

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

NEW YORK STATE RIFLE & PISTOL)
ASSOCIATION, INC., ET AL.,)
Petitioners,)
v.) No. 18-280
CITY OF NEW YORK, NEW YORK, ET AL.,)
Respondents.)

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3 NEW YORK STATE RIFLE & PISTOL)
4 ASSOCIATION, INC., ET AL.,)
5 Petitioners,)
6 v.) No. 18-280
7 CITY OF NEW YORK, NEW YORK, ET AL.,)
8 Respondents.)

9 - - - - -
10 Washington, D.C.
11 Monday, December 2, 2019

12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:05 a.m.

16
17 APPEARANCES:
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19 on behalf of the Petitioners.
20 JEFFREY B. WALL, Principal Deputy Solicitor
21 General, Department of Justice, Washington, D.C. ;
22 for the United States, as amicus curiae,
23 supporting the Petitioners.
24 RICHARD P. DEARING, ESQ., New York, New York ;
25 on behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 18-280, the
5 New York State Rifle and Pistol Association
6 versus the City of New York.

7 Mr. Clement.

8 ORAL ARGUMENT OF PAUL D. CLEMENT

9 ON BEHALF OF THE PETITIONERS

10 MR. CLEMENT: Mr. Chief Justice, and
11 may it please the Court:

12 Text, history, and tradition all make
13 clear that New York City's restrictive premises
14 license and accompanying transport ban are
15 unconstitutional. The city's restriction on
16 transporting firearms to places where they may
17 be lawfully possessed and its insistence in its
18 revised regulations that any such transport be
19 continuous and uninterrupted are premised on a
20 view of the Second Amendment as a home-bound
21 right, with any ability to venture beyond the
22 curtilage with a firearm, even locked and
23 unloaded, a matter of government grace.

24 That view is inconsistent with text,
25 history, tradition, and this Court's cases. The

1 text of the Second Amendment protects rights to
2 keep and bear arms. That latter right makes
3 clear that the Second Amendment protects rights
4 that are not strictly limited to the premises.

5 And there is no historical analogue
6 for the city's prohibition on transporting
7 firearms to places where they may be lawfully
8 used. To the contrary, the second Congress
9 required the militia to take their own firearms
10 from their homes to the training ground.

11 And the regulations on limiting where
12 firearms may be discharged or where training may
13 occur that the city invokes both underscore that
14 the general rule was that firearms could be
15 safely transported between and among places
16 where they could be used and discharged. This
17 Court recognized as much in *Heller*, both by
18 recognizing the long history of handgun
19 possession outside the home and by recognizing
20 the government's interest in limiting possession
21 in sensitive places, not every place outside the
22 home.

23 The city, of course, has struggled
24 mightily ever since this Court granted
25 certiorari to make this case go away, but those

1 efforts are unavailing and only underscore their
2 continuing view that the transport of firearms
3 is a matter of municipal grace rather than
4 constitutional right. The standard for
5 mootness --

6 JUSTICE GINSBURG: But, Mr. -- Mr.
7 Clement, the city has now been blocked by a
8 state law, and the state has not been party to
9 these proceedings. The state says: City, thou
10 shalt not enforce the regulations. So what's
11 left of this case? The Petitioners have gotten
12 all the relief that they sought. They can carry
13 a gun to a second home. They can carry it to a
14 fire -- to a practice range out of state.

15 MR. CLEMENT: So, Justice Ginsburg,
16 the Petitioners have not gotten all the relief
17 to which they've been entitled if they prevailed
18 in this litigation before the city and the state
19 changed their law.

20 I think the best way to illustrate
21 that is if we prevailed in the district court
22 before these changes in the law, we would have
23 been entitled, of course, to a declaration that
24 the transport ban is and always was
25 unconstitutional.

1 But we would also be entitled to an
2 injunction that did three things: one, prohibit
3 future enforcement of the transport ban; second,
4 prevent the city from taking past conduct in
5 violation of the ban into account in licensing
6 decisions; and, third, an injunction that
7 safeguard our right to transport meaningfully
8 such that it wouldn't be limited to continuous
9 and uninterrupted transport.

10 JUSTICE GINSBURG: But even as --

11 MR. CLEMENT: Now the state law --

12 JUSTICE GINSBURG: -- as far as what
13 you said about enforcing past violations, no
14 plaintiff has alleged that they ever violated
15 the regulations when they were in effect?

16 MR. CLEMENT: That's actually not
17 correct, Justice Ginsburg. If you look at
18 paragraphs 12, 15, and 17 of the complaint, at
19 pages 28 and 29 of the Joint Appendix, all three
20 of the individual Petitioners alleged that they
21 regularly went outside the City of New York to
22 firing ranges in -- outside -- Westchester,
23 basically, and in New Jersey.

24 So all three of my clients are on the
25 record as saying that, in the past, they engaged

1 in conduct that is inconsistent with the
2 transport ban. And if you understand the ways
3 that the City of --

4 JUSTICE SOTOMAYOR: Mr. Clement --

5 MR. CLEMENT: -- New York licenses
6 handguns or --

7 JUSTICE SOTOMAYOR: -- Mr. Clement, I
8 believe that the city has foresworn any future
9 prosecution for past violations.

10 MR. CLEMENT: Well --

11 JUSTICE SOTOMAYOR: I thought that
12 that's the representation they made to this
13 Court.

14 MR. CLEMENT: Well, Justice Sotomayor,
15 in their latest letter, they were very careful
16 about what they represented. They represented
17 that they wouldn't try to prosecute somebody
18 from past conduct if that past conduct didn't
19 violate the current regulations.

20 So if the past conduct happened to
21 involve a stop for coffee and not continuous and
22 uninterrupted transport --

23 JUSTICE SOTOMAYOR: But that has to do
24 with the current law, and that hasn't been
25 decided by the court below. That -- that's

1 something -- that's a complaint about the limits
2 of the current law, not the limits of the old
3 law. You're asking us to mix apples and oranges
4 now.

5 MR. CLEMENT: Well, I don't think so,
6 Justice Sotomayor. I think what I'm asking you
7 to do is exactly what this Court did in the Knox
8 case.

9 JUSTICE SOTOMAYOR: No, Mr. Clement,
10 what you're asking us to do is to take a case in
11 which the other side has thrown in the towel and
12 completely given you every single thing you
13 demanded in your complaint for relief, and
14 you're asking us to opine on a law that's not on
15 the books anymore, and one that's not on the
16 books, not because of something necessarily the
17 city did but because the state, a party who's
18 not a party to this litigation, has changed the
19 law and prohibited them from doing.

20 So this is, I think, something quite
21 different. You're asking us to opine on an old
22 law, not the new law.

23 MR. CLEMENT: Well --

24 JUSTICE SOTOMAYOR: And the new law
25 hasn't been reviewed below yet.

1 MR. CLEMENT: So, again, Justice
2 Sotomayor, I really think what we're asking you
3 to do is exactly analogous to what was before
4 this Court in Knox. In Knox, the thrust of the
5 underlying complaint was that the supplemental
6 fee assessment that the union imposed on the
7 members was unconstitutional. That's what the
8 complaint framed. And then --

9 JUSTICE SOTOMAYOR: But you've got
10 what you want now. In terms of the contiguous,
11 we don't even know whether the city is taking
12 the -- the position that you can't stop for a
13 cup of coffee. Presumably, if you leave your
14 gun in the car, I'm not sure how they would know
15 you were traveling with a gun, but put that
16 aside.

17 MR. CLEMENT: Well, so before I put it
18 aside, let me just say I think we do know the
19 answer to that because, in subsection 7 of the
20 new regulations that they promulgated,
21 specifically to try to moot this case, they made
22 clear that the kind of transport they were
23 allowing, at least within the City of New York,
24 had to be continuous and uninterrupted. I don't
25 know what "continuous and uninterrupted" means

1 if it doesn't -- if it -- if it means that you
2 can make stops for coffee.

3 And I assure you, I think the right
4 way to think about this for Article III purposes
5 is, if we had been successful in the lower court
6 and proposed an injunction, I guarantee the
7 words "continuous and uninterrupted" would not
8 be in our proposed injunction.

9 If the city had offered their proposed
10 injunction and included that limitation, we
11 would have said we don't accept that. We think
12 that's inconsistent with the right that we just
13 prevailed on. And that dispute --

14 JUSTICE KAGAN: Did you --

15 MR. CLEMENT: -- would be a continuing
16 dispute that would render the case not moot,
17 just like in Knox, there was a continuing
18 dispute about the sufficiency of the refund
19 notice that the union offered, post certiorari,
20 in its effort to moot the case. The dispute
21 that would still lie between the parties about
22 the sufficiency of the refund notice wasn't the
23 exact same dispute that initiated the
24 litigation, but the case was still a live
25 controversy for Article III purposes, and this

1 Court decided both the question presented and
2 then also addressed the refund notice.

3 Now this Court could address the
4 question presented here and leave the question
5 of "continuous and uninterrupted" for the lower
6 court if it wanted to, but there's no basis for
7 not answering the question presented.

8 So if I could turn to that --

9 JUSTICE SOTOMAYOR: I'm sorry, that --
10 that's the oddest decision I've heard. Answer
11 an old law that's no longer in effect and then
12 reserve consideration of the new law's
13 interpretation for the lower courts? I don't
14 know how that doesn't constitute mootness on the
15 issue that's before us. If --

16 MR. CLEMENT: Well, with respect,
17 Justice Sotomayor --

18 JUSTICE SOTOMAYOR: -- if -- if
19 they've agreed and you agree that everything but
20 the "continuous and uninterrupted" has been
21 resolved and that you've gotten everything you
22 wanted as demanded in your complaint, you can
23 travel to a second home, you can travel to any
24 lawful firing range, that's all your original
25 complaint demanded, if you got all of that, that

1 is the issue that was before us.

2 MR. CLEMENT: Well --

3 JUSTICE SOTOMAYOR: And your question
4 is whether -- and you've agreed we should leave
5 that to the courts below, what contiguous --
6 "continuous and uninterrupted" is. That happens
7 to go to the new law, not the old one.

8 MR. CLEMENT: With respect, Justice
9 Sotomayor, we don't think we've gotten
10 everything that we could have gotten if we
11 prevailed in the district court, including
12 continuous and uninterrupted.

13 But also we would like, with all due
14 respect, given our five years of history in this
15 litigation with my friends on the other side,
16 we'd like something more than their
17 representations to protect us against the use in
18 the future of past conduct --

19 JUSTICE SOTOMAYOR: I -- I -- I have
20 one --

21 MR. CLEMENT: -- in licensing
22 decisions.

23 JUSTICE SOTOMAYOR: -- I have one
24 question. The SG tried to give you a -- a
25 lifeline by saying you could get damages. But I

1 read your representations to the Court and you
2 said we could get damages. I don't see a
3 request for relief, either damages or nominal,
4 in your complaint. And you don't say we want
5 damages in your submissions to us. Did you ask
6 for damages, nominal or --

7 MR. CLEMENT: We -- we asked for all
8 other appropriate relief in our complaint. We
9 did not make a specific request for damages
10 below. I'm happy to affirm that we'd like
11 damages, but I also think that although we --

12 JUSTICE SOTOMAYOR: You'd have to ask
13 for permission to amend your complaint to seek
14 that, don't you?

15 MR. CLEMENT: We would have to do
16 that, but with all due respect to the Solicitor
17 General, we were happy that they recognized the
18 case wasn't moot, but we didn't really feel like
19 we needed a damages lifeline because we think we
20 had multiple strong arguments based on this
21 Court's precedents, including the Knox case,
22 that said that wholly apart from the damages
23 issue this dispute isn't moot.

24 So if I could turn to --

25 JUSTICE GINSBURG: Mr. Clement, just

1 one more on the damages. As far as I know, this
2 Court has never used a late, meaning in this
3 Court and not below, request for damages to save
4 a case from mootness. I don't know of any such
5 case.

6 MR. CLEMENT: I'm not aware of one
7 either, Justice Ginsburg. Perhaps my -- my
8 colleague from the SG's office will have one
9 since it was his suggestion, but we think we
10 have plenty of cases from this Court that are
11 analogous to this situation.

12 And, indeed, with respect, I don't
13 think the practice of getting the recognition
14 after certiorari is granted that a certiorari
15 grant may not signal anything good for the
16 defendant. I mean, that's quite common practice
17 that they then come up with an idea to moot the
18 case.

19 Just if you think of a couple of
20 recent cases, not just Knox, but Trinity
21 Lutheran and Parents Involved, all involved
22 late-breaking efforts, often by government
23 entities, to make the case go away.

24 In each case, this Court said no,
25 that's too little, too late. And if this Court

1 starts accepting these kind of post-certiorari
2 maneuvers, it's going to be very hard for the
3 Court to continue --

4 JUSTICE BREYER: I probably have a --

5 MR. CLEMENT: -- to have --

6 JUSTICE BREYER: I mean, I don't think
7 it's bad when people who have an argument settle
8 their argument and, thus, there no longer is
9 one, so I wonder if, should I ask them this
10 question? You say this case is still alive
11 because the City of New York might prosecute one
12 of your clients because they stopped for coffee
13 on the way to a firing range.

14 I think I'm going to ask them that.
15 And I have a suspicion they will say no, we
16 aren't going to prosecute that particular
17 individual. So then what should I do? Should
18 I -- we have a dispute. You think they will.
19 They think they won't.

20 MR. CLEMENT: Right. So that suggests
21 to me we that we have the kind of live
22 controversy --

23 JUSTICE BREYER: Here's your time. I
24 --

25 MR. CLEMENT: -- and if the standard

1 for mootness is whether it is possible to
2 provide effectual relief, I guarantee an
3 injunction backed by contempt that enforces
4 those promises is going to give my clients more
5 effectual relief.

6 And do keep in mind what makes this
7 case quite different from a lot of others is
8 this is a discretionary licensing process where
9 the city makes judgments about good moral
10 character. There are 79 officials in the
11 licensing department of the City of New York.
12 Where are they going to look for guidance?

13 They could, I think, look for guidance
14 to a Court-ordered injunction. I'm not sure
15 they're going to pull the transcript from this
16 argument, let alone a letter from the city to
17 the Solicitor General's Office for this. So we
18 think we're entitled to that kind of meaningful,
19 effectual relief.

20 We think, on the merits, this case is
21 actually quite straightforward because there is
22 no historical analogue for this kind of
23 transportation restriction. As I suggested, if
24 you look at the second Militia Act, passed by
25 the second Congress, they not only understood

1 that you could transport your firearms from your
2 home to a place where they could be lawfully
3 discharged, but they required it of the members
4 of the militia.

5 If you look at the history and
6 traditions of this country, there are very few
7 laws that tried to do anything like this, and
8 the few that tried to do this were invalidated
9 by the courts.

10 JUSTICE KAGAN: Mr. Clement, as I
11 understand New York's scheme, New York has two
12 kinds of licences. It has a premises license
13 and it has a carry license. And you're
14 attacking the premises license scheme on the
15 ground that it doesn't allow you to carry.

16 So why don't you just attack the carry
17 license scheme? If you want to carry, why
18 didn't your clients get a carry license?

19 MR. CLEMENT: Well, Justice Kagan, I
20 think what my clients wanted in this lawsuit,
21 and there are plenty of other lawsuits out there
22 challenging carry restrictions, but they wanted
23 the right to transport, not the right to carry.

24 Now I --

25 JUSTICE KAGAN: Well, transporting is

1 a kind of carrying. You take your gun and it
2 goes with you someplace. That's a kind of
3 carrying.

4 MR. CLEMENT: I -- I will agree with
5 that. I think it's also a kind of bearing,
6 which is why I think this is such a
7 straightforward case.

8 I think it's protected --

9 JUSTICE KAGAN: All I'm asking is --
10 is -- is there's a premises scheme and a
11 carrying scheme, and your clients want to carry,
12 which suggests that you should have brought a
13 challenge to the carrying scheme if you thought
14 that that was deficient.

15 MR. CLEMENT: Again, with respect,
16 Justice Kagan, my clients for years had -- at
17 least two of the three, had what the city for a
18 while called a target license, and it didn't
19 give them a full right to carry, but it did give
20 them the right to transport their firearms to
21 New Jersey and other places, probably would have
22 allowed a second home, though I'm not sure that
23 issue is squarely presented.

24 My clients did not insist on getting a
25 carry license either under the -- before this

1 lawsuit was filed or in this lawsuit. What they
2 wanted is to restore rights to transport their
3 firearms between and among places where they
4 could be lawfully used.

5 That's different from a license that
6 says, I get to have this firearm with me at all
7 times, loaded, ready to go. What they wanted is
8 to restore their right to transport firearms,
9 locked and unloaded, between places where they
10 could be lawfully used. That's what they asked
11 for. That is what there is no historical
12 analogue for.

13 And if I could emphasize, I think it
14 would send a very important signal to the lower
15 courts to say that when a regulation like this
16 is inconsistent with text and has no analogue in
17 history or tradition, it is unconstitutional,
18 full stop. The way the lower courts have
19 interpreted Heller is like text, history, and
20 tradition is a one-way ratchet.

21 If text, history, and tradition sort
22 of allow this practice, then they'll uphold the
23 law. But if text, history, and tradition are to
24 the contrary, then the courts proceed to a
25 watered-down form of scrutiny that's heightened

1 in name only.

2 And I think this Court should reaffirm
3 that text, history, and tradition essentially is
4 the test and can be administered in a way that
5 provides real protection for --

6 JUSTICE BREYER: I want to go back --

7 MR. CLEMENT: -- Second Amendment
8 rights.

9 JUSTICE BREYER: -- for one second to
10 the question presented. Does New York City's
11 ban on transporting a licensed, locked, and
12 unloaded handgun to a home or shooting range
13 outside the city limits consistent with the
14 Second Amendment?

15 In New York, now you're going to hear
16 in one minute, there is no New York City ban on
17 transporting a licensed, locked, and unloaded
18 handgun to a home or other place outside. I
19 think you'll hear that.

20 Now what will your, very brief,
21 response? There's a question presented, they
22 say there is no ban. And you say?

23 CHIEF JUSTICE ROBERTS: You can finish
24 the question.

25 JUSTICE BREYER: That was the finish.

1 (Laughter.)

2 CHIEF JUSTICE ROBERTS: Briefly.

3 Thank you.

4 MR. CLEMENT: Mr. Chief Justice, thank
5 you.

6 So my answer in a -- in a nutshell is
7 Knox. My slightly longer answer is every time
8 this Court confronts a post-certiorari maneuver
9 to try to moot a case, it almost by definition
10 will try to take away from you the question
11 presented. That's what happened in Knox.

12 The question presented concerned the
13 constitutionality of the special assessment. It
14 didn't concern the adequacy of the refund
15 notice, but yet this Court decided both.

16 Thank you, Your Honor.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Mr. Wall.

20 ORAL ARGUMENT OF JEFFREY B. WALL
21 FOR THE UNITED STATES, AS AMICUS CURIAE,
22 SUPPORTING THE PETITIONERS

23 MR. WALL: Mr. Chief Justice, and may
24 it please the Court:

25 One point on the merits and one on

1 mootness. On the merits, text, history, and
2 tradition all condemn New York's transport ban.
3 Such bans have been rare and commonly struck
4 down precisely because the right to keep arms
5 and keep and bear arms must entail and has
6 always entailed the ability of a law-abiding
7 citizen to carry a firearm unloaded and locked
8 from one lawful place to another.

9 On mootness, Petitioners pointed below
10 to economic harms from the violation of their
11 constitutional rights. If they prevail here,
12 the district court could award them damages,
13 just like any other 1983 plaintiff.

14 JUSTICE GINSBURG: But they never
15 asked for it.

16 MR. WALL: That's true, Justice
17 Ginsburg, but there's a specific federal rule on
18 this, Federal Rule 54(c), which says the prayer
19 of relief binds on a default judgment, but it
20 doesn't bind when you've litigated on the
21 merits. And so the question for Article III
22 purpose -- and I'll grant that there are
23 questions about -- prudential questions about
24 whether, under the rules, a court should allow
25 them to inject a theory, and it would have to

1 weigh that against the city's tardiness in
2 changing its theory of the case as well.

3 But, for Article III purposes, the
4 question under Mission Products and Knox is, is
5 it impossible for a court to grant effectual
6 relief? It is not. It is possible for a court
7 to award them the damages they have sustained --

8 JUSTICE GINSBURG: Has --

9 MR. WALL: -- as a result of the city's
10 conduct.

11 JUSTICE GINSBURG: -- has it -- has
12 the SG, the Solicitor General, ever asked this
13 Court to allow such a late interjection of a
14 damages question to save a case from mootness?
15 Mr. Clement said he was not aware of any such
16 case. Are you?

17 MR. WALL: So I don't know of any case
18 in which it's directly come up or we've weighed
19 in on it. We, obviously, participated on the
20 merits before the city's suggestion of mootness,
21 and we felt compelled to explain to the Court
22 our view on mootness.

23 JUSTICE KAGAN: Didn't it come up in
24 Alejandrino? Is that the -- the name of the
25 case? And it was decided the other way, that

1 the Court said no, we're not going to allow that
2 to happen.

3 MR. WALL: So I think -- but that's
4 in -- first, it's in 1926, so it predates the
5 federal rule. So it predates 54(c), which makes
6 clear that the prayer for relief no longer
7 binds.

8 I also think the facts are somewhat
9 distinguishable from here, where they've got
10 evidence in the record at the summary judgment
11 stage of their economic harms. Now, to be sure,
12 they're not focused on damages. What they
13 wanted was to engage in the conduct. They
14 wanted an injunction and they fought for years
15 over it.

16 JUSTICE KAGAN: I mean, not focused on
17 damages is an understatement. They -- they
18 practically won't take damages. They've had
19 every opportunity to say that they want damages,
20 including today, and for whatever reason,
21 Mr. Clement has, you know, basically said this
22 case is not about damages. That's not why we
23 think it's not moot and that's not what we want.

24 MR. WALL: So I -- I heard Mr. Clement
25 say: I'm happy to affirm that my clients want

1 damages, but we don't think we need that
2 lifeline from the solicitor general. We think
3 our other theories are good.

4 We, obviously, disagree on some of
5 those other theories, but I think the -- the
6 question under Knox and Mission Products is, is
7 it impossible for a court to award damages?

8 Here, there is evidence in the record
9 of economic harm. If they get a declaration on
10 the merits that they're right as a matter of the
11 Second Amendment --

12 JUSTICE SOTOMAYOR: All right. Would
13 you remind --

14 MR. WALL: -- there is no barrier to
15 their receiving an award of damages from a
16 court.

17 JUSTICE SOTOMAYOR: Would you remind
18 me what -- where in the complaint they set forth
19 damages?

20 MR. WALL: Sure. So I think the best
21 examples are at pages 32, 33, 35, 36 of the
22 Joint Appendix and then again at 52 through 54,
23 56, 57, and 59 to 61.

24 JUSTICE KAGAN: But --

25 MR. WALL: Those are both the

1 pleadings and the summary judgment affidavits,
2 and they rely on two kinds of harm. One is the
3 competitions they were not allowed to attend
4 with the firearms, and the other is the costs of
5 dues and membership fees to the in-city ranges,
6 which I think implicitly they're suggesting are
7 higher than the out-of-city ranges.

8 JUSTICE KAGAN: Mr. Wall, I mean, they
9 filed a complaint. They filed a motion for
10 summary judgment. They briefed this case before
11 the Second Circuit. They filed a cert petition.
12 Then, in response to the suggestion of mootness,
13 they filed another brief there.

14 And in none of those places did they
15 ask for damages. Damages has been injected into
16 this case because of the solicitor general in a,
17 you know, very late-breaking three-page letter.

18 MR. WALL: Look, Justice Kagan, I'll
19 certainly grant that there's a lot of post-grant
20 maneuvering on both sides. The city has
21 withdrawn its law, and the Petitioners have come
22 up with theories for why the case is not moot.
23 As a matter of Article III, our view is that
24 damages could change hands and hence it's not
25 moot.

1 I suppose you could also rest it on
2 future consequences and say that the city's
3 representations have come too late. It has an
4 express scheme that allows you to consider these
5 things.

6 JUSTICE KAGAN: Well, I -- I thought
7 that in your brief, in your letter brief, you
8 specifically rejected every other theory of --
9 of why this case was live.

10 MR. WALL: We do think that the Court
11 credits those kinds of assertions by
12 governmental litigants. It did in DeFunis. The
13 facts here are a little different. You have a
14 scheme that expressly allows you to consider the
15 conduct. You don't have any acknowledgment from
16 the city that its former conduct was
17 unconstitutional, and you have a representation
18 that comes, as Mr. Clement said in his letter,
19 at the 11th and a half hour.

20 On those facts, could you say we're
21 not going to take a look at the city's
22 representation? You could. That is not our
23 theory. Our theory is that money could change
24 hands here and they'd be entitled to that money
25 --

1 JUSTICE KAGAN: And what do you think

2 --

3 MR. WALL: -- if they prevailed on the
4 merits.

5 JUSTICE KAGAN: -- of Mr. Clement's
6 theory? I take it that you rejected Mr.
7 Clement's theory about this continuous travel
8 and stopping for coffee?

9 MR. WALL: I -- I think it's a close
10 call. In our view, that's a new controversy
11 that arises from the new law, not the old
12 controversy in the old law, but I -- I think
13 it's a -- I think it's a hard question, and I
14 understand his point that there would have been
15 fighting over the terms of the injunction in the
16 -- in the district court or at least potentially
17 there could have been.

18 If I could turn to the -- to the
19 merits for just a minute --

20 JUSTICE GORSUCH: Well, why -- why
21 isn't that good enough? If under the prior law
22 the plaintiffs would have sought relief that
23 would allow them to take their firearms locked
24 safely to a range and stop along the way for a
25 cup of coffee or a bathroom break and that that

1 is still being denied under the -- if that's a
2 proper reading, we'll ask New York about that,
3 I'm sure, but if that's still a proper reading
4 of their existing regulations, why isn't there a
5 live controversy remaining?

6 MR. WALL: I think --

7 JUSTICE GORSUCH: There would seem to
8 be a delta of relief that's been denied them.

9 MR. WALL: Oh, I do think there is a
10 -- a live controversy potentially now about the
11 meaning of this "continuous and uninterrupted"
12 requirement. I just think that arises from the
13 new law. And the premise, I think --

14 JUSTICE GORSUCH: Well, why doesn't --

15 MR. WALL: -- we have doubts since --

16 JUSTICE GORSUCH: -- it arise -- why
17 isn't the dispute still alive from the old law
18 if that's a form of relief they would have
19 sought and is still, despite the new law, being
20 denied them? Isn't that a classic definition of
21 relief that was sought but now still -- despite
22 herculean, late-breaking efforts to moot the
23 case, still alive?

24 MR. WALL: I -- if the Court wanted to
25 say that, I don't think it would harm the United

1 States' interests. So --

2 JUSTICE GORSUCH: You're not aware of
3 any precedent that would foreclose that and, in
4 fact, that's pretty much what Knox did, isn't
5 it?

6 MR. WALL: Well, except that Knox
7 wasn't a governmental litigant, so I think
8 presumption of voluntary cessation worked a
9 little differently, but to -- Justice Gorsuch,
10 just to go to the question, I think in the
11 district court, the fight was about whether they
12 could do the thing at all.

13 And now we have a -- what strikes us
14 as a different fight about the manner in which
15 they can go. And the legal restriction is
16 different. The legal restriction now is tied to
17 the new law. But, no, I'm not aware of anything
18 --

19 JUSTICE GORSUCH: Sure, they granted

20 --

21 MR. WALL: -- that would keep the
22 Court from going there.

23 JUSTICE GORSUCH: -- new relief. They
24 have granted but not total relief that the
25 plaintiffs sought. You'd agree with that?

1 MR. WALL: I -- I would agree with
2 that. I think there is still a controversy
3 about the manner in which they can go. That
4 seems somewhat different to us from the
5 controversy that was litigated below and that
6 this Court agreed to hear, but I don't think
7 there's any case that would keep the Court from
8 going down that road.

9 If I could turn to the merits for just
10 a minute, I think all that the Petitioners are
11 asking for, and it's a fairly modest ask, is for
12 the Court to reiterate what it said in Heller,
13 that the lower courts have been correct in
14 starting with text and history and tradition,
15 but they have created, as Mr. Clement said, this
16 sort of asymmetry where they find that history
17 and tradition can give a thumbs up to a law but
18 not a thumbs down.

19 JUSTICE SOTOMAYOR: I'm sorry, can I
20 go back to that question? In what other area,
21 constitutional area, the First Amendment in
22 particular, have we decided any case based
23 solely on text, history, and tradition?

24 This seems sort of a made-up new
25 standard. And I thought Heller was very careful

1 to say we don't do that. We treat it like any
2 other constitutional provision. And if I
3 analogize this to the First Amendment, which is
4 what Heller suggested we should do, this seems
5 to me to be a time, place, and manner
6 restriction. It may not pass any of the
7 standards of scrutiny, but, if you're looking at
8 a First Amendment right to speak, it's never
9 absolute. There are some words that are not
10 protected. We're going to have a different
11 fight about that at some point. Or there are
12 some weapons that are not protected, just like
13 there might be some words that are not
14 protected.

15 We know under the First Amendment that
16 there are time, place, and manner restrictions
17 that a government can impose on the basis of
18 safety and other things. On the basis of
19 safety, you can't have a demonstration at will.
20 You need a permit, and you have to have certain
21 equipment and certain protections and certain
22 things.

23 So, if I treat it in that way, we
24 might have a fight about whether text, history,
25 and tradition permits a time, manner, and place

1 restriction of this type, but I don't know why
2 that's a free-standing test.

3 MR. WALL: So two points, Justice
4 Sotomayor. The first is I understand manner
5 restrictions. I understand the requirement that
6 you carry the gun unloaded or that you do it in
7 a locked container. But a ban is not a time,
8 place, or manner restriction. And in
9 determining which category it falls into and
10 what's permissible, Heller said you start with
11 text, history, and tradition.

12 And the Court commonly does that, even
13 under the First Amendment with respect to
14 categories, the Fourth Amendment for a search,
15 the Seventh Amendment for the jury trial right.
16 Heller just says you start here. And starting
17 here, I think this is a straightforward case.
18 There is no historical analogue and a contrary
19 tradition.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. Dearing.

24

25

1 ORAL ARGUMENT OF RICHARD P. DEARING

2 ON BEHALF OF THE RESPONDENTS

3 MR. DEARING: Mr. Chief Justice, and
4 may it please the Court:

5 Contrary to how they're presenting it
6 now, Petitioners framed this case narrowly.
7 They argue that a premises license, a premises
8 license specifically, must allow certain limited
9 transport of the licensed handgun to effectuate
10 its possession and use in the premises, and they
11 sought only injunctive and declaratory relief to
12 require the city to allow that limited
13 transport.

14 And that narrow framing, in turn, has
15 two implications now. First, the case is moot
16 because changes in state and city law have given
17 Petitioners everything they asked for and,
18 indeed, more than that.

19 Petitioners suggest these changes
20 should be viewed skeptically, but it's a good
21 thing and not a cause for concern when the
22 government responds to litigation by resolving
23 matters through the democratic process.

24 The Solicitor General agrees that all
25 the objections actually raised by Petitioners to

1 mootness are unfounded but suggests that the
2 Court could proceed to the merits of the
3 constitutional questions anyway because
4 Petitioners might be -- in the future be able to
5 add a new claim for damages that they have never
6 asserted and still now only most reluctantly
7 embrace.

8 The Court has never adopted that kind
9 of reasoning under Article III and it should not
10 begin with this case.

11 And the second implication of the
12 case's framing is that if the case weren't moot,
13 the only question presented on the merits would
14 be whether a premises license must, as an
15 adjunct thereto, include the implied transport
16 rights sought by Petitioners.

17 Though Petitioners now invoke a
18 general right to bear arms outside the home, a
19 premises license is not addressed to that
20 purpose. A premises license is instead issued
21 for possession in a particular place, and
22 Petitioners never challenged the separate New
23 York license that is addressed to carrying
24 weapons outside the home, which is the carry
25 license. So those broad questions are not

1 properly part of this case.

2 Turning first to the issue of
3 mootness, and I'll go straight to the question
4 of coffee stops, there are two -- two levels to
5 this response. First is, there is no dispute on
6 that question. The city's enforcement -- the --
7 the governing standard is provided by state law
8 here because the state enactment preempts local
9 law.

10 The "continuous and uninterrupted"
11 language cited by my friend is not in the state
12 law. The city acknowledges that. And the
13 city's enforcement position is that coffee
14 stops, bathroom breaks are entirely permissible
15 --

16 JUSTICE ALITO: But let's go to
17 something --

18 MR. DEARING: -- under current law.

19 JUSTICE ALITO: -- beyond a coffee
20 stop or a bathroom break. Suppose they had
21 prevailed under and obtained a judgment that the
22 old law was a violation of the Second Amendment,
23 and suppose that after that, one of the
24 plaintiffs had made a trip to a firing range in,
25 let's say, New Jersey and, while there, decided

1 to stop to visit his mother for a couple of
2 hours to take care of a few things for her.

3 Would there be any law that that would
4 violate?

5 MR. DEARING: That would be, I
6 think -- I'm not certain that it would. I think
7 that would have to be a question now to be
8 litigated under the state law, which would have
9 nothing --

10 JUSTICE ALITO: No, no, no, no, we're
11 back, without the new laws, city or state, would
12 that have been -- would that have been legal
13 conduct?

14 MR. DEARING: If that had happened
15 prior to the changes in conduct?

16 JUSTICE ALITO: After a judgment that
17 the old law was unconstitutional, prior to the
18 enactment of any new law.

19 MR. DEARING: I don't think it's --
20 it's at all clear because that question -- those
21 kind of questions were never put at issue or
22 litigated in the case. And so --

23 JUSTICE ALITO: Well, what -- you
24 don't know what -- you don't know whether
25 there's any city law that that would violate?

1 MR. DEARING: If there were a judgment
2 that said that our law had been struck down --
3 our former --

4 JUSTICE ALITO: Yeah.

5 MR. DEARING: -- law had been struck
6 down?

7 JUSTICE ALITO: Yeah.

8 MR. DEARING: I'm not aware of any
9 city law that that --

10 JUSTICE ALITO: So then why is this
11 case moot? Because they didn't get all that
12 they wanted. They wanted a declaration that the
13 old law was unconstitutional, period.

14 And what they have obtained as a
15 result of the new city ordinance and the new
16 state law is a rule that says, yes, you can take
17 the firearm to a firing range outside of New
18 York City, but it must be a direct trip.

19 It can't include an hour spent with
20 your mother.

21 MR. DEARING: I think that -- the
22 answer is that Article III analysis is always
23 focused on what the plaintiffs asked for, not
24 speculation about what might have been an
25 injunction here. And the -- and the only thing

1 that was ever put at issue here and -- and --
2 and you can see this by looking at the actual
3 injunction that plaintiffs framed, was the
4 permissible categories of destination, shooting
5 ranges and second homes outside the city.

6 JUSTICE KAGAN: Where is the
7 injunction that plaintiffs framed?

8 MR. DEARING: It's in -- it's in a
9 number of docket entries, and I don't remember
10 the numbers offhand, but they're in the summary
11 judgment in -- in both motions for preliminary
12 judgment -- injunction, motions for summary
13 judgment, across several different docket
14 numbers, injunctions were repeatedly proposed by
15 the Petitioners. They're basically verbatim,
16 identical.

17 And what they say is they want an
18 injunction restraining the city from enforcing
19 its old rule in any manner that would prohibit
20 or preclude plaintiffs from traveling to
21 shooting ranges and second homes outside of --

22 JUSTICE ALITO: And why wouldn't that
23 include a non-direct trip?

24 MR. DEARING: Your Honor, the issue of
25 directness was never ever litigated as part of

1 this case. It was never in the complaint. We
2 have no idea what -- what the answer to that
3 question might be if it had been litigated, but
4 it is not what plaintiffs -- the -- the -- the
5 Article III analysis focuses on what plaintiffs
6 asked for and what they asked for dealt with
7 permissible categories of destination and that
8 is more than fully addressed by the state and
9 city laws.

10 To -- to turn to -- now to the
11 question of future consequences. We are -- we
12 would -- as I've said, the issue about coffee
13 stops is an entirely feigned dispute. We would
14 not undertake any -- any prosecution or action
15 now based on that or any other violation of the
16 repealed law at this point.

17 CHIEF JUSTICE ROBERTS: Is there -- is
18 there any way in which any violation could
19 prejudice a gun owner?

20 MR. DEARING: Not that -- not that I
21 can think of. The city is committed to -- to
22 closing the book on that old rule and we're not
23 going to take it into effect.

24 CHIEF JUSTICE ROBERTS: Is there any
25 way in which a finding of mootness would

1 prejudice further options available to the
2 Petitioners in this case, for example, seeking
3 damages?

4 MR. DEARING: I don't -- I don't think
5 so. I mean, they -- they -- it's possible
6 they'd have -- they'd have a time bar on --
7 on -- on damages, but it depends -- it would
8 depend on the allegation they've made. They've
9 never made any allegations related to damages,
10 and I think we'd have to assess that based on
11 the allegations they make.

12 I think the other key point on future
13 consequences is there's really no factual basis
14 in the complaint for that. Mr. Clement for the
15 first time today suggests that -- that -- that
16 the complaint may alluded to a possibility of
17 past violations. It certainly did not allege
18 that these Petitioners had violated this -- the
19 rule in the past.

20 And the most important thing to know
21 about -- about those paragraphs of the complaint
22 is that the -- the Petitioners would have
23 been -- would have had their licenses renewed at
24 least twice by now.

25 JUSTICE GORSUCH: Counsel, can I just

1 make sure I understood you correctly earlier? I
2 understood you to suggest that there there will
3 be no collateral consequences to anyone for
4 violating the city's prior ban, any kind of
5 collateral consequences.

6 MR. DEARING: I think there's no basis
7 to think there would be.

8 JUSTICE GORSUCH: No, I'm wondering --
9 you're -- you're representing the city, and so
10 I'm asking the city's representative here --

11 MR. DEARING: Yes.

12 JUSTICE GORSUCH: -- that the city --
13 that there will be no collateral consequences
14 from the city to individuals who violated the
15 prior ban?

16 MR. DEARING: Absolutely correct,
17 there will be none.

18 JUSTICE GORSUCH: All right.

19 JUSTICE GINSBURG: And you're making
20 that representation to this Court?

21 MR. DEARING: I'm making that
22 representation to this Court on the record on
23 behalf of the City of New York.

24 JUSTICE SOTOMAYOR: I'm not going to,
25 because I want to be careful for you and for

1 society, you're not representing if they shot
2 somebody with a gun that you're not going to
3 prosecute them for that?

4 MR. DEARING: Correct.

5 JUSTICE SOTOMAYOR: You're just not
6 going to prosecute them for any violation of
7 this old law?

8 MR. DEARING: Of the repealed
9 provisions of the law, that's right. If -- if
10 there were other potential acts of loaded guns,
11 violent acts, that -- that's different. But the
12 repealed provisions of the old law we will
13 not prosecute anyone for with any --

14 CHIEF JUSTICE ROBERTS: Well, I guess
15 my -- my question and some of the others went
16 beyond prosecution. The question is whether
17 they'd be prejudiced in any way, for example,
18 with respect to qualifying for a -- a premises
19 license under the new law, would the fact of a
20 violation of the prior law be used against them?

21 MR. DEARING: It will not. It
22 absolutely will not. And -- and I think a
23 deeper point is there is no reason to think
24 there are -- there are such violations that the
25 Petitioners -- that there are such violations.

1 If we refer back to the complaint as I noted
2 before, these Petitioners have been renewed --
3 their licenses have been renewed twice at least
4 since that complaint was filed.

5 JUSTICE KAGAN: Do you have a way --
6 sorry. Do you have a way, Mr. Dearing -- I take
7 it these licensing decisions are made by the
8 office, an office in the New York Police
9 Department.

10 Do you have a way of communicating to
11 that office what they are not permitted to do,
12 given your representation.

13 MR. DEARING: Absolutely. And
14 we've -- we've consulted that office. They're
15 aware of this. We will communicate to them that
16 -- that no such consequences are -- are to be
17 imposed and the event -- in the extremely
18 unlikely, and I think not going to happen, event
19 that any -- that anyone thought that that might
20 have happened, they should bring that to the
21 attention of the Law Department and we'll review
22 it and make sure that it's addressed.

23 I do, though, want to just put a
24 slightly finer point on the lack of factual
25 basis, in any event, for the claim of future

1 consequences.

2 The Petitioners only now have made
3 this allusion to their complaint. They've been
4 renewed twice since then. The Court, of course,
5 ordinarily presumes individuals follow the law.

6 Even before this case, our -- our
7 practice was not to ask people to disclose past
8 violations unless it had resulted in an arrest,
9 summons, revocation, or something like that, and
10 there is no suggestion that any Petitioner has
11 had any of those events.

12 JUSTICE ALITO: But do you think it's
13 really fair for you at this point to look for
14 specific allegations in the complaint to defeat
15 a claim of mootness that the plaintiffs had no
16 reason whatsoever to anticipate until after we
17 granted certiorari and the city decided to try
18 to moot this case?

19 MR. DEARING: This -- that just
20 confirms that the plaintiffs got everything they
21 asked for in this case. There's nothing -- the
22 -- the issue of potential --

23 JUSTICE ALITO: Well, how does that
24 confirm that they got everything that they asked
25 for? If you say, well, they didn't ask for

1 nominal damages, they didn't ask for actual
2 damages, they didn't specifically allege that
3 they violated the old law, you -- you really --
4 they didn't allege that they wanted to make a
5 non-direct trip, how could any plaintiff
6 possibly have anticipated that until you took
7 the quite extraordinary step of trying to moot
8 the case after we granted review?

9 MR. DEARING: First, the state
10 legislature has passed a new State law here.

11 JUSTICE ALITO: Yeah. And did the
12 city have nothing to do with the enactment of
13 that law?

14 MR. DEARING: The city supported the
15 law, as we do with many -- many potential bills,
16 and most of them go nowhere. The state
17 legislature and the governor made their own
18 decision -- make their own decisions about what
19 to enact, of course, responsive to their
20 state-wide constituency. And that's what
21 happened here.

22 And that, by the way, is a good thing,
23 not a bad one. The government should respond to
24 litigation, should assess its laws or other --
25 or political subdivisions' laws when they are

1 challenged. And --

2 JUSTICE GORSUCH: Counsel, let's say I
3 -- I agree with you -- I mean, I accept that.
4 It's -- it's great when local governments
5 respond to the constitutional constraints that
6 are suggested by others in litigation.

7 But it does seem a bit much, doesn't
8 it, to fault plaintiffs for not having a
9 specific damages requirement in their prayer for
10 relief in a complaint that was framed years ago.
11 This litigation, I think, has taken five-plus
12 years, and that has become relevant only at this
13 late stage after the city and the state have
14 enacted a new law.

15 Why isn't the prospect of allowing
16 damages to be added to the complaint enough? In
17 a 1983 action, damages are clearly available.
18 The complaint, long ago as it was filed, did say
19 that they sought all available relief, you know,
20 typical prayer for relief. Rule 54 doesn't hold
21 people to their prayers for relief. Why isn't
22 there at least a fair prospect that a district
23 court on remand would allow an amended complaint
24 to seek actual damages?

25 MR. DEARING: Well, two answers. One

1 is that that's not how the Court has approached
2 mootness questions. And, two, a fair prospect
3 is not enough to sustain a case under Article
4 III. But --

5 JUSTICE GORSUCH: A fair prospect of
6 relief isn't enough to sustain?

7 MR. DEARING: A fair prospect whether
8 the claim is even in the case at all. That --
9 whether the claim -- a decision about whether
10 the claim is in the case must precede a decision
11 on the merits. That question is a
12 jurisdictional one. And the solicitor general
13 is mistaken that it can be deferred to later and
14 the merits reached anyway.

15 But -- but the prior point, I think,
16 is equally important, which is that it's not a
17 matter of faulting the plaintiffs, but the
18 plaintiffs chose the case they wanted to bring,
19 as plaintiffs do.

20 Demands for relief are taken very
21 seriously. They're crafted carefully. And the
22 -- one of the reasons they're crafted carefully
23 is that litigation -- demands are meant to cause
24 a defendant to consider whether to meet that
25 demand. And in -- in this case, this demand was

1 crafted not just in the prayer for relief but in
2 numerous paragraphs of the complaint. The --
3 the case was consistently litigated in accord
4 with that structure of the complaint. And, in
5 fact, even after mootness -- the mootness
6 question arose, the Petitioners in their -- in
7 their lengthy comprehensive response never
8 suggested --

9 JUSTICE GORSUCH: So you think it's
10 totally irrelevant that the state has at this
11 late stage sought to moot the case when we're
12 assessing the prospect and the interests of the
13 plaintiff in seeking damages?

14 MR. DEARING: I think it is, because
15 -- because the reason demands are made in
16 litigation is to prompt a defendant to decide
17 whether to meet them, not to decide later if
18 they do meet them, to -- to -- to reinvent the
19 case and make it something else. And the
20 clearest example --

21 JUSTICE GORSUCH: Do you agree that
22 there --

23 MR. DEARING: -- from this Court's
24 cases --

25 JUSTICE GORSUCH: -- do you agree that

1 there would at least be a fair prospect that a
2 district court on remand might disagree with you
3 and find that there is a reasonable excuse for
4 the plaintiffs' introduction of damages at this
5 stage?

6 MR. DEARING: I don't think so. I'm
7 not -- I'm not aware of any case where anything
8 like that has happened. In fact, consistent
9 decisions from the courts of appeals have said
10 these were --

11 JUSTICE GORSUCH: Let's say if we
12 disagreed with you, then what?

13 MR. DEARING: Still not enough, I
14 think, because the -- the prospect of adding a
15 potential live claim is not enough to -- to
16 sustain an Article III case or controversy now
17 and to allow the court to reach the merits
18 before that claim is in the case.

19 And the clearest example is Alvarez
20 versus Smith. That is a case that -- that --
21 where the complaint sought declaratory
22 injunctive relief, just like the complaint here,
23 but a slight -- a difference, a significant
24 difference, in that case, the plaintiffs had a
25 motion pending in the district court.

1 JUSTICE GORSUCH: What do you do about
2 the fact that that was pre-Rule 54 and the
3 federal rules and so on?

4 MR. DEARING: Alvarez was not pre-Rule
5 -- Alvarez was -- was about a decade ago.
6 Alvarez was long --

7 JUSTICE GORSUCH: Oh, I'm sorry. I'm
8 sorry.

9 MR. DEARING: -- after Rule 54.
10 That's a different -- that's Alejandrino --

11 JUSTICE GORSUCH: Alejandrino, sorry.

12 MR. DEARING: -- which is a different
13 case. Rule 54, I think, is really a red herring
14 here. Rule 54 is a question that governs the
15 district court's power -- remedial powers when a
16 live controversy remains continuing before it.
17 It says that the district court is not beholden
18 necessarily to what is -- categorically beholden
19 to what is included in a prayer for relief and
20 can craft appropriate remedies. But the Court
21 and lower courts do not look to Rule 54 in
22 determining questions under Article III.

23 The right place to look is the
24 complaint, the consistent litigation history,
25 and the courts below that determined what did

1 the plaintiff ask for and has what they asked
2 for been provided. And that has happened here.

3 JUSTICE ALITO: Mr. Dearing, are the
4 -- are people in New York less safe now as a
5 result of the enactment of the new city and
6 state laws than they were before?

7 MR. DEARING: We -- we -- no, I don't
8 think so. We made a judgment expressed by our
9 police commissioner that -- that it was
10 consistent with public safety to repeal the
11 prior rule and to move forward without it.

12 JUSTICE ALITO: Well, if they're not
13 less safe, then what possible justification
14 could there have been for the old rule, which
15 you have abandoned?

16 MR. DEARING: It was a reasonable --
17 as we've outlined in our briefs, it was a
18 reasonable implementation of the -- of the state
19 premises license, carry license division. I
20 think -- and we've explained that there was --
21 was a verification benefit to the way that that
22 rule was set up. That verification benefit
23 perhaps has not played out as much in practice
24 as it had been predicted, and we believe the
25 police can work harder and make sure that the

1 city stays safe.

2 JUSTICE ALITO: So you think the
3 Second Amendment permits the imposition of a
4 restriction that has no public safety benefit?

5 MR. DEARING: I think you have to
6 look, first, to consider whether the -- the type
7 of restriction -- how the restriction accords
8 with the history under the Second Amendment
9 before we answer that question.

10 And so I -- I think -- I think the
11 right place to start, and -- and for our
12 purposes, maybe starting with shooting ranges is
13 the best, first key point is this must be viewed
14 as an adjunct to the premises license. This is
15 not just a general statute or generally
16 applicable statute.

17 It's an adjunct to the premises
18 license. It's --

19 JUSTICE ALITO: Well, if it's viewed
20 in that way, could the city -- would it be
21 consistent with the Second Amendment for the
22 city to prohibit any trip by a person holding a
23 premises license to a firing range?

24 MR. DEARING: I think that would be
25 doubtful. And the -- and the reason the city

1 went beyond what state law says about a premises
2 license and -- and authorized transport to
3 shooting ranges in the city was because the city
4 recognized that -- that training is -- does
5 intersect with and is important to effective use
6 of the handgun in the home.

7 JUSTICE ALITO: So you are
8 conceding -- I take it "doubtful" means that it
9 would be unconstitutional. You can tell me if
10 you -- you -- you don't know the answer to that
11 question.

12 But, if it -- if that's what it means,
13 you're conceding that the Second Amendment
14 protects the possession of a firearm outside the
15 home under at least some circumstances?

16 MR. DEARING: I think what I'm
17 conceding is that, in the case of a premises
18 license, the Second Amendment has something to
19 say about what effective possession in the home
20 means. And sometimes that may mean that you
21 need to be able to -- that a license holder
22 needs to be able to undertake certain activities
23 outside the home.

24 JUSTICE ALITO: Well, if the person is
25 taking the firearm, the handgun, from the home

1 to a firing range, the person is out on the
2 streets of New York, and if -- unless a total
3 ban on taking it to a firing range would be
4 consistent with the Second Amendment, it follows
5 that the Second Amendment, under at least some
6 circumstances, protects the possession of a
7 handgun outside the home. Isn't that correct?

8 MR. DEARING: I think -- I think
9 that's a fair way to look at it, that -- that --
10 that -- but -- but, from our perspective, the
11 right question regarding a premises license is,
12 did the -- did the rule impermissibly burden
13 effective use of the handgun in the premises?
14 In the same way that to get a gun to a premises,
15 you have to get it somewhere outside -- you
16 know, purchase it somewhere outside your
17 premises and bring it there, that certain things
18 that happen outside the home may -- may be
19 integrally related to effective use of a handgun
20 inside the home.

21 But, when you look at a premises
22 license, and not speaking about the Second
23 Amendment at large or writ large, but the
24 premises license specifically, the only proper
25 lens to look at the question through is whether

1 the restriction impinges on effective use of the
2 handgun in the home.

3 And with regard to training, we have
4 two -- two related reasons why it doesn't. The
5 first is to look to historical restrictions,
6 which were not themselves directed at premises
7 licenses but are illuminating, and,
8 historically, the location where people were
9 permitted to train was -- was fairly extensively
10 restricted, provided that opportunities to train
11 remained available.

12 And we -- that's the principle we
13 distill from history. And -- and when you apply
14 it to the premises license here, what -- the
15 conclusion is that the ability to train locally
16 in a circumstance where market forces are
17 allowed to operate to determine how many
18 facilities are present, where there is no
19 indication that supply was insufficient to meet
20 demand, and where the Petitioners here actually
21 in their summary judgment affidavits never even
22 said they wished to engage in any form of
23 regular training outside the city.

24 All they said is they wanted to go to
25 shooting competitions -- regional shooting

1 competitions out of the city, that on this
2 record, the former restriction or the former
3 rule implementing the premises license to allow
4 fire -- training locally meets Second Amendment
5 requirements.

6 JUSTICE ALITO: Well, how should --
7 what methodology should the courts use in
8 approaching Second Amendment questions?

9 If they conclude that text and history
10 protect a -- the text and history of the Second
11 Amendment protect a particular activity, is that
12 the end of the question or do they then go on
13 and apply some level of scrutiny?

14 MR. DEARING: I think -- I think,
15 first, we look -- we look to history and
16 determine whether history answers the question
17 one way or the other, whether it's
18 constitutional or unconstitutional.

19 JUSTICE ALITO: Right.

20 MR. DEARING: And in a significant
21 number of cases, history will not speak with one
22 voice or conclusively on that subject and then
23 the right step is to move on to an assessment of
24 justification and fit under a means and scrutiny
25 approach.

1 JUSTICE ALITO: But if history says
2 this is protected, then that's the end of the
3 question, there's no resort to some level of
4 scrutiny?

5 MR. DEARING: If history conclusively
6 shows that the restriction is impermissible,
7 then I -- I think -- as in Heller, Heller is an
8 example of that phenomenon. Heller determined
9 without consulting means and scrutiny, that
10 the -- that the law in question sort of went to
11 the core of and destroyed, in essence, the --
12 the -- the -- the Second Amendment right and,
13 therefore, was -- and more severe than any --
14 any historical, any analogous or prior law and
15 its degree of burden on the Second Amendment --

16 JUSTICE BREYER: No --

17 MR. DEARING: -- right.

18 JUSTICE BREYER: -- you're supposed to
19 do there, because you're correctly stating the
20 views of some judges.

21 MR. DEARING: Right.

22 JUSTICE BREYER: And some judges had
23 an opposite view.

24 MR. DEARING: I'm aware -- I'm aware
25 of that, that's correct.

1 (Laughter.)

2 MR. DEARING: Our -- our -- our -- our
3 view is that -- is that history can answer some
4 questions pretty directly and -- and in other
5 many -- in other -- in a -- in a significant
6 number of cases, history doesn't speak so
7 clearly and that the most reliable method of
8 answering the question in those cases is a -- is
9 means and scrutiny.

10 JUSTICE GINSBURG: One -- one problem
11 with the prior regulation, if you wanted to have
12 a gun in your second home, you had to buy a
13 second gun. And what public safety or any other
14 reasonable end is served by saying you have to
15 have two guns instead of one and one of those
16 guns has to be maintained in a place that is
17 often unoccupied and that, therefore, more
18 vulnerable to theft?

19 MR. DEARING: I think that the -- the
20 question on second homes, there Petitioners have
21 identified a difficult application of our former
22 rule that wasn't really contemplated when the
23 rule was -- was adopted.

24 I still think, though, if you look
25 historically, and the -- the right way to answer

1 a question about whether it was unconstitutional
2 is to ask whether there had been some historical
3 tradition of enabling individuals to use the
4 same handgun to protect two different homes.

5 Of course our rule never spoke to the
6 question of whether an individual could have a
7 handgun in a -- in a -- in a residence outside
8 our jurisdiction. That's something completely
9 that we don't speak to -- we could never speak
10 to.

11 And when you look at the question
12 about -- about what happened historically, there
13 have been incidental burdens that would have
14 been burdened similarly that kind of conduct in
15 the past. And --

16 JUSTICE BREYER: Suppose -- I mean,
17 this is why these things are difficult for you.
18 All right? I understand that.

19 But in Massachusetts, historically,
20 all the guns and ammunition were stored in a
21 central place at night, I believe, at the time
22 of the resolution -- revolution. Not in
23 anybody's home. And this -- do we have a
24 different law for Massachusetts? I guess not.
25 What history do we look to?

1 And you did at one point, or someone
2 said I am a policeman, I happen to notice
3 there's a gun next to this person in the car who
4 stopped at the stoplight. I say, sir, what are
5 you doing with this gun? He says, I am going to
6 a firing range. Oh, I see. You're going to
7 test. Where is it?

8 Now if he says it's in Brooklyn, I can
9 find it. If he says it's somewhere 14 miles
10 northwest of Utica in the Adirondacks, I have a
11 harder time.

12 And I don't know who to believe. And
13 so it's tough. So there are more guns in New
14 York. What happened to that, that argument?

15 MR. DEARING: That argument is the --
16 is the argument that -- that is presented on the
17 record of the -- of the detective --
18 detective -- detective's affidavit, sorry.

19 We, of course, took a close look at
20 that question, and the police commissioner
21 determined that -- that the rule could be
22 repealed without a negative impact on public
23 safety.

24 I do think the police will have to
25 work harder to verify what's happening in those

1 situations, but we -- we are confident that they
2 can do it and they will do it --

3 JUSTICE ALITO: Why --

4 MR. DEARING: -- successfully.

5 JUSTICE ALITO: Why will they have to
6 work harder? Somebody who lives in midtown is
7 stopped and -- with a gun and the officer says,
8 where are you going? I'm going to a firing
9 range in Jersey City, which is right across the
10 river.

11 That's tougher than, I'm going to a
12 firing range in Staten Island. And I think
13 three of your seven ranges are in Staten Island;
14 am I right?

15 MR. DEARING: Two -- two are in Staten
16 Island.

17 JUSTICE ALITO: Two are in Staten
18 Island?

19 MR. DEARING: I think it is a little
20 bit tougher but of course the -- the person may
21 not say Jersey City either.

22 JUSTICE ALITO: All right. How about
23 somebody who lives in the north Bronx says, I'm
24 going across the border to Westchester County.
25 That's tougher for you to -- to look into than,

1 yes, I'm going all the way to Staten Island?

2 MR. DEARING: Well, still the -- still
3 what happens in Staten Island is within the
4 Police Department's jurisdiction. They have
5 access to records, immediate access to records.
6 They have -- that range is subject to the
7 requirement to maintain a roster of individuals
8 to use it.

9 I agree with you that it's not -- that
10 it is enforceable as to Jersey City or as to
11 Westchester and that's part of the reason the
12 city is determined to change the rule, even
13 ignoring the fact that the state came in and
14 preempted it, but I do think it is not -- it is
15 more difficult and that -- that the judgment
16 previously was that with respect to premises
17 licensees, of course, not a carry license, which
18 is not at issue in this case, has never been
19 challenged, the target license that Mr. Clement
20 referred to was understood to be a kind of carry
21 license.

22 And if that was the heart of the
23 complaint, the -- the claim should have been
24 that the city needs to reinstate that carry
25 license. That was not the claim in this case.

1 The claim in this case was
2 specifically articulated by the Petitioners that
3 they have a premises license, this is about the
4 scope of a premises license, and the claim made
5 framed by the Petitioners most clearly in their
6 summary judgment papers at page 6 was that the
7 relief sought here is necessary to allow the
8 full exercise of the -- of the right of defense
9 of hearth and home in the home.

10 They accepted the premises license
11 framing and the entire case has been litigated
12 --

13 JUSTICE GORSUCH: Counsel, can I --

14 MR. DEARING: Through that lens.

15 JUSTICE GORSUCH: I JUST want to
16 circle back to the direct and continuous travel
17 requirement of the current rule and Justice
18 Alito's question about visiting your mother.

19 Is it now the city's position that any
20 reasonable stops are permissible?

21 MR. DEARING: That is our
22 enforcement -- reasonably necessary stops in the
23 course of travel --

24 JUSTICE GORSUCH: Reasonably
25 necessary.

1 MR. DEARING: -- are permissible.

2 JUSTICE GORSUCH: Now does that
3 include stopping to visit your mother --

4 MR. DEARING: I haven't -- I'm --

5 JUSTICE GORSUCH: Or use the --

6 MR. DEARING: I'm not sure I know the
7 answer to that.

8 JUSTICE GORSUCH: Get a cup of coffee?
9 I mean, I'm not sure a cup -- is coffee
10 reasonably necessary?

11 (Laughter.)

12 MR. DEARING: Probably depends who you
13 ask. But the Police Department has --

14 (Laughter.)

15 MR. DEARING: The Police Department
16 has affirmed and we have made clear that -- the
17 enforcement position is that a stop for a cup of
18 coffee is not a problem.

19 JUSTICE GORSUCH: So that's reasonably
20 --

21 MR. DEARING: And in fact --

22 JUSTICE GORSUCH: -- necessary. So
23 what -- what's going to qualify? I -- I'm just
24 a little unclear about that.

25 MR. DEARING: I think that -- well,

1 the controlling standard here -- I'm -- I'm
2 giving you the enforcement position of the
3 Police Department on the questions we have
4 considered. But the controlling standard here,
5 I should hasten to add, is provided by state
6 law.

7 We -- we do not offer a definitive --
8 cannot offer a definitive construction of that
9 law. And I think the -- the question about what
10 that state law means is one that's going to need
11 to be litigated probably in state courts, but
12 before there's any dispute here ripe for -- for
13 constitutional adjudication, the meaning of that
14 law is going to have to be determined.

15 JUSTICE GORSUCH: So we have no
16 representations to us as to what is -- is direct
17 and continuous, other than coffee is okay.

18 MR. DEARING: Coffee -- what -- what I
19 know -- what I -- what I can represent because
20 -- because it's come up before, coffee,
21 restrooms, food, gas, the kinds of things that
22 you ordinarily would stop for in the course of
23 -- of travel, I hadn't considered the mother or
24 mother-in-law example before. I think that's
25 going to need to play out in the state courts.

1 The more important point here, though,
2 is that none of those issues were ever part of
3 this controversy. The -- this controversy was
4 about two things, as repeatedly emphasized by
5 Petitioners throughout the --

6 JUSTICE GORSUCH: I understand --

7 MR. DEARING: -- litigation.

8 JUSTICE GORSUCH: -- that. But you're
9 asking us to say that there is no controversy
10 now. So I am trying to just nail down exactly
11 what is the delta, if any, remaining in the
12 relief that might have been sought and the
13 relief you've provided.

14 MR. DEARING: Well, this is all -- I
15 guess -- in short what I'm saying is -- Mr.
16 Chief Justice, may I answer?

17 CHIEF JUSTICE ROBERTS: Sure.

18 MR. DEARING: In short what I'm saying
19 is this is not relief that was ever sought.
20 There may be a controversy here, but it's a new
21 controversy, it would need to be litigated in a
22 new case. And the relief -- the -- the
23 speculation about what an injunction
24 theoretically could have included is not the way
25 this Court analyzes questions under Article III.

1 thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Three minutes, Mr. Clement.

5 REBUTTAL ARGUMENT OF PAUL D. CLEMENT
6 ON BEHALF OF THE PETITIONERS

7 MR. CLEMENT: Thank you, Mr. Chief
8 Justice.

9 Just a few points in rebuttal. First
10 of all, Justice Kagan, we never got to the point
11 of a proposed injunction in this case. We
12 didn't exactly succeed really well under the
13 current Second Circuit law, so we never got to
14 the point of proposing an injunction.

15 The only thing my friend is referring
16 to are some allusions to the kind of relief we
17 wanted in a summary judgment motion.

18 If we had gotten to that point, we
19 would have wanted clarity, the kind of clarity
20 that a federal court applying the Second
21 Amendment can provide. You don't have to depend
22 on a city's representation about --

23 JUSTICE SOTOMAYOR: Mr. Clement --

24 MR. CLEMENT: -- state law.

25 JUSTICE SOTOMAYOR: -- your complaint

1 from relief states it: "An order preliminarily
2 and permanently enjoining the defendants" -- I
3 skip out whoever else -- "who receive actual
4 notice of the injunction from enforcing this
5 prohibition from traveling beyond the borders of
6 the City of New York to attend a gun range,
7 shooting competition, or to use a lawfully
8 possessed and licensed firearm for the purposes
9 of defending one's home, person, or property."

10 And you asked for a declaratory relief
11 in -- with those same words.

12 MR. CLEMENT: That's right, Justice
13 Sotomayor. I don't think we would have been
14 tethered to those in a proposed injunction.

15 But if we're going to go to the
16 complaint, I think we should look at page 40 --
17 at paragraph 41, at Joint Appendix 36, where we
18 asked for "unrestricted access to gun ranges and
19 second homes." Unrestricted.

20 I don't think at this late stage we
21 are still being offered unrestricted access.
22 And I think it's --

23 JUSTICE SOTOMAYOR: Well, let --

24 MR. CLEMENT: -- important to
25 understand --

1 JUSTICE SOTOMAYOR: -- let's stop.
2 Justice Alito said stopping at your mother's.
3 When you say unrestricted, does that mean I can
4 carry my gun for three days?

5 Do you think that a court actually
6 would have crafted an injunction at all with
7 hypothetical situations?

8 It would have said you can carry your
9 gun to the range, and then would have left for
10 further litigation, specific applications of
11 that general rule.

12 MR. CLEMENT: I -- I don't think so,
13 Your Honor.

14 JUSTICE SOTOMAYOR: Unless you had --

15 MR. CLEMENT: I think what would have
16 happened is the parties would have had their
17 proposed injunctions. There would have been a
18 huge delta between them. And then we would have
19 disputed the same kind of questions that are
20 still being disputed here.

21 But we wouldn't have to rely on the
22 city's representation about state law because we
23 could have an injunction that enforced the
24 Second Amendment.

25 I think it's important to understand

1 how state law and city law --

2 JUSTICE SOTOMAYOR: So you want us --

3 MR. CLEMENT: -- work together.

4 JUSTICE SOTOMAYOR: -- to create --

5 CHIEF JUSTICE ROBERTS: Maybe you
6 could proceed --

7 JUSTICE SOTOMAYOR: -- the law.

8 CHIEF JUSTICE ROBERTS: -- with the
9 other points you intended to --

10 MR. CLEMENT: I -- I -- I would be
11 delighted to, Your Honor.

12 I think the way that city law and
13 state law work together here is all the state
14 law says is we're going to allow your transport
15 if it's direct. It doesn't otherwise specify
16 what's direct.

17 The city took it on itself in
18 Section 7 of the new regs to tell you what they
19 at least at that point thought was sufficiently
20 direct, which is continuous and uninterrupted.

21 Now, they're now making
22 representations that the reg doesn't mean what
23 it seems to mean and the like. And I would say
24 that my client shouldn't have to rely on those
25 representations. They should get that in

1 writing in an injunction that would be
2 enforceable. That would be effectual relief.

3 Again, I think the damages point was
4 not our principal claim here, but let's think
5 about in real time what would have happened is
6 as soon as we filed the lawsuit, the city would
7 have turned around, dropped its case entirely,
8 and then admitted to the court that it served no
9 public safety purpose.

10 Then I think my clients, who for years
11 had tried to comply with the law and restricted
12 where they wanted to go, would have immediately
13 sued for damages.

14 I don't think they should lose that
15 right just because the city's maneuvering
16 happened post-certiorari.

17 Thank you, Your Honor.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel. The case is submitted.

20 (Whereupon, at 11:07 a.m., the case
21 was submitted.)

22

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