

**SUPREME COURT
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

NEW YORK STATE RIFLE & PISTOL)
ASSOCIATION, INC., ET AL.,)
 Petitioners,)
 v.) No. 18-280
CITY OF NEW YORK, NEW YORK, ET AL.,)
 Respondents.)

Pages: 1 through 72
Place: Washington, D.C.
Date: December 2, 2019

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**Duke Center for Firearms Law
Annotated Transcript**



**DUKE CENTER
FOR FIREARMS LAW**

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4 ASSOCIATION, INC., ET AL.,)

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7 CITY OF NEW YORK, NEW YORK, ET AL.,)

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10 Washington, D.C.

11 Monday, December 2, 2019

12

13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:05 a.m.

16

17 APPEARANCES:

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19 on behalf of the Petitioners.

20 JEFFREY B. WALL, Principal Deputy Solicitor

21 General, Department of Justice, Washington, D.C.;

22 for the United States, as amicus curiae,

23 supporting the Petitioners.

24 RICHARD P. DEARING, ESQ., New York, New York;

25 on behalf of the Respondents.

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1 text of the Second Amendment protects rights to
2 keep and bear arms. That latter right makes
3 clear that the Second Amendment protects rights
4 that are not strictly limited to the premises.

5 And there is no historical analogue
6 for the city's prohibition on transporting
7 firearms to places where they may be lawfully
8 used. To the contrary, the second Congress
9 required the militia to take their own firearms
10 from their homes to the training ground.

11 And the regulations on limiting where
12 firearms may be discharged or where training may
13 occur that the city invokes both underscore that
14 the general rule was that firearms could be
15 safely transported between and among places
16 where they could be used and discharged. This
17 Court recognized as much in Heller, both by
18 recognizing the long history of handgun
19 possession outside the home and by recognizing
20 the government's interest in limiting possession
21 in sensitive places, not every place outside the
22 home.

23 The city, of course, has struggled
24 mightily ever since this Court granted
25 certiorari to make this case go away, but those

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Author: Jake Charles Subject: Sticky Note Date: 12/9/2019 8:18:43 AM
Here and in the briefing, Clement focused on a right to bear, but this case originated as a "keep" case--and what adjuncts to the right to keep are constitutionally required.

Author: Joseph Blocher Subject: Sticky Note Date: 12/10/2019 12:31:16 PM
Whether the militia acts' affirmative requirements - which were, after all, a kind of gun regulation - can be used as guidance for a broader right is a tough question.

Author: Joseph Blocher Subject: Sticky Note Date: 12/10/2019 12:31:25 PM
Historian Patrick Charles filed a useful brief on this point: https://www.supremecourt.gov/DocketPDF/18/18-280/99640/20190514123434398_Charles%20Brief.pdf.

1 efforts are unavailing and only underscore their
2 continuing view that the transport of firearms
3 is a matter of municipal grace rather than
4 constitutional right. The standard for
5 mootness --

6 JUSTICE GINSBURG: But, Mr. -- Mr.
7 Clement, the city has now been blocked by a
8 state law, and the state has not been party to
9 these proceedings. The state says: City, thou
10 shalt not enforce the regulations. So what's
11 left of this case? The Petitioners have gotten
12 all the relief that they sought. They can carry
13 a gun to a second home. They can carry it to a
14 fire -- to a practice range out of state.

15 MR. CLEMENT: So, Justice Ginsburg,
16 the Petitioners have not gotten all the relief
17 to which they've been entitled if they prevailed
18 in this litigation before the city and the state
19 changed their law.

20 I think the best way to illustrate
21 that is if we prevailed in the district court
22 before these changes in the law, we would have
23 been entitled, of course, to a declaration that
24 the transport ban is and always was
25 unconstitutional.

1 But we would also be entitled to an
2 injunction that did three things: one, prohibit
3 future enforcement of the transport ban; second,
4 prevent the city from taking past conduct in
5 violation of the ban into account in licensing
6 decisions; and, third, an injunction that
7 safeguard our right to transport meaningfully
8 such that it wouldn't be limited to continuous
9 and uninterrupted transport.

10 JUSTICE GINSBURG: But even as --

11 MR. CLEMENT: Now the state law --

12 JUSTICE GINSBURG: -- as far as what
13 you said about enforcing past violations, no
14 plaintiff has alleged that they ever violated
15 the regulations when they were in effect?

16 MR. CLEMENT: That's actually not
17 correct, Justice Ginsburg. If you look at
18 paragraphs 12, 15, and 17 of the complaint, at
19 pages 28 and 29 of the Joint Appendix, all three
20 of the individual Petitioners allege that they
21 regularly went outside the City of New York to
22 firing ranges in -- outside -- Westchester,
23 basically, and in New Jersey.

24 So all three of my clients are on the
25 record as saying that, in the past, they engaged

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Author: Joseph Blocher Subject: Sticky Note Date: 12/10/2019 9:43:10 AM
Chief Justice Roberts' questions (pgs. 40-41) focused on this point.

Author: Jake Charles Subject: Sticky Note Date: 12/9/2019 8:21:51 AM
After the City's representations later in argument, it seems most of these concerns are answered, except perhaps to the continuous and uninterrupted portion (though, as that later questioning suggests, it's not clear whether that goes only to a controversy about the new law).

Author: Joseph Blocher Subject: Sticky Note Date: 12/10/2019 12:31:49 PM
This third point would end up being the most significant in the questions from Justices' Alito and Gorsuch.

1 in conduct that is inconsistent with the
2 transport ban. And if you understand the ways
3 that the City of --

4 JUSTICE SOTOMAYOR: Mr. Clement --

5 MR. CLEMENT: -- New York licenses
6 handguns or --

7 JUSTICE SOTOMAYOR: -- Mr. Clement, I
8 believe that the city has foresworn any future
9 prosecution for past violations.

10 MR. CLEMENT: Well --

11 JUSTICE SOTOMAYOR: I thought that
12 that's the representation they made to this
13 Court.

14 MR. CLEMENT: Well, Justice Sotomayor,
15 in their latest letter, they were very careful
16 about what they represented. They represented
17 that they wouldn't try to prosecute somebody for
18 past conduct if that past conduct didn't violate
19 the current regulations.

20 So if the past conduct happened to
21 involve a stop for coffee and not continuous and
22 uninterrupted transport --

23 JUSTICE SOTOMAYOR: But that has to do
24 with the current law, and that hasn't been
25 decided by the court below. That -- that's

1 something -- that's a complaint about the limits
2 of the current law, not the limits of the old
3 law. You're asking us to mix apples and oranges
4 now.

5 MR. CLEMENT: Well, I don't think so,
6 Justice Sotomayor. I think what I'm asking you
7 to do is exactly what this Court did in the Knox
8 case.

9 JUSTICE SOTOMAYOR: No, Mr. Clement,
10 what you're asking us to do is to take a case in
11 which the other side has thrown in the towel and
12 completely given you every single thing you
13 demanded in your complaint for relief, and
14 you're asking us to opine on a law that's not on
15 the books anymore, and one that's not on the
16 books, not because of something necessarily the
17 city did but because the state, a party who's
18 not a party to this litigation, has changed the
19 law and prohibited them from doing.

20 So this is, I think, something quite
21 different. You're asking us to opine on an old
22 law, not the new law.

23 MR. CLEMENT: Well --

24 JUSTICE SOTOMAYOR: And the new law
25 hasn't been reviewed below yet.

1 MR. CLEMENT: So, again, Justice
2 Sotomayor, I really think what we're asking you
3 to do is exactly analogous to what was before
4 this Court in Knox. In Knox, the thrust of the
5 underlying complaint was that the supplemental
6 fee assessment that the union imposed on the
7 members was unconstitutional. That's what the
8 complaint framed. And then --

9 JUSTICE SOTOMAYOR: But you've got
10 what you want now. In terms of the contiguous,
11 we don't even know whether the city is taking
12 the -- the -- the position that you can't stop
13 for a cup of coffee. Presumably, if you leave
14 your gun in the car, I'm not sure how they would
15 know you were traveling with a gun, but put that
16 aside.

17 MR. CLEMENT: Well, so, before I put
18 it aside, let me just say I think we do know the
19 answer to that because, in subsection 7 of the
20 new regulations that they promulgated
21 specifically to try to moot this case, they made
22 clear that the kind of transport they were
23 allowing, at least within the City of New York,
24 had to be continuous and uninterrupted. I don't
25 know what "continuous and uninterrupted" means

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Author: Joseph Blocher Subject: Sticky Note Date: 12/10/2019 12:32:13 PM

One way to understand the back and forth here and throughout the argument is as being between what the petitioners *requested* and what they *wanted*. It seems clear that they did not actually get what they want. But the question for mootness is whether they got what they asked for.

Author: Jake Charles Subject: Sticky Note Date: 12/9/2019 8:24:15 AM

Despite this focus, the state law does not have this same limitation and preempts contrary local regulations.

1 if it doesn't -- if it -- if it means that you
2 can make stops for coffee.

3 And I assure you, I think the right
4 way to think about this for Article III purposes
5 is, if we had been successful in the lower court
6 and proposed an injunction, I guarantee the
7 words "continuous and uninterrupted" would not
8 be in our proposed injunction.

9 If the city had offered their proposed
10 injunction and included that limitation, we
11 would have said we don't accept that. We think
12 that's inconsistent with the right that we just
13 prevailed on. And that dispute --

14 JUSTICE KAGAN: Did you --

15 MR. CLEMENT: -- would be a continuing
16 dispute that would render the case not moot,
17 just like in Knox, there was a continuing
18 dispute about the sufficiency of the refund
19 notice that the union offered, post certiorari,
20 in its effort to moot the case. The dispute
21 that would still lie between the parties about
22 the sufficiency of the refund notice wasn't the
23 exact same dispute that initiated the
24 litigation, but the case was still a live
25 controversy for Article III purposes, and this

1 Court decided both the question presented and
2 then also addressed the refund notice.

3 Now this Court could address the
4 question presented here and leave the question
5 of "continuous and uninterrupted" for the lower
6 court if it wanted to, but there's no basis for
7 not answering the question presented.

8 So if I could turn to that --

9 JUSTICE SOTOMAYOR: I'm sorry, that --
10 that's the oddest decision I've heard. Answer
11 an old law that's no longer in effect and then
12 reserve consideration of the new law's
13 interpretation for the lower courts? I don't
14 know how that doesn't constitute mootness on the
15 issue that's before us. If --

16 MR. CLEMENT: Well, with respect,
17 Justice Sotomayor --

18 JUSTICE SOTOMAYOR: -- if -- if
19 they've agreed and you agree that everything but
20 the "continuous and uninterrupted" has been
21 resolved and that you've gotten everything you
22 wanted as demanded in your complaint, you can
23 travel to a second home, you can travel to any
24 lawful firing range, that's all your original
25 complaint demanded, if you got all of that, that

1 is the issue that was before us.
2 MR. CLEMENT: Well --
3 JUSTICE SOTOMAYOR: And your question
4 is whether -- and you've agreed we should leave
5 that to the courts below, what contiguous --
6 "continuous and uninterrupted" is. That happens
7 to go to the new law, not the old one.
8 MR. CLEMENT: With respect, Justice
9 Sotomayor, we don't think we've gotten
10 everything that we could have gotten if we
11 prevailed in the district court, including
12 continuous and uninterrupted.
13 But also, we would like, with all due
14 respect, given our five years of history in this
15 litigation with my friends on the other side,
16 we'd like something more than their
17 representations to protect us against the use in
18 the future of past conduct --
19 JUSTICE SOTOMAYOR: I -- I -- I have
20 one --
21 MR. CLEMENT: -- in licensing
22 decisions.
23 JUSTICE SOTOMAYOR: -- I have one
24 question. The SG tried to give you a -- a
25 lifeline by saying you could get damages. But I

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Author: Joseph Blocher Subject: Sticky Note Date: 12/10/2019 12:32:32 PM

The argument here is that the issue of "continuous and uninterrupted" travel is in fact encompassed in the original law/complaint, because if petitioners had prevailed the injunction they would have obtained could look different than the new state law.

1 read your representations to the Court and you
2 said we could get damages. I don't see a
3 request for relief, either damages or nominal,
4 in your complaint. And you don't say we want
5 damages in your submissions to us. Did you ask
6 for damages, nominal or --

7 MR. CLEMENT: We -- we asked for all
8 other appropriate relief in our complaint. We
9 did not make a specific request for damages
10 below. I'm happy to affirm that we'd like
11 damages, but I also think that although we --

12 JUSTICE SOTOMAYOR: You'd have to ask
13 for permission to amend your complaint to seek
14 that, don't you?

15 MR. CLEMENT: We would have to do
16 that, but with all due respect to the Solicitor
17 General, we were happy that they recognized the
18 case wasn't moot, but we didn't really feel like
19 we needed a damages lifeline because we think we
20 had multiple strong arguments based on this
21 Court's precedents, including the Knox case,
22 that said that wholly apart from the damages
23 issue this dispute isn't moot.

24 So if I could turn to --

25 JUSTICE GINSBURG: Mr. Clement, just

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Author: Darrell Miller Subject: Sticky Note Date: 12/10/2019 12:32:51 PM

Tension between Solicitor General and NYSRPA regarding strategy

Author: Jake Charles Subject: Sticky Note Date: 12/9/2019 8:26:44 AM

It's not entirely clear to me why Clement resists the SG's lifeline, even if he reluctantly accepts that it's a viable alternative theory.

1 one more on the damages. As far as I know, this
2 Court has never used a late, meaning in this
3 Court and not below, request for damages to save
4 a case from mootness. I don't know of any such
5 case.

6 MR. CLEMENT: I'm not aware of one
7 either, Justice Ginsburg. Perhaps my -- my
8 colleague from the SG's office will have one
9 since it was his suggestion, but we think we
10 have plenty of cases from this Court that are
11 analogous to this situation.

12 And, indeed, with respect, I don't
13 think the practice of getting the recognition
14 after certiorari is granted that a certiorari
15 grant may not signal anything good for the
16 defendant. I mean, that's quite common practice
17 that they then come up with an idea to moot the
18 case.

19 Just if you think of a couple of
20 recent cases, not just Knox, but Trinity
21 Lutheran and Parents Involved, all involved
22 late-breaking efforts, often by government
23 entities, to make the case go away.

24 In each case, this Court said, no,
25 that's too little, too late. And if this Court

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Author: Joseph Blocher Subject: Sticky Note Date: 12/10/2019 10:00:41 AM

I am not an expert on the intricates of mootness doctrine, but this would seem to be an interesting change to doctrine.

1 starts accepting these kind of post-certiorari
2 maneuvers, it's going to be very hard for the
3 Court to continue --
4 JUSTICE BREYER: I probably have a --
5 MR. CLEMENT: -- to have --
6 JUSTICE BREYER: I mean, I don't think
7 it's bad when people who have an argument settle
8 their argument and, thus, there no longer is
9 one, so I wonder if -- should I ask them this
10 question? You say this case is still alive
11 because the City of New York might prosecute one
12 of your clients because they stopped for coffee
13 on the way to a firing range.
14 I think I'm going to ask them that.
15 And I have a suspicion they will say no, we
16 aren't going to prosecute that particular
17 individual. So then what should I do? Should
18 I -- we have a dispute. You think they will.
19 They think they won't.
20 MR. CLEMENT: Right. So that suggests
21 to me we that we have the kind of live
22 controversy --
23 JUSTICE BREYER: Here's your time. I
24 --
25 MR. CLEMENT: -- and if the standard

Author: Darrell Miller Subject: Sticky Note Date: 12/10/2019 3:21:02 PM

Specter of manipulating court/wasting its time. This must be an appeal to the Chief.

Author: Joseph Blocher Subject: Sticky Note Date: 12/10/2019 10:10:20 AM

Very nice return to the central theme!

1 for mootness is whether it is possible to
2 provide effectual relief, I guarantee an
3 injunction backed by contempt that enforces
4 those promises is going to give my clients more
5 effectual relief.

6 And do keep in mind what makes this
7 case quite different from a lot of others is
8 this is a discretionary licensing process where
9 the city makes judgments about good moral
10 character. There are 79 officials in the
11 licensing department of the City of New York.
12 Where are they going to look for guidance?

13 They could, I think, look for guidance
14 to a court-ordered injunction. I'm not sure
15 they're going to pull the transcript from this
16 argument, let alone a letter from the city to
17 the Solicitor General's Office for this. So we
18 think we're entitled to that kind of meaningful,
19 effectual relief.

20 We think, on the merits, this case is
21 actually quite straightforward because there is
22 no historical analogue for this kind of
23 transportation restriction. As I suggested, if
24 you look at the second Militia Act, passed by
25 the second Congress, they not only understood

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Author: Darrell Miller Subject: Sticky Note Date: 12/9/2019 9:06:02 AM

Appeal to concern about unbridled administrative discussion with vague terms - another appeal to the Chief?

Author: Joseph Blocher Subject: Sticky Note Date: 12/10/2019 10:14:09 AM

An interesting practical question.

Author: Jake Charles Subject: Sticky Note Date: 12/9/2019 8:29:27 AM

This strikes me as odd. I doubt the licensing officers would pull an order from a federal district court either. I presume the way they would be notified of legal requirements would be from the legal department--and certainly that department can notify them of any representations the City makes in whatever forum.

Author: Joseph Blocher Subject: Sticky Note Date: 12/10/2019 10:15:09 AM

The petitioners are trying to get back to the merits of the Second Amendment.....

1 that you could transport your firearms from your
2 home to a place where they could be lawfully
3 discharged, but they required it of the members
4 of the militia.

5 If you look at the history and
6 traditions of this country, there are very few
7 laws that tried to do anything like this, and
8 the few that tried to do this were invalidated
9 by the courts.

10 JUSTICE KAGAN: Mr. Clement, as I
11 understand New York's scheme, New York has two
12 kinds of licences. It has a premises license
13 and it has a carry license. And you're
14 attacking the premises license scheme on the
15 ground that it doesn't allow you to carry.

16 So why don't you just attack the carry
17 license scheme? If you want to carry, why
18 didn't your clients get a carry license?

19 MR. CLEMENT: Well, Justice Kagan, I
20 think what my clients wanted in this lawsuit,
21 and there are plenty of other lawsuits out there
22 challenging carry restrictions, but they wanted
23 the right to transport, not the right to carry.

24 Now I --

25 JUSTICE KAGAN: Well, transporting is

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Author: Darrell Miller Subject: Sticky Note Date: 12/10/2019 3:21:07 PM

Going to heart of the dispute - why not just challenge a may-issue scheme?

Author: Joseph Blocher Subject: Sticky Note Date: 12/10/2019 12:33:39 PM

This is certainly true.

Author: Darrell Miller Subject: Sticky Note Date: 12/10/2019 3:21:16 PM

Clement not taking bait - this is a transport case - if the court writes a broad carry decision that's up to them.

1 a kind of carrying. You take your gun and it
2 goes with you someplace. That's a kind of 
3 carrying.
4 MR. CLEMENT: I -- I will agree with
5 that. I think it's also a kind of bearing,
6 which is why I think this is such a
7 straightforward case.
8 I think it's protected --
9 JUSTICE KAGAN: All I'm asking is --
10 is -- is there's a premises scheme and a
11 carrying scheme, and your clients want to carry,
12 which suggests that you should have brought a
13 challenge to the carrying scheme if you thought
14 that that was deficient.
15 MR. CLEMENT: Again, with respect,
16 Justice Kagan, my clients for years had -- at
17 least two of the three, had what the city for a
18 while called a target license, and it didn't
19 give them a full right to carry, but it did give
20 them the right to transport their firearms to
21 New Jersey and other places, probably would have
22 allowed a second home, though I'm not sure that
23 issue is squarely presented.
24 My clients did not insist on getting a
25 carry license either under the -- before this

This is a very interesting exchange. The petitioners are eager to make this a case about bearing (i.e., public carrying) which explains why Paul Clement is quick to accept Justice Kagan's suggestion. An alternative would be to say that this is a case about keeping - to "keep" a gun in a second home, one has to be able to transport it there.

There's also a flip side to this argument. If this kind of transporting - locked and unloaded - does indeed constitute "a kind of bearing", then the government seems to have a lot of regulatory authority.

1 lawsuit was filed or in this lawsuit. What they
2 wanted is to restore rights to transport their
3 firearms between and among places where they
4 could be lawfully used.

5 That's different from a license that
6 says, I get to have this firearm with me at all
7 times, loaded, ready to go. What they wanted is
8 to restore their right to transport firearms,
9 locked and unloaded, between places where they
10 could be lawfully used. That's what they asked
11 for. That is what there is no historical
12 analogue for.

13 And if I could emphasize, I think it
14 would send a very important signal to the lower
15 courts to say that when a regulation like this
16 is inconsistent with text and has no analogue in
17 history or tradition, it is unconstitutional,
18 full stop. The way the lower courts have
19 interpreted Heller is like text, history, and
20 tradition is a one-way ratchet.

21 If text, history, and tradition sort
22 of allow this practice, then they'll uphold the
23 law. But, if text, history, and tradition are
24 to the contrary, then the courts proceed to a
25 watered-down form of scrutiny that's heightened

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Author: Darrell Miller Subject: Sticky Note Date: 12/10/2019 3:21:23 PM

Another appeal to Chief: lower courts are dissing what you said in Heller.

Author: Joseph Blocher Subject: Sticky Note Date: 12/10/2019 12:35:02 PM

This is the phenomenon I describe and to some extent criticize in "Bans," just published in the *Yale Law Journal*: <https://www.yalelawjournal.org/article/bans>.

Author: Jake Charles Subject: Sticky Note Date: 12/9/2019 8:32:01 AM

The challengers want to use THT the sole criterion of constitutionality.

Author: Joseph Blocher Subject: Sticky Note Date: 12/10/2019 12:35:35 PM

Darrell and I take issue with this in the amicus brief we filed along with Eric Ruben, in support of neither side: https://www.supremecourt.gov/DocketPDF/18/18-280/99659/20190514134252322_18-280%20ac%20Second%20Amendment%20Law%20Professors%20support%20Neither%20Party.pdf.

1 in name only.
2 And I think this Court should reaffirm
3 that text, history, and tradition essentially is
4 the test and can be administered in a way that
5 provides real protection for --
6 JUSTICE BREYER: I want to go back --
7 MR. CLEMENT: -- Second Amendment
8 rights.
9 JUSTICE BREYER: -- for one second to
10 the question presented: Does New York City's
11 ban on transporting a licensed, locked, and
12 unloaded handgun to a home or shooting range
13 outside the city limits consistent with the
14 Second Amendment?
15 In New York, now you're going to hear
16 in one minute, there is no New York City ban on
17 transporting a licensed, locked, and unloaded
18 handgun to a home or other place outside. I
19 think you'll hear that.
20 Now what will your, very brief,
21 response? There's a question presented, they
22 say there is no ban. And you say?
23 CHIEF JUSTICE ROBERTS: You can finish
24 the question.
25 JUSTICE BREYER: That was the finish.

1 (Laughter.)
2 CHIEF JUSTICE ROBERTS: Briefly.
3 Thank you.
4 MR. CLEMENT: Mr. Chief Justice, thank
5 you.
6 So my answer in a -- in a nutshell is
7 Knox. My slightly longer answer is every time
8 this Court confronts a post-certiorari maneuver
9 to try to moot a case, it almost by definition
10 will try to take away from you the question
11 presented. That's what happened in Knox.
12 The question presented concerned the
13 constitutionality of the special assessment. It
14 didn't concern the adequacy of the refund
15 notice, but yet this Court decided both.
16 Thank you, Your Honor.
17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.
19 Mr. Wall.
20 ORAL ARGUMENT OF JEFFREY B. WALL
21 FOR THE UNITED STATES, AS AMICUS CURIAE,
22 SUPPORTING THE PETITIONERS
23 MR. WALL: Mr. Chief Justice, and may
24 it please the Court:
25 One point on the merits and one on

Author: Darrell Miller Subject: Sticky Note Date: 12/10/2019 3:21:29 PM
Again, Chief is the target; NYC is gaming you.

1 mootness. On the merits, text, history, and
2 tradition all condemn New York's transport ban.
3 Such bans have been rare and commonly struck
4 down precisely because the right to keep arms
5 and keep and bear arms must entail and has
6 always entailed the ability of a law-abiding
7 citizen to carry a firearm unloaded and locked
8 from one lawful place to another.
9 On mootness, Petitioners pointed below
10 to economic harms from the violation of their
11 constitutional rights. If they prevail here,
12 the district court could award them damages,
13 just like any other 1983 plaintiff.
14 JUSTICE GINSBURG: But they never
15 asked for it.
16 MR. WALL: That's true, Justice
17 Ginsburg, but there's a specific federal rule on
18 this, Federal Rule 54(c), which says the prayer
19 of relief binds on a default judgment, but it
20 doesn't bind when you've litigated on the
21 merits. And so the question for Article III
22 purpose -- and I'll grant that there are
23 questions about -- prudential questions about
24 whether, under the rules, a court should allow
25 them to inject a theory, and it would have to



Author: Jake Charles Subject: Sticky Note Date: 12/9/2019 8:33:22 AM
First words from the government's mouth also focus on methodology.

Author: Joseph Blocher Subject: Sticky Note Date: 12/10/2019 12:35:46 PM

Again, leading with text history and tradition, no mention of scrutiny.

1 weigh that against the city's tardiness in
2 changing its theory of the case as well.
3 But, for Article III purposes, the
4 question under Mission Products and Knox is, is
5 it impossible for a court to grant effectual
6 relief? It is not. It is possible for a court
7 to award them the damages they have sustained --
8 JUSTICE GINSBURG: Has --
9 MR. WALL: -- as a result of the city's
10 conduct.
11 JUSTICE GINSBURG: -- has -- has the
12 SG, the Solicitor General, ever asked this Court
13 to allow such a late interjection of a damages
14 question to save a case from mootness?
15 Mr. Clement said he was not aware of any such
16 case. Are you?
17 MR. WALL: So I don't know of any case
18 in which it's directly come up or we've weighed
19 in on it. We, obviously, participated on the
20 merits before the city's suggestion of mootness,
21 and we felt compelled to explain to the Court
22 our view on mootness.
23 JUSTICE KAGAN: Didn't it come up in
24 Alejandrino? Is that the -- the name of the
25 case? And it was decided the other way, that

Author: Darrell Miller Subject: Sticky Note Date: 12/10/2019 3:21:34 PM
Translation: "You are taking a highly unusual position for the government counselor."

1 the Court said no, we're not going to allow that
2 to happen.

3 MR. WALL: So I think -- but that's
4 in -- first, it's in 1926, so it predates the
5 federal rule. So it predates 54(c), which makes
6 clear that the prayer for relief no longer
7 binds.

8 I also think the facts are somewhat
9 distinguishable from here, where they've got
10 evidence in the record at the summary judgment
11 stage of their economic harms. Now, to be sure,
12 they're not focused on damages. What they
13 wanted was to engage in the conduct. They
14 wanted an injunction and they fought for years
15 over it.

16 JUSTICE KAGAN: I mean, not focused on
17 damages is a understatement. They -- they
18 practically won't take damages. They've had
19 every opportunity to say that they want damages,
20 including today, and, for whatever reason,
21 Mr. Clement has, you know, basically said this
22 case is not about damages. That's not why we
23 think it's not moot and that's not what we want.

24 MR. WALL: So I -- I heard Mr. Clement
25 say: I'm happy to affirm that my clients want

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Author: Darrell Miller Subject: Sticky Note Date: 12/9/2019 9:08:57 AM
Translation: "The Plaintiffs aren't buying what you're selling, so why should we?"

Author: Joseph Blocher Subject: Sticky Note Date: 12/10/2019 10:32:01 AM
This is almost verbatim! See page 13.

1 damages, but we don't think we need that
2 lifeline from the solicitor general. We think
3 our other theories are good.
4 We, obviously, disagree on some of
5 those other theories, but I think the -- the
6 question under Knox and Mission Products is, is
7 it impossible for a court to award damages?
8 Here, there is evidence in the record
9 of economic harm. If they get a declaration on
10 the merits that they're right as a matter of the
11 Second Amendment --
12 JUSTICE SOTOMAYOR: All right. Would
13 you remind --
14 MR. WALL: -- there is no barrier to
15 their receiving an award of damages from a
16 court.
17 JUSTICE SOTOMAYOR: Would you remind
18 me what -- where in the complaint they set forth
19 damages?
20 MR. WALL: Sure. So I think the best
21 examples are at pages 32, 33, 35, 36 of the
22 Joint Appendix and then again at 52 through 54,
23 56, 57, and 59 to 61.
24 JUSTICE KAGAN: But --
25 MR. WALL: Those are both the



1 pleadings and the summary judgment affidavits,
2 and they rely on two kinds of harm. One is the
3 competitions they were not allowed to attend
4 with the firearms, and the other is the costs of
5 dues and membership fees to the in-city ranges,
6 which I think implicitly they're suggesting are
7 higher than the out-of-city ranges.

8 JUSTICE KAGAN: Mr. Wall, I mean, they
9 filed a complaint. They filed a motion for
10 summary judgment. They briefed this case before
11 the Second Circuit. They filed a cert petition.
12 Then, in response to the suggestion of mootness,
13 they filed another brief there.

14 And in none of those places did they
15 ask for damages. Damages has been injected into
16 this case because of the solicitor general in a,
17 you know, very late-breaking three-page letter.

18 MR. WALL: Look, Justice Kagan, I'll
19 certainly grant that there's a lot of post-grant
20 maneuvering on both sides. The city has
21 withdrawn its law, and the Petitioners have come
22 up with theories for why the case is not moot.
23 As a matter of Article III, our view is that
24 damages could change hands and hence it's not
25 moot.

This damages claim is the late-breaking change.

1 I suppose you could also rest it on
2 future consequences and say that the city's
3 representations have come too late. It has an
4 express scheme that allows you to consider these
5 things.

6 JUSTICE KAGAN: Well, I -- I thought
7 that in your brief, in your letter brief, you
8 specifically rejected every other theory of --
9 of why this case was live.

10 MR. WALL: We do think that the Court
11 credits those kinds of assertions by
12 governmental litigants. It did in DeFunis. The
13 facts here are a little different. You have a
14 scheme that expressly allows you to consider the
15 conduct. You don't have any acknowledgment from
16 the city that its former conduct was
17 unconstitutional, and you have a representation
18 that comes, as Mr. Clement said in his letter,
19 at the 11th and a half hour.

20 On those facts, could you say we're
21 not going to take a look at the city's
22 representation? You could. That is not our
23 theory. Our theory is that money could change
24 hands here and they'd be entitled to that money
25 --



Author: Jake Charles Subject: Sticky Note Date: 12/9/2019 8:38:01 AM
It's interesting the government brings up one of the theories that it rejects to say that's another theory
the Court could rest a ruling on.

1 JUSTICE KAGAN: And what do you think
2 --
3 MR. WALL: -- if they prevailed on the
4 merits.
5 JUSTICE KAGAN: -- of Mr. Clement's
6 theory? I take it that you rejected Mr.
7 Clement's theory about this continuous travel
8 and stopping for coffee?
9 MR. WALL: I -- I think it's a close
10 call. In our view, that's a new controversy
11 that arises from the new law, not the old
12 controversy in the old law, but I -- I think
13 it's a -- I think it's a hard question, and I
14 understand his point that there would have been
15 fighting over the terms of the injunction in the
16 -- in the district court or at least potentially
17 there could have been.
18 If I could turn to the -- to the
19 merits for just a minute --
20 JUSTICE GORSUCH: Well, why -- why
21 isn't that good enough? If under the prior law
22 the plaintiffs would have sought relief that
23 would allow them to take their firearms locked
24 safely to a range and stop along the way for a
25 cup of coffee or a bathroom break and that that

Author: Darrell Miller Subject: Sticky Note Date: 12/9/2019 9:09:42 AM
Solicitor General and Clement for NYSRPA again at odds over reason this is not moot.

1 is still being denied under the -- if that's a
2 proper reading, we'll ask New York about that,
3 I'm sure, but if that's still a proper reading
4 of their existing regulations, why isn't there a
5 live controversy remaining?

6 MR. WALL: I think --

7 JUSTICE GORSUCH: There would seem to
8 be a delta of relief that's been denied them.

9 MR. WALL: Oh, I do think there is a
10 -- a live controversy potentially now about the
11 meaning of this "continuous and uninterrupted"
12 requirement. I just think that arises from the

13 new law. And the premise, I think --

14 JUSTICE GORSUCH: Well, why doesn't --

15 MR. WALL: -- we have doubts since --

16 JUSTICE GORSUCH: -- it arise -- why
17 isn't the dispute still alive from the old law
18 if that's a form of relief they would have
19 sought and is still, despite the new law, being
20 denied them? Isn't that a classic definition of
21 relief that was sought but now still -- despite
22 herculean, late-breaking efforts to moot the
23 case, still alive?

24 MR. WALL: I -- if the Court wanted to
25 say that, I don't think it would harm the United

1 States' interests. So --

2 JUSTICE GORSUCH: You're not aware of 

3 any precedent that would foreclose that and, in

4 fact, that's pretty much what Knox did, isn't

5 it?

6 MR. WALL: Well, except that Knox

7 wasn't a governmental litigant, so I think the

8 presumption of voluntary cessation worked a

9 little differently, but to -- Justice Gorsuch,

10 just to go to the question, I think, in the

11 district court, the fight was about whether they

12 could do the thing at all.

13 And now we have a -- what strikes us

14 as a different fight about the manner in which

15 they can go. And the legal restriction is

16 different. The legal restriction now is tied to

17 the new law. But, no, I'm not aware of anything

18 --

19 JUSTICE GORSUCH: Sure, they granted

20 --

21 MR. WALL: -- that would keep the

22 Court from going there.

23 JUSTICE GORSUCH: -- new relief. They

24 have granted but not total relief that the

25 plaintiffs sought. You'd agree with that?

1 MR. WALL: I -- I would agree with
2 that. I think there is still a controversy
3 about the manner in which they can go. That
4 seems somewhat different to us from the
5 controversy that was litigated below and that
6 this Court agreed to hear, but I don't think
7 there's any case that would keep the Court from
8 going down that road.
9 If I could turn to the merits for just
10 a minute, I think all that the Petitioners are
11 asking for, and it's a fairly modest ask, is for
12 the Court to reiterate what it said in Heller,
13 that the lower courts have been correct in
14 starting with text and history and tradition,
15 but they have created, as Mr. Clement said, this
16 sort of asymmetry where they find that history
17 and tradition can give a thumbs up to a law but
18 not a thumbs down.
19 JUSTICE SOTOMAYOR: I'm sorry, can I
20 go back to that question? In what other area,
21 constitutional area, the First Amendment in
22 particular, have we decided any case based
23 solely on text, history, and tradition?
24 This seems sort of a made-up new
25 standard. And I thought Heller was very care --

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Author: Jake Charles Subject: Sticky Note Date: 12/9/2019 8:40:52 AM

Agree that they did not receive all the relief they sought? The government seemed to reject that in their letter brief.

Author: Joseph Blocher Subject: Sticky Note Date: 12/10/2019 10:44:35 AM

This "asymmetry" argument is important to unpack and understand. Under the prevailing framework, a armory law with strong historical analogues will be upheld, in keeping with the "longstanding" regulations recognized as presumptive lawful in Heller. This includes things like felon bans. But the majority of cases proceed to step to - scrutiny - as happened in the lower courts here. Eric Ruben and I explore this in more depth in our empirical study. [Link] <https://bit.ly/2YEa85n>

Author: Darrell Miller Subject: Sticky Note Date: 12/10/2019 3:21:42 PM

Translation: "Doesn't this create an asymmetry, where historical regulations can uphold, but not strike down a regulation?"

1 careful to say we don't do that. We treat it
2 like any other constitutional provision. And if
3 I analogize this to the First Amendment, which
4 is what Heller suggested we should do, this
5 seems to me to be a time, place, and manner
6 restriction. It may not pass any of the
7 standards of scrutiny, but, if you're looking at
8 a First Amendment right to speak, it's never
9 absolute. There are some words that are not
10 protected. We're going to have a different
11 fight about that at some point. Or there are
12 some weapons that are not protected, just like
13 there might be some words that are not
14 protected.

15 We know under the First Amendment that
16 there are time, place, and manner restrictions
17 that a government can impose on the basis of
18 safety and other things. On the basis of
19 safety, you can't have a demonstration at will.
20 You need a permit, and you have to have certain
21 equipment and certain protections and certain
22 things.

23 So, if I treat it in that way, we
24 might have a fight about whether text, history,
25 and tradition permits a time, manner, and place

Sotomayor: Text history and tradition gives super-priority to 2nd Amendment, not equal priority.

1 restriction of this type, but I don't know why
2 that's a free-standing test.
3 MR. WALL: So two points, Justice
4 Sotomayor. The first is I understand manner
5 restrictions. I understand the requirement that
6 you carry the gun unloaded or that you do it in
7 a locked container. But a ban is not a time,
8 place, or manner restriction. And in
9 determining which category it falls into and
10 what's permissible, Heller said you start with
11 text, history, and tradition.
12 And the Court commonly does that, even
13 under the First Amendment with respect to
14 categories, the Fourth Amendment for a search,
15 the Seventh Amendment for the jury trial right.
16 Heller just says you start here. And starting
17 here, I think this is a straightforward case.
18 There is no historical analogue and a contrary
19 tradition.
20 Thank you.
21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.
23 Mr. Dearing.
24
25

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Author: Joseph Blocher Subject: Sticky Note Date: 12/10/2019 12:37:06 PM

Again, this is a tricky conceptual label - I try to make sense of it in "Bars," but in short i think it's a characterization that tends to obscure a lot of normative conclusions.

<https://www.yalelawjournal.org/article/bans>

Author: Darrell Miller Subject: Sticky Note Date: 12/10/2019 3:21:47 PM

THT start of analysis for 1st, 4th, 7th

Author: Joseph Blocher Subject: Sticky Note Date: 12/10/2019 12:37:29 PM

Darrell's Yale Law Journal article is the standard reference here!

<https://www.yalelawjournal.org/article/text-history-and-tradition-what-the-seventh-amendment-can-teach-us-about-the-second>

1 ORAL ARGUMENT OF RICHARD P. DEARING
2 ON BEHALF OF THE RESPONDENTS
3 MR. DEARING: Mr. Chief Justice, and
4 may it please the Court:
5 Contrary to how they're presenting it
6 now, Petitioners framed this case narrowly.
7 They argue that a premises license, a premises
8 license specifically, must allow certain limited
9 transport of the licensed handgun to effectuate
10 its possession and use in the premises, and they
11 sought only injunctive and declaratory relief to
12 require the city to allow that limited
13 transport.
14 And that narrow framing, in turn, has
15 two implications now. First, the case is moot
16 because changes in state and city law have given
17 Petitioners everything they asked for and,
18 indeed, more than that.
19 Petitioners suggest these changes
20 should be viewed skeptically, but it's a good
21 thing and not a cause for concern when the
22 government responds to litigation by resolving
23 matters through the democratic process.
24 The Solicitor General agrees that all
25 the objections actually raised by Petitioners to

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Author: Darrell Miller Subject: Sticky Note Date: 12/9/2019 9:18:09 AM
Moot

Author: Joseph Blocher Subject: Sticky Note Date: 12/10/2019 10:49:39 AM
As discussed above, there is a difference between "asked for" and wanted.

Author: Darrell Miller Subject: Sticky Note Date: 12/9/2019 9:19:07 AM
Transation: "You should encourage this type of resolution, not punish it."

1 mootness are unfounded but suggests that the
2 Court could proceed to the merits of the
3 constitutional questions anyway because
4 Petitioners might be -- in the future be able to
5 add a new claim for damages that they have never
6 asserted and still now only most reluctantly
7 embrace.

8 The Court has never adopted that kind
9 of reasoning under Article III and it should not
10 begin with this case.

11 And the second implication of the
12 case's framing is that if the case weren't moot,
13 the only question presented on the merits would
14 be whether a premises license must, as an
15 adjunct thereto, include the implied transport
16 rights sought by Petitioners.

17 Though Petitioners now invoke a
18 general right to bear arms outside the home, a
19 premises license is not addressed to that
20 purpose. A premises license is instead issued
21 for possession in a particular place, and
22 Petitioners never challenged the separate New
23 York license that is addressed to carrying
24 weapons outside the home, which is the carry
25 license. So those broad questions are not

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Author: Jake Charles Subject: Sticky Note Date: 12/9/2019 4:28:18 PM
The City is trying to frame this as a "keep" case--what does the government need to allow as part of respecting the right to "keep" an arm.

1 properly part of this case.
2 Turning first to the issue of
3 mootness, and I'll go straight to the question
4 of coffee stops, there are two -- two levels to
5 this response. First is, there is no dispute on
6 that question. The city's enforcement -- the --
7 the governing standard is provided by state law
8 here because the state enactment preempts local
9 law.
10 The "continuous and uninterrupted"
11 language cited by my friend is not in the state
12 law. The city acknowledges that. And the
13 city's enforcement position is that coffee
14 stops, bathroom breaks are entirely permissible
15 --
16 JUSTICE ALITO: But let's go to
17 something --
18 MR. DEARING: -- under current law.
19 JUSTICE ALITO: -- beyond a coffee
20 stop or a bathroom break. Suppose they had
21 prevailed under and obtained a judgment that the
22 old law was a violation of the Second Amendment,
23 and suppose that after that, one of the
24 plaintiffs had made a trip to a firing range in,
25 let's say, New Jersey and, while there, decided



Author: Darrell Miller Subject: Sticky Note Date: 12/9/2019 9:19:47 AM

Translation: "This is not a carry case."

Author: Jake Charles Subject: Sticky Note Date: 12/9/2019 4:29:14 PM

This seems the more important point of response that, to me, seems to get lost in the debate about visiting mothers, etc.

Author: Darrell Miller Subject: Sticky Note Date: 12/9/2019 4:29:24 PM

Continuous and uninterrupted is preempted by NY Law to extent unconstitutional.

1 to stop to visit his mother for a couple of
2 hours to take care of a few things for her.
3 Would there be any law that that would
4 violate?
5 MR. DEARING: That would be, I
6 think -- I'm not certain that it would. I think
7 that would have to be a question now to be
8 litigated under the state law, which would have
9 nothing --
10 JUSTICE ALITO: No, no, no, no, we're
11 back, without the new laws, city or state, would
12 that have been -- would that have been legal
13 conduct?
14 MR. DEARING: If that had happened
15 prior to the changes in conduct?
16 JUSTICE ALITO: After a judgment that
17 the old law was unconstitutional, prior to the
18 enactment of any new law.
19 MR. DEARING: I don't think it's --
20 it's at all clear because that question -- those
21 kind of questions were never put at issue or
22 litigated in the case. And so --
23 JUSTICE ALITO: Well, what -- you
24 don't know what -- you don't know whether
25 there's any city law that that would violate?

Author: Jake Charles Subject: Sticky Note Date: 12/9/2019 4:30:19 PM
I suspect that, had the old law been struck down, the City would have acted swiftly to pass a new law anyway.

1 MR. DEARING: If there were a judgment
2 that said that our law had been struck down --
3 our former --
4 JUSTICE ALITO: Yeah.
5 MR. DEARING: -- law had been struck
6 down?
7 JUSTICE ALITO: Yeah.
8 MR. DEARING: I'm not aware of any
9 city law that that --
10 JUSTICE ALITO: So then why is this
11 case moot? Because they didn't get all that
12 they wanted. They wanted a declaration that the
13 old law was unconstitutional, period.
14 And what they have obtained as a
15 result of the new city ordinance and the new
16 state law is a rule that says, yes, you can take
17 the firearm to a firing range outside of New
18 York City, but it must be a direct trip.
19 It can't include an hour spent with
20 your mother.
21 MR. DEARING: I think that -- the
22 answer is that Article III analysis is always
23 focused on what the plaintiffs asked for, not
24 speculation about what might have been an
25 injunction here. And the -- and the only thing

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Author: Joseph Blocher Subject: Sticky Note Date: 12/10/2019 12:38:31 PM

Justice Alito is emphasizing that a world with *no* analogous law - as would potentially be the case if petitioners had prevailed in court - could be different than the one with this new law. Note again the difference between Dearing's focus on what petitioners "asked for" (pg. 34) and Alito's focus on what "they wanted".

Author: Jake Charles Subject: Sticky Note Date: 12/9/2019 4:32:04 PM

I think one answer to this question that the City doesn't really offer is that if it is going to allow transport, it has to set certain parameters around what permissible stops are--like Justice Kagan or Sotomayor alludes to.

1 that was ever put at issue here -- and -- and --
2 and you can see this by looking at the actual
3 injunction that plaintiffs framed -- was the
4 permissible categories of destination, shooting
5 ranges and second homes outside the city.

6 JUSTICE KAGAN: Where is the
7 injunction that plaintiffs framed?

8 MR. DEARING: It's in -- it's in a
9 number of docket entries, and I don't remember
10 the numbers offhand, but they're in the summary
11 judgment in -- in both motions for preliminary
12 judgment -- injunction, motions for summary
13 judgment, across several different docket
14 numbers, injunctions were repeatedly proposed by
15 the Petitioners. They're basically verbatim,
16 identical.

17 And what they say is they want an
18 injunction restraining the city from enforcing
19 its old rule in any manner that would prohibit
20 or preclude plaintiffs from traveling to
21 shooting ranges and second homes outside of --

22 JUSTICE ALITO: And why wouldn't that
23 include a non-direct trip?

24 MR. DEARING: Your Honor, the issue of
25 directness was never ever litigated as part of

Author: Jake Charles Subject: Sticky Note Date: 12/9/2019 4:33:28 PM

I kind of suspect an injunction would have just said the old law is unconstitutional and the City is enjoined from enforcing it.

1 this case. It was never in the complaint. We
2 have no idea what -- what the answer to that
3 question might be if it had been litigated, but
4 it is not what plaintiffs -- the -- the -- the
5 Article III analysis focuses on what plaintiffs
6 asked for, and what they asked for dealt with
7 permissible categories of destination, and that
8 is more than fully addressed by the state and
9 city laws.

10 To -- to turn to -- now to the
11 question of future consequences. We are -- we
12 would -- as I've said, the issue about coffee
13 stops is an entirely feigned dispute. We would
14 not undertake any -- any prosecution or action
15 now based on that or any other violation of the
16 repealed law at this point.

17 CHIEF JUSTICE ROBERTS: Is there -- is
18 there any way in which any violation could
19 prejudice a gun owner?

20 MR. DEARING: Not that -- not that I
21 can think of. The city is committed to -- to
22 closing the book on that old rule and we're not
23 going to take it into effect.

24 CHIEF JUSTICE ROBERTS: Is there any
25 way in which a finding of mootness would

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Author: Joseph Blocher Subject: Sticky Note Date: 12/10/2019 11:27:42 AM

While they don't clearly signal a substantive view, these questions seem designed to assure the Chief Justice that the old law is indeed of no effect and that the case is therefore moot.

Author: Darrell Miller Subject: Sticky Note Date: 12/9/2019 9:21:31 AM

The city is not going to prosecute for any past actions under old rule.

1 prejudice further options available to the
2 Petitioners in this case, for example, seeking
3 damages?

4 MR. DEARING: I don't -- I don't think
5 so. I mean, they -- they -- it's possible
6 they'd have -- they'd have a time bar on --
7 on -- on damages, but it depends -- it would
8 depend on the allegation they've made. They've
9 never made any allegations related to damages,
10 and I think we'd have to assess that based on
11 the allegations they make.

12 I think the other key point on future
13 consequences is there's really no factual basis
14 in the complaint for that. Mr. Clement for the
15 first time today suggests that -- that -- that
16 the complaint may -- alluded to a possibility of
17 past violations. It certainly did not allege
18 that these Petitioners had violated this -- the
19 rule in the past.

20 And the most important thing to know
21 about -- about those paragraphs of the complaint
22 is that the -- the Petitioners would have
23 been -- would have had their licenses renewed at
24 least twice by now.

25 JUSTICE GORSUCH: Counsel, can I just

1 make sure I understood you correctly earlier? I
2 understood you to suggest that there will be no
3 collateral consequences to anyone for violating
4 the city's prior ban, any kind of collateral
5 consequences.

6 MR. DEARING: I think there's no basis
7 to think there would be.

8 JUSTICE GORSUCH: No, I'm wondering --
9 you're -- you're representing the city, and so
10 I'm asking the city's representative here --

11 MR. DEARING: Yes.

12 JUSTICE GORSUCH: -- that the city --
13 that there will be no collateral consequences
14 from the city to individuals who violated the
15 prior ban?

16 MR. DEARING: Absolutely correct,
17 there will be none.

18 JUSTICE GORSUCH: All right.

19 JUSTICE GINSBURG: And you're making
20 that representation to this Court?

21 MR. DEARING: I'm making that
22 representation to this Court on the record on
23 behalf of the City of New York.

24 JUSTICE SOTOMAYOR: I'm not going to,
25 because I want to be careful for you and for

1 society, you're not representing if they shot
2 somebody with a gun that you're not going to
3 prosecute them for that?
4 MR. DEARING: Correct.
5 JUSTICE SOTOMAYOR: You're just not
6 going to prosecute them for any violation of
7 this old law?
8 MR. DEARING: Of the repealed
9 provisions of the law, that's right. If -- if
10 there were other potential acts of loaded guns,
11 violent acts, that -- that's different. But the
12 repealed provisions of the old law we will
13 not prosecute anyone for with any --
14 CHIEF JUSTICE ROBERTS: Well, I guess
15 my -- my question and some of the others went
16 beyond prosecution. The question is whether
17 they'd be prejudiced in any way, for example,
18 with respect to qualifying for a -- a premises
19 license under the new law, would the fact of a
20 violation of the prior law be used against them?
21 MR. DEARING: It will not. It
22 absolutely will not. And -- and I think a
23 deeper point is there is no reason to think
24 there are -- there are such violations that the
25 Petitioners -- that there are such violations.

Author: Darrell Miller Subject: Sticky Note Date: 12/10/2019 3:21:57 PM

City is guaranteeing no consequences with respect to prior law, either with respect to prosecution or prejudice to new license.

1 If we refer back to the complaint as I noted
2 before, these Petitioners have been renewed --
3 their licenses have been renewed twice at least
4 since that complaint was filed.

5 JUSTICE KAGAN: Do you have a way --
6 sorry. Do you have a way, Mr. Dearing -- I take
7 it these licensing decisions are made by the
8 office, an office in the New York Police
9 Department.

10 Do you have a way of communicating to
11 that office what they are not permitted to do,
12 given your representation?

13 MR. DEARING: Absolutely. And
14 we've -- we've consulted that office. They're
15 aware of this. We will communicate to them that
16 -- that no such consequences are -- are to be
17 imposed and the event -- in the extremely
18 unlikely, and I think not going to happen, event
19 that any -- that anyone thought that that might
20 have happened, they should bring that to the
21 attention of the Law Department and we'll review
22 it and make sure that it's addressed.

23 I do, though, want to just put a
24 slightly finer point on the lack of factual
25 basis, in any event, for the claim of future



The City keeps wanting to revert to the facts of this case (naturally enough), but the justices seem just as concerned about whether the old law will prejudice anyone, even if we don't know whether any of these petitioners violated that law.

1 consequences.

2 The Petitioners only now have made
3 this allusion to their complaint. They've been
4 renewed twice since then. The Court, of course,
5 ordinarily presumes individuals follow the law.

6 Even before this case, our -- our
7 practice was not to ask people to disclose past
8 violations unless it had resulted in an arrest,
9 summons, revocation, or something like that, and
10 there is no suggestion that any Petitioner has
11 had any of those events.

12 JUSTICE ALITO: But do you think it's
13 really fair for you at this point to look for
14 specific allegations in the complaint to defeat
15 a claim of mootness that the plaintiffs had no
16 reason whatsoever to anticipate until after we
17 granted certiorari and the city decided to try
18 to moot this case?

19 MR. DEARING: This -- that just
20 confirms that the plaintiffs got everything they
21 asked for in this case. There's nothing -- the
22 -- the issue of potential --

23 JUSTICE ALITO: Well, how does that
24 confirm that they got everything that they asked
25 for? If you say, well, they didn't ask for

Author: Jake Charles Subject: Sticky Note Date: 12/9/2019 4:39:46 PM
Justice Alito is concerned with strategic efforts of the City to give *just enough* to try to moot the case and no more.

1 nominal damages, they didn't ask for actual
2 damages, they didn't specifically allege that
3 they violated the old law, you -- you really --
4 they didn't allege that they wanted to make a
5 non-direct trip, how could any plaintiff
6 possibly have anticipated that until you took
7 the quite extraordinary step of trying to moot
8 the case after we granted review?

9 MR. DEARING: First, the state
10 legislature has passed a new state law here.

11 JUSTICE ALITO: Yeah. And did the
12 city have nothing to do with the enactment of
13 that law?

14 MR. DEARING: The city supported the
15 law, as we do with many -- many potential bills,
16 and most of them go nowhere. The state
17 legislature and the governor made their own
18 decision -- make their own decisions about what
19 to enact, of course, responsive to their
20 state-wide constituency. And that's what
21 happened here.

22 And that, by the way, is a good thing,
23 not a bad one. The government should respond to
24 litigation, should assess its laws or other --
25 or political subdivisions' laws when they are

1 challenged. And --

2 JUSTICE GORSUCH: Counsel, let's say I
3 -- I agree with you -- I mean, I accept that.
4 It's -- it's great when local governments
5 respond to the constitutional constraints that
6 are suggested by others in litigation.

7 But it does seem a bit much, doesn't
8 it, to fault plaintiffs for not having a
9 specific damages requirement in their prayer for
10 relief in a complaint that was framed years ago?
11 This litigation, I think, has taken five-plus
12 years, and that has become relevant only at this
13 late stage after the city and the state have
14 enacted a new law.

15 Why isn't the prospect of allowing
16 damages to be added to the complaint enough? In
17 a 1983 action, damages are clearly available.
18 The complaint, long ago as it was filed, did say
19 that they sought all available relief, you know,
20 a typical prayer for relief. Rule 54 doesn't
21 hold people to their prayers for relief. Why
22 isn't there at least a fair prospect that a
23 district court on remand would allow an amended
24 complaint to seek actual damages?

25 MR. DEARING: Well, two answers. One

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Author: Jake Charles Subject: Sticky Note Date: 12/9/2019 4:41:29 PM
It seems less "faulting them" and more seeing what they said they wanted.

Author: Darrell Miller Subject: Sticky Note Date: 12/10/2019 3:22:02 PM
Gorsuch seems to like the damages claim.

Author: Jake Charles Subject: Sticky Note Date: 12/9/2019 4:42:27 PM
Agreed - perhaps one could even see Justices Alito and Gorsuch both thinking the case is not moot but on different grounds.

1 is that that's not how the Court has approached
2 mootness questions. And, two, a fair prospect
3 is not enough to sustain a case under Article
4 III. But --

5 JUSTICE GORSUCH: A fair prospect of
6 relief isn't enough to sustain?

7 MR. DEARING: A fair prospect whether
8 the claim is even in the case at all. That --
9 whether the claim -- a decision about whether
10 the claim is in the case must precede a decision
11 on the merits. That question is a
12 jurisdictional one. And the solicitor general
13 is mistaken that it can be deferred to later and
14 the merits reached anyway.

15 But -- but the prior point, I think,
16 is equally important, which is that it's not a
17 matter of faulting the plaintiffs, but the
18 plaintiffs chose the case they wanted to bring,
19 as plaintiffs do.

20 Demands for relief are taken very
21 seriously. They're crafted carefully. And the
22 -- one of the reasons they're crafted carefully
23 is that litigation -- demands are meant to cause
24 a defendant to consider whether to meet that
25 demand. And in -- in this case, this demand was

Author: Darrell Miller Subject: Sticky Note Date: 12/9/2019 9:25:05 AM
Zing!

1 crafted not just in the prayer for relief but in
2 numerous paragraphs of the complaint. The --
3 the case was consistently litigated in accord
4 with that structure of the complaint. And, in
5 fact, even after mootness -- the mootness
6 question arose, the Petitioners in their -- in
7 their lengthy comprehensive response never
8 suggested --

9 JUSTICE GORSUCH: So you think it's
10 totally irrelevant that the state has at this
11 late stage sought to moot the case when we're
12 assessing the prospect and the interests of the
13 plaintiff in seeking damages?

14 MR. DEARING: I think it is, because
15 -- because the reason demands are made in
16 litigation is to prompt a defendant to decide
17 whether to meet them, not to decide later, if
18 they do meet them, to -- to -- to reinvent the
19 case and make it something else. And the
20 clearest example --

21 JUSTICE GORSUCH: Do you agree that
22 there --

23 MR. DEARING: -- from this Court's
24 cases --

25 JUSTICE GORSUCH: -- do you agree that

1 there would at least be a fair prospect that a
2 district court on remand might disagree with you
3 and find that there is a reasonable excuse for
4 the plaintiffs' introduction of damages at this
5 stage?

6 MR. DEARING: I don't think so. I'm
7 not -- I'm not aware of any case where anything
8 like that has happened. In fact, consistent
9 decisions from the courts of appeals have said
10 these were --

11 JUSTICE GORSUCH: Let's say if we
12 disagreed with you, then what?

13 MR. DEARING: Still not enough, I
14 think, because the -- the prospect of adding a
15 potential live claim is not enough to -- to
16 sustain an Article III case or controversy now
17 and to allow the court to reach the merits
18 before that claim is in the case.

19 And the clearest example is Alvarez
20 versus Smith. That is a case that -- that --
21 where the complaint sought declaratory
22 injunctive relief, just like the complaint here,
23 but a slight -- a difference, a significant
24 difference, in that case, the plaintiffs had a
25 motion pending in the district court.

1 JUSTICE GORSUCH: What do you do about
2 the fact that that was pre-Rule 54 and the
3 federal rules and so on?

4 MR. DEARING: Alvarez was not pre-Rule
5 -- Alvarez was -- was about a decade ago.
6 Alvarez was long --

7 JUSTICE GORSUCH: Oh, I'm sorry. I'm
8 sorry.

9 MR. DEARING: -- after Rule 54.
10 That's a different -- that's Alejandrino --

11 JUSTICE GORSUCH: Alejandrino, sorry.

12 MR. DEARING: -- which is a different
13 case. Rule 54, I think, is really a red herring
14 here. Rule 54 is a question that governs the
15 district court's power -- remedial powers when a
16 live controversy remains continuing before it.
17 It says that the district court is not beholden
18 necessarily to what is -- categorically beholden
19 to what is included in a prayer for relief and
20 can craft appropriate remedies. But the Court
21 and lower courts do not look to Rule 54 in
22 determining questions under Article III.
23 The right place to look is the
24 complaint, the consistent litigation history,
25 and the courts below that determined what did

1 the plaintiff ask for and has what they asked
2 for been provided. And that has happened here.

3 JUSTICE ALITO: Mr. Dearing, are the
4 -- are people in New York less safe now as a
5 result of the enactment of the new city and
6 state laws than they were before?

7 MR. DEARING: We -- we -- no, I don't
8 think so. We made a judgment expressed by our
9 police commissioner that -- that it was
10 consistent with public safety to repeal the
11 prior rule and to move forward without it.

12 JUSTICE ALITO: Well, if they're not
13 less safe, then what possible justification
14 could there have been for the old rule, which
15 you have abandoned?

16 MR. DEARING: It was a reasonable --
17 as we've outlined in our briefs, it was a
18 reasonable implementation of the -- of the state
19 premises license, carry license division. I
20 think -- and we've explained that there was --
21 was a verification benefit to the way that that
22 rule was set up. That verification benefit
23 perhaps has not played out as much in practice
24 as it had been predicted, and we believe the
25 police can work harder and make sure that the

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Author: Darrell Miller Subject: Sticky Note Date: 12/9/2019 9:25:39 AM

Alito suggests that NYC didn't need this law from the get-go , perhaps setting stage to strike down similar regs (assuming there are any)

Author: Joseph Blocher Subject: Sticky Note Date: 12/10/2019 11:31:37 AM

This line of questions is perhaps the strongest signal in the arguments for the view that the Second Amendment extends outside the home - as nearly all courts have held or assumed that it does and also perhaps that it is subject to second class treatment (i.e., regulation over with no public safety benefit).

1 city stays safe.
2 JUSTICE ALITO: So you think the
3 Second Amendment permits the imposition of a
4 restriction that has no public safety benefit?
5 MR. DEARING: I think you have to
6 look, first, to consider whether the -- the type
7 of restriction -- how the restriction accords
8 with the history under the Second Amendment
9 before we answer that question.
10 And so I -- I think -- I think the
11 right place to start, and -- and, for our
12 purposes, maybe starting with shooting ranges is
13 the best, first key point is this must be viewed
14 as an adjunct to the premises license. This is
15 not just a general statute or generally
16 applicable statute. It's an adjunct to the
17 premises license. It's --
18 JUSTICE ALITO: Well, if it's viewed
19 in that way, could the city -- would it be
20 consistent with the Second Amendment for the
21 city to prohibit any trip by a person holding a
22 premises license to a firing range?
23 MR. DEARING: I think that would be
24 doubtful. And the -- and the reason the city
25 went beyond what state law says about a premises

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Although the answer to this question might seem to be an obvious one (though the question of whether a particular law has a public safety benefit will typically be contested), it is not at all clear that public safety, narrowly defined, is the only governmental interest served by gun regulation. Reva Siegel and I explored that question in a recent blog post: <https://takecareblog.com/blog/why-regulate-guns>

Author: Jake Charles Subject: Sticky Note Date: 12/9/2019 4:45:39 PM

I "think" what the City is saying is that if the law is justified by history under step 1, then we don't even get to step 2 to decide whether it passes means-end scrutiny (and thus we don't get to assessing whether it furthers public safety).

1 license and -- and authorized transport to
2 shooting ranges in the city was because the city
3 recognized that -- that training is -- does
4 intersect with and is important to effective use
5 of the handgun in the home.

6 JUSTICE ALITO: So you are
7 conceding -- I take it "doubtful" means that it
8 would be unconstitutional. You can tell me if
9 you -- you -- you don't know the answer to that
10 question.

11 But, if it -- if that's what it means,
12 you're conceding that the Second Amendment
13 protects the possession of a firearm outside the
14 home under at least some circumstances?

15 MR. DEARING: I think what I'm
16 conceding is that, in the case of a premises
17 license, the Second Amendment has something to
18 say about what effective possession in the home
19 means. And sometimes that may mean that you
20 need to be able to -- that a license holder
21 needs to be able to undertake certain activities
22 outside the home.

23 JUSTICE ALITO: Well, if the person is
24 taking the firearm, the handgun, from the home
25 to a firing range, the person is out on the

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Author: Darrell Miller Subject: Sticky Note Date: 12/9/2019 9:26:07 AM

Looking for a concession on public carry, not just locked and unloaded.

Author: Joseph Blocher Subject: Sticky Note Date: 12/10/2019 11:52:47 AM

The back and forth here has in part to do with whether these "outside the home" activities should be considered "bearing" or an incident to "keeping" (as Dearing suggests).

Author: Darrell Miller Subject: Sticky Note Date: 12/9/2019 9:26:13 AM

NYC not biting. This is a "keep" case.

1 streets of New York, and if -- unless a total
2 ban on taking it to a firing range would be
3 consistent with the Second Amendment, it follows
4 that the Second Amendment, under at least some
5 circumstances, protects the possession of a
6 handgun outside the home. Isn't that correct?

7 MR. DEARING: I think -- I think
8 that's a fair way to look at it, that -- that --
9 that -- but -- but, from our perspective, the
10 right question regarding a premises license is,
11 did the -- did the rule impermissibly burden
12 effective use of the handgun in the premises?
13 In the same way that to get a gun to a premises,
14 you have to get it somewhere outside -- you
15 know, purchase it somewhere outside your
16 premises and bring it there, that certain things
17 that happen outside the home may -- may be
18 integrally related to effective use of a handgun
19 inside the home.

20 But, when you look at a premises
21 license, and not speaking about the Second
22 Amendment at large or writ large but the
23 premises license specifically, the only proper
24 lens to look at the question through is whether
25 the restriction impinges on effective use of the

1 handgun in the home.

2 And with regard to training, we have
3 two -- two related reasons why it doesn't. The
4 first is to look to historical restrictions,
5 which were not themselves directed at premises
6 licenses but are illuminating, and,
7 historically, the location where people were
8 permitted to train was -- was fairly extensively
9 restricted, provided that opportunities to train
10 remained available.

11 And we -- that's the principle we
12 distill from history. And -- and when you apply
13 it to the premises license here, what our -- the
14 conclusion is that the ability to train locally
15 in a circumstance where market forces are
16 allowed to operate to determine how many
17 facilities are present, where there's no
18 indication that supply was insufficient to meet
19 demand, and where the Petitioners here actually
20 in their summary judgment affidavits never even
21 said they wished to engage in any form of
22 regular training outside the city.

23 All they said is they wanted to go to
24 shooting competitions -- regional shooting
25 competitions out of the city, that on this



Author: Jake Charles Subject: Sticky Note Date: 12/9/2019 4:47:37 PM

In other words, even if the right to keep and bear arms *only* protects conduct in the home, there
still might be a necessary constitutional right to some sort of training or transport.

1 record, the former restriction or the former
2 rule implementing the premises license to allow
3 fire -- training locally meets Second Amendment
4 requirements.

5 JUSTICE ALITO: Well, how should
6 the -- what methodology should the courts use in
7 approaching Second Amendment questions?

8 If they conclude that text and history
9 protect a -- the text and history of the Second
10 Amendment protect a particular activity, is that
11 the end of the question, or do they then go on
12 and apply some level of scrutiny?

13 MR. DEARING: I think -- I think,
14 first, we look -- we look to history and
15 determine whether history answers the question
16 one way or the other, whether it's
17 constitutional or unconstitutional.

18 JUSTICE ALITO: Right.

19 MR. DEARING: And in a significant
20 number of cases, history will not speak with one
21 voice or conclusively on that subject, and then
22 the right step is to move on to an assessment of
23 justification and fit under a means and scrutiny
24 approach.

25 JUSTICE ALITO: But, if history says

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Author: Joseph Blocher Subject: Sticky Note Date: 12/10/2019 11:54:02 AM

This is the big question!

Author: Darrell Miller Subject: Sticky Note Date: 12/10/2019 3:22:08 PM

What kind of firearm habits are we talking about. This is where an individual right superimposed on a militia-centric history becomes problematic.

1 this is protected, then that's the end of the
2 question? There's no resort to some level of
3 scrutiny?
4 MR. DEARING: If history conclusively
5 shows that the restriction is impermissible,
6 then I -- I think -- as in *Heller*, *Heller* is an
7 example of that phenomenon. *Heller* determined
8 without consulting means and scrutiny that
9 the -- that the law in question sort of went to
10 the core of and destroyed, in essence, the --
11 the -- the -- the Second Amendment right and,
12 therefore, was -- and more severe than any --
13 any historical, any analogous or -- or prior law
14 in -- in its degree of burden on the Second
15 Amendment --
16 JUSTICE BREYER: No --
17 MR. DEARING: -- right.
18 JUSTICE BREYER: -- you're supposed to
19 do there, because you're correctly stating the
20 views of some judges.
21 MR. DEARING: Right.
22 JUSTICE BREYER: And some judges had
23 an opposite view.
24 MR. DEARING: I'm aware -- I'm aware
25 of that, that's correct.

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Author: Darrell Miller Subject: Sticky Note Date: 12/9/2019 9:27:20 AM

Alito says that if history says protected, that's the end (but this is where levels of generality become very, very important).

Author: Joseph Blocher Subject: Sticky Note Date: 12/10/2019 12:41:54 PM

This is in part an answer to the argument by petitioners and the United States that history is being used inappropriately as a one-way ratchet against gun rights. In "Bans," I explore *Heller* and *Moore v. Madigan*, the Seventh Circuit case striking down a statewide prohibition on public carry, as examples of situations where a kind of historical-formal analysis can indeed doom a law.

1 (Laughter.)
2 MR. DEARING: Our -- our -- our -- our
3 view is that -- is that history can answer some
4 questions pretty directly and -- and in other
5 many -- in other -- in a -- in a significant
6 number of cases, history doesn't speak so
7 clearly and that the most reliable method of
8 answering the question in those cases is a -- is
9 means and scrutiny.
10 JUSTICE GINSBURG: One -- one problem
11 with the prior regulation, if you wanted to have
12 a gun in your second home, you had to buy a
13 second gun. And what public safety or any other
14 reasonable end is served by saying you have to
15 have two guns instead of one and one of those
16 guns has to be maintained in a place that is
17 often unoccupied and, therefore, more vulnerable
18 to theft?
19 MR. DEARING: I think that the -- the
20 question on second homes, there, Petitioners
21 have identified a difficult application of our
22 former rule that wasn't really contemplated when
23 the rule was -- was adopted.
24 I still think, though, if you look
25 historically, and the -- the right way to answer

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Author: Darrell Miller Subject: Sticky Note Date: 12/10/2019 3:22:12 PM

Where history is unclear, means - end scrutiny is necessary.

Author: Jake Charles Subject: Sticky Note Date: 12/9/2019 4:49:17 PM

This is, by my count, at least the second time in this argument that a left-leaning justice has questioned the merits of the old rule.

1 a question about whether it was unconstitutional
2 is to ask whether there had been some historical
3 tradition of enabling individuals to use the
4 same handgun to protect two different homes.

5 Of course, our rule never spoke to the
6 question whether an individual could have a
7 handgun in a -- in a -- in a residence outside
8 our jurisdiction. That's something completely
9 that we don't speak to -- we could never speak
10 to.

11 And when you look at the question
12 about -- about what happened historically, there
13 have been incidental burdens that would have
14 burdened similarly that kind of conduct in the
15 past. And --

16 JUSTICE BREYER: Suppose -- I mean,
17 this is why these things are difficult for you.
18 All right? I understand that.

19 But, in Massachusetts, historically,
20 all the guns and ammunition were stored in a
21 central place at night, I believe, at the time
22 of the resolution -- revolution. Not in
23 anybody's home. And this -- do we have a
24 different law for Massachusetts? I guess not.
25 What history do we look to?

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Author: Darrell Miller Subject: Sticky Note Date: 12/9/2019 9:28:00 AM

Breyer - whose history matters? In other words, why would we privilege one state or regions history concerning firearms over another?

Author: Joseph Blocher Subject: Sticky Note Date: 12/10/2019 12:42:34 PM

See Saul Cornell and Eric Ruben for an extended study of the Massachusetts Model: <https://www.yalelawjournal.org/forum/firearm-regionalism-and-public-carry>

1 And you did at one point, or someone
2 said, I am a policeman, I happen to notice
3 there's a gun next to this person in the car who
4 stopped at the stoplight. I say, sir, what are
5 you doing with this gun? He says, I am going to
6 a firing range. Oh, I see. You're going to
7 test it. Where is it?

8 Now, if he says it's in Brooklyn, I
9 can find it. If he says it's somewhere 14 miles
10 northwest of Utica in the Adirondacks, I have a
11 harder time.

12 And I don't know who to believe, and
13 so it's tough. So there are more guns in New
14 York. What happened to that, that argument?

15 MR. DEARING: That argument is the --
16 is the argument that -- that is presented on the
17 record of the -- of the detective --
18 detective -- detective -- detective's affidavit,
19 sorry.

20 We, of course, took a close look at
21 that question, and the police commissioner
22 determined that -- that the rule could be
23 repealed without a negative impact on public
24 safety.

25 I do think the police will have to

1 work harder to verify what's happening in those
2 situations, but we -- we are confident that they
3 can do it and they will do it --

4 JUSTICE ALITO: Why --

5 MR. DEARING: -- successfully.

6 JUSTICE ALITO: -- why will they have
7 to work harder? Somebody who lives in midtown
8 is stopped and -- with a gun and the officer
9 says, where are you going? I'm going to a
10 firing range in Jersey City, which is right
11 across the river.

12 That's tougher than, I'm going to a
13 firing range in Staten Island. And I think
14 three of your seven ranges are in Staten Island,
15 am I right?

16 MR. DEARING: Two -- two are in Staten
17 Island.

18 JUSTICE ALITO: Two are in Staten
19 Island?

20 MR. DEARING: I think it is a little
21 bit tougher, but, of course, the -- the person
22 may not say Jersey City either.

23 JUSTICE ALITO: All right. How about
24 if somebody who lives in the north Bronx says,
25 I'm going across the border to Westchester

1 County? That's tougher for you to -- to look
2 into than, yes, I'm going all the way to Staten
3 Island?

4 MR. DEARING: Well, still, the --
5 still, what happens in Staten Island is within
6 the Police Department's jurisdiction. They have
7 access to records, immediate access to records.
8 They have -- that range is subject to the
9 requirement to maintain a roster of individuals
10 to use it.

11 I agree with you that it's not -- that
12 it is enforceable as to Jersey City or as to
13 Westchester, and that's part of the reason the
14 city is determined to change the rule, even
15 ignoring the fact that the state came in and
16 preempted it, but I do think it is not -- it is
17 more difficult and that -- that the judgment
18 previously was that with respect to premises
19 licensees, of course, not a carry license, which
20 is not at issue in this case, has never been
21 challenged, the target license that Mr. Clement
22 referred to was understood to be a kind of carry
23 license.

24 And if that was the heart of the
25 complaint, the -- the claim should have been

1 that the city needs to reinstate that carry
2 license. That was not the claim in this case.
3 The claim in this case was
4 specifically articulated by the Petitioners that
5 they have a premises license, this is about the
6 scope of a premises license, and the claim made
7 framed by the Petitioners most clearly in their
8 summary judgment papers at page 6 was that the
9 relief sought here is necessary to allow the
10 full exercise of the -- of the right of defense
11 of hearth and home in the home.
12 They accepted the premises license
13 framing, and the entire case has been litigated
14 --
15 JUSTICE GORSUCH: Counsel, can I --
16 MR. DEARING: -- through that lens.
17 JUSTICE GORSUCH: I just want to
18 circle back to the direct and continuous travel
19 requirement of the current rule and Justice
20 Alito's question about visiting your mother.
21 Is it now the city's position that any
22 reasonable stops are permissible?
23 MR. DEARING: That is our
24 enforcement -- reasonably necessary stops in the
25 course of travel --

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Author: Jake Charles Subject: Sticky Note Date: 12/9/2019 4:51:20 PM
Seems to me again here that state law now provides the key considerations for transport.
Author: Darrell Miller Subject: Sticky Note Date: 12/9/2019 9:28:13 AM
Concedes NYC law allows reasonably necessary stops.

1 JUSTICE GORSUCH: Reasonably
2 necessary.
3 MR. DEARING: -- are permissible.
4 JUSTICE GORSUCH: Now does that
5 include stopping to visit your mother --
6 MR. DEARING: I haven't -- I --
7 JUSTICE GORSUCH: -- or use the --
8 MR. DEARING: -- I don't know the
9 answer to that.
10 JUSTICE GORSUCH: Get a cup of coffee?
11 I mean, I'm not sure a cup -- is a cup of coffee
12 reasonably necessary?
13 (Laughter.)
14 MR. DEARING: Well, it probably
15 depends who you ask. But the Police Department
16 has --
17 (Laughter.)
18 MR. DEARING: The Police Department
19 has affirmed and we have made clear that -- that
20 the enforcement position is that a stop for a
21 cup of coffee is not a problem.
22 JUSTICE GORSUCH: So that's reasonably
23 --
24 MR. DEARING: And, in fact, there's no
25 --

1 JUSTICE GORSUCH: -- necessary. So
2 what -- what's going to qualify? I -- I'm just
3 a little unclear about that.
4 MR. DEARING: I think that -- well,
5 the controlling standard here -- I'm -- I'm
6 giving you the enforcement position of the
7 Police Department on the questions we have
8 considered. But the controlling standard here,
9 I should hasten to add, is provided by state
10 law.
11 We -- we do not offer a definitive --
12 cannot offer a definitive construction of that
13 law. And I think the -- the question about what
14 that state law means is one that's going to need
15 to be litigated probably in state courts, but
16 before there's any dispute here ripe for -- for
17 constitutional adjudication, the meaning of that
18 law is going to have to be determined.
19 JUSTICE GORSUCH: So we have no
20 representations to us as to what is -- is direct
21 and continuous, other than coffee's okay?
22 MR. DEARING: Coffee -- what -- what I
23 know -- what I -- what I can represent because
24 -- because it's come up before, coffee,
25 restrooms, food, gas, the kinds of things that

Author: Jake Charles Subject: Sticky Note Date: 12/9/2019 4:52:24 PM
Even after counsel points out state law standard, Justice Gorsuch is back on the City law standard.

1 you ordinarily would stop for in the course of
2 -- of travel, I hadn't considered the mother or
3 mother-in-law example before. I think that's
4 going to need to play out in the state courts.

5 The more important point here, though,
6 is that none of those issues were ever part of
7 this controversy. The -- this controversy was
8 about two things, as repeatedly emphasized by
9 Petitioners throughout the --

10 JUSTICE GORSUCH: I understand --

11 MR. DEARING: -- litigation.

12 JUSTICE GORSUCH: -- that. But you're
13 asking us to say that there is no controversy
14 now. So I'm trying to just nail down exactly
15 what is the delta, if any, remaining in the
16 relief that might have been sought and the
17 relief you've provided.

18 MR. DEARING: Well, this is all -- I
19 guess, in short, what I'm saying is -- Mr. Chief
20 Justice, may I answer?

21 CHIEF JUSTICE ROBERTS: Sure.

22 MR. DEARING: In short, what I'm
23 saying is this is not relief that was ever
24 sought. There may be a controversy here, but
25 it's a new controversy, it would need to be

1 litigated in a new case. And the relief -- the
2 -- the speculation about what an injunction
3 theoretically could have included is not the way
4 this Court analyzes questions under Article III.

5 Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Three minutes, Mr. Clement.

9 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

10 ON BEHALF OF THE PETITIONERS

11 MR. CLEMENT: Thank you, Mr. Just --
12 Chief Justice.

13 Just a few points in rebuttal. First
14 of all, Justice Kagan, we never got to the point
15 of a proposed injunction in this case. We
16 didn't exactly succeed really well under the
17 current Second Circuit law, so we never got to
18 the point of proposing an injunction.

19 The only thing my friend is referring
20 to are some allusions to the kind of relief we
21 wanted in a summary judgment motion.

22 If we had gotten to that point, we
23 would have wanted clarity, the kind of clarity
24 that a federal court applying the Second
25 Amendment can provide. You don't have to depend

1 on a city's representation about --

2 JUSTICE SOTOMAYOR: Mr. Clement --

3 MR. CLEMENT: -- state law.

4 JUSTICE SOTOMAYOR: -- your complaint
5 from relief states it: "An order preliminarily
6 and permanently enjoining the defendants" -- I
7 skip out whoever else -- "who receive actual
8 notice of the injunction from enforcing this
9 prohibition from traveling beyond the borders of
10 the City of New York to attend a gun range,
11 shooting competition, or to use a lawfully
12 possessed and licensed firearm for the purposes
13 of defending one's home, person, or property."

14 And you asked for declaratory relief
15 in -- with those same words.

16 MR. CLEMENT: That's right, Justice
17 Sotomayor. I don't think we would have been
18 tethered to those in a proposed injunction.

19 But, if we're going to go to the
20 complaint, I think we should look at page 40 --
21 at paragraph 41, at Joint Appendix 36, where we
22 asked for "unrestricted access to gun ranges and
23 second homes." Unrestricted.

24 I don't think at this late stage we
25 are still being offered unrestricted access.

1 And I think it's --

2 JUSTICE SOTOMAYOR: Well, let --

3 MR. CLEMENT: -- important to

4 understand --

5 JUSTICE SOTOMAYOR: -- let's stop.

6 Justice Alito said stopping at your mother's.

7 When you say unrestricted, does that mean I can

8 carry my gun for three days?

9 Do you think that a court actually

10 would have crafted an injunction at all with

11 hypothetical situations?

12 It would have said you can carry your

13 gun to the range, and then would have left for

14 further litigation specific applications of that

15 general rule.

16 MR. CLEMENT: I -- I don't think so,

17 Your Honor. I think --

18 JUSTICE SOTOMAYOR: Unless you had --

19 MR. CLEMENT: -- I think what would

20 have happened is the parties would have had

21 their proposed injunctions. There would have

22 been a huge delta between them. And then we

23 would have disputed the same kind of questions

24 that are still being disputed here.

25 But we wouldn't have to rely on the

1 city's representation about state law because we
2 could have an injunction that enforced the
3 Second Amendment.

4 I think it's important to understand
5 how state law and city law --

6 JUSTICE SOTOMAYOR: So you want us --

7 MR. CLEMENT: -- work together.

8 JUSTICE SOTOMAYOR: -- to create --

9 CHIEF JUSTICE ROBERTS: Maybe you
10 could proceed --

11 JUSTICE SOTOMAYOR: -- the law.

12 CHIEF JUSTICE ROBERTS: -- with the
13 other points you intended to on your rebuttal.

14 MR. CLEMENT: I -- I -- I would be
15 delighted to, Your Honor.

16 I think the way that city law and
17 state law work together here is all the state
18 law says is we're going to allow your transport
19 if it's direct. It doesn't otherwise specify
20 what's direct.

21 The city took it on itself in
22 Section 7 of the new regs to tell you what they
23 at least at that point thought was sufficiently
24 direct, which is continuous and uninterrupted.

25 Now they're now making representations

Author: Jake Charles Subject: Sticky Note Date: 12/9/2019 4:54:22 PM
Justice Sotomayor was too tenacious it seems.

Author: Jake Charles Subject: Sticky Note Date: 12/9/2019 4:55:09 PM
Clement senses that some members of the Court may be persuaded by this argument and so jumps in on it.

1 that the reg doesn't mean what it seems to mean
2 and the like. And I would say that my client
3 shouldn't have to rely on those representations.
4 They should get that in writing in an injunction
5 that would be enforceable. That would be
6 effectual relief.

7 Again, I think the damages point was
8 not our principal claim here, but let's think
9 about in real time what would have happened is
10 as soon as we filed the lawsuit, the city would
11 have turned around, dropped its case entirely,
12 and then admitted to the court that it served no
13 public safety purpose.

14 Then I think my clients, who for years
15 had tried to comply with the law and restricted
16 where they wanted to go, would have immediately
17 sued for damages.

18 I don't think they should lose that
19 right just because the city's maneuvering
20 happened post-certiorari.

21 Thank you, Your Honor.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel. The case is submitted.

24 (Whereupon, at 11:07 a.m., the case
25 was submitted.)