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. BLOOMBERG, 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' REPLY

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TABLE OF CONTENTS

SUMMARY OF REPLY 1

REPLY 2

I. THE BURDEN IS SUBSTANTIAL AND A HEIGHTENED LEVEL OF SCRUTINY APPLIES 2

A. *The Differential Burden is the City's Power to Shift its Full Costs* 2

B. *Section 400.00(14) Directly Burdens the Right to Keep and Bear Arms* 3

C. *The Difference Between the Fee-Setting Standards is Substantial and Heightened Scrutiny Applies* 7

D. *Second Amendment Jurisprudence Likewise Counsels a Heightened Level of Scrutiny* 10

II. DEFENDANTS' PROFFERED GOVERNMENTAL INTERESTS DO NOT JUSTIFY THE DISPARITY OF THE DIFFERENT FEE STANDARDS 16

A. *The Interest in Recouping Costs Does Not Justify the Disparity* 17

B. *Unique Territorial Concerns Do Not Justify the Disparity*...........................18

C. *The Fact that the City "Requested" Disparate Treatment is Irrelevant*.......20

D. *Extension is the Appropriate Remedy*...22

III. THE CITY CANNOT CONDITION THE BASIC ABILITY TO EXERCISE A FUNDAMENTAL RIGHT ON A PROHIBITORY, NON-NOMINAL FEE........................23

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

729, Inc. v. Kenton Co. Fiscal Ct., 402 Fed. Appx. 131 (6th Cir. 2010).................24

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 5

Barefoot v. City of Wilmington, 306 F.3d 113 (4th Cir. 2002)...............................18

Bullock v. Carter, 405 U.S. 134 (1972) 6, 26-27

Bush v. Gore, 531 U.S. 98 (2000)...7

Califano v. Westcott, 443 U.S. 76 (1979).. 22-23

Clear Channel Outdoor, Inc. v. City of St. Paul, no. 02-1060, 2003 U.S. Dist. LEXIS 13751 (D. Minn. Aug. 4, 2003)..8

Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta, 219 F.3d 1301 (11th Cir. 2000) 24

Cox v. New Hampshire, 312 U.S. 569 (1941) 25

District of Columbia v. Heller, 554 U.S. 570 (2008) 5, 27

Exxon Corp. v. Eagerton, 462 U.S. 176 (1983)...21

Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011) 11-12

Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992)....................... 25-26

Fulani v. Krivanek, 973 F.2d 1539 (11th Cir. 1992) 8-9, 17

Hearne v. Board of Education, 185 F.3d 770 (7th Cir. 1999) 18

Heckler v. Matthews, 465 U.S. 728 (1984) 22

Hightower v. City of Boston, no. 11-2281 , 2012 U.S. App. LEXIS 18445 (1st Cir. Aug. 30, 2012) 14-15

Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979)..... 17-18

Kadramas v. Dickinson Public Schools, 487 U.S. 450 (1988) 6-7, 10

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 4

Lyng v. International Union, 485 U.S. 360 (1988)... 4-5

Mastrovincenzo v. City of New York, 435 F.3d 78 (2d Cir. 2006) 24

McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) 1, 5, 16

Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue,
460 U.S. 575 (1983)..26

Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982)..20

Missouri v. Lewis, 101 U.S. 22 (1880)...18

Murdock v. Pennsylvania, 319 U.S. 105 (1943).. 1, 25-26

N.Y. City Transit Auth. v. Beazer, 440 U.S. 568 (1979) 14

National Awareness Foundation v. Abrams, 50 F.3d 1159 (2d Cir. 1995).............24

Nordlinger v. Hahn, 505 U.S. 1 (1992) 9-10

Nordyke v. King, 681 F.3d 1041 (9th Cir. 2012) 15

Ramos v. Town of Vernon, 353 F.3d 171 (2d Cir. 2004)..17

Reed v. Reed, 404 U.S. 71 (1971) 21

Rockefeller v. Powers, 74 F.3d 1367 (2d Cir. 1996)...6

Romer v. Evans, 517 U.S. 620 (1996) 21

Salsburg v. Maryland, 346 U.S. 545 (1954) 18

Schneider v. State, 308 U.S. 147 (1939)..2

Selevan v. N.Y. Thruway Auth., 584 F.3d 82 (2d Cir. 2009) 24

Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 502 U.S. 105 (1991)....17

Soto-Lopez v. N.Y. City Civil Serv. Comm'n, 755 F.2d 266 (2d Cir. 1985),
aff'd 476 U.S. 898 (1986).. 22-23

United States v. Decastro, 682 F.3d 160 (2d Cir. 2012) 9, 11, 16

Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955) 20-21

STATUTES

N.Y. Penal L. § 400.00(10) 20

N.Y. Penal L. § 400.00(14) .... *passim*

OTHER AUTHORITIES

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 (1983) 28

SUMMARY OF REPLY

The Second Amendment mandates that "citizens *must be permitted* to use handguns for the core lawful purpose of self-defense." McDonald v. City of Chicago, 130 S. Ct. 3020, 3036 (2010) (quotation and alteration omitted; emphasis added). In New York State, this activity is absolutely prohibited without a license issued under Article 400 of the Penal Law – and, in order to obtain an Article 400 license, it is necessary to pay a license fee pursuant to Penal Law § 400.00(14). Because the license fee requirement stands as a complete obstacle to obtaining an Article 400 handgun license, it also stands as a complete obstacle to exercising a recognized "core" of the Second Amendment right.

This backdrop places the claims of the City and State (collectively, "Defendants") in context. The burden is not (as Defendants suggest) that § 400.00(14) "delegates authority" to the City, because § 400.00(14) delegates fee-shifting authority to *all* who issue handgun licenses. Rather the disparity is that § 400.00(14) substantially limits most localities' fee-setting authority to a minimal range, but delegates the City authority to shift its full costs in implementing Article 400. None of Defendants' justifications address this disparity.

Separate and apart from this, Defendants fail to acknowledge that it is the Second Amendment – not the City or State of New York – that confers the right to keep and bear arms. See Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943)

(freedom of religion is not "a privilege or benefit bestowed by the state," but is instead "guaranteed the people by the Federal Constitution"). Article 400 does not *supply* New Yorkers with the right to keep and bear arms; rather, it *restricts* the right of New Yorkers to keep and bear arms. The Constitution would still protect the right to keep and bear arms even if Article 400 did not exist. As such, the City cannot claim to be charging for a "benefit" it has provided to its citizens. To the extent any cost of allowing handguns is unavoidable, this cost "results from the constitutional protection" of the right – not the State's regulations of the right. See Schneider v. State, 308 U.S. 147, 162 (1939).

REPLY

I. THE BURDEN IS SUBSTANTIAL AND A HEIGHTENED LEVEL OF SCRUTINY APPLIES

A. *The Differential Burden is the City's Power to Shift its Full Costs*

Defendants attempt to characterize the burden as being a "delegation of authority" that merely "authorizes the City to collect a residential license fee," and emphasize that it is the City that actually implements the standards of § 400.00(14) by setting the fee. See State Br. pp. 3, 16, 18; City Br. pp. 2, 19. This proposed framing of the issue misstates the nature of § 400.00(14)'s differential burden.

In *all* cases, § 400.00(14) delegates local governments the authority to determine and collect handgun license fees. Outside the City (and Nassau County), the statute provides that the handgun license fee will be "determined by

the legislative body of the county," and inside the City, the statute provides that "the city council . . . shall fix the fee." See N.Y. Penal L. § 400.00(14). There is no material distinction between delegating authority to "determine" a fee and delegating authority to "fix" it. Hence, it is inaccurate to describe the disparity as being that the statute "delegates authority" to the City.

Instead, the disparity is the *different manner* in which § 400.00(14) delegates fee-setting authority. The original statutory approach, which still applies to most state residents, bounds the fee-setting authority of local governments to a nominal range (presently $3 to $10). The statutory approach that applies to the City bounds fee-setting authority only by the general state-law principle that fees not exceed the costs of the regulatory scheme. Hence, the classification is the difference between a delegation of authority that is bounded by a nominal fee range standard, and a delegation of authority that allows the shifting of full regulatory costs.

B. *Section 400.00(14) Directly Burdens the Right to Keep and Bear Arms*

Defendants claim that § 400.00(14) does not impose *any* burden because it is the City that actually implements § 400.00(14) by setting a license fee that is consistent with § 400.00(14)'s requirements. See State Br. pp. 3, 20-21; City Br. pp. 37-38. But there can be no dispute that § 400.00(14)'s classification is the source of Plaintiffs' injury. Because of the 1947 amendment, the City has authority to charge the Plaintiffs a $340 fee (injury). If the nominal-fee-range

standard still applied to everyone, then the City would not be able to do this (traceability). Finally, this Court's order re-imposing the nominal-fee-range standard would redress the Plaintiffs' injury (redressability). See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

Tellingly, Defendants present no authority that actually supports their no-burden claim – and counsel's research also has not disclosed any supporting authority. The State cites *no* cases, and the City cites only one, Lyng v. International Union, 485 U.S. 360 (1988). See State Br. pp. 3, 20-21; City Br. pp. 37-38. However, Lyng is readily distinguished and actually weighs against Defendants' assertion.

Lyng concerned an amendment to the AFDC program that eliminated food stamp eligibility when a worker had gone on strike. See Lyng, 485 U.S. at 362-63. The Supreme Court concluded that this law did not burden the rights of free association or free expression because it did not "directly and substantially interfere" with the ability of workers to engage in these activities. Id. at 367 (quoting Lyng v. Castillo, 477 U.S. 635, 638 (1986)). The law "d[id] not 'prevent' them from associating together or burden their ability to do so in any significant manner." Id. Rather, any burden the AFDC provisions imposed was *indirect* and steps removed from the individual's decision to engage in protected conduct. See id. at 368.

Lyng did not concern a burden laid directly on one's ability to exercise a constitutional right. To the contrary, the Court distinguished Abood v. Detroit Board of Education, 431 U.S. 209 (1977), as having concerned a much more direct burden: a law that "required certain employees *to pay a fee* to their representative union." Lyng, 485 U.S. at 368 (emphasis added). The AFDC provision, "[b]y contrast, . . . *requires no exaction* from any individual; it does not 'coerce' belief; and it does not require appellees to participate in political activities or support political views." Id. at 369 (emphasis added).

This case is materially different from Lyng because this case concerns a direct burden on the ability to possess a handgun in one's home in the form of a mandatory exaction. A person who does not pay the license fee cannot keep a handgun at home. This activity lies in the recognized core of the Second Amendment's protections, and is one that states and localities must allow. See District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home"); see also McDonald, 130 S. Ct. at 3036 ("citizens must be permitted to use handguns for the core lawful purpose of self-defense" (quotation and alteration omitted)); Plaintiffs' Br. pp. 12-23.

Accepting Defendants' claim – that the different fee standards do not constitute a burden because the City implements the state law and *could* do so in a

manner that would not injure the Plaintiffs – is inconsistent with the rationales of established Supreme Court precedents. For example, in Bullock v. Carter, 405 U.S. 134 (1972), the Court overturned a Texas state law that conferred broad discretion on local political parties to set the fees for appearing on the ballot in primary elections "as in their judgment is just and equitable." See id. at 138 (quoting statute). Bullock concerned a different issue than that presented here (the denial of equal protection on the basis of ability to pay, and in the context of ballot access) – but what is significant is that the Court held that the *state law* conferring discretion was itself unconstitutional, and the Court affirmed a lower court's order that enjoined enforcement of the statute itself. See id. at 149. By Defendants' reasoning, the Court should have instead held that the state law did *not* impose a burden. But as this Court has observed, Bullock "found state action, even though the filing fee requirement applied only to primaries and the political parties were free to fix whatever fees they wished." Rockefeller v. Powers, 74 F.3d 1367, 1374 (2d Cir. 1996).

And, in Kadramas v. Dickinson Public Schools, 487 U.S. 450 (1988) – a case the State cites for other purposes (p. 24) – the Court rejected the claim that a plaintiff could not challenge a state law that authorized some (but not all) localities to impose fees for school busing services with the following explanation: "The fee that Dickinson is permitted to charge under the 1979 statute is itself a burden rather

than a benefit to appellants, and they are not estopped from raising an equal protection challenge to the statute that imposes that burden on them." Id. at 457. Significantly, the statute provided (certain) localities with wholly "optional" authority to impose fees, bounded only by the requirement they not exceed costs. See id. at 454 (quoting statute). The statute did not "require" localities to impose fees. See id.

Finally, Bush v. Gore, 531 U.S. 98 (2000), was certainly a controversial decision, but still, seven of the Justices agreed that the use of different vote recount standards at the local level, pursuant to an order from the state supreme court, violated equal protection. See id. at 111; id. at 134 (Souter, J., dissenting); id. at 145-46 (Breyer, J., dissenting). It is hard to square this reasoning with Defendants' claim that state laws that delegate authority to lesser state actors cannot themselves be denials of equal protection.

C. *The Difference Between the Fee-Setting Standards is Substantial and Heightened Scrutiny Applies*

Plaintiffs already showed that when classifications impose disparate fee burdens, heightened scrutiny applies if the fees stand as an obstacle to the exercise of a constitutional right. In contrast, the rational basis standard applies if the disparate fees do not burden protected conduct, or if they do so only tangentially. See Plaintiffs' Br. pp. 29-34. Defendants ignore most of this demonstration, but

the State does try to distinguish two of Plaintiffs' cases by emphasizing irrelevant differences. See State Br. pp. 25-27.

According to the State, Fulani v. Krivanek, 973 F.2d 1539 (11th Cir. 1992), is inapposite because the disparate fee burden in that case arose in the context of ballot access, and the court found that the disparity "violate[d] the Equal Protection Clause at least in part because it imposed a disparate burden" on the basis of political viewpoint (*i.e.* minor parties). State Br. p. 26. The State argues that the decision is irrelevant because "First Amendment terms have no meaning in the Second Amendment context." Id. Likewise, the State claims that Clear Channel Outdoor, Inc. v. City of St. Paul, no. 02-1060, 2003 U.S. Dist. LEXIS 13751 (D. Minn. Aug. 4, 2003), is "inapposite because it did not even adjudicate an equal protection claim" and instead invalidated the differential fee structure as a violation of the First Amendment. See State Br. pp. 26-27.

Plaintiffs cited these cases to show that the burden between a lesser fee and a greater fee is substantial, and that heightened scrutiny applies to a significant difference in fee treatment that burdens the exercise of a constitutional right. The fact that these cases concerned other rights (voting, association, and free speech) is no basis to distinguish their analytic approach. Indeed, in its prior foray into the Second Amendment, this Court concluded that it is "appropriate to consult principles from other areas of constitutional law, including the First Amendment

(to which Heller adverted repeatedly)" in order to "decid[e] whether a law substantially burdens Second Amendment rights." United States v. Decastro, 682 F.3d 160, 167 (2d Cir. 2012); see also id. at 166-67 (considering the standards that apply to marriage, voting, abortion, speech, and takings).

Defendants argue that the rational basis standard applies because "the fee . . . does not interfere with plaintiffs' Second Amendment right to possess a handgun." State Br. p. 17. But this is not the case, for payment of the § 400.00(14) license fee is an unavoidable requirement of obtaining the state's permission to engage in this activity – not an indirect or resultant cost. While Fulani concerned a different constitutional protection, the court was clear that the burden of being "forced to shoulder an undue burden on [one's] finances in order to" exercise a constitutional right was plainly a material and substantial difference in treatment. Fulani, 973 F.2d at 1544.

The decisions that Defendants cite (City Br. pp. 39-40; State Br. p. 24) to support their claim for the rational basis standard do not support Defendants' position because they concerned classifications that either did not burden fundamental rights, or that did so in only indirect or tangential manners.

First, Nordlinger v. Hahn, 505 U.S. 1 (1992), concerned a California tax scheme that "capped" property tax increases from the time a homeowner purchased his or her property – and thereby resulted in newer homeowners paying higher

taxes. See id. at 5-6. The essential issue before the Court was whether this disparate treatment "jeopardize[d the] exercise of a fundamental right," because otherwise, the rational basis standard applied. See id. at 10. The Court concluded that the facts of the case did not place the right to travel in jeopardy because the plaintiff had lived in California prior to purchasing her home. See id. at 10-11. Because there was no burden on a fundamental right, the Court applied the rational basis standard. See id. at 11. Nordlinger is readily and properly distinguished because it did not concern a classification that directly interfered with the ability to exercise a fundamental right.

Next, Kadramas concerned a North Dakota law that allowed some localities, but not all, to impose user fees to cover the costs of school busing services. See Kadramas, 487 U.S. at 454. Because there is no fundamental right to education, the classification did not "interfere[ ] with a 'fundamental right,'" and the Court applied rational basis review. Id. at 457-58. Notwithstanding the State's citation, Kadramas does not indicate that the rational basis standard should apply here, where the statutory disparity is a direct burden on the basic ability to exercise a fundamental right.

D. *Second Amendment Jurisprudence Likewise Counsels a Heightened Level of Scrutiny*

Plaintiffs have amply demonstrated that the level of scrutiny that applies to a burden on the right to keep and bear arms depends on the severity of the burden

and its proximity to the "core" of the Second Amendment. See Plaintiffs' Br. pp. 12-19. These principles point to a strict level of scrutiny in this case because payment of the § 400.00(14) handgun license fee is an absolute prerequisite to engaging in the "core" activity of keeping a handgun at home. See id. at 20-23. There are no alternatives.

Notwithstanding the State's claim (p. 27), this Court's decision in Decastro counsels against the rational basis standard. In Decastro, this Court explained that heightened scrutiny applies to laws that "operate as a substantial burden on the *ability* of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes)." Decastro, 682 F.3d at 166 (emphasis added). Unlike the restriction in Decastro, which only served to protect a regulatory requirement that people purchase handguns in their states of residence (see Plaintiffs' Br. pp. 16-17), the payment of a § 400.00(14) license fee is an absolute and unavoidable requirement of keeping a handgun in one's home anywhere within the State of New York. It substantially burdens the "ability" to keep a handgun in one's home. To the extent the fee is higher, the burden is likewise higher.

The City contends that Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011), supports the conclusion that the recurring $340 license fee is nothing but a "minimal burden." City Br. p. 36. In Ezell, the City of Chicago required people to take 1 hour of training at a firing range in order to obtain a firearms license, but

also prohibited firing ranges from the city. See Ezell, 651 F.3d at 689-90. The Court of Appeals for the Seventh Circuit applied a near-strict level of scrutiny to the firing range ban and enjoined its enforcement. See id. at 708-09, 711. This was because the range ban was "a serious encroachment on the right to maintain proficiency in firearm use," and the fact "[t]hat the City conditions gun possession on range training [was] an additional reason to closely scrutinize the range ban." Id. at 708.

The City's argument flows from its claim that the Seventh Circuit applied near-strict scrutiny because the range ban, in conjunction with the training requirement, "amount[ed] to a prohibition on the right to have a firearm in the home." City Br. p. 36. But this is not the case. Ezell expressly observed that even though firing ranges were prohibited, people could still obtain the requisite hour of training by driving outside the city, and that there were 5 ranges within 5 miles of city limits. See Ezell, 651 F.3d at 693. Hence, the range ban did not actually "amount to a prohibition" on possessing handguns. To the contrary, the Seventh Circuit distinguished the range ban from the "broadly prohibitory laws" that Heller and McDonald had addressed, and explained that "broadly prohibitory" restrictions on the right to keep and bear arms are "categorically unconstitutional" without the need to resort to *any* standard of scrutiny. See id. at 703. While Ezell was a direct challenge to the burden of the range-ban, rather than an equal protection claim that

concerned the relative disparity of two different statutory burdens, it is significant that the court found the burden of having to travel outside Chicago to be substantial. Surely this counsels against Defendants' claim that there is no substantial difference between a fee that cannot exceed $10 and a fee that is presently $340 (but which could be immediately increased to $977).

Defendants also argue (in substance) that the Equal Protection Clause exempts the Second Amendment from its protection. The City claims that the rational basis standard always applies to classifications that burden right to keep and bear arms because "Second Amendment analysis is sufficient." City Br. p. 41. The State contends that the Courts of Appeal for the First and Ninth Circuits have categorically adopted this approach. State Br. p. 28.

Defendants' argument is ill-conceived. This case does not concern a statutory burden that applies to all people. Instead, this case concerns a burden that by its terms applies differently to different people subject to the jurisdiction of the same New York Penal Law.

This distinction matters, for any law that imposes *any* burden operates to "discriminate" between people. For example, a law that sets a speed limit discriminates between people who drive fast and slow – and a challenge to the burden of that speed limit could alternatively be stated as an equal protection challenge to the classification between fast and slow drivers. As a general

proposition, when a statutory burden applies to everyone, the same governmental purposes that justify the burden will normally also justify the resulting disparity. See, e.g., N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 592 (1979) ("the exclusionary line challenged by respondents is not one which is directed 'against' any individual or category of persons, but rather it represents a policy choice" (quotation omitted)). Considerations unique to the Equal Protection Clause really arise "when a governmental unit adopts a rule that has a special impact on less than all the persons subject to its jurisdiction," rather than a restriction that applies to all persons subject to the law's jurisdiction. Beazer, 440 U.S. at 587-88; see also Plaintiffs' Br. p. 25.

The cases that Defendants cite to support their equal protection argument (State Br. p. 28; City Br. p. 41) all challenged *generally applicable* burdens and asserted "equal protection" claims that were merely restatements of their Second Amendment claims. Hightower v. City of Boston, no. 11-2281 , 2012 U.S. App. LEXIS 18445 (1st Cir. Aug. 30, 2012), concerned the revocation of a person's firearms license as the result of a misstatement. See id. at *1-2. The court rejected the plaintiff's Second Amendment challenge to the statutory power to revoke licenses for misstatements, see id. at *25, and then considered (what it called) the "cursory" equal protection claim. See id. at *42. The equal protection claim contended "that the revocation of [the] license violated equal protection *for the*

same reasons as advanced in support of [the] Second Amendment claim." Id. (emphasis added). In other words, the "equal protection" claim did not concern a statutory distinction between classes of persons, but instead concerned the result of a statutory burden that applied to all persons. It was in this context that the First Circuit stated that because "the Second Amendment challenge fails, the equal protection claim is subject to rational basis review." Id. This case does not support the categorical assertion that heightened scrutiny under the Equal Protection Clause never applies to significant statutory disparities on the right to keep and bear arms.

Just the same, the court in Nordyke v. King, 681 F.3d 1041 (9th Cir. 2012) (en banc), upheld a county policy that required guns to be secured at gun shows conducted on county property. See id. at 1044. The Ninth Circuit disposed of the equal protection claim in a footnote, explaining that the same government interest that justified imposing the burden on gun shows likewise justified the resulting disparity on gun shows. See id. at 1043 n.2. Again, this case does not support Defendants' categorical assertion.

A final cleanup matter is the State's (footnote) suggestion that the Supreme Court has not yet decided "whether the Second Amendment right to possess a handgun in the home rises to the level of a fundamental constitutional right." State Br. p. 20 n.6. This is wrong. In McDonald v. City of Chicago, 130 S. Ct. 3020

(2010), a majority of the Justices joined Part III-B, which concluded that "the right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered liberty." Id. at 3042; see also id. at 3059 (Thomas, J., concurring) (agreeing that the right to keep and bear arms is "fundamental to the American scheme of ordered liberty" (quotations omitted)); Decastro, 682 F.3d at 166 (acknowledging "the classification of th[e Second Amendment] right as fundamental to our scheme of ordered liberty in McDonald").

II. DEFENDANTS' PROFFERED GOVERNMENTAL INTERESTS DO NOT JUSTIFY THE DISPARITY OF THE DIFFERENT FEE STANDARDS

There is no "fit" between the Defendants' proffered justifications and the disparity this case concerns. Defendants' justifications do not explain the need to give the City full authority to shift all of its licensing costs, while limiting the fee-setting authority of other officials that implement Article 400 to a nominal range. Although the City details its duties under Article 400, it never gets around the fact that local officials throughout the state have the *same* obligations under Article 400 to (for example) investigate license applications and applicants, obtain fingerprints, and investigate mental health history.

Defendants' justifications do not pass muster under any type of scrutiny that applies to a burden on a fundamental right. See Plaintiffs' Br. pp. 34-35. Setting labels aside, under any standard of heightened scrutiny it is the government that must demonstrate both that there is a governmental interest of sufficient weight,

and also that there is a substantial and adequate degree of fit between that interest and the disparity. See Ramos v. Town of Vernon, 353 F.3d 171, 175 (2d Cir. 2004); Plaintiffs' Br. pp. 25-28. The government has not met that burden here because none of its proffered governmental interests justify the need for a more burdensome fee standard for the City.

A. *The Interest in Recouping Costs Does Not Justify the Disparity*

Defendants first attempt to justify the disparate fee standards by pointing to the interest in "better . . . defray[ing] the administrative costs of the licensing program." State Br. p. 4; see also id. at 8, 32; City Br. pp. 8, 39.

However, the general interest in defraying costs does nothing to justify the disparity of materially different fee standards. This interest "is merely a justification for the fee," not for the use of unequal fee standards. See Fulani v. Krivanek, 973 F.2d 1539, 1546 (11th Cir. 1997); see also 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"); Plaintiffs' Br. pp. 30-32.

Defendants' reasoning is ultimately circular and follows the impermissible approach of "tak[ing] the *effect* of the statute and posit[ing] that effect as the State's interest." Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991). The question is, "why should the City be allowed to shift its

full regulatory costs while other issuing authorities can only charge a nominal fee?" Defendants cannot answer this question simply by saying, "so that the City can shift its full regulatory costs."

B. *Unique Territorial Concerns Do Not Justify the Disparity*

The State contends that the classification can be upheld "as *rational* . . . on the basis of geography or that [it] distinguish[es] among political subdivisions within the state." State Br. pp. 29-30 (emphasis added). However, the cases the State cites – Salsburg v. Maryland, 346 U.S. 545 (1954), Missouri v. Lewis, 101 U.S. 22 (1880), and Hearne v. Board of Education, 185 F.3d 770 (7th Cir. 1999) – all concerned geographic disparities that did *not* impose direct burdens on the exercise of fundamental rights. See Salsburg, 346 U.S. at 550-51 (evidence rules varied by county; upheld as a "procedural" variance); Missouri, 101 U.S. at 29 (different procedural systems for appeals); Hearne, 185 F.3d at 772, 774 (different procedures for terminating public school teachers in Chicago). Because substantial disparities on the exercise of fundamental rights require *more* than a "rational basis" to uphold, mere interests of territory or geography are not, standing alone, enough. See, e.g., Ill. State Bd., 440 U.S. at 186 ("appellant has advanced no reason, much less a compelling one, why the State needs a more stringent requirement for Chicago"); Barefoot v. City of Wilmington, 306 F.3d 113, 122 (4th Cir. 2002) ("Where the exercise of a state's discretion in ordering its political

subdivisions involves the creation of suspect classifications or infringes on fundamental rights, the state action will be upheld only if it furthers a compelling state interest.").

The State attempts to justify the classification by pointing to the number of applications processed in the City and in Nassau County. See State Br. pp. 9, 31. The State argues that every year, most New York counties process "fewer than 300" applications, while the City processes 2,612 applications (and 9,522 renewals), and Nassau County processes "over a thousand license applications." Id. at 31.

While it is true that the City issues more licenses numerically, the City's relative burden is actually much less than that of other New York counties – who implement the same law, and charge no more than $10. According to the 2010 Census figures that the State cites (p. 9), and taking into account averages calculated from the 2007-2009 licensing figures that the State submitted (JA 602 – JA 607), the 2,612 applications that the City processes annually represent only 0.032 % of the City's population, and the 946 licenses that Nassau County processes annually represent only 0.071% of Nassau County's population. In the rest of New York State, licensing officials process an average of 13,651 applications every year, representing 1.019% of their collective populations – which is about 32 times more than the City, and 14 times more than Nassau

County.[1] So the relative burden in the City (and in Nassau County) is actually *substantially less* than in the rest of the state. This proffered justification for the disparity simply does not pass scrutiny. See, e.g., Miss. Univ. for Women v. Hogan, 458 U.S. 718, 728 (1982) (under intermediate scrutiny a state's proffered legislative justifications must be "closely scrutinized").

C. *The Fact that the City "Requested" Disparate Treatment is Irrelevant*

Finally, Defendants try to distinguish the differential treatment on the ground that the City (and Nassau County) "requested" the ability impose fees under the "full cost" standard. See State Br. pp. 4, 8, 21-22, 30; City Br. pp. 30, 40. Defendants contend that the operative question is whether there is "evidence that other jurisdictions sought and were denied a[similar] exemption." City Br. p. 40; see also State Br. pp. 21, 30.

Defendants provide no authority that supports the proposition that a state actor's mere desire to impose more burdensome treatment can justify a state law disparity. Their only citation on this point is the State's quotation from Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955), that "a legislature can address itself to the phase of a problem which seems most accute." State Br. p. 30 (quoting Williamson, 348 U.S. at 489 (alterations omitted)). It is

[1] It is not possible to compare the relative burden of processing renewals because JA 602 – JA 607 only includes initial applications. However, licenses must be renewed every 5 years in Nassau, Suffolk, and Westchester counties, so all of these counties are also processing renewals. See N.Y. Penal L. § 400.00(10).

unclear precisely how this passage would save the statute, but in any event, the decision concerned economic legislation that regulated professions. See Williamson, 348 U.S. at 486. Because a "lenient standard of rationality" applies to classifications that involve the "regulation of economic and commercial matters" – in contrast to burdens that "affect[] a fundamental interest" – the reasoning has no bearing here. See Exxon Corp. v. Eagerton, 462 U.S. 176, 195-96 (1983).

In the end, this justification is also circular. Defendants attempt to answer the question, "why should state law allow the City to impose more burdensome fees?" with the response, "because the City wants to." However, Defendants cannot justify a statute that imposes a disparate burden merely by citing their desire to impose disparate treatment. Under *any* standard of equal protection scrutiny, "a classification of persons undertaken for its own sake[is] something the Equal Protection Clause does not permit." Romer v. Evans, 517 U.S. 620, 635 (1996); see also Reed v. Reed, 404 U.S. 71, 76 (1971) (state could not justify different hearing rights by citing the legislative purpose "to accomplish the elimination of hearings on the merits").

It is significant that while Defendants look to *some* parts of the Sponsor's Memorandum, they ignore the fact that one of the originally stated justifications for the City's different fee standard was to allow the City to "discourage" gun ownership – at least among those who would have difficulty paying high license

fees. See Plaintiffs' Br. p. 5. Indeed, this is the only reason put forward by anyone that explains the need for the disparity.

D. *Extension is the Appropriate Remedy*

There is no basis for the State's (footnote) claim that this Court should nullify the protective fee range for *all* New Yorkers, leaving them subject to fees in the range of New York City's $340 fee (see State Br. p. 22 n.7). When a state law is under-inclusive – when it provides one class of people with more favorable treatment than another class – "ordinarily" the proper remedy is to extend the favorable treatment to benefit all people equally. Heckler v. Matthews, 465 U.S. 728, 739 n.5 (1984); see also Califano v. Westcott, 443 U.S. 76, 89-90 (1979) ("extension, rather than nullification, is the proper course"); Soto-Lopez v. N.Y. City Civil Serv. Comm'n, 755 F.2d 266, 280 (2d Cir. 1985) (extension is "generally" the proper remedy), aff'd 476 U.S. 898 (1986). This has been the case "even when the government could deprive a successful plaintiff of any monetary relief by withdrawing the statute's benefits from both the favored and the excluded class." Heckler, 465 U.S. at 739. Nullification becomes an appropriate remedy when it is clear it would better comport with the legislature's intent. See id. at 739 n.5; Soto-Lopez, 755 F.2d at 280.

The State provides no explanation of how nullification would better serve legislative intent. Furthermore, the basic legislative parameters of the fee statute

do not show that the New York legislature would prefer nullification. Since 1922, the generally applicable approach has been to limit fees. When the legislature exempted New York City, it continued its preexisting practice of providing limits for the rest of the state, and this is the same structure that remains in place today. See Soto-Lopez, 751 F.2d at 280-81 (state law had long provided civil-service preference points to veterans so it was appropriate to extend preference points to the excluded class of veterans).

The only authority that the State cites is Califano v. Westcott, but this case does not support the State's remedial argument. See State Br. p. 22 n.7. In Califano, the Supreme Court unanimously held that a federal law that provided AFDC benefits to mothers and fathers on different terms violated the Equal Protection Clause, but the Court split 5-4 on the appropriate remedy. See Califano, 443 U.S. at 89-91 & 94 (Powell, J., concurring in part and dissenting in part). What is significant (and apparently missed by the State) is that *none* of the Justices advocated nullification. See id. at 91 (the question presented is "not the merits of extension versus nullification, but rather the form that extension should take.").

III. THE CITY CANNOT CONDITION THE BASIC ABILITY TO EXERCISE A FUNDAMENTAL RIGHT ON A PROHIBITORY, NON-NOMINAL FEE

Plaintiffs showed that while states and localities may impose cost-shifting user fees on constitutionally protected activities that lie away from the core of constitutional protection, they may not condition permission to exercise the core

aspects of fundamental rights on the payment of non-nominal, prohibitive fees. See Plaintiffs Br. pp. 41-52. Defendants respond by arguing there is no merit to this claim, and that they can impose fees on any protected activity, so long as the fees do not exceed attendant regulatory costs. See City Br. pp. 20-27; State Br. p. 19.

Most of the modern cases that Defendants cite (City Br. pp. 22-24; State Br. p. 19) do not concern fees imposed on the basic and core aspects of fundamental rights. Rather, they concern fees imposed activities that lie away from the core of constitutional protection, like for-profit fundraising and sexually explicit dancing. See 729, Inc. v. Kenton Co. Fiscal Ct., 402 Fed. Appx. 131, 132 (6th Cir. 2010) (sexually oriented theaters and cabarets); Selevan v. N.Y. Thruway Auth., 584 F.3d 82, 101 (2d Cir. 2009) (bridge tolls); Mastrovincenzo v. City of New York, 435 F.3d 78, 81 (2d Cir. 2006) (concerns licensing the sale of clothing on city streets, but does not discuss the license fee); Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta, 219 F.3d 1301, 1305 n.2 (11th Cir. 2000) (gatherings that used “public parks or public streets”); National Awareness Foundation v. Abrams, 50 F.3d 1159, 1161 (2d Cir. 1995) (“professional” charitable fundraising activities). They are inapposite to a fee that is an obstacle to exercising a fundamental right in its basic form.

Defendants ignore Plaintiffs' demonstration that the courts have either disproved fees, or constrained them to nominal amounts, when the fees stand as an obstacle to speaking, publishing, exercising a religion, or voting – all of which lie in the core of protected conduct. See Plaintiffs' Br. pp. 43-45, 50-52.

The City hangs its argument that cost-shifting user fees are *always* acceptable on Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992). See City Br. pp. 17, 22-24. However, as Plaintiffs previously showed, Forsyth County concerned fees imposed as a condition of using public spaces – and did not concern a situation in which the denial of those public spaces would amount to a denial of the ability to peaceably assemble. See Plaintiffs' Br. pp. 46-48; see also Forsyth County, 505 U.S. at 127 (permit system and fees applied to "uses of public property and roads"). While the City contends (pp. 17, 22) that Forsyth "explicitly rejected" any requirement that fees be nominal or non-prohibitive, the Court's ruling was not so broad. The Court explained that whether the fee was "nominal" was "one distinction between the facts in Murdock and those in Cox." Forsyth County, 505 U.S. at 137 (citing Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cox v. New Hampshire, 312 U.S. 569 (1941)). However, Murdock had concerned a core aspect of religious practice (where the fee was not permissible), while Cox had concerned a parade through a public space (where the fee was permissible, but subject to limitations). See Plaintiffs Br. pp. 43-44; Cox, 312 U.S. at 574 (citing

society's interest in maintaining order on highways but noting that the right at issue "in other circumstances would be entitled to protection"). Hence, when Forsyth explained that Murdock's reference to nominal fees "does not mean that an invalid fee can be saved if it is nominal, or that only nominal charges are constitutionally permissible," Forsyth County, 505 U.S. at 137, it was not rejecting the law laid down in cases such as Murdock and Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983). Forsyth County does not address circumstances where a fee is imposed as a condition of exercising a fundamental right in its basic form.

The Court in Bullock v. Carter, 405 U.S. 134 (1972), did indeed find that candidate filing fees were generally permissible – but Bullock distinguished candidate filing fees from fees laid on the core activity of voting, and expressly observed that there was no fundamental right to obtain ballot access. See id. at 142-43. Moreover, the Court evaluated the permissibility of candidate filing fees in the context of their impact on the right to vote, reasoning that when fees became prohibitive, the injury would be "limit[ing] the field of candidates from which voters might choose." Id. at 143. No less significant, the Court surveyed the candidate filing fees imposed in other parts of Texas, which were generally quite less. See id. at 139-40 & nn.11-15. The Court concluded that "the very size of the fees . . . gives [the fee requirement] a patently exclusionary character." Id. at 143.

The City characterizes this case as upholding the imposition of substantial fees on the exercise of fundamental rights (p. 26), but this is not the case. First, the Court found that the activity of appearing on the ballot was not protected as "fundamental." See id. Second, the Court said that fees on non-fundamental, but protected, conduct could still not be "patently exclusionary." See id.

The City's handgun license fee is (far and away) the highest gun license fee in the United States. See Plaintiffs' Br. pp. 53-55. The City contends that this basic fact is of no moment and does not show that the fee is prohibitive. See City Br. pp. 23-24. However, the City offers no support for the (remarkable) proposition that a federal court cannot consider the relative burdens imposed by analogous state and local laws to decide whether a burden is constitutional. Heller itself surveyed the laws of other jurisdictions in order to characterize the relative severity of the law that it addressed. See District of Columbia v. Heller, 554 U.S. 570, 629 (2008) ("Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban."). The Court also took this same approach in Bullock v. Carter, as discussed above. Federal courts often look to normative state standards to decide constitutional issues, and particularly ones that depend on judgments about what is "reasonable." See Plaintiffs Br. p. 53.[2]

[2] The relative fees would be particularly relevant were the Court to accept the City's invitation (pp. 27-29) to use the framework of means-end burden analysis to evaluate the "burden" of the license fee. This analysis would be straightforward:

CONCLUSION

Defendants have not identified any governmental purpose – much less a compelling or important interest – that would justify the disparity in fee treatment that § 400.00(14) accords to New York residents. The generalized interest in collective revenues or offsetting costs does not explain the disparity, and the extraordinarily low rates of (legal) gun ownership in New York City also do not explain the disparity. And it is beyond cavil that a government cannot justify a legislative classification with the circular act of reciting its desire to impose disparate treatment.

The City's $340 handgun license fee is the highest in the country and is plainly prohibitive. While the City tries to defend its fee by defending the efficacy and wisdom of its gun laws, this is beside the point. The enumeration of a right as fundamental precludes states and localities from charging any significant amount for the "benefit" of exercising the right.

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the fact that other New York localities are able to issue handgun licenses under Article 400 by charging a fee of no more than $10 shows that a fee of *more* than $10 is neither "necessary" nor "substantially related" to important governmental purposes. It also shows that the fee is not narrowly tailored, since a more narrowly tailored approach is available. It is respectfully submitted that this discussion illustrates the square-peg, round-hole issues that would attend using means-end analysis to evaluate a monetary payment that the government requires. See generally 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 (1983) (author proposes that courts *should* begin using means-end burden analysis to evaluate fees).

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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 6,984 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B).

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Dated: October 12, 2012

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CERTIFICATE OF SERVICE

On 12 October 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: October 12, 2012

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