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

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

Dear Mr. Harris:

I represent petitioners in the above-captioned matter. I write in response to respondents' April 12, 2019 letter making the unusual request that the Court stay the briefing in this case pending the outcome of an administrative rulemaking proceeding that was only recently initiated in response to this Court's grant of certiorari. A stay is neither necessary nor appropriate.

This litigation has been ongoing for more than six years. Throughout those six years, respondents have vigorously defended the City's novel handgun transport ban, which prohibits law-abiding New Yorkers from taking their licensed handguns anywhere—including any legal destination outside of the state of New York—other than the meager seven authorized shooting ranges within the limits of the 8.5-million-person city. *See* 38 R.C.N.Y. §5-23(a). In the courts below, respondents denied that the City's ban even implicates the Second Amendment, while simultaneously arguing that it is necessary to protect public safety. And, to date, respondents have succeeded not only in defending the City's ban, but in procuring a precedential decision upholding the ban and minimizing Second Amendment protections within the entire Second Circuit. Even now, respondents insist that the transport ban promotes public safety, but in a nakedly transparent effort to evade this Court's review, respondents have commenced an administrative rulemaking to reconsider the ban. Although that process was only recently initiated, and respondents have not yet received any of the public comments they have solicited, respondents make the extraordinary request that this Court stay any further briefing in this case. That request is radically premature and should be denied in all events.

Respondents ask this Court to put this case on indefinite hold merely because the New York City Police Department has initiated a rulemaking process involving *proposed* amendments

to §5-23(a) that they maintain, *if* adopted in their current form after public comment, *may* moot this case. To state the obvious, a proposed amendment is not law. Indeed, as a matter of city law, a proposed amendment cannot become law (absent extenuating circumstances that the Department has not invoked here) until the agency that proposed it has provided at least 30 days for written comments, followed by a public hearing on the proposal. N.Y.C. Charter §1043(b), (e); *see id.* §1043(i) (setting forth narrow circumstances under which a rule may be adopted without notice and comment, and allowing such rules to remain in force only 60 days). And the agency not only must seek public comments, but must actually consider them. The agency may adopt a final rule only "after consideration of the relevant comments presented." *Id.* §1043(e). Indeed, just as under the federal Administrative Procedure Act, failure to adequately consider comments on a proposed rule may be grounds for invalidating a final rule. *See, e.g.*, *St. Vendor Project v. City of New York*, 811 N.Y.S.2d 555, 561-62 (N.Y. Sup. Ct. 2005), *aff'd*, 43 A.D.3d 345 (N.Y. App. Div. 2007). After all, the point of the City's notice-and-comment rulemaking procedures is to ensure that its agencies actually consider the comments they receive. Accordingly, although respondents' letter and request leave the uncomfortable impression that respondents view the proposed amendments as a *fait accompli* and consider the public comment period and public hearing mere formalities, the law is to the contrary. Respondents thus cannot provide any legally valid assurance that the amendments the Department has proposed will be adopted at all, let alone be adopted in the precise form proposed.

The mere potential for potentially relevant agency action is hardly cause to put a case on indefinite hold after this Court has granted certiorari. The potential for government action that may strengthen the government's case or potentially moot the case entirely is inherent in the review of government action. This Court routinely grants certiorari despite the possibility that subsequent government action could move the proverbial goalposts or otherwise shape the issues being reviewed. If this Court routinely stayed the briefing in cases involving potential government action of that nature, it would be difficult for cases involving potentially unlawful government action to be briefed at all. There is certainly no reason to put the briefing on hold here merely because respondents have initiated a rulemaking process. *See, e.g.*, *Nat'l Asso'n of Mfrs. v. Dep't of Defense*, No. 16-299 (U.S. 2018) (denying motion to hold case in abeyance pending potential agency rulemaking). Petitioners stand ready to file their opening brief on May 7 as scheduled, and respondents' brief is not due until August 5, which is long after they claim the amendments are likely to take force if approved. If and when the proposed amendments take effect in some form, there will be time enough to brief any implications they may have on this case. Until then, this Court should decline respondents' request to put its review on indefinite hold while they embark on a rulemaking proceeding that may end up proving for naught.

At any rate, even assuming the proposed amendments to the City's transport ban were to be adopted in their current form, they would not moot this case. Indeed, it is not even clear that the City has the legal authority to take the action proposed, and the extent to which the City can

forbid or permit action beyond city and state borders is one of the issues included in the question presented. What is more, the timing and circumstances of respondents' efforts raise serious voluntary cessation concerns, as the proposed rulemaking appears to be an effort to frustrate this Court's review, rather than a serious effort to bring the City's regulatory regime into alignment with this Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). The statement accompanying the proposed rule does not even acknowledge that the transport ban is constitutionally infirm in its current form; instead, it acknowledges only that this Court has granted review to resolve that question. Indeed, the statement reflects the City's continuing belief that the existing ban serves important public safety goals. Combined with the fact that the City has previously denied that its policy seriously implicates the Second Amendment and has procured a precedential decision that denies meaningful protection of Second Amendment rights in the Second Circuit, respondents' proposed actions raise the concerns that underlay the voluntary cessation doctrine. Put simply, the proposed rulemaking appears to be the product not of a change of heart, but rather of a carefully calculated effort to frustrate this Court's review.

In all events, again, there will be time enough to brief the implications, if any, of the proposed amendments to the transport ban if and when they are actually adopted, and if respondents then file a suggestion of mootness or other appropriate filing. In the meantime, there is no reason to put this case on indefinite hold to accommodate respondents' nascent efforts to deprive this Court of jurisdiction to review the favorable decision that they procured.

Sincerely,

Paul D. Clement

cc: All counsel of record