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

RESPONSE TO RESPONDENTS' SUGGESTION OF MOOTNESS

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INTRODUCTION

For decades, the City of New York imposed numerous restrictions on law-abiding residents that effectively prohibited them from transporting their licensed handguns anywhere beyond seven in-city ranges. Five years ago, petitioners (three city residents and an association representing handgun owners statewide) challenged that regime, insisting that the Second Amendment gives them a right to transport their licensed handguns to places where they can be lawfully possessed, like second homes, out-of-city ranges, and shooting competitions. For five years, the City actively and successfully defended its regime, ultimately procuring a Second Circuit decision that eliminated meaningful protection for Second Amendment rights. Then this Court granted certiorari, and the City abruptly shifted gears, undertaking a series of extraordinary maneuvers designed to frustrate this Court's review and obviate the City's need even to explain itself in a merits brief. The City's efforts culminated in a revised regulation designed to loosen the City's restrictions to the minimum degree necessary to render this litigation moot and a City-procured state law that actually grants the City unique authority to prevent non-residents from transporting licensed handguns through the city. Neither of those changes renders this controversy moot, and each vindicates this Court's well-grounded skepticism of voluntary cessation of unlawful conduct generally and of "postcertiorari maneuvers designed to insulate a decision from review by this Court" in particular. *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012).

The City's begrudging revisions to its restrictive transport ban reflect the City's unwavering view that the ability to transport a licensed handgun is a matter of government-conferred privilege, rather than a constitutional right. As a consequence, the revised regulations demand continuous and uninterrupted transport (forbidding a stop at a gas station or coffee shop en route), require written permission before a handgun can be taken to a gunsmith, and preclude transport to a summer rental house. If the City had suggested the same revisions as a proposed injunction after a loss on the merits, petitioners would have objected to them as inconsistent with their just-reaffirmed Second Amendment rights. The (in)adequacy of such miserly accommodations presents no less a live controversy when the City unilaterally imposes them as a supposed mooting event. Equally problematic, the City's revised rules, unlike a judicial declaration that the longstanding rules are and always have been unconstitutional, do nothing to prevent the City or another jurisdiction from using past non-compliance as a basis for denying future licenses. The City plainly has fallen far short of making it "impossible for a court to grant 'any effectual relief whatever'" to petitioners should they prevail before this Court. *Id.* (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000)).

The state legislation that the City procured also fails to eliminate a live controversy between the parties. The state law leaves many disputed questions—from the propriety of coffee stops to the scope of places where handgun use is "lawfully authorized"—to local officials. It thus does nothing to eliminate the ongoing controversy over issues such as

the adequacy of the City's rule demanding continuous and uninterrupted transport, or the possibility of localities attributing continuing consequences to past violations. Even more troubling, the state law contains a massive carve-out that allows the City—and the City alone—to prohibit non-residents from transporting a licensed handgun into or across the city. Thus, the City's claim that it "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," SM.1, is demonstrably wrong.

Of course, even if (contrary to fact) the new laws were so unequivocally accommodating of petitioners' constitutional claims so as to eliminate any immediate controversy, the unilateral and voluntary nature of the changes, along with their undisguised purpose to frustrate this Court's review, would justify injunctive relief to foreclose the possibility that the City could return to its ways. Especially given the City's ongoing regulation of constitutionally protected conduct through its licensing regime, the possibility of "effectual" injunctive relief is obvious. Indeed, the carve-out in the state law confirms that the City maintains an undiminished interest in prohibiting the transport of lawful handguns and has yielded only when and to the extent necessary to attempt to foreclose this Court's plenary review. In short, everything about this case confirms not only that a live controversy remains, but the wisdom of this Court's admonition that post-grant maneuvers designed to defeat the Court's exercise of discretionary review "must be viewed with a critical eye." *Knox*, 567 U.S. at 307.

BACKGROUND

1. Despite the Constitution's express protection of "the right of the people to keep and bear Arms," U.S. Const. amend. II, law-abiding residents of New York State are prohibited, under penalty of criminal prosecution, from "hav[ing] and possess[ing]" a handgun "in [their] dwelling" without a license. N.Y. Penal Law §400.00(2)(a); *see id.* §§265.01(1), 265.20(a)(3). In New York City, the police commissioner may deny a law-abiding resident's application for that necessary license for any number of reasons, including "good cause." Pet.App.47. And even if a law-abiding city resident succeeds in obtaining a "premises license," she must confine her handgun "to the inside of the premises" listed on the license at all times, save for a handful of narrow exceptions delineated by the City. 38 R.C.N.Y. §5-23(a)(2).

When petitioners initiated this challenge, when the Court granted certiorari in this case, and indeed until a few weeks ago, the City's rules provided that a premises licensee could remove her handgun from "the inside of the premises" under only two circumstances:

> (3) To maintain proficiency in the use of the handgun, the licensee may transport her/his handgun(s) directly to and from an authorized small arms range/shooting club, unloaded, in a locked container, the ammunition to be carried separately.
>
> (4) A licensee may transport her/his handgun(s) directly to and from an authorized area designated by the New York State Fish and Wildlife Law and in

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

Pet.App.88 (reproducing 38 R.C.N.Y. §5-23(a)). Although the City's rules did not specifically define what made a range or shooting club "authorized," the City took the position that the only "authorized" ranges and shooting clubs were those located in New York City—of which there were a grand total of seven open to the public. Pet.App.94-95.

The City steadfastly and successfully defended this restrictive licensing regime without suggesting any doubts about its constitutionality or wisdom. After two relists, this Court granted certiorari on January 22, 2019. After the Court informed the parties that it did not intend to calendar the case for argument until the 2019 Term, the parties agreed on an extended briefing schedule that would ensure that the case would be fully briefed in time to hear argument as soon as the Court returned from its summer recess.

2. Nearly three months after the Court granted certiorari, and mere weeks before petitioners were scheduled to file their opening brief, respondents filed a letter informing the Court that the City had proposed revisions to §5-23 that it believed would moot this case. *See* Letter from Richard Dearing to the Honorable Scott S. Harris (Apr. 12, 2019) ("Apr. 12 Letter"). That letter was accompanied by the revised

rule that the City had proposed for notice and comment, as well as a "Statement of Basis and Purpose" for that proposed rule. *See id.* Add.1-8.

In that Statement, the City maintained that its longstanding rule "seeks 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." *Id.* Add.3. Nonetheless, the City explained that it had decided to reevaluate the rule in light of "[t]wo legal developments." *Id.* The first was a six-year-old decision from the New York Court of Appeals confirming, based on the State's mid-litigation change in position, that "a New York City resident who owns a second home elsewhere in the state" is not confined to exercising his Second Amendment rights only in his principal residence, but rather (to use the City's skeptical words) "may apparently apply to the licensing officer in that jurisdiction for a license to possess a handgun at the second home." *Id.* (citing *Osterweil v. Bartlett*, 21 N.Y.3d 580 (2013)). The second was this Court's grant of certiorari in this case. *Id.*

Notably, the City did not announce that either *Osterweil* or the grant of certiorari had caused it to reevaluate the constitutionality or propriety of its existing rule. Far from it—the City emphasized that "[t]he Police Department has strongly believed, and continues to maintain, that the present Rule furthers an important public-safety interest." *Id.* But the City announced that, "in light of the *Osterweil* decision and the ongoing *NYSRPA* case," the Police Department had concluded that an "accommodation" could be made to allow "premises licensees to transport a

handgun listed on their premises license directly to and from" second homes, authorized shooting ranges, and shooting competitions outside the city, so long as it is unloaded and locked up in a container separate from its ammunition. *Id.* The City underscored that this limited "accommodation" would ensure that law-abiding premises holders "will continue to be unauthorized to transport a firearm in operable condition in public." *Id.* Add.3-4.

Although the proposed revisions to its rule had not yet been through the requisite notice-and-comment process, the City nonetheless considered their ultimate adoption a sufficiently forgone conclusion that it asked this Court to suspend merits briefing indefinitely. This Court declined, and petitioners filed their opening brief as scheduled.

3. Over the next three months, the City persisted in its efforts to preclude this Court from reviewing the constitutionality of its regime. First, the City revised §5-23 to provide, *inter alia*, as follows:

> (a) *Premises License–Residence or Business.* This is a restricted handgun license, issued for the protection of a business or residence premises.
>
> (1) The handguns listed on this license may not be removed from the address specified on the license except as otherwise provided in this chapter.
>
> (2) The possession of the handgun 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) The licensee may transport the handgun(s) listed on her/his 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.

SM.8a-9a (reproducing revised §5-23(a)(1)-(3)).

The City preserved the provision allowing for transport to authorized hunting areas with prior authorization from the police department. SM.9a (reproducing §5-23(a)(4)). Beyond making clear that its restriction is not limited to the city, the rule does not specify what makes a range, shooting club, or shooting competition "lawful."

Underscoring just how restrictive its premises license regime is, the City also added provisions "to clarify" that a licensee is not prohibited from transporting her handgun from the place where she purchased it to her residence—*i.e.*, from actually getting a handgun to the home where she is constitutionally entitled to keep it—or to a police station or licensing division. SM.9a-10a (reproducing

revised §5-23(a)(5)-(6)). But lest there be any doubt about the narrow scope of these exceptions to the general rule that "[t]he possession of the handgun is restricted to the inside of the premises," SM.8a, the City's new rule added the following constraint: "Transport within New York City pursuant to Paragraph (3), (4), (5), or (6) of this subdivision shall be continuous and uninterrupted." SM.10a (reproducing revised §5-23(a)(7)).

Before that new rule could even take effect, the City once again filed a letter asking this Court to suspend briefing, and further asked the Court to declare the case moot and vacate and remand with instructions to dismiss. *See* Letter from Richard Dearing to the Hon. Scott S. Harris 2 (July 3, 2019) (not accepted for filing) ("July 3 Letter"). The City also maintained that the case was on the verge of being "doubly moot" on account of pending state legislation regarding handgun transport. *Id.* at 3. The City closed by informing the Court that, even if the Court preferred to require the City to file its response brief and present oral argument, the City had no intention of addressing the question on which this Court granted certiorari because the City purportedly "no longer ha[s] any stake in that legal question." *Id.*

This Court rejected that letter as procedurally improper and directed that any claim of mootness be pursued through a Suggestion of Mootness. The City then took no further action for two weeks.

4. In the meantime, the State of New York enacted into law the proposed changes to N.Y. Penal Law §400.00(6) that the City had foreshadowed in its July 3 letter. Both on their face and in the official debates

that accompanied the new law, it is evident that the changes were passed to aid the City's efforts to frustrate this Court's review. Indeed, when expressly asked on the statehouse floor whether the legislation was designed to try to moot this case, its sponsor responded, "who knows what those five guys are gonna do." N.Y. State Assembly, *Record of Proceedings* (June 19, 2019), https://bit.ly/2K9MPK9 (Hon. J. Dinowitz).

The state legislation amends §400.00(6) to provide that, "[n]otwithstanding any inconsistent provision of state or local law or rule or regulation," a premises license "shall not prevent the transport of such pistol or revolver directly to or from" the following places:

> (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;

SM.14a. The new provision further provides, "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." *Id.*

On its face, the new state law makes clear that it is the product of a coordinated effort by the City and the State to moot this litigation without extinguishing the City's ongoing efforts to restrict transportation of licensed handguns through the city even when being transported to and from places where they can be lawfully possessed. In particular, the new law contains a special proviso that its transport exceptions do not apply with full force in New York City. Instead, under the new provision, a premises license "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." SM.14a-15a. Accordingly, while residents of New York City may now *leave* the city with their handguns, residents of other jurisdictions may not *enter* the city with theirs.

In other words, a member of petitioner NYSRPA who lives outside of New York City cannot join petitioners Romolo Colantone and Efrain Alvarez for a practice session at an in-city range. Similarly, given the geography of Long Island, an NYSRPA member living there who wants to participate in a New Jersey shooting competition still cannot do so, just as the City's previous regime precluded petitioners Colantone and Alvarez from doing so, *see* Pet.App.94, because she cannot cross the city with her handgun to get there. And Colantone, in turn, would be precluded from bringing a handgun registered only with

Delaware County, where his second home is located, to participate in a shooting competition in the city.

5. One week after the Governor signed the state legislation, the City finally filed a Suggestion of Mootness, accompanied by a motion seeking a further extension of the deadline to file its merits brief. The Court denied the latter, and petitioners now respond to the former.

ARGUMENT

I. Respondents Have Failed To Establish That This Case Is Moot.

As this Court recently explained, "postcertiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye." *Knox*, 567 U.S. at 307. That skepticism applies not only when assessing whether the challenged conduct is likely to recur, *see infra* Part II, but also when assessing whether those maneuvers actually succeed in eliminating any ongoing controversy and rendering the case moot. In short, the always-heavy burden of establishing mootness is all the heavier when, as here, an effort to moot a case is intended to thwart this Court's discretionary review. *See United States v. Or. State Med. Soc'y*, 343 U.S. 326, 333 (1952).

The City's undisguised effort to avoid a precedent-setting loss and to frustrate this Court's discretionary review falls short by every measure. "A case becomes moot only when it is impossible for a court to grant 'any effectual relief whatever to the prevailing party.'" *Knox*, 567 U.S. at 307 (quoting *Erie*, 529 U.S. at 287). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* at 307-08; *see also, e.g.*, *Chafin*

v. Chafin, 568 U.S. 165, 172 (2013). Here, petitioners continue to have a very concrete interest in the question on which this Court granted certiorari, and a decision resolving that question in their favor would entitle them to far more than the City has begrudgingly deigned to provide.

1. At the outset, there can be no serious dispute that the City has never abandoned its view that the right protected by the Second Amendment is a homebound right. Indeed, even in its latest incarnation, the City's premises licensing regime preserves a default rule that a law-abiding citizen may not remove her handgun from "the inside of [her] premises," except in the narrow set of circumstances the City is willing to accept. 38 R.C.N.Y. §5-23(a)(2).

To be sure, the City has now modestly expanded those circumstances to include a second residence and a "lawful" shooting range or competition "within or outside New York City." SM.8a-9a. But the City manifestly has not altered its view that any possession of a handgun outside the home, even when the handgun is unloaded and stored away, is a privilege that the City can micromanage, rather than an individual right. Thus, the City feels the need to "clarify" the seemingly obvious "exception" that a law-abiding, fully licensed New Yorker may bring her handgun "directly" home from the store where she purchased it, while the City claims the right to demand written permission before a trip to a gunsmith, *see* 38 R.C.N.Y. §5-22(a)(16), and to insist that transport to and from second homes and ranges occur without detour. In short, the City continues to claim plenary authority over any transport outside the

home, and its revised rule is plainly designed to provide the bare minimum of what the City believes will suffice to moot this case, and not an inch more.

Even by that yardstick, the City has come up far short. There is, after all, a fundamental difference between having a right declared (and confirmed by an injunction) on the one hand, and merely having a privilege extended—subject to all manner of restrictions and limitations that a successful litigant would never tolerate as conditions on an injunction—on the other. For example, while the City will now tolerate unloaded, locked-up transport "directly to and from … [a] lawful small arms range/shooting club or lawful shooting competition … within or outside New York City," SM.8a-9a, the City nowhere explains what qualifies as a "lawful" range, and it makes clear that it will tolerate no detours.

This is doubly problematic. The City's original regulation allowed transport to "authorized" ranges, and part of the difficulty came from the City's miserly definition of "authorized." There is thus a likely source of continuing conflict over the scope of "lawful." Equally problematic, the City has made clear that it will permit transport only directly to and from "lawful" homes, ranges, and competitions, and has specified that, within city limits, that means "continuous and uninterrupted" transport. Thus, if petitioners Colantone and Alvarez wanted to meet at the range and for coffee beforehand, the City would forbid it. That is an absurd restriction on a constitutional right, and petitioners would never agree to it as a condition in an injunction. They do not need to accept it as the final word in this litigation just because it is included

in a unilaterally imposed regulation; the controversy between the parties about the scope and nature of petitioners' Second Amendment rights remains alive and well.

Likewise, while the City will now tolerate unloaded, locked-up transport "directly to and from … [a]nother residence, or place of business," that residence or place of business must belong to "the licensee." SM.8a-9a. Apparently summer rental homes and family members' beach houses are out, even if both the property's owner and the jurisdiction in which the property is located respect the right to keep and bear arms in that home. The City's revised rule thus not only continues to put petitioners and NYSRPA members at risk of committing a crime if they try to transport their handguns to places where they are lawfully entitled to keep and bear them (in violation of the Second Amendment), but also continues to claim the power to regulate conduct that occurs wholly beyond the city's borders (in violation of the Commerce Clause).

Again, if petitioners had litigated this case to a successful conclusion and obtained a declaration that they have *a constitutional right* to transport their firearms to places where they are entitled to keep and bear them, they would not need to suffer the micromanagement of whether they stopped for gas or whether they owned or rented their place on the beach. And if the City insisted on including such limitations in a proposed injunction, petitioners would fight them tooth and nail as impermissible restrictions on the constitutional right just declared. The notion that the City's miserly view of such matters forecloses

further litigation and eliminates any case or controversy between the parties just because it is reflected in a unilateral regulation as opposed to a proposed injunction is mistaken.

2. Making matters worse, and underscoring the fundamental difference between what petitioners seek (a judicial declaration of a constitutional right) and what the City offers (a unilateral modification of prospective licensing terms), nothing in the City's revised rule precludes the previous version of the rule, which governed for nearly two decades, from having continuing adverse effects. There is, of course, a fundamental difference between judicial action, which is inherently retroactive and declares what the law has always been, and legislative and regulatory action, which are presumptively prospective and set licensing terms going forward. *See*, *e.g.*, *James M. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); *United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982). Thus, a judicial declaration that the City's longstanding restrictive licensing scheme is incompatible with the Second Amendment would mean that it *always* violated the Second Amendment and was null and void ab initio. And any effort to impose future regulatory consequences based on a past failure to comply would be foreclosed.

The City's prospective changes to its licensing conditions provide no comparable assurance. *See, e.g.*, *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 607-10 (2013) (intervening EPA regulation did not moot case because plaintiffs could still face consequences for their pre-change conduct). Indeed, the prospect of future consequences of past regulatory violations is

particularly acute in light of the demanding regulatory and licensing regimes imposed by the City and other jurisdictions.

As part of its extensive background check for issuing or renewing a handgun license, the City investigates whether the applicant has ever violated any law, including, as the application instructions specifically note, New York State Penal Law §400.00, the state law dealing with conditions on firearms licenses.[1] That is the same provision that an NYSRPA member would have violated had she, before the City decided to try to moot this case, taken her handgun to a nearby range in New Jersey based on the impression that such a range qualified as "authorized." Indeed, petitioners Colantone and Alvarez avoided making just such a mistake only because the organizers of the New Jersey shooting competition in which they sought to participate alerted them to the City's view that its transport ban precluded their participation. JA52 ¶6; JA56-57 ¶7; JA59-60 ¶7. The City—or, for that matter, any licensing jurisdiction—thus could deny an NYSRPA member a license for a failure to comply with a licensing condition that petitioners believe is incompatible with the Second Amendment and that the City has thus far successfully defended as constitutional.

That remains an all-too-real possibility even if the unwitting NYSRPA member was not prosecuted for violating the City's transport ban. All the City (or another licensing jurisdiction) would need to do is ask

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[1] *See* NYPD License Division, *New Application Instructions*, https://bit.ly/32ZM6Ui (last visited July 31, 2019).

the applicant the not-at-all unlikely question, "Have you ever violated a licensing restriction on a firearm?" An applicant who did not know that only in-city ranges were "authorized" when he took his handgun to the range in Yonkers, but later learned as much because of this case, would have to either disclose a violation or risk committing perjury, which undoubtedly is itself an offense that could result in a denial under the City's "good cause" standard. And even if the City were willing to represent that *it* would not deny any kind of license because of a past violation of its transport ban, the City certainly cannot represent that no other licensing jurisdiction would not do so.

NYSRPA's members thus continue to face the very real prospect of suffering adverse consequences—indeed, of being prohibited from exercising their Second Amendment rights *at all*—because of the City's transport ban. That risk would be eliminated by a judicial declaration that the licensing conditions, which petitioners have consistently assailed as unconstitutional and which the City has successfully defended, are in fact unconstitutional (and always have been). The City's proposed regulatory changes to its licensing conditions do not provide petitioners will the full relief they seek and have always sought in this lawsuit. A live controversy between the parties persists.

3. The recent state law amendment to which the City points does nothing to fix these problems. While the state law goes further than the City's rule, in that it permits unloaded, locked-up transport "directly to or from … any … location where the licensee is lawfully authorized to have and possess such pistol or

revolver," SM.14a, that new provision leaves to City officials determinations about how "directly to or from" transport must occur and which locations are "lawfully authorized." Indeed, given that the City plainly procured this state law as part of its concerted effort to moot this case, there is no reason to think the state law preempts any of the objectionable aspects of the City's regime addressed above, including the inability to stop for coffee or gas, the need for prior written permission to visit a gunsmith, and the like. Equally important, the newly procured state law neither retroactively preempts past licensing conditions nor precludes a licensing jurisdiction from denying a license for past failures to comply with the rules that petitioners insist are unconstitutional and that the City has successfully defended.

Beyond all that, the new transport "rights" that the state has "granted" are subject to a remarkable caveat: They do not apply with full force in New York City. A license "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." SM.14a-15a. As a result of that conspicuous proviso, while residents of New York City may now *leave* the City with their handguns, residents of other jurisdictions (and city residents with handguns registered elsewhere) may not *enter* the city with theirs. In other words, the City *still* claims—indeed, persuaded the state legislature to expressly reserve to the City alone—the power to preclude law-abiding NYSRPA members from transporting their unloaded, locked-up handguns

outside their homes to engage in the constitutionally protected conduct of target practice, shooting competitions, or self-defense in a second home. It is thus decidedly *not* true that "the City no longer has any stake" or "ongoing interest" in the constitutional questions this case presents, SM.1, 13, for the City continues to claim the very powers that petitioners maintain the Constitution denies it.

Nor is the City correct in its claim that the "changes in state and municipal law give petitioners all they seek," SM.8, for it remains the case today that the City may preclude NYSRPA members from "participat[ing] in numerous rifle and pistol matches within and without the City of New York on an annual basis." JA27. A resident of White Plains needs the City's permission to bring his handgun to a range in the city. And given the geography of New York, a Long Islander cannot remove her handgun from Long Island *at all* unless she accomplishes the unlikely feat of locating a boat or airplane on which she is permitted to transport it. Petitioner Colantone likewise could not bring to a New York City shooting competition a handgun that was licensed to him by Delaware County, where his second home is located. A judicial declaration that the City's efforts to micromanage the transport of lawfully possessed handguns between places they may lawfully be possessed would likely preclude these ongoing efforts, and surely effectual injunctive relief in this case could and would be crafted to preclude them.

Moreover, as the City acknowledges, *see* SM.12 n.7, petitioners sought all relief that "the Court deems just and proper," which plainly would encompass an

injunction not just against regulations that existed at the time, but against closely related aspects of new regulations.[2] Petitioners also sought "[a]ttorney's fees and costs pursuant to 42 U.S.C. §1988." JA48. The City conspicuously does not promise to pay petitioners all the fees and costs that they may seek. Instead, the City notes only that an interest in attorney's fees is ordinarily "insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." SM.12 n.7 (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990)). But here, there remains a very live controversy on the merits. And while this Court has opined that "courts should use caution to avoid carrying forward a moot case solely to vindicate a plaintiff's interest in recovering attorneys' fees," *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 192 n.5 (2000), it has never invoked that proposition in the context of "postcertiorari maneuvers designed to insulate a decision from review by this Court," *Knox*, 567 U.S. at 307.

* * *

[2] It is thus of no moment that petitioners' complaint did not specifically challenge aspects of the new regulatory regime that did not exist at the time. If a theatre owner challenged a law forbidding all displays of a movie, and the City amended its law mid-litigation to permit displays only between midnight and 2:00 am, that begrudging amendment would not moot the lawsuit or require the theatre owner to file a new lawsuit. *See Decker*, 568 U.S. at 609-10; *Ne. Fl. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993). In similar fashion, petitioners were under no burden to anticipate the latest rules, and their begrudging provisions neither render this lawsuit moot nor necessitate the filing of a second lawsuit.

In sum, the City's late-breaking attempt to frustrate this Court's review not only casts considerable doubt on any claim that the City will respect petitioners' rights going forward, *see infra* Part II, but falls far short of giving petitioners everything they could obtain in a successful lawsuit culminating in declaratory and injunctive relief. Indeed, if petitioners had succeeded in the litigation below, not only would they have obtained a declaration that the City's longstanding regime is and always was unconstitutional and can have no lingering effects, but they would have been under no obligation to accept a proposed injunction along the lines of the new city and state laws. They would not have had to simply accept a regime where they cannot stop for gas or coffee on the way to a shooting competition, or where they cannot meet a fellow NYSRPA member from the suburbs at a range in the city. They instead would be able to continue to insist that the Second Amendment rights that they vindicated provide them broader protection than the City is offering. The situation is no different when the restrictions are the product of unilateral regulatory changes rather than a proposed injunction. The new rules do not fully respect the constitutional rights petitioners have been seeking to vindicate for the past five years. They do not eliminate the live controversy between the parties. They do not moot this litigation.

II. Respondents' "Voluntary Cessation" Does Not Suffice To Render This Controversy Moot.

The City's mootness claim is all the more suspect because it is the product of the City's voluntary

cessation of the challenged conduct, in an avowed effort to insulate that conduct from this Court's review. While the City blithely insists that "[i]t does not matter that this Court's grant of certiorari contributed to NYPD's decision to amend its rules," SM.13-14, this Court has in fact cautioned that "postcertiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye." *Knox*, 567 U.S. at 307. And rightly so, both because a court with discretionary jurisdiction cannot be indifferent to efforts to frustrate its review, and because the motivations behind actions designed to moot a case speak directly to whether effectual relief could be granted and unconstitutional conduct could recur. When the party asserting mootness is engaged in an unabashed effort to preclude this Court from issuing a binding decision that would declare its longstanding practices unconstitutional and *compel* it to change its ways going forward, it should be plain that injunctive relief remains available, effectual, and necessary. That is precisely the case here.

1. It has long been settled law that "[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox*, 567 U.S. at 307. That is not an "exception" to mootness principles, but rather an application of them, because "[a] case becomes moot only when it is impossible for a court to grant 'any effectual relief whatever to the prevailing party.'" *Id.* (quoting *Erie*, 529 U.S. at 287). When a case is litigated to conclusion, the prevailing plaintiff is free to seek, and a court is free to grant, an injunction to guard against the risk that the losing

party will resume its illegal ways after the court yields its jurisdiction. That relief is no less available just because that party has temporarily abated those illegal ways (and is particularly appropriate when the government maintains a licensing regime implicating constitutionally protected conduct).

To be sure, the circumstances surrounding the "abandonment" of a challenged law or practice are "an important factor bearing on the question whether a court *should* exercise its power to enjoin the defendant from renewing the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) (emphasis added). But "that is a matter relating to the *exercise*, rather than the *existence*, of judicial power." *Id.* (emphasis added). Accordingly, unless the party asserting mootness can prove that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007), its voluntary cessation of the challenged practices does not suffice to deprive a court of Article III jurisdiction.

That already-high burden is higher still when, as here, the voluntary cessation follows an exercise of discretionary jurisdiction. While in the ordinary case a temporary evasion of mandatory jurisdiction may be deterred by the certainty that a court would entertain a follow-on lawsuit, the same thing is not true when the effort is designed to frustrate this Court's grant of certiorari. In that situation, a calculating party can conclude that the constellation of factors that led this Court to grant certiorari may not be likely to recur if the party resumes the challenged conduct. The need

for protection against such strategic behavior is thus all the more evident in such a case. Moreover, unless a case is moot in the Article III sense—which voluntary cessation alone will rarely accomplish—there is room for prudential factors to hold sway. And first and foremost among prudential factors in this Court should be the need to guard its system of discretionary review against machinations designed to defeat the Court's selection of a particular case or controversy for elucidation of an important question of law.

2. The City cannot begin to meet its heavy burden here. Indeed, this is the very last case in which the Court should give the benefit to the party asserting mootness, as the City's voluntary cessation is plainly the product not of a change of heart, but of a naked desire to prevent this Court from hearing this case on the merits. The City has never once taken the position, either in briefing or filings before this Court or in public statements, that it believes that the recent changes to its rules are constitutionally required. To the contrary, the City accompanied its proposed rule changes with a statement reiterating that "[t]he Police Department has strongly believed, and continues to maintain, that the present Rule furthers an important public-safety interest." Apr. 12 Letter at Add.3. And far from confessing error, the City has informed this Court that it does "not intend to address" the merits of this case at all. July 3 Letter at 3.

Those are hardly the actions of a defendant that has had a "realization regarding 'the very *merit* of [petitioners'] claim.'" SM.14 (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human*

Res., 532 U.S. 598, 616 (2001) (Scalia, J., concurring)). Indeed, if the City had truly realized the merits of petitioners' constitutional claims, then it would not have gone out of its way to preserve its regime for non-city-residents, or to continue its homebound premises licensing regime for city residents, confining handguns "to the inside of the premises" save for transport "directly to and from" a handful of locations that the City broadened only to the precise extent that it (mistakenly) thought would suffice to moot this case. 38 R.C.N.Y. §5-23(a)(2)-(3). The City instead would have abandoned entirely the asserted power to interfere with the transport of unloaded and safely stowed handguns to and from places where individuals are entitled to have them. The City's post-certiorari efforts to insulate its actions from this Court's review thus provide no comfort whatsoever that it would not revert to its past ways once the threat of this Court's review has passed—especially given its success in this litigation in persuading courts within the Second Circuit to apply only the most lax scrutiny to its regulatory efforts.

3. The City acknowledges that "[j]ust like any other litigant, … 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." SM.16. But the City claims that "a governmental defendant's change in *law*" (as opposed to a "practice" or "policy") "fall[s] beyond the reach of the voluntary cessation doctrine." SM.18 (emphasis added). At the outset, even assuming such a distinction exists, the City's rule change—which was accomplished through an administrative process that required no legislative vote, or even review—would

not fall on the "law" side of that line. The City conspicuously fails to identify any case in which this Court has endorsed its law/policy distinction at all—let alone endorsed its claim that this purported exception to voluntary cessation "principles appl[ies] with equal force to changes in law made by formal administrative rulemaking." SM.18 n.10. Moreover, even assuming that *some* administrative processes may be sufficiently "formal" to be comparable to changes in actual "laws," it is hard to see how the City's process could qualify when the City was so confident in the outcome of that process that it declared this case moot on the very same day that the notice-and-comment window opened.

But setting all that aside, the City's claimed distinction between "laws" and "policies" is difficult to square with the cases in which this Court has refused to treat a city's voluntary change to a *law* as sufficient to render a case moot. *See, e.g.*, *City of Mesquite*, 455 U.S. at 289; *Ne. Fl. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993). The City seeks to distinguish those as cases in which "the new law continued to 'disadvantage[the plaintiffs] in the same fundamental way' as the original law," SM.19 (quoting *Ne. Fl.*, 508 U.S. at 662), and in which "the defendant city expressly told the Court that if the case were held moot, it intended to reenact precisely the same provision," SM.19 (citing *City of Mesquite*, 455 U.S. at 289 n.11). But those distinctions cannot withstand scrutiny.

As for the former, the City's revised rule *does* continue to disadvantage petitioners in the same way, as it continues to put them at risk of adverse

consequences for transporting their handguns to places where they are entitled to have them. *See supra* Part I. More fundamentally, the new rule "does nothing to remedy the source of the … original policy"—namely, the City's mistaken view of handgun ownership as a matter of City-conferred privilege rather than constitutional right. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017). As for the latter, the voluntary cessation doctrine would be toothless if all a city needed to do to escape it were refrain from openly announcing its intention to revert to the challenged conduct if given the chance. It is also worth noting that, while the City is quick to invoke the purported *presumption* that a government entity will not revert to its former ways, it never actually promises that it has no intention of reinstating its former rule should a time come when it believes that it can do so without attracting the attention of this Court.

4. Instead, the only assurance the City offers is that "the new *state* law prohibits respondents from reverting to the prior rules even if they wanted to." SM.17 (emphasis added). But that is cold comfort when that new state law is itself the product of an acknowledged City-orchestrated effort to frustrate this Court's review.

There is no better illustration of that than the words of its sponsor, when asked whether his proposed legislation was designed to try to moot this case: "Who knows what those five guys are gonna do?" N.Y. State Assembly, *Record of Proceedings* (June 19, 2019), https://bit.ly/2K9MPK9 (Hon. J. Dinowitz). It is little surprise, then, that even the City concedes (with

considerable understatement) that "this Court's grant of certiorari … may have contributed to the State's decision to change its law." SM.13-14.[3]

Moreover, any claim that the City and the State are genuinely independent actors is belied both by the coordinated timing of their post-certiorari machinations and by the remarkable special carve-out for the City that the new state law includes. By providing that a premises license "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," SM.14a (emphasis added), the new law preserves to the City exactly the power that petitioners claim it lacks: the power to preclude law-abiding citizens from transporting their handguns to and from places where they are constitutionally entitled to have them.

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[3] To the extent the City means to suggest that it would be difficult for the State to later alter or repeal the new transport provisions that it just fast-tracked into existence, that claim is hard to reconcile with the fact that those amendments went from proposal to law in a matter of weeks and carved out authority for the City to regulate non-city residents to a fare-thee-well. Indeed, there is no better illustration of the City and State's continued willingness to regulate the transportation of licensed handguns in New York City to the maximum extent consistent with their overriding interest in mooting this case than the carve-out for non-city residents. Notably, the rapidity of the repeal-and-replace-to-moot effort here stands in stark contrast with the pace of various other firearms-related bills on which the Governor has now taken no action for six months and counting. *See* Tom Precious, *Gun control bills passed 6 months ago have yet to become NY laws*, The Buffalo News (July 25, 2019), https://bit.ly/2Znx6O1.

That presumably explains why the City is so careful to tie its mootness claims to its prior rules, as opposed to the claim of power underlying them. *See, e.g.*, SM.13 (asserting that "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*" (emphasis added)); SM.17 (asserting that state law now "prohibits respondents from reverting to *the prior rules*" (emphasis added)). Far from abandoning the notion that it has the power to prohibit people from transporting their handguns throughout New York City to take them to shooting ranges, shooting competitions, and second homes, the City succeeded in persuading the State to expressly reserve to it the power to do exactly that as to non-residents. The City cannot begin to meet its heavy burden of proving that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *Parents Involved*, 551 U.S. at 719, when the very legal changes to which it points were carefully crafted to ensure that the City can continue to engage in the same allegedly wrongful behavior, with the only plausible difference between what is permitted and foreclosed being what the City (wrongfully) perceived as necessary to moot this case.

The City's continuing regulatory and licensing efforts also inform the question of whether its voluntary cessation forecloses the possibility of effectual judicial relief. Whatever would be the case if the City discontinued the challenged regulations and simultaneously foreswore the close oversight of constitutionally protected conduct, the calculus is very

different when the government tweaks its licensing conditions but maintains an intensive and intrusive licensing regime. That licensing system ensures that the City will continue to oversee constitutionally protected activity and will have the temptation to apply its licensing discretion in ways that continue to hamper the exercise of petitioners' constitutional rights. In those circumstances, the possibility of effectual injunctive relief is obvious. In the First Amendment context, there would be an obvious difference between a jurisdiction that dismantled its parade permitting system altogether and one that merely tweaked the rules while continuing to assert an ongoing role in overseeing constitutionally protected activity. The same principles should apply in the Second Amendment context.[4]

5. Finally, the Court should thoroughly reject the City's remarkable request to dismiss this case even if it is *not* moot. SM.20-21. Throughout this litigation, the City has shown nothing short of contempt for the notion—seemingly settled by *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010)—that the Second

[4] To be clear, petitioners did not (and do not) challenge the constitutionality of the City's licensing regime vel non. But for purposes of determining whether the City's voluntary cessation renders this controversy moot and precludes the possibility of effectual judicial relief, there is a material difference between a voluntary decision to suspend the whole enterprise of closely monitoring and licensing constitutionally protected activity, and voluntarily altering the precise licensing conditions that were challenged while maintaining both the overall licensing regime and regulations of the manner in which constitutional rights will be exercised.

Amendment protects an individual right to keep and bear arms, not a mere privilege that municipal officials may deny as they see fit. The City has consistently taken the position that its transport ban "does not … *even meaningfully impact*" "the right to possess a handgun in the home for the purpose of self-defense"—which is the only Second Amendment right that the City will even (begrudgingly) acknowledge exists. BIO.19-20 (emphasis added); *see also, e.g.*, Br. for Appellees 13, *N.Y. State Rifle & Pistol Ass'n, Inc. v. The City of New York*, No. 15-638 (2d Cir. Sept. 15, 2015), Dkt. 62. And the City succeeded in persuading two lower courts to embrace that startling position.[5]

All of that presumably contributed to this Court's decision to grant certiorari even though petitioners were perfectly upfront about the fact that the City's transport ban was one-of-a-kind. *See* Pet.2-3. What makes this case so extraordinary, and such an appropriate candidate for this Court's review, is the fact that the lower courts managed to hold that novel regime constitutional. That makes this an excellent vehicle not only for examining the dubious forms of "scrutiny" to which lower courts are subjecting laws that burden Second Amendment rights, but for

[5] Even now the City does not concede that its longstanding regime violates the Second Amendment, which makes the City's suggestion of a dismissal or remand absurd. Even if the City conceded a constitutional violation, there would be a continuing controversy over whether the provisions of the new city and state laws adequately remedy that violation, which would be a sufficiently live controversy for Article III purposes. But given that the City does not concede the constitutional question on which this Court granted certiorari, the suggestion of a dismissal or remand makes no sense at all.

definitively laying to rest any notion that courts may "treat the right recognized in *Heller* as a second-class right." *McDonald*, 561 U.S. at 780 (plurality op.). Far from undermining the propriety of this Court's grant of certiorari, the City's palpable fear of a decision opining on the scope of the Second Amendment only reinforces the need for this Court's review.

Indeed, to vindicate the City's efforts to avoid that result would create perverse incentives. The City is not the first party to endeavor to frustrate this Court's review when the constitutional stakes are high. *See, e.g.*, *Knox*, 567 U.S. at 307; *Parents Involved*, 551 U.S. at 719; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1010-11 (1992). Time and again, this Court has rejected such efforts, reiterating that mootness is a high bar to establish—particularly when (as here) a mootness claim rests on voluntary cessation of the challenged conduct. The Court has done so not only because those mootness claims were unfounded, but because allowing parties to so easily frustrate the Court's efforts to resolve constitutional questions of national import would impede the orderly development of the law. To abandon that settled course now, when the City has not even tried to hide the fact that its paramount goal is to evade the prospect of a binding unfavorable decision from this Court, would stand as an invitation to future litigants to engage in similar post-certiorari maneuvers whenever they fear their arguments will not meet a welcome reception. Nothing in Article III commands that result, and nothing in common sense commends it.

CONCLUSION

For the foregoing reasons, the Court should reject respondents' suggestion of mootness.

Respectfully submitted,

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