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

REPLY BRIEF FOR PETITIONERS

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The City's response brief lays bare the reason for its reluctance to defend the decision it procured below: It cannot muster even a colorable argument that its restrictive transport regime is consistent with a Constitution that protects an individual and fundamental right to keep *and bear* arms. The City manages to offer a defense of the ban only by distorting text, history, and tradition, while faulting *petitioners* for failing to meet purported burdens that do not exist, such as failing to demonstrate a history of a completely unfettered right to transport and train with firearms. Indeed, the City even goes so far as to double down on its claim that its policy does not trigger *any* constitutional scrutiny at all. That the City could make such a remarkable claim—and, even more remarkable still, have the Second Circuit largely endorse it—is a vivid testament to just how radically divorced lower court Second Amendment doctrine has become from basic principles of constitutional analysis. The simple truth is that the City's draconian regime is antithetical to the right enshrined in the Second Amendment, has no grounding in text, history, or tradition, and plainly flunks any meaningful form of means-ends scrutiny.

The constitutional infirmities with the City's regime do not end there. As the United States recognizes, the City's efforts to limit its residents to a handful of in-city ranges (and prevent non-residents from accessing those ranges) promotes a degree of economic balkanization that violates the Commerce Clause and related constitutional guarantees. The City's "don't-leave-home-with-it" policy violates the

constitutional right to travel as well. In the end, nothing in law or history supports the City's regime, and nothing in logic commends it.

I. The City's Restrictive Regime Violates The Second Amendment.

A. The City's Regime Infringes the Right to Keep and Bear Arms.

The City begins its merits argument by asserting that it need not shoulder *any* burden in defending its restrictive transport regime because petitioners purportedly have not met their "burden" of demonstrating that the regime "interfere[d] with" their Second Amendment rights *at all*. NYC.Br.18.[1] That remarkable claim epitomizes everything that is wrong with the watered-down form of "scrutiny" lower courts have concocted to deal with (or, more aptly, dismiss) Second Amendment claims.

1. According to the City (and the Second Circuit), petitioners have the "initial burden" of showing not just that the conduct the City prohibits is protected by the Second Amendment, but that the City's regime renders them "unable to … sufficiently or effectively"

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[1] The City prefaces its merits argument by repeating its contention that this case is moot. It is not. As petitioners have explained, they manifestly have not obtained everything from the unilateral and begrudging changes in city and state law that they could have gotten were this case litigated to a favorable result, with declaratory relief that the transport ban is (and always was) unconstitutional and binding, forward-looking injunctive relief. The City notably does not claim otherwise, here or in its mootness papers. The case is thus not moot for Article III purposes. And to the extent the City's objection is merely prudential, there is no plausible basis to reward the City's transparent effort to frustrate this Court's discretionary review.

engage in that conduct. NYC.Br.18. Thus, while the City (almost) concedes a right to train with firearms, it faults petitioners for failing to prove that restricting 8.5 million residents to 7 ranges effectively precludes petitioners from training. In the City's (and the Second Circuit's) view, unless petitioners make this "threshold" showing, the City's regime need not be subjected to any constitutional scrutiny *at all*.

There are at least two fundamental problems with the City's effort to deny that its regime implicates the Second Amendment. First, the City ignores that the constitutional right at issue here is not just a right to train and hone skills necessary to use firearms safely, but the more fundamental textual right to "keep *and bear* arms." Thus, what is at stake here is not just an implied right to train in order to make the explicit right to keep arms for self-defense meaningful. Rather, unless contrary to all textual and historical evidence the right to bear arms is limited to the home, the transport ban interferes directly with the textual right to bear arms by all but prohibiting the least controversial form of transporting arms outside the home—namely, unloaded and locked away, separate from ammunition.

Second, the City's conception that the plaintiff's burden is to show not just a burden on constitutionally protected activity, but some total or near prohibition, is simply not how any form of heightened scrutiny works. To be sure, a party challenging a law as unconstitutional must show that the conduct the law restricts is protected by the Constitution. But once that showing is made, the burden shifts to the government to justify the law. The challenger does not

have the additional threshold burden of showing that her constitutional rights are not just burdened but obliterated.

Take, for instance, a First Amendment claim. "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions," full stop. *United States v. Playboy Entm't Grp., Inc.,* 529 U.S. 803, 816 (2000). The government does not bear that burden only if the challenger first shows that the restriction renders him "unable to … sufficiently or effectively" speak. NYC.Br.18. To the contrary, once it is clear that the law restricts protected speech, it is *the government*'s burden "to prove that the restriction … is narrowly tailored to achieve [a compelling] interest." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015). That is equally true under intermediate scrutiny. *See*, *e.g.*, *McCutcheon v. FEC*, 572 U.S. 185, 199 (2014) (plurality op.). Requiring the government to make that showing only if the challenger first proves that the restriction on a constitutional right is so draconian as to prohibit its effective exercise entirely would render both heightened scrutiny and its burden-shifting a dead letter. Heightened scrutiny would apply, and the burden would shift, only if the challenger first demonstrated that the law was wholly incompatible with the constitutional right. In other words, heightened scrutiny would apply only to laws that could not survive any level of scrutiny.

Implicitly recognizing this problem, the City suggests that the transport ban does not implicate constitutionally protected conduct *at all* because the Second Amendment does not protect "a freestanding

right to engage, without geographical limitation, in firearm training." NYC.Br.18. That is just a variation on the same mistake. When determining whether a law restricts constitutionally protected conduct and hence is subject to heightened scrutiny, the Court does not require the challenger to prove that the Constitution protects an "unfettered right," NYC.Br.23, to engage in that conduct without limitation. In *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011), for instance, this Court did not require a "threshold" showing that the First Amendment protects an "unfettered right" to sell violent video games free from any government restraint. It asked only whether violent "video games qualify for First Amendment protection." *Id.* at 790. Once the Court concluded that they do, it was the state's burden to prove that its restrictions on that constitutionally protected conduct satisfied strict scrutiny.

2. The threshold question, then, is not whether the Second Amendment protects an "absolute" right "to train anywhere one wishe[s]" or to "transport[] … guns without restriction." NYC.Br.20, 23, 34. It is instead whether the conduct that the transport ban severely restricts—transporting an unloaded and securely stowed firearm outside the home so that it can be lawfully used elsewhere—is protected by the Second Amendment. As to that relevant question, there can be no serious debate that the Second Amendment right to keep and bear arms protects that conduct and that a law restricting that conduct must be justified by the government. Indeed, the only way such a restriction could plausibly fail to even *implicate*

the Second Amendment is if the right to keep and bear arms is strictly confined to the home.

It is not. As petitioners explained at length in their opening brief, the text, history, and tradition of the Second Amendment confirm that the right to keep and bear arms is *not* a homebound right. *See* Petrs.Br.19-26; *accord* U.S.Br.9-13. That is clear from the text of the amendment, which protects the right not just to "keep" arms, but to "bear" them—an activity that occurs outside the home. It is clear from the historical record, which is replete with sources confirming the rights to carry, transport, and train with firearms outside the home. It is clear from the long tradition of laws protecting the exercise of Second Amendment rights outside the home. And it is clear from judicial decisions invalidating efforts to impose severe restrictions on those rights. *See* U.S.Br.20-21 (discussing cases).

The City makes no effort to refute any of that text, history, or tradition. Instead, it endeavors to prove only that "any right to train" with or transport firearms is not "absolute." NYC.Br.18. But that misguided effort actually confirms that the Second Amendment was never confined to the home. The fact that some governments imposed some regulations on firearm possession and use outside the home—for example, by requiring that certain types of firearms training occur outside city limits or that militia exercises take place at specified locations—confirms that the Second Amendment was never constrained to the curtilage, and that the general right to safely transport firearms from the home to another location where they could be safely and lawfully used, subject

only to modest restrictions, has deep historical roots. Put differently, by attempting to prove that the right to transport firearms outside the home was not completely unfettered by pointing to a handful of truly modest fetters, the City only underscores that a general ability to transport firearms between locations where they could be lawfully used was the historical norm.

The City has even less to say when it comes to its interference with transport between a primary and secondary residence. Even the City does not claim that the right to possess a handgun in the home for self-defense is confined to one's primary residence. And the history of the Second Amendment, including the history of using personal firearms for militia training, positively refutes the notion that the people were expected to possess a distinct firearm at each location where firearms could be lawfully used. *See* U.S.Br.12, 27-28. While the City can bring itself to make only the begrudging admission that "the right to 'keep and bear arms' *may* … imply the right to learn how to handle arms," NYC.Br.19 (emphasis added), this Court has already recognized that the Second Amendment protects the right to "learn[] to handle and use [firearms] in a way that makes those who keep them ready for their efficient use." *District of Columbia v. Heller*, 554 U.S. 570, 617-18 (2008); *see also Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011). A restriction that precludes individuals from transporting firearms to second homes and restricts their ability to transport them to shooting ranges thus plainly implicates the Second Amendment.

B. The City's Regime Fails Any Mode of Constitutional Scrutiny.

Because the transport ban infringes on conduct protected by the Second Amendment, the burden rests with the City to prove that it is constitutional. The City falls woefully short. It cannot identify any historical (or even modern-day) practice of prohibiting individuals from transporting their unloaded, locked-up firearms outside the jurisdiction to second homes and ranges (or, for that matter, anywhere else). That alone suffices to doom the ban. *See Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1272-73 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). But even assuming some form of means-end scrutiny applied, the City utterly fails to demonstrate that its ban is "narrowly tailored" to "avoid unnecessary abridgement" of Second Amendment rights. *McCutcheon*, 572 U.S. at 199.

1. The City's regime finds no support in the text, history, or tradition of the Second Amendment.

Starting with text, history, and tradition, the City does not and cannot prove that any of those sources supports its draconian restraint. As for text, the City makes only the unremarkable point that the Second Amendment does not explicitly "describe[] a right to engage in training" with firearms. NYC.Br.19. But this case implicates not just the right to train with firearms, but the right to transport firearms from one place where they may lawfully be used and possessed (such as the home) to other such places (be it a firing range, a competition, or a second home), and the textual guarantee of a right to bear arms speaks

directly to that right to transport. Moreover, as to the right to train, this Court has already concluded (as common sense dictates) that the text of the amendment plainly encompasses such a right, for the term "*to bear arms* … implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use." *Heller*, 554 U.S. at 617-18 (emphasis added). It would be the height of absurdity to enshrine in the Constitution the right of the people to keep and bear arms but to leave the government free to prohibit the people from learning how to use them.

As for history and tradition, the City does not identify a single historical (or even modern-day) law that restricted the right of individuals to transport their firearms to places where they could lawfully engage in firearms training or keep and bear them for self-defense. Indeed, the City's misguided effort to show that the right to train was historically subject to some modest time and place restrictions only underscores that the right to transport firearms to lawful places was presumed, and that its wholesale restrictions on that right are wholly unprecedented. The City can point to laws placing certain training locations off-limits, but when it comes to a law saying that firearms cannot be transported from the home to places where they can be lawfully used and possessed, the City comes up empty.

The City's reliance on early laws prohibiting the "indiscreet" or "random" firing of firearms in public is equally misplaced. *See* NYC.Br.20-23 (citing SA5-6). Petitioners have never made the absurd claim that the Second Amendment protects a right to fire their

handguns at random throughout the streets of New York City. Laws prohibiting individuals from *firing* their handguns in certain public places absent the need to use them for self-defense thus lend no support to the City's effort to preclude individuals from *transporting* their handguns to out-of-city locations where they are lawfully entitled to keep and bear them. If anything, those laws fatally undermine the City's cause. After all, there would have been no need to restrict the indiscriminate firing of firearms in public if there were a history or tradition of confining firearms to the home.[2]

The early militia laws the City invokes are (if possible) even less relevant. The City claims that these laws "tightly controlled" the location and manner of firearms training. NYC.Br.20 (citing SA27-33). But none of these laws placed any limits on when, where, or how a law-abiding citizen could transport or train with his firearm outside the militia context. They instead dealt with how frequently the militia would muster for formal training each year, and imposed sensible limits on how often people could be

[2] To be clear, these laws restricted only the *indiscriminate* firing of firearms; they did not restrict their use for self-defense. For instance, while the City claims that a sixteenth-century English law allowed residents to fire their arms only "in defense of their homes," NYC.Br.20, the law in fact allowed their use—even "within any city, borough, or market town"—"for the defense *of his person or* house." SA4, England (1541) (emphasis added). Other laws prohibited only the "unnecessary" firing of firearms in public. *See, e.g.*, SA31, Massachusetts (1793); SA32, Maine (1840); SA33, Massachusetts (1866). Still others are the same laws that *Heller* found it "inconceivable … would have been enforced against a person exercising his right to self-defense." 554 U.S. at 632.

called away from their daily lives to assemble for militia training. The only relevance of those laws is that they prove beyond cavil that the Second Amendment right was never a homebound right, and that no state regulated the transport of firearms to and from the militia ground by purporting to prohibit all other transport or by precluding a coffee stop on the way to the proving ground.

In short, the City identifies nothing in the text, history, or tradition of the Second Amendment that remotely supports its novel effort to prohibit individuals from transporting firearms to places where they are entitled to keep and bear them. Indeed, the City readily concedes that, even today, no other jurisdiction imposes a law like the one it defends. Suggestion of Mootness 21. And while there are no historical analogs for the City's restrictive regime, the few efforts to come anywhere close were struck down. *See* U.S.Br.20-21. That complete lack of historical or even modern-day analogs is enough to doom the City's law. *See Heller II*, 670 F.3d at 1272-73 (Kavanaugh, J., dissenting).

The City protests that it need not identify "an exact historical analogue." NYC.Br.28. But the problem here is not a lack of exactitude. The City has not identified anything close because there is nothing close. The notion that the government can confine a firearm to the premises with only the most minimal of exceptions granted as a matter of municipal grace is completely antithetical to the textual right enshrined in the Second Amendment and completely unprecedented.

2. The City's regime flunks means-ends scrutiny.

To the extent means-end scrutiny applies, the transport ban fares no better.[3] At the outset, if any form of means-end scrutiny applies, it must be strict scrutiny. *See* Petrs.Br.30-32. The City contends that intermediate scrutiny should apply because "petitioners have failed to show that the former rule substantially burdened Second Amendment rights." NYC.Br.38. That claim is wrong in both its premise and its conclusion.

The transport ban *does* substantially burden Second Amendment rights, for it flatly forbids law-abiding individuals from taking their handguns to places where they are entitled to keep and use them. But, more important, the degree of burden the ban imposes is relevant only to whether it *satisfies* heightened scrutiny (where the burden rests squarely on the City), not to which level of heightened scrutiny applies. If the City prohibited its residents from visiting out-of-city printing presses or libraries, it could not evade strict scrutiny by faulting the challengers for failing to "come forward with … proof" that the facilities "available in the City are insufficient to accommodate all those who want to" use them.

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[3] The City suggests that the Second Amendment *must* be subject to means-ends scrutiny to avoid "subject[ing it] to an entirely different body of rules than the other Bill of Rights guarantees." NYC.Br.36 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality op.)). But multiple constitutional rights are not subject to means-ends scrutiny. *See Heller II*, 670 F.3d at 1283 (Kavanaugh, J., dissenting) (collecting cases).

NYC.Br.27. Nor can a law that forbids transport outside the city under *any* circumstances plausibly be likened to laws regulating the time, place, and manner of speech. The point of that doctrine is to identify circumstances when the government is not regulating the content of the speech at all, but is addressing issues like noise or pollution. The notion that a law limiting speech to the home and prohibiting speech outside city limits (because it cannot be pervasively regulated there) would be subject to anything but the strictest of scrutiny and swiftest of invalidations is fanciful. If the Second Amendment is to be treated like other rights enshrined in the Constitution, then the appropriate level of means-end scrutiny is strict scrutiny.

In all events, whichever level of heightened scrutiny applies, the City bears the burden of proving that the transport ban is "narrowly tailored to serve a significant governmental interest," *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017), and "avoid[s] unnecessary abridgement" of Second Amendment rights, *McCutcheon*, 572 U.S. at 199. Thus, all of the City's complaints that petitioners should have done more to show that 7 ranges were inadequate for 8.5 million residents (especially when the City notes, without apparent irony, that it licenses fewer than 1 in every 200 residents) are entirely beside the point. The burden is on the City, and it comes up woefully short.

The City asserts two "important government objective[s]": "public safety," and making it easier for the City to enforce the ban on carrying loaded firearms in public. NYC.Br.39-43. The first at least qualifies

as a substantial interest; the second decidedly does not. In all events, the City's law is not remotely tailored to further *either* end.

While the City invokes "public safety," it makes no effort to explain how the transport of *unloaded* firearms, locked up in containers separate from their ammunition, poses any appreciable public-safety risk. That is likely because it has produced zero evidence to support that unlikely claim. Indeed, the sole "evidence" the City offered on that score was an affidavit hypothesizing that handguns might pose a public-safety risk in "road rage" or other "stressful" situations. Pet.App.26-28. But the City has yet to come forward with a single instance in which a law-abiding, licensed firearm owner en route to out-of-city target practice or a second home actually stopped halfway through a fit of rage, removed his firearm from its locked contained in the trunk of his car, removed his ammunition from the separate container in which it was locked, loaded his firearm, and then put his firearm to misuse. When it comes to burdens on constitutional rights, "the Government must present more than anecdote and supposition." *Playboy Entm't Grp.*, 529 U.S. at 822; *see also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 437 (2002).[4]

[4] The City belatedly points to a few articles discussing theft of firearms from unoccupied cars. NYC.Br.42 & n.37. It is hard to see how that is relevant to the transport of firearms. And to the extent the City is concerned about firearms being left in unoccupied places, forcing residents to leave firearms behind in unoccupied homes is not the answer.

Even assuming the transport of unloaded, locked-up handguns presented some appreciable public-safety risk, moreover, the City's ban does little to reduce that activity. If anything, the ban would seem to increase it, for it needlessly forces individuals who seek to engage in target practice to transport their firearms throughout New York City, even when out-of-city ranges may be much closer. And if the ban *does* meaningfully reduce transport, that can be only because it is so burdensome as to deter individuals from engaging in target practice at all. Either way, it fails heightened scrutiny—either because it does not further even the City's dubious proffered public-safety objective or because it does so only at the expense of deterring the exercise of constitutional rights.

It is little surprise, then, that the City's principal defense of the transport ban is not that the ban itself furthers public safety, but that the ban purportedly makes it easier to enforce *other* laws that the City claims further public safety. According to the City, "limiting premise licensees' ability to remove their handguns from their homes except to the extent necessary for such activities as training or repair" makes it easier to enforce the ban on *carrying loaded firearms* in public without a carry license (which is virtually impossible for an ordinary, law-abiding citizen to get in New York, *see Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012)). NYC.Br.40. That argument ignores the fact the carry ban is *itself* a restriction on the exercise of Second Amendment rights. That makes the City's position doubly problematic. First, the notion that the government can prohibit protected activity as a prophylaxis to make it easier to enforce valid laws is an anathema

when it comes to constitutional rights. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002). Second, the Court has been particularly critical of government efforts to pile "prophylaxis-upon-prophylaxis," noting that such an approach *heightens* the government's burden, as it "requires that [the Court] be particularly diligent in scrutinizing the law's fit." *McCutcheon*, 572 U.S. at 221.

The sole authority on which the City relies does not suggest otherwise. The City claims that *United States v. Edge Broadcasting Company*, 509 U.S. 418 (1993), stands for the proposition that any "regulation [that] is a reasonable means of safeguarding the integrity of another law" necessarily satisfies intermediate scrutiny. NYC.Br.39. But the Court went out of its way in *Edge Broadcasting* to make clear that the underlying law whose integrity was being safeguarded "implicate[d] no constitutionally protected right." 509 U.S. at 426.

Here, by contrast, the City seeks to justify its additional restriction on Second Amendment rights as useful to its efforts to enforce *another* restriction on Second Amendment rights. Even accepting the proposition that the carry ban "must be presumed valid," NYC.Br.39, that hardly means that this Court must ignore the fact that it is a restriction on constitutional rights (and an extreme one, at that). When this Court expressed concern with the heaping of prophylaxis upon prophylaxis in *McCutcheon*, it did not question the underlying base-contribution limits that the aggregate limits purportedly reinforced. It instead assumed their constitutionality, but nonetheless emphasized that those base limits

severely restrict constitutional rights—and indeed "themselves are a prophylactic measure … because few if any contributions to candidates will involve quid pro quo arrangements." 572 U.S. at 221. That is precisely the case here.

At any rate, even assuming the City had a legitimate interest in imposing ever more restrictive laws to help enforce the carry ban, the transport ban still could pass muster only if it were "no broader than necessary to advance the Government's interest." *Edge Broad.*, 509 U.S. at 426. Yet the City has never identified *any* evidence that prohibiting individuals from transporting unloaded, locked-up firearms outside city limits has *any* effect on its ability to enforce the carry ban. What is more, the fact that numerous jurisdictions enforce their carry bans without the prophylactic benefit of the City's unprecedented transport ban makes it well-nigh impossible for the City to carry its burden of showing the ban is, in fact, a least restrictive alternative. Finally, the fact that the federal government has not had to resort to bans on the transport of unloaded firearms as a component of its various firearms regulations is likewise fatal to the City's narrow tailoring argument. As the United States aptly summarized, "the City's ban subjects adults to more severe restrictions than Congress considered necessary for children, and it subjects the entire city to more severe restrictions than Congress considered necessary for school zones." U.S.Br.20.

More fundamentally, the City's regime proceeds from the profoundly mistaken premise that anyone found "transporting a licensed handgun through the

City," NYC.Br.40, must be up to no good, requiring a full-fledged investigation into his "excuse" for engaging in this "suspicious" activity. In fact, individuals are constitutionally *entitled* to transport their firearms to places where they may keep and bear them, and even the City seems to agree that those places include second homes and shooting ranges. The City cannot justify its exceedingly restrictive transport regime by treating constitutionally protected activity as inherently suspect.

* * *

The transport ban is contrary to constitutional text, is unprecedented in history, and does not even make sense on its own terms. It simply cannot be reconciled with this Court's conclusion that the Second Amendment protects an individual and fundamental right.

II. The City's Restrictive Premises License And Transport Ban Violate The Commerce Clause And The Right To Travel.

The City fares no better with its efforts to demonstrate that the transport ban is consistent with the Commerce Clause and the right to travel.

1. The City "begin[s]" with the upside-down assertion that the Commerce Clause is not even "implicate[d]" here because the Firearm Owners Protection Act (FOPA) purportedly "expressly authorized" state and local regulation of interstate "transport" of "firearm[s]." NYC.Br.43, 47. That argument misapprehends FOPA, the Commerce Clause, and the constitutional problem with the challenged rule. FOPA protects firearm owners from state regulators, not vice versa. FOPA, after all, is the

Firearm Owners Protection Act, not the State Regulators Empowerment Act. Thus, if the transport ban would violate the Commerce Clause without FOPA (and it does), nothing in FOPA saves it.

Far from empowering state and local government to discriminate against out-of-state ranges or regulate extraterritorially, FOPA *authorizes* firearm owners "to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm," so long as "the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible." 18 U.S.C. §926A. And it displaces all contrary state and local laws. *Id.* The evident point of FOPA, then, is to *preclude* states and localities from interfering with the transport of firearms to places where individuals are entitled to have them.

The City attempts to draw nearly the opposite conclusion from the fact that FOPA authorizes transport to places where people are entitled to "possess and carry" firearms. In the City's view, by including the word "carry," Congress "expressly authorized states and localities" to prohibit individuals from transporting their firearms to or from any jurisdiction that does not allow the public carrying of firearms. NYC.Br.43. That is nonsensical. FOPA does not confine the right to transport firearms to destinations where there is a right to carry firearms. It codifies the individual right "to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm *to any other place* where he may lawfully possess and carry

such firearm." 18 U.S.C. §926A (emphasis added). FOPA certainly does not say that "any other place" means only places where the right to "possess and carry" extends to the entirety of a state or city. Even in New York, individuals have a right to "possess and carry" firearms at ranges, competitions, and second homes, and FOPA affirmatively precludes states or localities from interfering with their transport of firearms to those places.

2. Even assuming FOPA were narrower, however, the fact that Congress saw fit to affirmatively protect a narrower right hardly means that it affirmatively authorized all other restrictions, including a Commerce-Clause-defying regime in which the City purports to regulate extraterritorially. Indeed, it is far from clear that Congress *could* authorize extraterritorial regulation, for the prohibition on state regulation of conduct that takes place *entirely outside the state* derives from more than just the Commerce Clause. *See* Petrs.Br.47 n.1.

The City makes the remarkable claim that the extraterritoriality doctrine applies only to "law[s] [that] … set prices for out-of-state transactions." NYC.Br.52-53. That is wrong as a matter of precedent and principle. This Court has applied the extraterritoriality principle beyond the price-setting context. *See Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality op.); *see also Healy v. Beer Inst., Inc.*, 491 U.S. 324, 335-37 (1989) (adopting *Edgar* plurality's view); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986) (same). That likely explains why every circuit to address the issue has held that state laws that regulate out-of-

state commerce violate the Commerce Clause even when they have nothing to do with setting prices.

Limiting the extraterritoriality doctrine to price-setting provisions would make no sense. Under our constitutional system, each state's authority "is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996) (internal citation omitted). The extraterritoriality doctrine helps police that boundary by prohibiting "the projection of one state regulatory regime into the jurisdiction of another State." *Healy*, 491 U.S. at 336-37. The problem with price-setting laws is not that they set prices; the problem is that they effectively impose one state's views of what terms of commerce are acceptable beyond that state's boundaries, which is precisely what the transport ban does.

3. The transport ban also impermissibly discriminates against out-of-state commerce. "'[D]iscrimination'" in this context "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). The City makes no argument that the transport ban treats out-of-state ranges and in-state ranges the same. Nor could it; the only "authorized" ranges are in the city, and use of a licensee's own handgun at any unauthorized (*i.e.*, out-of-state) range is prohibited. The City thus declares off-limits to out-of-state ranges commerce that is open to in-city ones. That is facial discrimination, plain and simple. *Accord* U.S.Br.29-30.

The City notes that in addition to discriminating against out-of-city ranges, it also discriminates against out-of-city *residents*, because "*only* New York City licensees … could shoot handguns at all at in-city civilian ranges." NYC.Br.50. But that only makes the Commerce Clause problem worse. *See Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019). A Clause designed to prevent economic balkanization is hardly satisfied by hermetically sealing off the local market so that it can only be patronized by locals who are strictly forbidden from taking their business elsewhere.

Because the transport ban discriminates against out-of-state commerce on its face, it can survive only if the City can "show[]" that it "has no other means" to advance the "legitimate local purpose[s]" it claims underlie the law. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338-39 (2007). The City, however, has never even tried to do so.

4. The City's right-to-travel arguments are equally unavailing. The City contends that the travel ban "neither directly nor indirectly targeted interstate travel." NYC.Br.55. Even if that were so, it is not what matters. A law "implicates the right to travel when it actually deters [interstate] travel" or "when it uses 'any classification which serves to penalize the exercise of that right.'" *Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 903 (1986). The transport ban *obviously* "deters" travel. The uncontested evidence is that the transport ban is *the only thing* that stopped petitioners from traveling out of the city and state to patronize firing ranges. Petrs.Br.55. If a but-for and

proximate cause of refraining from interstate travel does not "directly burden egress," NYC.Br.55, then it is hard to understand what would.

The only remaining question, then, is whether the City has "shown" that the ban is "necessary to promote a compelling governmental interest." *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). The City does not even attempt to make that showing. Nor does it offer any response to the argument that its regime "forces petitioners to choose [between] their right to travel or their right to keep and bear arms." Petrs.Br.56. That is likely because there is none.

* * *

In short, "[f]ew laws in the history of our Nation have come close to the severe restriction of" the City's transport ban, and those that have "have been struck down." *Heller*, 554 U.S. at 629. The transport ban should meet the same fate.

CONCLUSION

For the foregoing reasons, the Court should reverse.

Respectfully submitted,

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