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Scott S. Harris
Clerk of the Court
Supreme Court of the United States
One First Street, NW
Washington, DC 20543-0001

Re: *New York State Rifle & Pistol Ass'n v. City of New York*, No. 18-280

Dear Mr. Harris:

On November 15, 2019, the Solicitor General filed a letter brief informing the Court of the United States' view that "respondents have not established that this case is moot." Letter from Noel J. Francisco, Solicitor General, to the Honorable Scott S. Harris 1 (Nov. 15, 2019) ("U.S. Letter Br."). Petitioners, of course, wholeheartedly agree. Indeed, this case is not moot for multiple reasons, including—but certainly not limited to—the one emphasized by the United States.

As the United States notes, "a case becomes moot only if intervening events mean that a court can no longer 'grant any effectual relief' to the plaintiff." *Id.* (quoting *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019)). In the United States' view, this case is not moot because "petitioners could still seek and a court could still award actual or nominal damages" pursuant to 42 U.S.C. §1983. *Id.* That is correct. To be sure, "petitioners' complaint does not specifically request damages." *Id.* at 2. But as the United States notes, petitioners have never foresworn damages; in fact, they specifically alleged that the challenged regime "imposes a financial burden on the exercise of a fundamental constitutional right," JA36 ¶38, repeatedly alleged that "Plaintiffs are thereby damaged in violation of 42 U.S.C. §1983," JA38-39 ¶51, JA41 ¶63, JA47 ¶85, and sought "[a]ny other such further relief as the Court deems just and proper," JA48. At a minimum, then, there is at least a "chance of money changing hands," so the "suit remains live." *Mission*

Prod., 139 S. Ct. at 1660; *see* Fed. R. Civ. P. 54(c) ("final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings"). Moreover, respondents' extraordinary machinations designed to frustrate this Court's review have inflicted additional legal costs on petitioners—this letter brief is only the latest example—which, under the unusual circumstances here, provides yet another reason the dispute remains live. *See* Response to Suggestion of Mootness 20-21 & n.2 (Aug. 1, 2019) ("Response").

That said, this case is not moot for the even more straightforward reasons that petitioners have already explained at length: Should this Court hold the original transport ban unconstitutional, petitioners could still obtain effectual declaratory and injunctive relief protecting them against future consideration of past conduct and providing them with broader and more definitive protections than the miserly prospective-only changes brought about by the City's efforts to moot this case. *See id.* at 12-22. And voluntary cessation principles underscore the propriety of preserving the prospect of such relief, as respondents' actions throughout this litigation fall woefully short of meeting their heavy burden of proving that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007); *see* Response 22-33. There is thus neither any jurisdictional nor any prudential reason to validate respondents' "postcertiorari maneuvers designed to insulate" the decision they procured below "from review by this Court." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012).

The United States agrees that "the possibility of future consequences for past violations of a repealed law can be sufficient to keep a case from becoming moot," and "further agree[s] with petitioners that, on the record before this Court, the possibility of such future consequences does keep this case from becoming moot." U.S. Letter Br. 2. The United States also agrees that, "[o]n the current record, there is a real possibility that licensing officers in the City would exercise" their "considerable discretion in evaluating applications for handgun licenses" "to hold past violations of the transport ban against petitioners when considering future applications for handgun licenses." *Id.* Yet the United States predicts that the record is about to change. It reports that the City has "informed the United States" that it will somehow enjoin licensing officials from exercising their "considerable discretion" in this manner. *Id.* at 2-3. The United States believes that this apparently forthcoming representation suffices to render this case moot. But even putting aside the

strangeness of learning of this coming attraction via a non-party, any such representation would be far too little and far too late to moot this controversy.

That any such representation would be far too little to moot this controversy follows directly from the legal standards that govern the mootness inquiry. If, as the United States acknowledges, the relevant legal question is whether "it is impossible for a court to grant 'any effectual relief whatever,'" *Knox*, 567 U.S. at 307 (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000)), and if, as all concede, the burden lies squarely on the party whose actions allegedly rendered the dispute moot, then the question does not seem close. The United States believes that the City's anticipated representation to this Court that it will not take past conduct involving the challenged provisions into account in future licensing decisions is the key action that will finally render this dispute moot. But in a choice between a representation by the City that it will prohibit its licensing officials from taking past conduct into account and a real court-ordered injunction, backed by contempt, to the same effect, it is clear beyond cavil that the latter provides more effectual relief. After five-plus years of hard-fought litigation during which the City opposed petitioners and defended its regulations at every turn until this Court granted certiorari, why should petitioners have to settle for an instruction from the City to its licensing officials backed by nothing, in lieu of an injunction from a court backed by contempt? And why should they have to settle for vacatur of decisions upholding the regulations as perfectly constitutional in lieu of a judicial declaration that the regulations are, and always were, unconstitutional? The conclusion that the latter judicial orders provide petitioners with more protection than the City's representations is inescapable. The judicial orders thus would provide "effectual relief." That is particularly true given the City's apparent willingness to make any representation to this Court that it thinks necessary to make this case go away. *Compare* Letter from Richard Dearing to the Honorable Scott S. Harris 2 (July 3, 2019) (not accepted for filing) (representing to this Court that it would not brief the merits even if ordered to file a brief), *with* Br. of Respondents 16-56 (begrudgingly but extensively briefing the merits). But even taking the City's representations at face value, they are no substitute for injunctive and declaratory relief, especially given the discretionary nature of the City's licensing regime.

The City's representations also come far too late. Indeed, they have not come yet, and the oral argument is less than a fortnight away. *See* U.S. Letter Br. 2 (recognizing that the dispute is not moot "on the current record"). The City's failure to make such representations earlier is certainly not for lack of opportunity.

Petitioners specifically identified the possibility of future licensing consequences for NYSRPA members as a reason why this case is not moot in their response, *see* Response 16-18, and the City conspicuously did not deny that possibility in its reply. Instead, it noted only that the City does not "ask[] applicants to confess undiscovered rule violations during the licensing process," and made no representations whatsoever about what the City would do if it were aware of such a violation. Reply in Support of Suggestion of Mootness 4 (Aug. 8, 2019). That omission is particularly notable given that the City's licensing application not only requires an applicant to disclose any arrest, indictment, or summons other than a parking violation, but also expressly commands: "**YOU MUST DO THIS EVEN IF**: the case was dismissed, the record sealed *or the case nullified by operation of law*." JA96-97 (italics added); *see also* JA102-03.

If the City now comes into Court and expressly represents that it will amend its application and direct licensing officials to disregard any violation of or inquiry into violations of the decades-old provisions, it will still come far too late. This Court has made clear that it views "postcertiorari maneuvers designed to insulate" decisions "from review by this Court" with considerable skepticism. *Knox*, 567 U.S. at 307. If so, then post-merits-briefing maneuvers designed to supplement and cure the inadequacy of prior post-certiorari maneuvers must be in their own special category. Such eleventh-and-a-half-hour representations merit extreme skepticism and should be recognized for what they are—a blatant effort to frustrate this Court's discretionary review. The costs to this Court and to the opposing party of such late-breaking maneuvers are considerable. Validating them here will encourage them elsewhere. Rejecting them, by contrast, will send a strong signal that the proper post-certiorari focus of the parties should be on briefing the merits.

The context of this case makes particularly clear both the possibility of effectual relief and the City's failure to meet its demanding burden of proving that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Parents Involved*, 551 U.S. at 719. This is not a situation where a municipality has had a discrete ordinance invalidated for failure to respect constitutional requirements and has decided to drop it and exit the regulatory field altogether to avoid future intrusions on liberty. Not only has the City had its intrusive regulatory regime, which vests licensing officials with enormous discretion, upheld by two federal courts, but it has left the entire licensing scheme intact, while modifying only the specific provisions targeted by petitioners' lawsuit. The City has neither acknowledged that those provisions are incompatible with the Second

Amendment nor indicated that it would not reinstate them if this Court reaches the merits and affirms. Moreover, given that City officials will continue to exercise wide-ranging discretion over firearms licensing decisions, and that the burden is on the City to prove that it is "absolutely clear" that future wrongful behavior could not recur and that effectual relief is impossible, the City cannot meet its burden. Just as a city that abandoned one challenged regulation but retained a discretionary parade licensing regime or intrusive regulations on adult theaters would have a much tougher time showing mootness than a city that abandoned a single discrete regulation and vacated the regulatory field (or at least eliminated all agency discretion), the City's decision to continue to enforce a discretionary and extensive licensing regime makes its burden of showing mootness insurmountable. Put differently, if petitioners had prevailed in district court *before* the City modified its ordinance, they would have been entitled to an injunction that not only enjoined further enforcement of the ordinance, *but also* enjoined any future use of past violations in administering the balance of the licensing regime. The City's unilateral decision to modify the ordinance may obviate the need for the first half of the injunction, but the second half would continue to provide effectual relief and would not be vacated just because the ordinance was withdrawn. The result might be different if there were only a discrete ordinance and a simple injunction against its enforcement, but in this area, as in so many others, context matters.

Details matter as well, and understanding just how much discretion City licensing officials enjoy, and just how intrusively they regulate, underscores that the risks of recurring violations and the need for effectual relief are real. To obtain the premises license that is a precondition to lawfully possessing a handgun in New York City, an applicant must (among other things) be deemed "of good moral character." 38 R.C.N.Y. §5-02. The City empowers its licensing officers to find such "good moral character" lacking for a long list of reasons, including (but by no means limited to) "a poor driving history," "multiple driver license suspensions," being "declared a scofflaw by the New York State Department of Motor Vehicles" (a declaration that can result from as little as failure to pay parking tickets), "terminat[ion] from employment under circumstances that demonstrate lack of good judgment or lack of good moral character," or "fail[ure] to pay legally required debts such as child support, taxes, fines or penalties imposed by governmental authorities." *Id.* §3-03(h), (j), (l). And while §5.02(b) already prohibits issuance of a license to anyone who has been convicted of "a felony or other serious offense, … or of a misdemeanor crime of domestic violence," §3-03 separately provides that an applicant can be found lacking in "good moral character" just for being "arrested" for *any* "crime or violation except

minor traffic violations, in *any* federal, state or local jurisdiction." *Id.* §3.03(a) (emphasis added). The City also specifically identifies as a permissible ground for finding a lack of "good character" the mere "fail[ure] to *comply* with federal, state or local law or with Police Department rules governing possession and use of handguns, rifles, shotguns or ammunition," even if that failure resulted in no conviction *or even arrest*. *Id.* §3.03(i) (emphasis added). And like any discretionary regime worth its salt, there is of course a broad catchall for any "[o]ther information [that] demonstrates an unwillingness to abide by the law, a lack of candor towards lawful authorities, a lack of concern for the safety of oneself and/or other persons and/or for public safety, and/or other good cause for the denial of the permit." *Id.* §3.03(n). Suffice it to say, even the least creative of licensing officials would not have to think very hard to conjure up a basis for finding that an applicant who disregarded a then-extant licensing condition—one that, before the City abandoned it, was upheld by both the Southern District of New York and the Second Circuit—lacked the kind of "good moral character" that licensing officials are looking for.

Such uses of past disregard for the decades-old restrictions on premises licenses would be difficult to detect and easy to disguise, making a court-ordered injunction, backed by the possibility of contempt fines, particularly "effectual." It is no answer to say that petitioners could challenge such denials if and when they happen. Injunctive relief serves as protection against *the possibility* that the defendant will deny the plaintiff's hard-won relief and persist in its illegal ways. That is why this Court's voluntary cessation test asks not whether the plaintiff may have some means of recourse should the defendant resume its unlawful conduct, but whether the defendant has proven that it is "absolutely clear that the allegedly wrongful behavior *could not reasonably be expected to recur*." *Parents Involved*, 551 U.S. at 719 (emphasis added). Only when the defendant satisfies that high burden of proof—which the City manifestly has not done here—can it truly be said that an injunction would no longer grant the plaintiff any "effectual relief." *Knox*, 567 U.S. at 307.

For similar reasons, the United States' concern (at 3) that the risk of adverse effects in other jurisdictions is too "remote" is likewise unfounded. New York City is certainly not alone in having a highly discretionary licensing regime; both the State and many of its neighbors require individuals seeking various types of handgun permits or licenses to satisfy "good cause" requirements. *See, e.g.*, *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d

865 (4th Cir. 2013). Like the City, most of those jurisdictions ask applicants about past criminal convictions, and sometimes even past arrests, as well as any refusals or revocations of a firearms license by another jurisdiction. *See, e.g.*, Letter from Arlington Police Department to Firearms License Applicant 3 (July 5, 2017), https://bit.ly/330RXYf ("Pay close attention to the questions on the application, especially to question #4. The question asks: **Have you ever been arrested <u>OR</u> appeared in court as a defendant for <u>any</u> criminal offense.** If you have, answer truthfully, and make sure to explain the circumstances that led to these events fully. An inaccurate, vague, or untruthful answer will be cause for denial or revocation of any license."); *see also, e.g.*, *In re Davis*, No. A-1604-14T1, 2016 WL 2675350, at *1 (N.J. Super. Ct. App. Div. May 11, 2016) (per curiam) (upholding denial of permit to purchase a handgun in part because. when "asked … if he was ever arrested or charged with a crime that did not result in a conviction," applicant falsely "answered, no"). The prospect that a past violation could have a future effect on an NYSRPA member who seeks a license in a neighboring jurisdiction is thus anything but remote. Moreover, the burden is not on petitioners to show that such adverse effects are certain rather than remote, but on the respondents to show that no effectual relief is possible. The United States' concern (at 3) that an injunction would not bind those non-party jurisdictions is equally misplaced. If this Court enters declaratory relief holding that the regulation is, and always was, unconstitutional, it will make it far less likely that other jurisdictions will make any adverse use of past violations, relative to a situation where New York just discontinues a regulation upheld by the Southern District and the Second Circuit. That declaratory relief would not provide the same assurance as an injunction does not render such relief ineffectual.

Protection against future consequences for past violations is but one form of effectual relief that an injunction could still provide in this case. If petitioners had prevailed in the district court while the regulations remained on the books, injunctive relief would not have been limited to an injunction against enforcing the challenged provisions *vel non*, and petitioners should not lose their right to greater relief just because the City has dropped the challenged provisions in the most begrudging (and calculated) manner imaginable. Both the City's new rule and the State's new law leave all manner of ambiguities that an injunction could be crafted to resolve. *See* Response 14-16, 18-20. The United States protests that these ambiguities are found in the new provisions, U.S. Letter Br. 3, but they are not unique to the City's post-certiorari regime; they were inherent in the original regime and would have needed to be addressed if petitioners had succeeded in invalidating the regulations before they were withdrawn. *See, e.g.*, Response 14 (highlighting, *inter alia*, a "continuing

conflict over the scope of 'lawful' [places]"). If, for example, petitioners prevailed in obtaining injunctive relief allowing them to transport handguns to second homes and ranges in neighboring states, a question would have arisen whether petitioners could make reasonable ancillary stops for coffee or restrooms. If the City took the position (that it apparently would have) that such ancillary stops were *verboten*, the injunction could have made clear that the right to transport included reasonable stops. Petitioners should not lose the ability to obtain that kind of "effectual relief" just because the City has unilaterally withdrawn the regulations and replaced them in a way that deems reasonable stops off-limits. Given that dynamic, petitioners do not need to bring separate litigation to resolve these "continuing" disputes, *id.*, as a favorable decision on the merits would enable them to seek injunctive relief that makes crystal clear, *e.g.*, whether transport to a summer rental home or a parent's second home, or stopping for coffee on the way back from the range, is permissible.

Finally, the United States suggests (at 3) that the high burden for proving that voluntary cessation has mooted a case does not apply to the recent change in *state* law, both because the State is not a defendant and because changes of law brought about by state or federal legislation always suffice to moot a case. Each contention is wrong, and in all events both are irrelevant. First, context belies any contention that the State is a genuinely independent actor here, as the legislative effort was coordinated and the sponsor of the state law all but admitted that it was enacted to try to moot this case, and the law expressly reserves to the City unique powers to continue restricting the transport of handguns within city limits. *See* Response 28-30. Second, while this Court has shown special solicitude for the actions and representations of the United States in the voluntary cessation context, it has not embraced the notion that States are uniformly entitled to that same solicitude, *see, e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017), and both separation-of-powers principles and the unique role of the United States as a repeat litigant in this Court may warrant in favor of treating the two differently.

In all events, whether the State's actions are subject to voluntary cessation principles makes no difference, as the United States agrees that, notwithstanding the changes to state law, the case is not moot on the current record because of the City licensing officials' "considerable discretion in evaluating applications for handgun licenses" "to hold past violations of the transport ban against petitioners when considering future applications for handgun licenses." U.S. Letter Br. 2. Nothing in the new state law addresses or eliminates that prospect. Thus, the relevant actor for

voluntary cessation purposes is the City, not the State. And so long as City licensing officials continue to possess that discretion as a matter of law, which all appear to agree they do, it is the City's burden to prove (among other things) that an injunction prohibiting its licensing officials from giving continuing effects to past violations would not grant petitioners "any effectual relief whatever." *Knox*, 567 U.S. at 307 (quoting *City of Erie*, 529 U.S. at 287). As already noted, that is not a close question. An injunction from a federal court to the City, backed by contempt, to not let City licensing officials take past violations into account in licensing decisions plainly provides effectual relief that a mere instruction by the City to its licensing officials does not provide.

The United States has an understandable interest in this Court treating the federal government's representations to this Court that a practice will be discontinued or regulations have been supplanted as sufficient to moot a case. But such representations generally produce a prudential decision by this Court to grant, vacate, and remand, and not a jurisdictional determination that the case has become moot. *See Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 166-67 (1996) (per curiam) (collecting cases in which the Court "GVR'd in light of … confessions of error or other positions newly taken by the Solicitor General"). Here, there are ample reasons not to grant, vacate, and remand, including that the courts below failed to identify any Second Amendment problem with the challenged regulations. *See also* Response 24-26 (discussing why following this course as a prudential matter would be imprudent). Moreover, the City and the United States are not similarly situated for this purpose. This Court has an understandable interest in treating the representations of a coordinate branch of government as definitive. And that constitutionally grounded respect for a coordinate branch is reinforced by the practical reality that the federal government appears before this Court nearly every time it sits, and so has powerful incentives to ensure that all of its subordinates hold the line. It entails no disrespect to the City to point out that it and other municipalities are not similarly situated. The City has no constitutional status, and it last appeared before this Court as a party to a merits case nearly a decade ago. Presumably the countless smaller municipalities that this Court's voluntary cessation doctrine would govern appear here far less often. On the spectrum of litigants trying to persuade this Court not only that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *Parents Involved*, 551 U.S. at 719, but that "it is impossible for a court to grant 'any effectual relief whatever'" should petitioners prevail on the merits, *Knox*, 567 U.S. at 307, the City and other municipalities are miles away from the United States. The City's

efforts thus must be viewed with the same "critical eye" this Court has afforded other "postcertiorari maneuvers designed to insulate a decision from review by this Court." *Id.* And viewed with that critical eye, the City's efforts fall woefully short of meeting its appropriately "heavy burden" of proving that it has unilaterally mooted this case. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000).

Sincerely,

Paul D. Clement

cc: All counsel of record