No. 18-280

In the
Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

REPLY BRIEF FOR PETITIONERS

BRIAN T. STAPLETON
75 South Broadway
4th Floor
White Plains, NY 10601

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
EDMUND G. LACOUR JR.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Petitioners

November 28, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

REPLY BRIEF

The City's brief in opposition is a vivid illustration of the need for this Court's intervention. Remarkably, the City does not even attempt to argue that what petitioners seek—the modest ability to transport their licensed firearms, unloaded and locked away separate from ammunition, to a shooting range or second home outside city limits—poses any threat to public safety. Instead, the City defends its extreme and novel ban on the theory that the ban makes it easier to enforce *other* laws that *already* specifically prohibit practices with which the City is really concerned. That kind of prophylaxis-on-prophylaxis is the antithesis of the meaningful tailoring required by heightened scrutiny. And it highlights that the ban is a prototypical example of a law that could survive when the collective rights view of the Second Amendment held sway but is a complete anachronism in light of *Heller* and *McDonald*. The City's ban cannot be reconciled with a Second Amendment that protects individual rights or with any meaningful level of constitutional scrutiny. The fact that the Second Circuit upheld it while purporting to apply heightened scrutiny is thus reason enough for this Court's review.

Seeking to turn a constitutional vice into a cert-stage virtue, the City insists that its ban is *so* extreme, and *such* an outlier, that it does not merit plenary review. But the laws in *Heller* and *McDonald* were outliers too. That the District and Chicago were virtually alone in attempting to ban handgun possession outright made those laws both plainly unconstitutional and ideal vehicles for advancing a Second Amendment jurisprudence that was

artificially arrested during the collective-rights era. Indeed, in numerous contexts, this Court reviews and invalidates outlying statutes, especially when lower courts have mistakenly upheld them. Doing so both vindicates constitutional rights and provides needed guidance for lower courts in addressing less extreme efforts. And nowhere is such guidance more acutely needed than in the Second Amendment context. A number of lower court decisions have drained not just *Heller* and *McDonald* but the very notion of heightened scrutiny of their meaning. The project this Court began in *Heller* and *McDonald* cannot end with those precedents, and New York's outlying ordinance is a perfect vehicle to reaffirm that those decisions and the constitutional text have consequences.

The City betrays its hostility to Second Amendment rights in its Commerce Clause and right-to-travel analysis. In implicit recognition that New York could not constitutionally insist that its residents use their golf clubs or obtain medical care only within the five boroughs, the City observes (at 26) that firearms are different because they pose public safety concerns. But that was true in 1789, and the framing generation adopted the Second Amendment despite, or perhaps because of, the fact that governments never lack public safety rationales for disarming the citizenry. That the City believes that it can impose distinct disabilities on rights the Framers singled out for especial protection underscores the acute need for this Court's review.

I. The City's Transport Ban Is An Extreme, Unjustified, And Irrational Restriction On Second Amendment Rights.

1. New York City's ban on transporting licensed, locked up, and unloaded handguns to any place outside the City—including a second home where petitioners would exercise their core right to possess them for self-defense, or a shooting range at which petitioners would hone their ability to exercise that right—is an extreme and irrational outlier that does not even make sense on its own terms. Setting aside that there is absolutely no evidence that transporting an unloaded firearm, locked in a container separate from its ammunition, presents a material public safety risk, the City's ban is not even rationally designed to reduce the incidence of such transport, as it actually forces New Yorkers to spend *more* time transporting their firearms through the streets of New York, rather than to more conveniently located shooting ranges just across city or state lines. And the prohibition on transporting a firearm to a second home has the bizarre result of keeping more handguns in the City, including in *vacant* within-city-limits residences.

It should come as little surprise, then, that the City does not even attempt to defend its ban on the theory that the prohibited conduct poses some public safety risk. *See* Br. of *Amicus Curiae* W. States Sheriffs' Ass'n, *et al.* at 3 ("from a law enforcement perspective," ban "does not advance any public safety interest"). Instead, the City defends the ban solely on the theory that it has *administrability* benefits: It purportedly "improves the City's ability to monitor and enforce the limited circumstances under which

premises licensees can possess a handgun in public." BIO.22. In other words, by severely limiting the circumstances in which the holder of a premises license can possess the firearm outside her premises, those limits become easier to enforce. But that circular reasoning is limitless and wholly inappropriate when it comes to constitutionally protected activity. It would always be easier to police limits on campaign contributions by banning them all (or all but one narrow category), or to police difficult questions of obscenity by prohibiting all displays of nudity (or all but one narrow category). Such prophylaxis-upon-prophylaxis is a hallmark of overbreadth and the antithesis of tailoring.

Moreover, even assuming the City has a sufficiently "important" interest in making it easier to enforce *other* severe restrictions on the exercise of Second Amendment rights, it provided absolutely no evidence that its ban actually furthers that purported goal. While the City claims that the ban has "reduce[d] the number of firearms carried in public," BIO.5, the only evidence it points to is a declaration that cites no data, studies, or expert conclusions and affirmatively undermines the City's claim by noting "a large [albeit unspecified] volume and pattern of premises license holders who are found in possession of their handguns in violation of the restrictions on their license" since the ban took effect. JA72. Nothing suggests that these permit-condition violators could have plausibly claimed they were on their way to New Jersey ranges or upstate vacation homes but not to an in-city range. Rather, the declaration only confirms that "there is no reason to believe that [the] extra layer of regulation" imposed by the City has "affected th[e]

behavior" it purports to be trying to deter. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2313 (2016).

As to the prohibition on transporting an unloaded and locked-up firearm to a second home, the City literally does not offer any public safety rationale at all. Instead, it merely attempts to minimize the public safety *risks* caused by the ban's requirement that New Yorkers leave their handguns in vacant homes. The City hypothesizes that those affected by the ban are sufficiently law-abiding that the handguns will be completely inaccessible to decidedly less law-abiding burglars. BIO.22. But even assuming the City is not underestimating its burglars, its confidence in the law-abiding nature of its licensees fatally undermines its administrability defense. If the City can trust handgun owners to exercise such care with their handguns at home, then surely it can trust them to responsibly transport them to shooting ranges and second homes.

2. The City is thus left trying to defend its ban principally on the rationale that it "does not … even meaningfully impact" Second Amendment rights because it still leaves petitioners *some* avenue for learning how to use their handguns and protecting themselves at their second homes. BIO.19-20. But the fact that the City has not banned handgun transport entirely hardly suffices to establish that it has not "meaningfully" burdened that Second Amendment right. After all, "[t]he distinction between laws burdening and laws banning [constitutionally protected activity] is but a matter of degree." *United*

States v. Playboy Entm't Grp., 529 U.S. 803, 812 (2000).

The City attempts to minimize the burden its ban imposes by asserting that petitioners could hone their skills by renting a firearm outside the City. BIO.20. As an initial matter, there is no record evidence whatsoever to substantiate this hypothesis. But more to the point, petitioners seek to confirm the operability of, and their ability to safely and effectively use, *their* handguns, not someone else's. If any of them is ever forced to defend his or her home, the fact that a different handgun maintained by someone else across the Hudson would be up to the task will be of precious little comfort. Recognizing as much, the City faults petitioners for failing to allege that practicing with their own firearms is necessary for safety and self-defense. BIO.20. The City is mistaken. Petitioners alleged that "[g]un owners trained in and familiar with the operations of *their* guns are less likely to be involved in accidental shootings, and more likely to successfully use *their* firearms in self-defense in case of need." JA14 (emphasis added); *see also* JA32, 42, 46.

The City mocks Petitioner Colantone's claim as "reduc[ing] to the assertion that those who are able to own two homes should not have to own two handguns as well." BIO.19. But "the right of law-abiding, responsible citizens to use arms in defense of hearth and home," *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), is not limited to just one home. Nor is any rational government interest served by requiring duplicative handguns (and presumably duplicative trips to ranges to ensure operability and

user-proficiency) for the subset of "the People" protected by the Second Amendment who split their time between residences.

The City tries to paint its ban as in accord with federal law affirmatively protecting individuals' rights to transport firearms in interstate commerce if they are unloaded, locked up, and not readily accessible. 18 U.S.C. §926A. According to the City, that law reflects Congress' judgment that "only individuals with a carry license, not those who hold a premises license," BIO.21, may be trusted to transport their firearms. But that argument is doubly problematic. Few jurisdictions have an analog to the City's "premises" license, and most not only allow unlicensed possession in the home but also permit carrying without a license (or issue a license on a shall-issue basis). Thus, the thrust of the federal law is to "confer[] upon all law-abiding citizens a *right* to transport their firearms in a safe manner in interstate commerce." *City of Camden v. Beretta U.S.A. Corp.*, 81 F. Supp. 2d 541, 549 (D.N.J. 2000) (emphasis added). And even the City acknowledges that those with a "premises" license can permissibly transport their handguns if they are unloaded, locked, and inaccessible while the owner is en route to an in-city range. Nothing in federal law remotely supports the City's irrational effort to prevent licensees from employing the same safe and federally sanctioned storage conditions en route to nearby ranges or vacation homes.

3. Given the complete absence of any public safety justification, it also should come as little surprise that the City's transport ban is a "'novel,' 'one-of-a-kind' regulation with 'no analog in any other jurisdiction.'"

BIO.13 (quoting Pet.1-3, 9-10, 14, 21). The City does not dispute this reality, but celebrates it as a reason to deny certiorari, arguing that a decision invalidating its outlier ban would not "provide meaningful guidance to lower courts." BIO.13. That counterintuitive argument, which would insulate the most unconstitutional laws from this Court's review, is deeply flawed. Indeed, it ignores that both *Heller* and *McDonald* involved outlier ordinances. The fact that the District and Chicago virtually alone among major municipalities (including New York) saw fit to ban handguns outright was hardly a reason to deny review. To the contrary, as in *Heller* and *McDonald*, this Court often develops its constitutional jurisprudence in the context of outlying efforts that failed to respect fundamental constitutional guarantees, especially when those efforts were endorsed by the lower courts. This phenomenon is hardly limited to the Second Amendment. *See*, *e.g.*, *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (invalidating North Carolina's alone-in-the-Nation prohibition on website access); *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (invalidating Arkansas' outlier ban on beards); *Gomillion v. Lightfood*, 364 U.S. 339 (1960) (invalidating Alabama's uncouth 28-sided district).

While this Court's tendency to clarify constitutional boundaries by reviewing and invalidating outlier statutes that transgress those boundaries is hardly limited to the Second Amendment, there is no context in which this kind of development is more essential. This Court's effort to develop a coherent Second Amendment to guide lower courts was frustrated by the decades in which the collective-rights view of the amendment held sway.

This Court's decisions in *Heller* and *McDonald* thus reflect the sum total of this Court's guidance. Yet, as the petition documented, many lower courts have drained *Heller* and *McDonald*, and even the very notion of heightened scrutiny, of much of their meaning by upholding laws that regulate and tax firearms as if they were entitled to no constitutional protection. *See* Pet.22-24. The City dismisses these laws as unrelated to its ban, but courts have upheld such laws by applying the same basic watered-down version of heightened scrutiny that the Second Circuit applied here. *Heller* and *McDonald* began the process of developing a meaningful Second Amendment jurisprudence by invalidating outlier statutes, but they cannot be this Court's last word.

Moreover, even though New York's ordinance stands alone, it does not mean that the circuits are not in disarray. The City does not and cannot explain why New York City should be allowed to preclude its residents from honing the safe and effective use of their handguns at shooting ranges *outside* city limits if it is unconstitutional for Chicago to preclude its residents from honing the safe and effective use of their handguns at shooting ranges *inside* city limits. *See Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011). The need for this Court's intervention and further clarification of the proper analysis of various efforts to treat that right like no other constitutional right is acute.

II. The Transport Ban Also Violates The Commerce Clause And Unconstitutionally Burdens The Right To Travel.

The City also fails to reconcile the decision below with this Court's Commerce Clause and right-to-travel jurisprudence. Though the transport ban limits New Yorkers to training with their handguns at in-city shooting ranges, the City asserts there is no discrimination against out-of-city ranges because New Yorkers can still practice there—just not with their own firearms. But that is like telling New Yorkers that they are free to golf beyond city limits, just not with their own clubs. Such a law would deny out-of-city golf courses access to in-city golfers who want to use their own clubs. The City's transport ban likewise denies out-of-city shooting ranges access to New Yorkers who want to learn how to use their own firearms. The ban thus plainly "deprive[s] citizens of their right to have access to the markets of other States on equal terms." *Granholm v. Heald*, 544 U.S. 460, 473 (2005).

The ban also violates the Commerce Clause by regulating "commerce that takes place wholly outside of the [City's] borders." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). The City insists that its law has no extraterritorial effect because it restricts only transport of firearms "*within the City*." BIO.24. But the whole point of the ban is to prohibit residents from transporting firearms *outside* the city. If New Yorkers with "premises" permits use their firearms at a New Jersey range, it is a per se violation of the permit. To deny that extraterritorial effect is to deny reality.

The City ultimately admits that its regulation "could be said to control" commerce "beyond the City's boundaries"—*i.e.*, "the ability to patronize a shooting range outside the City with a gun that, by definition, is licensed to a City residence." BIO.24. With that, the City concedes the Second Circuit's error. Indeed, the City is left arguing only that no one has "a constitutionally protected right" to engage in the conduct the City is restricting. BIO.24. But even granting that flawed Second Amendment premise, the Commerce Clause restricts extraterritorial control of *any* commerce, not just constitutionally protected commerce. The brewers in *Healy* did not have to establish a constitutional right to set beer prices to show that Connecticut's extraterritorial regulation of prices violated the Commerce Clause. *See Healy*, 491 U.S. at 335-40.

Finally, the transport ban violates petitioners' fundamental right to travel by forcing them to choose which constitutional right they would rather exercise: their right to travel or their right to keep and bear arms. The City insists that the right to travel is not implicated because the transport ban imposes only "a minor restriction on travel," presumably because petitioners may travel wherever they like *without* handguns. BIO.25. But if the City passed a regulation prohibiting its citizens from leaving their residences with an iPhone, it could not maintain with a straight face that such a statute did not infringe "the right of a citizen of one State to enter and to leave another State." *Saenz v. Roe*, 526 U.S. 489, 500 (1999).

The City's response to the obvious unconstitutionality of efforts to restrict golf clubs or

iPhones to the city limits betrays the deeper flaw with its ordinance. Firearms are different, the City submits (at 26), because unlike golf clubs or iPhones, firearms pose unique threats to public safety. As this argument lays bare, the City believes it has greater ability to regulate firearms than any ordinary article of commerce and has enacted and enforced an ordinance that squarely reflects that hierarchy. The Framers, though fully aware that firearms pose unique risks to public safety, would-be assailants, and tyrants alike, enshrined a different hierarchy in the Constitution. That decision forecloses both the City's contrary approach and the decision below, which balanced constitutionally protected rights out of existence.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

BRIAN T. STAPLETON
75 South Broadway
4th Floor
White Plains, NY 10601

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
EDMUND G. LACOUR JR.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Petitioners

November 28, 2018