No. 18-280

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF ROBERT LEIDER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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May 14, 2019

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Robert Leider is Assistant Professor of Law at the Antonin Scalia Law School of the George Mason University. *Amicus* has a professional interest in criminal law and constitutional law, especially as they relate to the use of force and gun control. *Amicus* has previously drafted articles on the Second Amendment and the right of self-defense.

SUMMARY OF ARGUMENT

This brief proceeds in four parts. Part I explains the background of New York City's licensing scheme. Part II argues that New York City's restrictions on transporting handguns violates the Second Amendment. Part III argues that New York City's restrictions also violate the federal Firearm Owners Protection Act. Finally, Part IV identifies state-law concerns with the remedy that New York City is pursuing and explains how the Court can appropriately fashion Petitioners' relief under New York law.

I. As relevant to most private citizens, New York State has two general types of firearm licenses: premises and carry. A premises license is valid only in a specific home or place of business. To carry or transport a firearm anywhere else, a carry license is required. N.Y. PENAL LAW § 400.00(2).

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1. Pursuant to this Court's Rule 37.6, counsel for *amicus* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus* and his counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

The problem that New York City is trying to address is that a carry license confers broad authority to carry a firearm "without regard to employment or place of possession." N.Y. PENAL LAW § 400.00(2)(f). Using their inherent authority, license officers may restrict carry licenses to the proper cause that justified their issuance (e.g., target shooting). But violating these restrictions carries only an administrative penalty (e.g., revocation of the license), not a criminal penalty. New York City has determined that an administrative penalty is insufficient. As a result, New York City has transitioned most license holders to premises licenses. New York City then has the power to prosecute premises license holders any time they carry firearms off their own premises. N.Y. PENAL LAW § 400.00(17).

By the letter of state law, premises holders may not take their firearms off their property, even for target shooting. To avoid this result, New York City purports to "endorse" premises licenses for target shooting within the City limits or for hunting. These "endorsements" are not expressly provided for by state law, however, and the City's authority to issue them is doubtful.

II. New York City's transportation restrictions on license holders violate the Second Amendment. Dating back to early nineteenth century cases, courts have recognized that the Second Amendment protects two rights: the right to keep arms and the right to bear them. While it is correct that New York City's transportation restrictions violate the right to bear arms, the Court can rule in Petitioners' favor based on the right to keep arms in the home without reaching that issue.

"Constitutional rights . . . implicitly protect those closely related acts necessary to their exercise." *Luis v. United States*, 136 S. Ct. 1083, 1097 (2016) (Thomas, J., concurring). The right to keep ammunition and the right to transport firearms between homes, places of purchase and repair, and places of target practice are among the incidental acts of the right to keep arms in the home. *See Andrews v. State*, 50 Tenn. (1 Heisk.) 165, 178 (1871). Because New York City's licensing policy creates a near-total ban on transporting firearms between homes and to ranges, it violates the right to keep arms. This is true whether one views the Second Amendment as protecting the right to have arms for individual self-defense or only for militia-related reasons of protecting the common defense.

III. New York City's policy also violates the Firearm Owners Protection Act. That Act grants a gun owner the right to transport unloaded and inaccessible firearms "from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm." 18 U.S.C. § 926A. Congress passed the Act to protect gun owners who transported their firearms between states. At a minimum, the Act should protect those New York City residents who transport their firearms to homes or target ranges in other states, including adjacent states. But the Act is phrased broadly and, by its text, arguably would protect those who transport their firearms intrastate as well.

IV. This Court has broad authority to remedy constitutional violations. New York City claims it can remedy this constitutional violation by endorsing premises

licenses for possession in second homes and transportation outside the city. But that remedy raises thorny issues of state law. The State of New York requires applicants to obtain licenses from the jurisdiction in which they reside, are employed, or have businesses, and premises licenses are not transferable to other locations. N.Y. Penal Law § 400.00(3), (6). New York state law also varies licensing requirements depending on whether someone lives in New York City, the surrounding counties, or upstate. New York Penal Law § 400.00 (4-b), (6), (10). Allowing one jurisdiction to endorse licenses for another jurisdiction creates structural conflicts with this scheme. And the use of "endorsements" to convert premises licenses into *de facto* limited carry licenses may violate state-law restrictions on premises licenses, which limit guns to a specific home or business. Although a New York intermediate appellate court approved the practice, there are good reasons to believe it may be wrong.

There is, however, a remedy available to New York City that would not raise any concerns under state law: it may—and should—order the police commissioner to grant licenses to "have and carry concealed" under § 400.00(2)(f) restricted to transportation between homes, target shooting, and hunting. Unlike a premises license, New York City licenses to carry are valid statewide. N.Y. Penal Law § 400.00(6). Indeed, issuance of a license to carry—often restricted to specific purposes—is how other New York jurisdictions currently authorize firearm transportation.

ARGUMENT

I. New York City's licensing policy is an end run around the State's failure to criminalize violating administrative restrictions.

Under the Sullivan Act, any New York resident who chooses to own or carry a handgun must first obtain a license. N.Y. Penal Law §§ 265.01-b(1), 265.20(3). New York has traditionally required pistol license applicants to demonstrate "good moral character," and, for licenses to carry, "proper cause." 1913 N.Y. Laws 1627–30; *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 85 (2d Cir. 2012). While this Court has recognized a fundamental individual right to keep arms in the home, *District of Columbia v. Heller*, 554 U.S. 570 (2008), which applies to the States, *McDonald v. City of Chicago*, 561 U.S. 742 (2010), New York treats the issuance of a handgun license more like a statutory privilege than a constitutional right. A licensing officer has "broad discretion" to issue a license, and "may deny [the license] for any good cause," subject only to rational-basis review. *Ricciardone v. Murphy*, 159 A.D.3d 1200, 1200–01 (N.Y. App. Div. 2018) (applying standard in revocation of a license to carry restricted for hunting and target shooting only); *Nelson v. Cty. of Suffolk*, No. 16113/15, 2019 WL 1461824, at *1 (N.Y. App. Div. Apr. 3, 2019) (finding a "rational basis" to deny applicant's firearm license). In New York City, the police commissioner has "broad discretion to determine whether to issue a handgun license" to possess a firearm in the home, and "[j]udicial review is limited to determining whether the administrative decision to deny petitioner a handgun license is arbitrary and capricious or an abuse of discretion." *Delgado v. Kelly*, 41 Misc. 3d 1211(A) (N.Y. Sup. Ct. 2013).

As relevant to most private citizens, the Sullivan Act identifies two license types, which are distinguished by location and scope:

> A license for a pistol or revolver . . . shall be issued to (a) have and *possess in his dwelling* by a householder; (b) have and possess in his place of business by a merchant or storekeeper; . . . (f) have and *carry concealed*, without regard to employment or place of possession, by any person when proper cause exists for the issuance thereof . . . .

N.Y. Penal Law § 400.00(2)(a), (b), (f) (McKinney 2012) (emphases added).

"Premises licenses," issued under subsections (a) and (b), are valid only in the home or business for which the license is granted. N.Y. Penal Law § 400.00(3), (6). "Carry licenses," issued under subsection (f), are valid everywhere "without regard to employment or place of possession" and are only granted "when proper cause exists." N.Y. Penal Law § 400.00(2)(f). Because a carry license is required to transport a gun from a legally recognized premises to an offsite location, traditionally, all New York jurisdictions issue carry licenses to transport a firearm from the licensee's home or business to a lawful destination, such as a shooting range. *See, e.g.*, Pistol License Safety and Information Handbook for Westchester County, at 11–12 (2018).

The broad scope of carry licenses and the necessity of having one to transport a pistol off of one's own premises pose a conundrum. By the letter of New York

law, an individual has no authority to transport a firearm outside his home or place of business, including for hunting or target shooting, unless he has a carry license. Yet, New York courts have not wanted to recognize that an individual with *some* lawful purpose to transport a firearm off his premises (e.g., for target shooting) should have the authority to carry that gun for any lawful purpose, including self-defense. *See, e.g.*, *O'Connor v. Scarpino*, 638 N.E.2d 950, 951 (N.Y. 1994). To escape this conundrum, New York courts allow licensing authorities to restrict carry permits based on the specific "proper cause" that justified issuance of the license—such as for target practice or hunting. *See Kachalsky*, 701 F.3d at 98; *O'Connor*, 638 N.E.2d at 951; *see also* 1972 N.Y. Op. Att'y Gen. No. 4 (Dec. 26, 1972). But nothing in New York Penal Law § 400.00 authorizes these restrictions; they are simply based on the inherent power of the licensing officer to issue (and limit) a license for proper cause.

The legal consequences of violating a licensing restriction depends on the type of the restriction. New York law recognizes two types of licensing restrictions: statutory and administrative.

A violation of a statutory restriction occurs when a person exceeds the legal authority granted by the license type. This would include, for example, a person who carries a firearm in public for self-defense despite only having a premises license for his home or business. Violating a statutory limit on a license is a misdemeanor. N.Y. Penal Law § 400.00(17).

A violation of an administrative restriction occurs when a person violates a licensing officer's restriction on

the use of his license. Often, this includes a person who carries a firearm for self-defense with a carry license issued under subsection (f) marked "hunting and target shooting only." Violation of an administrative restriction is not a criminal offense. *See People v. Thompson*, 705 N.E.2d 1200, 1201 (N.Y. 1998). It carries administrative penalties, including revocation of the pistol license. *See Matter of Perrone v. Bratton*, 226 A.D.2d 150 (N.Y. App. Div. 1996); *People v. Keung Li Lap*, 570 N.Y.S.2d 258, 260 (Crim. Ct. 1991). In practice, this penalty could mean the forfeiture of the Second Amendment right to have a handgun in the home since a pistol license is a precondition to possess a handgun lawfully.

For years, New York City issued target shooting licenses that allowed licensees to transport firearms to shooting ranges outside the City. *See* Brief in Opp'n, *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 2018 WL 5994146, at *4 (Nov. 8, 2018) (No. 18-280) (citing 38 RCNY §§ 5-01(b), 5-23(b)(1) as applied prior to 2001). In 1998, however, the City lost *Thompson*, in which the City tried to prosecute a license holder for transporting an unloaded pistol in an unlocked pouch rather than in a locked container as required by a city regulation. 705 N.E.2d at 1201. The New York Court of Appeals held that "this violation of the regulatory terms and conditions of the license may not carry a penal sanction." *Id.*

To have the ability to criminally prosecute license violations, New York City began shifting pistol license holders to premises licenses. JA88, ¶¶ 27–28. But this created a problem for those wanting to go target shooting, since under state law premises licenses are valid only for the premises contained on the license. N.Y. Penal Law

§ 400.00(6). To avoid this, the police commissioner in New York City began issuing premises licenses with various "endorsements" that permit a premises license holder to transport a pistol in public for target shooting or hunting. At present, all premises licenses are endorsed for target shooting, but only at New York City ranges.[2] 38 RCNY § 5-23(a)(3); JA63. Thus, premises licenses are valid only in the City and require additional authorization under § 5-23(a)(4) to transport a firearm outside the City. And the police commissioner generally denies permission to carry pistols outside of New York City for target shooting. *Sgueglia v. Kelly*, 990 N.Y.S.2d 794, 799 (Sup. Ct. 2014), *aff'd*, 134 A.D.3d 443 (N.Y. App. Div. 2015).

In 2004, firearms owners challenged New York City's authority to issue target endorsements on premises licenses. Although issued by local authorities, pistol licenses are state licenses, and state law has no provisions for "endorsements" that essentially convert premises licenses into limited carry licenses. Yet, with little analysis, a New York intermediate court upheld the regulation as an acceptable supplement to state law rather than a direct conflict with the Sullivan Act. *De Illy v. Kelly*, 775 N.Y.S.2d 256, 256–57 (N.Y. App. Div. 2004).

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2. A 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." 38 RCNY § 5-23(a)(3). *See also New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 883 F.3d 45, 53 (2d Cir. 2018) ("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.").

Whether this New York intermediate court correctly interpreted New York law is critical. New York City has sought to moot this case by endorsing premises licenses for second homes and for target shooting locations throughout New York state. *See* Letter from Zachary W. Carter, Corporation Counsel, to Scott S. Harris, Clerk of the Supreme Court (Apr. 12, 2019). But it is doubtful whether New York City has authority under state law to issue such endorsements. Hence, as explained below, this Court should instead order the New York City police commissioner to issue a restricted license to carry a pistol under § 400.00(2)(f) in order to remedy the constitutional violation.

II. New York's licensing policies infringe the Second Amendment's right to keep arms.

The Second Amendment provides that "[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. Although the Court could decide this case in Petitioners' favor based on the right to bear arms,[3] this brief focuses on the right to keep arms in the home. That right includes not only the actual possession of a weapon within the home, but also necessary incidents of that right, including the right to train with arms. Because New York City has severely limited the ability of its residents to practice and train with their arms, it has violated this fundamental constitutional right.

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3. *See* THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 271 (1880) (treating firearm practice as an incident of the right to bear arms rather than the right to keep arms)

A. The right to keep arms and the right to bear arms are distinct rights.

Courts have traditionally recognized that the Second Amendment and its equivalent state analogues protect two distinct rights: the right to keep arms and the right to bear arms. *See, e.g.*, *Hill v. State*, 53 Ga. 472, 475–76 (1874); *Aymette v. State*, 21 Tenn. 154, 158 (1840); *see also District of Columbia v. Heller*, 554 U.S. 570, 581–92 (2008).

The right to keep arms protects the right to have arms in the home. *Id.* at 582. Although the English Bill of Rights guaranteed that "the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law," 1 W. & M., c. 2, § 7 (Eng.), *in* 3 Eng. Stat. at Large 441 (1689), that privilege "under various pretences . . . ha[d] been greatly narrowed," and by the time of the Framing, was more "nominal than real," 1 Joseph Story, Commentaries on the Constitution of the United States § 1898, at 621 (Law Book Exchange 2007) (1873). Laws limiting gun ownership generally used the word "keep" to refer to ownership, possession, or custody, particularly within the home. For example, under the game laws, Parliament denied any person whose lands did not produce an annual income of £100 or who was under a certain social rank from "hav[ing] or keep[ing] for themselves or any other person or persons any Guns, Bowes, [or other hunting equipment]." 22 & 23 Car. II c. 25 (1671) (Eng.), *in* 5 Statutes of the Realm 745. And Parliament prohibited Catholics from "keep[ing] arms in their houses." 4 William Blackstone, Commentaries *55; *see* 1 W. & M. c. 15 (providing that no Catholic "may have or keepe in his House or elsewhere . . . any Arms[,] Weapons[,] Gunpowder[,] or Ammunition [except as

authorized by a justice of the peace for self-defense or defense of the home]").

Likewise, in this country, "keep" generally referred to owning and having arms in the home. Thus, in *Aymette*, the Supreme Court of Tennessee separated the right to keep arms from the right to bear arms in public, and referred to the former as an "unqualified right" to own common arms. 21 Tenn. at 160. And in *Haile v. State*, the Supreme Court of Arkansas upheld a law that restricted the carrying of arms in public, in part, because it did not infringe the right of "every citizen [to] keep arms in readiness upon his place." 38 Ark. 564, 567 (1882). Other authorities have also treated the right to keep arms as referring to having arms in the home. *See, e.g.*, *Andrews v. State*, 50 Tenn. 165, 185–86 (1871); 2 Joel Prentiss Bishop, Commentaries on the Criminal Law § 124 (3d ed. 1865).

In contrast, the phrase "bear arms" protected the carriage of arms, particularly in public. To "bear arms" meant to "wear, bear, or carry . . . for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Heller*, 554 U.S. at 584. Sources have diverged over the scope of this right. Most courts have held that the right to bear arms in public protected some public carrying of firearms for private self-defense. *See, e.g.*, *State v. Chandler*, 5 La.Ann. 489, 490–91 (La. 1850); *Nunn v. State*, 1 Ga. 243, 251 (1846); *State v. Huntly*, 25 N.C. 418, 422–23 (1843); *State v. Reid*, 1 Ala. 612, 615 (1840). A few courts, however, have thought that the right to bear arms refers only to carrying arms in a military manner or for military purposes. *See, e.g.*, *State v. Buzzard*, 4 Ark. 18, 24–25 (opinion of Ringo, C.J.); *Aymette,* 21 Tenn. at 158; *see also* 2 Bishop, Criminal Law

§ 124 ("[T]he right to 'bear' arms refers merely to the military way of using them.").

The distinction between the right to "keep" arms and the right to "bear" them is not perfectly coextensive with "inside the home" and "in public." A person can bear arms at home by walking around his property carrying weapons on his person. *Haile*, 38 Ark. at 566. Thus, the District of Columbia law that prohibited "keep[ing] any firearm" unless "unloaded and disassembled or bound by trigger lock or similar device," D.C. Code § 7-25-07.02 (2001), infringed the right to bear arms in the home. *See Heller*, 554 U.S. at 630; *id. at* 635 (requiring the District to issue "a license to carry [the handgun] in the home"). The converse is also possible. A law that prohibited the private ownership and possession of weapons in the home while freely allowing individuals to carry government-issued firearms would infringe the right to keep arms, even while respecting the right to bear them. *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1452 (2009) ("[C]onstitutional rights have always been understood as involving a right to use one's own property to accomplish one's goal, not the property of others . . . ."). Thus, before *Heller*, a police officer living in the District with rights to carry firearms on duty or off duty, but no right to purchase or keep a private firearm in the home, would still have had a viable Second Amendment claim.

Since *Heller*, some courts have been reluctant to recognize that the Second Amendment extends "beyond the home." *See, e.g.*, *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011); *Woollard v. Gallagher*, 712

F.3d 865, 874 (4th Cir,. 2013); *Williams v. State*, 10 A.3d 1167, 1169, 1177 (Md. 2011); *Commonwealth v. Perez*, 952 N.E.2d 441, 451 (Mass. App. Ct. 2011). This framing of the issue is unfortunate. For reasons explained in the next section, the Second Amendment obviously extends beyond the home in some form. The question in these cases is a narrower one: whether, and to what extent, the Second Amendment grants a right to carry a loaded firearm outside the home *for personal protection*. On this, the courts of appeals are divided, and the circuit split is virtually complete.[4] But the Court need not reach that

4. The Ninth and Tenth Circuits have held that there is no right to carry a firearm in a concealed manner. *Peruta v. Cty. of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (en banc); *Peterson v. Martinez*, 707 F.3d 1197, 1209–11 (10th Cir. 2013). The Ninth Circuit is also considering whether the Second Amendment grants the right to carry firearms openly. *Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018), *reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019). The First, Second, Third, and Fourth Circuits have held that, even assuming the Second Amendment protects the right to carry firearms outside the home for personal protection, states may limit this right to a few people who are in special danger. *Gould v. Morgan*, 907 F.3d 659, 676 (1st Cir. 2018), No. 18-1272 (applying for certiorari); *Kachalsky*, 701 F.3d at 94, 96 (finding that carrying firearms in public was not a core Second Amendment protection); *Drake v. Filko*, 724 F.3d 426, 431–32 (3d Cir. 2013); *Woollard*, 712 F.3d at 876. The Seventh and D.C. Circuits have required that law-abiding citizens have some avenue to exercise their right to bear arms. *Wrenn v. Dist. of Columbia*, 864 F.3d 650, 665 (D.C. Cir. 2017) (invalidating a "good reason" requirement), *and Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012) (invalidating a total ban on carrying firearms for self-defense, but also suggesting that a special need requirement would be unconstitutional). It is unlikely that this issue will arise in the Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits. All states in those circuits allow law-abiding citizens to obtain permits to carry concealed weapons without a

issue in order to rule for Petitioners. That is because, as explained below, the Second Amendment issue in this case falls squarely within the incidents of the right to keep arms in the home under *Heller*.

B. New York City's restrictions violate the Second Amendment right to keep arms in the home for self-defense.

"Constitutional rights . . . implicitly protect those closely related acts necessary to their exercise." *Luis*, 136 S. Ct. at 1097 (Thomas, J., concurring). The Sixth Amendment right to assistance of counsel in a criminal case, for example, protects the right to pay that lawyer. *Id.* at 1098. And the freedom of speech and of the press guaranteed by the First Amendment "would be largely ineffective if it did not include the right to engage in financial transactions that are the incidents of its exercise." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 252 (2003) (Scalia, J., concurring in part, concurring in judgment in part, and dissenting in part).

For over a century, courts have recognized that certain incidental acts also fall within the scope of the right to keep and bear arms. For example, the right to keep and bear arms "also implied the possession of ammunition." *United States v. Miller*, 307 U.S. 174, 180 (1939) (quoting 1 Herbert L. Osgood, The American Colonies in the 17th Century 499 (1904)); *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014). And it implied the right "to acquire and maintain proficiency in their

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showing of special danger, and most of them allow individuals to carry firearms openly without a license.

use." *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011). As the Tennessee Supreme Court explained nearly 150 years ago:

> The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair. And clearly for this purpose, a man would have the right to carry them to and from his home, and no one could claim that the Legislature had the right to punish him for it, without violating this clause of the Constitution.

Andrews v. State, 50 Tenn. 165, 178 (1871); *Heller*, 554 U.S. at 614 (quoting *Andrews*, 50 Tenn. at 178).

New York City's licensing policy creates a near-total ban on transporting firearms to shooting ranges. Although the New York City Code states that a license holder may transport "an unloaded handgun directly to and from an authorized small arms range/shooting club, secured unloaded in a locked container," RCNY § 5-01(a), the License Division has interpreted this requirement as applying only to the few shooting ranges within the confines of New York City. JA63. Contrary to the Second Circuit's analysis, *New York State Rifle & Pistol Ass'n, Inc.*, 883 F.3d at 59, this near total-ban on transporting handguns to firing ranges constitutes "a serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense." *Ezell*, 651 F.3d at 708.

The Second Circuit and the City contend that the seven ranges within the City's boundaries satisfactorily allow licensees to train with their firearms. *New York State Rifle & Pistol Ass'n, Inc.*, 883 F.3d at 59, 61; Brief in Opp'n at 10, 19. The Second Circuit specifically noted that at least one of the seven ranges were within a "reasonable commuting distance" of each of the City's 8.5 million residents, so this satisfied the right. *See New York State Rifle & Pistol Ass'n, Inc.*, 883 F.3d at 61.

But it is not even clear that New York City ranges are fully adequate for defensive firearm training. Westside Pistol Range, the only shooting range in Manhattan, prohibits shooting with common self-defense calibers such as a .357 magnum. Westside Rifle & Pistol Range, Westside Policies, https://westsidepistolrange. com/ westside-policies/ (accessed April 30, 2019). Stuyvesant Rod and Gun Club, a private club (not a public range), prohibits self-defense ammunition, requiring instead that "[t]arget loads only will be used on the range." Stuyvesant Rod and Gun Club, Range Rules, https:// stuyvesantrodandgun.org/range-rules/ (accessed April 30, 2019).

This restriction also severely limits the ability of licensees to seek firearm instruction. Firearm education is not one-size-fits-all. Just like Professor Jerry Mashaw has a different academic perspective on the administrative state from Professor Philip Hamburger,[5] different firearm instructors have different training techniques and

5. *Compare* Philip Hamburger, Is Administrative Law Unlawful (2014), *with* Jerry L. Mashaw, Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law (2012).

methods for handling firearms. Moreover, this Court has firmly rejected the notion that constitutional rights are not violated simply because some alternatives are available. *Heller*, 534 U.S. at 629 ("[I]t is no answer to say, as Petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed."); *Caetano v. Massachusetts*, 136 S.Ct. 1027, 1033 (2016) (Alito, J., concurring) ("[T]he right to bear other weapons is 'no answer' to a ban on the possession of protected arms.").

While the Second Circuit held that New York City pistol license holders can attend shooting competitions in the City, *New York State Rifle & Pistol Ass'n, Inc.*, 883 F.3d at 59, it neglected to mention that New York State law prohibits non-residents of the City from possessing handguns inside city limits without the approval of the New York City police. N.Y. Penal Law § 400.00(6); Op. Atty. Gen. 97 F-4. That approval is generally issued only for business-related reasons. 38 RCNY § 5-23(e)(1), (2). So New York City pistol license holders are effectively limited only to local shooting competitions among the few license holders in the city.[6]

Equally unsatisfactory is the Second Circuit's suggestion that Petitioners could "utiliz[e] gun ranges or attend[] competitions outside New York City, since guns can be rented or borrowed at most such venues

6. State law has a narrow exception for out-of-state residents to attend NRA or International Handgun Metallic Silhouette Association competitions. N.Y. Penal Law § 265.20(13); NYC Admin. Code § 10-131(i)(12) (incorporating state-law exceptions). But it is far from clear that the City actually recognizes this exception.

for practical purposes." *New York State Rifle & Pistol Ass'n, Inc.*, 883 F.3d at 61. The Second Circuit provides no citation to the record for this proposition. While it is true that many commercial ranges rent firearms, not all commercial ranges do,[7] let alone the private gun clubs where many such competitions are held.[8] Even among the commercial ranges that rent firearms, because of concerns about suicide at the ranges, those ranges increasingly require people to come with a guest or to have a firearm already in their possession to rent a gun.[9] That the Second Circuit could make such an unsupported evidentiary assertion—on summary judgment no less—illustrates a troubling trend among the lower courts of refusing to entertain Second Amendment claims with the same rigor

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7. Among the examples of commercial ranges that do not rent firearms: the NRA Headquarters Range in Fairfax, Virginia, National Rifle Association, Frequently Asked Questions, https://nrahqrange.nra.org/faqs/; Phoenix Rod and Gun Club, https://phoenixrodandgun.org/node/1194; Honey Island Shooting Range in Pearl River, Louisiana, Honey Island Shooting Range Information, https://www.honeyisland.org/range-information.htm.

8. For private clubs, see, for example, Fairfax Rod and Gun Club, Fairfax Rod and Gun Club IDPA: First Time Shooters, http://fxrgc.org/images/shared/Pistol/IDPA/FXRGC_IDPA_New_Shooter_Handout.pdf (individuals must bring their own firearms); Golden City Gun Club, Frequently Asked Questions, http://www.goldengunclub.com/faq.php; Tiverton Rod-Gun Club, Frequently Asked Questions, https://tivertongunclub.com/about/faq/ (no handguns available to loan).

9. *See, e.g.*, Target World, Inc., Gun Rentals, https://targetworldinc.com/gun-rentals/; ShotShot Pistol Range, Range Policies, http://www.shoreshotpistolrange.com/policies.htm; C.I. Shooting Sports, Range Rules, https://cishootingsports.com/the-range/range-rules.

that they approach cases involving other fundamental rights.

One would think that New York officials would want to encourage a high degree of proficiency. After all, New York City is dense. In another city, a missed shot in self-defense might end up in the wall of a home or a yard. In New York, the bullet quite possibly could land in a neighbor's apartment.

Yet the City apparently prefers prosecutions to proficiency. Officials have taken this regulatory approach so that they have maximum prosecutorial leverage against licensed gun owners. Previous court decisions had thwarted their ability to criminally prosecute licensees who do not dot every "i" and cross every "t" when navigating the City's byzantine regulations. *See supra* pp. 8-9. But the "need" to prosecute gun owners who place their firearms in an unlocked pouch rather than locked case during transport, *Thompson*, 705 N.E.2d 1201, does not justify depriving its eight million residents of the opportunity to seek firearm training outside the small confines of the city.

A similar analysis governs the city rule prohibiting license holders from taking their arms to a second home. A regulation that prohibits transporting weapons into a home is a functional ban on maintaining arms within the home and is thus patently unconstitutional. *Andrews*, 50 Tenn. at 178. And while the Second Circuit thought it adequate that Petitioners could obtain a second handgun for their second residence, *New York State Rifle & Pistol Ass'n, Inc.*, 883 F.3d at 57, that solution unreasonably imposes a gratuitous burden on gun owners, like requiring

a person with a second home to maintain two sets of the same books.

And having two guns in two homes means that a homeowner must leave one gun in an unattended residence. Leaving a gun in an empty residence for days or weeks is an invitation for theft, with no discernable public safety benefit. The right to keep and bear arms is violated not just by laws that substantially frustrate the right, but also by pointless restrictions that bear no relationship to promoting public safety. *Britt v. State*, 681 S.E.2d 320, 322 (N.C. 2009) ("This Court has held that regulation of the right to bear arms is a proper exercise of the General Assembly's police power, but that any regulation must be at least reasonable and not prohibitive, and must bear a fair relation to the preservation of the public peace and safety.").

C. New York City's licensing scheme frustrates the militia-related objectives of the Second Amendment adopted by *Heller* dissenters.

Even under a militia-centric interpretation of the Second Amendment, New York City's prohibition on training with firearms outside the city is unconstitutional. The fundamental point of disagreement between the majority and dissenters in *Heller* was whether the Second Amendment right was tied to the individual for self-defense or only to militia-related activity. *Compare Heller*, 554 U.S. at 595, 628, *with Heller*, 554 U.S. at 643 (Stevens, J., dissenting), *and Heller*, 554 U.S. at 681 (Breyer, J., dissenting) ("[T]he Second Amendment protects militia-related, not self-defense-related, interests."). The City's scheme prevents residents who are subject to state

and federal militia service from adequately practicing and training with their arms, as well as transporting those arms to and from homes that they occupy. *See* 38 RCNY § 5–23. Consequently, this scheme violates the Second Amendment even under an interpretation that is concerned exclusively with the militia-related objective of promoting the common defense.

As this Court explained in *Miller*, "[t]he militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress." 307 U.S. at 178–79. The militia "comprised all males physically capable of acting in concert for the common defense," who "when called for service were expected to appear in person bearing arms supplied by themselves and of the kind in common use of the time." *Id.* at 179. Today, the militia "consists of all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32, under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard." 10 U.S.C. § 246; *accord* N.Y. MIL. LAW § 2 (McKinney 1950) (providing a similar definition of the New York militia). And while today's law divides the militia into organized and unorganized components, 10 U.S.C. § 246(b); N.Y. MIL. LAW § 2(1), all members of the militia, organized or not, are subject to military service on appropriate occasions. 10 U.S.C. §§ 251–253; *Perpich v. Dep't of Def.*, 496 U.S. 334, 352 n.25 (1990).

Congress has taken many steps to promote firearms proficiency among able-bodied citizens. It has provided for the sale of surplus rifles and pistols to civilians for target

practice. 36 U.S.C. §§ 40721–33. And it has required that "[a]ll rifle ranges constructed in whole or in part with funds provided by the United States may be used . . . by persons capable of bearing arms." 10 U.S.C. § 4309(a).

Courts that focused on the Second Amendment's role in preserving the common defense have emphasized the importance of citizens training with arms. In 1874, the Supreme Court of Georgia explained that "the great purpose" of the right to bear arms was "that the people shall be familiar with the use of arms and capable from their habits of life, of becoming efficient militiamen." *Hill*, 53 Ga. at 476. Citizens training with arms, thus, was essential to preserve "the security of a free State." U.S. Const. Amendment II; *see Hill*, 53 Ga. at 479 ("We suppose that in view of what they deemed a necessity of a free state, to-wit: the existence of a well regulated militia, they guaranteed to the people, not only the right to have and keep arms, but the right so to use them as to become familiar with that use, so that when an exigency of the state arose, they would be ready and capable for its defense."). Three years earlier, the Supreme Court of Tennessee provided a similar explanation of the right to keep arms: "the citizens making up the yeomanry of the land, the body of the militia, shall become familiar with their use in times of peace, that they may the more efficiently use them in times of war; then the right to keep arms for this purpose involves the right to practice their use, in order to attain to this efficiency." *Andrews*, 50 Tenn. at 178; *see also* Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America 271 (1880). More recently, Justice Breyer emphasized the importance of citizens training with arms. *Heller*, 554 U.S. at 707–09 (Breyer, J., dissenting).

Under Justice Breyer's analysis in *Heller*, this regulation is unreasonable. Justice Breyer was willing to sustain the District's handgun ban, in part, because "the District law prevents citizens from training with handguns *within the District*," which "consists only of 61.4 square miles of urban area"; and, "adjacent States do permit the use of handguns for target practice, and those states are only a brief subway ride away." *Id.* at 708. In contrast, New York's licensing scheme specifically forecloses the ability to use handguns for target practice in adjacent cities or states—even those on the brief subway ride to New Jersey. Because this regulation bans New York citizens from training with their arms anywhere in the country, except for the 300 square miles of New York City, this regulation imposes an unreasonable restriction on the right to keep and bear arms.

III. New York City's enforcement of Rule 5–23 violates the Firearm Owners Protection Act.

The City prohibits all pistol license holders from taking guns to their second homes or to target ranges out of state. JA 63. And while the City allows hunters to take their firearms elsewhere in the State, it bans hunters from taking their pistols out of state. *Id.* These policies violate the Firearm Owners Protection Act of 1986. Section 926A provides:

> Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person who is not otherwise prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to transport a firearm for

> any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle: *Provided,* That in the case of a vehicle without a compartment separate from the driver's compartment the firearm or ammunition shall be contained in a locked container other than the glove compartment or console.

18 U.S.C. § 926A.

The Second and Third Circuits have severely limited § 926A. Both have suggested that § 926A only protects firearm owners transiting through States. That is, a person traveling from Bethesda, Maryland to Portland, Maine would be protected against restrictive laws of intermediate States (e.g., New York or New Jersey), but not restrictive laws in the originating or destination State. *See Ass'n of New Jersey Rifle and Pistol Clubs Inc. v. Port Authority of New York & New Jersey*, 730 F.3d 252, 256–58 (3rd Cir. 2013); *Torraco v. Port Authority of New York & New Jersey*, 615 F.3d 129, 132 (2d Cir 2010).

This limitation to intermediate states is wrong. The operative text of § 926A is clear. Individuals may transport their firearms for any lawful purpose from any place where they are lawfully allowed to possess and carry them to any other place where they are lawfully allowed

to possess and carry them. Here, Petitioners are lawfully allowed to possess and carry firearms in their New York City homes. And they are also lawfully allowed to possess and carry their firearms at second homes and many shooting ranges outside the State of New York. Thus, § 926A protects the City's residents from any state or local law during transportation of the firearm, provided the firearm is unloaded and inaccessible during transport.

More arguably, § 926A should also protect residents during intrastate transportation. Although it is titled "Interstate Transportation of Firearms," Congress removed the requirement that the firearm move in interstate commerce. The initial version of § 926A did require that the firearm move in interstate commerce:

> Any person not prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to transport an unloaded, not readily accessible firearm in interstate commerce notwithstanding any provision of any legislation enacted, or any rule or regulation prescribed by any State or political subdivision thereof.

Firearm Owner's Protection Act of 1986, Pub. L. No. 99–308, 100 Stat. 449, 460. Shortly after passing the Firearm Owners Protection Act, Congress removed the interstate commerce requirement when it tightened the firearm transportation rules from any "not readily accessible" location in a vehicle to specifically being in the trunk or, if no trunk, in a locked container other than the glove compartment or console. Pub. L. No. 99-360, 100 Stat. 766, 766 (1986). This Court has made it clear that

titles of a statute or section headers cannot limit the plain meaning of the statute's text or substitute for its operative text. *See e.g.*, *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008); *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998).

Thus, New York City's policy not only violates the Second Amendment, but also the Firearm Owners Protection Act. Residents of New York have the federal statutory right to transport their firearms to shooting ranges wherever located and between their homes—or, at a minimum, between their New York City residences and out-of-state shooting ranges or out-of-state homes.

IV. This Court should order the police commissioner to issue a restricted license to carry.

If the Court agrees that the City's policies violate the Second Amendment or otherwise violate federal law, an appropriate remedy must be fashioned. This Court has broad power to remedy constitutional violations. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971). But the remedy New York City proposed in an attempt to moot this case—*i.e.*, issuing "endorsements" on premises licenses for second homes and for target shooting locations throughout New York state—is doubtful under state law and thus may be beyond the City's power to implement.

In particular, such endorsements appear to conflict with the Sullivan Act, which limits the scope of premises licenses and distinguishes premises and carry licenses. But even if New York City, by virtue of its home-rule authority, has some power to "supplement" state law by issuing endorsements, its power to govern licensees outside the

geographic limits of New York City is especially doubtful. New York City has no more home-rule authority to govern the possession of weapons in Albany than Albany would have to govern weapons possession in New York City. For the remedy, then, this Court should order the New York City police commissioner to issue a license to carry a pistol under New York Penal Law § 400.00(2)(f) that is restricted to target shooting, hunting, and transportation between homes. That is how other licensing authorities in New York State authorize firearms transport when they do not issue full carry licenses.

Unlike States, which are sovereign, "local government units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 433 (2002). Article IX of the New York Constitution grants local governments extensive home-rule powers over *local* matters. N.Y. Const. art. IX, § 1 ("Every local government shall have power to adopt local laws as provided by this article."). Among other things, local governments have the "power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to . . . [t]he government, protection, order, conduct, safety, health and well-being of persons or property therein." N.Y. Const. art. IX, § 2(c)(10). "The principle of home rule" is "the right of self-government as to *local affairs*." *People ex. rel. Metro. St. Ry. Co. v. State Bd. of Tax Comm'rs.*, 67 N.E. 69, 70 (N.Y. 1903) (emphasis added), *aff'd* 199 U.S. 1 (1905).

In New York, home-rule powers are limited by state preemption. *Albany Area Builders Ass'n v. Town of*

Guilderland, 546 N.E.2d 920, 922 (N.Y. 1989). "Preemption applies both in cases of express conflict between local and State law and in cases where the State has evidenced its intent to occupy the field." *Id.* Although New York state extensively regulates firearms, New York courts have long held that state law does not preempt the entire field of firearms regulation. *See, e.g.*, *Grimm v. City of New York*, 289 N.Y.S.2d 358 (Sup. Ct. 1968). Nevertheless, conflict preemption bars local governments from creating ordinances, laws, or regulations that explicitly or implicitly contradict State law. *Norse Energy Corp. USA v. Town of Dryden*, 964 N.Y.S.2d 714, 718-19 (N.Y. App. Div. 2013).

Adding "endorsements" to premises licenses may present a conflict preemption problem. To be sure, there is no explicit textual prohibition on issuing "endorsements" to premises licenses. Recognizing this power, however, seems to conflict with the structure of the Sullivan Act. As explained above, *supra* Part I, Section 400.00(2) gives the Commissioner the authority to issue two types of firearm licenses: premises licenses for the possession of firearms within one's home or business and licenses to carry in public. By state law, a premises license merely allows a person to keep a firearm within the bounds of his residence or business. And Section 400.00(6) provides that "No [premises permit] shall be transferable to any other person or premises." An "endorsement" for a second residence would essentially transfer the premises license to another residence. Moreover, a person who violates a statutory limit on his license—say, a premises licensee who transports his firearm in public—commits a crime under state law. N.Y. Penal Law § 400.00(17). That law does not recognize any exception for a person holding an "endorsement" from a local government.

Further, the Commissioner does not have the right to issue a premises license for a second residence in another town. To prevent applicants from forum shopping for a gun license, "[a]pplications shall be made and renewed . . . where the applicant resides, is principally employed[,] or has his or her principal place of business." N.Y. PENAL LAW § 400.00(3)(a). Even though a pistol license is a state license, different criteria apply to different localities. For example, in New York City, licenses are valid for up to three years; in Nassau Suffolk, and Westchester, they are valid up to five years; and in the rest of New York, they are valid indefinitely. N.Y. PENAL LAW § 400.00(10)(a). If the City's theory were right, a person with homes in Westchester and the Catskills could get a lifetime license from a Greene County judge with an endorsement to his Westchester residence. That would obviously circumvent the intent of the legislature.

State law already provides for when local licensing authorities have power to authorize firearms outside their jurisdiction. Although issued by local jurisdictions, New York firearm licenses are *state* licenses, which are "valid notwithstanding the provisions of any local law or ordinance." N.Y. PENAL LAW § 400.00(6). New York State grants individuals with licenses to *carry* firearms the power to take firearms outside the local jurisdictions that issued their licenses. New York City licenses to carry are valid throughout the State. *Id.* Upstate licenses to carry are valid throughout New York State, except in New York City, in which they require a special endorsement from the New York City police. *Id.* But, again, this authority is a creature of state law.

What New York City is trying to do is different. Using its inherent home-rule authority, it is purporting to give premises license holders the authority to transport their guns for reasons beyond the legal authority granted by a state license. Even worse, it is purporting to grant licensees this power outside the territorial jurisdiction of New York City. But what grants the New York City Council or the New York Police Department the power to regulate the possession of weapons in Albany, Westchester, or the Catskills? That power has not been delegated by the legislature. *Cf.* N.Y. Const. art. IX, § 2(b)(3) (allowing local governments to act in non-local matters, provided the legislature has conferred the power upon the municipality). And by regulating weapons possession extraterritorially, the City is not using its home-rule power to regulate matters of local concern.

Now, it may be that the New York Court of Appeals would not view these endorsements as preempted by state law. New York's intermediate appellate court previously has approved these endorsements. In *de Illy*, the Appellate Division held that the target endorsement was not "supplanting the [Sullivan Act], but merely supplementing it." 6 A.D.3d at 218. And in *Sgueglia v. Kelly*, 134 A.D.3d 443 (N.Y. App. Div. 2015), the Appellate Division approved the Department's rules allowing licensees to take hunting weapons but not target weapons outside of New York City against claims that the regulations were arbitrary and capricious and violated the Equal Protection Clause. But although "decrees of lower state courts should be attributed some weight," these decisions are "not controlling where the highest court of the State has not spoken on the point," especially where there are strong indications "that the highest court of the state would

decide otherwise." *Comm'r v. Bosch's Estate*, 387 U.S. 456, 465 (1967) (internal quotation marks and citations omitted; ellipses omitted). Here, neither Appellate Division decision thoroughly examined the preemption question. The *de Illy* court's analysis was perfunctory. And *Sgueglia* did not directly raise the issue of whether the City has authority to issue endorsements valid outside New York City.

Although the issuance of extraterritorial "endorsements" creates tension with New York state law, this Court could order relief consistent with state law by ordering the New York City police to issue restricted licenses to carry pistols. A license to carry issued under subsection (f) is valid throughout New York State. N.Y. Penal Law § 400.00(2)(f), (6). The police commissioner could then use his inherent authority as a licensing officer to restrict the license to proper purposes. *Thompson*, 705 N.E.2d at 1201. A restricted license to carry will satisfy all the relief requested by Petitioners, and it will avoid the legal issues created by ordering the New York City police to "endorse" premises licenses in potential violation of state law.[10] This is the method employed by other New York jurisdictions that want to restrict firearm licenses to target shooting and related reasons.

10. Because Second Amendment challenges remain pending before this Court on whether a licensing officer can prohibit a licensee from carrying firearms in public for self-defense, *Gould v. Morgan*, 907 F.3d 659, 676 (1st Cir. 2018), *petition for cert.* filed, No. 18-1272 (Apr. 1, 2019), this Court should also make clear it is not implicitly deciding that broader issue if it resolves this case by ordering a restricted carry license.

CONCLUSION

Amicus curiae respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Second Circuit and issue an injunction ordering the Commissioner to issue carry permits.

Respectfully submitted,

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May 14, 2019