No. 18-280

In the Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ET AL., PETITIONERS

v.

CITY OF NEW YORK, NEW YORK, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether New York City's ban on transporting a handgun to a home or a shooting range outside the City violates the right to keep and bear arms guaranteed by the Second and Fourteenth Amendments.

2. Whether New York City's ban on transporting a handgun to a shooting range outside the State violates the dormant Commerce Clause.

3. Whether New York City's ban on transporting a handgun to a shooting range outside the State violates the right to travel.

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in the preservation of the right of the people to keep and bear arms. In addition, Congress has enacted numerous laws regulating firearms, and the United States has a substantial interest in defending the constitutionality of those laws.

STATEMENT

1. The State of New York requires a person to obtain a license before he may possess a handgun. N.Y. Penal Law §§ 265.01, 265.20(a)(3) (McKinney 2017). A premises license entitles the holder to "have and possess" a handgun in a "dwelling" or "place of business." *Id.* § 400.00(2)(a) and (b) (McKinney Supp. 2019). In contrast, a carry license entitles the holder to "carry" a

"concealed" handgun. *Id.* § 400.00(2)(c)-(f) (McKinney Supp. 2019). An application for either type of license prompts an investigation into the applicant's criminal record, mental health, and moral character. *Id.* §§ 400.00(1), (3)(b), and (4) (McKinney Supp. 2019). After the investigation, the local licensing officer decides whether the applicant fulfills the statutory criteria. An applicant must establish, among other things, that he is at least 21 years old, that he has "good moral character," and that there is no "good cause" "for the denial of the license." *Id.* § 400.00(1) (McKinney Supp. 2019). An applicant for a carry license must also show "proper cause" "for the issuance" of the license, *id.* § 400.00(2) (McKinney Supp. 2019), which usually means that he must show "a special need for self-protection distinguishable from that of the general community," *In re Klenosky* v. *New York City Police Dep't*, 428 N.Y.S.2d 256, 256 (N.Y. App. Div. 1980). The licensing officer enjoys "considerable discretion" in applying these criteria. Pet. App. 3 (citation omitted).

The licensing officer for the City of New York is the New York City Police Commissioner. N.Y. Penal Law § 265.00(10) (McKinney Supp. 2019). The Police Commissioner has issued a rule—referred to here as the "transport ban"—under which a residential premises license or business premises license authorizes the possession of a handgun only "inside" "the premises" for which the license was issued. 38 R.C.N.Y. 5-23(a)(2). Under the transport ban, handguns ordinarily "may not be removed from the address specified on the license." 38 R.C.N.Y. 5-23(a)(1).

The Police Commissioner has made three exceptions to the transport ban. First, a license-holder may transport a gun "to and from [a] gunsmith," but only if he

asks for and receives written "permission" from the Police Department. 38 R.C.N.Y. 5-22(a)(16). Second, a license-holder may transport a gun "to and from" designated hunting grounds, but only if he receives a separate hunting authorization from the Police Department. 38 R.C.N.Y. 5-23(a)(4). Third, a license-holder may transport a gun "to and from an authorized small arms range/shooting club." 38 R.C.N.Y. 5-23(a)(3). Only firing ranges located in New York City qualify as "authorized," and there were seven authorized ranges when petitioners brought this lawsuit. Pet. App. 6, 94-96. Under each of these exceptions, the license-holder must transport the gun directly to and from the destination, in a locked container, unloaded, and (except for trips to a gunsmith) separate from the ammunition. 38 R.C.N.Y. 5-22(a)(16), 5-23(a)(3) and (4).

The Police Commissioner has not established comparable exceptions for the transportation of handguns to and from the license-holder's other residences, or to and from firing ranges outside the City. The transportation of handguns to and from these locations thus remains forbidden to premises license-holders, even if the owner carries the gun unloaded, locked, and separate from the ammunition. Pet. App. 94-96.

2. Petitioners New York State Rifle and Pistol Association, Inc., Romolo Colantone, Efrain Alvarez, and Jose Anthony Irizarry brought this lawsuit to challenge the City's restrictions on transporting handguns. Colantone, Alvarez, Irizarry, and members of the Association hold residential premises licenses and seek to transport their handguns to and from firing ranges outside the City. Pet. App. 7. In addition, Colantone seeks to transport his handgun between his home in the City and his second home in Hancock, New York. *Ibid.* As

relevant here, petitioners claimed that the transport ban violates the Second Amendment, the dormant Commerce Clause, and the right to interstate travel. *Id.* at 8.

3. The district court denied petitioners' motions for summary judgment and for a preliminary injunction, and granted the City's cross-motion for summary judgment. Pet. App. 42-76. The court rejected petitioners' claim that the transport ban violates the Second Amendment right to keep and bear arms. *Id.* at 59-65. Applying intermediate scrutiny, the court concluded that the restrictions "are substantially related to the City's substantial interest in public safety and crime prevention." *Id.* at 62. The court also rejected petitioners' claims that the transport ban violates the dormant Commerce Clause and the right to travel. *Id.* at 65-76.

4. The court of appeals affirmed. Pet. App. 1-39. Like the district court, the court of appeals rejected the claim that the transport ban violates the right to keep and bear arms. *Id.* at 9-29. The court used a "two-step inquiry" to evaluate the claim: first, "determine whether the challenged legislation impinges upon conduct protected by the Second Amendment," and second, if it does, "apply the appropriate level of scrutiny." *Id.* at 9-10 (citations omitted). The "appropriate level of scrutiny," in turn, depends on "two factors": "'how close the law comes to the core of the Second Amendment right'" and "'the severity of the law's burden on the right.'" *Id.* at 11 (citation omitted).

At the first step, the court of appeals assumed without deciding that the transport ban "impinge[d] on conduct protected by the Second Amendment." Pet. App. 10. At the second step, the court elected to apply intermediate scrutiny, on the ground that the transport ban imposed "at most trivial limitations on the ability of law-

abiding citizens to possess and use firearms for self-defense." *Id.* at 13.

Under intermediate scrutiny, the court of appeals upheld the transport ban. Pet. App. 24-29. According to the court, the City "presented evidence" that the transport ban served "to protect the public safety of both license-holding and non-license-holding citizens." *Id.* at 26. The court cited an affidavit from a former Commander of the City's License Division, who "explained that premises license holders 'are * * * susceptible * * * to stressful situations,' including driving situations that can lead to road rage, 'crowd situations, demonstrations, family disputes,' and other situations 'where it would be better to not have the presence of a firearm.'" *Ibid.* (citation omitted). In addition, according to the affidavit, "the New York Police Department concluded that officers cannot be expected to verify whether a licensee stopped with a firearm was, in fact, traveling to a firing range outside of the City." *Id.* at 27. The court asserted that, "[i]n contrast," petitioners had failed to demonstrate that the transport ban imposed "a substantial burden" on their rights. *Id.* at 28. The court stated that a license-holder who wants to transport a gun from one home to another could instead "acquir[e] a second gun to keep at that location." *Id.* at 15. The court further stated that new guns "can be rented or borrowed" at "most" gun ranges outside the City. *Id.* at 22.

The court of appeals also rejected petitioners' claims that the transport ban violates the dormant Commerce Clause and the right to travel. Pet. App. 30-36. In the court's view, the transport ban does not discriminate against interstate commerce, because petitioners remain "free to patronize firing ranges outside of New York

City"; "they simply [cannot] do so with their premises-licensed firearm." *Id.* at 31. The court likewise stated that "[t]he Constitution protects the right to travel, not the right to travel armed." *Id.* at 35.

5. In April 2019, nearly three months after this Court granted certiorari, the City issued a Notice of Public Hearing and Opportunity to Comment on Proposed Rule proposing amendments to the transport ban. The proposed amendments would allow a licenseholder to transport a handgun "directly to and from" "[a]nother residence or place of business where the licensee is authorized to possess such handgun," "[a] small arms range/shooting club authorized by law to operate as such" within or outside the City, and "[a] shooting competition at which the licensee is authorized to possess such handgun." Resps.' Mot. to Hold Briefing Schedule in Abeyance, Attach. 5. As of the time of the printing of this brief, the proposal remains under consideration.

SUMMARY OF ARGUMENT

I. New York City's transport ban infringes the right to keep and bear arms guaranteed by the Second and Fourteenth Amendments.

In *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), this Court held that the Second Amendment protects the right of a law-abiding, responsible citizen to keep a firearm in his home for lawful purposes such as self-defense. In this case, the Court should confirm that the Second Amendment also protects the right of a law-abiding, responsible citizen to take his firearm outside his home, and to transport it to other places—such as a second home or a firing range—where he may lawfully possess that firearm. The Second Amendment guarantees both the right to "keep" and the right to "bear" firearms.

Read naturally, the right to "bear" firearms includes the right to transport firearms outside the home; otherwise, the right to "bear" would add nothing to the right to "keep." In addition, the right to "keep" arms, on its own, implies the right to transport firearms between the home and at least some places outside the home—for instance, the place of purchase, the repair shop, and the firing range.

Like other rights, the right to transport firearms is not absolute. To determine whether a law violates this right, a court should look first to the text of the Second Amendment, the history of the right to keep and bear arms before ratification, and the tradition of gun regulation after ratification. In *Heller*, the Court held that the District of Columbia's near-complete ban on the possession of handguns in the home violated the Second Amendment because the District had "totally ban[ned]" an activity protected by the Second Amendment's text, because "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban," and because "some of those few have been struck down." 554 U.S. at 628-629. Each of those observations is also true of the transport ban here. The transport ban constitutes an almost-total prohibition on the transportation of arms outside the home; it bans the carrying of firearms to virtually any destination, including a second home or a firing range outside the City, even when those firearms are locked, unloaded, and separate from ammunition. Few laws in the history of our Nation, or even in contemporary times, have come close to such a sweeping prohibition on the transportation of arms. And on some of the rare occasions in the 19th and 20th centuries when state and local governments have adopted such prohibitions, state courts have

struck them down. That is enough to establish that the transport ban is unconstitutional.

II. Petitioners also contend that the ban on transporting handguns to firing ranges outside the City violates the dormant Commerce Clause and the right to interstate travel. Because the ban violates the Second Amendment, the Court need not reach these additional constitutional arguments.

In any event, the ban violates the dormant Commerce Clause. Under that doctrine, a state or local government ordinarily may not discriminate against interstate commerce in favor of local commerce. On its face, the transport ban discriminates against interstate commerce: It allows a license-holder to take his firearm to a local firing range, but precludes him from taking his firearm to a firing range outside the City.

Contrary to petitioners' contentions, however, the transport ban does not violate the unenumerated right to interstate travel. This Court has explained that a law violates this right only if it directly impairs interstate travel by imposing an obstacle to free movement across state borders. The transport ban does not directly impair interstate travel. The ban does not regulate travel as such; rather, it forbids a person to remove his firearm from his home, irrespective of whether he means to travel to another State or to do something else.

ARGUMENT

I. THE TRANSPORT BAN INFRINGES THE RIGHT TO KEEP AND BEAR ARMS

The Second Amendment, which binds New York City by virtue of the Fourteenth Amendment, provides: "A well regulated Milita, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." New York City's near-

total ban on transporting firearms outside the home—including to places such as second homes and out-of-city firing ranges—violates this constitutional guarantee.

A. The Second Amendment Protects A Right To Transport Arms Outside The Home

The right to keep and bear arms includes more than the right to possess a firearm at home. It also includes the right to take that firearm out of the home, and to transport it to other places—such as an additional home or a firing range—where the owner has a right to possess and use the firearm for lawful purposes. The government may regulate in certain respects the manner in which firearms are transported, but it may not forbid the transportation of firearms altogether.

1. The right to "bear arms" includes a right to transport arms outside the home for lawful purposes. The ordinary, common-sense meaning of the term "bear arms" includes the transportation of arms outside the home. In *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), this Court explained that, "[a]t the time of the founding, as now, to 'bear' meant to 'carry.'" *Id.* at 584. The term "bear arms" thus "means * * * simply the carrying of arms." *Id.* at 589. That carrying can occur outside the home. It is natural to speak of "bearing arms" outside the home, but awkward to speak of "bearing arms" indoors. And it is "extremely improbable" that those who adopted the Second Amendment understood the right to bear arms as nothing more than the right to carry a gun "from the bedroom to the kitchen." *Peruta* v. *California*, 137 S. Ct. 1995, 1998 (2017) (Thomas, J., dissenting from the denial of certiorari).

This meaning of the term "bear arms" becomes even more evident in the context of the phrase "right of the people to keep and bear arms." On any reasonable

reading, the right to "keep" arms already includes the right to carry arms within the home—say, from the bedroom to the kitchen. If the right to "bear" arms were limited to the home, it would be superfluous, adding nothing to the right to "keep" arms. The word "bear" contributes something meaningful to the Second Amendment only if it encompasses the "bearing" of arms outside the home.

2. Quite apart from the right to "bear" arms, the right to "keep" arms includes a right to take arms outside the home for some purposes. It is an "ancient" principle of interpretation that "[a]uthorization of an act also authorizes a necessary predicate act." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 192 (2012) (emphasis omitted). This principle is especially important in the interpretation of the Constitution, which does not "partake of the prolixity of a legal code," and which marks only the "great outlines" and designates only the "important objects," leaving "the minor ingredients" to "be deduced from the nature of the objects themselves." *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819). In accordance with this principle, constitutional rights "implicitly protect those closely related acts necessary to their exercise." *Luis* v. *United States*, 136 S. Ct. 1083, 1097 (2016) (Thomas, J., concurring in the judgment).

In some circumstances, carrying arms outside the home is necessary to exercise the right to keep arms within the home. For example, in order to get the firearm home, the owner must ordinarily first bring it home from some other place. In order to become proficient in the use of the firearm for self-defense, the owner may have to carry it to and from a firing range where he can practice with it. And in order to keep the firearm in

good repair, the owner may have to carry it to and from a gunsmith.

The right to "keep" arms has traditionally been understood, on its own, to imply the right to transport arms to these and similar places. *Andrews* v. *State*, 50 Tenn. (3 Heisk.) 165 (1871)—a decision on which this Court repeatedly relied in *Heller*, see 554 U.S. at 608, 614, 629—illustrates this point. There, the Tennessee Legislature had adopted an "absolute prohibition" on the carrying of pistols "publicly or privately, without regard to time, or place, or circumstances"—even "from [one's] home to a gunsmith to be repaired." *Andrews*, 50 Tenn. (3 Heisk.) at 187. The Tennessee Supreme Court held that this absolute prohibition violated the right to "keep arms" guaranteed by the state constitution. The court explained that the "right to keep arms" "clearly" includes "the right to carry them to and from [one's] home" for purposes such as "purchase" and "repair." *Id.* at 178. The court further explained that the "right to keep arms" "involves the right to practice their use," *ibid.*, and acknowledged that the right accordingly protects the "carrying [of] arms" to such places as are "necessary" for the owner's "familiarity with them, and his training and efficiency in their use," *id.* at 182.

3. The purposes of the right to keep and bear arms confirm that the right includes the freedom to take arms from the home to appropriate places outside the home. The Second Amendment guarantees a right to keep and bear arms for "lawful purpose[s]." *Heller*, 554 U.S. at 620 (quoting *United States* v. *Cruikshank*, 92 U.S. 542, 553 (1876)). In *Heller*, the Court identified several such lawful purposes: the "core lawful purpose of self-defense," *id.* at 630; "'learning to handle and use [arms],'" *id.* at 618 (citation omitted); and "hunting," *id.* at 599.

But the right to keep and bear arms can serve those purposes only if one can take one's arms from the home to places outside the home. For example, the need for self-defense can arise outside one's primary home—say, in a second home. Training with weapons occurs outside the home. And hunting occurs outside the home. To confine a weapon to the home is thus to preclude the owner from using it for many of the purposes that the right to keep and bear arms is meant to serve.

The prefatory clause reinforces this reading. The prefatory clause shows that the Framers of the Bill of Rights codified the individual right to keep and bear arms in order to preserve a "well regulated militia." A militia, in turn, was considered "necessary to the security of a free State" because it was "useful in repelling invasions and suppressing insurrections," made "large standing armies unnecessary," and enabled the people "to resist tyranny." *Heller*, 554 U.S. at 597-598. The militia could serve these functions, however, only if people could take the arms they kept in their homes to places outside their homes. Indeed, the traditional militia consisted of men who "appear[ed] bearing arms supplied by themselves"; "weapons used by militiamen and weapons used in defense of person and home were one and the same." *Id.* at 624-625 (citations omitted). A statute enacted a year after the Second Amendment thus required militiamen to appear "armed, accoutered and provided, when called out to exercise, or into service." Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271. The prefatory clause contemplates that people may not only keep arms within their homes, but also transport those arms outside their homes, for example to the place of training.

4. The court of appeals (like some other courts) misread *Heller* to mean that the "core" of the Second Amendment is the "right to keep and use firearms in self-defense *in the home*." Pet. App. 17 (emphasis added). In *Heller*, this Court explained that the Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation," without suggesting that the guarantee is limited to the home. 554 U.S. at 592. The Court's references to the "core" of the Second Amendment served to distinguish self-defense from other lawful purposes such as hunting, not to distinguish the home from places outside the home. The Court thus explained that "self-defense" is "the *central component* of the right," *id.* at 599; that the "right of self-defense" is "central to the Second Amendment right," *id.* at 628; and that the Second Amendment guarantees a right to use firearms "for the core lawful purpose of self-defense," *id.* at 630. In *McDonald* v. *City of Chicago*, 561 U.S. 742 (2010), the Court reaffirmed that "individual self-defense is 'the *central component*' of the Second Amendment right" and that the "'inherent right of self-defense [is] central to the Second Amendment right.'" *Id.* at 767 (citations omitted). In neither case did the Court suggest that the right to keep and bear arms is limited to the home.

B. The Transport Ban Infringes The Right To Transport Arms Outside The Home

Like the right to possess arms at home for self-defense, the right to transport arms outside the home is not absolute. *Heller* establishes that a court should discern the scope of this right—and other rights secured by the Second Amendment—by first turning to the Amendment's text, the history of the right to keep and bear arms before ratification, and the tradition of gun

regulation after ratification. In this case, text, history, and tradition demonstrate the invalidity of the City's transport ban. The ban all but negates the textually protected right to bear arms, and interferes with the right to keep arms as well; few laws in our history have restricted the right to keep and bear arms as severely as the ban does; and some of those few have been struck down.

1. This Court explained in *Heller* that a regulation of firearms is "presumptively lawful" if it is "fairly supported" by "historical tradition." 554 U.S. at 627 & n.26. The Court emphasized that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-627. A plurality of the Court "repeat[ed] those assurances" in *McDonald*. 561 U.S. at 786.

In addition, *Heller* establishes that modern firearm regulations can be constitutional even if they do not mirror colonial regulations. Just as the Second Amendment protects some modern weapons that were not "in existence in the 18th century," *Heller*, 554 U.S. at 582, so too it permits some modern regulations that were not in existence in the 18th century. It is enough if the modern law is "fairly supported" by tradition—if, for example, it is reasonably analogous to a restriction that legislatures have traditionally enacted, or traditionally been understood to have the power to enact. For example, the historical understanding that the government may disarm people because of "crimes committed, or real danger of public injury," *United States* v. *Skoien*, 614 F.3d

638, 640 (7th Cir. 2010) (en banc) (quoting *Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents*, *reprinted in* 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 662, 665 (1971)), cert. denied, 562 U.S. 1303 (2011), fairly supports modern laws disarming felons, drug addicts, people with mental illnesses, stalkers, and domestic abusers, 18 U.S.C. 922(g)(1), (3), (4), (8), and (9). The tradition of prohibiting the carrying of arms in sensitive places, such as "a church," "a lecture room," or "a ball room," *English* v. *State*, 35 Tex. 473, 479 (1871), fairly supports modern laws prohibiting the carrying of arms in other sensitive places, such as school zones, 18 U.S.C. 922(q). And the tradition of imposing reasonable "conditions and qualifications on the commercial sale of arms," *Heller*, 554 U.S. at 626-627, supports modern federal laws that regulate arms sales, see, *e.g.*, 18 U.S.C. 922(a)-(c).

Conversely, a law presumptively violates the Second Amendment if it regulates an activity protected by the Amendment's text in a way that goes "far beyond the traditional line of gun regulation." *Heller* v. *District of Columbia*, 670 F.3d 1244, 1270 (D.C. Cir. 2011) (*Heller II*) (Kavanaugh, J., dissenting). For example, in *Heller*, this Court concluded that the District of Columbia's handgun ban violated the right to keep and bear arms because it in effect "totally ban[ned]" an activity protected by the Second Amendment's text, because "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban," and because "some of those few have been struck down." 554 U.S. at 628-629.

Text, history, and tradition are as definitive here as they were in *Heller*. These guides therefore provide

both the starting and the ending point of the constitutional analysis in this case, and the Court need not decide what additional indicia of constitutional meaning judges should consult when interpreting the Second Amendment.

2. Like the handgun ban at issue in *Heller*, the transport ban at issue in this case amounts to a near-complete prohibition. See 554 U.S. at 629. The ban nullifies the right of holders of premises licenses to "bear" arms, because it all but eliminates their ability to transport their firearms outside their homes. The ban provides that a handgun "may not be removed from the address specified on the license." 38 R.C.N.Y. 5-23(a)(1). It applies 24 hours a day, 365 days a year. It applies to the transportation of firearms anywhere in the City. It applies regardless of the manner in which the owner carries the firearm—in fact, even if the owner unloads the firearm, locks it away, and keeps it separate from the ammunition.

The narrowness of the exceptions only confirms the breadth of the ban. A firearm owner who holds a premises license may transport his handgun to firing ranges in the City, designated hunting grounds, and gunsmiths, but nowhere else. 38 R.C.N.Y. 5-22(a)(16), 5-23(a)(3) and (4). The owner may also seek a carry license, but such a license is ordinarily available only in extremely limited circumstances. See, *e.g.*, *In re Klenosky* v. *New York City Police Dep't*, 428 N.Y.S.2d 256, 256 (N.Y. App. Div. 1980). These narrow exceptions do not meaningfully distinguish the transport ban from a complete prohibition. In *Heller*, this Court treated the District of Columbia's handgun ban as an effectively complete pro-

hibition even though the ban contained "minor exceptions," 554 U.S. at 575 n.1; the same course is warranted here.

In addition to nullifying the right of holders of premises licenses to *bear* arms, the transport ban also interferes with their right to *keep* arms in two respects. First, in *Heller*, this Court held that the right to keep arms includes the right to possess a handgun in the home for self-defense. 554 U.S. at 635. But the transport ban prevents license-holders from taking handguns from the City to homes outside the City—homes where, under *Heller*, they have a right to possess those handguns for self-defense. Second, courts and commentators have long recognized that the right to keep firearms for self-defense must likewise include the "right to acquire and maintain proficiency in their use," because the possession of firearms "wouldn't mean much without the training and practice that make it effective." *Ezell* v. *City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011).[1] Indeed, the prefatory clause's reference to a "well regulated militia" presupposes a right to train in the use of firearms; "the adjective 'well-regulated' implies nothing more than the imposition of proper discipline and train-

[1] See, *e.g.*, *Haile* v. *State*, 38 Ark. 564, 567 (1882) (right to "render [oneself] skillful in their use by practice"); *Hill* v. *State*, 53 Ga. 472, 480 (1874) (right to acquire "[s]kill and familiarity in the use of arms"); *Andrews*, 50 Tenn. (3 Heisk.) at 178 ("right to practice their use"); Benjamin Vaughan Abbott, *Judge and Jury: A Popular Explanation of Leading Topics in the Law of the Land* 333 (1880) (right to "practi[ce] in safe places the use of [arms]") (quoted in *Heller*, 554 U.S. at 619); Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 271 (1880) (right includes "learning to handle and use [arms]") (quoted in *Heller*, 554 U.S. at 618).

ing." *Heller*, 554 U.S. at 597. The transport ban, however, interferes with the right to acquire skill and familiarity in the use of arms, because it deprives license-holders of the freedom to transport their arms to firing ranges at which the license-holders wish to practice.

3. Also as in *Heller*, "[f]ew laws in the history of our Nation have come close to the severe restriction" of the City's transport ban. 554 U.S. at 629. Americans have long enjoyed the freedom to transport weapons that they lawfully own. During the early 19th century, multiple States began to restrict the concealed carrying of firearms, but these laws still allowed people to carry weapons openly. See Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1516 (2009). In any event, courts usually interpreted these laws to prohibit the concealed carrying of a firearm *as a weapon*—as opposed to the "transportation of a pistol home from the place of purchase," "its transportation to a shop for repairs," or the mere "removal of a weapon from place to place." 5 *The American and English Encyclopedia of Law* 731 n.2 (David S. Garland & Lucius P. McGehee eds., 2d ed., 1897).[2]

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[2] See, *e.g.*, *Carr* v. *State*, 34 Ark. 448, 450 (1879) (firearm "merely, and in good faith, * * * transported, to be repaired, or given to another, or for purposes of trade, or any other object, save to be used in fight"); *State* v. *Roberts*, 39 Mo. App. 47, 49 (1890) (transportation of firearm "as a mere messenger for transmission to a third party"); *State* v. *Larkin*, 24 Mo. App. 410, 412 (1887) (transportation of firearm "as a mere article of merchandise"); *Waddell* v. *State*, 37 Tex. 354, 356 (1872) (transportation "from the place where [the owner] purchased" the firearm "to his home"); *Underwood* v. *State*, 29 S.W. 777, 777 (Tex. Crim. App. 1895) (transportation "to the gunsmith for repairs"); *Pressler* v. *State*, 19 Tex. Ct. App. 52, 53 (1885)

Even in contemporary times, a near-complete ban on transporting weapons remains unusual. Indeed, we are unaware of any modern state law that is as restrictive as the transport ban.

The City's near-total ban on the transportation of firearms also contrasts with federal statutes that address the transportation of firearms outside the home. Federal law provides that a lawful owner of a firearm is "entitled," notwithstanding contrary state law, "to transport [the] firearm" for lawful purposes between places where "he may lawfully possess and carry" it, if "during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible." 18 U.S.C. 926A.[3] Federal law prohibits juveniles from knowingly possessing handguns, but even this prohibition does not apply "during the transportation by the juvenile of an unloaded handgun in a locked container" on the way to a place where the juvenile may use the handgun in the course of "employment," "ranching or farming," "hunting," "target practice," or "a course of instruction." 18 U.S.C. 922(x)(3). And federal law prohibits the possession of a gun in a school zone, but this prohibition does not apply to the possession of a firearm that is "not loaded" and "in a locked container," 18 U.S.C. 922(q)(2)(B)(iii), or to

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(transportation to one's "home," to a "place of business," "to the shop to be repaired," or "from the shop after it has been repaired").

[3] Petitioners raised an alternative claim under this provision in the district court. The court rejected the claim on the ground that the statute applies where a person may "'lawfully possess and carry'" the firearm at both the origin and destination of the trip, but petitioners lacked the right to "carry" firearms in New York City because they lacked a carry license. Pet. App. 67-68 (quoting 18 U.S.C. 926A). Petitioners did not appeal that decision, which is not at issue here.

a person who possesses an "unloaded" firearm while lawfully "traversing school premises for the purpose of gaining access to public or private lands open to hunting," 18 U.S.C. 922(q)(2)(B)(vii). In contrast, the City's ban subjects adults to more severe restrictions than Congress considered necessary for children, and it subjects the entire city to more severe restrictions than Congress considered necessary for school zones.

4. Finally, as in *Heller*, some of the rare laws that *have* categorically prohibited the carrying of firearms "have been struck down." 554 U.S. at 629. In fact, when the Court in *Heller* observed that courts had struck down laws resembling the District of Columbia's handgun ban, all of the Court's cited cases involved carrying firearms in public. See *ibid.* In *Nunn* v. *State*, 1 Ga. 243 (1846), the Georgia Supreme Court struck down a categorical ban on carrying pistols openly. *Id.* at 251 (cited in *Heller*, 554 U.S. at 629). In *Andrews*, the Tennessee Supreme Court struck down an "absolute prohibition" on the carrying of pistols "without regard to time, or place, or circumstances." 50 Tenn. (3 Heisk.) at 187 (cited in *Heller*, 554 U.S. at 629). Relatedly, in *State* v. *Reid*, 1 Ala. 612 (1840), the Alabama Supreme Court upheld a concealed-carry ban as a permissible exercise of the State's power to regulate "the manner of bearing arms," but warned that "[a] statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional." *Id.* at 616-617 (cited in *Heller*, 554 U.S. at 629).

The understanding that laws akin to the transport ban violate the right to keep and bear arms has persisted into the 20th century. In one case, the Colorado

Supreme Court held that a city violated the state constitution by adopting an ordinance "to prohibit individuals from transporting guns to and from * * * places of business" such as "gunsmiths, pawnbrokers and sporting goods stores." *City of Lakewood* v. *Pillow*, 501 P.2d 744, 745 (1972) (en banc). In another, the Kansas Supreme Court held that a city violated the state constitution by prohibiting an owner from transporting his gun "from the place where he purchased it or had it repaired or between his office and his home." *City of Junction City* v. *Mevis*, 601 P.2d 1145, 1152 (Kan. 1979). In a third, a court in New Mexico held that a city's ban on carrying guns "den[ied] the people the constitutionally guaranteed right to bear arms." *City of Las Vegas* v. *Moberg*, 485 P.2d 737, 738 (N.M. Ct. App. 1971). In *McDonald*, Justice Breyer identified these three transportation bans as examples of laws that state courts had struck down even under "a highly deferential" approach to gun-control legislation. 561 U.S. at 939 (Breyer, J., dissenting). In short, the transport ban goes "far beyond the traditional line of gun regulation." *Heller II*, 670 F.3d at 1270 (Kavanaugh, J., dissenting).

C. The Court Of Appeals' Reasons For Upholding The Transport Ban Are Mistaken

1. The court of appeals asserted that, "[t]o the extent that [petitioners] are limited in their ability to carry firearms in public, those limitations are not imposed by [the transport ban], but rather are inherent in their lack of carry permits." Pet. App. 13 n.7. That assertion is incorrect. The City's regulations *do* limit petitioners' right to transport firearms in public. A City regulation provides that, under a premises license, "[t]he possession of the handgun for protection is restricted to the inside of the premises [whose] address is

specified on the license." 38 R.C.N.Y. 5-23(a)(2). A City regulation provides that the handgun "may not be removed from the address specified on the license." 38 R.C.N.Y. 5-23(a)(1). And the City has failed to make an exception for the transportation of a firearm to an additional home or to a firing range outside the City. See 38 R.C.N.Y. 5-23(a). Those are the restrictions that petitioners challenge as violative of their Second Amendment rights.

Petitioners have no obligation to challenge the State's concealed-carry regime as well. That regime primarily addresses a different activity that is not at issue in this case: the carrying of "loaded handgun[s]" for self-defense in public. *In re Revocation of Pistol License of Beach*, 837 N.Y.S.2d 534, 535 (N.Y. Sup. Ct. 2007), rev'd on other grounds, *Beach* v. *Kelly*, 860 N.Y.S.2d 112 (N.Y. App. Div. 2008). To obtain a carry license, an applicant must show "proper cause," N.Y. Penal Law § 400.00(2) (McKinney Supp. 2019), which usually means that he must "demonstrate a special need for self-protection distinguishable from that of the general community," *Klenosky*, 428 N.Y.S.2d at 256. Petitioners do not seek a right to transport loaded handguns for self-defense in public. Rather, they seek only the right to transport unloaded, locked, and inoperable handguns to certain destinations. The proper targets for their constitutional challenge are thus the City's restrictions on the transportation of unloaded guns, not the State's licensing regime for the carrying of loaded guns.

2. The court of appeals also held that the transport ban was constitutional because it satisfied the court's sliding-scale test for applying the Second Amendment. The court first weighed "two factors": "'how close the law comes to the core of the Second Amendment right'"

and the "'severity of the law's burden on the right.'" Pet. App. 11 (citation omitted). On the basis of those factors, the court chose a "proper level of scrutiny"—in its view, intermediate scrutiny. *Id.* at 12. It then concluded that the transport ban satisfied intermediate scrutiny, because it considered the City's interest "substantial enough to * * * justify the insignificant and indirect costs" that the ban imposes on "Second Amendment interests." *Id.* at 29.

There is no need to decide in this case whether or how to import doctrinal tests from other contexts into Second Amendment adjudication. At a minimum, these tests should supplement, not supplant, an analysis of the constitutional text, history, and tradition. As this Court explained in *Heller*, a law that clearly contradicts text, history, and tradition would be unconstitutional under "any of the standards of scrutiny" that "appl[y] to enumerated constitutional rights." 554 U.S. at 628. And as the Court has explained elsewhere, it is "unnecessary" to turn to "'formal tests'" where "history" definitively resolves the constitutional issue at hand. *Town of Greece* v. *Galloway*, 572 U.S. 565, 575 (2014) (citation and internal quotation marks omitted). In this case, as in *Heller*, text, history, and tradition definitively establish the unconstitutionality of the City's near-total ban on the transportation of handguns outside the home.

Moreover, the particular mode of analysis that the court of appeals applied—a sliding-scale standard under which a court uses a threshold, case-by-case evaluation of factors to select a level of scrutiny—itself conflicts with this Court's precedents. In *Heller*, this Court explicitly rejected Justice Breyer's proposal to evaluate gun-control laws under an "interest-balancing inquiry, with the interests protected by the Second Amendment

on one side and the governmental public-safety concerns on the other," 554 U.S. at 689 (Breyer, J., dissenting). Observing that it could identify "no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach," the Court explained that "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* at 634. And the plurality in *McDonald* confirmed that the Court in *Heller* had "expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing." *McDonald*, 561 U.S. at 785.

The court of appeals' sliding-scale standard essentially replicates the interest-balancing inquiry that this Court has twice rejected. The court treated the Second Amendment like "no other enumerated constitutional right," *Heller*, 554 U.S. at 634, and its analysis, at bottom, calls for a case-by-case judgment about whether the government's interest outweighs the individual right. Pet. App. 10-11. The court of appeals thus summed up its decision by stating that "review of state and local gun control" involves a "balancing of the individual's constitutional right to keep and bear arms against the states' obligation to 'prevent armed mayhem,'" that the City "has a clear interest in protecting public safety through regulating the possession of firearms in public," that the "burdens imposed by the Rule" do not "substantially" impair the right to keep and bear arms, and that the "state interest" is "substantial enough" to "justify the insignificant and indirect costs" imposed on "Second Amendment interests." *Id.* at 29 (citation omitted). That is straightforward interest balancing.

3. The court of appeals further concluded that the transport ban is constitutional because it "seeks to protect public safety." Pet. App. 25. "The 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted." *Schall* v. *Martin*, 467 U.S. 253, 264 (1984) (citation omitted). "But the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U.S. at 636. For example, in *Heller*, text, history, and tradition established that the Constitution denied the District of Columbia the power to ban all handguns, even though the District of Columbia considered the "prohibition of handgun ownership" "a solution" to "the problem of handgun violence." 554 U.S. at 636. So too here, text, history, and tradition establish that the Constitution denies the City the power to ban almost all transportation of firearms, even though the City believes that the ban promotes public safety.

Even assuming that the Court should apply intermediate scrutiny to assess the City's stated interest, moreover, the transport ban would still violate the Second Amendment. The City claims that the transport ban promotes public safety by enabling the police "to monitor and enforce the limited circumstances under which premises licensees can possess a handgun in public." Br. in Opp. 22. The City, however, fails to establish that it has an important interest in ensuring that people transport locked and unloaded firearms only in "limited circumstances." The City claims that it must limit firearm transportation because some holders of premises licenses may be "'susceptible'" to "'stressful situations'" —such as "'crowd situations,'" "'family disputes,'" and "road rage"—"'where it would be better to not have the presence of a firearm.'" Pet. App. 26 (citation omitted).

Under intermediate scrutiny, however, the government must "demonstrate that the harms it recites are real," rather than "speculat[ive]." *Edenfield* v. *Fane*, 507 U.S. 761, 770-771 (1993). The City has made no effort to show that license-holders often find themselves in "stressful situations," no effort to explain why license-holders are more likely to face these "stressful situations" when traveling to out-of-city firing ranges than when traveling to local ones, and no effort to demonstrate that license-holders (who have passed rigorous background checks) are apt to misuse firearms that are locked and unloaded when they confront such "stressful situations."

In addition, even assuming that the City has an important interest in confining the transportation of handguns to "limited circumstances," the City fails to establish that the restrictions at issue are appropriately tailored to the objective of helping police officers "monitor and enforce" those limitations. Br. in Opp. 22. The City worries that license-holders could transport firearms to improper destinations "and then if discovered create an explanation about traveling for target practice" outside the City. Pet. App. 27 (citation omitted). Under intermediate scrutiny, however, a law violates the Constitution if it is "substantially more" burdensome than "necessary to achieve" the government's interests. *McCullen* v. *Coakley*, 573 U.S. 464, 490 (2014). Here, the City ignores a substantially less restrictive alternative means of refuting the fictitious explanations that it fears: Looking up the address of the out-of-state range and checking whether the license-holder is taking a direct route to that destination. To be sure, it may be easier for the City to ban transportation outright, but the ap-

propriate response to the transportation of guns to illegal destinations or for illegal purposes is to punish that conduct, not to ban all or almost all transportation. After all, "the prime objective" of the Bill of Rights "is not efficiency," and a law does not become constitutional "simply" because "the chosen route is easier" than the alternatives. *Id.* at 495.

4. The court of appeals also concluded that the City may ban the transportation of guns because petitioners could exercise their rights in alternative ways. See Pet. App. 14-15, 19, 22. The possibilities highlighted by the court do not make the transport ban constitutional.

The court of appeals first posited that people do not need to transport guns to second homes or firing ranges, because they could buy, rent, or borrow new guns to use at those locations. Pet. App. 14-15, 22. The Second Amendment, however, protects a right to keep and bear arms, not just a right to rent and borrow them. The government may not deny a person the right to "bear" arms on the theory that he can achieve the goals of defending himself and learning how to defend himself without exercising that right. That line of reasoning improperly "abstracts from the right to its purposes, and then eliminates the right." *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 145 (2006) (citation omitted). In addition, the Second Amendment guarantees that people may, if they wish, "keep" and "bear" the same set of "arms" for different lawful purposes. Thus, at the time of the framing, "weapons used by militiamen and weapons used in defense of person and home were one and the same." *Heller*, 554 U.S. at 625. And during the 19th century, "pioneer[s]" could use the same "rifle[s]" for "self-defense" and for hunting "the beast of the forest." *Id.* at 609 (citation omitted). The City therefore

may not require holders of premises licenses to acquire a new set of firearms for each new use.

The court of appeals also asserted that the City may prohibit the transportation of handguns to ranges outside the City because owners could still take their handguns to one of the seven ranges within the City. This Court has explained, however, that a person may exercise his constitutional rights in the "natural and proper places" for doing so, and that "one is not to have the exercise of [a constitutional right] in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State (Town of Irvington)*, 308 U.S. 147, 163 (1939). For example, under the Free Speech Clause, a city may not prevent a person from bringing back books from out-of-town libraries, even if there are seven libraries in town. So too, under the Second Amendment, a city may not prevent a law-abiding, responsible citizen from taking a gun to an out-of-town firing range, even if there are seven firing ranges in town.

* * *

All in all, the transport ban denies the holders of premises licenses the right to bear arms, and it interferes with their right to keep arms to boot. None of the court of appeals' rationales for upholding the ban is sound. The ban therefore infringes petitioners' right to keep and bear arms.

II. THE BAN ON TRANSPORTING FIREARMS TO OUT-OF-STATE RANGES VIOLATES THE DORMANT COMMERCE CLAUSE, BUT NOT THE RIGHT TO TRAVEL

Petitioners also contend that the ban on transporting firearms to out-of-state firing ranges violates the dormant Commerce Clause and the right to interstate travel. A ruling that rests on these doctrines would decide only

the part of the case that concerns firing ranges outside the City, not the part that concerns additional homes, because the additional home in this case is located within the State of New York. The Court would therefore need to address petitioners' Second Amendment claim regardless, and because the transport ban violates the Second Amendment, the Court need not reach petitioners' additional constitutional arguments. In any event, the ban violates the dormant Commerce Clause, but not the right to interstate travel.

A. This Court has interpreted the Commerce Clause to forbid States and municipalities from discriminating against interstate commerce. Under this Court's precedents, "[d]iscrimination against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 392 (1994). And "local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors." *Id.* at 394.

A straightforward application of these precedents establishes the invalidity of the City's ban on transporting firearms to firing ranges outside the City. This ban, on its face, discriminates against interstate commerce in favor of local business; it allows petitioners to take their firearms to local firing ranges, but not to firing ranges outside the City. And the City has not shown that the ban satisfies "rigorous scrutiny"—that it has "no other means" to advance its interest in protecting public safety. *C & A Carbone*, 511 U.S. at 392. The ban is thus "*per se* invalid." *Ibid.*

The court of appeals reasoned that the ban "does not facially discriminate against interstate commerce, as it does not *prohibit* a premises licensee from patronizing an out-of-state firing range." Pet. App. 31 (emphasis added). That reasoning is flawed. In this context, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc.* v. *Department of Envtl. Quality*, 511 U.S. 93, 99 (1994). And a discriminatory law violates the dormant Commerce Clause regardless of the "precise * * * extent of the discrimination." *Maryland* v. *Louisiana*, 451 U.S. 725, 759-760 (1981). Here, although the transport ban does not prohibit anyone from using out-of-state ranges, it does treat out-of-state ranges less favorably than local ranges, allowing residents of the City to use their own guns at the latter but not the former. That means it is impermissibly discriminatory.

B. This Court has also held that the Constitution protects a right to travel from State to State. See *Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35, 44 (1868). This right to travel consists of "three different components": (1) an implied right "to enter and to leave" a State, (2) an express right, guaranteed by the Privileges and Immunities Clause of Article IV, "to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State," and (3) an express right, guaranteed by the Privileges or Immunities Clause of the Fourteenth Amendment, to "'become a citizen of any State.'" *Saenz* v. *Roe*, 526 U.S. 489, 500-503 (1999) (citation omitted). The Court has held that the implied right to cross state borders "is assertable against private as well as governmental interference." *Griffin* v. *Breckenridge*, 403 U.S. 88, 105 (1971).

This case involves the first component of the right to travel: the implied right to cross state borders. This Court has explained that a law violates this right only if it "directly impair[s]" the right to leave or enter a State, *Saenz*, 526 U.S. at 501—for instance, by taxing departure, see *Crandall*, 73 U.S. (6 Wall.) at 49, or by prohibiting entry, see *Edwards* v. *California*, 314 U.S. 160, 173 (1941). If a law "impose[s] no obstacle" to a citizen's entry or departure, but has only an incidental effect on travel, the law does not violate the implied right. *Saenz*, 526 U.S. at 501.

The City's transport ban does not directly impair the right to travel from State to State. The ban does not target interstate travel as such. It precludes a licenseholder from removing his handgun from his home, regardless of whether he wants to take it to another State, to another city in the same State, or to another place in the same city. The ban thus has only an incidental, not a direct, effect on interstate travel.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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