one's home would at all times have been an awkward usage." *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012). The text of the Constitution thus confirms that the Second Amendment is not a homebound right, strictly limited to the premises. Instead, people have not just the right to possess firearms on their premises, but the right to transport arms outside the home for lawful use beyond the premises and the right to bear arms outside the home "for the core lawful purpose of self-defense." *Heller*, 554 U.S. at 630.

The Second Amendment's structure reinforces that conclusion. The prefatory clause—"[a] well regulated Militia, being necessary to the security of a free State"—performs a "clarifying function" with respect to the meaning of the operative clause. *Id.* at 577-78. Indeed, this Court *unanimously* agreed in *Heller* that the Second Amendment was codified at least in part to ensure the viability of the militia. *See id.* at 599; *id.* at 637 (Stevens, J., dissenting). The prefatory clause thus makes plain that the operative clause of the Second Amendment extends beyond the curtilage for the simple reason that militia service necessarily involved bearing arms outside the home.

Moreover, in light of the prefatory clause, it is inconceivable that the framers intended the people to keep and bear one set of arms at home and then to use

a different set of government-supplied firearms when they mustered to train as a militia, with no right to transport their own firearms from their home to the training grounds. The Second Militia Act of 1792, enacted just a year after the ratification of the Bill of Rights, made the link between the arms that could be kept in the home and the arms that were to be borne on the militia training grounds explicit. The Act required every "free able-bodied white male citizen" not only to "provide himself with" a musket or rifle plus ammunition and various accoutrements, but also to "appear, so armed, accoutred and provided, when called out to exercise, or into service, except, that when called out on company days to exercise only, he may appear without a knapsack." 1 Stat. 271 (1792). The Act further required militiamen to keep their arms "exempted from all suits, distresses, executions or sales, for debt or for the payment of taxes." *Id*. at 272. Officers, for their part, were required to come equipped with various additional items, including "a pair of pistols" and a suitable horse. *Id.*

At least two conclusions necessarily follow from the combined effect of the operative and prefatory clauses. First, the individual right protected by the Second Amendment is not limited to the premises, as law-abiding, responsible citizens at a bare minimum have a right to transport their arms to other places where they may be lawfully used, whether that be a second home, a shooting competition, or a militia training ground. A right to keep and bear arms designed both to ensure self-defense and to facilitate a militia necessarily assumes a right to transport arms from places where the need for self-defense is undeniable—such as the defense of family and home

in a principal or secondary residence—to places where they can be used for other lawful purposes, be it militia service, hunting, training, or the protection of a second residence. And whatever the scope of those places may be, there can be no serious dispute that they include both primary and secondary residences. Indeed, there is not the slightest suggestion in the text of the Second Amendment that the right of "law-abiding, responsible citizens to use arms in defense of hearth and home," *Heller*, 554 U.S. at 635, applies to only one home per person.

Second, the "right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use." *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011); *see also Heller*, 554 U.S. at 617-18. After all, "the core right" to keep and bear arms for self-defense "wouldn't mean much without the training and practice that make it effective." *Ezell*, 651 F.3d at 704. Nor would the operative clause of the Second Amendment further its prefatory clause if "the able-bodied men" who were expected to stand ready to serve in the "well-regulated Militia" were not "trained" in the use of the "arms" that they were required to bring with them when called to service. *Heller*, 554 U.S. at 597-98.

2. History and tradition confirm what the text of the Second Amendment makes clear: The right to keep and bear arms is not confined to the premises. To the contrary, the historical record makes clear that individuals were permitted not only to transport their firearms between residences and places where they would practice and train with them, but to carry loaded firearms upon their persons as they went about

their daily lives. Indeed, much of that history and tradition directly informed *Heller*'s analysis and conclusion that the Second Amendment protects an individual right.

As St. George Tucker explained in his American version of Blackstone's *Commentaries*, "[i]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side." 5 St. George Tucker, *Blackstone's Commentaries*, app. n.B (1803). Indeed, in many parts of early America, the carrying of arms was not only permitted but *mandated* for certain segments of the population. Nicholas J. Johnson, et al., *Firearms Law and the Second Amendment* 106 (2012). Many of the Founding Fathers, including Washington, Jefferson, and Adams, likewise carried firearms and defended the right to do so. *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 137 (D.D.C. 2016). And, as noted, the Second Militia Act of 1792 drew an express link between the keeping of firearms in the home and the transport of those same firearms for use on the training field. In short, "it is unquestionable that the public carrying of firearms was widespread during the Colonial and Founding Eras." *Id.* at 136.

That tradition continued well after the founding. Indeed, many of the authorities this Court surveyed in *Heller* confirm that the Second Amendment was understood both before and after the Civil War to protect a right to carry a loaded firearm upon one's person should the need for self-defense arise. *See, e.g.*, *State v. Chandler*, 5 La. Ann. 489, 490 (1850) ("right

to carry arms … 'in full open view'" is "guaranteed by the Constitution of the United States"); *State v. Reid*, 1 Ala. 612, 616-17 (1840) ("A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional."); *Nunn v. State*, 1 Ga. 243, 251 (1846) (Georgia statute invalid to the extent it "contains a prohibition against bearing arms openly").

At a minimum, both *Heller* and the historical record it surveyed confirm that the right to keep and bear arms is not *confined* to the premises of one's home (let alone to one's principal home). The Court repeatedly discussed historical evidence that the right was understood to extend outside the home. *See, e.g.*, *Heller*, 554 U.S. at 599 (discussing historical importance to founding era of using firearms to hunt); *id.* at 609 (relying on Charles Sumner's famous speech proclaiming that "[t]he rifle has ever been the companion of the pioneer"); *id.* at 614 (noting objections to post-Civil War laws that interfered with ability of black citizens "to kill game for subsistence, and to protect their crops from destruction by birds and animals").

The historical record is likewise replete with sources confirming that the right to keep and bear arms "implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use." *Id.* at 617-18 (quoting Thomas Cooley, *The General Principles of Constitutional Law in the United States of America* 271 (1868)). Indeed, as far back as 1541, Englishmen were entitled "to use and

shoot the same, at a butt or bank of Earth … whereby they and every one of them, by the exercise thereof … may the better aid and assist to the defence of this Realm, when need shall require." 33 Hen. VIII, ch. 6 (1541). As the Crown recognized, possessing arms alone was not enough; those keeping them needed to have some level of familiarity with their use.

That commonsense principle carried over to this side of the Atlantic, where the author of the original New York penal code observed: "No doubt, a citizen who keeps a gun or pistol under judicious precautions, practises in safe places the use of it, and in due time teaches his sons to do the same, exercises his individual right." Benjamin Vaughan Abbott, *Judge and Jury: A Popular Explanation of the Leading Topics in the Law of the Land* 333 (1880); *cf.* Va. Declaration of Rights §13 (1776) (referring to "a well-regulated militia, composed of the body of the people, trained to arms"). That is unsurprising, as few things would more obviously frustrate the exercise of the right to self-defense, the people's interest in a well-regulated militia, and public safety, than to entitle the people to keep and bear arms but then deprive them of the means to hone their safe and effective use.

* * *

Taken together, text, history, and tradition confirm that the right to keep and bear arms is not confined to the premises. To the contrary, the Second Amendment protects a right to carry arms outside the home, and at a minimum to transport them to other places where they may be lawfully used. Those places undoubtedly include second residences and places

where individuals would hone their ability to safely and effectively use them.

2. New York City's restrictive premises-only regime and transport ban are plainly inconsistent with that text, history, and tradition.

As the foregoing confirms, the City's restrictive premises-only license and accompanying transport ban rest on a supposition that is fundamentally incompatible with the text, history, and tradition of the Second Amendment. The Second Amendment does not confer a premises-only right. Nor does it allow the government to proceed on the assumption that once it allows the people to keep arms in the privacy of their homes, it has exhausted the right and possesses plenary power to restrict transport and use outside the home. Yet the City's ban prohibits law-abiding individuals from transporting their lawfully owned handguns—even locked-up, unloaded, and separated from their ammunition—outside the borders of New York City, with the limited exception that they may transport them to a designated hunting area within the state if (but only if) they obtain separate written authorization from the Police Department. Individuals may not transport their handguns to ranges, competitions, or second homes outside the borders of New York City. Even within the city, moreover, individuals may take their handguns nowhere other than seven approved ranges that must serve all 8.5 million of the City's residents. In fact, individuals may not even transport their handguns to a gunsmith for servicing without first obtaining

written permission from the City. *See* 38 R.C.N.Y. §5-22(16).

The City's regime is inescapably based on the view that the rights protected by the Second Amendment, like the City's license, are confined to the home. Indeed, the City has openly acknowledged that the transport ban is designed to help it ensure that individuals will be unable to remove their handguns from their homes except under "the limited circumstances" the City deems permissible. BIO.22. Those "limited circumstances" do not even come close to including all the places where the Second Amendment applies. The transport ban thus conflicts with the most basic guarantees of the Second Amendment, for it treats as a mere privilege, to be granted or denied at the City's pleasure, what the Constitution declares a fundamental right.

Unsurprisingly, there is no historical analog to the City's regime. There is no record of any longstanding tradition of confining firearm rights to the premises or prohibiting the removal of a firearm beyond the curtilage of one's principal residence. When Washington, Jefferson, and Adams extolled the virtues of carrying firearms, they made no mention of any need to leave their firearms behind when they traveled between the seat of government and their personal residences. The Second Militia Act not only permitted, but required, the transport of firearms from the home to the training ground. And while a few jurisdictions required a license to use designated ranges for target practice at the founding, *see Ezell*, 651 F.3d at 705 & n.13, none appears to have had restrictions on transporting a firearm either outside

city limits for target practice or within the city for other purposes. Rather, as explained, individuals historically were freely permitted not just to transport their firearms if they were unloaded and inaccessible, but to carry loaded firearms upon their persons for self-protection as they went about their daily lives. *See supra* pp.23-25. In short, any attempt to characterize the transport ban as the kind of "longstanding prohibition," *Heller*, 554 U.S. at 626, that the people would have understood the Second Amendment to allow is a nonstarter.

Indeed, even today, petitioners are aware of no other jurisdiction *in the entire country* that prohibits law-abiding individuals from taking their lawfully owned handguns outside the jurisdiction. Most states do not confine their residents to "transporting" their firearms, but rather protect their right to carry loaded firearms upon their persons. *See supra* p.7. And most of the handful of states that do not protect the right to carry allow their residents to transport a handgun to any place where it may be kept and carried, so long as it is unloaded and secured during transport. *See supra* pp.7-8. The federal government takes the same approach in the Firearm Owners Protection Act, which protects a firearm owner's ability "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," so long as "the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle." 18 U.S.C. §926A.

As these laws illustrate, even jurisdictions that expressly regulate the transport of lawfully owned firearms generally consider a requirement that a handgun be unloaded and locked-up as exhausting their regulatory authority. And even the exceedingly small number of jurisdictions that restrict both how *and where* a firearm may be transported do not confine the transport of firearms to places within the geographic limitations of the jurisdiction. *See, e.g.*, Haw. Rev. Stat. Ann. §§134-23(a), 134-24(a), 134-25(a), 134-27(a); Md. Code, Crim. Law §4-203.

The City thus stands alone, both historically and presently, in precluding its residents from transporting unloaded, locked-up handguns outside the jurisdiction to places where they may lawfully keep and bear them, like second homes, ranges, and competitions. That is likely because every other jurisdiction recognizes that such a restriction is not even coherent, *see infra* Part I.B.2, but in all events could not plausibly be reconciled with the individual and fundamental right to keep and bear arms for self-defense.

B. The City's Regime Is Unconstitutional Under any Mode of Analysis.

The obvious incompatibility of the City's regime with text of the Second Amendment and the complete absence of any historical (or even modern-day) analog suffice to resolve this case. "*Heller* established that the scope of the Second Amendment right—and thus the constitutionality of gun bans and regulations—is determined by reference to text, history, and tradition." *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1272-73 (D.C. Cir. 2011) (Kavanaugh,

J., dissenting). The transport ban has zero grounding in text, history, and tradition. For that reason alone, it is "not consistent with the Second Amendment individual right." *Id.* at 1285.

The same result would obtain, however, were the Court inclined to subject the ban to any level of meaningful means-end scrutiny. The proper form of means-end analysis should be strict scrutiny, because the right protected by the Second Amendment is fundamental. But at an absolute minimum, government regulations that implicate Second Amendment rights must be subject to *real* intermediate scrutiny, for "[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws." *Heller*, 554 U.S. at 628-29 n.27. In all events, unless the scrutiny applied is heightened in name only, the City's restrictive premises-only regime cannot survive.

1. If means-end scrutiny governs Second Amendment claims, strict scrutiny should apply.

It is black-letter law that "strict judicial scrutiny" applies when a regulation interferes with "fundamental constitutional rights." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973). Indeed, a long line of cases confirms that the government may not infringe on "'fundamental' liberty interests … unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993); *see, e.g.*, *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Zauderer v. Office of*

Disciplinary Counsel, 471 U.S. 626, 651 n.14 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *see also Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting); *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring in the judgment).

The right protected by the Second Amendment is not only individual, but fundamental. That conclusion follows directly from the framers' decision to enshrine the right in the Constitution. But to the extent there were ever any doubt on that score, this Court laid it to rest in *McDonald*. *See* 561 U.S. at 778 (plurality op.) ("[T]he Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."); *id.* at 806 (Thomas, J., concurring in part and concurring in the judgment) ("agree[ing]" that "the right to keep and bear arms … is 'fundamental'"). Accordingly, if means-end scrutiny applies, the applicable level of scrutiny must be strict.

Subjecting laws that burden the right protected by the Second Amendment to lesser scrutiny than those that burden other fundamental rights would be tantamount to imposing "a hierarchy of constitutional values" by judicial fiat. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982). This Court has already squarely refused "to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald*, 561 U.S. at 780 (plurality op.). For good reason: "To view a particular provision

of the Bill of Rights with disfavor … is to disrespect the Constitution." *Ullmann v. United States*, 350 U.S. 422, 428-29 (1956).

That said, the City's policy could not survive *any* meaningful form of heightened scrutiny, whether strict or intermediate. Under both strict and intermediate scrutiny, a court must assess both the strength of the government's interest and "the fit between the stated governmental objective and the means selected to achieve that objective." *McCutcheon v. FEC*, 572 U.S. 185, 199 (2014) (plurality op.). And even under intermediate scrutiny, the government must prove that its law is "narrowly tailored to serve a significant governmental interest." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (quoting *McCullen v. Coakley*, 573 U.S. 464, 486 (2014)). In other words, the question is not just whether the means advance the government's stated end, but whether they do so in a way that "avoid[s] unnecessary abridgement" of constitutional rights. *McCutcheon*, 572 U.S. at 199. And both strict and intermediate scrutiny "place[] the burden of establishing the required fit"—which is to say the burden of proving narrow tailoring—"squarely upon the government." *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (citing *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480-81 (1989)).

2. The City cannot begin to carry its burden of demonstrating narrow tailoring.

The City claims that its restrictive premises-only license and accompanying transport ban promote public safety and crime prevention. Pet.App.25-26.

Those are undoubtedly substantial interests. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 435 (2002) (opinion of O'Connor, J.). But no matter how important its asserted interest may be, the City may "pursue that interest only so long as it does not unnecessarily infringe an individual's" Second Amendment rights. *McCutcheon*, 572 U.S. at 206 (plurality op.). And courts may "not truncate this tailoring test" based on their perception that the interest imprecisely pursued is very important. *Id.*

The first problem is that the City's principal justification for its policy is at fundamental odds with the Second Amendment. According to the City, the ban furthers public safety because it better enables the City to ensure that individuals remove their handguns from their homes only under "the limited circumstances" of the City's choosing. BIO.22. As explained, however, the right to keep and bear arms is not confined to the home. *See supra* Part I.A.1. Thus, even if the City could demonstrate that confining handguns to the home furthers public safety, it could not enact laws with the objective of furthering that end, because that is a policy choice that "the enshrinement of" the right to keep and bear arms "necessarily takes … off the table." *Heller*, 554 U.S. at 636. The City cannot justify the transport ban on the ground that it aids the City's efforts to achieve a policy preference that is directly contrary to the views of the framers who enshrined a right to keep *and bear* arms in the Second Amendment without ever suggesting that the right is enjoyed on the premises and nowhere else. *Compare* U.S. Const. amend. III (prohibiting unauthorized quartering of soldiers "in any house");

U.S. Const. amend. IV (distinctly protecting security of, *inter alia*, "houses").

The problems with the narrow tailoring of the City's approach hardly end there. In scrutinizing the fit between the City's stated ends and its chosen means, it is important to take stock of the broader regulatory regime. Before New York City residents may possess a handgun in the home, they must obtain a license from the City, which requires them to pass multiple background checks, satisfy City officials that the statements on their license applications are truthful, and establish that they are extraordinarily law-abiding. *See* 38 R.C.N.Y. §1-03(d). After obtaining that "premises license," individuals remain precluded from carrying their handguns on their persons outside the home, either openly or concealed. *See Kachalsky*, 701 F.3d at 87. Instead, individuals may remove their handguns from their homes only if they are "unloaded, in a locked container, the ammunition to be carried separately." 38 R.C.N.Y. §5-23(a)(3). And on top of all that, the City imposes the additional and novel restriction that a licensee may only "transport her/his handgun(s) directly to and from an authorized small arms range/shooting club," *id.*, thereby precluding law-abiding residents from taking their handguns to second homes, out-of-city ranges or competitions, or anywhere else inside or outside of the city or state.

"This 'prophylaxis-upon-prophylaxis approach' requires that [the Court] be particularly diligent in scrutinizing the law's fit." *McCutcheon*, 572 U.S. at 221. So does the fact that the City stands alone in taking that approach. "[I]t would be hard to

persuasively say that the government has an interest sufficiently weighty to justify a regulation that infringes constitutionally guaranteed Second Amendment rights if the Federal Government and the states have not traditionally imposed—and even now do not commonly impose—such a regulation." *Heller II*, 670 F.3d at 1294 (Kavanaugh, J., dissenting). As explained, *see supra* Part I.A.2, that is precisely the case here: The City stands alone in prohibiting its residents from transporting unloaded, locked-up handguns even to second homes, ranges, or competitions outside the jurisdiction.

The complete absence of other jurisdictions following New York City's lead is truly remarkable. One does not have to accept the *New Yorker*'s cartography to understand the outsized influence that the policy prescriptions of the Nation's largest city can have on other jurisdictions. It would be comforting to think that the absence of comparable restrictions reflects other jurisdictions' greater respect for Second Amendment rights, but that supposition is belied by continuing efforts to ban handguns, *see Jackson v. City & Cty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014), and confiscate long-legal firearms, *see Guns Save Life, Inc. v. Village of Deerfield*, No. 18CH498 (Ill. Ct. Cl. June 12, 2018). Instead, the most logical explanation for why the City stands alone is that its policy does not meaningfully advance its stated interests. In fact, in many respects it runs directly contrary to those interests, for it ensures both the presence of unattended handguns in vacant residences and the transport of handguns across the city to inconvenient ranges when a quick trip across the Hudson would suffice.

The only "evidence" the City has ever mustered to support the tailoring of its policy is an affidavit from a former commander of the state licensing division hypothesizing, with no evidentiary support whatsoever, that the mere presence of a handgun—even unloaded, secured in a pistol case, separated from its ammunition, and stowed in the trunk of the car—might pose a public-safety risk in "road rage" or other "stressful" situations. Pet.App.26-28. That rank speculation, unsupported by even an anecdote, does not begin to carry the City's burden of proving that the ban actually furthers any public-safety interest, let alone that it does not "burden substantially more [protected conduct] than is necessary." *McCullen*, 573 U.S. at 486; *see United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 822 (2000) ("the Government must present more than anecdote and supposition").

Worse still, even if the City's speculation had some grounding, it is not clear that its policy actually reduces the number of unloaded handguns in trunks of automobiles on city streets, because its policy forces residents to use a training facility across town, rather than crossing a bridge or tunnel and getting the handgun out of the city. Thus, to the extent the transport ban rests on the notion that spending time on city streets with an unloaded, locked-up handgun in tow is itself a public-safety risk, it cannot survive either strict or intermediate scrutiny, as a law that affirmatively undermines the government's stated interest is manifestly not "narrowly tailored." *Packingham*, 137 S. Ct. at 1736. And the ban makes even less sense (if possible) as applied to confining a handgun to the premises in lieu of its transportation to a second home, as it has the perverse effect of

forcing people to leave their handguns in their vacant residences whenever they leave the city. The City has never even tried to explain how the transport of unloaded, locked-up handguns on their way out of the city poses a greater public-safety risk than increasing the number of unattended handguns in vacant city residences.

The City has suggested that its transport ban "improves the City's ability *to monitor and enforce* the limited circumstances under which premises licensees can possess a handgun in public," because it is easier to tell if someone is in unlawful possession of a handgun if there are only a very small number of places that he may take his handgun. BIO.22 (emphasis added). That argument not only adds prophylaxis upon prophylaxis, but would make the restriction of a constitutional right the justification for further restrictions on the constitutional right. That gets the whole notion of textually protected rights and narrow tailoring exactly backward. It undoubtedly would be easier for the government to prohibit obscenity if no one could engage in any speech that touched on the subject of sex. It would be easier still if no one could publish anything without prior government approval. But each of those policies would be obviously unconstitutional, because when the government regulates constitutionally protected activity, over-inclusiveness is a vice, not a virtue. When it comes to Second Amendment rights, no less than other fundamental rights enshrined in the Constitution, the government must regulate in the most narrowly tailored manner, or not at all.

C. The Second Circuit Failed to Conduct the Meaningful Scrutiny that this Court's Cases Require.

Given the weakness of the City's justification, the most remarkable aspect of the Second Circuit's analysis is that it credited that justification while purporting to apply heightened scrutiny. Unfortunately, the Second Circuit's approach is all too typical of lower courts that apply heightened scrutiny in name only when it comes to the Second Amendment. That approach contradicts this Court's teaching in *McDonald* that the Second Amendment is not some weak sibling of the other rights protected in the Bill of Rights, but a full-fledged fundamental right. And, if uncorrected, this rights-diluting version of heightened scrutiny threatens *all* fundamental rights when applied by courts that place less importance on the underlying right than the First Congress and the people did in fashioning and ratifying the Bill of Rights.

1. Like many lower courts, when analyzing Second Amendment challenges, the Second Circuit "uses what might be called a tripartite binary test with a sliding scale and a reasonable fit." *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1117 (S.D. Cal. 2017), *aff'd*, 742 F. App'x 218 (9th Cir. 2018). The court first asks whether the challenged law "impinges upon conduct protected by the Second Amendment." Pet.App.9-10. If it does, then the court "next determine[s]," and finally "appl[ies,] the appropriate level of scrutiny." Pet.App.10. This convoluted analysis bears no resemblance to the heightened scrutiny applied to laws infringing other fundamental

rights, and its multi-step process appears tailor-made to dilute Second Amendment protections at every step.

Even assuming the court finds that the Second Amendment is implicated at step one, that finding does not necessarily trigger either strict *or even intermediate* scrutiny. Instead, in the Second Circuit, "[l]aws that neither implicate the core protections of the Second Amendment nor substantially burden their exercise do not receive heightened scrutiny." Pet.App.11. Each inquiry is dilutive of the right. The search for a core guarantees that some Second Amendment rights deemed insufficiently "core" will be unprotected. The quest for a "substantial burden[]" means laws that do not "amount[] to a ban (either explicit or functional)" escape meaningful review. Pet.App.17. If a law burdens—but does not "ban"—conduct that is protected by the Second Amendment—but is not at its purported "core"—then the Second Circuit will subject it to only rational-basis review. *But see Heller*, 554 U.S. at 628-29 n.27.

As the Second Circuit made clear in this case, it will not apply *strict* scrutiny unless both requirements are satisfied—*i.e.*, a law "substantially burdens" (*i.e.*, effectively bans) a right at the "core" of the Second Amendment. Pet.App.12 ("Even where heightened scrutiny is triggered by a substantial burden, however, strict scrutiny may not be required if that burden 'does not constrain the Amendment's "core" area of protection.'"). In practice, that means that the Second Circuit will not apply strict scrutiny to any law that is not materially identical to the laws struck down in *Heller* and *McDonald*. All other laws, even if they substantially burden a fundamental right or trench

near the core of the right, are subject (at most) to a version of intermediate scrutiny that approves the intrusion as long as "the defendants produce evidence that fairly supports their rationale." Pet.App.25.

2. That reasoning is wrong at every turn. First, and most fundamentally, strict scrutiny applies whenever the government interferes with a fundamental right, as a host of this Court's cases confirm. *See supra* pp.30-31. Strict scrutiny is not reserved for laws that intrude on "the core" of a constitutional right so substantially that they "amount[] to a ban (either explicit or functional)." Pet.App.17. As this Court's decision in *Heller* attests, laws that outright ban activity protected by the Constitution—whether at the "core" of the right or otherwise—need not be subjected to *any* formal scrutiny analysis because the government plainly cannot flatly prohibit what the Constitution protects. *See United States v. Stevens*, 559 U.S. 460, 470 (2010) ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits."). Such laws flunk any meaningful level of constitutional scrutiny. Thus, by limiting strict scrutiny to laws that substantially burden core constitutional rights, the Second Circuit cleverly manages to limit strict scrutiny to violations so obvious that no level of scrutiny is necessary (and that would be directly controlled by *Heller* and *McDonald* in any event). In short, while purporting to apply the strictest of scrutiny to certain Second Amendment violations, the Second Circuit has effectively held that strict scrutiny will never apply in any case that matters.

Of course, the whole notion that the Second Amendment has a "core" and a "periphery" is misguided. The provisions of the Bill of Rights protect what they protect; they do not have cores that really matter and lukewarm peripheries that may be discounted. The Fifth Amendment, for example, does not provide "core" protection against self-incrimination and merely peripheral protection for double-jeopardy violations. In reality, the notion of "core" rights is just an artificial construct designed to dilute Second Amendment rights. It uses a formulation that sounds especially protective of the "core" to essentially guarantee that aspects of the right deemed non-core are under-protected. Worse still, since the constitutional text provides no mechanism for determining what aspects of the right it textually protects are core or peripheral, this methodology provides a convenient excuse for judges to substitute their preferences for those of the framers. That was on full display in the decision below, which rejected the notion that training for effective use of firearms for self-defense is within the "core" of the Second Amendment. Pet.App.16. There is ample historical evidence to the contrary, *see supra* pp.25-26, and nothing in the Second Amendment's text to justify assigning this aspect of the right to the periphery.

To the extent the Second Circuit tried to tether its concept of "core" rights to *Heller*, that effort is unavailing. The Second Circuit read *Heller* as holding that "the 'core' protection of the Second Amendment" is confined to the "the right to keep and use firearms in self-defense *in the home*." Pet.App.17 (emphasis added). In reality, *Heller* held that the Second Amendment "guarantee[s] the individual right to

possess and carry weapons in case of confrontation." 554 U.S. at 592. Cases of confrontation are hardly limited to the gun owner's own premises, and nowhere in *Heller* did the Court even hint at the notion that this individual right may be exercised only in the home. To the contrary, at every step in its analysis, the Court emphasized how text, history, and tradition confirm that the Second Amendment protects a right to keep and bear arms for self-defense—full stop. *See, e.g.*, *id.* ("Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation."); *id.* at 603 ("state constitutional provisions … protect[ed] an individual right to use arms for self-defense"); *id.* at 616 ("It was plainly the understanding in the post-Civil War Congress that the Second Amendment protected an individual right to use arms for self-defense.").

Indeed, in the entirety of its nearly-50-page analysis of the scope of the right (as opposed to its application of the constitutional principles it announced to the particular restrictions at hand), the Court referred to the "home" or "homestead" a grand total of three times, in each instance quoting a historical source that recognized a right to keep and bear arms to defend *both* one's home *and* one's person and family. *See id.* at 615-16, 625. And many of the historical sources on which the Court relied in that analysis expressly recognized a right to bear arms outside the home. *See supra* pp.24-25. The Court also made a point of noting that "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" are "presumptively lawful," *id.* at 626 & 627 n.26—a caveat that would be

inexplicable if the only laws that even implicate the Second Amendment were laws that "substantially burden" the "right to keep and use firearms in self-defense *in the home*," Pet.App.17 (emphasis added). The notion that *Heller* limited the Second Amendment to some judicially delimited core, let alone identified the premises as the extent of that core, simply has no grounding in *Heller*.

The problems with the Second Circuit's test run deeper still. First, by reserving heightened scrutiny for laws that "substantially burden" Second Amendment rights, the Second Circuit impermissibly flips the burden of proof against the challenger. Under heightened scrutiny, once the challenger shows an interference with a fundamental right, the burden of proof shifts to the government to show that its law does not "burden substantially more [protected conduct] than is necessary to further the government's legitimate interests." *McCullen*, 573 U.S. at 486. The Second Circuit, by contrast, requires *the challengers* to prove that a law "substantially encumbers their core rights." Pet.App.25 n.12. Making matters worse, the court then treats as "substantial" only those burdens that amount to an "explicit or functional" ban. Pet.App.17. Everything short of a functional ban is relegated to rational-basis review.

3. Only through the combination of all these errors did the Second Circuit manage to reach the remarkable conclusion that the transport ban "impose[s] at most trivial limitations" on Second Amendment rights. Pet.App.13. As for the prohibition on transporting a handgun to one's second home, the court faulted petitioners for failing to prove

that "the costs … associated with obtaining a premises license for" a second home, and/or of "acquiring a second gun to keep at that location, would be so high as to be exclusionary or prohibitive." Pet.App.15. Absent the Second Circuit's misguided reservation of heightened scrutiny for functional bans, this question is not even relevant, let alone petitioners' burden to prove.

Moreover, the burdens imposed by the City's policy are hardly trivial. As the court itself noted, the City charges $340 for a premises license fee, *see Kwong*, 723 F.3d at 168 (upholding City's fee after assuming, without deciding, that it was at least subject to intermediate scrutiny), and that is on top of the hundreds of dollars in costs for a second handgun. It is hard to imagine the Second Circuit describing a special $500 charge for obtaining an abortion outside the city as an "insignificant and indirect cost[]" on the exercise of a fundamental right. Pet.App.29; *cf. Bynum v. Conn. Comm'n on Forfeited Rights*, 410 F.2d 173 (2d Cir. 1969) (reversing decision rejecting First Amendment challenge to $5 fee to reinstate felon's right to vote); *see also Yoder v. Wisconsin*, 406 U.S. 205 (1972) (treating $5 fine for non-compliance as substantial burden on religious exercise). And even if someone can afford both a second handgun and a second premises license, there is no serious question that the City's regime precludes entirely the use of the handgun with which someone is most familiar for self-defense in his second home. Forcing city residents to use a different weapon for self-defense while in a second home is no "trivial" inconvenience, Pet.App.13; it may be a matter of life and death.

As for the prohibition on transporting a handgun to out-of-state ranges and competitions, the court concluded that any hypothetical burden on "non-core" Second Amendment rights (which it would only assume *arguendo*) is minimal because petitioners have two outlets to hone their skills: in-city ranges or "utilizing gun ranges or attending competitions outside New York City" with "rented or borrowed" firearms. Pet.App.22. As for the former, the question the court should have asked is whether the City could prove the dubious proposition that seven ranges are sufficient to accommodate the demand of a city of 8.5 million people. *But cf. Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2316 (2016) (noting district court's conclusion that "the proposition that … seven or eight providers could meet the demand of the entire State stretches credulity"). As for the latter, setting aside the problem that the City supplied no evidence that "rented or borrowed firearms" are even available, the notion that practicing with a "rented or borrowed" firearm is an adequate substitute for practicing with the firearm that one would actually use for self-defense should the need arise could be advanced only by a jurisdiction that does not take seriously this Court's holding that the right to keep and bear arms for self-defense is a fundamental constitutional right.

* * *

Unfortunately, while the transport ban may be an outlier, the reasoning the Second Circuit employed to uphold it is not. *See Silvester v. Becerra*, 138 S. Ct. 945, 951 (2018) (Thomas, J., dissenting from the denial of certiorari). Accordingly, even if the Court

does not find it necessary to establish a comprehensive test for analyzing Second Amendment claims in this case, the Court should at the very least take the opportunity to admonish lower courts that when *Heller* ruled out rational-basis scrutiny, it likewise ruled out watered-down forms of scrutiny that systematically discount the burden on Second Amendment rights and ultimately reduce to a "judge-empowering 'interest-balancing inquiry.'" *Heller*, 554 U.S. at 634.

II. The City's Restriction Of Licensees To In-City Ranges And Related Transport Ban Violate The Commerce Clause.

This Court has long held that the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders," *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989), and imposes strict limitations on states' power "to discriminate against interstate commerce," *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992). These restrictions apply to states and political subdivisions alike. *Maine v. Taylor*, 477 U.S. 131, 151 (1986). By limiting residents to in-city ranges and precluding the lawful use of their handguns outside city limits, the City's regime transgresses both limitations. The Second Circuit's contrary conclusion cannot be reconciled with this Court's cases or with basic common sense.

A. The City Impermissibly Prevents, and thus Controls, Commerce Outside New York.

In light of the framers' "special concern both with the maintenance of a national economic union

unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres," both the Commerce Clause and the basic federalist structure of our Constitution protect against "the projection of one state regulatory regime into the jurisdiction of another State." *Healy*, 491 U.S. at 335-37 (footnote omitted). To that end, states are prohibited from enforcing laws that "control[] commerce occurring wholly outside [their] boundaries." *Id.* at 336. New York City's ban on transporting lawfully owned handguns outside city limits plainly violates that proscription.[1]

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[1] While the Court has typically identified the restriction on extraterritorial regulation as a Commerce Clause limitation, in reality, the restriction is implicit in our federalist structure and reflects basic principles of representational government and due process. *See, e.g.*, *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality op.) ("[T]he federal balance … posits that each State has a sovereignty that is not subject to unlawful intrusion by other States."); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996) ("[O]ne State's power … is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States."); *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977) ("[A]ny attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power."). The framers' vision of a union of states, each with its distinct residual sovereignty, could not long survive if states were free to regulate conduct occurring in sister states, whether properly classified as "commerce" or not—particularly given that states surrendered the kind of "foreign policy" tools necessary to respond to such efforts when they joined the union. It is thus no surprise that even dormant Commerce Clause skeptics have accepted that the Constitution forbids this kind of extraterritorial regulation. *See, e.g.*, *MeadWestvaco Corp. ex rel. Mead Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 33 (2008) (Thomas, J., concurring).

There is little doubt that the City's prohibition implicates commerce, both inside and outside the city. Paying a range fee to practice with one's handgun, or paying the membership fee to join a range, is plainly commerce, as is paying the entrance fee to participate in a target-shooting competition. By strictly limiting license-holders to seven in-city ranges, the City not only strictly limits commerce within the city, but prohibits commerce outside the city—and it is long settled that the prohibition of commerce is a form of regulation. *See Champion v. Ames* (*Lottery Case*), 188 U.S. 321 (1903). It should therefore come as no surprise that the City itself has conceded that its ban "could be said to control" out-of-state commerce by depriving New Yorkers of "the ability to patronize a shooting range outside the City with" their own handguns. BIO.24.[2]

In a case involving any other form of commerce, that concession would be fatal. If New York City sought to limit its automobile owners to in-city repair garages, or its golf club owners to in-city driving ranges, it would be obviously interfering with the flow

[2] It is of no moment that the extraterritorial effect of the City's regime is not explicit on the face of the regulations. There is no practical difference between a regulation limiting license-holders to seven in-city ranges and a regulation limiting them to the same seven in-city ranges *and* expressly prohibiting the use of the licensed firearm at any other ranges whether inside or outside the state. The latter prohibition is already implicit in the former restriction, and making it explicit changes nothing practically or legally. *See, e.g.*, *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 583 (1986) (the fact that a New York law "is addressed" on its face "only to" conduct "in New York is irrelevant if the 'practical effect' of the law is to control" commercial activity "in other States").

of interstate commerce and impermissibly regulating (in the form of a prohibition) commerce outside the city and the state. And where the practical effect of a state or local law is to "directly regulate[]" commerce in other states, courts do not balance the strength of "the [enacting] State's interest" against the law's incursion on interstate commerce. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986). They simply "str[ike] down" such laws "without further inquiry." *Id.*[3]

According to the City, however, this is not an ordinary case because it involves guns, not automobiles or golf clubs. The City has consistently argued that firearm-related commerce is not subject to the same Commerce Clause constraints as other commerce because firearms are dangerous. Even setting aside the obvious Second Amendment problems with subjecting to uniquely disfavored treatment an article of commerce that is affirmatively protected by the Constitution, that argument only highlights the impermissibly extraterritorial nature of the City's regulation. The perceived dangerousness of an article or form of commerce may explain why a state or local government wants to regulate it, but it does not justify regulation beyond the jurisdiction's borders. The fact that cars are dangerous does not allow California to prescribe the speed limit in Oregon.

Thus, even if (contrary to fact) transporting lawfully owned and lawfully registered handguns,

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[3] Hence, there is a "long line of cases holding that states violate the Commerce Clause by regulating or controlling commerce occurring wholly outside their own borders." *Dean Foods Co. v. Brancel*, 187 F.3d 609, 615 (7th Cir. 1999).

unloaded and locked in containers separate from ammunition, posed a genuine public-safety risk, and even if (contrary to fact) forcing residents to patronize cross-town rather than cross-the-nearest-bridge-or-tunnel ranges reduced the amount of such transportation, that *still* would not justify a law that had the practical effect of preventing (and thus controlling) commerce in other states. And here, the City cannot meaningfully dispute that the transport ban has that inevitable effect. After all, the uncontested facts are that the only thing stopping petitioners from paying to use ranges and enter competitions in neighboring states is the ban on transporting their lawfully owned handguns outside city limits. *See* JA53-54 ¶¶11, 13; JA57 ¶¶9-10; JA60-61 ¶¶9-10. Under a straightforward application of this Court's cases, then, the transport ban "exceeds the inherent limits" of the City's authority under our constitutional system. *Healy*, 491 U.S. at 336; *see Shaffer v. Heitner*, 433 U.S. 186, 197 (1977).

B. The City Discriminates Against Interstate Commerce by Limiting Licensees to In-City Ranges.

The City's ban not only impermissibly prohibits and regulates activity outside the city; it impermissibly discriminates in favor of in-city ranges and against interstate commerce. This Court has made clear that "local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 394 (1994). The City's

limitation of licensees to seven in-city ranges does just that.

Once again, this would all be obvious if the City purported to limit car-owners to in-city mechanics or restrict its residents to in-city driving ranges or tennis courts. The situation is no different when it comes to licensed handguns. The City forbids law-abiding individuals like petitioners from transporting their lawfully acquired, lawfully possessed handguns to firing ranges in another state, even when an out-of-state range is more convenient and closer than any range in the city. Moreover, while the City does allow residents to take their handguns outside city limits to hunt in certain areas designated by the state if they obtain an additional hunting authorization, they are still prohibited from transporting their handguns to hunt—or for any other purpose—*out of state*. Pet.App.88. In short, the City asserts a right to treat the city (not just Manhattan) as an island and limit its residents to patronizing ranges within city limits. It is hard to imagine a law that more directly promotes economic balkanization and favors local businesses.

The Second Circuit nonetheless concluded that the transport ban is not discriminatory because "it does not prohibit a premises licensee from patronizing an out-of-state firing range or going to out-of-state shooting competitions." Pet.App.31. As with the Second Circuit's comparable effort to limit violations of the Second Amendment to functional bans, this effort to dilute the Commerce Clause is profoundly mistaken. The Commerce Clause does more than prevent states and localities from banning the use of out-of-state facilities; it prohibits discrimination

against interstate commerce.[4] And when it comes to commercial activities where participants prefer to use their own equipment, precluding that possibility except at facilities within the jurisdiction is blatant discrimination against interstate commerce.

That is particularly true when it comes to firearms. While prohibiting individuals from golfing with their own clubs or using their own tennis racquets would have real commercial impact, training with one's own firearm is far more critical. One who acquires a handgun and a premises license wants—and has a constitutional right—to be able to use *that firearm* proficiently in the unfortunate event that defending hearth or home becomes necessary. License-holders like petitioners thus consume range services and engage in shooting competitions not simply to "patronize" a recreational establishment, Pet.App.31, but to develop and maintain proficiency with the *same weapon* they will use to protect their homes. *Cf. Ezell*, 651 F.3d at 704.

Yet the City "deprive[s] [residents of New York City] of their right to have access to the markets of other States on equal terms." *Granholm v. Heald*, 544 U.S. 460, 473 (2005). And it does so even though it is indisputable that many (if not most) city residents

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[4] Despite this Court's admonition that "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter," *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994), the Second Circuit nonetheless suggested that the transport ban may not even be discriminatory, and once again only "assume[d] for the sake of argument" that the ban was sufficiently "discriminatory … to raise a substantial" question under the Commerce Clause. Pet.App.32.

could more efficiently engage in the relevant commerce outside city limits. Moreover, it favors in-city ranges and commerce explicitly by limiting the universe of authorized ranges to seven in-city ranges. That sort of "economic Balkanization" is precisely what the Commerce Clause is intended to avoid. *See Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

The City insists that any economic protectionism its policy exhibits is incidental and unintentional—*i.e.*, that the law is driven by public-safety concerns, not an interest in favoring local ranges. But having a discriminatory purpose is only one way to violate the Commerce Clause. A law that is facially discriminatory or has discriminatory effects is unconstitutional whether or not it also was the product of a discriminatory purpose. *See United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). And here, there is simply no denying that the City's regime is discriminatory on its face and in its effects: Only the seven within-city ranges are "authorized," and use of the licensee's handgun at any other range is prohibited.

The City has never been forced to justify its discrimination, and it could not even begin to "demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *C & A Carbone*, 511 U.S. at 392; *see Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951) (striking down statute requiring that all milk sold within jurisdiction be pasteurized within jurisdiction after challenge from distributor who wished to pasteurize elsewhere). The fact that no other jurisdiction has adopted such a

discriminatory policy, and the problem that it is not clear how the City's policy even reduces the intra-city transport of handguns, suffice to make clear that the City has no prospect of surviving any form of "rigorous scrutiny."

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The City's interrelated efforts to limit license-holders to seven in-city ranges and to prohibit virtually all other uses of licensed handguns even outside the jurisdiction violate two established precepts of this Court's Commerce Clause cases. The City's regime simultaneously regulates extraterritorially and discriminates against interstate commerce. But the City's regime suffers an even more basic flaw that renders it fundamentally incompatible with the Commerce Clause and foundational principles of federalism and liberty. The City takes an indisputable article of interstate commerce and directs its residents that if they are to possess that article for its intended and constitutionally protected use, they must not only obtain a license, but agree to keep that article forever within the city and outside the stream of interstate commerce. There is no precedent for such a policy, because it is antithetical to the basic judgments underlying the Constitution.

III. The City's Regime Violates The Right To Travel.

Given the evident conflict between the City's effort to restrict a lawfully purchased handgun to the premises and a handful of in-city ranges and the integrated national republic that the Constitution establishes, it is hardly surprising that the City's ban runs afoul of another postulate of our constitutional

system. The "freedom to travel … has long been recognized as a basic right under the Constitution." *United States v. Guest*, 383 U.S. 745, 758 (1966). Although the right "finds no explicit mention in the Constitution," it is "a necessary concomitant of the [new] stronger Union the Constitution created." *Id.*; *see Smith v. Turner* (*Passenger Cases*), 48 U.S. 283, 492 (1849) (Taney, C.J., dissenting) ("We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."). That right is not limited to the mere physical ability to leave one state and enter another. The fundamental right to travel guarantees that "a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the 'Privileges and Immunities of Citizens in the several States' that he visits." *Saenz v. Roe*, 526 U.S. 489, 501 (1999) (quoting U.S. Const. Art. IV, §2, cl. 1).

A law "implicates the right to travel when it actually deters [interstate] travel" or "when it uses 'any classification which serves to penalize the exercise of that right.'" *Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 340 (1972)). There can be no doubt that New York City's transport ban "actually deters" travel. Petitioners would travel out of the city and state to patronize firing ranges and participate in shooting competitions but for the ban. *See* JA53-54 ¶¶11, 13; JA57 ¶¶9-10; JA60-61 ¶¶9-10. The transport ban is thus the only thing standing between petitioners and participating in a shooting competition in New Jersey, practicing at a licensed

shooting range in Connecticut, or traveling to a second residence with their licensed handguns.

The transport ban accordingly forces petitioners to choose which constitutional right they would rather exercise: their right to travel or their right to keep and bear arms. If petitioners attempt to exercise both of these rights at the same time—by, say, taking their lawfully owned handguns from their residences to a firing range in Jersey City or a competition in Stamford—they run the risk of having their licenses revoked, which would completely deprive them of their Second Amendment rights. That should be the end of the inquiry, as "[i]t has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution." *Dunn*, 405 U.S. at 341 (quoting *Harman v. Forssenius*, 380 U.S. 528, 540 (1965)).

The City nonetheless has maintained (and the Second Circuit accepted) that the right to travel is not even *implicated*, let alone violated, here because the "Constitution protects the right to travel, not the right to travel armed." Pet.App.35. That misses the point. A law that prohibited citizens from leaving their residences with their cell phones would deter interstate travel, even if the citizen could rent an iPhone at the terminus of his or her journey. The fact that the City grounds handguns instead of cell phones does not change the analysis, especially given that the former enjoy greater constitutional protection. The question remains whether the City has "shown" that the transport ban (a restriction on the fundamental right to travel) is "necessary to promote a compelling governmental interest." *Shapiro*, 394 U.S. at 634.

Once again, the City has never been forced to make that showing and could not possibly make it. Even accepting the City's safety concerns for purposes of argument, the City's purported interests would seem to be affirmatively promoted by getting the supposedly dangerous handguns out of the jurisdiction. And, of course, once they are out of the jurisdiction, the possession and transport of firearms become the proper concern of the jurisdiction where the city resident is traveling. In short, the City's unique "don't-leave-home-with-it" policy cannot help but interfere with the right to travel and cannot begin to be justified.

CONCLUSION

For the foregoing reasons, the Court should reverse.

Respectfully submitted,

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