



## Supreme Court Cert Grant Creates Uncertainty in Post-*Heller* World: Part II

February 14, 2019

As discussed in [Part I](#) of this two-part Sidebar, the Supreme Court recently granted certiorari in *New York State Rifle & Pistol Association, Inc. v. City of New York*, agreeing to review a decision of the U.S. Court of Appeals for the Second Circuit (“Second Circuit”) upholding New York City’s effective prohibition on the transportation of certain licensed firearms to locations outside the City. While Part I discusses the Second Circuit’s ruling vis-a-vis the Second Amendment of the U.S. Constitution, this part examines two other constitutional issues that the Second Circuit considered and that the Supreme Court has agreed to review: (1) whether New York City’s licensing scheme runs afoul of the Commerce Clause by discriminating against interstate commerce; and (2) whether the licensing scheme violates the constitutional right to travel.

Although much of the [discussion](#) surrounding the case has focused on the Second Amendment, a decision on the Commerce Clause or right-to-travel-issues could have significant implications for state and local firearms regulations. Should the Court strike down New York City’s licensing scheme on one of these two grounds, the power of states and localities to enact restrictions on the transportation of licensed firearms within their jurisdictions could be substantially curtailed.

**Commerce Clause:** As discussed in greater detail in Part I, the licensing regime challenged in *New York State Rifle & Pistol Association* [requires](#) a New York City resident to obtain a license to possess a handgun in her home (“premises license”), and the license authorizes its holder to remove the handgun from the home only (1) to transport it to and from an authorized shooting range *within the City* or (2) to transport the handgun to and from areas designated by the New York State Fish and Wildlife Law for authorized hunting, so long as the permit holder has received a hunting amendment to the premises license.

Among other things, the plaintiffs in the case (three New York City residents and the organizational plaintiff, the New York State Rifle & Pistol Association) have argued that the licensing regime is inconsistent with the U.S. Constitution’s Commerce Clause. That Clause, in part, grants Congress the power to “regulate Commerce . . . among the several states.” On [more](#) than one [occasion](#), the Supreme Court and lower federal courts have considered the Commerce Clause’s application to federal firearms laws, with a key question being whether the legislation at issue is an appropriate exercise of Congress’s power. In the *New York State Rifle & Pistol Association* case, however, the plaintiffs contend that *local*

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regulations are precluded by the Clause because they impede on an area that is constitutionally reserved to the federal government. This argument stems from the Supreme Court’s longstanding [interpretation](#) of the Commerce Clause as establishing “an implicit restraint on state authority,” [referred](#) to as the “dormant” Commerce Clause. The implicit restraint is grounded in a [concern](#) about “economic protectionism—that is, [the enactment of] regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” Thus, under the dormant Commerce Clause, states and localities [are](#) “significantly limit[ed]” in their ability to “regulate or otherwise burden the flow of interstate commerce,” and state or local laws that discriminate against—or excessively burden—such commerce may be struck down as unconstitutional. A state or local regulation may be unconstitutional under the dormant Commerce Clause in at least three scenarios: (1) the regulation facially [discriminates](#) against interstate commerce or, though facially neutral, has a discriminatory purpose or effect (for instance, [prohibiting](#) the sale of products not processed within a certain geographical radius); (2) the regulation is nondiscriminatory but imposes incidental [burdens](#) on interstate commerce (e.g., a [requirement](#) that causes certain non-local businesses to have to relocate their operations) that are “clearly excessive in relation to the putative local benefits”; or (3) the regulation is “[extraterritorial](#),” meaning that it seeks to control conduct beyond the state’s borders.

The plaintiffs in *New York State Rifle & Pistol Association* contend that New York City’s premises licensing regime violates the dormant Commerce Clause in all three of these ways. The plaintiffs assert that the licensing scheme (1) “has the effect of baldly discriminating against interstate commerce” by “forbid[ding] law-abiding Premises Residence license holders from transporting their . . . handguns to engage in constitutionally protected commercial activity” at firing ranges in other states, instead “requiring that activity to take place within New York City”; (2) “disparately impacts non-local” firing ranges without actually serving any local interest in public safety; and (3) attempts to impermissibly control extraterritorial economic activity by forbidding licensed handgun owners from “entering into lawful transactions with firing ranges taking place entirely outside of the City.” The Second Circuit, however, [rejected](#) these arguments. The appellate court [determined](#) that the regulation is not discriminatory, as it “does not prohibit a premises licensee from patronizing an out-of-state firing range or going to out-of-state shooting competitions” but merely precludes a licensee from bringing along her premises licensed firearm. The court also [concluded](#) that the regulation “clearly focuses” on the locality’s “legitimate interest” in minimizing the risks of gun violence by [addressing](#) “only activity within New York City,” with any “extraterritorial impact [being merely] incidental to this purpose and thus . . . of no judicial significance.”

At the present stage of the Supreme Court proceedings, the plaintiffs have [argued](#), among other things, that the Second Circuit’s analysis “misses the point” by focusing on “[t]he fact that individuals may have alternative means to engage in commerce”—i.e., patronizing out-of-state firing ranges without their premises-licensed handguns. The plaintiffs note that regulation of “commercial items and instrumentalities of commerce,” which they claim the City’s regulatory scheme to be, may still be effectively discriminatory and thus contravene the dormant Commerce Clause. The plaintiffs also assert that whether the regulation “directly governs only activity within New York City” is irrelevant for extraterritoriality purposes, because its “necessary effect” is to prohibit “constitutionally protected uses” outside the City. In opposition, the City has [averred](#) that the plaintiffs’ Commerce Clause argument rests on the “faulty premise” that they possess a constitutionally protected right to transport the specific handguns they have licensed in New York City to other locations, pointing out that the plaintiffs remain free to patronize businesses outside the City or State and use other firearms there.

**Right to Travel:** Generally, federal law does not [bar](#) the transportation of firearms across state lines and leaves room for states and localities to structure their licensing regimes in ways that may impact the permissibility of such transfers. Nevertheless, in addition to their Second Amendment and Commerce Clause challenges, the *New York State Rifle & Pistol Association* plaintiffs allege that New York City’s licensing scheme violates their “fundamental constitutional right to interstate and intrastate travel.” This

asserted right actually embraces at least three conceptual “**components**” that the Supreme Court has identified: the right of “a citizen of one State to enter and to leave another state, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State,” and the right of those who permanently relocate to a new state “to be treated like other citizens of that State.”

The components of the right to travel appear to derive, in part, from Article IV, Section 2 of the Constitution, which entitles the citizens of each state to the “Privileges and Immunities of Citizens in the several States,” and from the Fourteenth Amendment, which (among other things) prohibits states from enacting laws that “abridge the privileges or immunities of citizens of the United States.” However, the precise constitutional locus of the broad concept of a right to state ingress and egress remains **unclear**. In any event, the Supreme Court has **said** that a local regulation “implicates the right to travel when it actually deters such travel,” when “impeding travel is its primary objective,” or when “it uses ‘any classification which serves to penalize the exercise of that right.’” If the right is implicated, the regulation at issue is **unconstitutional** “unless shown to be necessary to promote a compelling governmental interest.”

The plaintiffs in *New York State Rifle & Pistol Association* claim that New York City’s premises license restrictions deter and seek to penalize travel to other states by forcing licensees “to choose which constitutional right they would rather exercise: their right to travel or their right to keep and bear arms,” while the City has “never even attempted to identify a compelling governmental interest that might support” that forced choice. The Second Circuit disagreed with the threshold proposition that the right to travel is implicated, however, **concluding** that the Constitution “protects the right to travel, not the right to travel armed.” In the court’s **view**, New York City’s licensing regime concerns only the ability to remove specific handguns from the premises for which they are licensed, with nothing in the regulatory scheme preventing the plaintiffs from “engaging in intrastate or interstate travel as they wish.” Thus, the court concluded, the regulations **have** only an “incidental impact on travel” that is no more “significant [a] disincentive . . . than any other regulation that limits the possession in one jurisdiction of items that may be more broadly permitted in another.” In their petition for certiorari, the plaintiffs have **charged** the appellate court decision with creating a de facto constitutional “handguns exception,” while the City has **responded** that the regulations restrict only one’s ability to transport specifically licensed firearms, which is “not a fundamental right.”

**Implications and Options for Congress:** Thus far, much of the **coverage** of the *New York State Rifle & Pistol Association* case has focused on the Second Amendment, but the Commerce Clause and right-to-travel issues could give the Supreme Court a basis to strike down the City’s licensing regime without having to wade too deeply into Second Amendment waters (should a majority on the question prove elusive). And although New York City’s licensing regime appears to be **unique**, a ruling in favor of the plaintiffs based on either the Commerce Clause or the right to travel could establish a template for challenging future state or local gun regulations that appear to impact interstate travel or patronage of non-local firearms ranges and competitions.

Significantly, at least with respect to the right-to-travel issue, the Court’s ultimate conclusion could hinge on its conception of the scope of the Second Amendment. Should the Court take a broad view of the right to keep and bear arms—i.e., that it encompasses the right to carry or transport firearms outside the home—the plaintiffs’ argument that the City’s licensing scheme impermissibly forces them to choose between the exercise of two different constitutional rights could be seen as more persuasive. Indeed, in a different context, the Supreme Court has **recognized** that a state may not penalize a citizen for exercising a right guaranteed by the Constitution.

Whether the Court upholds or strikes down New York City’s licensing regime, Congress may still have a role to play through legislation. First, Congress has the **power** to expressly authorize state or local regulations that burden or discriminate against interstate commerce (as long as it

does so “unambiguously”), which it could invoke if the Court rules that the regulations run afoul of the dormant Commerce Clause and Congress wishes to counteract that result. Conversely, should Congress seek to restrict or preempt regulations like those at issue in *New York State Rifle & Pistol Association*, it could likely do so by amending 18 U.S.C. § 926A. That statute currently provides that notwithstanding any state or local regulation, a person may “transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm,” so long as the firearm is transported safely. The provision appears not to apply to the regulatory scheme at issue in *New York State Rifle & Pistol Association*, because the New York City premises licenses are not licenses to “possess and carry.” If Congress wished to expand the scope of Section 926A, however, it could do so by making this language disjunctive. Indeed, a [bill](#) introduced in the current Congress would appear to achieve this result.

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