15-638

United States Court of Appeals
for the Second Circuit

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

Plaintiffs-Appellants,

v.

THE CITY OF NEW YORK and THE NEW YORK CITY POLICE DEPARTMENT – LICENSE DIVISION,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR APPELLEES

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PRELIMINARY STATEMENT

Plaintiffs-appellants, New York State Rifle & Pistol Association, Inc., Romolo Colantone, Efrain Alvarez, and Jose Anthony Irizarry, seek to extend the Second Amendment's guaranty of an individual's right to possess a handgun for self-defense to now also include (a) a right to transport a handgun, licensed for possession in one's residence, for the purpose of bringing the gun to target ranges or shooting competitions; and (b) a right to avoid the inconvenience of keeping a second handgun in one's second residence. Plaintiffs contend that by limiting the ability of individuals who hold restricted premises licenses to transport their handguns, the City of New York and the New York City Police Department License Division have violated the Second Amendment, the Commerce Clause, the fundamental right to travel, and the First Amendment freedom of association.

The United States District Court for the Southern District of New York (Sweet, U.S.D.J.) correctly rejected plaintiffs' constitutional challenges. The City has issued premises handgun licenses to all of the individual plaintiffs who sue here; those plaintiffs have full ability to use those weapons for the purpose of defending themselves and their

families in their New York City homes. To promote proficiency in firearms use, the City's rules also allow premises licensees to transport their licensed handguns directly to and from authorized target ranges within the City (and the rules also allow transportation of the handguns for the purpose of going hunting, provided that an individual holds appropriate licenses and documentation).

To protect the public safety and to control the prevalence of handguns on the City's densely populated streets, however, the City does not allow premises licensees to transport their handguns on the City's streets for other reasons, including for the purpose of bringing them to target ranges or shooting competitions outside of the City. The NYPD's past experience showed that such privileges, when previously afforded, had often been abused. Nothing in the City's rules purports to prohibit licensees from using rented or borrowed firearms at out-of-City target ranges or shooting competitions, as New York State law expressly allows, and as other States' laws also seem to allow. We acknowledge that plaintiffs would prefer to bring and use their own handguns from their New York City residences, particularly when they go to shooting competitions. While their interest in doing so may

arguably warrant accommodation through the legislative or regulatory process, it does not present any constitutional claim.

Nor does the Constitution compel the City to allow premises licensees to transport their handguns through the City for the purpose of bringing them to second residences outside of the City. The City's rules do not purport to prohibit individuals from obtaining a premises license in the location of a second New York residence and keeping a separate handgun in that residence. Again, plaintiffs are free to lobby legislative or executive officials for permission to transport a single handgun between multiple New York residences, but the Constitution does not guarantee them the right to do so.

ISSUES PRESENTED

1. Where the challenged rule permits plaintiffs to keep a handgun in their City residence for self-defense and transport it to and from shooting ranges within the City for target practice or shooting competitions, does the rule violate the Second Amendment by not allowing them to transport that handgun on the streets of the City for the purpose of taking that gun shooting ranges, shooting competitions, or second residences that are located outside of the City?

2. Where the challenged rule does not purport to prohibit plaintiffs from patronizing gun ranges or participating in shooting competitions outside the City, does it burden interstate commerce by effectively preventing them from doing so with the particular firearms associated with their restricted New York City premises license?

3. Where the challenged rule permits plaintiffs to travel anywhere they like to attend target shooting events or visit out-of-City residences, and does not purport to prohibit plaintiffs from participating in any shooting event with a different weapon or from keeping a handgun in an out-of-City residence, does the rule violate their fundamental right to travel by effectively preventing them from taking the particular firearm associated with their restricted New York City premises license with them when they travel outside the City?

4. Where the challenged rule permits plaintiffs to attend target shooting events outside the City, and to associate with organizations and endorse their expressive messages in any way they wish, does the rule interfere with their right to free association by effectively preventing them from participating in those shooting events with the

particular firearms associated with their restricted New York City premises license?

STATEMENT OF THE CASE

A. The Premises Handgun License

New York state law establishes the framework for handgun licensing in New York and delegates authority to local governments to regulate and administer the licensing scheme, so that those governments may oversee the possession of handguns in their communities. The Penal Law thus requires persons to apply for a handgun license in the city or county where they reside. Penal Law § 400.00(3)(a).[1] In 2013, the New York Court of Appeals held that this requirement specifies only residency, not domicile, thereby allowing persons to apply for a handgun license in the place of a secondary residence in New York. *Osterweil v. Bartlett*, 21 N.Y.3d 580 (2013), *overruling Matter of Mahoney v. Lewis*, 199 A.D.2d 734 (3d Dep't 1993). In most counties, state judges serve as the handgun licensing officers,

[1] State law does not require a license for possession of a long gun, including most rifles and shotguns. New York City does require a license for possession of long guns. See 38 RCNY § 3-02. Licensees may transport their rifles and shotguns so long as they are not left unattended in a vehicle and are kept locked in the trunk or equivalent space, not in plain view, while being transported in a vehicle. 38 RCNY § 3-14.

whereas in New York City, the NYPD Commissioner serves that role. Penal Law § 265.00.

The Penal Law describes two major types of handgun licenses: (1) *premises* licenses, which permit the licensee to possess a handgun in the licensee's dwelling or place of business; and (2) *carry* licenses, which permit the licensee to have and carry a concealed handgun in public. Penal Law §§ 400.00(2)(a) and (f). To obtain a carry license, the applicant must establish "proper cause" for the license, meaning that the applicant must demonstrate a need to carry a concealed firearm that is distinguishable from that of the general public (JA75).[2]

The NYPD Commissioner, who serves as the City's firearm licensing officer, is empowered to grant and issue licenses pursuant to the provisions of Penal Law § 400.00. *See* Penal Law § 265.00, New York City Administrative Code § 10-131(a)(1). Title 38 of the Rules of the City of New York (RCNY) sets forth NYPD's rules and regulations for the licensing of firearms in the City. Pursuant to these rules, and

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[2] The Penal Law provides that carry licenses (but not premises licenses) are effective throughout the State, unless the license states otherwise. With certain limited exceptions, however, concealed carry licenses issued outside of New York City are not valid within the City without a special permit from the commissioner of NYPD. Penal Law § 400.00(6).

consistent with state law, New York City residents may apply for (1) a *premises* license issued for a specific business or residence location; or (2) a *carry* license that also permits the holder to carry a concealed handgun in public. 38 RCNY § 5-01(a), (b). The City's rules provide that a premises license is issued for the protection of a business or residence, 38 RCNY § 5-23(a), and that possession of a handgun for protection under a premises license is restricted to the inside of the premises specified on the license, with an exception that allows transport of the handgun (unloaded and secured in a locked container) directly to and from an authorized arms range or shooting club within the City. *See* 38 RCNY §§ 5-01(a); 5-22(a)(14).[3]

B. Shooting Ranges in New York City and Elsewhere

New York state law expressly permits persons holding a handgun license to possess and use a handgun other than their own at an indoor or outdoor shooting range or at a target pistol shooting competition, provided that the license holder for that handgun is also present. Penal

[3] The City's rules also allow a premises license holder to transport a handgun for the purpose of hunting, provided that the holder holds a hunting license from the Department of Environmental Conservation and has obtained a hunting endorsement from the NYPD commissioner. 38 RCNY § 5-23(a)(4)

Law § 265.20(7-a). This means that handgun licensees may rent or borrow a gun for use at a target range or shooting competition in New York. The neighboring State of New Jersey also allows shooting ranges to rent handguns to patrons. *See, e.g.*, http://gunforhire.com (advertising handgun rentals at a shooting range in McBride Township, New Jersey, 12 miles from New York City; the website touts that "all you need to shoot is a photo ID and a friend," and for females, even the friend is not required).

Within New York City, NYPD requires a person or organization seeking to operate a small arms firing range to apply for and obtain a license (JA79-80, 116-117). For protection of the public safety, NYPD conducts a background check on the applicant; reviews the proposed site's zoning, property, and land use designation; and investigates the suitability and safety of the proposed premises (JA80, JA117, 119-120). NYPD-approved firing ranges are required to comply with all legal requirements; to maintain records, including a roster listing the names and addresses of all persons who have used the range and the date and hour that they used it; and to make those records available for inspection by NYPD during their hours of operation (JA 120). A list of

approved ranges is filed with the City Clerk and published in the City Record (JA120).

There are currently eight NYPD-approved small arms ranges (other than police or military ranges), with each New York City borough having at least one range (JA81, JA122). Those ranges are: the Westside Rifle & Pistol Range on West 20th Street (between Fifth and Sixth Avenues) in Manhattan; the Woodhaven Rifle & Pistol Range in Woodhaven, Queens; the Bay Ridge Rod and Gun Club, Inc., located in Bay Ridge, Brooklyn; Colonial Rifle & Pistol Club, located in Staten Island; the Richmond Borough Gun Club, located in Staten Island; and Olinville Arms, located in the Bronx (JA81, JA122, JA124-125). Some of these establishments require persons to become a member and pay a membership fee to use the target range; whether to adopt a membership structure is entirely the choice of the establishment, and may often serve primarily to establish the method or frequency of payment (as with a gym or fitness center, for example) (JA 78-82). While the record here does not purport to be exhaustive about the practices of shooting ranges within the City, it shows that at least one establishment does not require membership as a precondition to using

the range, and at least one holds regular shooting competitions and other events for both members and non-members throughout the year (JA15, 82, 127-141).

C. The City's Elimination of Its Previously Existing "Target" License Due To Observed Abuses

Before 2001, in addition to premises and carry licenses, the NYPD had also issued another class of restricted firearm license called the "target license" (JA77). 38 RCNY §§ 5-01(b), 5-23(b)(1) (as in effect prior to June 30, 2001). The target license allowed the holder to travel with his or her firearm, unloaded and in a locked container, to authorized shooting ranges and competitions, not limited to those located within New York City.

NYPD eliminated the target license after observing widespread abuses of the license (JA77). Over many years, NYPD received reports of target licensees travelling with their firearms when it was apparent they were not travelling to or from an NYPD authorized range (*id.*). These reports included licensees travelling with loaded firearms, licensees found with firearms nowhere near the vicinity of an NYPD authorized range, licensees taking their firearms out on airplanes, and

licensees travelling with their firearms during hours when no NYPD authorized range was open (*id.*).

Because of these repeated abuses, NYPD eliminated the target license and converted existing target licenses into premises licenses (JA78-79).[4] NYPD restricted transport of firearms for target shooting to ranges within the City both to reduce the number of firearms carried in public, which are susceptible to use in stressful or hostile situations (JA68), and to enhance NYPD's ability to verify a licensee's statement that he is transporting his gun to or from an authorized range (JA70-71).

D. Plaintiffs' Action Under the Second Amendment and Other Constitutional Provisions

Romolo Colantone, Jose Anthony Irizarry, and Efrain Alvarez are all New York City residents who hold premises licenses issued for the protection of a specific New York City residence (JA31, JA41, JA45).

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[4] The New York Appellate Division, First Department twice upheld the elimination of this license. *See Murad v. City of New York*, 12 A.D.3d 193, 193 (1st Dep't 2004), *appeal denied* 4 N.Y.3d 708 (2005) (holding that police commissioner's revision of handgun licensing regulations, eliminating permits for transporting a gun to a target range, was neither arbitrary nor capricious, and was a rational and proper exercise of authority); *De Illy v. Kelly*, 6 A.D.3d 217, 218 (1st Dep't 2004) (rejecting claims that that City's premises license, permitting transport of firearms to authorized target ranges and hunting areas, is inconsistent with state law).

Plaintiffs each asked NYPD for permission to travel with their handguns for the purpose of attending shooting competitions outside of the City (JA32-33, JA42, JA46). NYPD denied those requests (*id.*).

Plaintiff Colantone owns a second home in Hancock, New York, which is in Delaware County (JA33). Colantone states that his home is in a remote area and he has not brought his handgun to Hancock for protection because of the City's restrictions on transporting his handgun (*id.*). Colantone does not say whether he has applied for or obtained a premises handgun license in Delaware County (JA31-34).

Plaintiffs sued the City of New York and the NYPD License Division seeking a declaration that the restrictions on the New York City premises license are unconstitutional (JA8-26). Plaintiffs assert that the prohibition against transporting a handgun outside the City to a second home, for target practice, or for competitive shooting violates the Second Amendment, the Commerce Clause, their fundamental right to travel, and the First Amendment (*id.*).

By opinion and order filed February 5, 2015, the district court granted the City's motion for summary judgment in its entirety and

denied plaintiffs' motions for summary judgment and preliminary injunction (JA171-216).

In rejecting plaintiffs' Second Amendment claim, the court noted that the restrictions on the premises license do not impinge on the core of the Second Amendment, as they do not establish a prohibition on plaintiffs' Second Amendment right to possess a handgun in the home for self-defense (JA192). Nor do these restrictions prohibit plaintiffs from engaging in target practice or shooting competitions as they contend; they only prohibit plaintiffs from transporting restricted handguns to ranges not approved by the City (*id.*). And although plaintiffs cannot transport their restricted handguns to a second home outside the City, the restrictions on the premises license do not prevent them from obtaining an appropriate license to possess a firearm in the jurisdiction of their second home (JA195). Accordingly, the court concluded that, to the extent the challenged rule impinges on plaintiffs' Second Amendment right, it survives the applicable level of scrutiny because restricting the transport of firearms for practice, competition, or to a second home is substantially related to the City's interest in public safety and crime prevention (JA194-201).

The court rejected plaintiffs' right to travel claim because the premises license restrictions do not prevent plaintiffs from travelling outside the City, they merely prevent plaintiffs from doing so with their restricted firearms (JA201-204). The court concluded that the requirement that premises licensees not travel with their restricted firearms outside the City does not infringe on any fundamental right[5] (204). The court also rejected plaintiffs' First Amendment claim (JA206-208). The court concluded that requiring premises licensees to only utilize NYPD-authorized small arms ranges does not directly and substantially interfere with plaintiffs' free exercise rights, it simply affects the place and manner in which they may engage in the elective activity of target shooting (JA206-208). Finally, the court denied plaintiffs' commerce clause claim finding that, where the challenged rule does not prohibit individuals from purchasing firearms or attending shooting competitions outside New York State, it does not

[5] The district court also rejected plaintiffs' argument that the challenged rule conflicts with the Firearms Owners' Protection Act (FOPA), 18 U.S.C. § 926A (JA19, JA205). Because plaintiffs have not briefed this issue on appeal, the issue is abandoned. *See Eagleston v. Guido*, 41 F.3d 865, 875 (2d Cir. 1994) (claims not briefed on appeal are deemed abandoned).

have the effect of discriminating against interstate commerce (JA209-215).

SUMMARY OF ARGUMENT

The core right protected by the Second Amendment is the right to possess a handgun in the home for self-defense. It is not the right to take a handgun to a shooting competition or to a second home. Because the challenged rule does not infringe upon plaintiffs' Second Amendment rights, the district court properly dismissed plaintiffs' Second Amendment claim.

The challenged rule does not prohibit plaintiffs from maintaining proficiency in the use of their handguns, whether by live-fire training or shooting competitions at any of the eight NYPD-approved shooting ranges that currently exist within the City, at target ranges or shooting competitions elsewhere, or by other means. Nor does the rule prohibit plaintiffs from obtaining a license to possess a handgun for self-defense at any second residence they may have outside of the City. The challenged rule imposes no cognizable burden on plaintiffs' Second Amendment rights, or the burden is at most in substantial, and thus does not trigger heightened scrutiny under the Second Amendment. If

the rule did trigger such scrutiny, the rule would survive it, as a measure promulgated to protect public safety by restricting the number of firearms in public within the City.

The district court also properly dismissed plaintiffs' Commerce Clause, right to travel, and freedom of association claims. All of these claims rest on the same faulty premise: that plaintiffs have a constitutionally protected right to transport their restricted handguns in the City's streets for the purpose of bringing them to shooting competitions or homes outside the City. But plaintiffs do not have any such right. And the challenged rule does not restrict plaintiffs' travel, freedom to associate with other target shooters at non-City ranges, or ability to patronize shooting ranges outside the City. The rule simply prevents them from engaging in these activities with the particular handguns associated with their premises licenses covering specified New York City residences, which is not a constitutional offense.

ARGUMENT

POINT I

THE SECOND AMENDMENT DOES NOT COMPEL THE CITY TO GIVE ADDITIONAL TRANSPORTATION PRIVILEGES TO HOLDERS OF LICENSES FOR ON-PREMISES HANDGUN POSSESSION

This case reflects policy objections to the City's rules for holders of premises handgun licenses that, reasonable or not, lie far from the concerns of the Second Amendment. The basic principle of a premises handgun license is to authorize the holder to possess the gun *on premises* for self-defense. The City's rules fully afford premises licensees that right. Those rules further allow licensees to transport their handguns on city streets, locked and unloaded, to and from authorized live-fire target ranges within the City (as well as for the purpose of going hunting). The Second Amendment requires no more.

Plaintiffs seek the ability to transport their handguns on the City's streets for additional purposes, such as to bring them to target ranges or shooting competitions outside the City, or to bring them to second homes outside of the City (rather than having to obtain a second handgun for a second home). Plaintiffs' proper recourse is to lobby the City's rule-makers or the State Legislature to afford them those

privileges. Nothing in the Second Amendment compels the City to extend such transportation privileges to holders of licenses for on-premises handgun possession.

A. The Second Amendment Protects the Right to Keep and Bear Arms for Self-Defense, Not the Right to Transport Guns to Shooting Competitions and Second Homes.

Plaintiffs' Second Amendment claims fail at the threshold, first, because their preferences to transport their handguns, specifically licensed for possession within their New York City residences, in order to bring those handguns to target practice and competitive shooting events outside the City or to bring them to out-of-City second homes, fall outside the scope of the Second Amendment.

In *Heller* and *McDonald*, the Supreme Court held that "the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense." *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008). In both cases, the Court struck down laws that operated as complete bans on handgun possession within the home. *McDonald*, 561 U.S. at 791; *Heller*, 554 U.S. at 628.

This Court has confirmed that the Second Amendment protects a right to possess a firearm for self-defense, and has also made clear that a firearm regulation will trigger heightened scrutiny under the Second Amendment "only if it operates as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense or for other lawful purposes." *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012). Thus, the Court has stressed, not every "marginal, incremental, or even appreciable restraint on the right to keep and bear arms" will receive heightened scrutiny. *Id.* at 166; *see also id.* at 167 ("[L]aw that regulates the availability of firearms is not a substantial burden on the right to keep and bear arms if adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense.").

This case presents no cognizable burden on plaintiffs' Second Amendment rights or at most presents an insubstantial burden that does not justify heightened scrutiny under the Amendment. As holders of New York City licenses authorizing them to possess handguns within their New York City residences, all plaintiffs are fully able to exercise the right to possess a handgun for self-defense in the home. Plaintiffs do

not contest that fundamental fact, and they raise no challenge here to the City's licensing system for premises handgun licenses.

Moreover, as plaintiffs themselves make clear, this case is also not about the right to possess a handgun for the purpose of self-defense *outside* the home and in public. In New York, persons seeking to exercise such a right must obtain a carry license, not a premises license. This Court has already upheld New York's requirement that a person seeking a carry license must demonstrate "proper cause" for such license, confirming in that case that the government has much broader latitude to restrict possessions of handguns in public than it does to limit their possession in the home. *See Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012), *cert. denied* 133 S. Ct. 1806 (2013). Plaintiffs cannot and do not challenge the holding of *Kachalsky* here. And, indeed, plaintiffs emphasize that they seek to carry their handguns unloaded and in locked containers, not in operable condition. So this case is not about either the right to possess a handgun in the home for self-defense or any claimed right to carry a handgun in public for self-defense. The case is not about self-defense at all.

Plaintiffs strain to compare this case to *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011), where the Seventh Circuit struck down the City of Chicago's law that totally banned target ranges within its jurisdiction, while at the same time mandating an hour of live-fire training as a precondition to obtaining a premises license.[6] They cite the Seventh Circuit's holding in *Ezell* that the core right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use. 651 F.3d at 704.

Even assuming that this Court would also recognize a right to acquire and maintain firearms proficiency, the City's rules do not burden any such right. In sharp contrast to the Chicago ban struck down in *Ezell*, New York City fully allows firing ranges within its jurisdiction; indeed, eight firing ranges exist in the City (JA122), and the law would permit the existence of more such ranges if demand supported it. To promote proficiency in firearms operation, the City's

[6] Chicago's prior ban on handgun possession, invalidated in *McDonald*, serves as a critical backdrop to *Ezell*. The Seventh Circuit noted that only days after the Supreme Court struck down the handgun ban in *McDonald*, Chicago had enacted a complex network of highly restrictive rules, including the challenged rules that simultaneously (a) required live-fire target training as a precondition to obtaining a handgun license and (b) totally banned live-fire ranges within the jurisdiction. *See Ezell*, 651 F.3d at 689-92. The strong suggestion was that, following *McDonald*, Chicago had attempted to reconstitute its handgun ban by indirect means. No similar history exists here.

rules specifically allow premises licensees to transport their firearms directly to and from authorized shooting ranges in the City. 38 RCNY § 5-23(a).

While the City does not permit premises licensees to transport their handguns on the City's streets for the purpose of bringing them to firing ranges or shooting competitions outside of the City, nothing in New York City law purports to restrict the ability of City residents to patronize such ranges or participate in such competitions. New York State law allows persons who hold a firearms license to rent (or borrow) handguns at indoor or outdoor target ranges or shooting competitions. *See* Penal Law § 265.20(7-a). New Jersey law evidently also allows patrons to rent guns at shooting ranges. See *supra*, at 8.[7] And, as a practical matter, plaintiffs have adduced no evidence suggesting that the City's rules have impaired their ability to maintain firearms proficiency. The challenged rule simply does not impose any cognizable

[7] Nor is live-fire training the sole means of obtaining or maintaining firearms proficiency: there is also classroom training and training with commercially available simulators, which have grown increasingly realistic, to the point of including guns that "mimic the recoil of firearms discharging live ammunition." *Ezell*, 651 F.3d at 712 (Rovner, J., concurring). *See also, e.g.*, http://www.virtra.com; http://meggitttrainingsystems.com. Nothing in New York City law restricts the use of these methods.

burden on a right to attain or maintain proficiency in firearms use, assuming such a right exists, and certainly does not substantially burden any such right, as would be necessary to trigger heightened Second Amendment scrutiny.

We understand that plaintiffs would like to participate in shooting competitions outside of New York City with the particular handgun that is associated with their City-issued premises licenses, and we do not minimize the importance to plaintiffs of using that particular weapon in those contests. The New York Legislature has enacted a special statutory provision allowing nonresidents to travel into and through the State with handguns licensed in their places of residence in order to attend sanctioned shooting competitions, provided that the gun is transported unloaded in a locked container, together with a copy of documentation for the competition. Penal Law § 265.20(12). Perhaps plaintiffs should lobby the Legislature to adopt an analogous statute for New York residents who would like to travel with their licensed handguns to attend shooting competitions across or outside the State. But the absence of such an accommodation does not constitute a violation of the Second Amendment.

Nor is there any merit to the claim of one individual plaintiff, Colantone, that the Second Amendment guarantees him the right to transport his handgun, specifically licensed for possession within a New York City residence, through the City's streets for the purpose of bringing the gun to a second residence outside of the City. To be sure, New York City premises licenses are issued only to persons with homes in New York City, and are limited to the specific premises for which they are issued. *See* 38 RCNY §§ 5-01(a), 5-02(g), 5-23(a)(1)-(2). But nothing in the State Penal Law or the City's rules prevents a New York City resident with a second New York home outside of the City from applying for or obtaining an appropriate license to possess a firearm in that second home in the county where the home is located.

Recently, in *Osterweil v. Bartlett*, 21 N.Y.3d 580, 584 (2013), the New York Court of Appeals held that an applicant who owns a part-time residence in New York, but is permanently domiciled elsewhere, is eligible for a New York handgun license in the jurisdiction of his residence. That decision overruled a prior holding from an intermediate state court that had construed Penal Law § 400.00 to impose a domicile

requirement for obtaining handgun licenses in New York. *See Matter of Mahoney v. Lewis*, 199 A.D.2d 734 (3d Dep't 1993).

The practical implications of the Court of Appeals' 2013 ruling in *Osterweil* have not yet been fully addressed by the State Legislature or by local licensing officials across New York. But there is no basis for Colantone's suggestion that the Second Amendment precludes any requirement that he obtain a separate license for the possession of a handgun in his second New York residence. Local officials in Delaware County, the location of Colantone's upstate residence, appropriately have an interest in reviewing applications for persons seeking to possess a firearm in a residence within their jurisdiction and in maintaining records reflecting that such possession is authorized for the residence in question.

Nor is there any credible claim that the cost or asserted inconvenience associated with obtaining and licensing a second handgun for a second home constitutes a substantial burden on Second Amendment rights. This Court rejected a similar contention in turning back a challenge to New York City's gun license fee of $340, payable every three years. *Kwong v. Bloomberg*, 723 F.3d 160, 167-68 (2d Cir.

2013), *cert. denied, sub nom.*, *Kwong v. De Blasio*, 1345 S. Ct. 2496 (June 2, 2014) (*quoting Nordyke v. King*, 644 F.3d 776, 787-88 (9th Cir. 2011)). The Court strongly suggested in *Kwong*, without ultimately deciding, that the fee requirement did not trigger heightened scrutiny under the Second Amendment. 723 F.3d at 167-68. The cost of obtaining a gun license outside of New York City and Nassau County is *de minimis*. *See* Penal Law § 400.00(14) (limiting license fees outside of New York City and Nassau County to not less than three dollars nor more than ten dollars). And the one-time cost of purchasing a handgun is a cost that any person seeking to exercise Second Amendment rights within a residence must be prepared to bear.

Plaintiffs' requests for permission to transport their City-licensed handguns on the city streets in order to bring them to target ranges, shooting competitions, or second residences outside the City would be better directed to policy-makers at the State and local levels of government for evaluation of the relevant enforcement challenges and risks to public safety. Their requests do not present viable constitutional claims under the Second Amendment.

B. The Challenged Rule Would Satisfy Heightened Scrutiny Under the Second Amendment If It Applied.

Plaintiffs' Second Amendment claims are fully resolved by our showing that the challenged rule does not substantially limit plaintiffs' right or ability to possess a gun for self-defense. But even if heightened scrutiny were applied, the level of scrutiny would be at most intermediate, and the rule would easily satisfy it. *See, e.g.*, *Kwong*, 723 F.3d at 167-68 (upholding City's handgun licensing fees); *Kachalsky*, 701 F.3d at 96 (upholding State's "proper cause" requirement for obtaining a concealed carry license). This Court observed that heightened scrutiny need not always be akin to strict scrutiny when a law burdens the Second Amendment. *Kachalsky*, 701 F.3d at 93. Thus, laws that do not burden the "core" protection of self-defense in the home do not need to be "narrowly tailored" or the least restrictive available means to serve the stated governmental interest. *Id.* at 97. To survive intermediate scrutiny, the fit between the challenged regulation and asserted governmental interest need only be substantial, "not perfect." *Id.* at 97.

In a detailed affidavit accompanied by supporting documents, the then-Commanding Officer of the NYPD License Division, Andrew Lunetta, explained how the restrictions on the transport of firearms for practice, competition, or to an out-of-City home applicable to premises licensees serve the undoubtedly compelling governmental interests in public safety and crime prevention (JA67-82). It is well established that the possession of firearms in public presents a greater public danger than the possession of firearms inside one's home. *See Kachalsky*, 701 F.3d at 94-99. The City has ample basis to limit the ability of persons who have not applied for and obtained carry licenses to possess handguns in public on the streets of the nation's most densely populated city. The fact that plaintiffs say that they will carry their handguns locked and unloaded does not mean that the Constitution guarantees them the right to do so. Nor does plaintiffs' promise give confidence that everyone else would necessarily abide by the same rules.

Plaintiffs' arguments ignore practical enforcement realities that the government cannot afford to overlook. Lunetta demonstrated that the harms articulated are not merely conjectural: actual past experience

has shown that if licensees believe that they will be able to avoid being caught carrying their firearms anywhere in New York State or across state lines, despite not holding a carry license, many licensees will transport firearms in their vehicles, thus eviscerating the restrictions on premises licenses (*see* JA68-69, JA77-79). Such persons might usually maintain the handgun in a locked and unloaded condition, but there is little ability to prevent them from unlocking and loading the weapon in particular episodes if they wish to, as law enforcement is neither omnipresent nor omniscient. The Second Amendment does not compel the government to create or facilitate such opportunities for the possession of dangerous firearms in public places without detection.

Nor should the fact that the City has afforded premises licensees the ability to transport their handguns to and from an authorized firing range within the City (and for hunting) mean that the City is now constitutionally compelled to provide additional and broader transportation privileges to premises licensees. The NYPD has far greater ability to verify a person's claim that he is transporting his weapon directly to or from one of the City's authorized target ranges (such as by confirming whether the person was stopped along a

plausible route directly to or from his residence to an authorized range) than the Department would have to verify a claim that the person is transporting the weapon to or from some target range or shooting competition somewhere outside the City, or transporting the weapon to or from an individual's second residence somewhere outside the City. The NYPD's ability to verify is further enhanced by the requirement that authorized ranges within the City must maintain records of their members, and rosters of the names and addresses of persons who have used the range, and the dates and times of such use, available for inspection by the NYPD (JA120). Consequently, permitting premises licensees to travel with their firearms only to approved ranges within the City ensures that licensees are not effectively able to travel in the public with their firearms at any time and to any place of their choosing, without obtaining the appropriate carry license (JA68-69).

Plaintiffs are wrong to dismiss the City's rule as a mere matter of administrative convenience. App. Br. at 34-35. Rather, the rule addresses the risk to public safety demonstrated by the past history of abuse (JA57, 77-78). NYPD's experience with the now-eliminated target license, and the abuse by target licensees who were travelling with their

firearms when not on their way to or from an authorized range, strongly demonstrates that the rule serves important public interests (*see* JA77-79). The possibility that there might be other ways to achieve the City's public safety interests does not invalidate the rule.

Nor is there any merit to plaintiffs' argument that preventing a person from transporting a handgun from his primary residence to a second residence outside the City increases the risk to public safety by requiring such a person to purchase a second handgun for the residence and requiring the person to leave a handgun behind in their residence when not home. At bottom, this presents a policy question—a weighing of relative risks in real-world conditions—that are ill-suited for resolution by courts in constitutional litigation. *Cf. Kachalsky*, 701 F.3d at 97 (deferring to the Legislature's policy assessment of the dangers and risks of gun possession).

The City has addressed the risks of handguns left unattended in a home by other means. For example, New York City Administrative Code § 10-312 makes it a criminal violation for any handgun owner to store or leave their gun out of their immediate possession or control, without rendering the gun inoperable by employing a safety locking

device. *See also* 38 RCNY § 5-22(13) (requiring safe storage of handguns); Penal Law § 265.45 (requiring unattended firearms to be securely locked in appropriate safe storage depository if a person prohibited from possessing a firearm lives in the home). Such safety locking devices must make it impossible to operate the weapon without a key or combination used to open or remove the locking device. *See* 38 RCNY § 5-25(a)(2) (enumerating accepted types of safety locking devices). In addition, if a premises licensee plans to be out of town for a prolonged period of time they can voucher their firearm with the local police. Other concerned jurisdictions are of course free to adopt similar requirements. *See* General Municipal Law § 139-d (authorizing municipalities to regulate storage of firearms).

Certainly, the City has sound basis to conclude that the risk of firearms being kept inside a residence when the owner is absent, subject to a rule requiring the guns to be inoperable and locked with a key or combination held by the owner, is less than the risk of allowing owners to carry weapons in public, subject to similar requirements, where the owners themselves hold the key or combination to unlock the weapon. Plaintiffs may believe that the relative risks should be weighed

differently, but their policy position does not establish any constitutional claim.

POINT II

THE CHALLENGED RULE DOES NOT VIOLATE THE COMMERCE CLAUSE

There is also no merit to plaintiffs' contention that the City's rules governing the transportation of handguns by holders of premises licenses violate the dormant Commerce Clause. Article I, § 8, clause 3 of the U.S Constitution gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States…" The Supreme Court has recognized that the Clause has "dormant" or "negative" implications that constrain state and local regulation. *See e.g. Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992).

In a dormant Commerce Clause challenge, "[t]he crucial inquiry…must be directed to determining whether [a challenged statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Thus, the dormant Commerce Clause is chiefly concerned with "economic protectionism – that is, regulatory

measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008).

The NYPD's rules granting a limited accommodation for the transportation of handguns by persons who hold only premises licenses do not reflect any form of economic protectionism, but rather is a public-safety measure to control the presence of handguns in public, an entirely appropriate concern of local officials. 38 RCNY § 5-23 does not require plaintiffs to patronize NYPD-authorized shooting ranges and it does not block plaintiffs from patronizing shooting ranges or participating in shooting competitions outside of the City. Unlike the cases on which plaintiffs rely, the challenged rule does not require a certain economic activity to be performed in State or within the City.[8] Plaintiffs may patronize ranges outside of the City and outside of the

[8] *See C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 394 (1994) (invalidating local ordinance requiring that all waste within its jurisdiction be processed at a local waste processing plant before leaving jurisdiction); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) (invalidating law requiring timber taken from state lands be processed in state prior to export); *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951) (invalidating law requiring milk to be pasteurized and bottled at an approved plant within five miles of city center); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 13 (1928) (invalidating law prohibiting shrimpers from exporting any shrimp from which heads and hulls have not been removed).

State with rented or borrowed guns. The challenged rule does not discriminate against interstate commerce because it does not erect an economic barrier to protect a local industry against competition from outside of the City or the State.

Nor, contrary to plaintiffs' contentions, does the City's rule constitute an impermissible extraterritorial regulation. In narrow circumstance, a state action may be found to violate the dormant Commerce Clause where it regulates commerce that takes place entirely outside its own borders. *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). The critical inquiry here is "whether the practical effect of the regulation is to control conduct beyond the boundaries of the state." *Id.* at 337. The extraterritoriality doctrine does not disallow all state rules with cross-border effects. *See Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 220 (2d Cir. 2004) (rejecting extraterritoriality argument where cross-border effect amounts to no more than upstream pricing impact of a state regulation).

Furthermore, the extraterritoriality doctrine under the dormant Commerce Clause is only rarely invoked. In *Healy*, for example, the Supreme Court struck down a Connecticut statute that directly affected

the pricing of alcoholic beverages in neighboring states by requiring brewers and importers of beer to affirm that their posted prices for products sold to in-state wholesalers are, as of the moment of posting, no higher than the prices at which they sell those products in three bordering states. 491 U.S. at 337. The Court found that this law had the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State. *Id.*

38 RCNY § 5-23(a) neither purports to nor has the effect of controlling commercial activity occurring wholly outside the City or State. It merely sets forth limitations on the use of the license issued by the City of New York: it neither projects the City's regulatory regime into other states nor controls activity occurring out-of-state. The rule does not prohibit patronage of non-City shooting ranges or obstruct the flow of firearms in interstate commerce. Its effect on interstate commerce, if any, is slight in comparison to its considerable local benefits: the control of firearms in public space.[9] It does not violate the dormant Commerce Clause.

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[9] If a statute does not discriminate against interstate commerce, it will nevertheless be invalidated under the *Pike v. Bruce Church, Inc.*, balancing test if it "imposes a burden on interstate commerce incommensurate with the local benefits secured."

We also note that, although plaintiffs argued below that the City's rule violated provisions of the Firearms Owners' Protection Act (FOPA) protecting the interstate transportation of firearms, they have abandoned that argument on appeal. The district court rejected plaintiffs' FOPA argument because the statute (18 U.S.C. § 926A) protects only the transportation of a firearm from a place where an individual may lawfully possess *and carry* such firearm to any other place where he or she may lawfully possess *and carry* it. Plaintiffs do not now contest that ruling.

Thus, Congress considered how far to go in using federal legislation to protect against state or local restrictions on the transport of weapons. *See* S. 49, 99th Cong., 1st Sess. § 107 (1985), 131 CONG. REC. S9101, at S9115-17 (daily ed. July 9, 1985). Congress opted not to enact a federal law compelling States or localities to afford individuals

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Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Although plaintiffs argue in a footnote that the challenged rule imposes burdens on interstate commerce that exceed the rule's local benefits, they do not propose that this Court engage in a *Pike* balancing test (App. Br. at 46 n7). But even if they did, the rule would survive such an inquiry, as any burden on interstate commerce is negligible, and the rule is reasonably constructed to accomplish the City's compelling public safety goals.

holding premises licenses the type of transportation privileges that plaintiffs seek here. *Id.* The purpose of dormant Commerce Clause doctrine is to protect State and localities from interfering with Congress' ability to regulate interstate commerce. Plaintiffs' claim is thus further undermined by Congress' refusal to go as far in the federal statute as plaintiffs now ask the court to go under the dormant Commerce Clause.

POINT III

THE CHALLENGED RULE DOES NOT VIOLATE PLAINTIFFS' FUNDAMENTAL RIGHT TO TRAVEL

Plaintiffs' claims based on the right to travel likewise fail. A statute or regulation that merely has an effect on travel, does not raise an issue of constitutional dimension. "[T]he right to travel cannot conceivably imply the right to travel whenever, wherever and however one pleases. *Lutz v. York*, 899 F.2d 255, 269 (3d Cir. 1990). A statute implicates the constitutional right to travel when it actually deters such travel, or when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right. *Soto-Lopez v. New York City Civil Serv. Comm'n*, 755 F.2d 266, 278 (2d

Cir. 1985). Thus, courts have found an infringement of a fundamental right to travel by laws that trigger concerns not present here—interference with free ingress to and egress from certain parts of a State or treatment of new residents of a locality less favorably than existing residents.

Plaintiffs contend that the challenged rule deters travel outside the City by forcing them to choose between two fundamental rights: their right to travel and their right to bear arms. But the challenged rule does not infringe upon plaintiff's Second Amendment rights or on their fundamental right to travel. It only restricts their ability to transport firearms that are specifically licensed for possession and use within their New York City residences for the purpose of bringing those guns to shooting ranges or homes outside the City, which is not a fundamental right.

The challenged rule does not burden or penalize plaintiffs' fundamental right to travel because plaintiffs are free to move about without their restricted handguns or to obtain the necessary permits to

travel with their guns if they wish.[10] Notwithstanding their arguments to the contrary, 38 RCNY § 5-23(a) does not prevent or deter plaintiffs from travelling to New Jersey or Yonkers or elsewhere to participate in shooting competitions or from travelling to their out-of-City residences and exercising their Second Amendment rights. Plaintiffs can use out-of-City ranges either with licenses that permit them to transport their firearms outside the City or by travelling to ranges where firearms are available to rent or may be borrowed, and they can protect their out-of-City homes by obtaining gun licenses in the jurisdictions of any such residences.

Moreover, to whatever limited extent the challenged rule could be construed to burden plaintiffs' right to travel, the rule need only be a reasonable time, place, and manner restriction to survive constitutional review. *See Turley v. New York City Police Dep't*, 1996 U.S. Dist. LEXIS 2582 *19 (S.D.N.Y. 1996), *aff'd in part, rev'd in part, after trial on other issues*, 167 F.3d 757 (2d Cir. 1999) (holding that right to travel is not violated by police power regulations that impose reasonable restrictions

[10] Under FOPA, notwithstanding any state or local law, a person is entitled to transport a firearm from any place where he or she may lawfully possess and carry such firearm to any other place where he or she may lawfully possess and carry it, if the firearm is unloaded and locked out of reach. 18 U.S.C. § 926A.

on use of streets and sidewalks). Here, the City's rule merely regulates the time, place, and manner in which premises licensees can transport their handguns. This type of minor restriction on travel, imposed to further the City's significant interests in ensuring public safety and reducing the number of firearms in public, does not amount to the denial of a fundamental right. *See Selevan v. New York Thruway Auth.*, 711 F.3d 253, 257-58 (2d Cir. 2013) (requiring payment of tolls to commute to work does not infringe on fundamental right to travel).

POINT IV

THE CHALLENGED RULE DOES NOT VIOLATE PLAINTIFFS' FIRST AMENDMENT RIGHTS

There is similarly no merit to plaintiffs' freedom-of-association claim. The Constitution does not recognize any generalized right of social association. *Sanitation Recycling Indus. v. City of New York*, 107 F.3d 985, 996 (2d Cir. 1997). Rather, the First Amendment protects rights of "intimate association" and "expressive association." *Id.* at 995-96. Plaintiffs do not contend that the City's handgun regulations burden their right to intimate association, so only the right to expressive association is at issue.

The First Amendment protects the right of individuals to associate for the purpose of engaging in activities protected by the First Amendment, such as speech, assembly, petition for redress of grievances, and the exercise of religion. *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). In order for an activity to fall within the ambit of the First Amendment, "a group must engage in some form of expression, whether it be public or private." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

Nothing in the City's rules prevents plaintiffs from becoming a member of any organization that they wish to join. To the extent that any such organizations engage in advocacy, education, or expression about gun rights or any other topic, nothing in the City's rules prevents plaintiffs from supporting, participating in, or promoting such efforts. On the other hand, the act of firing a handgun at a shooting range or in a shooting competition is not itself protected expressive or associational conduct. Nor, even more clearly, does the First Amendment guarantee individuals any right to fire their own handgun, licensed for possession within a residence, at a shooting range or in a shooting competition.

But even if this Court were to conclude that firing a handgun at shooting ranges or in shooting competitions is protected associational conduct, which it should not, the challenged rule still would not violate plaintiffs' First Amendment rights. Government regulation or conduct that makes it "more difficult for individuals to exercise their freedom of association … does not, without more, result in a First Amendment violation." *Fighting Finest, Inc. v. Bratton*, 95 F.3d 224, 228 (2d Cir. 1996). Rather, "[t]o be cognizable, the interference with associational rights must be 'direct and substantial' or 'significant.'" *Id.* (*quoting Lyng v. UAW*, 485 U.S. 360, 366-67 n.5 (1988)). The existence of a "'chilling effect' even in the area of First Amendment rights" does not support a freedom of expressive association claim. *Id.* (*citing Younger v. Harris*, 401 U.S. 37, 51 (1971)).

38 RCNY § 5-23 does not forbid plaintiffs from participating in competitive shooting events outside the City, as they contend. As already explained, they are free to participate in competitive shooting events outside of New York City at shooting ranges where they can rent or may borrow guns. The rule simply does not allow them to participate in shooting competitions outside the City with the particular firearm

licensed for possession within their New York City residences. The availability of alternative means for patronizing out-of-City ranges significantly decreases any obstacles to the freedom to associate that might even arguably result from the rule.

Nor is there any support for plaintiffs' "forced association" argument. In support of their forced association argument, plaintiffs rely upon cases concerning laws explicitly compelling individuals to speak against their will. App. Br. at 51 (*citing United States v. United Foods*, 533 U.S. 405, 416 (2001) (striking down law requiring mushroom producer to subsidize advertising speech with which they disagreed); *Keller v. State Bar of Cal.*, 496 U.S. 1, 16 (1990) (holding that compulsory bar dues could not be expended to endorse activities of an ideological nature unrelated to the bar's goals); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (striking down law requiring vehicle owners to promote State's ideological message on their license plates or suffer a penalty); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (striking down regulation requiring public school children to salute the American flag); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977) (holding that plaintiffs could constitutionally prevent union's spending

part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative)). But here, plaintiffs do not even assert that they are being compelled to speak against their will, they simply state that the challenged rule "effectively coerce[s]" them to join private clubs that the "may prefer not to join" (App. Br. at 51).

In any event, plaintiffs are not correct that they have to join a private shooting range in order to participate in target shooting competitions in the City. The Richmond Boro Gun Club, of which plaintiff Colantone was formerly the president, has range facilities available to non-members for scheduled registered matches (JA82, JA127, JA130). And even if plaintiffs did have to join a private club to engage in this elective activity, it would not be a result of the challenged rule. It would be a result of the business or organizational decision of the shooting range to charge a membership fee. And joining a shooting club would not create a constitutional injury in any event. Although forced associations that burden protected speech are impermissible, being required to engage in a particular recreational activity involving firearms at designated locations, if one should choose

to engage in that recreational activity, does not violate the freedom of association or any other constitutional right.

CONCLUSION

The judgment appealed from should be affirmed.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,304 words, including the pats of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).