No. 18-280

In the Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

BRIEF FOR FEDERAL COURTS SCHOLARS AS AMICI CURIAE IN SUPPORT OF VACATUR AND DISMISSAL OR REMAND

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INTEREST OF AMICI CURIAE[1]

Amici are professors of law who focus their research, scholarship, and teaching on federal courts, federalism, and the role of the federal judiciary in our legal system.

Amici do not all agree on the best understanding of the Second Amendment or the best regulatory policies for firearms. But each agrees that this case is moot under well-established Article III principles.

Amici[2] include:

- Jessica Bulman-Pozen,
  Columbia Law School
- Gillian Metzger,
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[1] The parties have filed blanket consents to the filing of amicus curiae briefs. No counsel for any party authored this brief in whole or in part, and no person other than amici's counsel made a monetary contribution to fund the preparation or submission of this brief.

[2] Amici join this brief as individuals. Institutional affiliations are noted for informational purposes and do not indicate endorsement by institutional employers of the positions advocated herein.

SUMMARY OF ARGUMENT

State law now grants petitioners all that they demanded in federal court. The claims in petitioners' complaint are therefore moot. No federal court has authority to offer an opinion on constitutional law without a live case or controversy under Article III. An ongoing disagreement about law—even federal constitutional law—is insufficient on its own to sustain Article III power. The claims here are moot "[n]o matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit." *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013).

We base this conclusion on New York State's recently enacted Penal Law § 400.00(6), as amended effective July 16, 2019. In the past, this Court has refused to reach the merits of claims against a State's own officials once state law has been amended. It has done so even when state law was amended while the dispute was pending in this Court, and it has not required a confession of constitutional error or inquired into the legislature's motives. *E.g.*, *Kremens* v. *Bartley*, 431 U.S. 119, 126-129 (1977); *Hall* v. *Beals*, 396 U.S. 45, 46-50 (1969) (per curiam). Judicial tradition reinforces that position particularly when the new law is generally applicable and lacks a sunset. We are aware of no case in which a court proceeded to the merits after a generally applicable state statute gave plaintiffs what they demanded from state officials—let alone when plaintiffs challenged municipal regulations that were subsequently preempted by the new state law.

Indeed, the mootness issue does not raise a question of voluntary cessation. Compare, *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 &

nn.10-11 (1982). A *State* has made unlawful what plaintiffs claimed that a *city* was doing unlawfully. New York State and New York City are separate entities, and state law preempts an inconsistent city regulation. The new state law thus prevents the City from reinstating the challenged regulation or adopting a substantively similar regulation, even if it wished to do so. This understanding of New York law informs our position on mootness. See *infra* note 3.

On petitioners' view, the Court would review a rule that is not in force in any jurisdiction today. See Pet. Br. 7. Constitutional law would be formulated in the absence of real parties with concrete legal interests at stake. Gun rights cases are not scarce in the lower federal and state courts. The fact that many live cases might be influenced by an opinion on the merits in this matter is a reason to dismiss, not forge ahead. See *Little* v. *Bowers*, 134 U.S. 547, 558 (1890) ("If * * * the question * * * is one of great importance * * *, so much the more important is it that it should not be decided in a case when there is nothing in dispute."); *Mission Prod. Holdings, Inc.* v. *Tempnology, LLC*, 139 S. Ct. 1652, 1668 (2019) (Gorsuch, J., dissenting) (similar). Pressing to the merits in this instance would, in traditional terms, "convert the highest tribunal * * * into a moot court." *Smith* v. *Cudworth*, 41 Mass. 196, 197, 24 Pick. 196, 197 (1837).

Article III principles cannot bend to accommodate this dispute, and softening those commitments would generate systematic problems for sound litigation and lawmaking in the future. The judgment below should be vacated and the case remanded with directions to dismiss this suit, (see *United States* v.

Munsingwear, Inc., 340 U.S. 36, 39 (1950)), a disposition that the City acknowledges is appropriate in these circumstances. In the alternative, the case should be remanded for additional proceedings to resolve any uncertainty about relevant facts, state law, or municipal law.[3]

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[3] Amici's analysis rests on the understandings of New York's state and local laws that are discussed in this brief. In addressing the new state statute and city regulation, petitioners raise questions about the meaning of those laws, and they appear to add allegations regarding hypothetical persons and claims that are not identified in the Amended Complaint. See*, e.g.*, Petitioners' Response to Respondents' Suggestion of Mootness 15, 19-20 (referring to rented properties, persons who would want to travel *into* the City with handguns, and persons who might have violated the repealed City rule and who might suffer adverse consequences someday). These allegations face a range of obstacles at this stage. See *infra* note 9.

To the extent that there is uncertainty about relevant facts, state law, or local law, and to the extent that another amendment to the complaint is still permitted, a remand to the lower courts is appropriate. See *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 481 (1990) ("[W]henever possible (and it is possible where the decision under review is that of a federal court) the evaluation of such factual contentions bearing upon Article III jurisdiction should not be made by this Court in the first instance."). See also *Friends of the Earth, Inc.* v. *Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 193-195 (2000) (remanding on likelihood of recurring private party conduct); *Fusari* v. *Steinberg*, 419 U.S. 379, 385, 387-390 (1975) (remanding for inquiry into the effect of a new state statute). A certified question to the New York Court of Appeals after remand may be another option, if state law and its relationship with the new city rule require clarification. To our knowledge, neither the state statute nor the new city rule has been interpreted in state court. See *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 75-79 (1997) (commending certified questions for novel State law issues during federal constitutional litigation).

STATEMENT

The three individual petitioners are residents of New York City who obtained dwelling-based premises licenses for their handguns. J.A. 26. See N.Y. Penal Law § 400.00(2)(a)-(b) & (f) (separating dwelling, business, and carry licenses). They do not allege that they hold public carry licenses. Under New York law, a dwelling-premises licensee may lawfully keep a handgun at home and, without an additional license, may transport the handgun to specified locations.

Petitioners filed suit in federal court to challenge a New York City rule regarding transport outside the City.[4] The complaint names as defendants the City and the City Police Department's License Division (collectively, "the City"), but not the State. Petitioners complained that the City's rule did not entitle premises licensees to transport their handguns from their homes in New York City to a second home or a shooting range outside that City, even when unloaded and locked in a container separate from the ammunition. J.A. 32-33. Petitioners sought declaratory and injunctive relief without stating a claim for damages. J.A. 47-48. The district court reached the merits on cross-motions for summary judgment and found no violation of constitutional law. Pet. App. 42-76. The court of appeals affirmed. Pet. App. 1-39.

After this Court granted certiorari to decide "[w]hether the City's ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the Commerce Clause, and the constitutional right to travel" (Pet. i.), the City re-

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[4] An association joined the suit, but it did not identify individual members with claims to pursue. See J.A. 26-27.

vised its rule. See 38 R.C.N.Y. § 5-23(a) (as amended effective July 21, 2019). For its part, the State amended the governing statute. See N.Y. Penal Law § 400.00(6) (as amended by 2019 N.Y. Sess. L. ch. 104, sec. 1, effective July 16, 2019). State law now authorizes petitioners to transport their handguns from their homes in New York City directly to a second home or to a shooting range, regardless of location, if the firearm is unloaded and in a locked container separate from the ammunition. See *id.* § 400.00(6)(i)-(iv) (referring, *inter alia*, to another dwelling, a shooting range authorized by law to operate as such, and "any other location where the licensee is lawfully authorized to have and possess such pistol or revolver"). The City's new rule is in accord. If it were not, the rule would be preempted by the state statute. See *id.* § 400.00(6) (assuring transport rights to those holding premises licenses "[n]otwithstanding any inconsistent provision of state or local law or rule or regulation").

Although the parties' disagreement over mootness has focused on the City's revised rule, Amici address only the state law. Section 400.00(6) of the New York Penal Code supersedes any contrary municipal law within the State, and it grants petitioners all the relief that they sought in court. See *Kremens*, 431 U.S. at 129 n.11 ("Given our view that the Act moots the claims of the named appellees, we need not address the issue of whether the promulgation of the new regulations had previously mooted their claims.").

ARGUMENT

The State's statute satisfies the demands that petitioners made in court, and it moots their claims.

I. PETITIONERS' CLAIMS ARE MOOT UNDER ARTICLE III PRINCIPLES THAT LIMIT FEDERAL COURT POWER

A. Mootness is a nondiscretionary constitutional limit on federal courts

The law of mootness helps specify what constitutes a "Case[]" or "Controvers[y]" to which the judicial power extends. U.S. Const. Art. III, § 2. It is part of a network of justiciability commitments that keep the judicial footprint modest in size and matched to the proper role of the federal courts. These commitments respect the work of the other branches and levels of government, the efforts of nongovernmental actors to solve problems without litigation, and the interests of litigants and potential litigants who are not full-fledged parties to the suit in question.

These commitments extend back to the founding. Accumulating judicial practices and doctrines reflect ongoing efforts to implement a principle that was promoted by James Madison and many others during his time: that the federal judiciary would decide only "cases of a Judiciary Nature" when called upon to interpret the Constitution. 2 The Records of the Federal Convention of 1787, at 430 (Max Farrand ed., 1911). See *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 405 (1821) (assuring that Article III "does not extend the judicial power to every violation of the constitution which may possibly take place"); 1 James Kent, Commentaries on American Law 40 (2d ed., 1832) (referring to "questions of a judicial nature" for this Court). That principle is nonpartisan

and neutral with respect to the scope and nature of substantive federal rights. It also is a fundamental element of our legal system, in which federal courts play a limited role. See *Allen* v. *Wright*, 468 U.S. 737, 750, 752 (1984).

Mootness thus imposes a nondiscretionary and lasting constraint on all federal courts. "In our system of government, courts have 'no business' deciding legal disputes or expounding on law in the absence of such a case or controversy." *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 90 (2013) (quoting *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 341 (2006)). Because the mootness limit persists during appeal, resources inevitably will be expended on litigation that is halted before an authoritative judicial pronouncement on the merits. Nonetheless, this Court has established that the authority of any federal court to interpret federal law depends on a live case at every stage of litigation. That position is at least a century old. See, *e.g.*, *United States* v. *Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018); *Already*, 568 U.S. at 91; *Alvarez* v. *Smith*, 558 U.S. 87, 92 (2009); *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 21 (1994); *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975); *Mills* v. *Green*, 159 U.S. 651, 653 (1895); *Washington Market Co.* v. *District of Columbia*, 137 U.S. 62, 62 (1890).

Furthermore, a party may continue to disagree with the other side's view of the law without converting such abstract disagreements into a case or controversy. Article III limits are directed at the federal courts, and they do not materialize or dissolve based on litigants' assertions. This Court accordingly has not imposed a rule that defendants must confess legal error as a condition of dismissal, nor do federal

courts test the sincerity of any such confession. "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit," the Court recently explained, "the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiffs' particular legal rights.'" *Already*, 568 U.S. at 91 (quoting *Alvarez*, 558 U.S. at 93).

Related doctrines do provide courts a measure of discretion to shape and withhold remedies. Examples include the standards for dismissing certiorari petitions as improvidently granted, (see, *e.g.*, *Rice* v. *Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 73-79 (1955)), for denying declaratory or injunctive relief in cases that are justiciable, (see, *e.g.*, *City of Mesquite*, 455 U.S. at 289; *A.L. Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324, 330-31 (1961)), and for deciding whether to vacate a lower court judgment after a dispute becomes moot. See, *e.g.*, *U.S. Bancorp*, 513 U.S. at 21-22, 24 (distinguishing mootness *vel non* from equitable principles that guide vacatur); *Khodara Envt'l, Inc. ex rel. Eagle Envt'l L.P.* v. *Beckman*, 237 F.3d 186, 195 (3d Cir. 2001) (Alito, J.) (addressing an alleged legislative motive to moot litigation as part of the vacatur analysis). But those doctrines reinforce the limits on Article III power, which extends only to live cases and controversies.[5]

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[5] Scholars have long debated the constitutional basis of mootness. See, *e.g.*, David P. Currie, *The Supreme Court and Federal Jurisdiction: 1975 Term*, 1976 Sup. Ct. Rev. 183, 188-89; Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1381-86 (1973); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 Harv. L. Rev. 603, 656 (1992). But this Court's decisions plainly hold that mootness doctrine is grounded in Article III.

No federal court enjoys authority to reach the merits simply because doing so would be expedient. To be sure, parties sometimes attempt to push Article III further, such as when there is an asserted "public interest" in settling important legal questions (*United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953)) or when dismissal might be "wasteful" (*Friends of the Earth, Inc.* v. *Laidlaw Envt'l Servs.*, 528 U.S. 167, 192 (2000)). But the Court's decisions in such cases must be read in their unique factual contexts. Defendants in those cases had unilaterally discontinued their conduct, with regard to a limited class of complainants, after suit was filed and without assurance that the conduct would not repeat upon dismissal.[6] On those facts, the Court determined that a live controversy might remain and found it proper to shift the burden of persuasion on mootness to defendants. The Court did not indicate that a public interest in settling legal questions or concerns about "sunk costs" could themselves "license courts to retain jurisdiction." *Friends of the Earth*, 528 U.S. at 192.

The dispute before the Court today does not involve voluntary cessation, as we discuss below, and the dispute would be moot even if that doctrine applied. In all events, no sound authority elevates pru-

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[6] Compare, *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 288 (2000) (evaluating a private business owner's affidavit in support of mootness in light of a delay in filing, and expressing concern about attempts to "manipulate the Court's jurisdiction to insulate a favorable decision"). Because this Court's review was from a state court in *Erie*, ordinary practice would have been to dismiss the certiorari petition and leave in place the judgment procured by the business owner. See *City News & Novelty, Inc.* v. *City of Waukesha*, 531 U.S. 278, 283 (2001).

dential factors over core Article III requirements. This dispute is moot "[h]owever convenient it might be to have decided the question" presented. *United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 116 (1920).

B. Statutes that redress litigated claims make those claims moot as a general rule

When plaintiffs seek declaratory and injunctive relief and new legislation satisfies their claims, the basic rule is that the dispute is moot. This Court has declined to reach the merits in such disputes repeatedly, including when the relevant change in law occurred after the Court granted certiorari or noted probable jurisdiction. Declinations have occurred without party confessions of error, and without raising or resolving fact disputes about the motives of multi-member legislatures.

This Court has long held that claims become moot when federal statutes change the law in pertinent respects. See, *e.g.*, *United States* v. *Microsoft*, 138 S. Ct. 1186, 1188 (2018) (per curiam) (after certiorari granted); *Bowen* v. *Kizer*, 485 U.S. 386 (1988) (per curiam) (after oral argument held); *Alaska S.S.*, 253 U.S. at 116 (after appeal accepted).

For example, in *U.S. Department of Treasury* v. *Galioto*, 477 U.S. 556 (1986), the Court held moot a constitutional challenge to federal firearms regulations after Congress rewrote the applicable provision. See *id.* at 559-560. The statutory amendment occurred after oral argument in *Galioto*, and people working on legislation in Congress were aware of the pending litigation. See H.R. Rep. 99-495, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327, 1341 (discussing, shortly before the oral argument, this Court's notation of probable jurisdiction in *Galioto*). Lawmakers may respond constructively to what they

learn from this Court's proceedings. See also *U.S. Department of Justice* v. *Provenzano*, 469 U.S. 14, 14-15 (1984) (per curiam) (holding a dispute moot based on a post-certiorari statutory amendment); H.R. Rep. 98-726(II), at 13-14 & n.28 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3778, 3788 & n.28 (discussing a circuit split and this Court's grant of review in *Provenzano*).

Consistent with federalism principles, the Court treats state statutes likewise. In *Hall* v. *Beals*, 396 U.S. 45 (1969) (per curiam), plaintiffs sought mandamus and injunctive relief against the operation of a State statute that imposed a six-month residency requirement to vote in presidential elections. See *id.* at 46-47 & n.1. The district court rejected plaintiffs' claims on the merits. While plaintiffs' appeal was pending in this Court, however, the state legislature amended the statute to reduce the residency requirement to two months. *Id.* at 48. Plaintiffs would have satisfied that test on election day. *Id.* at 46, 48. After noting that the 1968 election had passed and that plaintiffs subsequently satisfied even a six-month residency test, the Court went on to explain that, "apart from these considerations, the recent amendatory action of the Colorado Legislature has surely operated to render this case moot." *Id.* at 48. "The case has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." *Ibid*.

The result was unaffected by the timing of the amendment. See also *Fusari* v. *Steinberg*, 419 U.S. 379, 387 & n.12 (1975) (following *Hall*, though allowing remand to clarify the impact of the new State statute); *Diffenderfer* v. *Central Baptist Church of*

Miami, 404 U.S. 412, 414 (1972) (per curiam) (same, though allowing remand for an opportunity to amend the complaint). Nor did any Justice suggest that the legislature's motive, intent, or purpose should bear on the mootness question. See *Hall*, 396 U.S. at 46-50; *id.* at 50-51 (Brennan, J., dissenting) (arguing that the two-month residency issue was capable of repetition yet evading review); *id.* at 51-52 (Marshall, J., dissenting) (same). Colorado did not confess constitutional error, either. See Appellee's Br. in *Hall* v. *Beals*, O.T. 1969, at 6, 20-21 (No. 39) (briefing only the two-month requirement on the merits and declaring that "[a] *dead* statute is not worth defending").

The Court also recognized that, by holding the dispute moot, it was declining to reach the merits of a serious constitutional issue. Plaintiffs argued that residency tests were injuring "millions of voters" nationwide. *Hall*, 396 U.S. at 48. "[A]ppellants' opposition to residency requirements in general," the Court responded, "cannot alter the fact that so far as they are concerned nothing in the Colorado legislative scheme as now written adversely affects either their present interests, or their interests at the time this litigation was commenced." *Ibid.*

If the social significance of claims did matter, petitioners' argument here would not benefit. Unlike in *Hall*, no one in the country currently faces the firearms regulation that petitioners challenged. And as in *Hall*, the claims that were filed in this suit are moot regardless of different claims that might be asserted against the new statute. "[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971).

Hall is not an outlier. In *Kremens* v. *Bartley*, 431 U.S. 119 (1977), plaintiffs challenged the constitutionality of State statutes that authorized parents and guardians to seek admission and commitment of minors to the State's mental health facilities. See *id.* at 121-24. The district court granted injunctive relief. After this Court noted probable jurisdiction, however, the State legislature amended the statutes at issue to treat older minors more like adults. See *id.* at 126-27. The Court recognized that "important constitutional issues" had been fully briefed and argued, but again held moot the claims of the named plaintiffs. *Id.* at 127.

"[T]hat the Act was passed after the decision below," the Court explained, "does not save the named [plaintiffs'] claims from mootness * * * [Plaintiffs'] concerns were eradicated with the passage of the new Act," *Kremens,* 431 U.S. at 128-29. Then-Justice Rehnquist's opinion for the Court did refer to judicial "policy, rather than *purely* constitutional, considerations," in favor of avoiding constitutional questions. *Id.* at 128 (emphasis added). See also *id.* at 134 n.15. But the Court also determined that there was no "live case or controversy" because the new statute had "clearly moot[ed]" the claims of the named plaintiffs. *Id.* at 128-29. For those plaintiffs, the proper disposition was to vacate the judgment with instructions to dismiss. See *id.* at 129, 132 (proceeding to address the certified class, holding a number of those claims moot as well, and remanding).[7]

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[7] To the extent that any special rules apply to facilitate class actions, (cf. *Campbell-Ewald Co.* v. *Gomez*, 136 S. Ct. 663, 672 (2016) (addressing an unaccepted settlement offer to a putative class representative)), they do not apply to this dispute.

This Court's now-cemented position is that mootness is grounded in Article III directives. Regardless, *Kremens* underscores that a post-appeal State statutory change can moot litigation against the State's own officials—without a judicial inquiry into legislative motives, without a confession of error from the State, (see *Kremens,* 431 U.S. at 143 (Brennan, J., dissenting)), and even when important constitutional questions remain unanswered.

In fact, mootness dismissals based on intervening state statutes have a long tradition. In *Berry* v. *Davis*, 242 U.S. 468 (1917) (Holmes, J.), for instance, the Court ordered dismissal of a bill to enjoin a state agency and state officers from sterilizing an inmate. While the inmate's appeal was pending in this Court, the state legislature repealed the statute at issue, and the new statute did not reach that particular plaintiff. The Court accordingly recognized that "[a]ll possibility or threat of the operation has disappeared now, if not before, by the act of the state." *Id.* at 470.[8]

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[8] For early American authority on this mootness point and related propositions, see, for example, *Washington Market Co.* v. *District of Columbia*, 137 U.S. 62, 62 (1890) (per curiam) (dismissing an appeal where the District's supreme court, while the appeal was pending, annulled the assessments and liens on which the complaint against the District was based); *Horton* v. *City of Los Angeles*, 119 Cal. 602, 603, 51 P. 956, 956 (1898) (holding that a new state statute mooted the dispute on appeal); *Payne Shoe Co.* v. *Dawson*, 94 Kan. 668, 146 P. 996, 996-97 (1915) (same for a repealed state statute); *State ex rel. Hughes* v. *McNabb*, 1933-NMSC-103, ¶ 3, 38 N.M. 92, 28 P.2d 521, 522 (same); *People ex rel. Teel* v. *Sweeting*, 2 Johns. 184 (N.Y. Sup. Ct. 1807) (halting a *quo warranto* proceeding to replace an appointed local official with an allegedly elected candidate where the appointee's office would expire and another

This dispute is resolved by that tradition. New York State law now confers on plaintiffs all of the regulatory relief they sought in their complaint. Petitioners appear to recognize as much. In their Response to Respondents' Suggestion of Mootness ("Petitioners' Response"), they raise a number of allegations that did not appear in the Amended Complaint. See, *e.g.*, Petitioners' Response 15, 17, 19 (discussing non-New York City residents entering the City with firearms, transport of firearms to summer

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election would occur before trial). See also *Washburne* v. *People ex rel. King*, 50 Ill. App. 93, 93-94 (Ill. App. Ct. 1893) (dismissing an appeal where a mayor sought favorable precedent but the disputed license had been granted).

Apart from case reporting practices and fewer actions filed, one reason that mootness decisions may seem scarce during the Nation's early history is that litigation probably tended to progress more rapidly on average. On the pace of criminal proceedings, including contested cases, see Julius Goebel, Jr. & T. Raymond Naughton, *Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664-1776)*, at 610-12 (1944) (time from arraignment to trial); 4 William Blackstone, *Commentaries* *351 (1753) (same); John H. Langbein, *The Origins of Adversary Criminal Trial* 17-18 & nn.38 & 40 (2003) (trial in parts of England). Less time between initiation and judgment would mean less time for intervening events to moot a dispute, and fewer opportunities for courts to develop mootness doctrine. Few citations from the eighteenth and early nineteenth centuries is not a basis for inferring weak judicial commitments to justiciability limits. Regardless, early on courts made commitments against advisory opinions (see *Hayburn's Case*, 2 Dall. 409 (1792)), and against manufactured federal jurisdiction. See*, e.g.*, *Lord* v. *Veazie*, 49 U.S. 251, 255 (1850) (Taney, C.J.); 1 James Kent, *Commentaries on American Law* 345 (2d ed. 1832). See also *The Amiable Isabella*, 19 U.S. 1, 20 (1821) (Story, J.) (stating that a third party to a capture "can have no just interest in that question [of authority to capture], and cannot be permitted to moot it before this Court.").

rental homes, and unnamed persons who might have violated the repealed City rule and might suffer adverse consequences at some time in the future). To raise those claims here, petitioners would need to overcome numerous obstacles that are not the focus of this brief.[9] As to the claims petitioners did raise, New York law furnishes relief.

This Court's conclusion in favor of mootness would continue a longstanding practice of honoring statutes that grant plaintiffs what they demand in court, and of avoiding unnecessary constitutional holdings even when parties continue to disagree about the law. Disagreements over law, without more, are not the "Controversies" to which Article III extends.

II. THE VOLUNTARY CESSATION DOCTRINE DOES NOT RENDER THIS DISPUTE A LIVE CASE OR CONTROVERSY

In asking the Court to reach the merits, petitioners largely rely on the City's rules and the voluntary cessation doctrine. But the voluntary cessation doctrine does not apply. Indeed, this dispute would be moot even if the City had left its old rule in place. The state statute moots petitioners' claims.

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[9] The apparent obstacles to pursuing such allegations include, but are not necessarily limited to: (1) the scope of the pleadings; (2) the scope of the question presented in the petition for certiorari; (3) ripeness of claims regarding feared future injuries; (4) standing to litigate the rights of unnamed parties and injuries that may or may not occur someday to the plaintiffs or to someone else; (5) the resolution of questions about newly enacted State and municipal laws that have not been interpreted by any State court (See *supra* note 3); and (6) the City's representation that it has no interest in returning to its abandoned regulatory regime. See Respondents' Br. 12.

A. The voluntary cessation doctrine does not apply when state law prohibits a city from reinstating a challenged regulation

Although the Court will hear only live controversies, there are circumstances in which the cessation of challenged conduct is merely apparent and not conclusive. For example, a live controversy may remain if such conduct is "capable of repetition yet evading review." See, *e.g.*, *Laidlaw*, 528 U.S. at 190; *id.* at 213-14 (Scalia, J., dissenting) (quoting *Honig* v. *Doe*, 484 U.S. 305, 341 (1988) (Scalia, J., dissenting) ("Where the conduct has ceased for the time being but there is a demonstrated probability that it *will* recur, a real-life controversy between parties with a personal stake in the outcome continues to exist.")).

Similarly, the voluntary cessation doctrine recognizes that the "temporar[y] altering [of] questionable behavior" may be just that—temporary. *City News & Novelty* v. *City of Waukesha*, 531 U.S. 278, 284 n.1 (2001). Thus a defendant who argues that a suit is moot because that same party voluntarily ceased to engage in the challenged conduct may "bear[] the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 190. Such a showing addresses the concern that "a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Already*, 568 U.S. at 91. See also *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found.*, 484 U.S. 49, 66-67 (1987) ("Mootness doctrine * * * protects plaintiffs from defendants who seek to evade sanction by

predictable 'protestations of repentance and reform.'") (quoting *United States* v. *Oregon State Medical Soc'y*, 343 U.S. 326, 333 (1952)).[10]

Insofar as the voluntary cessation doctrine seeks to prevent defendants from easily reversing course, the doctrine is inapplicable when a defendant is bound by a different actor's intervening action. Here, New York State—a government entity distinct from respondent New York City—has adopted legislation that authorizes petitioners to transport their handguns outside the City to second homes and shooting ranges. Under the New York Constitution and Municipal Home Rule Law, the State's law preempts inconsistent municipal regulation. Even if New York City wished to reinstate the challenged regulation—a desire it disavows—it could not. See Respondents' Br. 12 ("The City has no desire to [revert to the former regulatory regime]"). Because the City has no ability to alter or supersede state law, the State's actions guarantee as a matter of law that the City does not remain "free to return to [its] old ways." *W.T. Grant Co.*, 345 U.S. at 632. Accord *Sands* v. *National Labor Relations Bd.*, 825 F.3d 778, 785 (D.C. Cir. 2016) ("Because the union operates only in Indiana and it can no longer use any union-security clause there [because of a recent change in Indiana law], it cannot reasonably be expected to resume sending

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[10] Like capable-of-repetition doctrine, voluntary cessation doctrine may be understood not as an exception to the Article III case or controversy requirement that would permit courts to "decide questions that cannot affect the rights of litigants" (*Rice*, 404 U.S. at 246), but rather as "an evidentiary presumption that the controversy reflected by the violation of alleged rights continues to exist" (*Laidlaw*, 528 U.S. at 213 (Scalia, J., dissenting)).

employees inadequate information about their rights under such clauses.").

Under the New York Constitution, New York City derives its legal authority from the State, (see N.Y. Const. Art. IX, § 2(a)), but it retains autonomy in two principal respects.

First, the New York Constitution expressly provides that every local government "shall have a legislative body elective by the people thereof." *Id.* § 1(a). The lawmaking bodies of the State and City are distinct.[11]

Second, the New York Constitution contemplates a degree of "home rule" for local governments, allowing them to adopt their own laws on matters of local concern. Local governments may adopt laws "not inconsistent" with general state law relating to the "property, affairs or government" of the locality, as well as ten enumerated areas including "[t]he government, protection, order, conduct, safety, health and well-being of persons or property therein." N.Y. Const. Art. IX, § 2(c)(ii)(10); See also N.Y. Mun. Home Rule Law § 10. See generally *Kamhi* v. *Town of Yorktown*, 74 N.Y.2d 423, 428, 547 N.E.2d 346, 348 (1989) ("Municipal home rule in this State has been a matter of constitutional principle for nearly a century.").

Nevertheless, the State retains broad authority to regulate. It may adopt general statewide laws as well as special laws that apply only to a limited

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[11] See also N.Y. Const. Art IX, § 1(b) ("All officers of every local government whose election or appointment is not provided for by this constitution shall be elected by the people of the local government, or of some division thereof, or appointed by such officers of the local government as may be provided by law.").

number of jurisdictions but address a matter of "State concern." See *Adler* v. *Deegan*, 251 N.Y. 467, 491, 167 N.E. 705, 713 (1929) (Cardozo, C.J., concurring) (arguing that if a subject "be in a substantial degree a matter of State concern, the Legislature may act, though intermingled with it are concerns of the locality.").

The overarching state constitutional design is to "further[] strong local governments but leav[e] the State just as strong to meet the problems that transcend local boundaries, interests, and motivations." *Wambat Realty Corp.* v. *State*, 41 N.Y.2d 490, 498, 362 N.E.2d 581, 587 (1977). Thus, home rule does not insulate local government from the operation of state law. Instead, the home rule provisions allow local lawmaking pursuant to the constitutional delegation of authority but limit the extent of this authority to laws "not inconsistent" with general state laws or special state laws addressing matters of state concern. See N.Y. Const. Art. IX, § 2(c); *Cohen* v. *Bd. of Appeals of Vill. of Saddle Rock*, 100 N.Y.2d 395, 399, 795 N.E.2d 619, 622 (2003); Richard Briffault *Local Government and the New York State Constitution*, 1 Hofstra L. & Pol'y Symp. 79, 89 (1996) ("[T]he [New York] constitution places little restriction on the power of the state to act with respect to local matters or to displace local decisions with respect to such matters.").

In particular, "[t]he preemption doctrine represents a fundamental limitation on home rule powers." *Cohen*, 100 N.Y.2d at 400. When state and local law are inconsistent, local law yields. See *DJL Rest. Corp.* v. *City of New York*, 96 N.Y.2d 91, 95, 749 N.E.2d 186, 190 (2001) (discussing field preemption and conflict preemption). "[C]onflict preemption oc-

curs when a local law prohibits what a State Law explicitly allows, or when a State Law prohibits what a local law explicitly allows." *Chwick* v. *Mulvey*, 81 A.D.3d 161, 168, 915 N.Y.S.2d 578, 584 (2010).

This case presents a simple instance of conflict preemption: There is no question that the version of the New York City transport regulation petitioners challenged would conflict with New York Penal Law § 400.00(6) and that any such City regulation would thus be invalid. The July 2019 statutory amendments authorize a premises licensee to transport his or her handgun directly to or from "any other location where the licensee is lawfully authorized to have and possess such pistol or revolver," including a "dwelling," "place of business," "shooting range," or "shooting competition." *Id.* § 400.00(6). The law also expressly preempts contrary regulation (see *id*. ("Notwithstanding any inconsistent provision of state or local law or rule or regulation * * *")), in keeping with its purpose of establishing a uniform "statewide standard." See Memorandum in Support of Legislation, A7752 (June 18, 2019) ("The purpose of this bill is to clarify when a pistol or revolver may be legally transported by a license holder, as well as set a statewide standard for the safe transportation of firearms.").

Any attempt by New York City to reinstate its prior transport rules would be preempted. Seeking to "prohibit[] what a State Law explicitly allows," *Chwick*, 81 A.D.3d at 168, would constitute just the sort of "head-on collision" that preemption doctrine forecloses. *Matter of Lansdown Entertainment Corp.* v. *New York City Dep't of Consumer Affairs*, 74 N.Y.2d 761, 764, 543 N.E.2d 725, 726 (1989). Thus,

New York Penal Law § 400.00(6) prevents the City from reinstating the challenged regulation, or adopting substantively similar transport restrictions, even if it wished to do so.

B. Even if voluntary cessation were relevant, state law moots this dispute

Even assuming the relationship between the City and State rendered the voluntary cessation exception pertinent, New York Penal Law § 400.00(6) renders this dispute moot. If New York City and New York State were understood to be a single legal entity for purposes of mootness analysis—a dubious proposition that petitioners nonetheless suggest, (see Pet. Response 28-29)—the question could arise whether the satisfaction of petitioners' claims was merely a matter of voluntary cessation. Even so, existing law and sound logic show that this dispute remains moot.

Consistent with the precedents described in Part I, a state legislature may enact a statute that moots claims against the State's own officials. The same principle applies to Congress and federal officials. Unlike a defendant who has temporarily altered its behavior and may readily resume the challenged conduct, a State that has enacted legislation faces the substantial and legally binding obstacles of the lawmaking process before the legislation can be repealed. Courts thus properly presume that state legislation will persist, absent some clear and concrete indication to the contrary. See, *e.g.*, *Hunt* v. *Cromartie*, 526 U.S. 541, 545 n.1 (1999) ("Because the State's 1998 law provides that the State will revert to the 1997 districting plan upon a favorable decision of this Court, * * * this case is not moot.").

Concerns about temporary and targeted action follow the doctrine's rationale. The voluntary cessation doctrine "traces to the principle that a party should not be able to evade judicial review, or to defeat a judgment, by *temporarily* altering questionable behavior." *City News*, 531 U.S. at 284 n.1 (emphasis added). See also *Parents Involved in Community Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (noting, among other factors, that a school district's practice was merely discontinued pending the outcome of judicial review); *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983) (relying on a local moratorium's six-month sunset).

Specifically, courts have reason to worry about a particular kind of ploy: temporarily halt the challenged conduct with respect to parties who filed suit, make the suit go away, then restart the conduct with respect to others and perhaps the erstwhile plaintiffs themselves. See *Already*, 568 U.S. at 91. This sort of conduct does involve an Article III case or controversy in a real sense. During a temporally extended plan that stays always within the defendant's control, the defendant attempts to obscure the real-world effect of its full course of conduct by a misleading intermission. Accord *Honig*, 484 U.S. at 341 (Scalia, J., dissenting) (discussing capable-of-repetition doctrine).

This concern has special force with respect to private parties, who normally are free to change course and then revert to prior conduct with relative ease. In addition, those parties may have obvious material incentives to reverse course. See, *e.g.*, *W.T. Grant*, 345 U.S. at 633 (involving an antitrust defendant); *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 308-09 (1897) (similar).

For governments that can reverse course only after following detailed procedures mandated by law, however, the likelihood of such reversals is significantly diminished. In particular, the Article I, Section 7 lawmaking process and its State analogues are textbook examples of heavily checked procedures that were engineered to provoke deliberation and make lawmaking difficult. See generally *Clinton* v. *City of New York*, 524 U.S. 417 (1998) (discussing the "finely wrought" requirements of bicameralism and presentment) (quoting *INS* v. *Chadha*, 462 US. 919, 951 (1983)); John F. Manning, *Competing Presumptions About Statutory Coherence*, 74 Fordham L. Rev. 2009, 2027-2028 (2006) (describing Article I lawmaking).

With respect to the voluntary cessation doctrine, the procedures attendant to passing legislation thus complement a judicial presumption of state legislatures' good faith. See, *e.g.*, *United States* v. *Des Moines Nav. & Ry. Co.*, 142 U.S. 510, 544 (1892). See generally 13C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3533.7, at 333 (3d ed. 2008) ("Courts are more apt to trust public officials than private defendants to desist from future violations."). Mootness follows readily from statutes that redress the claims that plaintiffs tried to litigate.

Of course, governments are not wholly exempt from voluntary cessation analysis. There are situations in which a government makes plain that, despite a temporary pause, the challenged conduct will recur. In *City of Mesquite*, 455 U.S. at 289, the city announced to this Court that it planned to reenact the very same ordinance under challenge if the case were dismissed, and the Court was concerned about

that likelihood. See *id.* at 289 & n.11; *id.* at 296 n.* (White, J., concurring in part and dissenting in part). Equally important, the city already had executed a similar plan to effectively stifle plaintiff's arcade without facing judicial review. The city had softened an age restriction for this particular plaintiff's arcade, then eliminated that individualized accommodation after a state court invalidated a different regulatory barrier to the arcade. See *id.* at 286-87, 289; See also *Trans-Missouri*, 166 U.S. at 308-09; *Knox* v. *Service Employees Int'l Union*, 567 U.S. 298, 307-08 (2012) (involving a union that sent a notice of refund, with conditions, to class members in a pending suit).

In the dispute here, by contrast, New York State legislated without sunset or any other indication that it might change course following a dismissal by this Court. Nor is there any suggestion that petitioners were singled out for a temporary dispensation. Compare *Already*, 568 U.S. at 93 (noting the breadth and enforceability of a defendant's covenant not to sue), with *City of Mesquite*, 455 U.S. at 289 & n.11 (noting the narrow targeting and planned obsolescence of a city's rules).[12] This is, then, the ordinary

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[12] See also *The Wilderness Soc'y* v. *Kane Cty.*, 632 F.3d 1162, 1175 (10th Cir. 2011) (Gorsuch, J., concurring) (noting that the Court of Appeals had precluded a mootness determination based on voluntary cessation "in cases challenging a prior version of a state statute only when the legislature *has openly expressed its intent to reenact the challenged law*") (emphasis in original); *Lamar Advert. of Penn, LLC* v. *Town of Orchard Park*, 356 F.3d 365, 377 (2d Cir. 2004) (Sotomayor, J.) ("Mindful of the deference due the legislative body, we are hesitant to hold that a significant amendment or repeal of a challenged provision that obviates the plaintiff's claims does not moot a litigation, absent evidence that the defendant intends to rein-

situation, in which "the law has been changed so that the basis of the dispute no longer exists." *Honig*, 484 U.S. at 341 (Scalia, J., dissenting).[13]

C. Legislative grants of relief should be honored and encouraged given the properly limited role of courts in a democratic society

Petitioners offer a skeptical take on the lawmaking that has occurred. They allege that respondents engaged in "maneuvers" and "machinations" intended to "frustrate" this Court's review; they indicate that the City's "motivations" are unlawful or otherwise improper; and they suggest that the state legislation is a product of improper collusion. Petitioners' Response 23, 25 (relying on *Knox*, 567 U.S. at 307, and *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 288 (2000)). These derogatory characterizations turn democratic principles on their head.

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state the challenged statute after the litigation is dismissed, or that the municipality itself does not believe that the amendment renders the case moot."); *National Black Police Ass'n* v. *District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997) ("[T]he mere power to reenact a challenged law is not a sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists. Rather, there must be evidence indicating that the challenged law likely will be reenacted.").

[13] The Court also has declined to hold a case moot when legislation does not, in fact, satisfy plaintiffs' claims as identified in their complaint. For example, in *Northeastern Florida Ch. of Associated Gen. Contractors of Am.* v. *City of Jacksonville*, 508 U.S. 656, 662 (1993), the Court held that a new city ordinance did not moot a pending case because it injured plaintiffs in the same fundamental way as the repealed ordinance, which was the target of plaintiffs' suit. That is not the situation in this dispute; petitioners now make new and distinct allegations about the new City rule and State law. See *supra* notes 3 & 9.

Petitioners' charges are principally leveled at the City and not the New York State legislature. But it is neither accurate nor appropriate to characterize the passage of New York Penal Law § 400.00(6) as a "manipulation" or "machination." As then-Judge Alito wrote in rejecting a claim that federal legislation represented "an attempt to frustrate an adverse judgment," for instance, "the new legislation could just as credibly be viewed as a commendable effort to repair what may have been a constitutionally defective statute." *Khodara*, 237 F.3d at 195 (internal quotations marks and citations omitted).

We cannot know fully what prompted the New York legislature to adopt the July 2019 amendments to Section 400.00(6). The challenges of ascertaining the motivations of multimember political bodies are well known. Members of this Court have recognized that a consolidated legislative motive sometimes may be absent, or at least obscured to outside observers. See, *e.g.*, *Virginia Uranium, Inc.* v. *Warren*, 139 S. Ct. 1894, 1906-1907 (2019) (opinion of Gorsuch, J., joined by Thomas & Kavanaugh, JJ.) (pointing to certain "conceptual and practical" problems that should not be "invit[ed] unnecessarily" when inquiring into state legislative motives); *Abramski* v. *United States*, 573 U.S. 169, 186-187 (2014) (Kagan, J.) (suggesting that congressional compromise, with multiple purposes at stake, may be common).

Given that the legislation was passed after certiorari was granted, it is certainly possible that the litigation "motivated" state representatives to review and revise relevant state law. Even if so, corrective legislation spurred by litigation is not problematic: "The mere fact that a legislature has enacted legislation that moots an appeal, without more, provides no

grounds for assuming that the legislature was motivated by * * * a manipulative purpose." *Khodara*, 237 F.3d at 195 (internal quotations and citations omitted). "The legislature may act out of reasons totally independent of the pending lawsuit, or because the lawsuit has convinced it that the existing law is flawed." *Ibid*. (internal quotations and citations omitted). Cf. *Fusari*, 419 U.S. at 385 n.9 (noting that the Department of Labor had been "instrumental in encouraging reform" to state law and further stating that the "record is silent as to whether the District Court's decision or this Court's notation of jurisdiction provided additional encouragement").[14]

To frame a state legislature's decision to reconsider state law based on pending litigation as a form of manipulation not only clashes with the presumption of good faith that should be afforded to state legislatures, but also disregards the proper roles of courts and legislatures in our democracy.

Mootness doctrine and related justiciability requirements serve an essential role in limiting the exercise of power by "unelected judges." *E.g.*, *Warth*

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[14] The strongest evidence petitioners offer for their claims that the State engaged in some type of impropriety is an incomplete quotation of Representative Dinowitz's answer to a question on the Assembly floor. When asked whether the proposed legislation might moot this case, Representative Dinowitz responded, "I suppose it could. I mean who knows what those five guys are gonna do? It could have an impact, but that's up to them. But we, separate and apart from that, should certainly be doing this because this makes sense for the State of New York." N.Y. State Assembly, *Record of Proceedings* (June 19, 2019), https://bit.ly/2K9MPK9 (Hon. J. Dinowitz). Contrary to petitioners' suggestion, this statement does not indicate that the legislation was designed to moot this case.

v. *Seldin*, 422 U.S. 490, 498 (1975) (noting that standing doctrine is "founded in concern about the proper—and properly limited—role of the courts in a democratic society"); *Campbell-Ewald Co.* v. *Gomez*, 136 S. Ct. 663, 682 (2016) (Roberts, C.J., dissenting) (similar, quoting *Allen*, 468 U.S. at 750). Such concerns are amplified in the case of state law because judicial review implicates not only the separation of powers but also federalism. See generally *Murphy* v. *National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018) ("The Constitution limited but did not abolish the sovereign powers of the States, which retained 'a residuary and inviolable sovereignty.'") (quoting *The Federalist* No. 39, p. 245 (C. Rossiter ed. 1961)); *Bond* v. *United States*, 564 U.S. 211, 221 (2011) ("The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States.").

Petitioners suggest that a determination of mootness in this dispute could create perverse incentives. See Pet. Response 33. Although the boundaries of Article III cannot be expanded by such an assertion in any event, it bears mention that *not* holding this dispute moot would create perverse incentives.

Petitioners' argument depends on the unstated proposition that legislative bodies should refuse to reconsider the constitutionality of their laws in the face of pending litigation, a proposition that is inconsistent with our system of constitutional democracy. Accepting that proposition would weaken legislative incentives to respond to litigation at all. It would also present risks for sensible litigation. If the sort of allegations of "manipulation" in petitioners' brief were sufficient to compel federal courts to adjudicate constitutional claims despite responsive legislation,

nearly any litigant could charge bad motives, without a proper record, and courts would not be able to seriously test the allegations. Courts would then be in the position of deciding constitutional questions untethered to current law, and with defendants less devoted to vigorous advocacy than if there was a live case to decide. Governments would be invited or encouraged to defend laws that no longer existed. Contrary to this Court's justiciability decisions, such a transformation of the doctrine would produce an aggressive leading role for the federal judiciary and displace valuable efforts of legislatures.

Here a state legislature has "respond[ed], through the enactment of positive law, to the initiative" of state residents who sought to change a regulatory regime. *Bond*, 564 U.S. at 221. Petitioners wished to transport handguns to their second homes and shooting ranges of their choice outside New York City but were prohibited by a City rule from doing so. The State has now adopted legislation that permits them to do so and that also prevents New York City or any other local government from imposing contrary restrictions on such transport. Petitioners have thus received the relief they sought in court, but through more democratically accountable channels. Not only is there no remaining relief this Court may grant petitioners based on their litigated pleadings, but to rule on claims that the state legislature has already satisfied would overstep the properly limited judicial role.

CONCLUSION

Petitioners' claims are moot. The judgment below should be vacated and the case remanded with instructions to dismiss—or, in the alternative, for additional proceedings to resolve any uncertainty about relevant facts, state law, or municipal law.

Respectfully submitted.

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