No. 18-280

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

SUGGESTION OF MOOTNESS

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INTRODUCTION

The Court granted certiorari in this case to decide whether a New York City regulation violated the Second Amendment or another constitutional guarantee insofar as it banned the "transport[of] a licensed, locked, and unloaded handgun to a home or shooting range outside city limits." Pet. for Cert. i. Two subsequent changes in law render that question—and this litigation—moot. First, the City has amended the challenged regulation to enable holders of premises licenses to transport their handguns to additional locations, including second homes or shooting ranges outside of city limits. Second, the State of New York has amended its handgun licensing statute to require localities to allow holders of premises licenses to engage in such transport. Independently and together, the new statute and regulation give petitioners everything they have sought in this lawsuit. The Court should accordingly vacate the decision below and remand with instructions to dismiss—or at least to consider in the first instance whether any Article III case or controversy still exists.

We respectfully also request that this Court rule on this motion as soon as is reasonably practicable. In light of the changes in state and municipal law, the City no longer has any stake in whether the Constitution requires localities to allow people to transport licensed handguns to second homes or firing ranges outside of municipal borders. So the City has no legal reason to file a brief addressing that substantive question on the merits. What is more, various organizations that might have views relating to the question presented—and that might have been considering filing bottomside amicus briefs—are caught in limbo, not knowing whether this case is going

forward. The sooner this Court resolves to dismiss this case, or that it should follow some other path, the better for all involved.

STATEMENT

1. The scheme for licensing handgun possession in New York City derives from a New York State statute, New York Penal Law § 400.00 (Consol. 2019). The statute recognizes two main types of handgun licenses. First, a "premises" license allows a "householder" to possess a handgun "in his dwelling," or a "merchant or storekeeper" to possess a handgun "in his place of business." *Id.* § 400.00(2)(a), (b). Second, a "carry" license permits the licensee to have and carry a concealed handgun in public. *Id.* § 400.00(2)(c)–(f).

New York law charges local officials with implementing the state licensing regime. *Id.* §§ 265.00(10), 400.00(3)(a). In New York City, the designated licensing official is the Commissioner of the New York City Police Department (NYPD). The NYPD Commissioner has promulgated rules regulating the possession of handguns by licensees. *See* 38 Rules of the City of New York (R.C.N.Y.), ch. 5.[1]

The City's rules recite that a handgun possessed under a premises license—the only type of license at issue here—must generally be kept at "the premises which address is specified on the license." *Id.* § 5-23(a)(2). At the same time, to ensure that persons can make proper and effective use of their premises licenses,

1. The Rules of the City of New York are available online at http://www.amlegal.com/codes/client/new-york-city_ny/.

the rules create certain exceptions. In particular, the rules authorize licensees to transport their handguns (unloaded and secured in a locked container, with the ammunition carried separately) for several specified purposes. For example, with the advance written permission of the NYPD, licensees may transport a handgun to a gunsmith. *Id.* § 5-22(a)(16). Furthermore, when this lawsuit began, licensees could transport a handgun directly to and from any shooting range or shooting club authorized by the NYPD. *Id.* § 5-23(a)(3). The NYPD authorized eight civilian firing ranges located within city limits, seven of which were open to anyone holding a valid handgun license. J.A. 92–93.

At the time of this lawsuit's filing, the City's rules did not allow persons with a premises license to transport their handguns to shooting ranges or shooting competitions *outside* of city limits. Nor did the rules make any provision for transport to a second home.

2. Petitioners—three individuals with New York City premises licenses and the New York State Rifle & Pistol Association—brought this lawsuit in the U.S. District Court for the Southern District of New York against the City of New York and the NYPD License Division. They sought to challenge two aspects of the City's transport rules for premises licenses. J.A. 26–48. First, the individual petitioners alleged that the transport rules prevented them from taking their handguns to shooting ranges and shooting competitions outside the City. J.A. 32–33. Second, one petitioner also asserted that the transport rules prevented him from taking his handgun

from his New York City residence to a second home that he owns in upstate New York. J.A. 32.[2]

Petitioners claimed that the transport restrictions at issue violated several constitutional guarantees: the Second Amendment, the dormant Commerce Clause, the right to interstate travel, and the First Amendment. J.A. 36–37. They requested only declaratory and injunctive relief, not any form of damages. J.A. 48. Specifically, petitioners sought to enjoin the City from enforcing its prohibition against premises licensees transporting their licensed handguns beyond city limits to a shooting range, shooting competition, or second home. *Id.*; *see also* Notice of Cross-Mot. for Summ. J. 1, S.D.N.Y. ECF No. 43 (seeking order allowing them "to attend a shooting range or competition or to travel to a second home"); Reply Mem. of Law in Support of Cross-Mot. for Summ. J. 1, S.D.N.Y. ECF No. 53 (arguing that the City's rule is unconstitutional in "its application to an individual who has a second home outside of New York City and its application to an individual who would like to travel to a shooting range or shooting competition outside of New York City").

3. The district court granted summary judgment against petitioners on all of their claims. Pet. App. 42–76.

4. The Second Circuit affirmed. Pet. App. 1–39. Before the panel and in their petition for rehearing en banc, petitioners reiterated that "the only places [they] seek to

2. As to the organizational plaintiff, the complaint alleged only that its members "participate in numerous rifle and pistol matches within and without the City of New York on an annual basis." J.A. 27.

transport" their licensed handguns are "shooting ranges or second homes." Pet. for Reh'g En Banc 1, 2d Cir. ECF No. 124; *see also* Pet. App. 7.[3] The Second Circuit held that petitioners' constitutional claims failed as a matter of law. Pet. App. 8–38.

5. Petitioners then sought certiorari in this Court. They asked the Court to decide "[w]hether the City's ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the Commerce Clause, and the constitutional right to travel." Pet. for Cert. i. The Court granted the petition. 139 S. Ct. 939 (2019).

6. About three months later, the NYPD announced proposed amendments to its transport rules with respect to premises licenses. As required by New York City Charter § 1043(b)(1)-(3), the NYPD published a notice of the proposed rulemaking in the City Record and forwarded the notice to the City Council, the Corporation Counsel, community boards, local news media, and local civic organizations. The NYPD has explained that it undertook the rulemaking in light of the continuation of this litigation and a state-court ruling regarding the availability of handgun licenses for second homes. *See* App. 3a–4a (Notice of Adoption of Final Rule).

A month after publishing the proposed amendments, NYPD held a public hearing. App. 1a. Then, on June 21,

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3. On appeal, petitioners stopped expressly breaking out their claim regarding shooting competitions. This is perhaps because the shooting competitions they have in mind take place at gun ranges. *See* J.A. 34.

2019, after reviewing written comments and receiving certification from the Corporation Counsel and Mayor's Office, NYPD published notice of adoption of the final rule. The final rule took effect on July 21, 2019. N.Y.C. Charter § 1043(f)(1)(c).

To start, the amended rules expressly codify various pre-existing practices in the interest of providing clarity for licensees. In particular, the amended rules provide that a licensee may transport a handgun from the place of purchase to the premises of the licensee, and from the licensee's premises to the offices of the NYPD License Division or the licensee's local police precinct, when authorized by the rules. App. 9a–10a (38 R.C.N.Y. § 5-23(a)(5), (6)). The amended rules further permit transport of a licensed handgun to a firearms dealer with the NYPD's written permission. App. 10a (38 R.C.N.Y. § 5-22(a)(16)).

Most relevant here, the amended rules also expand the transport authorizations in the prior rules to allow a premises licensee to transport a handgun directly to and from:

- Another residence, or place of business, of the licensee where the licensee is authorized to have and possess a handgun, whether located within or outside New York City; and

- A lawful small-arms range or shooting club, or a lawful shooting competition, whether located within or outside New York City.

App. 8a–9a (38 R.C.N.Y. § 5-23(a)(3)). Thus, the amended rules no longer prohibit a premises licensee from taking

a licensed handgun out of the home to attend a shooting range or shooting competition outside the City, or from transporting a handgun to the licensee's second home outside the City.[4]

7. Separate from the NYPD's amendments to its transport rules, on July 16, 2019, the Governor of New York signed a bill amending New York Penal Law § 400.00(6), effective immediately, to allow state premises licensees to transport their handguns. As specifically relevant here, the new law permits premises licensees to transport their pistol or revolver from one location where they may legally possess such weapon, directly to "any other location where [they are] lawfully authorized to have and possess" such weapon, and specifically references other dwellings or places of business, shooting ranges, and shooting competitions. App. 14a (N.Y. Penal Law § 400.00(6)). This law overrides any inconsistent state or local law. *See id.*

ARGUMENT

I. This case is moot.

The new state law, as well as the City's amendments to its regulations, independently and together render this case moot. This Court should vacate the decision below and remand with instructions to dismiss—or at least with instructions directing the lower courts to apply Article III principles in the first instance to the current

4. The NYPD also has clarified that the authorization to transport a handgun to another residence or place of business of the licensee includes the ability to transport a handgun when moving to a new premises. *See* App. 6a.

circumstances. *See, e.g.*, *United States v. Chesapeake & Potomac Tel. Co.*, 516 U.S. 415 (1996) (per curiam).

A. There is no longer a case or controversy because the changes in state and municipal law give petitioners all they seek.

1. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation," embedded in Article III, "of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976)). That is, federal courts may exercise their authority "only in the last resort, and as a necessity in the determination of real, earnest and vital controversy" between parties. *Chi. & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892); *see also Allen v. Wright*, 468 U.S. 737, 752 (1984). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006).

A core Article III principle is the concept of mootness. "Throughout the litigation, the party seeking relief must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *United States v. Juvenile Male*, 564 U.S. 932, 936 (2011) (per curiam) (internal quotation marks omitted). Therefore, if an event transpires while an appeal is pending that deprives the parties of "a personal stake in the outcome of the lawsuit," the case becomes moot and must be dismissed. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477–78 (1990) (internal quotation marks omitted). For an appellate court to proceed under such

circumstances to decide the case on the merits would be to issue an "advisory opinion[] on abstract propositions of law." *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam). And "[h]owever convenient" or tempting that might be, the Court lacks the power to declare "principles or rules of law which cannot affect the result" of the lawsuit before it. *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920).

2. An intervening change in law entitling plaintiffs to everything they seek is a classic event that renders litigation moot. A century ago, for instance, various carriers sought an injunction restraining the Interstate Commerce Commission from requiring certain actions the carriers argued the Commission lacked the ability to prescribe. When the case reached this Court, lawmakers turned their attention to the matter and enacted new legislation precluding the Commission from requiring the actions at issue. *Id.* at 115. The Court held that "the necessary effect" of the new statute was "to make the cause a moot one." *Id.* Because the plaintiffs no longer "need[ed] an injunction" to do what they wished to do, the only "proper course" was to "remand the cause to the court below with directions to dismiss." *Id.* at 116.

In the years since, the Court has reaffirmed these basic principles time and again. For instance, in *Hall v. Beals*, plaintiffs argued a residency requirement for voting was unconstitutional and sought an order enjoining it. 396 U.S. at 46–47. After this Court noted probable jurisdiction, the state legislature reduced the requirement from six to two months, thus rendering all of the plaintiffs qualified to vote. Because that change gave the plaintiffs everything they sought in their lawsuit, the case "lost its character as a present, live controversy of the kind that must exist if [the Court is] to avoid advisory opinions on

abstract propositions of law." *Id.* at 48. The Court thus "remanded with directions to dismiss the cause as moot." *Id.* at 50.

In *United States Department of Treasury v. Galioto*, 477 U.S. 556 (1986), the plaintiff sought an injunction invalidating a law that forbade him—as someone previously involuntarily committed to a mental institution—from purchasing a firearm. After oral argument, Congress enacted new legislation permitting such persons to obtain administrative approval to purchase firearms. *Id.* at 559. The Solicitor General then suggested that the claims before the Court may be moot. The Court agreed, explaining that, in light of the intervening legislation, the plaintiff could "no longer … contend[]" he was prohibited from taking the action he sued for the right to undertake. *Id.* at 559–60.[5]

5. The Solicitor General's position in *Galioto* was consistent with the position the federal government has taken in other cases with similar facts. For example, in *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597 (2013), the plaintiff sought, among other things, an injunction requiring the defendant to obtain a permit under the Clean Water Act for certain discharges into navigable waters. After the Court granted certiorari and on the eve of oral argument, the Environmental Protection Agency promulgated amendments to the regulation at issue, making clear no such permits were necessary. Noting that requests for injunctive relief turn on "the law in effect at the time of [a court's] decision," the Solicitor General argued that the amendments rendered the plaintiffs' demand for an injunction requiring a permit moot. Supp. Br. for United States at 5, *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597 (2013) (No. 11-338). The Court did not disagree and maintained jurisdiction only to decide whether other claims, unaffected by the amendment, were meritorious. *Decker*, 568 U.S. at 604–05; *see also, e.g.*, United States' Suggestion

And just last year, the Court dismissed as moot *United States v. Microsoft*, 138 S. Ct. 1186 (2018) (per curiam), in similar circumstances. The Court explained that legislation enacted after oral argument had amended the statute at issue, terminating any dispute between the parties "over the issue with respect to which certiorari was granted." *Id.* at 1188. The Court's two-page order, finishing with a single paragraph declaring the case moot, reflected how straightforward and uncontroversial its determination was.[6]

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of Mootness at 2, *United States v. Chesapeake & Potomac Tel. Co.*, 516 U.S. 415 (1996) (No. 94-1893) ("Because the provision under challenge in these cases has now been repealed [after oral argument], the cases are now moot.").

6. There are many similar dismissals. *See Bowen v. Kizer*, 485 U.S. 386, 387 (1988) (per curiam) (new legislation enacted after case was briefed and argued mooted case); *U.S. Dep't of Justice v. Provenzano*, 469 U.S. 14, 15–16 (1984) (per curiam) (new law enacted after grant of certiorari rendered case moot because Freedom of Information Act requests must be "judged under the law presently in effect"); *United Bldg. & Constr. Trades Council v. Mayor and Council of Camden*, 465 U.S. 208, 213–14 (1984) (repeal, after grant of certiorari, of municipal residency requirement "moot[ed] appellant's equal protection challenge based on that durational requirement"); *Diffenderfer v. Cent. Baptist Church*, 404 U.S. 412, 414 (1972) (per curiam) (intervening legislation rendered lawsuit seeking injunctive relief moot because availability of such relief turns on the "law as it now stands, not as it stood when the judgment below was entered"); *Bd. of Pub. Util. Comm'rs v. Compania Gen. De Tabacos De Filipinas*, 249 U.S. 425, 426–27 (1919); *Berry v. Davis*, 242 U.S. 468, 470 (1917); *see also Honig v. Doe*, 484 U.S. 305, 341 (1988) (Scalia, J., dissenting) (referencing settled rule that a case is moot where, after a grant of certiorari, "the law has been changed so the basis of the dispute no longer exists").

3. The same straightforward analysis applies in this case. Petitioners seek declaratory and injunctive relief against the City's former rule preventing them from transporting licensed handguns (1) "to attend a gun range" or "shooting competition" outside of the City; and (2) to a second home outside of the City. J.A. 48 (complaint); *see also* Pet. for Cert. i (question presented in this Court); Cert. Reply 1 (reiterating that petitioners seek only "the modest ability to transport their licensed firearms, unloaded and locked away separate from ammunition, to a shooting range or second home outside city limits"); Pet. App. 7 (similar recitation of claim in court of appeals).[7]

The new state legislation unequivocally allows plaintiffs to do everything they ask for. That legislation amended the section of the New York Penal Law regulating handgun licenses. The amendments allow holders of premises licenses to transport their pistol or revolver directly to or from any other location where they may legally possess it, and specifically refer to shooting ranges, shooting competitions, and other dwellings or places of business where they are authorized to have the firearm. App. 14a. These new amendments also operate notwithstanding any inconsistent state or local law. They accordingly moot the case all on their own.

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7. Petitioners' complaint also seeks attorney's fees and costs, and it asks for any other relief that is just and proper. J.A. 48. But a request for fees and costs is "insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Lewis*, 494 U.S. at 480. So, in these circumstances, is a boilerplate request for any other relief the court deems just and proper. *See Bain v. Cal. Teachers Ass'n*, 891 F.3d 1206, 1212–13 (9th Cir. 2018); *WildEarth Guardians v. Pub. Serv. Co.*, 690 F.3d 1174, 1191 (10th Cir. 2012).

The City's new regulation only confirms this case is moot. Just like the new state law, it allows people with premises licenses to transport their handguns, without geographic limitation, to shooting ranges, shooting competitions, or "another residence, or place of business, of the licensee, where the licensee is authorized to possess [his or her] handgun." App. 9a (38 R.C.N.Y. § 5-23(a)(3)). Petitioners therefore have no ongoing injury, and the City has no ongoing interest in the constitutionality of prohibiting people licensed to possess handguns in their homes from taking their guns to second homes, shooting ranges, or shooting competitions outside city limits. The municipal regulation that prohibited those activities no longer exists.

B. None of petitioners' objections to ordering dismissal has merit.

Even though this Court's practice of ordering cases dismissed as moot where an intervening change in law gives plaintiffs everything they want has become so well-settled as to be routine, petitioners previously signaled they may resist such a disposition. In a letter filed on April 19, 2019, petitioners complained that the City's new regulation was intended to "frustrate this Court's review" of the Second Amendment arguments they are asserting. Letter at 3. They also contended that the City's new rule could "raise serious voluntary cessation concerns" because the City defended the old one until it was changed. *Id.* But none of this hand-waving alters the basic fact that this case should be dismissed for lack of any continuing case or controversy.

1. It does not matter that this Court's grant of certiorari contributed to NYPD's decision to amend its

rules and may have contributed to the State's decision to change its law. Advances in pending litigation (and the accompanying prospect of a court decision) commonly spur new laws or regulations. Sometimes a realization regarding "the very *merit* of the [plaintiff's] claim le[ads] the defendant to capitulate before judgment." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 617 (2001) (Scalia, J., concurring). Other times a defendant simply decides that the continued "cost of litigation—either financial or in terms of public relations—would be too great." *Id.* In still other instances, this Court's grant of review commands the attention of busy policymakers in a way that a previously simmering dispute did not—spurring them to act on an issue that had been on their radar but that they had put to the side in favor of other matters that seemed more pressing. *Cf. Microsoft*, 138 S. Ct. at 1187.

In any of these scenarios, new legislation or regulations giving plaintiffs all they seek moots the case. *See, e.g.*, *Buckhannon*, 532 U.S. at 601 (noting that new legislation prompted by plaintiffs' lawsuit mooted case); *Fusari v. Steinberg*, 419 U.S. 379, 385 & n.9 (1975) (remanding case without reaching merits even though "this Court's notation of jurisdiction" may have contributed to state legislature's decision to amend the law at issue); *Kremens v. Bartley*, 431 U.S. 119, 128–29 (1977) ("The fact that the Act was passed after the decision below [and after this Court noted probable jurisdiction] does not save the named appellees' claims from mootness."). Simply put, governmental defendants are entitled, even after fighting for years, to reconsider their positions. That, in fact, is a primary purpose of litigation like this—to pressure the governmental actors to agree to a demand. And where

other actors who are not even parties to the litigation (such as the State here) change their laws in ways that accommodate plaintiffs' grievances, their motives for doing so are all the more irrelevant. All that matters is whether the plaintiffs' purported injuries have been redressed. If so, there is no longer a case or controversy.

2. Nor, as should already be clear, does it matter under Article III whether plaintiffs want to keep litigating instead of accepting their victory. It is hornbook law that parties cannot confer Article III jurisdiction on courts that otherwise lack it. "[A] dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm, falls outside the scope of the constitutional words 'Cases' and 'Controversies.'" *Alvarez v. Smith*, 558 U.S. 87, 93 (2009).

Time and again, therefore, this Court has ordered cases dismissed—or at least sent back to lower courts for Article III analyses—where intervening developments seemingly mooted a case but plaintiffs nonetheless implored the Court to decide it. *See, e.g.*, *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 102 (2013); *Alvarez*, 558 U.S. at 93; *Hall*, 396 U.S. at 48–49. This Court has done so even where it has recognized the constitutional issues it granted review to decide are of the utmost importance and the plaintiffs "earnestly seek a decision on the merits." *Kremens*, 431 U.S. at 136. Article III is absolute. No matter how "convenient for the parties and the public" it would be to have guidance on the scope of a constitutional provision, *Ashwander v. TVA*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring), there is no substitute for the requirement that the arguments the plaintiffs press be "embedded in an[] actual controversy about the plaintiffs'

particular legal rights," *Alvarez*, 558 U.S. at 93. Put another way, this Court may not "rule on a plaintiff's entitlement to relief" simply because he "won't take 'yes' for an answer." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 678, 683 (2016) (Roberts, C.J., dissenting).[8]

3. Finally, there is no basis for petitioners' suggestion that the "voluntary cessation" doctrine might apply in this case. Letter at 3. That doctrine holds that a party may not evade judicial review, or defeat a judgment, by "temporarily altering questionable behavior." *City News & Novelty v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001). Just like any other litigant, therefore, a governmental entity cannot moot a case simply by announcing that it will no longer engage in a certain practice or enforce a certain policy. *See, e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017). But, for two reasons, this doctrine does not apply here.

First, an actor other than the City has taken action that prevents the City from resuming the conduct

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8. Petitioners also complain that respondents have "procured a precedential decision" from the courts below upholding the prior law. Letter at 3. But this Court's jurisprudence already accounts for "the unfairness of according preclusive effect to a decision that [a party] had tried to appeal but could not." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 22 (1994). In that circumstance, the Court "reverse[s] or vacate[s] the judgment below and remand[s] with a direction to dismiss," eliminating any precedential effect of the prior decision. *Id.* (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39–40 (1950)); *see also Bowen*, 485 U.S. at 387 (issuing such an order where a change in law mooted the case); *Galioto*, 477 U.S. at 559–60 (same). Respondents recognize that such action would be appropriate here.

petitioners challenged. Specifically, the State of New York has changed its law and provided that any conflicting municipal law is invalid. *See supra* at 7. Because the new state law prohibits respondents from reverting to the prior rules even if they wanted to, the "voluntary" prong of the voluntary cessation doctrine is not implicated here. *See, e.g.*, *Lewis*, 494 U.S. at 482 (dismissing claim that state law violated the Commerce Clause as moot in light of intervening amendment to federal law); *Bowen*, 485 U.S. at 387 (dismissing a lawsuit challenging agency inaction as moot where Congress passed a law requiring agency action after this Court heard argument). The Court need go no further.

Second, even on its own terms, the City's change in law is not subject to the voluntary cessation doctrine. The voluntary cessation doctrine is "an evidentiary presumption that the controversy reflected by the violation of alleged rights continues to exist." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 213 (2000) (Scalia, J., dissenting). This presumption that defendants may well revert to prior conduct makes sense where defendants are private parties that control their own affairs—and even where defendants are public officials or governmental entities who have done nothing more than announce they will no longer engage in a certain practice or enforce a certain policy. But when a state or local government goes through all of the hoops necessary to bind itself to a new law, the presumption is that the new law has been enacted in good faith and is intended to be permanent. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts

presume that they have properly discharged their official duties." (internal quotation marks omitted)); *Preiser v. Newkirk*, 422 U.S. 395, 402–03 (1975).[9]

Accordingly, this Court has long treated a governmental defendant's change in law as falling beyond the reach of the voluntary cessation doctrine. *See, e.g.*, *Galioto*, 477 U.S. at 559–60 (amendment to federal law); *Kremens*, 431 U.S. at 126–27 (state law); *Diffenderfer v. Cent. Baptist Church*, 404 U.S. 412, 414–15 (1972) (per curiam) (same); *United Bldg. & Constr. Trades Council v. Mayor and Council of Camden*, 465 U.S. 208, 213–14 (1984) (municipal law); *Bd. of Pub. Util. Comm'rs v. Compania Gen. De Tabacos De Filipinas*, 249 U.S. 425, 426–27 (1919) (local law). "[A]ll the circuits to address the issue" also have agreed that a change in law "moots a plaintiff's injunction request" because governmental entities are presumed to make such changes without any intent to revert to prior law. *Fed'n of Adver. Indus. Representatives, Inc. v. City of Chi.*, 326 F.3d 924, 930 (7th Cir. 2003).[10]

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9. Principles of comity and federalism make clear that this presumption extends to state and local officials. *Chi. United Indus. v. City of Chi.*, 445 F.3d 940, 947 (7th Cir. 2006); *see also Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1283 (11th Cir. 2004).

10. These principles apply with equal force to changes in law made by formal administrative rulemaking. *See, e.g.*, *Ala. Hosp. Ass'n v. Beasley*, 702 F.2d 955, 961 (11th Cir. 1983); *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990); 13C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3533.6, at 259 (3d ed. 2008) (mootness principles apply equally to new "legislative rules established by statute or administrative regulation").

The two cases in which this Court has applied the voluntary cessation doctrine to changes in law only serve to confirm the doctrine's inapplicability here. In *Northeast Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), the Court held that new legislation did not moot the case because the new law continued to "disadvantage[the plaintiffs] in the same fundamental way" as the original law the plaintiffs challenged. *Id.* at 662. In other words, the new law did not fully (or even mostly) address the plaintiffs' alleged injuries. *Id.* at 662 & n.3. And in *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283 (1982), the Court held that a repeal of the challenged law did not moot the case because the defendant city expressly told the Court that if the case were held moot, it intended to reenact precisely the same provision that gave rise to the lawsuit. *Id.* at 289 n.11; *see also id.* at 296 n.* (White, J., concurring in part and dissenting in part); *see also Hunt v. Cromartie*, 526 U.S. 541, 545 n.1 (1999) (relying on *City of Mesquite* to hold that new legislation did not moot case "[b]ecause the State's [new] law provides that the State will revert to the [old] districting plan upon a favorable decision of this Court").

Neither of the special circumstances in those cases is present here. The City's new regulation fully addresses petitioners' alleged injuries. And the City has no intention of returning to its former regulatory scheme (even if it could, which, as noted above, it cannot because of the state legislation). The new rule is part of a broader reformation of the rules governing premises permits, to which the City is committed going forward. As then-Judge Sotomayor has explained, a municipality under these circumstances is entitled to "deference," thereby mooting the plaintiffs'

claims. *Lamar Adver. of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365, 375–77 (2d Cir. 2004).

Any other outcome would mean that a new law could *never* moot a case. It is always theoretically possible for a legislature or administrative body to revert sometime in the future to a prior law (at least in a case, unlike this one, where a relevant change would not be preempted). Yet sustaining jurisdiction to decide a case simply because a law might be passed in the future would be the *essence* of issuing an advisory opinion.

II. Even if the case were not moot, the proper course would still be to dismiss it without reaching the merits.

Even if this case were not moot, the intervening changes in state and local law would still counsel for dismissing the petition. There is no good reason for this Court to opine on the constitutionality of restricting the transport of handguns in ways that, according to petitioners themselves, no jurisdiction in the country currently does. And if the Court is interested in opining on other issues, such as the ability to carry guns in public, it should wait for a case that actually presents such a question.

1. Petitioners have repeatedly emphasized that the City's prior restriction on transporting handguns to firing ranges or second homes outside of municipal limits was a "novel, one-of-a-kind regulation with no analog in any other jurisdiction." Cert. Reply 7 (internal quotation marks omitted); *see also* Pet'rs' Br. 28 ("petitioners are aware of no other jurisdiction *in the entire country*" that prohibits law-abiding individuals from taking their lawfully owned

handguns to such places); *id.* at 35 (the City "stands alone"). Now that that restriction is no more, there is no reason for this Court to expend its resources to decide whether the limitations it imposed were constitutional. It is one thing to grant review in order to determine whether an "outlier" law transgresses constitutional principles. Cert. Reply 8. It is wholly another to decide whether limitations that *no* jurisdiction imposes would be constitutional.

2. Nor would it be proper to use this case to address the broader Second Amendment arguments that petitioners advance in their merits brief. After stressing at the certiorari stage (and throughout the litigation more generally) that all they seek is the "modest ability to transport their licensed firearms, unloaded and locked away separate from ammunition, to a shooting range or second home outside city limits," Cert. Reply 1, parts of petitioners' merits brief maintain in much more sweeping terms that "the Second Amendment protects a right to carry arms outside the home," Pet'rs' Br. 25; *see also id.* at 22 (suggesting prior generations understood the Second Amendment to guarantee a right "to carry loaded firearms upon their persons as they went about their daily lives").

Petitioners, however, have never challenged the regulatory regime under which the City grants licenses to carry handguns in public. Nor have they challenged the underlying state law distinguishing between premises licenses and carry licenses or setting standards for their issuance. By contrast, there have been, and will continue to be, numerous lawsuits across the country that squarely challenge restrictions on carrying handguns in public. *See, e.g.*, Pet. for Writ of Cert. 13–19, *Rogers v. Grewal*, No. 18-824 (cert. pending) (collecting cases). Consequently,

if and when this Court wishes to consider whether the Second Amendment guarantees a right to carry arms in public beyond transporting them to second homes or firing ranges, there will be every opportunity to do so in another case where the plaintiffs have actually sought such relief and challenged a law that stands in their way.

CONCLUSION

For the foregoing reasons, the Court should vacate and remand with instructions to dismiss—or at least with instructions directing the lower courts to apply Article III principles in the first instance to the current situation.

Respectfully submitted,

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July 22, 2019

APPENDIX

Appendix A

New York City Police Department

Notice of Adoption

NOTICE OF ADOPTION relating to transport of handguns by premises license holders pursuant to Chapters 5 and 16 of Title 38 of the Rules of the City of New York.

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED IN the Commissioner of the New York City Police Department ("Police Department") by Section 400.00 of the Penal Law, Sections 435 and 1043 of the New York City Charter, and Section 10-131 of the Administrative Code of the City of New York, and in accordance with the requirements of Section 1043 of the New York City Charter, that the Police Department hereby amends Sections 5-01, 5-22 and 5-23 of Chapter 5, and Section 16-02 of Chapter 16, of Title 38 of the Rules of the City of New York.

This rule was first published on April 12, 2019 (the "Proposed Rule"), and a public hearing was held on May 17, 2019.

Statement of Basis and Purpose of Final Rule

As the firearms-licensing officer for the City of New York, the Police Commissioner has promulgated rules governing the possession, carry, and transport of handguns by licensees. Section 5-01 of Title 38 of the Rules of the City of New York defines the types of available

handgun licenses in the City and generally describes the restrictions imposed by the different types of licenses. Section 5-01(a) defines a premises license as a restricted handgun license issued for a specific business or residence. Section 5-23 sets forth in greater detail the restrictions and conditions imposed by the different types of handgun licenses available in the City. Section 5-23(a) governs the possession and transport of handguns by holders of a premises license. Subdivision a provides that any handguns listed on a premises license may not be removed from the address specified on the license except as provided in Chapter 5 of Title 38 of the Rules of the City of New York. Section 5-23(a) authorizes a premises licensee to remove a handgun from the premises listed on the license to take it directly to and from one of the following destinations, provided that the handgun is transported unloaded, in a locked container, with the ammunition carried separately:

- An authorized small arms range/shooting club, to maintain proficiency in the use of a handgun, where all such authorized ranges/clubs are located within New York City; or

- An authorized area for hunting, provided that the licensee requested and received an appropriate amendment to the handgun license from the Police Department.

Separately, Section 5-22(a)(16) authorizes a licensee to transport the handgun to a gunsmith, with written authorization of the Police Department's License Division,

provided that the handgun is transported unloaded, in a locked container. Additionally, Chapter 16 of Title 38 of the Rules of the City of New York generally governs the transport or delivery of weapons into or within the City. Chapter 16 applies to circumstances described in that chapter not otherwise addressed by the Rules, including the transport of handguns by premises licensees.

The requirement that premises licensees keep at their premises the handguns listed on their licenses, along with the above two exceptions to that requirement, sought to balance public safety against the interests of licensees in maintaining proficiency in the use of their handguns and in using their handguns for hunting. Two legal developments occasioned a reexamination of the balance struck by these rules. The first was the New York Court of Appeals' decision in *Osterweil v. Bartlett*, 21 N.Y.3d 580 (2013), which held that the New York Penal Law permits the owner of a part-time residence in the state to apply for a handgun license in the jurisdiction of that residence, although the owner may be domiciled outside the state. Prior to the decision, the statute had been interpreted to require the applicant for a handgun permit to show that he or she was a domiciliary of the county (or City) where the application was filed. *See, e.g.*, *Matter of Mahoney v. Lewis*, 199 A.D.2d 734 (3d Dep't 1993). Following the *Osterweil* decision, a New York City resident who owns a second home elsewhere in the state apparently may apply to the licensing officer in that jurisdiction for a license to possess a handgun at the second home. The former rules, however, did not authorize a premises licensee to transport a handgun listed on a New York City premises

license to another premises where the licensee resides and is authorized to possess a handgun.

The second development was the *New York State Rifle and Pistol Association, Inc. v. City of New York* (*NYSRPA*) lawsuit, which challenges the former transport restrictions for premises licensees on Second Amendment and other constitutional grounds. One plaintiff in the case alleges that the former rules improperly prevented him from transporting a handgun listed on the premises license for his New York City residence to a second home upstate. Several plaintiffs allege that the former rules improperly prevented them from transporting their handguns to small arms ranges/shooting clubs outside of New York City for purposes of firearms training or competitions. *See New York State Rifle & Pistol Association, Inc. v. City of New York*, 883 F.3d 45 (2d Cir. 2018). The case is currently pending in the United States Supreme Court.

The *Osterweil* decision suggests that an accommodation of licensees who own second homes is warranted as a matter of New York law, and the ongoing *NYSRPA* case raises questions about the constitutionality of the former transport rules. The Police Department accordingly reviewed the rules and determined that it was possible to modify them to reflect a carefully considered accommodation to the interests of licensees while also ensuring the safe transport of handguns by licensees. In furtherance of this determination, the Police Department announced the Proposed Rule.

The Proposed Rule would have allowed a premises licensee to transport the handgun(s) listed on her/his premises license directly to and from any of the following locations, in addition to the locations authorized under the former version of section 5-23(a), provided that the handgun was transported unloaded, in a locked container, with the ammunition carried separately:

- Another residence or place of business where the licensee was authorized to have and possess a handgun;

- A small arms range/shooting club authorized by law to operate as such, whether located within or outside New York City; or

- A shooting competition at which the licensee was authorized to possess the handgun consistent with the law applicable at the place of the competition.

In addition to clarifying and otherwise adopting the transport authorizations found in the Proposed Rule, the Final Rule authorizes a premises licensee to transport the handgun(s) listed on her/his license as follows:

- When purchasing a handgun in accordance with 38 RCNY § 5-25, directly from the place of purchase to the address specified on the license, provided that the handgun is transported unloaded, in a locked container, with the ammunition carried separately;

- Directly to or from the offices of the License Division, or the licensee's local police precinct, as authorized by applicable rules, provided that the handgun is transported unloaded, in a locked container, without ammunition; or

- Directly to or from a dealer in firearms with written authorization of the License Division, provided that the handgun is transported unloaded, in a locked container. This authorization supplements the existing authorization of transport to a gunsmith.

The additional authorizations added in the Final Rule were included to codify existing practice in the interest of clarity. Toward that end, the Police Department further confirms that the authorization in 38 RCNY § 5-23(a)(3)(i) to transport a handgun to another residence or place of business of the licensee authorizes the licensee to transport a firearm when moving to a new premises in accordance with 38 RCNY § 5-27 or 5-29. Moreover, references in Chapter 5 of Title 38 of the Rules of the City of New York to an "authorized small arms range/shooting club," as applied to premises licenses, are intended to include any lawful small arms range, shooting club, or shooting competition, whether within or outside New York City.

The Final Rule continues to recognize the importance of public safety. It requires that (1) a handgun possessed pursuant to a premises license be kept at the premises when not being transported directly to or from, or possessed at, an authorized location; (2) any such

handgun be transported unloaded, in a locked container, with the ammunition carried separately (or, in certain cases, without ammunition); and (3) transport of any such handgun within New York City be continuous and uninterrupted. These requirements ensure that a person who has not obtained a carry license will continue to be unauthorized by a premises license to transport a firearm in operable condition in public.

New material is underlined.

[Deleted material is in brackets.]

Section 1. Subdivision (a) of Section 5-01 of Chapter 5 of Title 38 of the Rules of the City of New York is amended to read as follows:

§ 5-01 **Types of Handgun Licenses.**

* * *

(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, except when the licensee transports or possesses such handgun consistent with these Rules. [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.]

§ 2. Subdivision (a) of Section 5-23 of Chapter 5 of Title 38 of the Rules of the City of New York is amended to read as follows:

§ 5-23 **Types of Handgun Licenses.**

(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 or to any other location to which the licensee is authorized to transport such handgun in accordance with these Rules.

(3) [To maintain proficiency in the use of the handgun, the] The licensee may transport the handgun(s) listed on her/his [handgun(s) directly to and from an authorized small arms range/ shooting club] license, unloaded, in a locked container, the ammunition to be carried separately, directly to and from the following locations:

(i) Another residence, or place of business, of the licensee where the licensee is authorized to possess such handgun. Such residence or place of business may be within or outside New York City.

(ii) A lawful small arms range/shooting club or lawful shooting competition. Such range, club, or competition may be within or outside New York City.

(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.

(5) A licensee may transport her/his handgun(s), unloaded, in a locked container, without ammunition, to or from the offices of the License Division, or the licensee's local police precinct, as authorized by these Rules.

(6) When purchasing a handgun in accordance with 38 RCNY § 5-25, a licensee may transport the handgun, unloaded, in a locked container, the ammunition to be carried separately, directly from the place of purchase to the address specified on the license.

(7) Transport within New York City pursuant to Paragraph (3), (4), (5), or (6) of this subdivision shall be continuous and uninterrupted.

§ 3. Paragraph (16) of subdivision (a) of Section 5-22 of Chapter 5 of Title 38 of the Rules of the City of New York is amended to read as follows:

(16) Except for licensees with unrestricted Carry Business licenses or Special Carry Business Licenses, a licensee wishing to transport her/his handgun to a gunsmith or a dealer in firearms shall request permission in writing from the Division Head, License Division. Authorization shall be provided in writing. The licensee shall carry this authorization with her/him when transporting the handgun to the gunsmith or the dealer in firearms, and shall transport the handgun directly to and from the gunsmith or the dealer in firearms. The handgun shall be secured unloaded in a locked container during transport.

§ 4. Section 16-02 of Chapter 16 of Title 38 of the Rules of the City of New York is amended by adding a new Subdivision (c) to read as follows:

§ 16-02 **Applicability.**

This chapter shall apply to all persons who transport or deliver one or more weapons into or within any location in the City of New York, except that it shall not apply to:

* * *

(c) transport pursuant to 38 RCNY § 5-23(a)(3), (4), (5), or (6).

Appendix B

LAWS OF NEW YORK, 2019

CHAPTER 104

AN ACT to amend the penal law, in relation to the transport of pistols or revolvers by licensees

Became a law July 16, 2019, with the approval of the Governor. Passed by a majority vote, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 6 of section 400.00 of the penal law, as amended by chapter 318 of the laws of 2002, is amended to read as follows:

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. Such license to carry or possess shall be valid within the city of New York in the absence of a permit issued by the police commissioner of

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EXPLANATION--Matter in **italics** is new; matter in brackets [-] is old law to be omitted.

that city, provided that (a) the firearms covered by such license have been purchased from a licensed dealer within the city of New York and are being transported out of said city forthwith and immediately from said dealer by the licensee in a locked container during a continuous and uninterrupted trip; or provided that (b) the firearms covered by such license are being transported by the licensee in a locked container and the trip through the city of New York is continuous and uninterrupted; or provided that (c) the firearms covered by such license are carried by armored car security guards transporting money or other valuables, in, to, or from motor vehicles commonly known as armored cars, during the course of their employment; or provided that (d) the licensee is a retired police officer as police officer is defined pursuant to subdivision thirty-four of section 1.20 of the criminal procedure law or a retired federal law enforcement officer, as defined in section 2.15 of the criminal procedure law, who has been issued a license by an authorized licensing officer as defined in subdivision ten of section 265.00 of this chapter; provided, further, however, that if such license was not issued in the city of New York it must be marked "Retired Police Officer" or "Retired Federal Law Enforcement Officer", as the case may be, and, in the case of a retired officer the license shall be deemed to permit only police or federal law enforcement regulations weapons; or provided that (e) the licensee is a peace officer described in subdivision four of section 2.10 of the criminal procedure law and the license, if issued by other than the city of New York, is marked "New York State Tax Department Peace Officer" and in such case the exemption shall apply only to the firearm issued to such licensee by the department of taxation and

finance. A license as gunsmith or dealer in firearms shall not be valid outside the city or county, as the case may be, where issued. **Notwithstanding any inconsistent provision of state or local law or rule or regulation, the premises limitation set forth in any license to have and possess a pistol or revolver in the licensee's dwelling or place of business pursuant to paragraph (a) or (b) of subdivision two of this section shall not prevent the transport of such pistol or revolver directly to or from (i) another dwelling or place of business of the licensee where the licensee is authorized to have and possess such pistol or revolver, (ii) an indoor or outdoor shooting range that is authorized by law to operate as such, (iii) a shooting competition at which the licensee may possess such pistol or revolver consistent with the provisions of subdivision a of section 265.20 of this chapter or consistent with the law applicable at the place of such competition, or (iv) any other location where the licensee is lawfully authorized to have and possess such pistol or revolver; provided however, that during such transport to or from a location specified in clauses (i) through (iv) of this paragraph, the pistol or revolver shall be unloaded and carried in a locked container, and the ammunition therefor shall be carried separately; provided further, however, that a license to have and possess a pistol or revolver in the licensee's dwelling or place of business pursuant to paragraph (a) or (b) of subdivision two of this section that is issued by a licensing officer other than the police commissioner of the city of New York shall not authorize transport of a pistol or revolver into the city of New York in the absence of written authorization to do so by the police**

commissioner of that city. The term "locked container" shall not include the glove compartment or console of a vehicle.

§ 2. Severability. If any clause, sentence, paragraph, section, or part of this act shall be adjudged by any court of competent jurisdiction to be invalid and after exhaustion of all further judicial review, the judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section, or part of this act directly involved in the controversy in which the judgment shall have been rendered.

§ 3. This act shall take effect immediately.

The Legislature of the STATE OF NEW YORK **ss:**

Pursuant to the authority vested in us by section 70-b of the Public Officers Law, we hereby jointly certify that this slip copy of this session law was printed under our direction and, in accordance with such section, is entitled to be read into evidence.

ANDREA STEWART-COUSINS **Temporary President of the Senate**	CARL E. HEASTIE **Speaker of the Assembly**

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with
Assembly Rule III, Sec 1(f)

BILL NUMBER: A7752 REVISED 6/18/2019

SPONSOR: Dinowitz

TITLE OF BILL: An act to amend the penal law, in relation to the transport of pistols or revolvers by licensees PURPOSE: The purpose of this bill is to clarify when a pistol or revolver may be legally transported by a license holder, as well as set a statewide standard for the safe transportation of firearms.

SUMMARY OF PROVISIONS:

Section one of this bill allows for a license holder to transport their pistol or revolver from one location where they may legally possess such weapon directly to another location where they may legally possess such weapon, including another dwelling or place of business where they have a license, an indoor or outdoor shooting range, or a shooting competition. During transport for the holder of a license with a premises limitation, the pistol or revolver must be kept in a locked container and separate from the ammunition. Individuals who do not have a special permit issued by the Commissioner of the New York City Police would still be required to receive written authorization from the New York City Police Commissioner if they wish to transport a firearm to a destination in the City of New York.

Section two of this bill is a severability clause.

Section three is the effective date.

JUSTIFICATION:

Premise licenses for firearms in New York State allow a license holder to possess a firearm in a specific location, either their home or place of work, the address of which is specified on the license. Recognizing that premise license holders may have a legitimate reason to transport their firearms to another location, either another premise where they have a license to possess a firearm, a shooting range to practice their marksmanship, or a shooting competition, this bill seeks to clarify the ability of premise license holders to transport their firearms to and from locations where they may legally possess such firearm. In order to ensure that any transportation of firearms that occurs is done safely and responsibly, this bill requires that, during transport, such firearms must be kept in a locked container separate from the ammunition. As provided for under existing law, properly licenses individuals would not be prohibited from transporting a pistol or revolver through the City of New York in a continuous and uninterrupted manner and would not be required to obtain specific written authorization to do so.

LEGISLATIVE HISTORY:

New Bill.

FISCAL IMPLICATIONS:

None to the State.

EFFECTIVE DATE:

This act shall take effect immediately.