12-1578

In the United States Court of Appeals for the Second Circuit

SHUI W. KWONG; GEORGE GRECO; GLENN HERMAN; NICK LIDAKIS; TIMOTHY S. FUREY; DANIELA GRECO; NUNZIO CALCE; SECOND AMENDMENT FOUNDATION, INC.; THE NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC.,

Plaintiffs-Appellants,

v.

MICHAEL R. BLOMBERG, in his Official Capacity as Mayor of the City of New York; CITY OF NEW YORK,

Defendants-Appellees,

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor-Appellee,

ERIC T. SCHNEIDERMAN, in his Official Capacity as Attorney General of the State of New York,

Defendant.

Appeal from a Judgment of the United States District Court for the Southern District of New York; Hon. John G. Koeltl, District Judge, District Court No. 11 Civ. 2356

APPELLANTS' BRIEF

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CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant Second Amendment Foundation, Inc. has no parent corporation, and no publicly held corporation owns its stock.

Plaintiff-Appellant New York State Rifle & Pistol Association, Inc. has no parent corporation, and no publicly held corporation owns its stock.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1291. The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343. The District Court's decision and order of March 26, 2012 was a final order. SA 1-38. Plaintiffs-Appellants ("Plaintiffs") timely filed their notice of appeal on April 18, 2012. JA 656.

ISSUES PRESENTED FOR REVIEW

1) New York law prohibits people from possessing handguns, including within their homes, unless they hold a license issued under Article 400 of the New York Penal Law. Article 400 directs local governments to issue handgun licenses, and to lay and collect local license fees. While Penal Law § 400.00(14) allows New York localities to determine their own license fees, the statute generally limits these fees to a range of $3 to $10. However, § 400.00(14) exempts New York City from this protective fee range and provides no statutory limitation on the City's authority to impose fees. Does the exemption of New York City residents from the permissible fee range violate the Equal Protection Clause?

2) The City of New York imposes a fee of $340 every 3 years to issue or renew a "residence premises" handgun license, which is needed keep a handgun in one's home. May the City impose its recurring $340 fee as a condition of granting permission to engage in the "core" Second Amendment activity of keeping a handgun in one's home?

STATEMENT OF THE CASE

This 42 U.S.C. § 1983 action seeks declaratory and injunctive relief to redress the deprivation of rights secured by the Second and Fourteenth Amendments. Plaintiffs commenced this action against Defendants-Appellees Mayor Michael R. Bloomberg and the City of New York ("Defendants") on April 5, 2011, also naming New York Attorney General Eric Schneiderman as a defendant. JA 12. Pursuant to a stipulation, the District Court dismissed Attorney General Schneiderman, and allowed the Office of the New York State Attorney General ("Intervenor") to intervene, on May 23, 2011. JA 24.

Plaintiffs moved for summary judgment on June 23, 2011, and Defendants and Intervenor cross-moved for summary judgment on July 28, 2011. JA 43-44, 114, 432. District Judge John G. Koeltl denied Plaintiffs' motion, and granted Defendants' and Intervenor's cross-motions, on March 26, 2012. Kwong v. Bloomberg, no. 11 Civ. 2356, 2012 U.S. Dist. LEXIS 41218 (S.D.N.Y. Mar. 26, 2012); SA 1-38. Plaintiffs timely filed their notice of appeal on April 18, 2012. JA 656.

STATEMENT OF FACTS

1. *New York Requires a License, Issued Under Article 400 of the Penal Law, in Order to Keep a Handgun at Home*

It is illegal to possess a handgun in the State of New York unless one holds a license issued under Article 400 of the New York Penal Law. See N.Y. Penal L.

§§ 265.01(1), 265.20(3). Article 400 "is the exclusive statutory mechanism for the licensing of firearms in New York State." O'Connor v. Scarpino, 638 N.E.2d 950, 951, 83 N.Y.2d 919, 920 (1994). Article 400 preempts the field of handgun licensing and prevents localities from enacting inconsistent handgun laws. See Chwick v. Mulvey, 915 N.Y.S.2d 578, 586-87, 81 A.D.3d 161, 171-72 (App. Div. 2010) (county's ban on "deceptively colored" handguns impermissible). Article 400 authorizes localities to issue several different types of handgun licenses. See N.Y. Penal L. § 400.00(2). This case concerns the "residence premises" license that authorizes one to "have and possess [a handgun] in his dwelling by a householder." Id. § 400.00(2)(a).

2. *State Law Directs Local Officials to Investigate Handgun License Applications, Issue Licenses, and Set License Fees*

Article 400 requires an individual seeking a handgun license to apply to a designated local "licensing officer." N.Y. Penal L. § 400.00(3)(a). In the City of New York, the licensing officer is the New York City Police Department. See id. § 265.00(10). An applicant must submit fingerprints and pay a fee to cover the expense of a background investigated conducted by the New York Division of Criminal Justice Services ("DCJS"), which is currently $94.25 for electronically submitted fingerprints. See id. § 400.00(4); see also N.Y. Comp. Codes R. & Regs. tit. 9, § 6051.3(a)-(b); JA 329. (This case does not challenge the DCJS fee.) Before the licensing officer makes a decision, local police authorities must

investigate each license applicant and provide the results to the licensing officer. See N.Y. Penal L. § 400.00(4).

Finally, Article 400 authorizes licensing officers to collect a locally determined license fee. See id. § 400.00(14). In most of New York State, individual county legislatures determine the amount of the license fee, while in New York City, the City Council has this authority. See id.

3. *State Law has Limited the Ability to Collect Fees Since 1922, but in 1947 it Exempted New York City from its Fee Limitations*

While Article 400 authorizes localities to set and impose license fees, it also constrains most New York localities from imposing a fee that is "less than three dollars nor more than ten dollars." N.Y. Penal L. § 400.00(14). However, Article 400 exempts New York City (and Nassau County) from this fee range limitation – and from any other statutory protection against excessive license fees. See id.

State law first authorized localities to charge a $0.50 fee for handgun licenses in 1922, and this law applied equally to all New York localities. See 1922 N.Y. Laws ch. 198, sec. 1 (JA 468). Adjusted for inflation, this fee is equivalent to about $7 today.[1] In 1938 the legislature amended this law to provide localities with the authority to set their own license fees, but bounded the permissible amount of these fees to a range of $0.50 to $1.50. See 1938 N.Y. Laws ch. 374,

[1] See Bureau of Labor Statistics, Inflation Calculator, available at http://www.bls.gov/data/inflation_calculator.htm/ (last visited Jun. 28, 2012).

sec. 1 (JA 76-77). Again, the fee limitation applied throughout all of New York State.

In 1947 the New York legislature enacted the current (substantive) statutory language that exempts New York City from the fee range limitation. See N.Y. Penal L. § 400.00(14); 1947 N.Y. Laws ch. 374, sec. 1 (JA 89). At the time of this 1947 amendment, Assemblyman Louis Kalish submitted a "sponsor's memorandum." See "Bill Jacket" for A. 499-497, at 7-8 (N.Y. 1947) (JA 97-98). The sponsor's memorandum identified three justifications for the fee range exemption. First, "[t]o give discretion to the City Council provides the flexibility required to keep costs and receipts balanced." Id. at 7. Second, "a higher fee, if the City Council considers it wise to impose same, *will tend to discourage a great number of possible applicants* who are better off, both as concerns themselves and the welfare of this City as a whole, without the possession of fire-arms." Id. (emphasis added). And third, "the possession of fire-arms for personal use is in the form of a non-essential grant which may be made the basis for revenue raising taxes." Id. at 8.

4. *The State Fee Range was Set Below Issuance Costs, while the City's $340 Fee was Set to Recoup Issuance Costs*

The State most recently amended the permissible fee range in 1984, when it increased the maximum permissible fee from $5 to $10. See 1984 N.Y. Laws ch. 739, sec. 1 (JA 556). Legislative materials from this amendment indicate that at

the time, the fees of New York City and Nassau County (then $76 and $51, respectively) "more closely approximate the actual costs involved in license processing," which were "[i]n some cases . . . as much as $250" per license. See "Bill Jacket" for S. 739-8673 (N.Y. 1984), at 7 (JA 570).

The City set the handgun license fee at its current level ($340 for each 3-year license) in 2004. N.Y.C. L. No. 37-2004, sec. 1 (JA 99-100). Prior to establishing this fee, the City prepared a "User Cost Analysis" that determined that the average cost of each pistol license was $343.49. JA 334, 370. The City also prepared a User Cost Analysis in 2010, which found the licensing cost to be $977.16 per initial license and $346.92 per renewal. JA 337, 384, 389.

5. *The Parties*

The Plaintiffs are seven individuals who hold "residence premises" handgun licenses issued by Defendant City of New York. JA 53, 55, 58, 61, 64, 67, 70. Plaintiff Shui W. Kwong is a union electrical contractor, husband, and father who immigrated to the United States from Hong Kong. JA 53. Plaintiff Nick Lidakis is a first-generation Greek American who is a paramedic, and Plaintiff Nunzio Calce is a first-generation Italian American who is a father and certified public accountant. JA 55, 58. Plaintiffs George and Daniela Greco have been married for 24 years and have two children. JA 61, 64. Mr. Greco operates a successful third-generation family woodworking business, and Mrs. Greco is a New York City

public school teacher. Id. Glenn Herman is married and is a certified firearms safety instructor. JA 67. Timothy Furey is an investment professional. JA 70. Each Plaintiff paid the $340 fee, and each will need to pay the fee to renew their licenses in the future. JA 53, 55, 58, 61, 64, 67, 70.

Plaintiff Second Amendment Foundation, Inc. ("SAF") is a nationwide non-profit member organization that promotes the right to keep and bear arms throughout the United States. JA 72-73. SAF has over 650,000 members and supporters nationwide, including in the City and State of New York. Id. The purposes of SAF include promoting the exercise of the right to keep and bear arms, as well as education, research, publishing, and legal action on the constitutional right to privately own and possess firearms. JA 73. Plaintiffs Nick Lidakis, Nunzio Calce, and Glenn Herman are members of SAF. JA 55, 58, 67. Both SAF members and the general public request advice and assistance from SAF regarding Defendants' application of the challenged laws, and this results in SAF's expenditure of time, energy, and money. JA 73, 586-87.

Plaintiff New York State Rifle & Pistol Association, Inc. ("NYSRPA") is a non-profit member organization first organized in 1871 in New York City. JA 74. NYSRPA is the oldest firearms advocacy organization in the United States, and it is the largest firearms organization in the State of New York. Id. NYSRPA provides education and training in the safe and proper use of firearms, promotes

the shooting sports, and supports the right to keep and bear arms through both legislative and legal action. JA 75. Plaintiffs Daniela Greco and Glenn Herman are members of NYSRPA, and Plaintiff George Greco is a NYSRPA board member. JA 61, 64, 67. NYSRPA also receives requests for assistance from both its members and the general public regarding the $340 handgun license fee in New York City. JA 75, 588. In addition to addressing these inquiries, NYSRPA publishes materials that provide information and advice on this issue. JA 589. NYSRPA expends its time, energy, and money to respond to Defendants' enforcement of the laws at issue. Id.

Defendant City of New York is a New York municipal corporation. JA 19, 34. Defendant Michael Bloomberg is before the Court in his official capacity as Mayor of the City, responsible to execute and administer its laws, including the law setting the license fee at $340 (N.Y.C. Admin. Code § 10-131). JA 19; see also N.Y.C. Charter § 8.

Intervenor Attorney General of the State of New York intervened pursuant to 28 U.S.C. § 2403(b) to defend the constitutionality of § 400.00(14). JA 24.

SUMMARY OF ARGUMENT

Article 400 of the New York Penal Law governs the issuance of handgun licenses throughout the State of New York and requires all New York localities to issue handgun licenses to their residents. Article 400 authorizes these localities to impose a locally determined license fee, but it limits that fee to the nominal range of $3 to $10 – except in the case of City of New York, where there is *no* statutory limit on the permissible license fee at all. Acting pursuant to this exemption, the City currently imposes a fee of $340 for a 3-year handgun license. This brief shows that Article 400's exemption of New York City residents from the otherwise applicable protective fee range violates the Equal Protection Clause. Furthermore, to the extent it is necessary to reach the issue, the City's $340 fee is an impermissible license tax because it is prohibitive and is imposed as a condition of exercising the core of an enumerated constitutional right – to wit, keeping a handgun in one's home for the purpose of self-protection.

Since the Supreme Court decided District of Columbia v. Heller, 554 U.S. 570 (2008), few judicial decisions have analyzed disparate burdens on the right to keep and bear arms in the framework of equal protection. Instead, most reported cases concern the permissibility of various burdens on gun ownership, standing alone, and reason that any equal protection claims are subsumed. See, e.g., Fletcher v. Haas, no. 11-10644, 2012 U.S. Dist. LEXIS 44623, *48 n.20 (D. Mass.

Mar. 30, 2012); Woollard v. Sheriden, no. L-10-2068, 2012 U.S. Dist. LEXIS 28498, *35-36 (D. Md. Mar. 2, 2012). But see State v. Ibrahim, 269 P.3d 292, 297, 164 Wash. App. 503, 515 (Ct. App. 2011) (invalidating state law that required lawful aliens, alone, to obtain firearms licenses under the Equal Protection Clause). While most of these post-Heller cases are therefore not *directly* analogous in the equal protection context, many are *indirectly* analogous. This is because the strong majority of these cases rely on the framework of heightened scrutiny (*i.e.* "intermediate" and "strict" scrutiny) that applies to burdens on other constitutional rights, most notably the First Amendment. Of course, the three-tiered framework of scrutiny that governs Equal Protection Clause claims is highly analogous to this mode of analysis, and indeed, both analytic models grow from a common origin – the discussion in footnote 4 of the Supreme Court's decision in United States v. Carolene Products Co., 304 U.S. 144 (1938).

Hence, after Point I explains the standard of review, Point II begins by detailing the scope of the Second Amendment and its judicial treatment to date. This discussion shows that because Article 400 burdens the basic right to possess a handgun at home, it burdens conduct lying in the very core of the Second Amendment's protection – and triggers an exacting level of scrutiny.

Point III begins by explaining the basic parameters of the Equal Protection Clause and the analytic tests that apply to laws that impose unequal burdens on the

exercise of fundamental rights. Section 400.00(14)'s inequality is that it protects one group of citizens with a nominal fee range of $3 to $10, but provides no statutory limit whatsoever on the fees imposed on the other group of citizens. This inequality is substantial, because there is a significant (and apparent) difference between a bounded, nominal fee and an unbounded fee. Hence, strict scrutiny (or some other form of rigorous scrutiny) applies, and there is no governmental interest that justifies the statutory disparity.

Separate and apart from this, Point IV shows that the City's recurring $340 fee is impermissible, standing alone, because the City imposes this non-nominal fee as a condition of obtaining permission to engage in the core of an enumerated constitutional right. While both the Supreme Court and this Court have indicated that localities can impose cost-shifting user fees on activities that enjoy a *degree* of constitutional protection, neither Court has ever held that states or localities may charge people for the "benefit" of exercising the basic and core conduct that an enumerated constitutional right guarantees.

ARGUMENT

I. THE STANDARD OF REVIEW IS *DE NOVO*

This Court decides the constitutionality of state and local laws *de novo*. See, e.g., Guiles v. Marineau, 461 F.3d 320, 324 (2d Cir. 2006); Deegan v. City of Ithaca, 444 F.3d 135, 141 (2d Cir. 2006); Myers v. County of Orange, 157 F.3d 66, 74 (2d Cir. 1998).

II. NEW YORK'S HANDGUN LICENSING LAWS BURDEN THE RIGHT TO KEEP ARMS AT HOME, WHERE THE SECOND AMENDMENT'S PROTECTIONS ARE STRONGEST

The level of scrutiny that applies to a law that burdens the Second Amendment depends on both the significance of the burden and how close that burden comes to the "core" of the right "to keep and bear Arms." New York State law requires people to obtain licenses to keep handguns in their homes, which is where the right to keep and bear arms applies "most notably." McDonald v. City of Chicago, 561 U.S. ___, 130 S. Ct. 3020, 3044 (2010). This means that New York's handgun licensing laws burden the very core of the Second Amendment's protections, and trigger a strict level of judicial scrutiny.

A. *The Second Amendment Protects a Fundamental Right to Keep and Bear Arms, Including (Specifically) Handguns*

The Second Amendment secures "the right of the people to keep and bear Arms." U.S. Const. amend. II. Four years ago, in District of Columbia v. Heller, the Supreme Court concluded that the words of the Second Amendment "guarantee

the individual right to possess and carry weapons in case of confrontation." Heller, 554 U.S. at 592. The Court invalidated two District of Columbia laws that prohibited people from registering handguns or keeping them in operable condition, and it ordered that "the District must permit [plaintiff] to register his handgun and must issue him a license to carry it in the home." Id. at 635.[2]

Two years later, the Supreme Court "h[e]ld that the Second Amendment right is fully applicable to the States." McDonald, 130 S. Ct. at 3026. While the majority split on the precise mechanics of incorporation, compare id. at 3044-48 (plurality op.) with id. at 3058-88 (Thomas, J., concurring), all agreed that "the right to keep and bear arms [is] among those *fundamental* rights necessary to our system of ordered liberty," id. at 3042 (emphasis added); see also id. at 3059 (Thomas, J., concurring).

The Supreme Court has specifically found that the Second Amendment protects handguns as a "class of 'arms,'" as they are "overwhelmingly chosen by American society" for the purpose of self-protection. Heller, 554 U.S. at 628; see also id. at 629 ("the American people have considered the handgun to be the quintessential self-defense weapon").

[2] The plaintiff in Heller had confined his claim for relief to the home. See Heller, 554 U.S. at 575-76; see also Parker v. District of Columbia, 478 F.3d 370, 373-74 (D.C. Cir. 2007), aff'd sub nom. Heller, 554 U.S. 570.

B. *The Rigor of Scrutiny Depends on the Extent of the Burden*

The Court in Heller "declined to announce the precise standard of review" that should apply to laws burdening the Second Amendment. United States v. Decastro, no. 10-3773, 2012 U.S. App. LEXIS 11213, *12 (2d Cir. Jun. 1, 2012). Since Heller, most Circuit Courts of Appeal have adopted a two-step approach that first considers whether the "scope" of a burden "impinges upon a right protected by the Second Amendment." Heller v. District of Columbia, 670 F.3d 1244, 1252 (D.C. Cir. 2011) ("Heller II"). If a burden falls within the Second Amendment's scope, then the court applies an "appropriate level of constitutional scrutiny." Id.; see also, e.g., Ezell v. City of Chicago, 651 F.3d 684, 702-03 (7th Cir. 2011); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2009).

While the Supreme Court did not specify the standards of review that would apply in the future, it did explain that the rational basis standard did not apply because "[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." Heller, 554 U.S. at 628-29 n.27; see also Ezell, 651 F.3d at 701 ("we know that Heller's reference to 'any standard of scrutiny' means any *heightened* standard of scrutiny").

In its only post-Heller decision that meaningfully addresses the standards of Second Amendment review, this Court held "that heightened scrutiny is appropriate only as to those regulations that substantially burden the Second Amendment." Decastro, 2012 U.S. App. LEXIS 11213 at * 11. Specifically, heightened scrutiny applied to substantial burdens "on the ability of law-abiding citizens to possess and use a firearm for self-defense (and other lawful purposes)." Id. at *15. Because the burden in Decastro was not "substantial," it was "not subject to any form of heightened scrutiny," and this Court concluded that it "need not decide the level of scrutiny applicable to laws that do impose such a burden." Id. at *11.

Although Decastro left this issue open, it still provides valuable guidance. First, the decision teaches that standards governing other fundamental rights are instructive in the Second Amendment context, as this Court substantially relied on "similar threshold showing[s] . . . needed to trigger heightened scrutiny of laws alleged to infringe other fundamental rights." Id. at *17. This Court drew specific analogies to the rights of free speech, marriage, voting, and abortion, and also to the standards governing regulatory taking claims. See id. at *17-19.

Second, the decision teaches that in determining whether a particular burden is in fact "substantial," it is again "appropriate to consult principles from other areas of constitutional law, including the First Amendment (to which Heller

adverted repeatedly)." Id. at *19. It is true, of course, that the Supreme Court repeatedly analogized the protections of the Second Amendment to those of the First. See McDonald, 130 S. Ct. at 3031, 3043, 3045, 3054 n.5, 3055, 3056; Heller, 554 U.S. at 591-92, 595, 606, 620 n.23, 625-26, 635; see also Marzzarella, 614 F.3d at 89 n.4 ("We think the First Amendment is the natural choice. Heller itself repeatedly invokes the First Amendment in establishing principles governing the Second Amendment."). There is a logical connection between the First and Second Amendments because they both set forth *enumerated* rights to engage in *affirmative* acts – and courts have long recognized this basic connection. See Commonwealth v. Blanding, 20 Mass. 304, 314 (1825) ("The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction."); Respublica v. Oswald, 1 U.S. (1 Dall.) 319, 330 n.* (Pa. 1788) ("The right of publication, like every other right, has its natural and necessary boundary; for, though the law allows a man the free use of his arm, or the possession of a weapon, yet it does not authorize him to plunge a dagger in the breast of an inoffensive neighbour.").

The final instructive aspect of Decastro is the rationale it applied to find that the burden it addressed was not "substantial." Decastro was a criminal case that facially challenged a federal law that (with some exceptions) prohibits people from

transporting guns back into their states of residence if they have "purchased or otherwise obtained" them in another state. 18 U.S.C. § 922(a)(3); see Decastro, 2012 U.S. App. LEXIS 11213 at *10-11. This law works in conjunction with other federal laws to generally prohibit people from purchasing handguns outside their states of residence. See 18 U.S.C. § 922(a)(5) (private citizens may not transfer firearms to residents of other states); id. § 922(b)(3) (licensed dealers may not transfer firearms to nonresidents, with exceptions for rifles and shotguns).

To evaluate the law, this Court drew a direct analogy to the standards governing content-neutral restrictions on the time, place, and manner of speech – and particularly the requirement that restrictions leave open ample alternative channels. See Decastro, 2012 U.S. App. LEXIS 11213 at *20 (citing Ward v. Rock Against Racism, 491 U.S. 781, 802 (1989); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)). This Court reasoned that a burden on "the availability of firearms" was not substantial "if adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense." Id. From this premise, the burden was not substantial because "it does nothing to keep someone from purchasing a firearm in her home state." Id. at *21. This Court next cited the "evident purpose" of "stop[ping] circumvention of state laws regulating gun possession." Id. And finally, this Court observed that out-of-state purchases are lawful as long as "the gun is first transferred to a licensed gun dealer in the

purchaser's home state." Id. Hence, the burden of § 922(a)(3) was not substantial "[i]n light of the ample alternative means of acquiring firearms for self-defense purposes." Id. at *21-22.

Most other Circuit Courts of Appeal, when occasioned to evaluate statutory burdens on the right to keep and bear arms, have employed a framework of means-end scrutiny that grows out of the Court of Appeals for the Third Circuit's decision in United States v. Marzzarella, 614 F.3d 85, 96-97 (3d Cir. 2009). See Heller II, 670 F.3d at 1256-58; Ezell, 651 F.3d at 706-08; United States v. Chester, 628 F.3d 673, 681-82 (4th Cir. 2010); United States v. Reese, 627 F.3d 792, 800-02 (10th Cir. 2010). This approach ties the level and rigor of judicial scrutiny to the extent and degree of the Second Amendment burden. Hence, "a severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end." Ezell, 651 F.3d at 708. However, burdens "lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified." Id. The key consideration is "the relative severity of the burden and its proximity to the core of the right." Id.

Although the articulated *nomenclature* of this Court's "substantial burden" approach in Decastro appears to differ from these other courts, it is not clear that

there is any meaningful difference in this Court's *substantive* analysis. The Third Circuit's original Marzzarella decision concerned a federal law that prohibits the possession of firearms with obliterated serial numbers. See Marzzarella, 614 F.3d at 88; see also 18 U.S.C. § 922(k). The Third Circuit analogized to the standards governing content-neutral time, place, and manner restrictions, and concluded that intermediate scrutiny (rather than strict scrutiny) should apply because the burden "does not severely limit the possession of firearms," and indeed, "leaves a person free to possess any otherwise lawful firearm he chooses – so long as it bears its original serial number." Marzzarella, 614 F.3d at 97. The obliterated-serial-number law survived the Third Circuit's intermediate scrutiny approach because "preserving the ability of law enforcement to conduct serial number tracing – effectuated by limiting the availability of untraceable firearms – constitutes a substantial or important interest." Id. at 98. As a practical matter, it seems difficult to distinguish the Third Circuit's analytic approach from this Court's approach in Decastro: both balanced the extent to which the burden impacted the ability of law-abiding citizens to obtain guns for lawful purposes against the legislative purposes justifying the burdens.

As this Court recognized in Decastro, the standards governing other affirmative rights can also be instructive. See Decastro, 2012 U.S. App. LEXIS 11213 at *17-19. While the standards surrounding these protections can be

instructive, not all of these rights are *enumerated*, and the Court in Heller repeatedly referenced the Second Amendment's status as an "enumerated" right as a factor compelling its stringent protection. See Heller, 554 U.S. at 628, 628-29 n.27, 630, 634.

C. *Article 400's Fee Provisions Lie in the Recognized Core of the Second Amendment's Protections*

Article 400 governs the possession of handguns under any circumstances, including within the home. The handgun ban that Heller addressed also concerned the "core" activity of keeping a gun at home, although the burden of a near-complete ban[3] was (obviously) more severe than the burden of paying a $340 fee every 3 years. It is significant that the Supreme Court did not need to apply *any* standard of scrutiny in order to decide Heller. Rather, the Court explained that "whatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." Heller, 554 U.S. at 635. The ban was invalid "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." Id. In McDonald, the Court found it sufficient to reiterate, simply, that "citizens must be permitted 'to use [handguns] for the core

[3] D.C. law did not absolutely ban handguns and allowed people to own "grandfathered" guns registered prior to 1976. See Parker v. District of Columbia, 478 F.3d 370, 376 (D.C. Cir. 2007), aff'd sub nom. Heller, 554 U.S. 570.

lawful purpose of self-defense.'" McDonald, 130 S. Ct. at 3036 (quoting Heller, 554 U.S. at 630) (alteration in source).

When the Court rules a law unconstitutional without regard to the standard of scrutiny, it necessarily finds that people have a right to actually engage in the activity at issue. The restriction is invalid because it prohibits something that may not be prohibited – the exercise of constitutional rights deemed fundamental. For example, in Board of Airport Commissioners v. Jews for Jesus, Inc., 482 U.S. 569 (1987), the Court struck down an LAX airport policy that prohibited (literally) all "First Amendment activities" on LAX property. See id. at 575. The unanimous Court declined to address the standard of review, explaining simply that "no conceivable governmental interest would justify such an absolute prohibition of speech." Id.

The Court's resolution of Heller is consistent with its resolution of Board of Airport Commissioners. Heller's resolution flowed from the Court's finding that the Second Amendment "elevates above all other interests the right . . . to use arms in defense of hearth and home." See Heller, 554 U.S. at 635. Indeed, Heller contemplated that courts would need to resort to the framework of means-end burden analysis to address gun laws in the future: the Court cited footnote 4 of United States v. Carolene Products Co., 304 U.S. 144 (1938), in its discussion of the standard of review and the *in*applicability of the rational basis standard. See

Heller, 554 U.S. at 628-29 n.27. Of course, footnote 4 of Carolene Products was the genesis of the current "tiered"-scrutiny approach to both due process and equal protection review. See Ezell, 651 F.3d at 706; Stacey L. Sobel, The Tsunami of Legal Uncertainty: What's a Court to do Post-*McDonald*?, 21 Cornell J. L. & Pub. Pol'y 489, 504-05 (2012); Robert A. Levy, Second Amendment Redux: Scrutiny, Incorporation, and the *Heller* Paradox, 33 Harv. J.L. & Pub. Pol'y 203, 206 (2010).

Most post-Heller Second Amendment decisions have concerned activities other than the basic ability to possess a gun at home – for example, restrictions on where guns can be carried, or on the possession of guns with specific attributes – and courts have applied intermediate scrutiny. See, e.g., United States v. Masciandaro, 638 F.3d 458, 473-74 (4th Cir. 2011) (prohibition on possessing loaded guns in National Parks); Marzzarella, 614 F.3d at 97 (ban on guns with obliterated serial numbers). Even so, some of these decisions have explicitly qualified that "any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen *would be subject to strict scrutiny*." Masciandaro, 638 F.3d at 470 (emphasis added).

And, courts have applied a strict or near-strict level of scrutiny to laws that significantly burdened the basic right of law-abiding citizens to keep and use arms for protection. The most pertinent example is the decision in Ezell v. City of Chicago, where Chicago laws both required the completion of live-fire training

before issuance of a Chicago Firearms Permit – and banned firing ranges from the city. See Ezell, 651 F.3d at 689-90. The Court of Appeals for the Seventh Circuit concluded that these laws burdened "core" Second Amendment activities because "maintain[ing] proficiency in firearm use [is] an important corollary to the meaningful exercise of the core right to possess firearms for self-defense," and also because Chicago law "condition[ed] gun possession on range training." Id. at 708. Hence, the range-ban could not stand unless the city "establish[ed] a close fit between the range ban and the actual public interests it serves, and also that the public's interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights." Id. at 708-09. The Seventh Circuit described its approach as "more rigorous" than intermediate scrutiny, "if not quite 'strict scrutiny.'" Id. at 708; see also id. at 712 (Rovner, J., concurring in the judgment) ("a standard akin to strict scrutiny"); see also Bateman v. Perdue, no. 5:10-CV-265, 2012 U.S. Dist. LEXIS 47336, *16-17 (E.D.N.C. Mar. 29, 2012) ("emergency powers" laws allowing officials to prohibit firearms possession during states of emergency "are subject to strict scrutiny" because "the statutes strip peaceable, law abiding citizens of the right to arm themselves in defense of hearth and home, striking at the very core of the Second Amendment").

III. PENAL LAW § 400.00(14) DENIES THE EQUAL PROTECTION OF THE LAW TO RESIDENTS OF NEW YORK CITY

Section 400.00(14) authorizes *all* New York localities to establish fees for handgun licenses, but it treats the amount of these fees differently. Section 400.00(14) generally limits local fees to the nominal range of "not less than three dollars nor more than ten dollars." N.Y. Penal L. § 400.00(14). However, this nominal-range limitation does not apply in New York City. See id. The only factor that limits the fees that the City can impose under § 400.00(14) is the general state law requirement that fees not exceed the costs of "issuing and recording the license or registration and pay[ing] for the inspection to see to the enforcing of the licensing or registration provisions." Nitkin v. Administrator, 399 N.Y.S.2d 162, 163, 91 Misc. 2d 478, 479 (Supr. Ct. N.Y. Co. 1975), aff'd 389 N.Y.S.2d 1022, 55 A.D.2d 566 (App. Div. 1976), aff'd 371 N.E.2d 535, 43 N.Y.2d 673 (1977); see also Torsoe Bros. Constr. Corp v. Bd. of Trs., 375 N.Y.S.2d 612, 616-17, 49 A.D.2d 461, 465 (App. Div. 1975); Alderstein v. City of New York, 174 N.Y.S.2d 754, 755, 174 N.Y.S.2d 610, 611 (Supr. Ct. N.Y. Co.), aff'd 181 N.Y.S.2d 165, 7 A.D.2d 717 (App. Div. 1958), aff'd 158 N.E.2d 512, 6 N.Y.2d 740 (1959); SA 33.

Hence, while State law provides a nominal fee range of $3 to $10 for most State residents, it allows the City to impose any fee up to the amount of its claimed

costs of issuance – and the City currently imposes a fee of $340 for each 3-year license. N.Y.C. Admin. Code § 10-131. Plaintiffs challenge § 400.00(14) to the extent it authorizes the City to impose a fee greater than $10. JA 11-12, 43.

A. *States Must Justify Disparate Burdens on the Exercise of Fundamental Rights with Compelling Societal Interests*

The Equal Protection Clause mandates that no state may "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV sec. 1. This constitutional protection focuses on "disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable," rather than on the permissibility of any particular burden when viewed in isolation. Ross v. Moffitt, 417 U.S. 600, 609 (1974). Equal protection concerns arise "when a governmental unit adopts a rule that has a special impact on less than all the persons subject to its jurisdiction." N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 587-88 (1979). When laws impose disparate burdens, those disparate burdens must adequately correspond to societal interests of sufficient magnitude. See Clark v. Jeter, 486 U.S. 456, 461 (1988); see also Ramos v. Town of Vernon, 353 F.3d 171, 174-75 (2d Cir. 2004).

A "strict" level of scrutiny applies when a legislative classification either burdens a fundamental right or relies upon a suspect classification (like race or religion). See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973); Ramos, 353 F.3d at 175. The Supreme Court has explained that "classifications

affecting fundamental rights . . . are given the most exacting scrutiny." Clark, 486 U.S. at 461. Under this standard, a burden is unconstitutional – unless the government affirmatively proves that "the law is narrowly tailored to achieve a compelling governmental interest." Ramos, 353 F.3d at 175.

For example, in Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979), the Supreme Court reviewed Illinois election laws that (by historical accident) required new political parties and independent candidates to meet different signature requirements in order to appear on the ballot in statewide and Chicago elections. See id. at 175-76. Specifically, a new political party or independent candidate needed 25,000 signatures to appear on the statewide ballot, but the same party or candidate would need 35,947 signatures to be listed in Chicago. See id. at 176-78. The Court reasoned that because the laws disparately burdened the exercise of "fundamental" rights – voting and association – the State needed to show that "its classification [was] necessary to serve a compelling interest." Id. at 184. While the Court conceded "a legitimate interest in regulating the number of candidates on the ballot," this interest did not justify the *disparity*. See id. at 184-85. Because there was no "compelling" reason "why the State needs a more stringent requirement for Chicago," id. at 186, the Court found the provisions invalid to the extent they required a candidate or party to supply more than 25,000 signatures to appear in Chicago, id. at 187.

It is significant that the Court did not address whether Chicago's signature requirement was permissible, standing alone. Indeed, the 35,947 signatures required for ballot access in Chicago amounted to 5% of qualified voters. See id. at 176-77. Only 8 years prior, the Court had upheld this *very same* 5% signature requirement. See Jackson v. Ogilvie, 325 F. Supp. 864, 868 (N.D. Ill.), aff'd 403 U.S. 925 (1971); see also Jenness v. Fortson, 403 U.S. 431, 438 (1971). And, in later decisions, the Supreme Court has signaled that a 5% signature requirement remains permissible. See, e.g., Munro v. Socialist Workers Party, 479 U.S. 189, 193 (1986). Therefore, the lesson of Illinois State Board is that States must justify significant *disparities* on the exercise of fundamental rights – even if either of the disparate burdens might be constitutionally permissible, viewed in isolation.

The standard of "intermediate" scrutiny applies when a classification "affects 'an important, though not constitutional, right,'" or alternatively, when it relies upon a quasi-suspect classification (like gender or legitimacy). Ramos, 353 F.3d at 176 (quoting United States v. Coleman, 166 F.3d 428, 431 (2d Cir. 1999)); Eisenbud v. Suffolk County, 841 F.2d 42, 45 (2d Cir. 1988). When intermediate scrutiny applies, "the government must show that the challenged legislative enactment is substantially related to an important governmental interest," or else the law is unconstitutional. Ramos, 353 F.3d at 175.

For example, in Eisenbud this Court used intermediate scrutiny to evaluate a county law that required certain public employees to file financial disclosures, reasoning that the burden on the employees' "right of privacy" was "important though not protected by the Constitution." Eisenbud, 841 F.2d at 45; see also Barry v. City of New York, 712 F.2d 1554, 1559 (2d Cir. 1983) (intermediate scrutiny applied to disclosure law because "privacy of personal matters is a protected interest"). Similarly, in Ramos this Court applied intermediate scrutiny to review a local curfew law directed at minors. See Ramos, 353 F.3d at 176. Observing that "the level of scrutiny in constitutional rights cases typically is determined by the right, not the class, affected," id. at 178, this Court applied intermediate scrutiny because it was unclear "whether children, like adults, possess the right to intrastate travel or, if they do, how such right is impacted by their age," id. at 176. However, this Court also observed "that were this ordinance applied to adults, it [presumably] would be subject to strict scrutiny." Id. It is noteworthy that, in one of the few post-Heller decisions to address equal protection issues, the court applied intermediate scrutiny to federal laws that restrict the possession of firearms on the basis of age. See United States v. Bledsoe, no. SA-08-CR-13, 2008 U.S. Dist. LEXIS 60522, *11-12 (W.D. Tex. Aug. 8, 2008).

All other legislative classifications, "neither involving fundamental rights nor proceeding along suspect lines," need only display "a rational relationship

between the disparity of treatment and some legitimate governmental purpose." Heller v. Doe, 509 U.S. 312, 319-20 (1993). Under this "rational basis" standard, the government does not need to establish that a disparate burden is justified, but rather, the plaintiff bears the burden of "prov[ing] that the law's class-based distinctions are wholly irrational." Ramos, 353 F.3d at 175. While rational basis review is more deferential, it is not toothless – and it invalidates statutory classifications that do not rationally serve *any* legitimate government interest. Cf. Romer v. Evans, 517 U.S. 620, 635 (1996) (striking down law that classified on the basis of sexual orientation as not being "directed to any identifiable legitimate purpose or discrete objective"); Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 882 (1985) ("We hold that under the circumstances of this case, promotion of domestic business by discriminating against nonresident competitors is not a legitimate state purpose.").

B. *The Framework of Heightened Scrutiny Applies (Specifically) to Disparate Fee Structures Imposed on Fundamental Rights*

A review of the decisions that address the constitutionality of disparate fees under the Equal Protection Clause shows that the level and rigor of scrutiny that applies to a disparate fee structure depends on the activity at issue and the level of protection it enjoys under the Constitution. When a disparate fee structure directly burdens the exercise of a fundamental right – as Penal Law § 400.00(14) does – an appropriate level of heightened scrutiny applies.

One significant decision is Fulani v. Krivanek, 973 F.2d 1539 (11th Cir. 1997), where the Court of Appeals for the Eleventh Circuit reviewed a Florida law that required all candidates for President to pay a signature-verification fee of 10 cents per signature – but provided an "undue burden" exemption that was only available to "major party" candidates. See id. at 1540. The Eleventh Circuit found, first, that the activity at issue (appearing on the ballot as a candidate for President) implicated the "fundamental . . . right of individuals to associate for the advancement of political beliefs." Id. at 1541 (quoting Illinois State Bd., 440 U.S. at 184 (internal quotation omitted)). The court next observed that strict scrutiny "[o]rdinarily" applies to "classifications affecting the exercise of fundamental rights" and mandates that "the law advances a compelling interest and is narrowly tailored to meet that interest." Id. at 1543 (internal quotations omitted). However, because the issue was ballot-access, the court was unsure of whether it was appropriate to apply strict scrutiny, or the more flexible approach outlined by the Supreme Court in Anderson v. Celebrezze, 460 U.S. 780 (1980), for ballot access cases. See Fulani, 973 F.2d at 1543-44.

Significantly, the court concluded that the disparate fee waiver failed under *either* level of scrutiny. See id. at 1544. Even under the more flexible Anderson standard, "the burden is on the state to 'put forward' the 'precise interests' . . . [that are] justifications for the burden imposed by its rule." Id. (quoting Anderson, 460

U.S. at 789) (alteration and omission in source). And, "the interests put forth by the defendant do not adequately justify the restriction imposed." Id. at 1545. While it was true that states had a valid interest in avoiding voter confusion, and in ensuring that candidates had statewide support and were "serious," these interests were "merely a justification for the fee, *not for the unequal availability of the fee-waiver*." Id. at 1546 (emphasis added).

A District Court in Florida reached a similar conclusion regarding the same law in Clean-Up '84 v. Heinrich, 590 F. Supp. 928 (M.D. Fla. 1984), aff'd on other grounds 759 F.2d 1511 (11th Cir 1985). The law violated equal protection because it provided no concomitant fee waiver for individuals seeking to place a legislative referendum on the ballot. See id. at 932. The disparity was unconstitutional because the State did not "sustain the burden of demonstrating that non-waiver of verification charges for petitioners is reasonably necessary." Id.

Another instructive case is McLaughlin v. North Carolina Board of Elections, 850 F. Supp. 373 (M.D.N.C. 1994), aff'd on other grounds 65 F.3d 1215 (4th Cir. 1995), which concerned a North Carolina law that required minor party unaffiliated candidates, but not major party candidates, to pay a signature-verification fee. See id. at 389-90. Relying in part on Fulani, the court accepted that the state had an interest in establishing ballot access requirements – but

concluded that "[t]he state has failed to provide any justification for unevenly applying the signature verification fee." Id. at 391.

Also pertinent is the District Court's decision in Clear Channel Outdoor, Inc. v. City of St. Paul, no. 02-1060, 2003 U.S. Dist. LEXIS 13751 (D. Minn. Aug. 4, 2003), which concerned disparities in the City of St. Paul's fees for billboard permits. See id. at *2. Specifically, the city imposed a $145 annual inspection fee as a condition of maintaining a billboard, but only imposed the fee on people who operated "commercial" billboards that advertised "off-site" services. See id. at *6. Both commercial and non-commercial billboards that were "on-site" were exempt. See id. at *6-7. The court reasoned that the "commercial" distinction was necessarily content-based, and that strict scrutiny should accordingly apply. See id. at *14-15. The court conceded that the city had a "substantial" (but not necessarily "compelling") interest in promoting safety and aesthetics in connection with billboards. See id. at *15-16. However, "a 50 square foot on-site sign poses the same danger as a 50 square foot off-site sign," and the city had "not met its burden of demonstrating that the off-site sign inspection program is narrowly tailored to serve a compelling government interest." Id. at *16.

In all of these cases, the court found that a disparate fee imposed on the exercise of a fundamental right was unconstitutional. In all of these cases, the

court found that such a fee could only stand if sufficiently compelling social interests made the disparate burden necessary.

In contrast, disparate fees that do *not* impact fundamental rights generally receive only rational basis review. For example, the Supreme Court applied rational basis review to a Texas law that allowed some localities (but not all) to impose user fees to cover the costs of school busing services. See Kadrmas v. Dickinson Public Schs., 487 U.S. 450, 461-62 (1988). The rational basis standard applied because public education is not a fundamental right, and as such, the law did not "interfere[] with a 'fundamental right' or discriminate[] against a 'suspect class.'" Id. at 457-58; see also San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1, 29 (1973). Likewise, the Court of Appeals for the First Circuit used rational basis review to evaluate an equal protection challenge to a harbor fee that differentiated between residents and non-residents. See LCM Enters., Inc. v. Town of Dartmouth, 14 F.3d 675, 678-79 (1st Cir. 1994). The rational basis standard applied because "the fee did not penalize the right to travel, or any other fundamental right, and it did not invoke a suspect classification." Id. at 679; see also Morris v. City of Buffalo, no. 98-7898, 1999 U.S. App. LEXIS 6118, *2-3 (2d Cir. Apr. 1, 1999) (rational basis review applied to city's different commercial and residential garbage disposal fees). The Eleventh Circuit's decision in Panama City Medical Diagnostic Ltd. v. Williams, 13 F.3d 1541 (11th Cir. 1994), which

concerned a Florida law that "capped" fees for diagnostic imaging services provided by some (but not all) medical providers, is also illustrative. See id. at 1544. The rational basis standard applied because the distinction did "not involve a suspect class, nor does it deal with a fundamental right." Id. at 1545. The District Court had erred in enjoining the law because it had failed to conduct a more searching inquiry for any "conceivable rational basis" that could support the distinction, regardless of whether that basis appeared in the record. See id. at 1546-47. Because the Eleventh Circuit found several rational bases to be "arguable," it reversed and upheld the classification. See id. at 1547.

C. *Strict Scrutiny Applies to § 400.00(14)'s Differential Burden*

Obtaining a handgun license under Article 400 of the New York Penal Law is a *mandatory* prerequisite to owning a handgun in the State of New York, including within one's home. See N.Y. Penal L. §§ 265.01(1), 265.20(a)(3). And, the payment of a handgun license fee pursuant to § 400.00(14) is a *mandatory* prerequisite to obtaining a handgun license. See id. § 400.00(14). This means that § 400.00(14) *directly* burdens a recognized "core" protection of the Second Amendment. See Heller, 554 U.S. at 635 ("whatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home"); see also United States v. Decastro, no. 10-3773, 2012 U.S. App. LEXIS

11213, *11 (2d Cir. Jun. 1, 2012) ("the core Second Amendment right of law-abiding citizens to possess firearms for self-defense"); Ezell v. City of Chicago, 651 F.3d 684, 689 (7th Cir. 2011) ("the core component of [the Second Amendment] is the right to possess operable firearms—handguns included—for self-defense, most notably in the home"); United States v. Marzzarella, 614 F.3d 85, 92 (3d Cir. 2010) ("At its core, the Second Amendment protects the right of law-abiding citizens to possess non-dangerous weapons for self-defense in the home."). Because the Second Amendment secures a fundamental constitutional right, and because the burden is on a "core" of that right, a strict level of equal protection scrutiny should apply.

While strict scrutiny *should* apply, it likely makes no difference whether this Court applies strict scrutiny or some other form of heightened scrutiny. This is because there is simply no legitimate government purpose that has any adequate degree of "fit" with the disparity at issue – the decision to limit fees for one group to a nominal range, while allowing those same fees to reflect the full (claimed) costs of licensing for the other group. Cf. Heller, 554 U.S. at 628-29 & n.27 ("Under any of the standards of scrutiny that we have applied to enumerated constitutional rights . . . [the ban] would fail constitutional muster.").

However, the District Court concluded that the rational basis standard should apply because § 400.00(14) "imposes no burden on the Second Amendment right

to keep and bear arms." SA 32. The District Court reasoned that the rational basis standard was appropriate because "§ 400.00(14) does not impose or endorse a higher licensing fee for New York City residents: it merely provides that, in New York City, the City Council may set the licensing fee at the level it sees fit." SA 32-33. Because § 400.00(14) served only to "permit[] the City to set a constitutionally permissible fee, the State Statute cannot be said to burden the plaintiffs' Second Amendment rights and therefore should not be subjected to heightened scrutiny." JA 34.

Preliminarily, the District Court's articulation of Plaintiffs' claim is incorrect. Plaintiffs challenge § 400.00(14) only to the extent that it authorizes the City to impose a fee greater than $10.[4] JA 11-12, 43. And, the disparity of § 400.00(14) is not that it authorizes the City to set its own fees, for § 400.00(14) authorizes *all* New York localities to set their own fees. Rather, the disparity is that § 400.00(14) limits those fees to a nominal range of $3 to $10, but exempts New York City residents from this nominal fee range protection. The only limitation on the City's ability to impose fees is the general state law requirement that fees be commensurate with documented costs.

The District Court's application of the rational basis standard of review was error. As explained in *supra* Point III(A), the level of equal protection scrutiny

[4] Concededly, the presence or absence of a fee "floor" of $3 is not a difference that is "substantial."

depends on the nature of the right that a classification burdens. And accordingly, as *supra* Point III(B) showed, when courts evaluate differential fee statutes under the Equal Protection Clause, the level of scrutiny they apply depends on the nature of the right that the differential fee burdens. Because a person *must* obtain an Article 400 handgun license to keep a handgun in one's home, and *must* pay the attendant license fee, § 400.00(14)'s differential fee structure substantially burdens the ability to exercise a fundamental right. See Fulani, 973 F.2d at 1544 (paying a mandatory candidate filing fee of a substantial amount was a significant burden because it diverted funds from other uses); see also Ezell, 651 F.3d at 711 (one reason for application of "near strict" scrutiny to firing-range ban was that Chicago law required firing range training for issuance of a gun license). Minimally, some form of heightened scrutiny applies. See Heller, 554 U.S. at 628-29 n.27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.").

To support its application of the rational basis standard, the District Court cited the Third Circuit's decision in Nationalist Movement v. City of York, 481 F.3d 178 (3d Cir. 2007). JA 34. However, this decision does not support the use of the rational basis standard here. First, Nationalist Movement did not concern fees laid *directly* on the exercise constitutional rights – but rather, it concerned

permits that authorized groups (of more than 25 people) to use public lands. See Nationalist Movement, 481 F.3d at 181.[5] The court confined its analysis of the equal protection issues surrounding the differential application fee ($50 for residents and $100 for nonresidents) to a footnote, where it explained that "[t]he Supreme Court has upheld residency requirements such as this under a rational basis test where, as here, *there was no contention that fundamental rights were at issue*." Id. at 183 n.4 (emphasis added). To support this statement, the Third Circuit cited Martinez v. Bynum, 461 U.S. 321, 328-29 (1983), which concerned a "school residency requirement," and Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 388-92 (1978), which concerned a "hunting permit for sport." See Nationalist Movement, 481 F.3d at 183 n.4. The Nationalist Movement decision simply does not support using the rational basis standard to evaluate a differential fee when the fee directly burdens the exercise of a fundamental constitutional right.

D. *No Legitimate Purpose Justifies the State's Disparate Fee Treatment*

One apparent purpose of any license fee is (as the District Court found) "[p]ermitting New York City to recover the costs incurred by the licensing scheme." SA 35. The problem is that this legislative purpose has no "fit" with § 400.00(14)'s markedly different fee structure. Certainly, "cost recovery" justifies

[5] Also notable is that the ordinance contained an exception "if the activity is protected by the First Amendment of the United States Constitution and the requirement would be . . . financially burdensome" – and the plaintiff had in fact been charged only $1. See Nationalist Movement, 481 F.3d at 181-82.

the imposition of license fees in general – for these fees always serve to defray attendant costs. However, for just this reason, the interest in cost-recovery does *not* explain the disparity. The question is: Why does the City need statutorily-unbridled latitude to recover its Article 400 handgun licensing costs, when it is appropriate to limit other localities to a range of $3 to $10? See Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 586 (1983) ("The main interest asserted by Minnesota in this case is the raising of revenue. Of course that interest is critical to any government. Standing alone, however, it cannot justify the special treatment . . . .").

Pertinent aspects of the legislative record reveal additional rationales for the New York City exemption, although only one of them can be characterized as a "legitimate" government interest. The most pertinent authority is the sponsor's memorandum, and indeed, this Court has previously ruled that "[i]n New York, while not determinative, a legislator's sponsor memo submitted contemporaneously with the legislation is entitled to considerable weight in discerning legislative intent." CFCU Cmty. Credit Union v. Hayward, 552 F.3d 253, 263 (2d Cir. 2009) (quotations omitted). The sponsor's memorandum for the 1947 bill that enacted the New York City exemption articulated three purposes for the legislative change: first, "giv[ing] discretion to the City Council provides the flexibility required to keep costs and receipts balanced;" second, "a higher fee, if

the City Council considers it wise to impose same, *will tend to discourage* a great number of possible applicants;" and third, "the possession of fire-arms for personal use is in the form of a non-essential grant which may be made the basis for revenue raising taxes." A. 499-497, at 7-8 (N.Y. 1947) (JA 97-98) (emphasis added).

Only the first articulated purpose of the sponsor's memorandum – that of "provid[ing] the flexibility required to keep costs and receipts balanced" – can be a "legitimate" government interest. And again, while this might justify the basic legislative decision to allow localities to set fees, it provides no justification for the *disparity*. In this context, the justification only begs the question: Why does the City need unlimited statutory flexibility to balance costs and receipts, while a statutory range of $3 to $10 is adequate for everyone else? See Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 186 (1979) ("appellant has advanced no reason, much less a compelling one, why the State needs a more stringent requirement for Chicago").

Because the Second Amendment secures an individual right, the other articulated purposes of the sponsor's memorandum – discouraging gun ownership and collecting revenue-raising taxes – are not legitimate. See, e.g., Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991) (no legitimate interest in suppressing speech); Nat'l Awareness Found. v. Abrams, 50 F.3d 1159, 1165 (2d Cir. 1995) (constitutionally protected activities may not be

taxed for revenue-producing purposes); Woollard v. Sheridan, no. L-10-2068, 2012 U.S. Dist. LEXIS 28498, *13 (D. Md. Mar. 2, 2012) (restrictive gun licensing standard unconstitutional because it operated as "a rationing system . . . [that] aims . . . simply to reduce the total number of firearms"). Although these interests are not legitimate, they do state what should already be apparent: that the only rationale for exempting New York City residents from the nominal fee range protection is to allow the City to further burden, and discourage, the lawful ownership of firearms. But, of course, the legislative intention to simply *limit* the keeping and bearing of arms is a suspect one that should itself merit strict scrutiny. Cf. Marzzarella, 614 F.3d at 97 (intermediate scrutiny applied in part because "the legislative intent . . . was not to limit the ability of persons to possess any class of firearms").

IV. THE CITY CANNOT LAY PROHIBITIVE FEES ON THE "CORE" SECOND AMENDMENT ACTIVITY OF KEEPING A HANDGUN AT HOME

American jurisprudence has long recognized that "the power to tax involves the power to destroy." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819). Because "[t]he power to tax the exercise of a privilege is the power to control or suppress its enjoyment," the constitutional protection of an activity serves, among other things, to limit the power of governments to impose fees. See Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943). There is generally no issue

with taxes and fees *of general application* that incidentally burden constitutional freedoms. See generally Jimmy Swaggart Ministeries v. Bd. of Equalization, 493 U.S. 378, 392 (1993). However, concerns arise when a fee "singles out" a protected activity. See Minneapolis Star & Tribune Co. v. Minn. Commissioner of Revenue, 460 U.S. 575, 585 (1983).

Careful analysis of the Supreme Court's decisions on the constitutionality of license fees reveals two principles. First, states and localities can generally charge fees to defray costs they incur as a result of people's conduct, including conduct that enjoys some degree of constitutional protection. The second principle – although the issue has arisen only rarely in our nation's history – is that states and localities may *not* charge people for permission to engage in the basic and core aspects of their fundamental constitutional rights. This is because the Constitution already guarantees people the ability to engage in this conduct as a *right*, independent of any restrictions or benefits that might arise from state law. The Supreme Court has accordingly overturned some license fees imposed on conduct lying in the core of personal fundamental rights, and it has approved other such fees only when they were nominal. And, even when cost-shifting user fees are permissible, still, the Court has required that these fees not be so high that they are inherently prohibitive.

A. *Fees Imposed on First Amendment Activities*

The First Amendment is the only Amendment (aside from the Second) that explicitly guarantees people the right to engage in affirmative acts – specifically, to "free[ly] exercise" a religion, to speak, to publish, to "peaceably . . . assemble," and "to petition the Government for a redress of grievances." U.S. Const. amend. I. The protections of both Amendments are analogous because "[l]ike the First, [the Second Amendment] is the very product of an interest balancing by the people." Heller, 554 U.S. at 635.

1. Religion, Press, and Speech

The First Amendment's explicit protection of religion and the press precludes the levying of taxes and fees *directly* on the basic acts of exercising a religion or publishing or distributing literature. A seminal decision is Murdock v. Pennsylvania, 319 U.S. 105 (1943), which concerned a municipal law that required peddlers to obtain licenses and pay fees of (for example) $1.50 per day or $7.00 per week before selling goods door-to-door. See id. at 106-07. Members of the Jehovah's Witness faith challenged the ordinance after they were convicted of distributing religious materials door-to-door without obtaining the licenses or paying the fees. See id. Key to the Court's resolution was its conclusion that "spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of

evangelism *with as high a claim to constitutional protection* as the more orthodox types." Id. a 110 (emphasis added); see also Jimmy Swaggart, 493 U.S. at 385-86 (quoting this language to characterize Murdock's holding).

The Court found the fee invalid because it was "a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment." Murdock, 319 U.S. at 114. The Court explained that the fee did not compensate "for the enjoyment of a privilege or benefit *bestowed by the state*." Id. at 115 (emphasis added). Rather, "[t]he privilege in question exists apart from state authority . . . [and] is guaranteed the people *by the Federal Constitution*." Id. (emphasis added). One year later, the Court similarly overturned the conviction of a Jehovah's Witness preacher who had been convicted of selling books without obtaining a local licensee for "book sellers" and paying the requisite fee. See Follett v. McCormick, 321 U.S. 573, 577-78 (1944). The Court concluded its opinion with the explanation that, while preachers could be subject to "general taxation," they could not "be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege." Id. at 578.

In the context of the right of publication, the Court overturned a Minnesota law that imposed a "use tax" (specifically) on the ink and paper used to print newspapers in Minneapolis Star & Tribune Co. v. Minn. Commissioner of

Revenue, 460 U.S. 575, 592-93 (1983). The Court explained that "[a] tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest." Id. at 582. Furthermore, the state's interest in collecting revenue was not an adequate interest. See id. at 586.

The Supreme Court has tacitly prohibited the imposition of fees on the basic act of speaking in public, as it holds prior restraints on speech to be generally invalid, except within very narrow parameters. See generally Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) ("prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights"); Greer v. Spock, 424 U.S. 828, 866 (1976) (Brennan, J., dissenting) ("The imposition of prior restraints on speech or the distribution of literature in public areas has been consistently rejected, except to the extent such restraints sought to control time, place, and circumstance rather than content."). If prior restraints are impermissible, then *ipso facto*, there is no opportunity to levy a fee. See Hull v. Petrillo, 439 F.2d 1184, 1186 (2d Cir. 1971) ("any fee imposed as a prerequisite to the exercise of the right to communicate ideas on the public sidewalks is an unconstitutional prior restraint upon the freedom of expression").

2. Rights of Peaceably Assembly and Petition

While the First Amendment protects the rights of petition and assembly, these activities often involve the use of public facilities such as streets, sidewalks, and parks. This raises a special consideration, for while the Court's decisions in Murdock and Follett overturned fees laid on the basic exercise of constitutional rights, the Court also indicated that localities could charge "a nominal fee . . . as a regulatory measure to defray the expenses of policing the activities in question." Murdock, 319 U.S. at 113-14; see also Follett, 321 U.S. at 575. As one scholar puts it, the net effect of Murdock and Follett is that "the state may recoup the actual costs of governmental services that are generated *by the use of public property* for speech activities, as long as the charge is not so great as to appear to the judiciary to be oppressive or completely preclusive of speech." David Goldberger, A Reconsideration of *Cox v. New Hampshire*: Can Demonstrators Be Required to Pay the Costs of Using America's Public Forums?, 62 Tex. L. Rev. 403, 409-10 (1983) (emphasis added).

Of course, people generally do not *need* to use public property to engage in the acts of petitioning the government or peaceably assembling, and for that matter, they have no absolute right to do so. Cf. Waller v. City of New York, 933 N.Y.S.2d 541, 545, 34 Misc. 3d 371, 375 (Supr. Ct. N.Y. Co. 2011) (no First Amendment right for Occupy Wall Street participants to remain in Zuccotti Park,

even though the park was quasi-public). For example, a group that cannot afford a permit, or that refuses to pay a permit fee, is not be prohibited from assembling or petitioning – rather, it is prohibited from doing so *on public property*. The rub is that demonstrations in public spaces may be (or may be perceived to be) more effective. It is significant that several other Circuits addressing the constitutionality of fees have looked to whether alternative, free public fora were available. See Int'l Women's Day March Planning Comm. v. San Antonio, 619 F.3d 346, 372 (5th Cir. 2010) (finding cost-shifting parade fees permissible in part because "there are procession routes that could be used for free"); see also Sullivan v. Augusta, 511 F.3d 16, 42 (1st Cir. 2007) (concluding, 2-1, that city did not need to provide an indigency exception for permits to parade on streets because sidewalks and parks could be used for free); Stonewall Union v. Columbus, 931 F.2d 1130, 1137 (6th Cir. 1991) (same conclusion).

The Supreme Court has addressed the constitutionality of fees laid on First Amendment activities only once since it decided Murdock and Follett. The decision in Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992), concerned a county law that allowed authorities to impose a fee of up to $1,000 for a permit to hold a march on public streets. See id. at 126-27. A neo-Nazi group held a demonstration that required over $670,000 in police costs. Id. at 128. The next year, the group applied for a permit and was asked to pay a fee of $100. See

id. at 127. The neo-Nazis filed suit, and the Eleventh Circuit ruled that the fee was impermissible because fees "for using public forums" must be "nominal," and the $100-$1,000 fee was not. See id. at 128. The Supreme Court granted certiorari to address this issue – that is, "the constitutionality of charging a fee for a speaker in a public forum," id. at 129 – but wound up declining to resolve the question, and instead overturned the county law because of its "variable" nature. Compare id. at 124, with id. at 137-38 (Rehnquist, C.J., dissenting). On the issue of nominality, the Court explained simply that the fee in Murdock "was invalid because it was unrelated to any legitimate state interest." Id. at 137. But again, the fee was unrelated because the "privilege" at issue was the basic ability to exercise one's rights under the federal Constitution – which is *not* a privilege or benefit that the state makes available in the first place. See Murdock, 319 U.S. at 115.

3. User Fees and Non-Core Activities

This Court has repeatedly sustained the use of cost-shifting user fees – but always in the context of activities lying away from the "core" of constitutional protection. For example, this Court upheld a $5 New York City fee for a sound amplification permit on the rationale that the fee was "less than the actual costs of the municipal service required." U.S. Labor Party v. Codd, 527 F.3d 118, 119 (2d Cir. 1975); see also Turley v. Police Dep't, 167 F.3d 757, 761 (2d Cir. 1999) (upholding $45 fee for amplified sound device). However, the use of a megaphone

is not the basic act of "speech," and indeed, municipalities can impose substantial restrictions on amplified sound devices that they could not impose on the basic act of speaking itself. See Kovacs v. Cooper, 336 U.S. 77, 87-88 (1949).

And, in Eastern Connecticut Citizens Action Group v. Powers, 723 F.2d 1050 (2d Cir. 1983), this Court ruled that a $200 fee that the Connecticut Department of Transportation ("CDOT") imposed as a condition of using a CDOT-owned rail bed for a march would be permissible, but only if CDOT could show that the fee was equal than or less than its costs. See id. at 1056. Of course, Eastern Connecticut is really about fees imposed for the use of public facilities – where the contemplated use is something that enjoys constitutional protection. It is not about a fee imposed for permission to exercise a right in its basic form.

Finally, this Court upheld New York's $80 annual registration fee for "professional" (*i.e.* for-profit) charitable fundraisers as a "nominal fee that serves the legitimate purpose of defraying the expenses incident to the administration and enforcement." See Nat'l Awareness Found. v. Abrams, 50 F.3d 1159, 1166 (2d Cir. 1995). While the First Amendment provides some degree of protection to charitable fundraising, it also allows further regulation of commercial activities – and indeed, the Court explained in Follett v. McCormack that the license fee at issue there *could* permissibly be imposed on "commercial" booksellers. See Follett, 321 U.S. at 576.

B. *Fees Imposed on Voting*

While the Constitution does not explicitly protect the right of individuals to vote in federal elections, it comes close – enumerated Amendments to the Bill of Rights prohibit *denying* the right to vote on the basis of race, gender, or age under 18 years. U.S. Const. amend. XV, XIX, XXVI. And, once a "state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental." Bush v. Gore, 531 U.S. 98, 104 (2000).

The Supreme Court sustained poll taxes of a nominal amount until the latter half of the twentieth century. For example, the Court upheld Georgia's $1 poll tax in Breedlove v. Shuttles, 302 U.S. 277 (1939), as a "a familiar form of taxation, much used in some countries and to a considerable extent here, at first in the Colonies and later in the States." Id. at 281. Adjusted for inflation, this fee was equivalent to approximately $17.[6] Part of the Court's rationale was that the "privilege of voting is not derived from the United States, but is conferred by the State." Id. at 283. Of course, in 1966 the Court ruled that the Equal Protection Clause prohibits "mak[ing] the affluence of the voter or payment of any fee an electoral standard." Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966). It is noteworthy that just prior to this ruling, a 3-judge panel in Texas had found that the state's $1.75 poll tax "must fall as an unjustified restriction on one of the most

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[6] See Bureau of Labor Statistics, Inflation Calculator, available at http://www.bls.gov/data/inflation_calculator.htm/ (last visited Jun. 28, 2012).

basic rights guaranteed by the Due Process Clause" – a decision the Supreme Court summarily affirmed. See United States v. Texas, 252 F. Supp. 234, 236 (W.D. Tex.), aff'd 384 U.S. 155 (1966).

A different standard applies to candidate filing fees. Citing the need to "keep[ ] ballots within manageable, understandable limits" and to discourage "the filing of frivolous candidates," the Court has upheld the general requirement of candidate filing fees. Lubin v. Parish, 415 U.S. 709, 715 (1974). However, it has also mandated that these fees not be prohibitive, both by requiring an indigency exception for candidates who cannot afford to pay, see id. at 718, and also by mandating that no fees be set so high that they have "a patently exclusionary character," Bullock v. Carter, 405 U.S. 134, 143 (1972).

In Bullock, Texas law authorized local election boards to impose candidate filing fees for participating in primaries for local offices – and fees those boards imposed ranged from $1,000 to $6,300. See id. at 135-36. The Court focused its analysis on the State's filing fees for other (non-local) offices, which were generally significantly less, as well as on the wide disparity in local office filing fees imposed in different localities throughout the State. See id. at 138-40. The Court also considered the relationship between the filing fee and the salary of the office at issue. See id. at 138 & n.10. The Court's conclusion was that the "the

very size of the fees imposed under the Texas system gives it a patently exclusionary character." Id. at 143.

Ultimately, Bullock v. Carter stands for the proposition that – all other issues aside – fees may not present the "obvious likelihood" of being prohibitive. See Anderson v. Celebrezze, 460 U.S. 780, 793 n.15 (1983); Corrigan v. City of Newaygo, 55 F.3d 1211, 1215-16 (6th Cir. 1995); see also Chesapeake B & M, Inc. v. Hartford County, 58 F.3d 1005, 1013 (4th Cir. 1995) ("A licensing scheme may adequately fetter the licensor's discretion and provide adequate procedural safeguards yet contain specific licensing or regulatory provisions that do not further a substantial governmental interest (e.g., *an outrageously high licensing fee* or an unreasonable restriction on the hours of operation)." (emphasis added)). The decision also teaches that the determination of whether a license fee is inherently prohibitive is contextual, based on an examination of both analogous fees and the financial investment otherwise at stake for the person paying the fee. It is noteworthy that while the Supreme Court avoided conclusively resolving the nominal fee issue in Forsyth County, it did observe that any acceptable permitting system must "leave open ample alternatives for communication." Forsyth County, 505 U.S. at 130; see 729, Inc. v. Kenton County Fiscal Court, 515 F.3d 485, 503 (6th Cir. 2008) ("Forsyth County created some limit on the amount the government could charge, based on the potential for a fee to deter protected speech.")

C. *The City's $340 Fee Far Exceeds the Comparable Fees of Other Jurisdictions*

A final consideration is the status of the City's $340 handgun license fee in the national context. Indeed, one of the factors that motivated the Supreme Court's decision in Heller was its observation that the burden imposed by the District of Columbia – a virtual bans on handguns – was so severe that "[f]ew laws in the history of our Nation have come close to" it. Heller, 554 U.S. at 629; see also id. at 600-03, 607-19 (relying on various state sources that construed both the Second Amendment and state constitutional right-to-arms provisions). And certainly, the Court has looked to normative standards established by the states to decide other constitutional issues. See, e.g., Graham v. Florida, 560 U.S. ___, 130 S. Ct. 2011, 2023 (2010) (looking to both legislation and actual practices in states to determine whether life sentences for juvenile offenders were cruel and unusual).

There is no other personal gun license fee in the country that even comes close to the $340 fee that New York City charges. To begin with, most other residents of the State of New York pay only $10 (plus the $94.25 DCJS fingerprinting fee) to obtain a handgun license – and their licenses do not expire. See N.Y. Penal Law § 400.00(10), (14). A New York City license expires after 3 years, and the (recurring) fee is *34 times higher*. The other New Yorkers who pay more than $10 are Nassau County residents, who pay $200 for each 5-year

license.[7] Still, the annualized cost of a New York City license is almost *3 times higher*.

Illinois also requires people to obtain licenses to keep handguns in their homes, and the $10 license is valid for 10 years.[8] The annualized cost of a New York City handgun license is *113 times higher*.

Finally, the only other state that licenses the basic possession of handguns is Massachusetts,[9] where a person can obtain a 6-year "License to Carry" – which authorizes the purchase, general possession, and carry of a handgun – for $100.[10] The annualized cost of a New York City license is *7 times higher*.

Aside from these states, two cities require people to pay license fees in order to keep handguns in their homes. Although both cities adopted their fees in response to Supreme Court decisions holding their handgun bans unconstitutional, their adopted fees are still much less than New York City's. The District of Columbia requires $25 to register a handgun for 3 years, plus $35 for

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[7] JA 111.

[8] See 430 Ill. Comp. Stat. 65/5, 65/7.

[9] New York's 1911 decision to prohibit the unlicensed possession of guns was and is relatively unique in the American landscape, and most other states opted to regulate the purchase and carry of handguns, rather than their mere possession. See generally C. Kevin Marshall, Why Can't Martha Stewart Have a Gun?, 32 Harv. J.L. & Pub. Pol'y 695, 701-04 (2009). As such, there are only a few permitting schemes – or associated fees – that are directly analogous.

[10] Mass. Gen. L. ch. 140, § 131(i).

fingerprinting and background checks.[11] New York City's annualized cost is almost *6 times higher*. And, the City of Chicago charges a fee of $100 for a 3-year Chicago Firearms Permit.[12] A person must also pay $15 to register a handgun for 3 years.[13] The annualized cost of a New York City license is still *3 times higher*.

A final analogy lies in states that charge fees in connection with the purchase of a handgun (but not its mere possession). New Jersey requires a permit to purchase a handgun, and the cost of this permit is $2.[14] A person applying for the first time must submit fingerprints for an FBI background check, which costs an additional $60.25.[15] Maryland requires one to submit an application form and pay a $10 application fee.[16] And, California requires a person to pay $25 to obtain a 5-year "handgun safety certificate" before purchasing a handgun, and to also pay background check fees totaling $14 any time they buy a gun.[17]

New York City's $340 fee far exceeds all of these amounts.

D. *The City's $340 Handgun License Fee is Impermissible*

The recurring $340 fee is impermissible because it is levied as a condition of obtaining permission to keep a gun at home – which is a fundamental right that

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[11] See D.C. Code §§ 7-2502.03(d), 7-2502.05(b); 7-2502.07a(a); D.C. Mun. Regs. tit. 24, § 2320.3(c)(3), (g).
[12] Chicago Code § 8-20-130(a)-(b).
[13] See id. §§ 8-20-145(b), 8-20-150(a).
[14] N.J. Stat. Ann. § 2C:58-3(f).
[15] See N.J. Admin. Code §§ 13:54-1.4(d) & (g), 13:59-1.3; JA 113.
[16] See Md. Code Ann., Pub. Safety §§ 5-117, 5-118(a)(2).
[17] See Cal. Penal Code §§ 27540(e), 28225(a), 31650(a).

people *already* enjoy by virtue of the federal Constitution. While the City's $340 fee may represent the costs the City incurs to implement its obligations under Article 400 of the Penal Law, Article 400 of the Penal Law does not create the right to keep and bear arms. To the contrary, Article 400 *restricts* the right to keep and bear arms. Because a "residence premises" handgun license is a prerequisite to exercising the "core" of one's Second Amendment rights, the City many not charge anything more than a nominal fee as a condition of issuing this license.

But even setting this aside, the $340 fee is plainly exclusionary and prohibitive because it far exceeds the comparable license fees charged by all other jurisdictions. A New York City resident who seeks to exercise his or her right to keep and bear arms by keeping a handgun at home must pay a total of $434.25 to obtain a license, which is equivalent to over 60 hours of work at the $7.25 minimum wage. Indeed, the license fee itself exceeds the cost of many well-made handguns. A person who seeks to own a $300 handgun for 10 years is forced to pay the City of New York a total of $1,454.25 – that is, 4 times $340, plus $94.25 – which is almost 5 times the value of the gun itself. Plainly, a fee that exceeds the cost of engaging in the activity at issue is not "nominal," but is instead "prohibitive."

Conclusion

No legitimate government purpose of sufficient import has any relation to § 400.00(14)'s exclusion of New York City from the $3 to $10 fee limitation. Indeed, the only apparent purpose of this disparity is to burden and discourage the keeping and bearing of arms by people who live in the City – and the purpose of burdening and discouraging the exercise of constitutional rights is no legitimate purpose at all. Even setting this aside, a recurring $340 fee cannot pass muster when levied as a condition of exercising the basic core of an enumerated constitutional right that has "fundamental" status. The City's $340 fee cannot stand.

Dated: June 29, 2012

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,802 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B).

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Dated: June 29, 2012

s/ David D. Jensen
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CERTIFICATE OF SERVICE

On 29 June 2012 I served the foregoing brief by electronically filing it with the Court's CM/ECF system, which generates a Notice of Filing and effects service upon counsel for all parties in the case.

I affirm the foregoing statement under penalty of perjury under the laws of the United States of America.

Dated: June 29, 2012

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