# APPENDIX

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*Appendix A*

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

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No. 15-638

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

*Plaintiffs-Appellants*,

v.

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

*Defendants-Appellees*.

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Argued: August 17, 2016
Decided: February 23, 2018

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Before: Pooler, Lynch, and Carney, *Circuit Judges*

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**OPINION**

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GERARD E. LYNCH, *Circuit Judge*:

Plaintiffs New York State Rifle & Pistol Association, Romolo Colantone, Efrain Alvarez, and Jose Anthony Irizarry (collectively, "the Plaintiffs") brought suit against Defendants City of New York and

the New York Police Department - License Division (collectively, "the City"), challenging a provision of a New York City licensing scheme, Title 38, Chapter Five, Section 23 of the Rules of the City of New York ("RCNY"), under which an individual with a "premises license" for a handgun may not remove the handgun "from the address specified on the license except as otherwise provided in this chapter." 38 RCNY § 5-23(a)(1). Under Rule 5-23 ("the Rule"), the licensee "may transport her/his handgun(s) directly to and from an authorized small arms range/shooting club, unloaded, in a locked container, the ammunition to be carried separately." *Id.* § 5-23(a)(3).

The New York Police Department - License Division ("License Division") has defined "authorized" facilities, among other requirements, to be "those located in New York City." App. 38. The Plaintiffs sought to remove handguns from the licensed premises for the purposes of going to shooting ranges and engaging in target practice outside New York City as well as, in the case of one Plaintiff, transporting the handgun to a second home in upstate New York. The United States District Court for the Southern District of New York (Robert W. Sweet, *J.*) denied the Plaintiffs' motions for summary judgment and for a preliminary injunction, and granted the City's cross-motion for summary judgment. The district court held that the restrictions in premises licenses do not violate the Second Amendment, the Commerce Clause, the fundamental right to travel, or the First Amendment. *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 86 F. Supp. 3d 249, 268 (S.D.N.Y. 2015). The Plaintiffs appeal that judgment.

For the reasons that follow, we AFFIRM.

## BACKGROUND

New York State law prohibits possession of "firearms" absent a license. N.Y. Penal Law §§ 265.01-265.04, 265.20(a)(3).[1] Section 400.00 of the Penal Law establishes the "exclusive statutory mechanism for the licensing of firearms in New York State." *O'Connor v. Scarpino*, 83 N.Y.2d 919, 920 (1994); *see also Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 85 (2d Cir. 2012). Licenses can be held by individuals at least twenty-one years of age, of good moral character, and "concerning whom no good cause exists for the denial of the license," among other requirements. N.Y. Penal Law § 400.00(1)(a)-(b), (n).

To obtain a handgun license, an individual must apply to his or her local licensing officer. "The application process for a license is rigorous and administered locally. Every application triggers a local investigation by police into the applicant's mental health history, criminal history, [and] moral character." *Kachalsky*, 701 F.3d at 87 (internal citation and quotation marks omitted). The licensing officers "are vested with considerable discretion in deciding whether to grant a license application,

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[1] As we explained in *Kachalsky v. County of Westchester*, the term "firearm" in New York law has a restricted meaning and does not encompass all guns to which the term generally applies in ordinary usage. 701 F.3d 81, 85 (2d Cir. 2012). Essentially, a "firearm" is defined by the relevant statutes to include pistols and revolvers, assault weapons, and rifles and shotguns with barrels of specified shortened lengths. *Id.*, citing N.Y. Penal Law § 265.00(3). Ordinary rifles and shotguns are not subject to the licensing provisions of the statute.

particularly in determining whether proper cause exists for the issuance of a carry license." *Id.* (internal quotation marks omitted). The New York Penal Law specifies that in New York City, the licensing officer is the City's Police Commissioner. N.Y. Penal Law § 265.00(10). The License Division exercises the Commissioner's authority to review applications for licenses, and issues handgun licenses. *See* 38 RCNY §§ 5-01 - 5-11.

The Penal Law establishes two primary types of handgun licenses: "carry" licenses and "premises" licenses. N.Y. Penal Law §§ 400.00(2)(a), (f). A carry license allows an individual to "have and carry [a] concealed" handgun "without regard to employment or place of possession . . . when proper cause exists" for the license to be issued. *Id.* § 400.00(2)(f).

> "Proper cause" is not defined by the Penal Law, but New York State courts have defined the term to include carrying a handgun for target practice, hunting, or self-defense. When an applicant demonstrates proper cause to carry a handgun for target practice or hunting, the licensing officer may restrict a carry license "to the purposes that justified the issuance."

*Kachalsky*, 701 F.3d at 86, quoting *O'Connor*, 83 N.Y.2d at 921. Generally, a carry license is valid throughout the state except that it is not valid within New York City "unless a special permit granting

validity is issued by the police commissioner" of New York City.[3] N.Y. Penal Law § 400.00(6).

A premises license is specific to the premises for which it is issued. The type of license at issue in this case allows a licensee to "have and possess in his dwelling" a pistol or revolver. *Id.* § 400.00(2)(a). Under the RCNY, a "premises license - residence" issued to a New York City resident is specific to a particular address, and "[t]he handguns listed on th[e] license may not be removed from the address specified on the license except" in limited circumstances, including the following:

> (3) To maintain proficiency in the use of the handgun, the licensee may transport her/his handgun(s) directly to and from an authorized small arms range/shooting club, unloaded, and in a locked container, the ammunition to be carried separately.

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[3] Another handgun license available to New York City residents is a "carry business license," which "permits the carrying of a handgun concealed on the person." 38 RCNY § 5-23(b). Andrew Lunetta, the former Commanding Officer of the License Division, has averred that to obtain such a license, "the applicant must show that he/she has a need to carry a concealed firearm which is distinguishable from that of the general public, for example, the applicant carries large sums of cash or valuables on a regular basis or is exposed to extraordinary personal danger in daily life." App. 75. The Plaintiffs have not alleged that they applied for carry business licenses nor that they were denied such licenses. Nor have the Plaintiffs claimed to hold premises licenses for their businesses, a category of license which would also be authorized under the Rule. 38 RCNY § 5-23(a). Accordingly, we need not further discuss carry business licenses or business premises licenses.

> (4) A licensee may transport her/his handgun(s) directly to and from an authorized area designated by the New York State Fish and Wildlife Law and in compliance with all pertinent hunting regulations, unloaded, in a locked container, the ammunition to be carried separately, after the licensee has requested and received a "Police Department - City of New York Hunting Authorization" Amendment attached to her/his license.

38 RCNY § 5-23(a).

Under Rule 5-23(a)(3), an "authorized small arms range/shooting club" is one that, among other requirements, is located in New York City, as the License Division notified Plaintiff Colantone in a letter dated May 15, 2012. App. 28. When this challenge was brought, there were seven such facilities in New York City, including at least one in each of the City's five boroughs.[4] The New York Police Department ("NYPD") also previously issued "target licenses" that allowed the licensee to take his or her handgun to shooting ranges and competitions outside New York City. These target licenses were not mandated by state law, but were issued by the NYPD in its discretion as the licensing agency for New York City. The NYPD received reports that licensees were using target licenses to carry weapons to many other locations, and not in the requisite unloaded and

[4] Neither of the parties has brought to our attention any change in that number.

enclosed condition. In part because of these issues, the NYPD eliminated the target license in 2001.

Plaintiffs Colantone, Irizarry, and Alvarez hold premises licenses issued by the License Division that allow them to possess handguns in their residences in New York City. They seek to transport their handguns outside the premises for purposes other than the ones authorized by Rule 5-23. All three Plaintiffs seek to transport their handguns to shooting ranges and competitions outside New York City.[5] In addition, Colantone, who owns a second home in Hancock, New York, seeks to transport his handgun between the premises for which it is licensed in New York City and his Hancock house. These plaintiffs, along with the New York State Rifle & Pistol Association, filed suit in the Southern District of New York, seeking a declaration that the restrictions imposed by the Rule were unconstitutional and an injunction against its enforcement.

The Plaintiffs moved for summary judgment and for a preliminary injunction, and the City cross moved for summary judgment. The district court granted the City's cross-motion for summary judgment and dismissed the complaint. The district court determined that the Rule "merely regulates rather

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[5] The Plaintiffs seek to take their handguns to tournaments such as the NRA Sectional Championships held in Roslyn, New York, and Old Bridge, New Jersey, and the Steel Challenge Championships, held in Old Bridge, New Jersey. They also argue that it would be more convenient for some of them to engage in target practice at shooting ranges located near, but outside of, New York City, rather than at ranges located within the City but farther from their homes.

than restricts the right to possess a firearm in the home and is a minimal, or at most, modest burden on the right." *N.Y. Rifle & Pistol Ass'n.*, 86 F. Supp. 3d at 260 (brackets and internal quotation marks omitted). Accordingly, the district court held that the Rule did not violate the Plaintiffs' Second Amendment rights. *Id.* at 160-61. The district court also found that the Rule did not violate the dormant Commerce Clause, the First Amendment right of expressive association, or the fundamental right to travel. *Id.* at 263-66.

## DISCUSSION

The Plaintiffs argue on appeal, as they did below, that by restricting their ability to transport firearms outside the City, Rule 5-23 violates the Second Amendment, the dormant Commerce Clause, the First Amendment right of expressive association, and the fundamental right to travel. We review a district court's decision on summary judgment *de novo*, construing the evidence in the light most favorable to the non-moving party. *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 252 (2d Cir. 2015). "We also review *de novo* the district court's legal conclusions, including those interpreting and determining the constitutionality of a statute." *Id.* (internal quotation marks omitted). Pursuant to the Federal Rules of Civil Procedure, summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). For the reasons explained below, we reject each of the Plaintiffs' arguments.

I. Rule 5-23 Does Not Violate the Second Amendment.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *District of Columbia v. Heller*, the Supreme Court announced that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." 554 U.S. 570, 592 (2008). In *McDonald v. City of Chicago*, the Court held that this right is incorporated within the Due Process Clause of the Fourteenth Amendment, and therefore binds the States as well as the Federal Government. 561 U.S. 742, 791 (2010). However, the Court remarked that its holding should not "be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626-27. "Neither *Heller* nor *McDonald* . . . delineated the precise scope of the Second Amendment or the standards by which lower courts should assess the constitutionality of firearms restrictions." *N.Y. State Rifle*, 804 F.3d at 254.

A. Analytical Framework

Following *Heller*, this Circuit adopted a "two-step inquiry" for "determining the constitutionality of firearm restrictions." *Id.* First, we "determine whether the challenged legislation impinges upon conduct protected by the Second Amendment," and second, if

we "conclude[] that the statute[]impinge[s] upon Second Amendment rights, we must next determine and apply the appropriate level of scrutiny." *Id.* at 254, 257.

1. First Step: Whether the Second Amendment Applies

At the first step, the Plaintiffs argue that Rule 5-23 impinges on conduct protected by the Second Amendment. We need not decide whether that is so, because, as explained below, the Rule "pass[es] constitutional muster" under intermediate scrutiny. *Id.* at 257. Thus, as in *New York State Rifle*, we "proceed on the assumption that [the Rule restricts activity] protected by the Second Amendment." *Id.*

2. Second Step: Level of Scrutiny

At the second step, we consider whether to apply heightened scrutiny. In Second Amendment cases, our Circuit has recognized at least two forms of heightened scrutiny—strict and intermediate. *See Kachalsky*, 701 F.3d at 93 (holding that although "some form of heightened scrutiny would be appropriate," strict scrutiny was not necessary, and instead applying intermediate scrutiny). Our Circuit has also recognized that a form of non-heightened scrutiny may be applied in some Second Amendment cases. *See United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012) (holding that heightened scrutiny is not appropriate where the regulation does not impose a "substantial burden on the ability of [plaintiffs] to possess and use a firearm for self-defense"). This recognition is limited by the Supreme Court's indication in *Heller* that rational basis review may be inappropriate for certain regulations involving Second

Amendment rights. 554 U.S. at 628 n.27. But we need not determine here which types of regulations may be subject only to rational basis review, or whether some form of non-heightened scrutiny exists that is more exacting than rational basis review. As explained below, we find that the Rule does not trigger strict scrutiny and that it survives intermediate scrutiny.

In determining whether some form of heightened scrutiny applies, we consider two factors: "(1) 'how close the law comes to the core of the Second Amendment right' and (2) 'the severity of the law's burden on the right.' Laws that neither implicate the core protections of the Second Amendment nor substantially burden their exercise do not receive heightened scrutiny." *N.Y. State Rifle*, 804 F.3d at 258, quoting *Ezell v. City of Chicago ("Ezell I")*, 651 F.3d 684, 703 (7th Cir. 2011). As relevant to the individual right to possess a firearm recognized in *Heller*, a statute can "implicate the core of the Second Amendment's protections by extending into the home, 'where the need for defense of self, family and property is most acute.'" *Id.,* quoting *Heller*, 554 U.S. at 628. Thus, in *Heller*, the Supreme Court struck down the District of Columbia's ban on handgun possession in the home because it completely prohibited "an entire class of 'arms' that is overwhelmingly chosen by American society for th[e] lawful purpose [of self-defense]." *Heller*, 554 U.S. at 628. The Court found that this prohibition, which extended into the home, would fail constitutional muster under any standard of scrutiny. *Id.*

As to the second factor, we have held that "heightened scrutiny is triggered only by those

restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes)." *Decastro*, 682 F.3d at 166. "The scope of the legislative restriction and the availability of alternatives factor into our analysis of the degree to which the challenged law burdens the right." *N.Y. State Rifle*, 804 F.3d at 259 (internal quotation marks omitted). For example, since *Heller*, we have found New York's and Connecticut's prohibitions of semiautomatic assault weapons to be distinguishable from the ban struck down in *Heller*, because under those statutes, "citizens may continue to arm themselves with non-semiautomatic weapons *or* with any semiautomatic gun that does not contain any of the enumerated military-style features." *Id.* at 260 (emphasis in original). Even where heightened scrutiny is triggered by a substantial burden, however, strict scrutiny may not be required if that burden "does not constrain the Amendment's 'core' area of protection." *Id.* Thus, the two factors interact to dictate the proper level of scrutiny.

The Plaintiffs argue that the Rule violates the Second Amendment in two ways: first, by preventing Plaintiff Colantone from taking the handgun licensed to his New York City residence and transporting it to his second home in Hancock, New York, and second, by preventing the Plaintiffs from taking their handguns licensed to New York City premises to firing ranges and shooting competitions outside the City. We address these arguments in turn.

In *Kachalsky*, we applied intermediate scrutiny and affirmed New York's "proper cause" requirement for the issuance of a carry license, despite finding that such a requirement "places substantial limits on the ability of law-abiding citizens to possess firearms for self-defense in public."[6] 701 F.3d at 93. In comparison to the regulation considered in *Kachalsky*, the restrictions complained of by the Plaintiffs here impose at most trivial limitations on the ability of lawabiding citizens to possess and use firearms for self-defense.[7] New York has licensed the ownership

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[6] We are aware that a divided panel of the Seventh Circuit and a divided panel of the District of Columbia Circuit have disagreed with *Kachalsky*. *See Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012); *Wrenn v. District of Columbia*, 864 F.3d 650, 662 (D.C. Cir. 2017). After giving careful and respectful attention to the reasoning of those opinions, we reaffirm our prior holding, by which this panel is, in any event, bound. We also recognize that the Third and Fourth Circuits have adopted reasoning similar to ours in upholding various state regulations on the carrying of firearms outside the home. *See Drake v. Filko*, 724 F.3d 426, 433 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 880-81 (4th Cir. 2013). The Ninth Circuit upheld a similar regulation on other grounds. *Peruta v. Cty. of San Diego*, 824 F.3d 919, 924 (9th Cir. 2016) (en banc) (holding that "the Second Amendment does not . . . protect a right of a member of the general public to carry concealed firearms in public"), cert. denied sub nom. *Peruta v. California*, 137 S. Ct. 1995 (2017).

[7] To the extent that the Plaintiffs are limited in their ability to carry firearms in public, those limitations are not imposed by Rule 5-23, but rather are inherent in their lack of carry permits. The Plaintiffs do not allege that they sought and were denied such permits, and the restrictions imposed on those who fail to demonstrate the requisite "proper cause" to obtain them were upheld in *Kachalsky*, 701 F.3d at 101. We understand the Plaintiffs to contend primarily that the restrictions on transportation of unloaded firearms in locked containers

and possession of firearms in their residences, where "Second Amendment guarantees are at their zenith," *id*. at 89, and does nothing to limit their lawful use of those weapons "in defense of hearth and home"—the "core" protection of the Second Amendment, *Heller*, 554 U.S. at 634-35.

Strict scrutiny does not attach to Rule 5-23 as a result of Colantone's desire to transport the handgun licensed to his New York City residence to his second home in Hancock, New York. Even if the Rule relates to "core" rights under the Second Amendment by prohibiting Colantone from taking his licensed firearm to his second home, the Rule does not substantially burden his ability to obtain a firearm for that home, because an "adequate alternative[] remain[s] for [Colantone] to acquire a firearm for self-defense." *Decastro*, 682 F.3d at 168; *see also New York State Rifle,* 804 F.3d at 259 ("No substantial burden exists . . . if adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense.") (internal quotation marks omitted). This case is easily distinguished from *Heller*, in which the Supreme Court considered, and deemed unconstitutional, an outright ban on the possession of handguns in the home. 554 U.S. at 635. Here, New York City imposes no limit on Colantone's ability to obtain a license to have a handgun at his second residence in Hancock; if he wants to keep a handgun at his Hancock house, he can apply to the licensing officers in Delaware

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undermine their ability to make proper use of the premises permits they possess, and thereby impose substantial limits on their self-defense rights separate from those at issue in *Kachalsky*.

County.[8] The Rule restricts only his ability to remove the handgun licensed by New York City authorities from the City premises for which it is specifically licensed.

Colantone presents no evidence that the costs, either financial or administrative, associated with obtaining a premises license for his house in Hancock, or acquiring a second gun to keep at that location, would be so high as to be exclusionary or prohibitive. In *Kwong v. Bloomberg*, we assumed that intermediate scrutiny applied to New York City's $340 application fee for a premises license and upheld that fee. 723 F.3d 160, 168 (2d Cir. 2013). We noted that otherwise-proper costs associated with a state's regulation of firearms could be impermissible "if [they] were so high as to be exclusionary or prohibitive." *Id.* at 166. But "the fact that the licensing regime makes the exercise of one's Second Amendment rights more expensive does not necessarily mean that it substantially burdens that right." *Id.* at 167-68 (internal quotation marks omitted). Here, Colantone does not even estimate the amount of money or time potentially at issue by the requirement of obtaining a premises license and second firearm for his second home, and he does not allege that the Rule restricts in any way his ability to obtain such a firearm.

Next, the Plaintiffs argue that the Rule imposes a substantial burden on their core Second Amendment rights by prohibiting them from taking their licensed

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[8] Colantone has not alleged or presented evidence that he has sought such a license.

handguns to firing ranges and shooting competitions outside the City.

The Plaintiffs' primary argument is that the right to possess and use guns in self-defense suggests a corresponding right to engage in training and target shooting, and thus restrictions on the latter right must themselves be subject to heightened scrutiny. Their argument relies on the Seventh Circuit's observation that the core right of the Second Amendment to use firearms in self-defense, particularly in the home, "wouldn't mean much without the training and practice that make it effective." *Ezell I*, 651 F.3d at 704.

To the extent that the Plaintiffs argue that firearms practice is itself a core Second Amendment right, and that even minimal regulation of firearms training must survive heightened scrutiny to pass constitutional muster, we reject that argument. It is reasonable to argue, as did the plaintiffs in *Ezell I*, that restrictions that limit the ability of firearms owners to acquire and maintain proficiency in the use of their weapons can rise to a level that significantly burdens core Second Amendment protections. Possession of firearms without adequate training and skill does nothing to protect, and much to endanger, the gun owner, his or her family, and the general public.[9] Accordingly, we may assume that the ability

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[9] The *Heller* Court cited with approval a post-Civil War legal commentary by Judge and Professor Thomas Cooley: "[T]o bear arms implies something more than the mere keeping; it implies the learning to handle and use them . . . ; it implies the right to meet for voluntary discipline in arms, observing in doing so the

to obtain firearms training and engage in firearm practice is sufficiently close to core Second Amendment concerns that regulations that sharply restrict that ability to obtain such training could impose substantial burdens on core Second Amendment rights.[10] Some form of heightened scrutiny would be warranted in such cases, however, not because live-fire target shooting is *itself* a core Second Amendment right, but rather because, and only to the extent that, regulations amounting to a ban (either explicit or functional) on obtaining firearms training and practice substantially burden the core right to keep and use firearms in self-defense in the home. Indeed, if the Plaintiffs' broader argument were accepted, every regulation that applied to businesses that provide firearms training or firing-range use would itself require heightened scrutiny, a result far from anything the Supreme Court has required.

Our analysis puts the focus where it belongs: on the core right of self-defense in the home. Rule 5-23 imposes no direct restriction at all on the right of the Plaintiffs, or of any other eligible New Yorker, to obtain a handgun and maintain it at their residences for self-protection. All of the individual Plaintiffs hold licenses to maintain handguns for that purpose. The Plaintiffs do not allege that the City's regulatory scheme imposes any undue burden, expense, or

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laws of public order." *Heller*, 554 U.S. at 617-18 (internal quotation marks omitted).

[10] We make no such assumption, in contrast, regarding the ability to engage in competitive firearm sports. Purely recreational activities of that sort are unrelated to core Second Amendment concerns.

difficulty that impedes their ability to possess a handgun for self-protection, or even their ability to engage in sufficient practice to acquire and maintain the skills necessary to keep firearms safely and use them effectively.

We are further unpersuaded by the Plaintiffs' attempts to analogize the Rule to the restrictions held unconstitutional in *Ezell I*, as those restrictions are easily distinguishable from the ones at issue in this case. *Ezell I* concerned a Chicago ordinance that flatly banned firing ranges within city limits (while simultaneously requiring, for the issuance of a handgun license, firearms training that was unavailable within the city). We can assume, without deciding, that the Seventh Circuit correctly concluded that such a dramatic ban on target shooting substantially limits the right of law-abiding citizens to engage in the training and practice that would enable them to safely and effectively make use of firearms for defensive purposes in the home. Under the Chicago ordinance, residents could not engage in firearms activities without leaving the city. At a minimum, such a limitation imposes significant inconvenience, and we can accept, for purposes of the argument in this case, that the imposition of such a burden comes close to prohibiting gun training and practice altogether. Particularly when coupled with a training requirement, such a limitation would impose a considerable obstacle to gun ownership in the home. New York's rule, however, imposes no such limitations. Rule 5-23 allows a holder of a premises license to take the handgun licensed for his or her New York City premises to an authorized firing range in

the City to engage in practice, training exercises, and shooting competitions.

Nor does the City take away with one hand what it gives with the other, by using its power to regulate firing ranges so restrictively that as a practical matter, firing ranges are unavailable. That was the route taken by Chicago in response to the *Ezell I* ruling. In *Ezell v. City of Chicago ("Ezell II")*, the Seventh Circuit confronted zoning restrictions that "severely limit[ed] where shooting ranges may locate," and which were justified by nothing more than "sheer speculation about accidents and theft." 846 F.3d 888, 894, 896 (7th Cir. 2017) (internal quotation marks omitted). In finding that the restrictions acted as a functional ban on firing ranges, the *Ezell II* Court cited calculations produced by the plaintiffs showing that only about 2.2% of the city's acreage could even theoretically be used to site a shooting range. *Id.* at 894. Additionally, the court referenced testimony from two experts, presented by the plaintiffs, indicating that other jurisdictions made available significantly more land for use by shooting ranges. *Id.*

In this case, by contrast, the Plaintiffs present no evidence demonstrating that the Rule serves to functionally bar their use of firing ranges or their attendance at shooting competitions. In fact, the Plaintiffs concede that seven authorized ranges are available to them, including at least one in each of the City's five boroughs. What the Plaintiffs seek is the inverse of what the *Ezell I* plaintiffs sought: they do not complain that they are required to undertake burdensome journeys away from the city in which they live in order to maintain their skills, but rather they

demand the right to take their handguns to ranges and competitions *outside* their city of residence. While the Plaintiffs make passing reference to the possibility that some New York City residents might find a firing range located outside the City more convenient to use, or closer to their residence, than the nearest facility within their home borough or an adjoining borough, they offer no evidence that the burden imposed by having to use a range within the City is in any way substantial.[11]

As with absolute limitations on the ability to engage in firearms training, laws that limit such opportunities by imposing excessive costs could in principle impose a substantial burden entailing heightened scrutiny. But the test, again, is whether core rights are substantially burdened. As we noted in *Kwong*, a "hypothetical licensing fee *could be* so high as to constitute a 'substantial burden,'" 723 F.3d at 168 n.15; nevertheless, we concluded that the permit fee charged by New York City did not impose such a substantial burden. *Id.* at 172.

Furthermore, a law that "regulates the availability of firearms is not a substantial burden on the right to keep and bear arms if adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense." *Decastro*, 682 F.3d at 168; *see also Nordyke v. King*, 644 F.3d 776, 787 (9th Cir. 2011), aff'd. en banc, 681 F.3d 1041 (9th Cir. 2012) ("[W]hen deciding whether a restriction on gun sales

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[11] The Plaintiffs do not allege that the number or location of firing ranges in the City is a byproduct of the Rule or any burdensome zoning regulations, or that it is anything more than the result of market forces.

substantially burdens Second Amendment rights, we should ask whether the restriction leaves law-abiding citizens with reasonable alternative means for obtaining firearms sufficient for self-defense purposes."). An analysis of the evidence in this case reveals that, contrary to the Plaintiffs' assertions, the Plaintiffs have sufficient opportunities to train with their firearms without violating the Rule.

The record evidence demonstrates that seven firing ranges in New York City are available to any premises license-holder. One range, Olinville Arms in the Bronx, is open to any member of the public for an hourly fee. Six of the firing ranges require payment of a membership fee, although at least one of those six is open to non-members for weekly shooting competitions. The Plaintiffs argue that they should not be relegated to joining "private clubs" in order to engage in firearms competitions, Appellants' Br. 51, but the record does not support any claim that these "clubs" are exclusionary in any way. Like privately owned gyms and other athletic facilities, they are places of public accommodation, open to anyone who pays their fees. The Plaintiffs do not argue that the fees charged by the available firing ranges are prohibitively expensive, still less that their cost is driven up by any burdensome or unreasonable City regulations. That some portion of the fee is charged in the form of an annual or monthly "membership," rather than a per-hour usage fee, does not put the facilities out of reach for license holders. Nor does it warrant a conclusion that New York City has imposed an unreasonable burden on a resident's ability to pursue firearms training—which may be a somewhat

costly pursuit in any event—thereby raising constitutional concerns.

Moreover, the Plaintiffs do not argue that the facilities located within the City are inadequate to provide the necessary opportunities for practice shooting. Indeed, the record reflects that some of these facilities are quite substantial. For example, the Richmond Boro Gun Club advertises a "100-yard rifle range with 30 covered and enclosed stations for Benchrest, Prone, and Bench shooting, [and an] outdoor 24 station 50-yard pistol range with covered and enclosed shooting bench with turning targets at 25 yards" among its many shooting facilities. App. 130. "Various rifle and pistol matches are held each week all year," according to their website, and these matches are open to non-members. *Id*.

Finally, nothing in the Rule precludes the Plaintiffs from utilizing gun ranges or attending competitions outside New York City, since guns can be rented or borrowed at most such venues for practice purposes. New York state law expressly allows individuals to use a gun that is not their own at a shooting range if the license holder is present. N.Y. Penal Law § 265.20(a)(7-a). We recognize that the Plaintiffs may prefer to practice with their own weapon—something that the Rule makes fully possible within the City. That the Rule restricts practicing with their own firearms to ranges within the City does not make practicing outside the City or with their own firearms impossible, just not the two together.

In short, nothing in this record suggests that the limitations challenged by the Plaintiffs significantly

inhibit their ability to utilize training facilities to obtain and maintain firearm skills, let alone that the Rule operates as a substantial burden on the right to keep and use firearms for self-defense in the home. Assuming *arguendo* that a total ban on firing ranges within the limits of a large city (as was at issue in *Ezell I*) or a functional ban on firing ranges through onerous zoning regulations (along the lines of *Ezell II*) would impose a substantial burden on the core Second Amendment right of residents to maintain firearms for self-defense in the home, we are not confronted with such a case here. Unlike the plaintiffs in *Ezell II*, the Plaintiffs here do not allege that any of the City's regulations, including Rule 5-23, serve to deter the construction or existence of firing ranges within city limits. Furthermore, given the existence of ample facilities for live-fire training and practice available at market prices within reasonable commuting distance from the homes of all City residents, the restrictions imposed by the Rule do not impose a substantial burden on the core Second Amendment right to own and possess handguns for self-defense.

It is clear, based on the essentially undisputed facts recited above, that strict scrutiny is not triggered by the Rule, either as applied to Colantone's second home or to the Plaintiffs' desire to take their handguns outside the City for shooting competitions or target practice. However, some form of heightened scrutiny may still be required. We have applied intermediate scrutiny when analyzing regulations that substantially burdened Second Amendment rights or that encroached on the core of Second Amendment rights by extending into the home. *See, e.g.*, *N.Y. State Rifle*, 804 F.3d at 258-59 (applying intermediate

scrutiny to statutes that were "both broad and burdensome" and that "implicate the core of the Second Amendment's protections"); *Kachalsky*, 701 F.3d at 93 (applying intermediate scrutiny to requirement that "places substantial limits on the ability of law-abiding citizens to possess firearms for self-defense in public").

Because we assume, *arguendo*, that the Rule approaches the Second Amendment's core area of protection as applied to Colantone's second home, though it does not impose a substantial burden, we find that intermediate scrutiny is appropriate to assess the Rule in that instance. As to the Plaintiffs' access to firing ranges and shooting competitions, the Rule does not approach the core area of protection, and we find it difficult to say that the Rule substantially burdens any protected rights. "But we need not definitively decide that applying heightened scrutiny is unwarranted here," *Kwong*, 723 F.3d at 168, because we find that the Rule would survive even under intermediate scrutiny. Accordingly, we proceed to assess the Rule by applying intermediate scrutiny.

B. Application of Intermediate Scrutiny

When applying intermediate scrutiny under the Second Amendment, "the key question is whether the statute[] at issue [is] substantially related to the achievement of an important governmental interest." *N.Y. State Rifle*, 804 F.3d at 261 (internal quotation marks omitted).

> To survive intermediate scrutiny, the fit between the challenged regulation [and the government interest] need only be substantial, not perfect. Unlike strict

> scrutiny analysis, we need not ensure that the statute is narrowly tailored or the least restrictive available means to serve the stated governmental interest. Moreover, we have observed that state regulation of the right to bear arms has always been more robust than analogous regulation of other constitutional rights. So long as the defendants produce evidence that fairly supports their rationale, the laws will pass constitutional muster.

*Id.* (internal quotation marks and footnotes omitted, brackets in original).[12]

The Rule seeks to protect public safety and prevent crime, and "New York has substantial, indeed

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[12] This language from *New York State Rifle* suggests that, under intermediate scrutiny, as we discuss in Section I.B, the City bears the burden of showing that the Rule passes muster. Allocating the burden of proof in this way is consistent with the Supreme Court's approach in other areas of constitutional law that involve heightened, but not strict, scrutiny. *See*, *e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571-72 (2011) ("Under a commercial speech inquiry, it is the State's burden to justify its content-based law as consistent with the First Amendment."); *United States v. Virginia*, 518 U.S. 515, 533 (1996) ("The burden of justification" in a sex-based Equal Protection challenge "rests entirely on the State."). In Section I.A.2, by contrast, we determined what level of scrutiny to apply by assessing the Plaintiffs' proffered evidence in support of their position that the Rule substantially encumbers their core rights. That initial emphasis on the Plaintiffs' showing aligns with the approach that we have adopted in other constitutional cases. *See N.Y. State Rifle*, 804 F.3d at 259 ("We typically require a threshold showing to trigger heightened scrutiny of laws alleged to implicate such constitutional contexts as takings, voting rights, and free speech.").

compelling, governmental interests in public safety and crime prevention." *Kachalsky*, 701 F.3d at 97. "[W]hile the Second Amendment's core concerns are strongest inside hearth and home, states have long recognized a countervailing and competing set of concerns with regard to handgun ownership and use in public." *Id.* at 96. "There is a longstanding tradition of states regulating firearm possession and use in public because of the dangers posed to public safety." *Id.* at 94-95; *see also U.S. v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) ("[O]utside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.").

The City has presented evidence supporting its contention that the Rule serves to protect the public safety of both license-holding and non-license-holding citizens of New York City. In a detailed affidavit, the former Commander of the License Division, Andrew Lunetta, discussed why taking a licensed handgun to a second home or a shooting competition outside the City, even under the restrictions imposed by the Rule for permitted transportation, constitutes a potential threat to public safety. He explained that premises license holders "are just as susceptible as anyone else to stressful situations," including driving situations that can lead to road rage, "crowd situations, demonstrations, family disputes," and other situations "where it would be better to not have the presence of a firearm." App. 68. Accordingly, he stated, the City has a legitimate need to control the presence of firearms in public, especially those held by individuals who have only a premises license, and not a carry license. He went on to discuss how "public safety will be

compromised" unless the regulations concerning when and where premises licensees can transport their firearms "can be effectively monitored and enforced, and are not easily ignored or susceptible to being violated." *Id.* at 69.

Indeed, the City produces evidence that it has, in the past, had difficulty monitoring and enforcing the limits of the premises license. Lunetta's affidavit documented "abuses" that occurred when, prior to adoption of the current Rule, the City *did* allow licensees to carry their handguns to shooting ranges out of the City. "Examples included, licensees travel[]ing with loaded firearms, licensees found with firearms nowhere near the vicinity of an authorized range, licensees taking their firearms on airplanes, and licensees travel[]ing with their firearms during hours where no authorized range was open." *Id.* at 77. Based on these abuses, Lunetta explained, the New York Police Department was concerned that allowing premises licensees to transport their firearms anywhere outside of the City for target practice or shooting competitions made it "too easy for them to possess a licensed firearm while traveling in public, and then if discovered create an explanation about traveling for target practice or shooting competition." *Id.* at 70.

According to Lunetta's affidavit, the New York Police Department concluded that officers cannot be expected to verify whether a licensee stopped with a firearm was, in fact, traveling to a firing range outside of the City. Based on that specific experience, the License Division restricted the scope of the premises license to allow for the transportation of the licensed

handgun only to a firing range within New York City (or, with the proper additional authorization, to a designated hunting area). Lunetta explained the reasoning for the License Division's decision: "When target practice and shooting competitions are limited to locations in New York City the ability to create . . . a fiction[al legal purpose] is limited." *Id.* Thus, the City asserts, limiting the geographic range in which firearms can be carried allows the City to promote public safety by better regulating and minimizing the instances of unlicensed transport of firearms on city streets.

In contrast to the City's evidence supporting the Rule's rationale, the Plaintiffs have produced scant evidence demonstrating any burden placed on their protected rights, and nothing which describes a substantial burden on those rights. The Plaintiffs have submitted individual affidavits expressing their desire to travel to additional locations with their handguns, and their decision not to participate in certain shooting competitions outside of the City. But, as we have stated, the Plaintiffs are still free to participate in those shooting competitions with a rented firearm, and to obtain licenses for handguns in their second homes, and the Plaintiffs have presented no evidence indicating that this understanding is mistaken. Additionally, the Plaintiffs present no evidence that the firing ranges that they wish to access outside the City are significantly less expensive or more accessible than those in the City. Even if the Plaintiffs did provide this evidence, they would still need to demonstrate that practicing with one's own handgun provides better training than practicing with

a rented gun of like model, and the Plaintiffs fail to even assert this fact.

In light of the City's evidence that the Rule was specifically created to protect public safety and to limit the presence of firearms, licensed only to specific premises, on City streets, and the dearth of evidence presented by the Plaintiffs in support of their arguments that the Rule imposes substantial burdens on their protected rights, we find that the City has met its burden of showing a substantial fit between the Rule and the City's interest in promoting public safety.

Constitutional review of state and local gun control will often involve difficult balancing of the individual's constitutional right to keep and bear arms against the states' obligation to "prevent armed mayhem in public places." *Kachalsky*, 701 F.3d at 96, quoting *Masciandaro*, 638 F.3d at 471. This is not such a case. The City has a clear interest in protecting public safety through regulating the possession of firearms in public, and has adduced "evidence that fairly supports [the] rationale" behind the Rule. *N.Y. State Rifle*, 804 F.3d at 261 (brackets and internal quotation marks omitted). The burdens imposed by the Rule do not substantially affect the exercise of core Second Amendment rights, and the Rule makes a contribution to an important state interest in public safety substantial enough to easily justify the insignificant and indirect costs it imposes on Second Amendment interests. Accordingly, Rule 5-23 survives intermediate scrutiny.

II. Rule 5-23 Does Not Violate the Commerce Clause.

The Plaintiffs next argue that Rule 5-23 violates the dormant Commerce Clause because it hinders interstate commerce. However, the Supreme Court has "recogniz[ed] that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people." *City of Phila. v. New Jersey*, 437 U.S. 617, 623-24 (1978). Our inquiry "must be directed to determining whether [the challenged statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Id.* at 624. We laid out the framework for this inquiry in *Town of Southold v. Town of East Hampton*:

> In analyzing a challenged local law under the dormant Commerce Clause, we first determine whether it clearly discriminates against interstate commerce in favor of intrastate commerce, or whether it regulates evenhandedly with only incidental effects on interstate commerce. . . . We then apply the appropriate level of scrutiny. A law that clearly discriminates against interstate commerce in favor of intrastate commerce is virtually invalid per se and will survive only if it is demonstrably justified by a valid factor unrelated to economic protectionism. A law that only incidentally burdens interstate commerce is subject to the more permissive balancing test under *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), and will be

> struck down if the burden imposed on interstate commerce clearly exceeds the putative local gains.

477 F.3d 38, 47 (2d Cir. 2007) (internal quotation marks and citations omitted).

The Plaintiffs argue that the Rule discriminates against interstate commerce by prohibiting them "from engaging in the interstate commercial activity of traveling with their handguns to patronize firing ranges in states beyond the borders of New York City." Appellants' Br. 42. "A clearly discriminatory law may operate in three ways: (1) by discriminating against interstate commerce on its face; (2) by harboring a discriminatory purpose; or (3) by discriminating in its effect." *Town of Southold*, 477 F.3d at 48 (citations omitted). In our view, the Rule does not offend in any of these ways.

The Rule does not facially discriminate against interstate commerce, as it does not prohibit a premises licensee from patronizing an out-of-state firing range or going to out-of-state shooting competitions. The Plaintiffs are free to patronize firing ranges outside of New York City, and outside of New York State; they simply cannot do so with their premises-licensed firearm.

The Plaintiffs also present no evidence that the purpose of the New York City rule was to serve as a protectionist measure in favor of the City's firing-range industry. To the contrary, as discussed above, the Rule is designed to protect the health and safety of the City's residents. It is therefore directed to legitimate local concerns, with only incidental effects upon interstate commerce.

Finally, the Plaintiffs have not convinced us that the Rule violates the dormant Commerce Clause by creating a discriminatory effect on interstate commerce. We note, first, that the Plaintiffs have offered no evidence of discriminatory effect aside from their statements that they, personally, have "refrained from attending any shooting events with [their] handgun[s] that take place outside of the City of New York." App. 33, 42, 46. They do not assert, for example, that they have refrained from attending *all* shooting events outside the City; they aver only that (in compliance with the Rule) they have refrained from attending such events with their premises-licensed handguns.

Even if we were to assume for the sake of argument, however, that the Plaintiffs have offered sufficient evidence of a discriminatory effect to raise a substantial dormant Commerce Clause question, we would nonetheless conclude that the Rule is "demonstrably justified by a valid factor unrelated to economic protectionism." *Town of Southold*, 477 F.3d at 47. The Plaintiffs themselves offer a useful comparison, arguing that the Rule functions in the same way as a law requiring New York City residents to use their tennis rackets only at in-City tennis courts. Of course, tennis rackets present none of the public safety risks that firearms do, and against which states have a legitimate interest in protecting themselves. *See, e.g.*, *Kachalsky*, 701 F.3d at 94-95 ("There is a longstanding tradition of states regulating firearm possession and use in public because of the dangers posed to public safety."). Thus, there could be no public health justification for a law limiting the transportation of tennis rackets, whereas here the

Rule clearly focuses on minimizing the risks of gun violence and "prevent[ing] armed mayhem in public places." *Masciandaro*, 638 F.3d at 471 (internal quotation marks omitted); *see also W. Lynn Creamery, Inc. v . Healy*, 512 U.S. 186, 206 n.21 (1994) (noting the "deeply rooted" distinction "between the power of the State to shelter its people from menaces to their health or safety . . . , even when those dangers emanate from interstate commerce, and its lack of power to . . . constrict the flow of such commerce for their economic advantage")*; Maine v. Taylor*, 477 U.S. 131, 151 (1986). While such a justification might theoretically be shown to be pretextual, the Plaintiffs have provided no evidence that the true intent or function of the Rule was protectionist. Accordingly, we conclude that the Rule does not discriminate against interstate commerce.[13]

Additionally, the Plaintiffs contend that Rule 5-23 has an impermissible extraterritorial effect because it attempts to control economic activity that is fully outside of New York City. But Rule 5-23 does not govern extraterritorial conduct in any way. As noted above, the Plaintiffs are free to patronize out-of-state firing ranges and to use firearms for target practice or competitive sporting events anywhere in the country or beyond; they simply may not transport the firearm

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[13] The Plaintiffs have not argued that the Rule incidentally burdens interstate commerce, which would subject the Rule to a more lenient balancing test under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Accordingly, we do not address that issue. *Cf. Town of Southold,* 477 F.3d at 49 n.2 (finding that "[d]espite counsel's failure to elaborate upon the *Pike* test, the limited reference to *Pike* in the brief is sufficient to allow us to give full consideration to it here.").

licensed to them for possession at a particular New York premises to such locations. To the extent that the Rule has any effect on conduct occurring outside the City, "[t]he mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940). An ordinance may be unconstitutional when it regulates commerce that takes place fully outside its borders. *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). But "the Commerce Clause's ban on extraterritorial regulation must be applied carefully so as not to invalidate many state laws that have permissible extraterritorial effects." *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 68 n.19 (2d Cir. 2010). Here, the Rule directly governs only activity within New York City, in order to protect the safety of the City's residents. Any extraterritorial impact is incidental to this purpose and thus "is of no judicial significance." *Osborn*, 310 U.S. at 62.

III. Rule 5-23 Does Not Violate the Right to Travel.

The Plaintiffs next invoke the constitutional right to travel interstate. "The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized." *United States v. Guest*, 383 U.S. 745, 757 (1966). This Court has "acknowledge[d] a correlative constitutional right to travel within a state." *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d

Cir. 1971). However, that local regulations "[m]erely hav[e] an effect on travel is not sufficient to raise an issue of constitutional dimension." *Soto-Lopez v. N.Y.C. Civil Serv. Comm'n*, 755 F.2d 266, 278 (2d Cir. 1985). The constitutional right is implicated only when the statute "actually deters such travel, or when impedance of travel is its primary objective, or when it uses any classification which serves to *penalize* the exercise of that right." *Id.* at 279 (internal quotation marks and citations omitted) (emphasis in original).

The Plaintiffs' right to travel argument fails for much the same reasons as does their parallel invocation of the dormant Commerce Clause. Nothing in the Rule prevents the Plaintiffs from engaging in intrastate or interstate travel as they wish. The Plaintiffs may go where they like, and in particular may attend and participate in shooting tournaments or similar events held outside the City of New York. The regulation concerns only their ability to remove the specific handgun licensed to their residences from the premises for which they hold the license. The Constitution protects the right to travel, not the right to travel armed.

The Rule was not designed to impede interstate travel and the history behind it "demonstrates that its purpose was not to impede travel but to protect the welfare of [city] residents." *Town of Southold*, 477 F.3d at 54. Nor does the Rule impose a significant disincentive to travel, any more than any other regulation that limits the possession in one jurisdiction of items that may be more broadly permitted in another. Any incidental impact on travel does not create a constitutional violation because "[i]f

every infringement on interstate travel violates the traveler's fundamental constitutional rights, any governmental act that limits the ability to travel interstate, such as placing a traffic light before an interstate bridge, would raise a constitutional issue." *Id.* State and local regulations that have an indirect effect on some travel impose merely "minor restrictions on travel [that] simply do not amount to the denial of a fundamental right." *Selevan v. N.Y. Thruway Auth.*, 711 F.3d 253, 258 (2d Cir. 2013).

IV. Rule 5-23 Does Not Violate the First Amendment.

The Plaintiffs argue that the Rule violates their First Amendment right to expressive association by (1) curtailing their ability to join the gun club of their choice and (2) forcing them to join a gun club in New York City. We disagree.

The Plaintiffs fail to demonstrate how the ability to join a specific gun club, or the ability to transport their licensed firearms to a shooting club outside of New York City, qualifies as expressive association. "The Constitution does not recognize a generalized right of social association. The right generally will not apply, for example, to business relationships; chance encounters in dance halls; or paid rendezvous with escorts." *Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 996 (2d Cir. 1997) (citations omitted). "It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). "Typically a person

possessing a gun has no intent to convey a particular message, nor is any particular message likely to be understood by those who view it." *Nordyke v. King*, 319 F.3d 1185, 1190 (9th Cir. 2003). The Plaintiffs fail to identify what expressive activity they would engage in with their guns and argue instead that they seek "participation in recreational and competitive shooting events." Appellants' Br. 51. Gathering with others for a purely social and recreational activity, whether it is dancing, *Sanitation & Recycling Indus.*, 107 F.3d at 996, or shooting guns, does not constitute expressive association under the First Amendment. Accordingly, the ability to join a specific gun club is not protected association under the First Amendment.

Even if we were to assume that engaging in firearms training or competition qualifies as expressive association, as repeatedly discussed above, the Plaintiffs are not prevented from engaging in such activities, wherever or with whomever they choose to do so.

First, nothing in the Rule forbids the Plaintiffs from joining and associating with gun clubs outside the City. The Plaintiffs claim that the Rule "impedes their right to associate with whom they choose," Appellants' Br. 50, but the Rule does nothing of the sort. The Plaintiffs remain free to associate with whomever they choose. They may join any club they like outside of New York City. To the extent that the gun clubs the Plaintiffs wish to join "take positions on public questions or perform any of the other similar activities" characteristic of expressive association, *City of Dallas*, 490 U.S. at 25 (internal quotation marks omitted), the Plaintiffs are not inhibited from

joining in those activities. The Rule limits only their ability to carry the handgun that is licensed for a specific premises outside of those premises.

The Plaintiffs also contend that the Rule constitutes "forced association" because it "effectively coerce[s]" them to join clubs that they "may prefer not to join." Appellants' Br. 51. That "effective" coercion is not coercion at all: the Rule does not require the Plaintiffs to join a gun club in New York City. The licensing scheme does not require the Plaintiffs to complete firearms training, and even if it did, they have access to Olinville Arms, which is open to the public, and the Richmond Boro Gun Club, which is available to non-members for weekly shooting competitions.

Regardless, the Plaintiffs are incorrect that there is any constitutional injury at stake in the question of "membership" in a firing range or gun club. As noted above, the Plaintiffs have not demonstrated that their firearms training is expressive association, and actually concede that it is recreational activity. Moreover, the decision of whether to charge a membership fee or a fee based on hourly usage is a business decision of the club or range. The Plaintiffs have offered no evidence that the firing ranges in New York City that structure themselves as clubs requiring "membership" either engage in (or require their members to engage in) expressive activity of any kind, let alone activity to which the Plaintiffs object. Nor have the Plaintiffs shown that these ranges have selected their particular fee structures as a byproduct of the Rule, or that their fee structures reflect any ideological or expressive content to which the

Plaintiffs, by utilizing the range, can be taken as assenting.

Accordingly, the Rule does not violate the First Amendment.

## CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment.

*Appendix B*

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

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No. 15-638

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

*Plaintiffs-Appellants*,

v.

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

*Defendants-Appellees*.

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Filed: April 5, 2018

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**ORDER**

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Appellants, New York State Rifle & Pistol Association, Inc., Romolo Colantone, Efrain Alvarez, and Jose Anthony Irizarry, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe,
Clerk

*Appendix C*

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK**

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No. 13-cv-2115-RWS

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

*Plaintiffs*,

v.

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

*Defendants*.

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Filed: February 5, 2015

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**OPINION**

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Sweet, D.J.

Plaintiffs New York State Rifle & Pistol Association (the "Association"), Romolo Colantone ("Colantone"), Efrain Alvarez ("Alvarez") and Jose Anthony Irizarry ("Irizarry") (collectively, "Plaintiffs") have moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure. Plaintiffs seek a declaration that restrictions on a Premises Residence license issued by Defendant the City of New York (the

"City") through Defendant the New York City Police Department License Division (the "License Division") (collectively the "Defendants") are unconstitutional. Defendants have cross moved for summary judgment pursuant to Rule 56, seeking dismissal of Plaintiffs' complaint. Upon the facts and conclusions of law set forth below, the Defendants' cross motion is granted, and the complaint is dismissed.

These motions present the sensitive issue of gun control in our largest city, an issue critical to the public safety and the protection of significant constitutional rights. Handguns are unfortunately not exclusively used for the legitimate purposes of law enforcement, civilian self-protection, or for sport. Handguns in this and other large cities are also the instruments with which violent crimes are perpetuated, and whose improper use has led to numerous accidental deaths in public places. Legislators and members of the executive branch at municipal, state, and federal levels of government have grappled with these problems, and promulgated and enforced laws in the hopes of reducing the deleterious effects of handguns while protecting citizens' constitutionally-protected rights to bear arms. One such law is Title 38, Chapter Five, Section 23 of Rules of the City of New York ("RCNY").

Plaintiffs seek to partially invalidate 38 RCNY § 5-23, which limits transport of a handgun through the following provision: "To maintain proficiency in the use of the handgun, the licensee may transport her/his handgun(s) directly to and from an authorized small arms range/shooting club, unloaded, in a locked container, the ammunition to be carried separately."

Plaintiffs contend that the decisions of the Supreme Court in District of Columbia v. Heller, 554 U.S. 570 (2008), and McDonald v. City of Chicago, Ill., 561 U.S. 742 (2010), render unconstitutional 38 RCNY § 5-23's limitations on transport, specifically, the prohibition against transporting a handgun to a second residence outside the City, for target price, or for competitive shooting outside the City.

Prior Proceedings

Plaintiffs filed an initial complaint on March 29, 2013 and filed the operative amended complaint on May 1, 2013. On May 7, 2013, Plaintiffs filed a motion for a preliminary injunction, which was stayed by this Court on September 20, 2013 pending the Court of Appeals' decision in Osterweil v. Bartlett, 706 F.3d 139, 140 (2d Cir.), certified question accepted, 20 N.Y.3d 1058 (N.Y. 2013) and certified question answered, 21 N.Y.3d 580 (N.Y. 2013). See generally, New York State Rifle & Pistol Ass'n v. City of New York, 13 CIV. 2115, 2013 WL 5313438 (S.D.N.Y. Sept. 20, 2013). Plaintiffs renewed their motion for a preliminary injunction in February 2014, and the parties filed cross motions for summary judgment on June 6, 2014 and July 16, 2014. The instant motions were heard and marked fully submitted on October 8, 2014.

Facts

The facts have been set forth in Plaintiffs' Local Rule 56.1 Statement of Uncontested Facts, Defendants' Statement of Undisputed Material Facts pursuant to Local Rule 56.1, Plaintiffs' Local Rule 56.1 Statement in Response to the Defendants' Rule 56.1 Statement, and Defendants' Responses and Objections

to Plaintiffs' Statement pursuant to Local Rule 56.1. These facts are not in dispute except as noted below.

New York State law prohibits an individual from possessing a pistol or revolver without a license. N.Y. Penal Law§§ 265.01, 265.20(a) (3). Violation of this statute is a Class A Misdemeanor punishable by up to one year in prison, a $1,000 fine, or both. N.Y. Penal Law§§ 265.01, 60.01(3), 70.15. The State of New York specifies certain classes of gun licenses under Penal Law§ 400.00(2).

Defendant, the City of New York, is a domestic municipal corporation organized and existing under the laws of the State of New York. See New York City Charter § 1. The License Division reviews applications for Premises Residence firearms licenses and issues licenses following an investigation of the applicant. See Lunetta Dec., ¶¶ 1, 15-27; Penal Law §§ 400.00, 265.00(10).

The different firearms licenses and permits issued by the License Division, along with a description of the license type are codified in 38 RCNY 5-23 (types of handgun licenses) and 38 RCNY 1-02 (rifle, shotgun, and longarm permits). One of the licenses available for New York City residents to obtain is a Premises License-Residence, which allows an individual to keep a handgun in his or her home. 38 RCNY §§ 5-01, 5-23.

Premises Residence handgun licensees are restricted to possessing the licensed weapon at the specific home address designated on the license. See 38 RCNY § 5-0l(a). Premises Residence licensees are also authorized to transport the licensed handgun directly to and from an authorized small arms range/shooting club, secured and unloaded in a locked

container. See 38 RCNY §§ 5-01 (a); 5-22 (a) (14) Title 38 was amended in May 2001 to read as follows:

> (a) Premises License-Residence or Business. This is a restricted handgun license, issued for the protection of a business or residence premises.
>
> > (1) The handguns listed on this license may not be removed from the address specified on the license except as otherwise provided in this chapter.
> >
> > (2) The possession of the handgun for protection is restricted to the inside of the premises which address is specified on the license.
> >
> > (3) To maintain proficiency in the use of the handgun, the licensee may transport her/his handgun(s) directly to and from an authorized small arms range/shooting club, unloaded, and in a locked container, the ammunition to be carried separately.
> >
> > (4) A licensee may transport his/her handgun(s) directly to and from an authorized area designated by the New York State Fish and Wildlife Law and in compliance with all pertinent hunting regulations, unloaded, in a locked container, the ammunition to be carried separately, after the licensee has requested and received a "Police Department - City of New York Hunting Authorization" Amendment attached to her/his license.

38 RCNY § 5-23.

Pursuant to New York State Penal Law § 400.00(1), "[n]o license shall be issued or renewed pursuant to this section except by the licensing officer, and then only after investigation and finding that all statements in a proper application for a license are true." New York's Penal Law details the duties of the licensing officer which include, inter alia, determining whether the applicant meets the eligibility requirements set forth under Penal Law § 400.00(1); inspecting mental hygiene records for previous or present mental illness; investigating the truthfulness of the statements in the application; and having the applicant's fingerprints forwarded for review against the records of the New York State Division of Criminal Justice Services and the FBI to ascertain any previous criminal record. See Penal Law §§ 400.00(1), 400.00(4). After an investigation, the licensing officer may not approve the application if, inter alia, "good cause exists for the denial of the license." Penal Law § 400.00(1) (g).

There are currently over 40,000 active licenses that have been issued by the License Division for the possession of handguns in New York City; and over 20,000 active permits for the possession of rifles and shotguns. The License Division currently processes an average of 3,200 new applications and over 9,000 renewal applications each year for the issuance and renewal of the various types of handgun licenses issued by the License Division. In addition, the License Division processes an average of 850 applications for rifle and shotgun permits and 5,000 renewal applications per year. The License Division

currently has 79 employees. It is divided into several different sections and units, and is overseen by a five member Executive Staff, that includes a director, deputy inspector (serving as commanding officer), a captain (serving as executive officer), and a lieutenant and sergeant (serving as Integrity Control Officer and Assistant). The License Division has an Incident Section that investigates on average 600 incidents pertaining to handgun licenses per year. The License Division receives reports from the New York State Division of Criminal Justice System regarding all arrests made within the State of New York for which an arrestee is fingerprinted. No formal report is forwarded to the License Division for summonses and other arrests, and for incidents for which a detainee is not fingerprinted. The NYPD Department Manual includes a procedure for NYPD personnel to investigate incidents involving holders of handgun licenses and rifle/shotgun permits to the License Division Incident Section.

Under current New York State Penal Law, there is no "target license" class permitting the transport of an unloaded registered firearm to and from an authorized shooting range or club for regular target shooting purposes. This class was eliminated in 2001 due to repeated incidents of permit holders not complying with the limitations on the target license.

The NYPD established a procedure for individuals or organizations to apply to the NYPD for special designation to operate a small arms range in New York City. The application process includes submission of an application for approval as a Small Arms Range in New York City. The applicant for a

license for approval as a Small Arms Range must provide a name and address for the applicant, location for the proposed range, information about whether the proposed range is outdoor or indoors, and if indoors, where in the building it would be located, information about any clubs or organizations the range is associated with, the types of weapons to be used at the range, and other information. The License Division conducts a background check on applicants for approval as Small Arms Ranges, including consulting with the New York City Department of Buildings for a review of the zoning, property, and land use designation for the proposed site. Approval letters for authorized Small Arms Ranges include requirements for the appropriate sound absorbent materials, fireproofing, and specifics on how targets and fire booths must be set up to ensure public safety, along with other rules.

There are currently eight NYPD-approved Small Arms Ranges in New York City, exclusive of police or military ranges. Defendants assert that seven of the eight ranges are open to any person possessing a valid NYPD license or permit for a firearm, but Plaintiffs dispute that those ranges are truly open as they require users to become members in order to gain access. These ranges include the Westside Rifle & Pistol Range on West 20th Street in Manhattan, the Woodhaven Rifle & Pistol Range in Queens, the Bay Ridge Road and Gun Club, Inc. in Brooklyn, Colonial Rifle & Pistol Club in Staten Island, the Richmond Borough Gun Club in Staten Island, and the Olinville Arms in the Bronx. Defendants further assert that the Richmond Borough Gun Club holds regular shooting competitions and other events. Plaintiffs also dispute

this assertion in part noting that the Richmond Borough Gun Club requires membership, thus shooting competitions and other events are available to those members only. The parties agree that there is at least one NYPD approved shooting range open to the public within City borders, though Plaintiffs emphasize that only that one exists. Defendants assert that some of the ranges require patrons to pay a fee for use of their range while Plaintiffs contend that all of the ranges charge a fee for use.

Colantone, Alvarez, and Irizarry are all holders of Premises Residence Licenses issued by New York City and subject to the restrictions of 38 RCNY § 5-23. They each assert that they previously regularly traveled outside of New York City and New York State to attend shooting competitions in order to maintain proficiency in handgun use. The Defendants dispute the contention that Colantone's, Alvarez's, and Irizarry's affidavits support these assertions.

On May 8, 2012, to confirm that their licenses allowed them to participate in a shooting competition held in New Jersey, Colantone and Alvarez wrote separately to Deputy Inspector Andrew Lunetta of the License Division to inquire about the scope of 38 RCNY § 5-23's restrictions. Colan tone Aff., ¶ 7, Ex. A; Alvarez Aff., ¶ 7, Ex. A. The Defendants dispute the characterization of Colantone's and Alvarez's letters. In letters dated May 15, 2012, Deputy Inspector Lunetta advised Colantone and Alvarez that:

> The Rules of the City of New York contemplate that an authorized small arms range/shooting club is one authorized by the Police Commissioner. Therefore the only

> permissible ranges for target practice or competitive shooting matches by NYC Premises Residence License Holders are those located in New York City.
>
> Premises license holders who have obtained the Hunting Authorization from the License Division may transport their handgun to those areas outside of City of New York designated by the New York State Fish and Wildlife Law for the purpose of hunting: no areas outside of New York State are permissible for this purpose.
>
> These rules do not apply to New York City issued long gun permits. Long guns owned and registered under a NYC Rifle and Shotgun permit can be transported out of the City and back to the permit holder's residence if they are unloaded, in a locked non-transparent case, with ammunition carried separately.

Colantone Aff., Ex B; Alvarez Aff., Ex B.

Colantone's family has owned land in the Catskill region of New York for the past thirty-two years. He built a second family home eight years ago in Hancock, New York. Colantone's Hancock house is located in a remote area and its location presents a threat to the safety of Colantone and his family when they stay at the house. Colantone and his family visit the land and second home several times each year. As a result of Deputy Inspector Lunetta's letter, Colantone has refrained from taking his handgun licensed in New York City to his house in Hancock, New York.

Alvarez and Irizarry have each been advised by out-of-state ranges that they were not permitted to engage in target practice or participate in shooting competitions at those ranges because of New York City's enforcement of 38 RCNY § 5-23. Consequently, Colantone, Alvarez, and Irizarry all assert that they have ref rained from engaging in target practice or participating in shooting competitions outside New York City as a result of 38 RCNY § 5-23. Defendants dispute the evidence submitted supports this assertion.

Applicable Standards

Summary judgment is appropriate only where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The relevant inquiry on application for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52. A court is not charged with weighing the evidence and determining its truth, but with determining whether there is a genuine issue for trial. *Westinghouse Elec. Corp. v. N.Y. City Transit Auth.*, 735 F. Supp. 1205, 1212 (S.D.N.Y. 1990) (quoting *Anderson*, 477 U.S. at 249).

A fact is "material" only if it will affect the outcome of the suit under applicable law, and such facts "properly preclude the entry of summary

judgment." *Anderson*, 477 U.S. at 248. Disputes over irrelevant facts will not preclude summary judgment. *Id.* The goal is to "isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). "[I]t ordinarily is sufficient for the movant to point to a lack of evidence . . . on an essential element of the non-movant's claim . . . [T]he nonmoving party must [then] come forward with admissible evidence sufficient to raise a genuine issue of fact for trial . . ." *Jaramillo v. Weyerhaeuser Co.*, 536 F.3d 140, 145 (2d Cir. 2008) (internal citations omitted); see also *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995) (same). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255.

The general purpose of a preliminary injunction is to avoid irreparable injury to the movant and to preserve the court's power to render a meaningful decision after a trial on the merits. See *WarnerVision Entm't Inc. v. Empire of Carolina, Inc.*, 101 F.3d 259, 261 (2d Cir. 1996); *see also* llA Charles A. Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ., § 2947 (3d ed.). A party seeking a preliminary injunction typically must establish: (1) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party; (2) irreparable harm; and (3) that issuance of the injunction would be in the public interest. *See Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154, 164 (2d Cir. 2011) (internal quotations and citations omitted); *Red Earth LLC v. United States*, 657 F.3d 138, 143 (2d

Cir. 2011). Where "the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme," as is the case here, a preliminary injunction may only be granted if the moving party meets the more rigorous likelihood of success on the merits of its claim standard. *Plaza Health Labs., Inc. v. Perales*, 878 F.2d 577, 580 (2d Cir. 1989).

The Second Circuit has held that "[v]iolations of First Amendment rights are commonly considered irreparable injuries for the purposes of a preliminary injunction." *Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996), cert. denied, 520 U.S. 1251 (1997). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *see also Million Youth March. Inc. v. Safir*, 155 F.3d 124, 125-26 (2d Cir. 1998) (modifying injunction because District Court failed to consider government's interest in public health, safety and convenience in balance against First Amendment rights). In considering an injunction, the Court must balance the interests and possible injuries to both parties. *See Yakus v. U.S.*, 321 U.S. 414, 440 (1944). Whether the relief sought is in the public interest is a factor to be considered. *Standard & Poor's Corp. v. Commodity Exchange, Inc.*, 683 F.2d 704, 711 (2d Cir. 1982).

In concluding that the District of Columbia's outright ban on the possession of handguns in the home violated the Second Amendment, the Supreme Court in *Heller* expressly provided that certain

regulations are "presumptively valid," including prohibitions on possession by certain categories of people, such as felons or the mentally ill, prohibitions on possession in certain places (such as schools and other sensitive places), and the imposition of "conditions and qualifications on commercial sale." 554 U.S. at 626-27. In *McDonald v. City of Chicago*, 561 U.S. 742, 787 (2010), the Court affirmed these presumptively lawful prohibitions. These "presumptively valid" regulations, presume a licensing scheme. Indeed, in *McDonald*, the Supreme Court emphasized that the Second Amendment "limits, but by no means eliminates," governmental discretion to regulate activity falling within the scope of the right and that incorporation "does not imperil every law regulating firearms." 561 U.S. 742, 904.

As the Court of Appeals for the Second Circuit noted in *Kachalsky v. County of Westchester*, the Supreme Court in Heller stressed that while prohibiting handguns in the home is not permissible, "a variety of other regulatory options remain available, including categorical bans on firearm possession in certain public locations." 701 F.3d at 81, 94 (2d Cir. 2012) (citing *Heller*, 554 U.S. at 626-27 & n.26). Since *Heller*, several other courts have upheld registration and licensing requirements, along with certain prohibitions on firearms. *See, e.g.*, *Kachalsky*, 701 F.3d 81, 97 (upholding New York State's "proper cause" requirement for license to carry a concealed firearm); *United States v. Decastro*, 682 F.3d 160, 168 (2d Cir. 2012) (upholding statute prohibiting transportation into New York of firearm purchased in another state); *Heller v. District of Columbia* ("Heller II"), 670 F.3d 1244, 1261-64 (D.C. Cir. 2011)

(upholding prohibition on possession of ammunition magazines in excess of certain capacity); *United States v. Masciandaro*, 638 F.3d 458, 473 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 756 (2011) (upholding statute prohibiting carrying or possession of weapon in motor vehicle in national park); *United States. v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), *cert. denied*, 131 S, Ct. 958 (2011) (upholding prohibition on possession of firearms with obliterated serial numbers because the law did not "severely limit the possession of firearms"); *United States v. Skoien*, 614 F.3d 638, 645 (7th Cir.2010) (en banc), *cert. denied*, 131 S. Ct. 1674 (2011) (upholding law prohibiting the possession of firearms by any person convicted of misdemeanor domestic violence crime).

A majority of courts, including the Second Circuit and courts in this Circuit, apply intermediate scrutiny to general challenges under the Second Amendment, even when reviewing statutes or laws that may restrict the possession of handguns in the home. *See, e.g.*, *Kwong v. Bloomberg*, 723 F.3d 160, 167-68 (2d Cir. 2013), *cert. denied*, *sub nom.*, *Kwong v. DeBlasio*, 134 S.Ct. 2696 (June 2, 2014) (applying intermediate scrutiny to fee governing New York City premises residence licenses); *Kachalsky*, 701 F.3d at 96 (applying intermediate scrutiny to New York's "proper cause" requirement for carry licenses); *United States v. Reese*, 627 F.3d 792, 800 (10th Cir. 2010), *cert. denied*, 131 S.Ct. 2476 (2011) (applying intermediate scrutiny to statute prohibiting gun possession—even in the home—for those who have an outstanding order of protection as opposed to a criminal conviction); *United States v. Skoien*, 614 F.3d 638, 641-42 (7th Cir. 2010) (en banc) (applying intermediate scrutiny to law

prohibiting the possession of firearms by any person convicted of misdemeanor domestic violence crime); *United States v. Chester*, 628 F.3d 673, 677 (4th Cir. 2010) (same); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (applying intermediate scrutiny to law limiting possession of firearms with obliterated serial number because the law did not "severely limit the possession of firearms"); *United States. v. Oppedisano*, 09-CR-0305, 2010 WL 4961663, at *2 (E.D.N.Y. Nov. 30, 2010) (applying intermediate scrutiny to challenge of federal statute prohibiting persons convicted of certain crimes from possessing firearms); *New York State Rifle & Pistol Ass'n v. Cuomo*, 990 F.Supp.2d 349, 366 (W.D.N.Y. Dec. 31, 2013) (applying intermediate scrutiny to New York SAFE Act and concluding that a mild form of intermediate scrutiny applies to restrictions posing modest burdens on the right to possess firearms). As the Second Circuit recently noted, intermediate scrutiny is satisfied if the regulation "is substantially related to the achievement of an important governmental interest." *Kachalsky*, 701 F.3d at 96-97.

Plaintiffs contend that strict scrutiny is appropriate. However, strict scrutiny does not apply here because the challenged rule does not impinge on the "core" of the Second Amendment, as it does not establish or purport to establish a prohibition or ban on the exercise of Plaintiffs' Second Amendment right to possess a handgun in the home for self-defense. *Cf. Heller* (ban on guns in the home, weapons must be completely disassembled); *Ezell*, 651 F.3d 684, 708 (applying more rigorous scrutiny, "if not quite 'strict scrutiny,'" to Chicago's absolute prohibition on firing

ranges in the context of law requiring training at a firing range to qualify for a premises gun license).

Plaintiffs contend that the challenged rule "categorically prohibits engaging in target practice or participating in shooting competitions," "effectively prohibits . . . the right to keep and bear arms," and otherwise makes it "impossible" to engage in target practice. Pl. Mem. at 11-12, 14. However, the rule does not prevent or prohibit anyone from engaging in target practice or shooting competitions, rather it prohibits transporting the handgun to a range not approved by the City. The laws struck down in *Heller* and *McDonald*, by contrast, were laws that prohibited or banned firearms rather than regulating them. In *Ezell* the ordinance was impossible to satisfy within City limits; a law requiring practice at a firing range could not be reconciled with a law prohibiting any such firing ranges from operating within city limits. 651 F.3d at 708 ("The City's firing-range ban is not merely regulatory; it prohibits the 'law-abiding, responsible citizens' of Chicago from engaging in target practice in the controlled environment of a firing range").

Here, there is no ban, prohibition or otherwise, on firing ranges in New York City. Although Plaintiffs state that only one such range exists that is open to the public, there is nothing in the challenged rule that prohibits public gun ranges from operating in New York City. Though Defendants strenuously dispute Plaintiffs' claim that only one range open to the public operates in New York City (Lunetta Dec., ¶¶ 39-40), the fact that few, or even no, such ranges exist is not tantamount to a ban; the number of firing ranges open to the public is a function of the market, and not the

challenged rule. *See, e.g.*, *U.S. Smokeless Tobacco Mfg. Co, v. City of New York*, 708 F.3d 428, 436 n.3 (2d Cir. 2013) ("Decision by owners of tobacco bars not to sell the product is a commercial choice that does not result from the ordinance itself.").

Unlike the ban on firing ranges which made compliance with the statute impossible in Ezell, the requirement that Premises Residence licensees only transport their firearms to approved ranges (located in New York City) is a regulatory measure which does not prevent people from going to a range to engage in target shooting practice or competitive shooting. The rule "merely regulate[s] rather than restrict[s]" the right to possess a firearm in the home and is a minimal, or at most, modest burden on the right. *Ezell*, 651 F.3d at 708-09. Premises Residence licensees are authorized to possess an assembled firearm in their home and to transport the weapon to a City-authorized firing range to engage in target practice in a controlled environment. *See* 38 RCNY §§ 5-01 (a), 5-22(a) (14). As such, strict scrutiny is not applied, and intermediate level scrutiny is appropriate in analyzing Second Amendment challenges—even those that touch upon the claimed "core" Second Amendment right to self-defense in the home. *See also, Kwong*, 763 F.3d at 167-68.

38 RCNY § 5-23(a)(3) Does Not Violate the Second Amendment

The Plaintiffs' contention that the challenged rule deprives them of the ability to protect themselves in their second homes outside of New York City does not present a Second Amendment problem. The Premises Residence license is only issued to persons with

residences in New York City, and it is limited only to the specific premise for which it is issued. *See* N.Y. Penal Law § 400.00(6); 38 RCNY §§ 5-0l(a), 5-02(9), 5-23(a) (1)-(2). There is nothing in the Penal Law or RCNY preventing such persons from obtaining an appropriate license to possess or utilize a firearm, in the jurisdiction of their second home. Following this Court's stay opinion, the New York Court of Appeals concluded that an applicant who owns a part-time residence in New York, but is permanently domiciled elsewhere is eligible for a New York handgun license under Penal Law § 400.00(3) (a) where the applicant is a resident. *Osterweil v. Bartlett*, 21 N.Y.3d 580, 584 (N.Y. Ct. App. 2013). Thus, the Penal Law simply requires one to be a resident, not a domiciliary, for purposes of eligibility of a firearms license.

According to Plaintiffs, Premises Residence license statute violates the Second Amendment's right to bear arms in two ways: (1) prohibiting transportation of the licensee's handgun from the authorized residence in the City to another out-of-City residence; and (2) barring transportation of the licensee's handgun to neighboring municipalities or states to participate in shooting competitions or for use in target ranges. Pls.' Mem. in Supp't 7. However, these regulations are reasonable and result from the substantial government interest in public safety.

Plaintiffs argue that Defendants' reliance on *Osterweil* does not alleviate the Second Amendment concern because, in their view, it is an impermissible burden to have to have separate firearms for each residence. Pl. Mem. at 9-10. However, nothing in the Second Amendment requires municipalities or states

to allow citizens to transport their firearms if they are owned under a restricted license. This Court has already stated that if Plaintiffs are permitted to obtain a firearms license both in New York City as well as other locations in the State of New York where they may have other residences, then "the cogency of Plaintiffs' second home argument suffers considerably as their complaint could be met with a rejoinder to simply acquire a handgun license from the county in which the second home is located and keep a gun in that home for use when it is being used as a residence." *New York State Rifle*, 2013 WL 5313438, at *2. The Premises Residence license is specific to the New York City residence and the firearms listed on the license must be connected to the license. Those requirements do not generate a constitutional issue. A gun owner may apply for a different type of firearm license permitting transportation of a firearm throughout New York State should he or she qualify. *See, e.g.*, 38 RCNY § 5-01.

Intermediate scrutiny requires that the government interest be important and that the fit between the regulation and the government's interest be reasonable. "To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective," *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Our Circuit has found that "the fit between the challenged regulation need only be substantial, 'not perfect.'" *Kachalsky*, 701 F.3d at 97 (quoting *Marzzarella*, 614 F.3d at 97).

The Circuit has held that "New York has substantial, indeed compelling, governmental interests in public safety and crime prevention."

*Kachalsky*, 701 F.3d at 97 (citing *Schenck v. Pro-Choice Network*, 519 U.S. 357, 376 (1997); *Schall v. Martin*, 467 U.S. 253, 264 (1984); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 300 (1981); and *Kuck v. Danaher*, 600 F.3d 159, 166 (2d Cir. 2010)). The City's interest here in limiting the permissible transport of dangerous firearms outside of the home is vital. Lunetta Dec., ¶¶ 2-7. Indeed, courts have found that "outside the home, firearms safety interests often outweigh individual interests in self-defense." *Masciandaro*, 638 F.3d at 470. The Second Circuit in *Kachalsky* noted that because of the "dangers posted to public safety," there "is a longstanding tradition of states regulating firearm possession and use," 701 F.3d at 94-94 (collecting statutes from Founding era), and that, "while the Second Amendment's core concerns are strongest inside hearth and home, states have long recognized a countervailing and competing set of concerns with regard to handgun ownership and use in public." *Id.* at 96.

The restrictions on the transport of firearms for practice or competition applicable to Premises Residence licensees set forth in 38 RCNY § 5-23(a) (3) are substantially related to the City's substantial interest in public safety and crime prevention. It is well-established that firearms in the public present a greater public danger than firearms inside one's home. *See Kachalsky*, 701 F.3d at 94-99. Permitting Premises Residence licensees to travel with their firearms to only approved ranges, or for regulated and approved hunting, ensures that licensees are not travelling in the public with their firearms to any place of their choosing. If holders of Premises

Residence licenses believe that they may carry their firearms anywhere in New York State or across state lines, past experience indicates that many licensees will transport firearms in their vehicles, thus eviscerating the restrictions on Premises Residence licenses. The License Division's experience with the now-eliminated target license,[1] and the abuse by target licensees who were caught travelling with their firearms when not on their way to or from an authorized range, supports this interest. Here, by ensuring that Premises Residence licensees only travel with their firearms to authorized ranges in New York City, the City is able to ensure that licensees are only travelling to limited areas with their restricted licenses while affording them the opportunity to maintain their proficiency in the use of their firearms.

Further, the License Division is better able to investigate the credibility of licensees' assertions regarding the purpose for transporting their handguns when the incident was reported by an NYPD officer, as well as the ability to better police and monitor whether the person was, in fact travelling

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[1] There is no provision in the N.Y. Penal Law (§ 400.00(4)) for a target license, whereas the Penal Law expressly provides for a license to possess a firearm in the home. *See* Penal Law § 400.00(2) (a). The New York State Supreme Court, Appellate Division, First Department upheld the elimination of the target license. *De Illy v. Kelly*, 6 A.D.3d 217 (App. Div. 2004). There, the Court concluded that although a Premises Residence license is "limited to that licensee's dwelling, we do not view respondent's expansion of that right, to allow transport of such arms to authorized target ranges and hunting areas for proficiency enhancement, as supplanting the statue but merely supplementing it." 6 A.D.3d at 218.

directly to or from an authorized range. Practice at an authorized range that has been investigated by the NYPD and is required to adhere to certain safety requirements ensures the public safety. The NYPD has the ability to monitor approved ranges, reviews the books of such ranges, and is aware of any incidents that occur at such ranges.

Plaintiffs have noted the exemption in 38 RCNY § 5-23 (a) (4) authorizing Premises Residence licensees to transport their handgun directly to or from an area authorized by N.Y. State Fish & Wildlife Law. Pl. Mem. at 16. However, a Premises Residence licensee with a hunting authorization is not permitted to unregulated travel around New York State with their firearms. Pursuant to Article 11, Title 7 of the New York State Environmental Conservation Law ("ECL"), authorization to hunt may be exercised only at the times, places, manner and to the extent as permitted by specific licenses and stamps to hunt specific species. *See, e.g.*, ECL §§ 11-0701, 11-0703. The state law further sets out limitations on the use and possession of firearms. *See, e.g.*, ECL §§ 11-0931, 11-1321. Hunting authorizations only allow the transport of a firearm for hunting that is authorized pursuant to the New York State Fish and Wildlife Law. As such, any licensee observed by law enforcement in New York State to be travelling with a firearm stating that they were on a direct route to hunting would be required to produce a copy of the New York City Premises Residence license, a City hunting authorization, a valid hunting license for the specific season and area at issue, and have knowledge of many other rules specific to the game and area (such as weapon types, ammunition restrictions, time and day restrictions,

and game gender and size restrictions). An officer anywhere in the state may ask a person with a weapon about game tags, or many other specific questions to evaluate the credibility of the assertion that the person was en route to an area covered by the Fish and Wildlife Law. In short, it would be a far more elaborate lie to justify the illegal transport of firearms under the N.Y. State Fish & Wildlife Law, than by falsely stating that the gun holder is en route to a range or shooting competition located anywhere in the state.

38 RCNY § 5-23(a)(3) Does Not Violate Plaintiffs' Right to Travel

Plaintiffs contend that the restriction on Premises Residence licenses impedes their fundamental right to travel. See Pl. Mem. 20-32. It is well-settled that the "constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union." *Shapiro v. Thompson*, 394 U.S. 618 (1969). This constitutional protection for interstate travel has been extended, in the Second Circuit, to intrastate travel as well. *King v. New Rochelle Municipal Housing Auth.*, 442 F.2d 646, 648 (2d Cir.) (1971), *cert. denied*, 404 U.S. 863 (1971).

Here, however, Plaintiffs point to nothing that requires New York City to allow its licensees to transport their restricted firearms to other states, or to other locales within New York State. Limiting restricted Premises Residence licensees to keep their firearms in their residences, or to and from an authorized small arms range, does not impede on Plaintiffs' right to travel. Courts have found that "'travelers do not have a constitutional right to the most convenient form of travel [, and] minor

restrictions on travel do not amount to the denial of a fundamental right.'" *Town of Southhold v. Town of East Hampton*, 477 F.3d 38, 53 (2d Cir. 2 2007) (citations omitted). "When a statute or regulation has merely ... an effect on travel, it does not raise an issue of constitutional dimension. A statute implicates the constitutional right to travel when it actually deters such travel, or when the impedance of travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right." *Five Borough Bicycle Club v. City of New York*, 483 F. Supp.2d 351, 362-63 (S.D.N.Y. 2007) (quoting *Soto-Lopez v. New York City Civil Serv. Comm'n*, 755 F.2d 266, 278 (2d Cir. 1985)) (internal quotations omitted). Nothing in the rules pertaining to Premises Residence licenses impedes, deters, or punishes travel. While the rule admittedly does not allow for unrestricted travel with a firearm outside New York City, the rule does not prevent Premises Residence licensees from travelling outside of New York City—it simply prevents them from travelling with their firearm. In *Town of Southhold*, the Second Circuit held that "[t]he fact that the [law] may make travel less direct for some passengers does not meet the threshold required for strict scrutiny review . . . something more than a negligible or minimal impact on the right to travel is required before strict scrutiny is applied." 477 F.3d at 54 (internal quotations and citations omitted). The Second Circuit has recognized that minor restrictions on travel "simply do not amount to the denial of a fundamental right." *Selevan v. New York Thruway Auth.*, 71 F.3d 253, 257-58 (2d Cir. 2013); *see also Joseph v. Hyman*, 659 F.3d 215, 279 (2d Cir. 2011). Moreover, in *Turley v. New York City Police Dep't*, the

plaintiff street musician challenged certain City regulations as violating the First Amendment, and raised a right to travel allegation arguing that he cannot afford to buy multiple permits for each day of performing for different locations. 93 CIV. 8748, 1996 WL 93726, at *l (S.D.N.Y. Mar. 5, 1996), *aff'd in part. rev'd in part, after trial on other issues*, 167 F.3d 757 (2d Cir. 1999). In *Turley*, the Court found that "the right to travel is not violated by police power regulations that impose reasonable restrictions on the use of streets and sidewalks." *Id.* at *7; *see also Lutz v. City of New York*, 899 F.2d 255, 270 (3d Cir. 1990) (finding state ordinance outlawing "cruising" was a reasonable time, place and manner restriction on right to local travel).

Here, like the regulations discussed above requiring sound permits for speech in *Turley* and *Lutz*, or the requirement to pay tolls to commute to work in *Selevan*, the requirement that Premises Residence licensees not travel unrestricted with their firearms throughout or outside of the state does not infringe on any fundamental right. Such restrictions are reasonable in time, place, and manner restrictions on the possession and use of a firearm.

Plaintiffs' argument that 38 RCNY § 5-23 (a) (3) conflicts with the Firearms Owners' Protection Act ("FOPA"), 18 U.S.C. § 9264, is similarly unconvincing. See Pl. Mem. at 27. FOPA protects individuals from prosecution for illegally transporting firearms when the origin or destination of the transfer is a place where the individual "may lawfully possess and carry such firearm." 18 U.S.C. § 926A. In *Torraco v. Port Auth. of N.Y. & N.J.*, 615 F.3d 129, 139 (2d Cir. 2010),

the Second Circuit held that FOPA does not create a presumption that gun owners may travel interstate with their guns to places that do not permit unlicensed firearm possession. Similarly, in a state court challenge invoking FOPA, the Appellate Division held that "[w]here the licensee is not permitted by the terms of the license to lawfully carry the firearm at the time he embarks on a trip to another state, FOPA is inapplicable." *Beach v. Kelly*, 52 A.D.3d 436, 437 (App. Div. 2008). Here, Premises Residence licensees are not authorized to carry firearms under the terms of their restricted license, other than in the limited exception of travel to a New York City authorized range. Thus, Plaintiffs do not meet the lawful carry requirement set forth in 18 U.S.C. § 926A.

38 RCNY § 5-23(a)(3) Does Not Violate The First Amendment

The First Amendment protects the right of individuals to associate for the purpose of engaging in activities protected by the First Amendment, such as speech, assembly, petition for redress of grievances, and the exercise of religion. *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984); *Sanitation Recycling Indus. v. City of New York*, 107 F.3d 985, 996-97 (2d Cir. 1997). However, government regulation or conduct that makes it "more difficult for individuals to exercise their freedom of association . . . does not, without more, result in a First Amendment violation." *Fiehting Finest. Inc. v. Bratton*, 95 F.3d 224, 228 (1996). Rather, "[t]o be cognizable, the interference with associational rights must be direct and substantial or significant." *Id.* quoting *Lyng v. UAW*, 485 U.S. 360, 366-67 n. 5 (1988)

(internal quotations omitted). Moreover, the existence of a "chilling effect even in the area of First Amendment rights" does not support a freedom of expressive association claim. *Id.* quoting *Younger v. Harris*, 401 U.S. 37, 57 (1971) (internal quotations omitted).

Plaintiffs have not alleged how engaging in target practice and competitive shooting outside of New York City constitutes expressive matter or free association protected by the First Amendment. In order for an activity to fall within the ambit of the First Amendment's protection of expressive association, "a group must engage in some form of expression, whether it be public or private." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). Plaintiffs have asserted that practicing at ranges and participating in shooting competitions is protected expressive or associational conduct. *See* Pl. Mem. at 17-19. However, asserting that gathering to practice and use what Plaintiffs deem to be their constitutional rights protected under the Second Amendment does not serve to create a right to expression and association protected under the First Amendment. Courts have viewed with care the implication of First Amendment rights in the context of the Second Amendment. *See, e.g.*, *Kachalsky*, 701 F.3d at 91-92 ("it would be . . . imprudent to assume that the principles and doctrines developed in connection with the First Amendment apply equally to the Second [Amendment]."); *Plastino v. Koster*, 12-CV-1316, 2013 WL 1769088, at *3 (E.D. Mo. Apr. 24, 2013), appeal dismissed (Oct. 11, 2013); *Woolard v. Sheridan*, 863 F. Supp.2d 462, 472 (D. Md. 2012), *rev'd on other grounds*, *sub. nom*, *Woolard v. Gallagher*, 712 F.3d

865, 883 fn. 11 (4th Cir. Mar. 21, 2013); *Piszczatoski v. Filko*, 840 F. Supp.2d 813, 832 (D.N.J. 2012) (declining to 35 apply the First Amendment's prior restraint doctrine to a Second Amendment case).

The requirement that Premises Residence licensees only utilize New York City authorized small arms ranges for purposes of practicing with their restricted firearm does not directly and substantially interfere with the rights of Plaintiffs to exercise their right to freely associate. The requirement simply affects the place and manner in which Plaintiffs may engage in target shooting—an activity that is elective. Although Plaintiffs argue that 38 RCNY § 5-23(a) (3) sets forth a requirement that Premises Residence licensees practice "[t]o maintain proficiency in the use of the handgun," nothing in that rule is compulsory, requiring licensees to practice at a range, it simply permits it. Nothing prevents Plaintiffs from associating with other handgun licensees at ranges in New York City, or any shooting competitions held therein. The City's rule does not prevent any of the Plaintiffs from obtaining a license to utilize, possess, or carry a handgun in the states or localities where Plaintiffs seek to engage in target practice or shooting competitions outside of New York City.

38 RCNY § 5-23(a)(3) Does Not Violate The Dormant Commerce Clause

Article I, Section 8, Clause 3 of the United States Constitution provides that Congress shall have power "[t]o regulate Commerce with foreign Nations, and among several States, and with the Indian Tribes." In addition to this express grant of power to Congress, the Commerce Clause contains a negative

implication—commonly referred to as the dormant Commerce Clause—"which limits the power of local governments to enact laws affecting interstate commerce." *Town of Southold*, 477 F.3d at 47. The chief concern of the dormant Commerce Clause is economic protectionism—"regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *McBurney v. Young*, 133 S. Ct. 1709, 1719 (Apr. 2 0, 2013) (internal quotations omitted).[2] However, this restriction is not absolute, and "the States retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected." *Maine v. Taylor*, 477 U.S. 131, 138 (1986); see also *McBurney*, 133 S. Ct. at 1719-20. Plaintiffs have contended that 38 RCNY § 5-23 (a) (3) is unconstitutional because it: (1) amounts to extraterritorial control of commerce; and (2) imposes a burden on interstate commerce outweighed by local benefits.

A law may violate the dormant Commerce Clause in three ways. First, if a statute clearly discriminates against interstate commerce on its face or in effect, it is virtually invalid per se. *See Town of Southold*, 477 F.3d at 47. Such a law can withstand judicial scrutiny

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[2] The U.S. Supreme Court recently expressed some misgivings about the Dormant Commerce Clause framework, but nevertheless continued to apply it. *McBurney*, 133 S. Ct. at 1719-1720; *see also id.* at 1721 (J. Thomas, concurrence) ("I continue to adhere to my view that 'the negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application, and, consequently, cannot serve as a basis for striking down a state statute.'") (quoting *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 68 (2003)).

only if the purpose is unrelated to economic protectionism. *See McBurney*, 133 S. Ct. at 1719-20; *Town of Southhold*, 477 F.3d at 47; *Selevan*, 584 F.3d at 94-95. Second, when a law regulates evenhandedly to effectuate a legitimate public interest, and burdens interstate commerce only incidentally, the balancing test articulated in *Pike v. Bruce Church. Inc.*, 397 U.S. 137, 142 (1970) is applied. Under *Pike*, the statute will be upheld unless the burden on interstate Commerce:

> is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

*Id.* A party challenging a law on either of these two grounds must first demonstrate that the statute has a "disparate impact" on interstate commerce. *See Town of Southold*, 477 F.3d at 47. In other words, the statute "must impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce." *National Elec. Mfrs.' Ass'n v. Sorrell*, 272 F.3d 104, 109 (2d Cir. 2001). Third, a statute is invalid per se "if it has the practical effect of 'extraterritorial' control of commerce occurring entirely outside the boundaries of the state in question." *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 216 (2d Cir. 2004).[3]

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[3] The extraterritorial reach of a statute is sometimes analyzed as a type of "disparate impact" under the Pike balancing test rather than as an independent basis for invalidity. *See Freedom*

The extraterritorial aspect of dormant Commerce Clause jurisprudence emerged from Supreme Court price-regulation cases. *See Freedom Holdings*, 357 F.3d at 219. The last in this line of cases, *Healy v. The Beer Inst.*, 491 U.S. 324 (1989), sets forth the following three principles to guide an extraterritoriality analysis:

> First, the Commerce Clause precludes the application of a state statute that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State, and specifically, a State may not adopt legislation that has the practical effect of establishing a scale of prices for use in other states. Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature . . . . Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.

*Id.* at 336 (internal quotations and citations omitted).

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*Holdings*, 357 F.3d at 216, fn.11. The outcome here is the same under both approaches.

38 RCNY § 5-23(a) differs markedly from the laws at issue in the price regulation cases. First, the rule does not "establish a scale of prices" or affect interstate pricing decisions. Second, the Connecticut price affirmation statute struck down in *Healy* constituted economic protectionism. Here, the rule regarding where restricted licensees may carry their firearms has nothing to do with economic interests. Third, the rule does not directly control commercial activity occurring wholly outside New York State. The price regulation statutes made specific reference to the conduct of out-of-state actors. Unlike those regulations, the challenged rule does not mention other states for any purpose. *See National Elec. Mfrs.' Ass'n v. Sorrell*, 272 F.3d at 110. The rule simply provides that restricted licensees may only deviate from the restriction of using their firearm in their home in the limited circumstance of carrying their firearms to authorized ranges, in order to protect the public safety.[4] The rule does not prohibit persons from purchasing firearms or attending shooting competitions. Like the statute challenged in *Brown & Williamson Tobacco Com. v. Pataki*, 320 F.3d 200, 214 (2d Cir. 2003), the rule "neither impedes nor obstructs the flow of" firearms in interstate commerce, it regulates the manner in which licensees transport their firearms.

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[4] Plaintiffs' entire extraterritoriality argument rests upon the notion that Premises Residence licensees are "lawfully licensed to *carry* firearms," which, according to the terms of such license, they are not. Pl. Mem. at 22 (emphasis added). Indeed, City residents bearing carry license can certainly travel with their license outside of the state if they are lawfully permitted to carry and possess a license in the other jurisdiction.

At most, Plaintiffs have demonstrated that 38 RCNY § 5-23(a)(3) is a municipal regulation that has minor, indirect ripple effects outside the City's boundaries. However, such effects are without constitutional significance where, as here, the challenged law does not directly control commerce and out-of-state entities "remain free to conduct commerce on their own terms. . . ." *Freedom Holdings*, 357 F.3d at 221; *see also Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 825 (3d Cir. 1994) ("[I]t is inevitable that a state's law . . . will have extraterritorial effects. The Supreme Court has never suggested that the dormant Commerce Clause requires Balkanization, with each state's law stopping at the border.").

In the alternative, Plaintiffs argue that the rule imposes a burden on commerce incommensurate with the local benefits, or the *Pike* balancing test. *See* Pl. Mem., at 23. However, before the balancing test is applied, Plaintiffs must make a threshold showing of disparate impact. *Town of Southold v. Town of East Hampton*, 477 F.3d 38, 50 (2d Cir. 2007). Plaintiffs have not met their burden of establishing that the rule has an impact on commerce. Further, any purportedly unique burden on commerce is outweighed by the strength of the local benefits, and thus, the *Pike* balancing test is satisfied. Because the important local interests at stake outweigh any negligible burden on interstate commerce, and nondiscriminatory alternatives are not available, 38 RCNY § 5-23(a) (3) is not unconstitutional under the *Pike* balancing test.

Plaintiffs contend that the rule's effect on commerce outweighs its local benefits. However, the

rule is narrowly drawn and reasonably constructed to accomplish the City's stated public safety goals. Local laws promoting public safety have a presumption of validity. *See Bibb v. Navajo Freight Lines*, 359 U.S. 520, 524 (1959). Courts have also found that "[c]onsiderable deference must be given to the legislature's policy determinations as to the local benefits of the challenged legislation." *Eric M. Berman, P.C. v. City of New York*, 895 F. Supp. 2d 453, 492 (E.D.N.Y. 2012). These factors militate against partial invalidation of 38 RCNY § 5-23.

Conclusion

Based on the conclusions set forth above, the Plaintiffs' motions for summary judgment and preliminary injunction are denied and the Defendants' cross motions for summary judgment dismissing the Amended Complaint is granted.

It is so ordered.

New York, NY
February [handwritten: 4], 2015

[handwritten: signature]
Robert W. Sweet
U.S.D.J

*Appendix D*

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### U.S. Const. art. I, §8, cl. 3

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among several States, and with the Indian Tribes . . .

### U.S. Const. art. IV, §2, cl. 1

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

### U.S. Const. amend. II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

### U.S. Const. amend. XIV, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### N.Y. Penal Law §265.00(10)

"Licensing officer" means in the city of New York the police commissioner of that city; in the county of Nassau the commissioner of police of that county; in the county of Suffolk the sheriff of that county except in the towns of Babylon, Brookhaven, Huntington,

Islip and Smithtown, the commissioner of police of that county; for the purposes of section 400.01 of this chapter the superintendent of state police; and elsewhere in the state a judge or justice of a court of record having his office in the county of issuance.

**N.Y. Penal Law §265.01**

A person is guilty of criminal possession of a weapon in the fourth degree when:

(1) He or she possesses any firearm, electronic dart gun, electronic stun gun, gravity knife, switchblade knife, pilum ballistic knife, metal knuckle knife, cane sword, billy, blackjack, bludgeon, plastic knuckles, metal knuckles, chuka stick, sand bag, sandclub, wrist-brace type slingshot or slungshot, shirken or "Kung Fu star"; or

(2) He or she possesses any dagger, dangerous knife, dirk, machete, razor, stiletto, imitation pistol, or any other dangerous or deadly instrument or weapon with intent to use the same unlawfully against another; or

(3)[1];

(4) He possesses a rifle, shotgun, antique firearm, black powder rifle, black powder shotgun, or any muzzle-loading firearm, and has been convicted of a felony or serious offense; or

(5) He possesses any dangerous or deadly weapon and is not a citizen of the United States; or

(6) He is a person who has been certified not suitable to possess a rifle or shotgun, as defined in

[1] So in original.

subdivision sixteen of section 265.00, and refuses to yield possession of such rifle or shotgun upon the demand of a police officer. Whenever a person is certified not suitable to possess a rifle or shotgun, a member of the police department to which such certification is made, or of the state police, shall forthwith seize any rifle or shotgun possessed by such person. A rifle or shotgun seized as herein provided shall not be destroyed, but shall be delivered to the headquarters of such police department, or state police, and there retained until the aforesaid certificate has been rescinded by the director or physician in charge, or other disposition of such rifle or shotgun has been ordered or authorized by a court of competent jurisdiction.

(7) He knowingly possesses a bullet containing an explosive substance designed to detonate upon impact.

(8) He possesses any armor piercing ammunition with intent to use the same unlawfully against another.

Criminal possession of a weapon in the fourth degree is a class A misdemeanor.

**N.Y. Penal Law §265.20(a)(3)**

a. Paragraph (h) of subdivision twenty-two of section 265.00 and sections 265.01, 265.01-a, subdivision one of section 265.01-b, 265.02, 265.03, 265.04, 265.05, 265.10, 265.11, 265.12, 265.13, 265.15, 265.36, 265.37 and 270.05 shall not apply to: . . .

(3) Possession of a pistol or revolver by a person to whom a license therefor has been issued as

provided under section 400.00 or 400.01 of this chapter or possession of a weapon as defined in paragraph (e) or (f) of subdivision twenty-two of section 265.00 of this article which is registered pursuant to paragraph (a) of subdivision sixteen-a of section 400.00 of this chapter or is included on an amended license issued pursuant to section 400.00 of this chapter. In the event such license is revoked, other than because such licensee is no longer permitted to possess a firearm, rifle or shotgun under federal or state law, information sufficient to satisfy the requirements of subdivision sixteen-a of section 400.00 of this chapter, shall be transmitted by the licensing officer to the state police, in a form as determined by the superintendent of state police. Such transmission shall constitute a valid registration under such section. Further provided, notwithstanding any other section of this title, a failure to register such weapon by an individual who possesses such weapon before the enactment of the chapter of the laws of two thousand thirteen which amended this paragraph and may so lawfully possess it thereafter upon registration, shall only be subject to punishment pursuant to paragraph (c) of subdivision sixteen-a of section 400.00 of this chapter; provided, that such a license or registration shall not preclude a conviction for the offense defined in subdivision three of section 265.01 of this article or section 265.01-a of this article.

## N.Y. Penal Law §400.00

1. Eligibility. No license shall be issued or renewed pursuant to this section except by the licensing officer, and then only after investigation and finding that all statements in a proper application for a license are true. No license shall be issued or renewed except for an applicant (a) twenty-one years of age or older, provided, however, that where such applicant has been honorably discharged from the United States army, navy, marine corps, air force or coast guard, or the national guard of the state of New York, no such age restriction shall apply; (b) of good moral character; . . . ; and (n) concerning whom no good cause exists for the denial of the license. . . .

2. Types of licenses. . . . A license for a pistol or revolver, other than an assault weapon or a disguised gun, shall be issued to (a) have and possess in his dwelling by a householder . . . (f) have and carry concealed, without regard to employment or place of possession, by any person when proper cause exists for the issuance thereof . . . .

3. (a) Applications shall be made and renewed, in the case of a license to carry or possess a pistol or revolver, to the licensing officer in the city or county, as the case may be, where the applicant resides, is principally employed or has his or her principal place of business as merchant or storekeeper; and, in the case of a license as gunsmith or dealer in firearms, to the licensing officer where such place of business is located. . . .

6. License: validity. Any license issued pursuant to this section shall be valid notwithstanding the provisions of any local law or ordinance. No license

shall be transferable to any other person or premises. A license to carry or possess a pistol or revolver, not otherwise limited as to place or time of possession, shall be effective throughout the state, except that the same shall not be valid within the city of New York unless a special permit granting validity is issued by the police commissioner of that city. . . .

**38 R.C.N.Y. § 5-01**

As used in this chapter, the term "handgun" shall mean a pistol or revolver. This section contains a description of the various types of handgun licenses issued by the Police Department. 38 RCNY § 5-09 of this subchapter contains a description of the procedure for obtaining an exemption from New York State Penal Law Article 265, allowing pre-license possession of a handgun for the purpose of possessing and using a handgun for instructional purposes with a certified instructor in small arms at an authorized small arms range/shooting club.

(a) *Premises License - Residence or Business*. This is a restricted handgun license, issued for a specific business or residence location. The handgun shall be safeguarded at the specific address indicated on the license. This license permits the transporting of an unloaded handgun directly to and from an authorized small arms range/shooting club, secured unloaded in a locked container. Ammunition shall be carried separately.

(b) *Carry Business License*. This is an unrestricted class of license which permits the carrying of a handgun concealed on the person. In the event that an applicant is not found by the License Division to be qualified for a Carry Business License, the License

Division, based on its investigation of the applicant, may offer a Limited Carry Business License or a Business Premises License to an applicant.

(c) *Limited Carry Business License.* This is a restricted handgun license which permits the licensee to carry the handgun listed on the license concealed on the person to and from specific locations during the specific days and times set forth on the license. Proper cause, as defined in 38 RCNY § 5-03, shall need to be shown only for that specific time frame that the applicant needs to carry a handgun concealed on her/his person. At all other times the handgun shall be safeguarded at the specific address indicated on the license, and secured unloaded in a locked container.

(d) *Carry Guard License/Gun Custodian License.* These are restricted types of carry licenses, valid when the holder is actually engaged in a work assignment as a security guard or gun custodian.

(e) *Special Licenses*. Special licenses are issued according to the provisions of § 400.00 of the New York State Penal Law, to persons in possession of a valid New York State County License. The revocation, cancellation, suspension or surrender of such person's County License automatically renders her/his New York City license void. The holder of a Special License shall carry her/his County License at all times when possessing a handgun pursuant to such Special License.

(1) *Special Carry Business License*. This is a special license, permitting the carrying of a concealed handgun on the person while the licensee is in New York City.

(2) *Special Carry Guard License/Gun Custodian License.* These are restricted types of special licenses that permit the carrying of a concealed handgun on the person only when the licensee is actually engaged in the performance of her/his duties as a security guard or gun custodian.

**38 R.C.N.Y. § 1-03(d)**

(d) No license shall be issued or renewed pursuant to these Rules except by the Police Commissioner, and then only after investigation of the application including a review of the circumstances relevant to the answers provided in the application, and finding that all statements in a proper application for a license or renewal are true. The application may be disapproved if a false statement is made therein. No license shall be issued or renewed except for an applicant:

(1) of good moral character;

(2) who has not been convicted anywhere of a felony or of any serious offense, as defined in § 265.00(17) of the New York State Penal Law, or of a misdemeanor crime of domestic violence as defined in § 921(a) of title 18, United States Code;

(3) who has stated whether s/he has ever suffered any mental illness or been confined to any hospital or institution, public or private, for mental illness and who is free from any disability or condition that would impair the ability to safely possess or use a rifle or shotgun;

(4) who has stated whether s/he is or has been the subject or recipient of an order of protection or a temporary order of protection, or the subject of a suspension or ineligibility order issued pursuant

to § 530.14 of the New York State Criminal Procedure Law or § 842-a of the New York State Family Court Act; and

(5) concerning whom no good cause exists for the denial of a license.

**38 R.C.N.Y. § 3-14**

(a) The permittee's rifle or shotgun shall not be loaded in a public place within New York City at any time except when using it at a licensed rifle and shotgun range.

(b) When the permittee travels to and from a licensed range or hunting area, or transports her/his rifle/shotgun for any reason, it shall be carried unloaded in a locked, non-transparent case, and the ammunition shall be carried separately. If the permittee is transporting her/his rifle/shotgun in a vehicle, it shall be kept locked in the trunk or equivalent space, not in plain view. The permittee shall never leave her/his rifle/shotgun in a vehicle unless s/he is physically present in or in close proximity to the vehicle.

(c) The permittee shall never alter, remove, obliterate or deface any of the following markings that may be on her/his rifle/shotgun:

(1) name of the manufacturer;

(2) model;

(3) serial number. This information identifies the rifle or shotgun in the permittee's possession.

(d) Pursuant to New York City Administrative Code § 10-311(c), any person who applies for and obtains authorization to purchase, or otherwise

lawfully obtains, a rifle or shotgun shall be required to purchase or obtain a safety locking device at the time s/he purchases or obtains the rifle or shotgun. Pursuant to New York City Administrative Code § 10-311(d), the City of New York and its agencies, officers or employees shall not be liable to any party by reason of any incident involving, or the use or misuse of a safety locking device that may have been purchased in compliance with these rules. The permittee shall take proper safety measures at all times to keep her/his rifle/shotgun from unauthorized persons—especially children. The permittee's rifle or shotgun should be kept unloaded and locked in a secure location in her/his home. Ammunition shall be stored separately from her/his rifle or shotgun.

> *Note:* Many rifles/shotguns that are stolen in residential burglaries are taken from bedroom closets.

(e) Pursuant to New York City Administrative Code § 10-312, it shall be a criminal violation for any person who is the lawful owner or lawful custodian of a rifle or shotgun to store or otherwise place or leave such weapon in such a manner or under circumstances that it is out of her/his immediate possession or control, without having rendered such weapon inoperable by employing a safety locking device as defined in 38 RCNY § 3-12(b). Such offense shall constitute a misdemeanor if the offender has previously been found guilty of such violation or if the violation is committed under circumstances which create a substantial risk of physical injury to another person.

(f) While there is no limit in the number of rifles or shotguns the permittee may possess, s/he should be

advised that permittees who own several rifles/shotguns shall be expected to safeguard and maintain each rifle or shotgun.

(g) Minors under the age of eighteen may carry or use the permittee's rifle or shotgun only in the permittee's actual presence. The permittee shall be held responsible for supervising closely any minor using her/his rifle/shotgun. The minor, in turn, shall be expected to abide by the same rules and restrictions as a permittee.

(h) It is recommended that new permittees take advantage of instruction and safety courses in the use of rifles/shotguns that are offered by the rifle ranges and clubs within the New York area. The permittee should consult the local consumer telephone directory to find out more about a course offered in her/his area.

(i) New laws or amendments of existing rules may be enacted by a legislature or promulgated by the Police Department affecting the ownership or use of rifles/shotguns. The permittee shall be held responsible for knowing any modification of rules pertaining to her/his permit.

(j) The permit to possess a rifle or shotgun expires three years after the last day of the month in which the permit was issued. The permittee is held responsible for applying to renew her/his permit when it expires. Failure to apply to renew the permit at such time shall result in cancellation of the permit and confiscation of any rifles/shotguns the permittee may possess.

(k) Permittees shall cooperate with all reasonable requests by the Police Department for information and assistance in matters relating to the permit.

**38 R.C.N.Y. § 5-23 (current)**

(a) *Premises License - Residence or Business.* This is a restricted handgun license, issued for the protection of a business or residence premises.

(1) The handguns listed on this license may not be removed from the address specified on the license except as otherwise provided in this chapter.

(2) The possession of the handgun for protection is restricted to the inside of the premises which address is specified on the license.

(3) To maintain proficiency in the use of the handgun, the licensee may transport her/his handgun(s) directly to and from an authorized small arms range/shooting club, unloaded, in a locked container, the ammunition to be carried separately.

(4) A licensee may transport her/his handgun(s) directly to and from an authorized area designated by the New York State Fish and Wildlife Law and in compliance with all pertinent hunting regulations, unloaded, in a locked container, the ammunition to be carried separately, after the licensee has requested and received a "Police Department - City of New York Hunting Authorization" Amendment attached to her/his license.

(b) *Carry Business License.* This is an unrestricted class of license which permits the carrying of a handgun concealed on the person.

(c) *Limited Carry Business License.* This is a restricted handgun license which permits the licensee to carry a handgun listed on the license concealed on the person

to and from specific locations during the specific days and times set forth on the license. Proper cause, as defined in 38 RCNY § 5-03, shall need to be shown only for that specific time frame that the applicant needs to carry a handgun concealed on her/his person. At all other times the handgun shall be safeguarded at the specific address indicated on the license and secured unloaded in a locked container.

(d) *Carry Guard License/Gun Custodian License.* These are restricted types of carry licenses, valid when the holder is actually engaged in a work assignment as a security guard or gun custodian.

(e) *Special Licenses.* Special licenses are issued according to the provisions of § 400.00 of the New York State Penal Law, to persons in possession of a valid County License. The revocation, cancellation, suspension or surrender of her/his County License automatically renders her/his New York City license void. The holder of a Special License shall carry her/his County License at all times when possessing a handgun pursuant to such Special License.

(1) *Special Carry Business.* This is a class of special license permitting the carrying of a concealed handgun on the person while the licensee is in New York City.

(2) *Special Carry Guard License/Gun Custodian License.* These are restricted types of Special Carry Licenses. The handgun listed on the license may only be carried concealed on the licensee's person while the licensee is actively on duty and engaged in the work assignment which formed the basis for the issuance of the license. The licensee may only transport the handgun concealed on

her/his person when travelling directly to and from home to a work assignment.

**38 R.C.N.Y. § 5-23 (prior to July 30, 2001)**

(a) *Premises License - Residence or Business.* This is a restricted handgun license, issued for the protection of a business or residence premise.

(1) The weapon(s) listed on this license may not be removed from the address specified on the license without the expressed written permission of the Commanding Officer-License Division and then only in the manner prescribed.

(2) The possession of the handgun for protection is restricted to the inside of the address specified on the license.

(3) To maintain proficiency in the use of the handgun, the licensee may transport his handgun(s) directly to and from an authorized range, unloaded, in a locked container, the ammunition to be carried separately, after the licensee has requested and received written permission from the Commanding Officer, License Division.

(4) A licensee may transport his handgun(s) directly to and from an authorized area designated by the New York State Fish and Wildlife Law and in compliance with all pertinent hunting regulations, unloaded, in a locked container, the ammunition to be carried separately, after the licensee has requested and received a "Police Department - City of New York Hunting Authorization" Amendment attached to his license.

(b) *Target License.* This is a Handgun License which permits the transporting of an unloaded handgun in a locked container to and from an authorized range.

(1) Target license applicants shall provide evidence of intention to use licensed handguns for regular recreational target shooting purposes, which indicates where and when the handgun(s) will be used, e.g., documentation of participation or membership at a pistol range which is duly certified by the New York City Police Commissioner pursuant to the New York City Administrative Code. When a licensee is applying for renewal of such license, he/she must demonstrate that the license has been used for regular recreational target shooting purposes during the prior license period.

(2) Handgun(s) shall be stored only at the address indicated on the license.

(3) Handgun(s) must be stored unloaded, in a locked container, with the ammunition stored separately.

(4) When going to an authorized range, the handgun(s) must be transported unloaded, in a locked container, with the ammunition transported separately.

(5) The licensee may only remove the handgun(s) from his residence to transport them directly to and from an authorized range.

(6) A licensee may transport his handgun(s) directly to and from an authorized area designated by the New York State Fish and Wildlife Law and in compliance with all pertinent

hunting regulations, unloaded, in a locked container, the ammunition to be carried separately, after the licensee has requested and received a "Police Department - City of New York Hunting Authorization" Amendment attached to his license.

(c) *Carry Business.* This is an unrestricted class of license which permits the carrying of a handgun concealed on the person.

(d) *Limited Carry Business.* This is a restricted handgun license which permits the licensee to carry a handgun listed on the license concealed on the person to and from specific locations during the specific days and times set forth on the license. At all other times the handgun shall be safeguarded at the specific address indicated on the license.

(e) *Security Guard I Courier I Private Investigator I Gun Custodian License.* These are restricted types of carry licenses, valid when holder is actually engaged in a work assignment as a security guard, courier, private investigator or gun custodian.

(f) *Special Licenses.* Special licenses are issued according to the provisions of § 400.00 of the New York State Penal Law, to persons in possession of a valid County License. The revocation, cancellation, suspension or surrender of his County License automatically renders his N.Y.C. license void. The holder of a Special License must carry his County License at all times when possessing a handgun pursuant to such Special License.

(1) *Special Target License.* This is a restricted type of special license. In New York City the handgun(s)

listed on the license may only be transported unloaded in a locked container while going directly to and from an authorized range.

(2) *Special Limited Carry Business.* This is a class of special license permitting the carrying of a concealed handgun on the person only when the licensee is actually engaged in the performance of his duties.

(3) *Special Carry License-Security I Courier I Private Investigator I Other Business.* This is a type of Special Carry License. The handgun listed on the license may only be carried concealed on the licensee's person while the licensee is actively on duty and engaged in the work assignment which formed the basis for the issuance of the license. The licensee may only transport the handgun concealed on his person when travelling directly to and from home to a work assignment, unless otherwise authorized by the Commanding Officer, License Division.

*Appendix E*

## NEW YORK CITY'S POLICY ON PERMISSIBLE SMALL ARMS RANGES AND SHOOTING CLUBS

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The City of New York Police Department

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May 15, 2012

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Mr. Romolo Colantone
129 Robinson Avenue
Staten Island, NY 10312-06213

Dear Mr. Colantone,

This is in response to your question about whether participation in a handgun competition in New Jersey would be in compliance with the terms and conditions of your New York City Premise Residence license. With the exception noted below, New York City Premises Residence licenses arc only valid in the City of New York.

The following sections from the Rules of the City of New York regarding Premise Residence licenses relate to your question:

> 38 RCNY § 5-23 (a) (3) To maintain proficiency in the use of the handgun, the licensee may transport her/his handgun(s) directly to and from an authorized small arms range/shooting club, unloaded, in a lucked container, the ammunition to be carried separately.

> 38 RCNY § 5-23 (a) (4) A licensee may transport her/his handgun(s) directly to and from an authorized area designated by the New York State Fish and Wildlife Law and in compliance with all pertinent hunting regulations, unloaded. in a locked container, the ammunition to be carried separately, alter the licensee has requested and received a "Police Department - City of New York hunting Authorization" Amendment attached to her/his license.

The Rules of' the City of New York contemplate that an authorized small arms range/shooting club is one authorized by the Police Commissioner. Therefore the only permissible ranges for target practice or competitive shooting matches by NYC Premises Residence license holders arc those located in New York City.

Premise license holders who have obtained the Hunting Authorization from the License Division may transport their handgun to those areas outside of the City of New York designated by the New York State Fish and Wildlife Law for the purpose of hunting; no areas outside of New York State are permissible for this purpose.

These rules do not apply to New York City issued long gun permits. Long guns owned and registered under a NYC Rifle and Shotgun permit can be transported out of the City and back to the permit holder's residence if they are unloaded, in a locked non-transparent case, with ammunition carried separately.

I hope that this information is helpful to you.

Very truly yours,

[handwritten: signature]

Andrew Lunetta
Deputy Inspector