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.,
Respondents.

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

BRIEF FOR STATES OF NEW YORK, CONNECTICUT, ILLINOIS, MARYLAND, MASSACHUSETTS, MICHIGAN, NEW JERSEY, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, AND VIRGINIA, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

New York law recognizes two main kinds of handgun licenses: premises licenses, which authorize a person to possess a handgun for self-defense at a home or business; and carry licenses, which authorize a person to possess and carry a loaded handgun outside the home. N.Y. Penal Law § 400.00(2). The City of New York administers this two-tiered licensing scheme for city residents and has issued regulations regarding transport of licensed handguns by city premises licensees. Until July 2019, the City's rules prohibited city premises licensees from transporting handguns to second homes or shooting ranges outside the City. But recent changes in state law and the City's rules now permit such licensees to do both.

The questions presented are:

1. Whether changes in state law and the City's rules have mooted this challenge to the City's former prohibition on transport of a licensed handgun through the City to a home or shooting range outside the City by persons holding a premises license, because the challenged transport restrictions are no longer in effect and are precluded by state law?

2. Whether the City's former rule was consistent with (a) the Second Amendment, (b) the Commerce Clause, and (c) the constitutional right to travel?

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INTEREST OF AMICI STATES

The States of New York, Connecticut, Illinois, Maryland, Massachusetts, Michigan, New Jersey, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia, and the District of Columbia (collectively, the "amici States") submit this brief as amici curiae in support of respondents. The amici States have vital sovereign interests in the correct application of the federalism principles and other constitutional doctrines that control this case.

As a threshold matter, those principles and doctrines confirm that the case is moot. Petitioners challenge the constitutionality of a state-preempted and now-repealed New York City regulation that banned transporting licensed, locked, and unloaded handguns to homes and shooting ranges outside city limits. That challenge no longer presents a live controversy. The City has rescinded the challenged ban and made clear it has no intention to reimpose the ban. Moreover, the New York State Legislature has enacted a statute that expressly permits the firearm transportation formerly banned by the City and overrides any contrary local law—thus prohibiting the City from reimposing the ban in any event.

Dismissal is thus required under this Court's longstanding precedents, which recognize that a case must be dismissed as moot where the repeal of a disputed provision gives challengers the relief they sought. As governments that sometimes amend, repeal, or preempt controversial laws—including laws subject to threatened or pending litigation—the amici States have crucial interests in ensuring that the Court adheres to those precedents. Statutory or regulatory changes that provide litigants with the same rights

they assert in court are preferable to constitutional adjudication, which this Court has repeatedly emphasized should occur only when absolutely necessary. The Court should not encroach on the authority and dignity of the States by treating such provisions as pretextual and proceeding to opine on the validity of a local law that a State has already overridden and barred the locality from reenacting—especially a local law that petitioners acknowledge was "unique." Pet. Br. 7, 57; *see also id.* at 35; Pet. 1-2, 11.

On the merits, the amici States seek to protect their sovereign prerogative to enact and implement legislation that advances their compelling interest in promoting public safety, preventing crime, and reducing the negative effects of firearm violence. The amici States and their localities have taken various approaches to the problem of firearm violence based on their own determinations about the measures that will best meet the needs of their citizens. The amici States submit this brief not because they necessarily believe that New York City formerly chose the optimal policy for itself—or that the City's former approach would be optimal for them or their localities—but because they believe that restricting firearm transportation is a policy choice that states and localities are constitutionally free to adopt.

Contrary to petitioners' arguments, neither the Second Amendment, nor the dormant Commerce Clause, nor the constitutional right to travel forecloses States and localities from enacting firearm regulations that are substantially related to the achievement of an important governmental interest. Petitioners' incorrectly broad interpretation of those constitutional guarantees threatens to hinder government responses to public-safety threats, even when those

responses do not substantially burden a constitutional right.

SUMMARY OF ARGUMENT

This case is moot. Throughout these proceedings, petitioners have requested only the right to transport to second homes and firing ranges outside New York City the handguns they are licensed to possess at specific locations within the City. Although a city regulation formerly prohibited that conduct, state and local laws now expressly permit it. Whether petitioners would be entitled to undertake that activity as a matter of constitutional law is thus a purely academic question of the type that falls outside the jurisdiction of the federal courts. This Court should therefore vacate the judgment below and remand with instructions to dismiss this case as moot.

Petitioners' counterarguments are meritless. Several of their arguments concern purported limitations in the City's new rule that are not present in the state's new law, which overrides any contrary local provision. And all of their objections to the new laws are premature, outside the scope of this litigation, or speculative: for example, their conjecture that the new laws would not permit them to stop for coffee or gas while transporting their firearms.

Moreover, no exception to mootness applies. The voluntary cessation doctrine invoked by petitioners does not apply here because the State's new law preempted the City's former ban *before* the City voluntarily replaced it. And there is no reasonable likelihood that the City will reinstate the former ban; even if the City wished to do so, any attempt would be preempted by state law. Petitioners misunderstand

the relationship between states and municipalities when claiming that the City "procured" the State's new law. Cities are creatures of their State, and their State controls them—not the other way around.

If this Court reaches the merits, it should reject petitioners' overbroad interpretations of the Second Amendment, the dormant Commerce Clause, and the constitutional right to travel. This Court has made clear that state and local governments may tailor their regulation of firearms to the varying circumstances prevailing in their different jurisdictions. Petitioners' requested approach to Second Amendment analysis would seriously inhibit lawmakers' ability to adopt tailored solutions to the grave problem of gun violence. This Court should decline petitioners' invitation to (a) exempt Second Amendment claims from the means-ends scrutiny applicable to other constitutional claims, or (b) require that strict scrutiny be applied to every Second Amendment claim.

This Court should instead recognize that certain types of firearm regulation can be constitutional when they are substantially related to an important government objective. And this Court should make clear that such laws may appropriately take into account distinct local conditions, such as the unique demographic and geographic context of New York City. Here, for example, the City showed a substantial relationship between its rule and the singular public-safety concerns presented by the movement of firearms through the nation's by-far largest, densest, and most urbanized major city—one with a unique concentration of schools, government buildings, places of worship, and the like.

Finally, this Court should reject petitioners' dormant Commerce Clause and right-to-travel claims. The former fails because Congress has enacted legislation under its Commerce Clause power—the Firearms Owner Protection Act of 1986, 18 U.S.C. § 926A—authorizing state and local restrictions on firearm transportation. The latter fails because the constitutional right to travel invalidates only laws that directly prohibit or penalize movement between States—not laws that make it less attractive for some people to leave their State.

ARGUMENT

I. Recent Developments Have Rendered This Case Moot.

A. Petitioners Have Received All the Relief They Sought.

Petitioners are New York City residents who have licenses to possess firearms at a home or business within the City—i.e., "premises licenses." (JA28-29.) Throughout these proceedings, petitioners have insisted that their suit requests only "the modest ability to transport their licensed firearms, unloaded and locked away separate from ammunition, to a shooting range or second home outside" New York City. Cert. Pet. Reply Br. 1. The former version of a New York City regulation codified at 38 R.C.N.Y. § 5-23 (Pet. App. 88-90) denied petitioners that ability unless they obtained a separate license to carry a loaded handgun in public. Petitioners expressly disavowed any desire to carry a loaded handgun around the City (CA2 ECF No. 41, at 38), and did not challenge any state or local provision regulating such

conduct. Instead, they challenged only 38 R.C.N.Y. § 5-23's former prohibition on *transporting* unloaded premises-licensed firearms to certain locations outside New York City.

That challenge became moot last month when the City amended its regulation to remove the challenged prohibition, and the State adopted legislation preempting such a prohibition and barring the City from reimposing it. *See* Suggestion of Mootness (SOM) App. 1a-11a (regulatory amendment to 38 R.C.N.Y. § 5-23); *id.* 12a-15a (statutory amendment to N.Y. Penal Law § 400.00(6)). These developments granted petitioners the very relief they sought. As a result, the case no longer presents a live controversy within the jurisdiction of the federal courts. *See* U.S. Const. art. III, § 2. This Court has long recognized this jurisdictional limit in dismissing claims as moot where, as here, a provision challenged in litigation is repealed or amended during the pendency of appellate proceedings. *See*, *e.g.*, *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (per curiam); *Diffenderfer v. Central Baptist Church of Miami, Inc.*, 404 U.S. 412, 414-15 (1972) (per curiam); *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam).[1] As Chief Justice Rehnquist explained in *Burke v. Barnes*, "a challenge to the validity of a statute that has been repealed" is no different from "a challenge to the validity of a statute that has expired":

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[1] *Accord*, *e.g.*, *Wyoming v. United States Dep't of Interior*, 587 F.3d 1245, 1252-53 (10th Cir. 2009) (Gorsuch, J.); *Nextel Partners Inc. v. Kingston Twp.*, 286 F.3d 687, 693 (3d Cir. 2002) (Alito, J.); *cf. Hedgepeth ex rel. Hedgepeth v. Washington Metro. Area Transit Auth.*, 386 F.3d 1148, 1152 (D.C. Cir. 2004) (Roberts, J.) (challenge to public-transit policies that resulted in arrest of twelve-year-old girl not mooted by policies' rescission only because of girl's request for expungement of arrest record).

both are moot once the challenged legislation no longer has "any present effect." 479 U.S. 361, 363-64 (1987).

Petitioners challenged only the City's former ban on removing premises-licensed firearms from the City—and only insofar as that ban applied to "*traveling beyond the borders of the City of New York*" with premises-licensed handguns for use at a gun range, shooting competition, or second home. (JA48 (emphasis added).) Their requests for declaratory and injunctive relief exclusively concerned that issue. (JA48.)

Petitioners thus pleaded a case that addressed only certain applications of the City's then-existing ban, and that is the case that petitioners have consistently litigated. At summary judgment, they requested an injunction limited to barring the enforcement of § 5-23 in a way that "prohibits or precludes the plaintiffs from traveling beyond either the borders of New York City or New York State with a licensed handgun to attend a shooting range or competition or to travel to a second home." Dist. Ct. ECF No. 43. Petitioners assured the Second Circuit that they "simply want to be permitted to safely transport their unloaded handguns between locations where they may lawfully be used and possessed." CA2 ECF No. 41, at 38. And in this Court, they sought review only of the constitutionality of "the City's ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits." Pet. i.

Petitioners' claims are unquestionably moot. Local law now allows them to transport their premises-licensed firearms to and from the following locations, whether "within or outside New York City": "[a]nother

residence, or place of business" where petitioners are authorized to possess their firearms, or a "lawful small arms range/shooting club or lawful shooting competition." SOM App. 9a. And state law allows them to transport their premises-licensed firearms to the same locations and to "any other location where" they are "lawfully authorized to have and possess" such firearms. SOM App 14a. Whether the Second Amendment independently entitles petitioners to undertake these actions—the question on which petitioners sought and this Court granted certiorari—is now academic. This Court should therefore vacate the Second Circuit's judgment and remand with instructions to dismiss this case as moot. *See*, *e.g.*, *Hall*, 396 U.S. at 50. Alternatively, it should at a minimum vacate and remand to the court of appeals with instructions to consider mootness in the first instance. *See*, *e.g.*, *United States v. Chesapeake & Potomac Tel. Co. of Va.*, 516 U.S. 415, 416 (1996) (per curiam).

B. Petitioners' Counterarguments Are Unavailing.

1. Petitioners' objections to the purported limitations of the City's and State's new laws cannot save this case from mootness.

Petitioners wrongly claim that the City's and State's new provisions fail to give them all of the relief they requested below. Response (Resp.) to SOM 12-22. Throughout this litigation, petitioners have emphasized that they are requesting only the right to "travel[] beyond" (JA48) New York City with their premises-licensed firearms to second homes, firing

ranges, and shooting competitions. Petitioners now indisputably have that right.

Petitioners nonetheless assert that the City's revised regulations prevent them from taking their firearms outside the City to vacation properties that they do not own (Resp. to SOM 15) and from stopping for coffee or gas while transporting their firearms within the City (Resp. to SOM 2, 13-15, 19, 22). They also object that the City has limited them to transporting their firearms to "lawful" shooting ranges and competitions. Resp. to SOM 8.

But those objections are based on particular language in the City's new provision that do not appear in the State's law preempting the City's former ban. Specifically, petitioners focus on language (a) allowing the transport of a premises-licensed firearm to another dwelling or business "of the licensee" (SOM App. 9a); (b) providing that transport within New York City "shall be continuous and uninterrupted" (SOM App. 10a); and (c) requiring that any shooting range or competition to which a firearm is transported be "lawful" (SOM App. 9a). Whatever limitations that language may create, the State's new law does not contain such language. That law makes clear that the holder of a firearm with a New York City premises license may transport it to "*any* other location" where he or she is "lawfully authorized" to possess it, and provides that travel must be "directly to or from" that location (SOM App. 14a (emphasis added)), rather than "continuous and uninterrupted."[2]

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[2] The "directly to or from" restriction goes no further than the equivalent restriction on travel to shooting ranges in the City that was part of the City's former regulation (Pet. App. 88), and

To be sure, the State's new law specifies that a shooting range to which a firearm is transported must be "authorized by law to operate as such," and that a shooting competition to which a firearm is transported must comply with New York State law or "the law applicable at the place of such competition" (SOM App. 14a). But petitioners do not (and cannot) show that those requirements are unduly restrictive: they cannot legitimately claim a right to transport a firearm to an *illegal* shooting range or competition. And regardless of how the City might interpret its "lawful" language, the State's law contains an additional provision permitting transport to "any other location" where a premises licensee may lawfully possess a firearm.

Petitioners attempt to sidestep these points by claiming, without any support, that "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." Resp. to SOM 2. That claim is refuted by the statutory text, which makes clear that the state law *displaces* local authority by preempting "any inconsistent provision of state or local law or rule or regulation." SOM App. 14a. Moreover, the meaning of the State's new statute—and the City's new regulation, for that matter—will ultimately be determined not by local officials, but by New York's state courts. Any dispute about the statute's meaning or validity must therefore await

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which petitioners never challenged. *See also* U.S. Br. 26 (suggesting City could legitimately require those transporting firearms to firing ranges outside the City to take "a direct route to that destination").

subsequent adjudication. *Cf. Hall*, 396 U.S. at 49-50. See *infra* at 12-13.

A second fatal flaw in petitioners' position is that their new arguments go beyond the "modest ability" to transport firearms outside New York City that petitioners previously presented as their sole object in this case. Petitioners did not assert below the right to transport handguns to vacation spots distinct from second homes; to the contrary, they represented to the Second Circuit when petitioning for en banc review that "the only places" they asked to bring their premises-licensed handguns were "shooting ranges or second homes." CA2 ECF No. 124, at 11. Similarly, they never before claimed a constitutional right to take a gas or coffee break while transporting firearms within New York City; instead, they claimed only a constitutional right to remove their premises-licensed firearms *from* New York City, and only for the limited purpose of going to a firing range, shooting competition, or second home.

The same consideration disposes of another objection raised by petitioners—i.e., that the State's new law allows holders of premises licenses issued outside New York City to bring their firearms into the City only with the written authorization of the New York City Police Commissioner. *See* SOM App. 14a-15a; Resp. to SOM 20. That objection, too, improperly seeks to expand this suit beyond the narrow bounds petitioners deliberately selected. This case is not—and has never been—about premises licenses issued *outside* New York City. Instead, the individual petitioners are holders of New York City–issued premises licenses whose complaint alleged that a former New York City regulation precluded them from taking those firearms to locations outside the City. And while

this case also features an institutional petitioner, the complaint says nothing about its members except that they "participate in numerous rifle and pistol matches within and without the City of New York on an annual basis." (JA27.) The complaint does not identify—let alone establish standing or raise a claim on behalf of—any holder of a premises license issued outside New York City. *See*, *e.g.*, *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). Moreover, the State's new law does not *prohibit* holders of premises licenses issued elsewhere from transporting their firearms into the City—the law simply requires prior authorization from the City's police commissioner.[3] *Cf.* City SOM Reply 2 (noting that State's new law actually liberalized transporting of firearms into New York City).

In any event, whether and how the authorization requirement might affect the transport of firearms is a question for another day. Beyond the absence from this case of any holders of premises licenses issued outside New York City, or any relevant facts or allegations about them, the statutory requirement that such license holders obtain authorization from the City's police commissioner before bringing a firearm into the City is brand new. Its meaning and practical effect thus have yet to be determined, and any dispute about its application or validity is unripe and can be adjudicated only in a future case that, unlike this one, properly presents the issue. Indeed, this Court has repeatedly held that state courts must be given the

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[3] Petitioners also note that the City's revised regulations still require them to obtain written authorization from the New York City Police Commissioner to transport their firearms to a gunsmith (*see* Resp. to SOM 2, 13, 19), but petitioners did not previously challenge *that* requirement, or even mention it in their complaint.

opportunity to give state laws a narrowing construction before a federal court opines on their constitutionality. *See*, *e.g.*, *Adams v. Robertson*, 520 U.S. 83, 90 (1997) (per curiam). And this Court has repeatedly stressed that it is a Court of final review, not a Court of first review. *See*, *e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

Finally, petitioners claim that this case is not moot because of the asserted potential for lingering effects of past conduct, suggesting that they might be prosecuted for past violations of the City's former rule or might need to disclose such a violation when seeking a firearms license in the future. That claim is entirely speculative and therefore unavailing. *See*, *e.g.*, *Summers*, 555 U.S. at 499. Petitioners do not state or suggest that they ever violated the City's former ban; to the contrary, they allege they refrained from participating in shooting competitions in order to avoid violating the former ban (JA32-33). And it is pure conjecture whether anyone else will ever be prosecuted for having violated the ban under circumstances that, according to petitioners, would make prosecution unconstitutional—i.e., where an individual transported a premises-licensed firearm to a second home, firing range, or shooting competition outside New York City.

Petitioners misplace their reliance on *Decker v. Northwest Environmental Defense Center*, an enforcement proceeding for alleged violations of a Clean Water Act regulation where the remedies available included penalties for past infractions and remediation of damage allegedly caused by those infractions. *See* 568 U.S. 597, 609-10 (2001). In *Decker,* the amendment of the underlying regulation while the matter was pending before this Court failed to moot the

parties' dispute over whether the defendants had violated the earlier version and if so, what remedies would be appropriate. *Id.* Here, by contrast, no one asserts that petitioners or anyone else violated the City's former ban or faces unconstitutional penalties for having done so.[4]

Similar considerations dispose of petitioners' concern about needing to disclose violations of the former ban in their future licensing applications. If an individual ever faces the denial of a firearm license under the circumstances hypothesized by petitioners, any issue concerning the constitutionality of that denial can be dealt with in a subsequent, concrete case presenting the requisite parties and facts. *See*, *e.g.*, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 235 (1990).

2. The "voluntary cessation" exception to mootness does not apply.

Petitioners are likewise wrong in claiming that this case qualifies for the "voluntary cessation" exception to the mootness doctrine, under which a defendant's decision to cease disputed conduct will not render a challenge to that conduct moot unless it is clear that the conduct will not resume after dismissal.

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[4] Petitioners similarly misplace their reliance on *Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298 (2012). In that case, there continued to be a live controversy over the sufficiency of defendants' attempt to comply with a remedial order of the district court while the case was pending in this Court. *Id.* at 308. Here, however, no such order was ever issued. Moreover, petitioners cannot save their case from mootness by claiming that the City's and State's new laws failed to give them broader relief than they requested in their complaint.

See, *e.g.*, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982).

The first problem with petitioners' argument is that the City's cessation of the challenged conduct was not voluntary. Before the City's new rule took effect, its former rule was preempted by state legislation. SOM 5-6; SOM App. 12a, 15a. And that state legislation gives petitioners the very relief they have sought throughout this lawsuit (and potentially more).

For similar reasons, this case does not present a reasonable prospect that the City will resume its challenged conduct: the City actually lacks the power to do so. Even if the City attempted to readopt its prior regulation, the same state law that preempted that regulation would bar any new provision containing the same restrictions.[5] Moreover, this case differs from *City of Mesquite*, where the municipal defendant announced its intention to reenact the challenged ordinance if the district court's order invalidating it were vacated. *See* 455 U.S. at 289 n.11. The City here has expressly stated, without qualification, that it has "no intention of returning to its former regulatory scheme" (SOM 19; City SOM Reply 7).[6] *See Wilderness Soc'y v. Kane County*, 632 F.3d 1162, 1174-76 (10th

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[5] *See Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1182 (9th Cir. 2006) (adoption of new ordinances by cities mooted case where any attempt to repeal exemption in new ordinances would result in preemption of local law by state law).

[6] In addition, this case is not one where the City's new regulation continues to impose the same allegedly unconstitutional restrictions as the prior one. *Cf. Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 n.3 (1993) (observing that there is "no basis" to conclude that disputed conduct will be repeated where challenged laws are "changed substantially" by intervening legislation).

Cir. 2011) (en banc) (Gorsuch, J., concurring in the judgment) (explaining that challenges to provisions of repealed county ordinance were moot where county expressed no interest in reenacting them).

Petitioners mistake the relationship between States and their municipal corporations in claiming (Resp. to SOM 1, 2, 9-10, 19, 28-29) that a municipality could procure a state law for the purpose of mooting a lawsuit against the municipality. As this Court has repeatedly recognized, cities "are merely departments of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 362 (2009) (quotation marks, brackets, and ellipsis omitted); *accord*, *e.g.*, *City of New York v. State of New York*, 86 N.Y.2d 286, 289-90 (1995). Cities thus cannot "procure[]" legislation from States (Resp. to SOM 1, 2, 19); such legislation can be passed only through the independent actions and judgment of a State's Legislature and Governor.

Petitioners misrepresent the facts in attempting to cast the State's legislation as the product of the desire of one of its sponsors to moot this case. Assemblymember Dinowitz's full answer to a question about whether the proposed legislation would impact this litigation—selectively and misleadingly quoted by petitioners—is: "I suppose it could, I mean, who knows what those five guys are gonna do? It could have an impact, but that's up to them. *But we, separate and apart from that, should certainly be doing this, because this makes sense for the State of New York*."[7]

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[7] N.Y. State Assembly, Proceedings, June 19, 2019, pt. 1, video at 5:41:00 (internet). (For authorities available on the

Accordingly, applying the voluntary cessation doctrine here would be a significant and unwarranted expansion of that doctrine. A challenged local law has been preempted by a State that is not a party to the litigation—in addition to being repealed by the defendant locality. In these circumstances, principles of comity, federalism, state sovereignty, and judicial restraint all warrant deference to the State's legislative judgment—regardless of whether that judgment has the effect of resolving a constitutional controversy, even one pending before this Court.

Indeed, this Court has recognized that state authorities have a legitimate interest in avoiding constitutional disputes. In *Adams*, the Court dismissed as improvidently granted a writ of certiorari to the Alabama Supreme Court, after determining that the issue on which certiorari was granted—a federal due process challenge to class action rules issued by the Alabama Supreme Court—had not been properly presented to that court. In doing so, this Court noted that the Alabama Supreme Court had an "undeniable interest" in being able to either interpret its rules in a way that would avoid due process concerns or "exercise its power to *amend those rules to avoid potential constitutional challenges*." 520 U.S. at 90 (emphasis added). State legislatures similarly have "an undeniable interest" in being able to exercise their power to override local laws to avoid constitutional challenges, and treating their legislation as pretextual or nonexistent would be an affront to the States' dignity and authority. *Cf. Hunt v. Cromartie*, 526 U.S. 541, 545 n.1 (1999) (case not mooted by new legislation

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internet, URLs appear in the table of authorities. Websites were last visited on August 12, 2019.)

providing that State would revert to challenged redistricting plan upon favorable decision by this Court). This Court has repeatedly stressed that it should decide constitutional questions only when absolutely necessary. *See*, *e.g.*, *Matal v. Tam*, 137 S. Ct. 1744, 1755 (2017). The State's legislation here has removed any necessity for this Court to decide the constitutionality of the City's former regulation.

3. Petitioners' remaining arguments are meritless.

Petitioners' remaining arguments fare no better. Although they claim they still possess live claims for costs, attorney's fees, and such other relief as the district court deems just and proper, such requests cannot confer jurisdiction on this Court. *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990). A party cannot procure "unnecessary judicial pronouncements," including on constitutional issues, "solely in order to obtain reimbursement of sunk costs." *Id.*

Petitioners are thus left to suggest that the City's mootness arguments somehow fail because those arguments are linked to the City's "prior rules, as opposed to the claim of power underlying them." Resp. to SOM 30. But that suggestion simply shows the mootness of petitioners' claims. Petitioners *themselves* were "careful to tie" their claims to the City's "prior rules." Resp. to SOM 30. That is why this case no longer presents a live controversy now that those rules have ceased to have "any present effect." *Burke*, 479 U.S. at 363. In the absence of any actual restraint imposed (or likely to be imposed) on petitioners by those rules, the validity of the "claim to power underlying" the rules is precisely the type of

academic question that lies beyond the jurisdiction of the federal courts.

II. If This Court Reaches the Merits, It Should Reject Petitioners' Sweeping Constitutional Claims.

This Court should not decide the merits of petitioners' now-moot claims. But if it does, it should reject petitioners' expansive reading of the Second Amendment, the dormant Commerce Clause, and the constitutional guarantee of a right to travel—and affirm the judgment below. Petitioners ask the court to fashion "a rule of constitutional law broader than is required by the precise facts." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (quotation marks omitted). Moreover, their specific arguments conflict with this Court's precedents and would jeopardize a wide swath of important state and local public-safety measures.

A. This Court's Second Amendment Cases Foreclose Petitioners' Broad Attack on State and Local Firearm Regulations.

1. The Second Amendment preserves state and local authority to enact firearm restrictions in furtherance of public safety.

In *District of Columbia v. Heller*, this Court made clear that the scope of the Second Amendment "is not unlimited." 554 U.S. 570, 626 (2008). And in *McDonald v. City of Chicago*, eight of the Court's nine members specifically stressed the role of state and local innovation in addressing the formidable issue of gun violence. As Justice Alito explained, the Second

Amendment "by no means eliminates" States' and localities' "ability to devise solutions to social problems that suit local needs and values." 561 U.S. 742, 785 (2010) (plurality op.). Accordingly, "state and local experimentation with reasonable firearms regulations will continue under the Second Amendment." *Id.* (quotation marks and brackets omitted); *see also id.* at 877, 902-03 (Stevens, J., dissenting); *id.* at 926-27 (Breyer, J., dissenting).

This view of state and local authority rightly recognizes the States' primary responsibility for ensuring public safety in our federal system. *See United States v. Morrison*, 529 U.S. 598, 618 (2000) ("[W]e can think of no better example of the police power . . . reposed in the States[] than the suppression of violent crime and vindication of its victims."); *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) ("Under our federal system, the States possess primary authority for defining and enforcing the criminal law." (quotation marks omitted)). That responsibility includes a duty to take steps to reduce the likelihood that a State's citizens will fall victim to preventable firearm violence. Through such state responses to the problem of gun violence, "the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring).

This Court, "aware of the problem of handgun violence in this country," has made clear that state and local policymakers retain "a variety of tools for combating that problem." *Heller*, 554 U.S. at 636; *see also McDonald*, 561 U.S. at 786 (plurality op.). The Court has elaborated on this point by identifying a list

of "presumptively lawful" firearms regulations. *Heller*, 554 U.S. at 626-27 & n.26. These include complete prohibitions on carrying concealed weapons, *id.* at 626; bans on the possession of firearms by felons and the mentally ill, *id.*; bans on carrying firearms in sensitive places, such as schools or government buildings, *id.*; and bans on carrying "dangerous and unusual weapons," *id.* at 627, including weapons "not typically possessed by law-abiding citizens for lawful purposes," *id.* at 625 (discussing *United States v. Miller*, 307 U.S. 174 (1939)).

This list "does not purport to be exhaustive." *Id.* at 626 n.26. Indeed, this Court has recognized that because "conditions and problems differ from locality to locality," state and local governments need flexibility to tailor their firearm regulations to their distinct circumstances. *McDonald*, 561 U.S. at 783 (plurality op.); *see also id.* at 902 (Stevens, J., dissenting); *id.* at 927 (Breyer, J., dissenting). For instance, the Federal Bureau of Investigation has identified numerous factors "known to affect the volume and type of crime occurring from place to place."[8] These factors include demographic conditions such as population density, composition, and stability, and the extent of urbanization; economic conditions such as median income, poverty level, and job availability; the strength of law enforcement; and the policies of other components of the criminal-justice system, including prosecutors, courts, and probation and correctional agencies. These and many other factors vary widely across States and within them. As

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[8] FBI, *Uniform Crime Reporting Statistics: Their Proper Use* 2 (Jan. 2011) (internet).

a result, the numbers of murders and aggravated assaults committed with firearms vary significantly from State to State.[9] There are also notable regional variations in the number of law-enforcement officers killed in the line of duty, almost all of whom are killed with firearms.[10]

In light of such local and regional differences, an approach to firearm violence that may be appropriate or effective in one State or locality may not be appropriate or effective in another. But all States have an interest in retaining the flexibility to enact regulations aimed at minimizing the adverse effects of firearm violence, while also allowing law-abiding citizens to use arms consistent with *Heller* and *McDonald*. Petitioners' arguments in this case would dramatically curtail the flexibility of States to respond to the problem of firearm violence. This Court should reject their efforts to stretch *Heller* and *McDonald* in ways that conflict with the Court's assurances in those cases.

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[9] FBI, *Crime in the United States 2017, Violent Crime*, tbl. 20 (murders), tbl. 22 (aggravated assault) (internet).

[10] *See* FBI, Overview, *Law Officers Killed & Assaulted, 2018* (noting that, in 2018, "[b]y region, 26 officers were feloniously killed in the South, 12 officers in the West, 12 officers in the Midwest, and 4 officers in the Northeast," and 1 officer in Puerto Rico, and that 51 of those 55 officers were killed with firearms, including 37 handguns) (internet).

2. This Court should reject petitioners' overbroad reading of the Second Amendment.

Petitioners advance a conception of the Second Amendment that would tie the hands of state and local governments in addressing the indisputable and deepening problem of firearm violence.[11] They suggest that historical analysis alone should be used to resolve Second Amendment cases (Pet. Br. 29-30), and assert that "*if* means-end scrutiny governs" such matters (at 30 (emphasis added)), "the applicable level of scrutiny must be strict" in all cases (at 31). This Court should reject both propositions.

a. This Court should not adopt petitioners' suggested mode of historical analysis.

This Court should avoid a rule that makes the presence of historical analogs the sole touchstone of whether a present-day firearm restriction passes muster. Indeed, this Court has already recognized that States and localities are not limited to adopting the types of measures that have been tried before. To the contrary, it has recognized that "state and local experimentation . . . *will continue* under the Second Amendment." *McDonald*, 561 U.S. at 785 (plurality op.) (emphasis added; quotation marks and brackets omitted). This recognition is in keeping with the States' long-recognized role "as laboratories for

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[11] Just ten days before the filing of this brief, twenty-nine people were killed in less than fourteen hours in mass shootings in El Paso, Texas, and Dayton, Ohio. *See* Meghan Keneally, *There Have Been at Least 18 Deadly Mass Shootings in the US So Far in 2019*, ABC News (Aug. 4, 2019) (internet).

devising solutions to difficult legal problems." *Oregon v. Ice*, 555 U.S. 160, 171 (2009). "This Court should not diminish that role absent impelling reason to do so." *Id.* That is especially true when dealing with measures to control crime, which is "much more the business of the States than it is of the Federal Government." *Patterson v. New York*, 432 U.S. 197, 201 (1977); *accord Ice*, 555 U.S. at 170-71 (quoting *Patterson*). This Court "should not lightly construe the Constitution so as to intrude upon" the States' crime-fighting efforts. *Patterson*, 432 U.S. at 201.

As the United States explains in its amicus brief, "modern firearm regulations can be constitutional even if they do not mirror colonial regulations." U.S. Br. 14. And as other amici note, historical practice is at best an imprecise guide to the scope of permissible firearm regulation given the diversity of regulatory approaches applied in different locations and at different times over more than two centuries of American history. *See* Giffords Law Ctr. Br. 18-22; Second Amendment Law Professors in Support of Neither Party Br. 27-31; Charles Br. 8-11, 15-16, 19, 30-33.

In addition, requiring a historical analog for every modern firearm regulation would unduly restrict governmental efforts to respond to advances in firearm technology, such as 3-D printed guns; to new understandings and data about particular dangers, such as the distinct threat that domestic abusers with firearms pose to their partners; and to new types of conduct, such as mass travel in airplanes and on crowded trains and buses. *See* Giffords Law Ctr. Br. 21-22; City Br. 29-31. States and localities should not be prevented from adopting reasonable restrictions to combat new dangers.

b. This Court should not require that strict scrutiny be applied to every Second Amendment claim.

Applying strict scrutiny in every case raising a Second Amendment claim could call into question a variety of firearm restrictions upon which *Heller* took care *not* to "cast doubt." 554 U.S. at 626. Under strict scrutiny, it would not be enough for a government to show that a firearm restriction was "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Instead, the law would need to be narrowly tailored to serve a compelling state interest, *see*, *e.g.*, *Johnson v. California*, 543 U.S. 499, 505 (2005), and the government's ability to rely on predictive judgments could be limited, *see Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 799-800 (2011); *but see id.* at 806 (Alito, J., concurring in the judgment); *cf. City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438-39 (2002). Yet such predictive judgments are essential to the state and local "experimentation" with solutions to the problem of gun violence that *McDonald* expressly endorsed. 561 U.S. at 785 (plurality op.); *see* Brady and Team Enough Br. 26. Indeed, the ability to make predictive judgments is critical if governments wish to proactively address the potential for gun-related deaths instead of merely reacting to the latest tragedy.

Moreover, petitioners are simply incorrect to claim that laws implicating other equally important constitutional rights uniformly trigger strict scrutiny, or that any failure to apply such scrutiny to a Second Amendment claim amounts to disfavored treatment of the Second Amendment right. Pet. Br. 31-32. For instance, different levels of scrutiny govern First

Amendment free-speech claims[12] and Fourteenth Amendment equal protection claims[13] depending on the type of restriction at issue. As other amici note, this Court often differentiates between the "core" of a right and its outer reaches—and varies the stringency of its analysis accordingly—when evaluating the scope of these and other enumerated constitutional rights. *See* Second Amendment Law Professors in Support of Neither Party Br. 14-18 (citing examples under First, Fourth, Fifth, Seventh, and Fourteenth Amendments).

Of particular relevance here, this Court has long recognized that the paramount governmental interest in protecting public safety can limit a variety of important constitutional rights. For instance, it has held that the First Amendment's protection of speech does not extend to fighting words or incitements to violence, *see*, *e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942), or to falsely shouting fire in a crowded theater, *see Schenk v. United States*, 249 U.S. 47, 52 (1919). Similarly, in the Fifth Amendment context, this Court has recognized a public-safety exception to the requirement to provide *Miranda* warnings before a suspect's answers may be admitted into evidence.

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[12] *Compare*, *e.g.*, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) (applying strict scrutiny to content-based speech restriction), *with*, *e.g.*, *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 189 (1997) (applying intermediate scrutiny to content-neutral restriction imposing incidental burden on speech).

[13] *Compare*, *e.g. Johnson*, 543 U.S. at 505 (racial classifications receive strict scrutiny), *with*, *e.g.*, *Clark*, 486 U.S. at 461 (gender classifications receive intermediate scrutiny), *with*, *e.g.*, *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (other classifications drawn by ordinary social and economic legislation receive rational basis review).

New York v. Quarles, 467 U.S. 649, 655-56 (1984). This Court has held that the Eighth Amendment does not prohibit long sentences under "three-strikes" laws because of the special public-safety dangers posed by recidivist offenders. *See Ewing v. California*, 538 U.S. 11, 24-26 (2003) (plurality op.). And it has explained that the protections of the Fourth Amendment yield to the interest in public safety when exigent circumstances exist. *See*, *e.g.*, *Plumhoff v. Rickard*, 572 U.S. 765, 776 (2014); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); *Mincey v. Arizona*, 437 U.S. 385, 392-93 (1978).

The government interest in promoting public safety is no less compelling in the context of the Second Amendment. Indeed, the use of firearms poses unique public-safety threats. This Court should reject petitioners' invitation to mandate a framework of analysis that excludes altogether the tiers of means-ends scrutiny commonly applied to other constitutional rights, or requires strict scrutiny in every case without respect to the type of restriction at issue or any other pertinent factor. *See* Second Amendment Law Professors in Support of Neither Party Br. 18.

3. This Court should preserve state and local authority to respond to unique conditions such as those in New York City.

The regulation at issue in this case is New York City's now-repealed partial ban on transporting firearms outside of homes in the City without a separate license to carry a loaded firearm in public. As explained in the City's brief (at 18-31), that regulation did not actually prevent petitioners from keeping their own handguns at their homes or second homes for self-

defense.[14] Nor did it prevent them from engaging in the training and practice needed to acquire and maintain proficiency in the use of those handguns. Nor did it prevent them from transporting their firearms to and from facilities adequate to those purposes—albeit not the ones that petitioners claimed were most convenient for them.[15] The City's former regulation is thus distinct from a total ban on protected activity and more analogous to a time, place, and manner restriction that would warrant intermediate scrutiny in the First Amendment context. *See* City Br. 38-39; *cf. City of Los Angeles*, 535 U.S. at 434 (intermediate scrutiny applicable to local law that "was not a complete ban on adult entertainment establishments"); Second Amendment Law Professors in Support of Neither Party Br. 27 ("If the law of self-defense applies differently inside the home than out, then it is unsurprising that courts have recognized that the right to bear arms for self-defense has different dimensions at home than in public.").

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[14] The United States suggests in its brief (at 27-28) that the Second Amendment protects the rights of a gun owner to use and train with the *same* handgun at every residence he or she has. But *Heller* and *McDonald* provide no basis for an unqualified constitutional right to use same gun for every purpose *and* at every location.

[15] Petitioners disavow any wish to carry handguns in public for self-defense. See *supra* at 5-6. Any limitation placed by the City's former regulation on their ability to engage in that activity is therefore beside the point in determining whether the law prohibited activities protected by the Second Amendment. And the City's former law did not *bar* the carrying of handguns in public for self-defense anyway—it simply imposed an additional licensing requirement petitioners do not challenge. *See* City Br. 35-36; U.S. Br. 22.

The lower courts therefore correctly determined that the City's former regulation was constitutional so long as the regulation was "substantially related to an important governmental objective," *Clark*, 486 U.S. at 461. It is beyond dispute that the City's objective here was substantial: as Chief Justice Rehnquist observed, protecting "the safety and indeed the lives of its citizens" is a "primary concern of every government." *United States v. Salerno*, 481 U.S. 739, 755 (1987). Indeed, petitioners concede that "public safety and crime prevention" are "undoubtedly substantial interests." Pet Br. 32-33. But they then suggest that these interests are illegitimate bases for state and local laws regulating when and how firearms may be transported from a particular premises into the public sphere. *See* Pet. Br. 33 ("[E]ven if the City could demonstrate that confining handguns to the home furthers public safety, it could not enact laws with the objective of furthering that end . . . ."). Yet public safety and crime prevention are the key rationales for the "presumptively lawful" firearm restrictions identified in *Heller*, including measures reflecting the increased danger posed by having firearms in public, *see* 554 U.S. at 626-27 (citing with approval, inter alia, bans on carrying concealed firearms in public and on firearms in sensitive places). This Court should therefore reject petitioners' suggestion that public safety and crime prevention are illegitimate government objectives for purposes of applying intermediate scrutiny to restrictions on firearms outside the home.

The Court should also reject petitioners' arguments that the former regulation was not "substantially related" to public-safety objectives. On this point, petitioners place great weight on the unique character of the City's former regulation. Pet. Br. 34-35. But that

argument ignores the unique character of the City, and the distinctive traits that warrant a distinct approach to firearm regulation there. In addition to being by far the largest city in the country, New York City has the highest population density[16] and, correspondingly, the highest potential for casualties from gun violence.[17]

Moreover, the City's unique geography and demography combine to give it an exceptional concentration of "sensitive areas," *Heller*, 554 U.S. at 626, including schools, government buildings, playgrounds, and places of worship. Indeed, as maps of the City prepared for other purposes reflect, large portions of it lie within 1000 feet of one or more such sites.[18] The City thus did not sweep substantially more broadly than necessary when it imposed restrictions that (a) limited the conditions under which firearms licensed for possession at a specific location could be removed and transported through the City, and (b) reasonably enhanced law enforcement's ability to ensure that firearms were transported only under those conditions. *Cf. Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (noting that even strict

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[16] NYC Dep't of City Planning, *New York City Population Facts* (internet).

[17] Recently, noises that sounded like gunfire in Times Square triggered a stampede of several hundred people that injured at least a dozen. *See* Michael Wilson, *There Was No Gunfire in Times Square. But the Panic Was Still Real*, N.Y. Times (Aug. 7, 2019) (internet).

[18] Br. for Amicus Curiae Prosecutors Against Gun Violence at 12-13, 30-34. *New York State Rifle & Pistol Ass'n v. Beach*, No. 19-156 (2d Cir. May 1, 2019), ECF No. 60.

scrutiny can be satisfied by resort to history, consensus, and "simple common sense" (quotation marks omitted)).

Whether this Court ultimately agrees with that conclusion or not, however, it should reaffirm the authority of States and localities to tailor firearm restrictions to unique local circumstances such as those presented in this case.

B. Neither the Dormant Commerce Clause nor the Right to Travel Curtails State and Local Authority to Protect Public Safety by Restricting the Transport of Firearms.

1. Petitioners' dormant commerce arguments fail.

The dormant Commerce Clause doctrine bars state and local governments from engaging in economic protectionism without congressional authorization. The doctrine does not apply at all where, as here, Congress has affirmatively exercised the Commerce Clause power. *See*, *e.g.*, *Northeast Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985). And where it does apply, the doctrine does not displace "the power of the State to shelter its people from menaces to their health or safety." *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 29 (1988) (quotation marks omitted). Petitioners' claim in this case rests on an overly broad application of the dormant Commerce Clause that fails to take into account States' and localities' legitimate public-safety interests. This Court should decline petitioners' request for the dormant Commerce Clause "to be expanded beyond its existing domain," *General Motors*

Corp. v. Tracy, 519 U.S. 278, 312 (1997) (Scalia, J., concurring); *see also id.* (calling dormant Commerce Clause "an unjustified judicial invention").

Petitioners' dormant commerce challenge fails at the threshold because Congress has authorized states and localities to participate in regulating the interstate transport of firearms. As the City's brief explains (at 43-50), the Firearms Owner Protection Act of 1986 to conditions a gun owner's ability to remove a firearm across state lines in part on the journey's starting in a place where the gun owner "may lawfully possess and carry such firearm," 18 U.S.C. § 926A. That is, Congress has recognized that states and localities may regulate how and where a firearm owner may "possess and carry" firearms—language that encompasses public-safety restrictions such as the City's former rule, which limited an individual who was licensed to a possess a firearm at a specific location from taking that firearm elsewhere without a separate license to carry it on his or her person. And Congress made clear its intent not to displace such regulations or to grant gun owners broader rights to travel with firearms across state lines, notwithstanding the burdens that might be imposed on interstate commerce. That precludes petitioners' dormant Commerce Clause challenge. "When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce, and it matters not that the courts would invalidate the state tax or regulation under the Commerce Clause in the absence of congressional action." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982).

In all events, this Court should reject petitioners' invitation to treat this case as though the City's former rule were no different from a restriction on the

transport of golf clubs or tennis racquets. Pet. Br. 48-49, 52. It trivializes the critical public-safety interests of the States to assert that laws governing lethal weapons merit no greater deference than laws governing ordinary sporting equipment. This Court's cases do not support such a cavalier approach. To the contrary, this Court has upheld a State's complete ban on importing out-of-state baitfish—a direct bar on interstate commerce, unlike the City's former rule here—as a legitimate exercise of the State's "broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources." *Maine v. Taylor*, 477 U.S. 131, 151 (1986); *see also id.* at 148 (noting Maine's legitimate interest in protecting its fisheries from threats posed by baitfish parasites and nonnative species).

New York City's interest in protecting the lives of its citizens in this case is no less compelling than Maine's interest in protecting its fisheries was in *Taylor*. This Court should not dismiss those concerns here by treating firearm regulations rooted in protecting the public as "arbitrary discrimination against interstate commerce," *id.* at 151.

2. Petitioners' right-to-travel arguments also fail.

The constitutional right to travel bars only those measures that—unlike the City's former rule here—directly outlaw or penalize the movement of citizens from one State to another. *See Saenz v. Roe*, 526 U.S. 489, 500, 501 (1999) (no violation of "the right of a citizen of one State to enter and leave another State" where statute "does not directly impair the exercise of the right to free interstate movement"); U.S. Br. 30-

31; City Br. 54-56. Petitioners' right-to-travel arguments sweep much more broadly, and would imperil a broad range of state and local provisions on the theory such regulations may make movement across state lines less appealing to a subset of the population. *See* Pet. Br. 56. This Court should reject petitioners' invitation to curtail state and local authority though a dramatic expansion of the right to travel.

Petitioners are not aided by their attempts to analogize the City's former rule to a law requiring "someone to leave her cell phone or laptop at home" when traveling. Pet. Br. 16. First, such a law would not violate the constitutional right to travel under this Court's precedents. Second, the transportation of firearms poses greater hazards than are posed by the transportation of ordinary consumer electronics. And those distinct dangers warrant deference to the reasonable judgments of state and local lawmakers. If this Court reaches the merits, it should reject petitioners' invitation to ignore *Heller* and *McDonald* and act as though a handgun were not a uniquely dangerous article rightly subject to a variety of state and local regulations to protect the public.

CONCLUSION

This Court should dismiss this case as moot or remand for a consideration of mootness by the lower courts. If this Court reaches the merits, it should affirm.

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August 2019

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