AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/Guns

**New York State Rifle & Pistol Association, Inc. v. City of New York, New York, 140 S.Ct. 1525** (2020)

*Members of the New York State Rifle & Pistol Association claimed that a New York City law that prohibited them from travelling with their lawfully owned weapons to a second home or shooting range out of New York City violated the Second Amendment as incorporated by the due process clause of the Fourteenth Amendment. After both the local district court and the Court of Appeals for the Second Circuit rejected this claim, the Rifle and Pistol Association successfully applied to the Supreme Court for a writ of certiorari. The state of New York and New York City then repealed the offending statutes rather than risk having them declared unconstitutional. They then claimed the Supreme Court should dismiss the Second Amendment claim as moot.*

 *The Supreme Court by a 6-3 vote agreed that the case was now moot. The per curiam opinion declared that claims the Rifle & Pistol Association* *could no longer obtain injunctive relief because the law whose enforcement they wished to enjoin was no longer on the books. Why does Justice Samuel Alito dispute this judgment? Did the majority opinion misinterpret Article III mootness principles in order to avoid resolving a difficult issue? Was the remand for further proceedings sufficient to resolve any lingering issues that might remain? Is this an example of the Chief Justice desperately trying to limit the political exposure of the court? Is that an appropriate posture for a Chief Justice?*

Per Curiam.

In the District Court, petitioners challenged a New York City rule regarding the transport of firearms. Petitioners claimed that the rule violated the Second Amendment. Petitioners sought declaratory and injunctive relief against enforcement of the rule insofar as the rule prevented their transport of firearms to a second home or shooting range outside of the city. After we granted certiorari, the State of New York amended its firearm licensing statute, and the City amended the rule so that petitioners may now transport firearms to a second home or shooting range outside of the city, which is the precise relief that petitioners requested in the prayer for relief in their complaint. Petitioners' claim for declaratory and injunctive relief with respect to the City's old rule is therefore moot. . . .Petitioners now argue, however, that the new rule may still infringe their rights. In particular, petitioners claim that they may not be allowed to stop for coffee, gas, food, or restroom breaks on the way to their second homes or shooting ranges outside of the city. The City responds that those routine stops are entirely permissible under the new rule. We do not here decide that dispute about the new rule; as we stated in *Lewis v. Continental Bank Corp.* (1990): . . . in instances where the mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously, our practice is to vacate the judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully.

Petitioners also argue that, even though they have not previously asked for damages with respect to the City's old rule, they still could do so in this lawsuit. Petitioners did not seek damages in their complaint; indeed, the possibility of a damages claim was not raised until well into the litigation in this Court. The City argues that it is too late for petitioners to now add a claim for damages. On remand, the Court of Appeals and the District Court may consider whether petitioners may still add a claim for damages in this lawsuit with respect to New York City's old rule. . . .

Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I0f099c01886a11ea8939c1d72268a30f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I0f099c01886a11ea8939c1d72268a30f), concurring.

I agree with the *per curiam* opinion's resolution of the procedural issues before us. . . .

I also agree with Justice ALITO's general analysis of  [*District of Columbia v. Heller* (2008)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2016385211&pubNum=0000708&originatingDoc=I0f099c01886a11ea8939c1d72268a30f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and [*McDonald v. Chicago* (2010)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022394586&pubNum=0000708&originatingDoc=I0f099c01886a11ea8939c1d72268a30f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I0f099c01886a11ea8939c1d72268a30f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I0f099c01886a11ea8939c1d72268a30f), with whom Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I0f099c01886a11ea8939c1d72268a30f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I0f099c01886a11ea8939c1d72268a30f) joins, and with whom Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I0f099c01886a11ea8939c1d72268a30f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I0f099c01886a11ea8939c1d72268a30f) joins [in part], dissenting.

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. . . . It is certainly true that the new City ordinance and the new State law give petitioners *most of* what they sought, but that is not the test for mootness. Instead, “a case ‘becomes moot only when it is *impossible* for a court to grant *any effectual relief whatever*to the prevailing party.’ ”  First, the changes in City and State law do not provide petitioners with all the injunctive relief they sought. Second, if we reversed on the merits, the District Court on remand could award damages to remedy the constitutional violation that petitioners suffered.

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Article III, § 2 of the Constitution limits the jurisdiction of the federal courts to “Cases” and “Controversies,” and as a result, we may not “ ‘decide questions that cannot affect the rights of litigants in the case before [us].’ ” . . .  This means that the dispute between the parties in a case must remain alive until its ultimate disposition. If a live controversy ceases to exist—*i.e.*, if a case becomes moot—then we have no jurisdiction to proceed. But in order for this to happen, a case must really be dead, and as noted, that occurs only “ ‘when it is impossible for a court to grant any effectual relief whatever to the prevailing party.’ ” ‘[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.’ ” . . .

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First, this case is not moot because the amended City ordinance and new State law do not give petitioners all the *prospective relief* they seek. Petitioners asserted in their complaint that the Second Amendment guarantees them, as holders of premises licenses, “unrestricted access” to ranges, competitions, and second homes outside of New York City, App. 36, and the new laws do not give them that.[4](https://1.next.westlaw.com/Document/I0f099c01886a11ea8939c1d72268a30f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa5000001760690335ac5622d7c%3FNav%3DCASE%26fragmentIdentifier%3DIf1893f4a072c11ebbea4f0dc9fb69570%26startIndex%3D41%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&list=CASE&rank=45&grading=na&sessionScopeId=f47efaba370c7d8c35e4897a0ffd85a9b4362f3940cefbb908d8c37bfe46d28a&originationContext=previousnextdocument&transitionType=SearchItem&contextData=%28sc.Search%29&listPageSource=0662795f2a2dd2f3339f6ce255378707#co_footnote_B00042050840644)

The new City ordinance has limitations that petitioners claim are unconstitutional, namely, that a trip outside the City must be “direc[t]” and travel within the City must be “continuous and uninterrupted.” Exactly what these restrictions mean is not clear from the face of the rule, and the City has done little to clarify their reach. At argument, counsel told us that the new rule allows “bathroom breaks,” “coffee stops,” and any other “reasonably necessary stops in the course of travel.”. But the meaning of a “reasonably necessary” stop is hardly clear. What about a stop to buy groceries just before coming home? Or a stop to pick up a friend who also wants to practice at a range outside the City? Or a quick visit to a sick relative or friend who lives near a range? The City does not know the answer to such questions.

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The case is not moot for a separate and independent reason: If this Court were to hold, as petitioners request and as I believe we should, that [the city law] violated petitioners' Second Amendment right, the District Court on remand could (and probably should) award damages. And while the amended complaint does not expressly seek damages, it is enough that it requests “[a]ny other such further relief as the [c]ourt deems just and proper.” Under modern pleading standards, that suffices.

The Federal Rules of Civil Procedure provide that a “final judgment should grant the relief to which each party is entitled, *even if the party has not demanded that relief in its pleadings*.” Courts have refused to award relief outside the pleadings only when that would somehow prejudice the defendant, such as when the defendant did not have an opportunity to contest the basis for that relief. . . . At a minimum, if petitioners succeeded on their challenge to the travel restrictions, they would be eligible for nominal damages. When a plaintiff 's constitutional rights have been violated, nominal damages may be awarded without proof of any additional injury. . . .

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. . . [T]he possibility of actual damages cannot be ruled out. One or more of the petitioners could seek compensation for out-of-pocket expenses, such as membership fees at in-city ranges. The current record shows that at least one of the petitioners is a member of a range in the City. In addition, a petitioner may be entitled to compensation for expenses incurred in registering for out-of-city competitions from which he was compelled to withdraw. The record shows that one petitioner signed up for such a competition but had to pull out as a result of the City ordinance. . Petitioners could also seek compensation for any intangible but nevertheless real and personal injuries that they suffered due to their inability to attend shooting competitions, to practice at out-of-city ranges, or to take their licensed handguns to second homes.

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Relief would be particularly appropriate here because the City's litigation strategy caused petitioners to incur what are surely very substantial attorney's fees in challenging the constitutionality of a City ordinance that the City went to great lengths to defend. Of course, a claim for attorney's fees is not alone sufficient to preserve a live controversy.  But where a live controversy remains, a defendant who would otherwise be liable for attorney's fees should not be able to wiggle out on the basis of a spurious claim of mootness.

If a [§ 1983](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=I0f099c01886a11ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) plaintiff achieves *any success on the merits*, even an award of nominal damages, the plaintiff is a prevailing party and is eligible for attorney's fees under [42 U.S.C. § 1988](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1988&originatingDoc=I0f099c01886a11ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). For this reason, were the Court to exercise jurisdiction in this case and rule for petitioners, they would be eligible for attorney's fees.

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Consider where acceptance of the argument adopted by the *per curiam* leads. Suppose that a city council, seeking to suppress a local paper's opposition to some of its programs, adopts an ordinance prohibiting the publication of any editorial without the approval of a city official. Suppose that a newspaper challenges the constitutionality of this rule, arguing that the First Amendment confers the unrestricted right to editorialize without prior approval. If the council then repeals its ordinance and replaces it with a new one requiring approval only if the editorial concerns one particular city program, would that render the pending lawsuit moot and require the paper to commence a new one?

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Having shown that this case is not moot, I proceed to the merits of plaintiffs' claim that the City ordinance violated the Second Amendment. This is not a close question. The answer follows directly from [*Heller*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2016385211&pubNum=0000780&originatingDoc=I0f099c01886a11ea8939c1d72268a30f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

In [*Heller*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2016385211&pubNum=0000780&originatingDoc=I0f099c01886a11ea8939c1d72268a30f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), we held that a District of Columbia rule that effectively prevented a law-abiding citizen from keeping a handgun in the home for purposes of self-defense constituted a core violation of the Second Amendment. . . . We deal here with the same core Second Amendment right, the right to keep a handgun in the home for self-defense. As the Second Circuit “assume[d],” a necessary concomitant of this right is the right to take a gun outside the home for certain purposes. One of these is to take a gun for maintenance or repair, which City law allows. Another is to take a gun outside the home in order to transfer ownership lawfully, which the City also allows. And still another is to take a gun to a range in order to gain and maintain the skill necessary to use it responsibly. As we said in [*Heller*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2016385211&pubNum=0000780&originatingDoc=I0f099c01886a11ea8939c1d72268a30f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), “ ‘to bear arms implies something more than the mere keeping [of arms]; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use.’ ”

It is true that a lawful gun owner can sometimes practice at a range using a gun that is owned by and rented at the range. But the same model gun that the person owns may not be available at a range, and in any event each individual gun may have its own characteristics. Once it is recognized that the right at issue is a concomitant of the same right recognized in [*Heller*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2016385211&pubNum=0000780&originatingDoc=I0f099c01886a11ea8939c1d72268a30f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), it became incumbent on the City to justify the restrictions its rule imposes, but the City has not done so. It points to no evidence of laws in force around the time of the adoption of the Second Amendment that prevented gun owners from practicing outside city limits. . . . Petitioners do not claim the right to fire weapons in public places *within the City*. Instead, they claim they have a right to practice at ranges and competitions *outside the City*, and neither the City, the courts below, nor any of the many *amici* supporting the City have shown that municipalities during the founding era prevented gun owners from taking their guns outside city limits for practice.

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. . . {The city] asserted that the travel restrictions discouraged licensees from taking their guns outside the home, but this is a strange argument for several reasons. It would make sense only if it is less convenient or more expensive to practice at a range in the City, but that contradicts the City's argument that the seven ranges in the City provide ample opportunity for practice. And discouraging trips to a range contradicts the City's own rule recommending that licensees practice. Once it is recognized that a reasonable opportunity to practice is part of the very right recognized in [*Heller*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2016385211&pubNum=0000780&originatingDoc=I0f099c01886a11ea8939c1d72268a30f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), what this justification amounts to is a repudiation of part of what we held in that decision.

[The city] claimed that prohibiting trips to out-of-city ranges helps prevent a person who is taking a gun to a range from using it in a fit of rage after an auto accident or some other altercation that occurs along the way. . . . [T]his argument does not explain why a person headed for a range outside the City is any more likely to engage in such conduct than a person whose destination is a range in the City. . . . .

[The city’s final justification for the travel restrictions . . . goes like this. Suppose that a patrol officer stops a premises licensee and finds that this individual is carrying a gun, and suppose that that the licensee says he is taking the gun to a range to practice or is returning from a range. If the range in question is one in the City, the officer will be better able to check the story than if the range is outside the officer's jurisdiction. . . . [I]it is dubious that it would be much harder for an officer to check whether a licensee was really headed for an out-of-city range as opposed to one in the City. . . .

In sum, the City's travel restriction burdened the very right recognized in [*Heller*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2016385211&pubNum=0000780&originatingDoc=I0f099c01886a11ea8939c1d72268a30f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). History provides no support for a restriction of this type. The City's public safety arguments were weak on their face, were not substantiated in any way, and were accepted below with no serious probing. And once we granted review in this case, the City's public safety concerns evaporated.

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