12-1578-cv

United States Court of Appeals

For the Second Circuit

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

Plaintiffs-Appellants,

-against-

MICHAEL BLOOMBERG, in his Official Capacity as Mayor of the City of New York, and THE CITY OF NEW YORK,

Defendants-Appellees

-and–

THE OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL,

Intervenor-Defendant-Appellee.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE CITY DEFENDANTS-APPELLEES

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PRELIMINARY STATEMENT

Plaintiffs-appellants appeal from a judgment of the United States District Court for the Southern District of New York ("District Court"), filed March 27, 2012. The judgment brings up for review the Opinion and Order, filed March 26, 2012 (Koeltl, U.S.D.J.), which denied plaintiffs' motion for summary judgment; granted the cross motions for summary judgment filed by the City defendants, Michael Bloomberg, in his Official Capacity as Mayor of the City of New York and the City Of New York, and by the intervenor-defendant, Attorney General of the State of New York; and directed the Clerk to enter judgment dismissing the complaint (SA1-38).[1] On appeal, the plaintiffs contend that New York City's fee for a residential handgun license and the New York State statute that authorizes the City to collect that fee are unconstitutional. As it did below, the City will focus primarily on plaintiffs' challenge to the constitutionality of the City's residential handgun license fee and will only briefly address plaintiffs' challenge to the constitutionality of the state law, deferring to the Attorney General's argument for a more in-depth defense.

[1] Unless otherwise indicated, references in parentheses in the form "SA#" and "JA#" are references to pages of the Special Appendix and to pages of the Joint Appendix filed with this Court by the plaintiffs-appellants.

QUESTIONS PRESENTED

1. Did the District Court properly conclude that the New York City Administrative Code § 10-131(a)(2), which establishes a $340 fee for a residential handgun license, imposes a permissible fee on the exercise of constitutionally protected activities and does not violate the Second Amendment?

2. Did the District Court properly conclude that New York State Penal Law § 400.00(14), the New York State statute that authorizes the City to collect a residential handgun license fee, does not violate the Equal Protection Clause?

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiffs, individuals who have been issued licenses to possess a handgun in their home by the New York City Police Department ("NYPD") License Division ("License Division"), known as a Premises Residence license, along with the Second Amendment Foundation ("SAF") and the New York State Rifle & Pistol Association, Inc. ("NYSRPA), commenced this action challenging the constitutionality of: (1) the $340 license fee charged by the License Division for Premises Residence licenses set forth in New York City Administrative Code § 10-131(a)(2); and (2) New York State Penal Law § 400.00(14). The plaintiffs brought this action pursuant to 42 U.S.C. § 1983, alleging that Admin. Code § 10-131(a)(2) and Penal Law § 400.00(14) violate their rights

under the Second Amendment as incorporated against the States by the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, respectively.

B. Course of the Proceedings

This action was commenced on April 5, 2011, with the filing of a Complaint for Deprivation of Civil Rights Under Color of Law against the City defendants and against Eric Schneiderman, in his official capacity as Attorney General of the State of New York (JA12-23). By Stipulation of Dismissal and Intervention, dated May 19, 2011, Eric Schneiderman was dismissed from the litigation and the Attorney General intervened to defend the constitutionality of Penal Law § 400.00(14) (JA24). The City defendants filed an Answer on or about May 26, 2011, and the intervenor filed a Pleading in Intervention on or about June 22, 2011 (JA26-37, 38-42).

By Notice of Motion, dated June 22, 2011, the plaintiffs moved for summary judgment in their favor pursuant to Rule 56 of the Federal Rules of Civil Procedure before any discovery in this action had taken place (JA43-44). The City defendants and the intervenor both cross-moved for summary judgment (JA114-116, 432-433). The City defendants' motion sought dismissal of all causes of action in this suit, while the intervenor's motion sought dismissal of the second cause of

action directed against Penal Law § 400.00(14)[2] (Id.). Heeding the Court's suggestions to avoid overlapping arguments, the City focused its briefing on the constitutionality of Admin. Code § 10-131(a)(2) and adopted the State's arguments regarding the constitutionality of Penal Law § 400.00(14).

By Opinion and Order dated March 26, 2012, the District Court (Koeltl, D.C.J.) denied the plaintiffs' motion for summary judgment, granted the cross motions for summary judgment filed by the City defendants and the intervenor, and directed the Clerk to enter judgment dismissing the complaint (SA1-38). Judgment was entered in favor of defendants on March 27, 2012 (see JA9). Plaintiffs filed a Notice of Appeal on April 18, 2012 (JA656).

STATEMENT OF RELEVANT FACTS

A. The License Division's Role in Processing Applications for Premises Residences Handgun Licenses.

In New York City, the License Division is responsible for processing issuance and renewal applications for handgun licenses, including those for residence handgun licenses. See Penal Law § 400.00. The different types of licenses and permits include licenses to possess a handgun in one's home, called Premises Residence licenses; licenses to possess a firearm at a

[2] In addition to defending the constitutionality of Penal Law § 400.00(14), the intervenor argued that neither the individual

specific business location, called Premises Business licenses; licenses to carry concealed weapons on one's person, called Full Carry licenses; and permits for rifles and shotguns (JA348). The various firearms licenses and permits issued by the License Division are codified in Title 38 of the Rules of the City of New York ("RCNY"). See 38 RCNY § 5-01 (types of handgun licenses); § 1-02 (rifle and shotgun permits).

This case concerns only the fees for Premises Residence licenses (see JA12-23). Such licenses allow the licensee to possess the licensed weapon at the specific home address designated on the license and to transport the licensed handgun directly to and from an authorized small arms range/shooting club, secured and unloaded in a locked container. See 38 RCNY §§ 5-01(a); 5-22(a)(14).

Under Article 400 of the Penal Law, "[n]o license shall be issued or renewed pursuant to this section except by the licensing officer, and then only after investigation and finding that all statements in a proper application for a license are true." Penal Law § 400.00(1). Article 400 of the Penal Law details the duties of the licensing officer which include, inter alia, determining whether the applicant meets the

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plaintiffs nor the organizational plaintiffs have standing to challenge the law (see SA10).

eligibility requirements set forth under Penal Law § 400.00(1)[3]; inspecting mental hygiene records for previous or present mental illness; investigating the truthfulness of the statements in the application; and having the applicant's fingerprints forwarded for review against the records of the New York State Division of Criminal Justice Services ("DCJS") and the FBI to ascertain any previous criminal record.[4] The licensing officer may deny an application if the applicant fails to satisfy any of the enumerated criteria in Penal Law § 400.00(1).

In ensuring that an applicant meets the requirements of Penal Law § 400.00, the License Division conducts a thorough investigation. See Penal Law § 400.00(4). License Division investigators review applications for completeness and accuracy, and investigate the information provided by the applicant for an

[3] Penal Law § 400.00(1) states that: No license shall be issued or renewed except for an applicant twenty-one years of age or older; of good moral character; who has not been convicted anywhere of a felony or a serious offense; who has stated whether he or she has ever suffered any mental illness or been confined to any hospital or institution, public or private, for mental illness; who has not had a license revoked or who is not under a suspension or ineligibility order issued pursuant to the provisions of section 530.14 of the criminal procedure law or section eight hundred forty-two-a of the family court act; and concerning whom no good cause exists for the denial of the license.

[4] Contrary to plaintiffs' assertions, DCJS does not conduct a background investigation, it simply runs a fingerprint report for all arrests in the State of New York and then sends the fingerprints to the FBI to check for out-of-state arrests and warrants. See Appellants' Brief at 3; JA330-331, 357.

average of 2,612 new handgun applications, 9,522 renewal handgun applications, and 973 rifle and shotgun applications each year (JA327, 329-332). Investigators reach out to various federal, state, and city agencies, and other third parties, for information about each applicant's history. Investigators often request additional documentation to support statements made in the application, request further information regarding any reported arrests or convictions, review the applicant's mental health history in detail, and interview the applicant (JA330-331).

B. City Council Authority to Set Fees for Premises Residence Handgun Licenses.

Penal Law § 400.00(14) authorizes the New York City Council to set the fees for the issuance and renewals of all pistol licenses issued in the City of New York. Penal Law § 400.00(14) provides, in relevant part, as follows:

> Fees. In the city of New York and the county of Nassau, the annual license fee shall be twenty-five dollars for gunsmiths and fifty dollars for dealers in firearms. In such city, the city council and in the county of Nassau the Board of Supervisors shall fix the fee to be charged for a license to carry or possess a pistol or revolver and provide for the disposition of such fees.

The City has been granted the authority to set its own licensing fees since 1947, when the New York State Legislature

determined that the then-$1.50 state-imposed fee was "inadequate to compensate for the administrative expense entailed in the issuance" of licenses to possess and carry handguns, particularly with respect to the need for the New York City Police Commissioner to conduct a thorough investigation to protect the "safety and welfare of the community" (JA128). The legislature noted that the City of New York was spending significantly more on its investigation than the costs received from the fees and that it was more appropriate to have the fees defray the costs on a self-sustaining basis, rather than impose a larger cost on the City taxpayers (see JA128-129). Accordingly, since that time, the City Council has periodically adjusted the fees to more accurately reflect the rising costs to the City of processing licenses to possess handguns.

C. Legislative History of Handgun Fees in New York City.

(1) Local Law 32 of 1948.

After the enactment of Penal Law § 400.00(14), the City Council conducted a thorough review to determine the appropriate fee for processing licenses in order for the City to defray the costs of the investigation conducted by the NYPD necessary to protect the public safety. In support of the fee, the NYPD Police Commissioner submitted a letter to the Mayor (JA149-151). The Police Commissioner's letter states, in relevant part, as follows:

> I reiterate my statements made at the public hearing of the Committee on General Welfare of the council that the cost to the City of New York of investigation, processing, issuance of licenses, supervision, and maintenance of records exceeds by a large amount the present fees, and that because of the fact that the applicant for, and recipient of, a pistol license is receiving a special service, distinguished from the service which the City and Police Department are bound by law to perform for all the citizens, a licensee should be required to defray a reasonable portion of the cost of this special service.

(JA 149-150).

The Police Commissioner explained that the investigation is necessary to ensure firearms be kept out of the hands of unqualified persons (JA150). He further stated that "[w]e are unwilling to sacrifice our present efficient method of issuing pistol licenses in the interest of decreasing the cost of licensing fees" (JA150). As part of the legislative process, the Mayor required the Police Commissioner to "demonstrate that the increased fees for the issuance of pistol licenses is reasonable, and does not exceed the cost to the city of New York for the issuance and supervision of licenses" (JA177-178). Accordingly, the Police Commissioner submitted a letter explaining how license applications are processed in accordance with NYPD regulations; and detailing the application, interview,

fingerprinting, and investigatory process in effect at that time (JA166-171). The letter stated that NYPD personnel spent an average of 13 hours per application and noted that the costs exceeded the proposed fee (JA171). This process led to the adoption of Local Law 32 of 1948, which increased the annual fee for a handgun license to $10 for the initial license, and $5 for each renewal license (see JA143-180).

(2) Subsequent Local Law Changes to the License Fees.

Between 1962 and 2004, the City Council passed legislation amending the fees for pistol license applications six times, basing each amendment on the rising costs to the License Division for processing pistol license applications (see JA182-183, 185-206 (Local Law 47 of 1962, relying on cost analysis and memorandum from Police Commissioner stating fees in effect were insufficient due to the increase in labor, services, and supply costs and new procedures adopted in 1957 that require an "extensive and thorough investigation"[5]); JA208-209 (Local Law 78 of 1973); JA211-214 (Local Law 42 of 1979, reviewing "cost per service unit" and setting fee at less than the cost); JA216-

[5] Although the Police Commissioner does not specify the requirements to which he is referring, in 1956, the State passed legislation amending the Penal Law to require applicants to state whether they have ever suffered or been hospitalized for mental illness and requiring an investigation of any such statement (JA233-234 (L. 1956, ch. 200)). In 1957, the State passed a law requiring fingerprints to be forwarded to the FBI (JA260-263 (L. 1957, ch. 111)).

217 (Local Law 37 of 1985, citing cost of processing and increasing fee to cover the cost); JA219-221 (Local Law 51 of 1989, relying on the average cost of processing license applications to increase the fee); and JA223-224 (Local Law 42 of 1992, increasing fee by $35)).

(3) Local Law 37 of 2004.

The City Council most recently amended the fees and the duration of firearms licenses in 2004. Local Law 37 of 2004 extended the length of a handgun license from two to three years and increased the fees from $170 for a two-year license ($255 if prorated for a three-year license), to $340 for a three-year license (JA226-227).

The Report of the Committee on Finance of the City Council detailed the costs associated with processing applications and renewals of handgun licenses and shotgun permits (JA229-238). At the time of the report, the License Division had 40,400 total handgun licensees, 23,300 total rifle and shotgun permit holders, and 4,173 Special Patrolmen (JA230, 234). In 2004 alone, the License Division processed 3,900 handgun applications, 1200 rife/shotgun permit applications, and 900 Special Patrolmen applications (JA234). The Council Report found that although the License Division incurred over $6 million in personnel costs per year for processing applications and renewals for handgun licenses and rifle/shotgun permits, the

License Division only collected $3,350,000 in fees (id.). The Committee on Finance concluded that the license fee "does not reflect the actual costs of licensing, including the expenses for equipment and other resources necessary to process applications, handle investigations, address incidents, and monitor compliance with the laws and rules associated with city and state gun laws" (id.).

Prior to the introduction of Local Law 37 of 2004, with the oversight of the New York City Office of Management and Budget ("OMB"), the NYPD prepared a detailed User Cost Analysis of the cost of processing license applications processed by the License Division (JA333-334, 359-365; 406-407). The OMB User Cost Analysis concluded that the average cost for each application processed by the NYPD License Division was $343.49 (JA370). As a result, OMB recommended that the proposed permit fee be increased to $340.00 (JA336, 367-372). Accordingly, Admin. Code § 10-131(a)(2), as amended by Local Law 37, provides: "Every applicant for a license to carry or possess a pistol or revolver in the city shall pay therefor, a fee of three hundred forty dollars for each original or renewal application for a three year license period or part thereof . . . ."

D. The City's 2010 User Cost Analysis for Handgun Licenses.

In 2010, working in conjunction with OMB, the NYPD again studied the costs to the License Division for processing handgun license applications – this time analyzing the cost to the License Division by the various license types. The NYPD prepared a User Cost Analysis for each of the different types of handgun licenses that it processes (JA374-389). The NYPD calculated that the total cost to the License Division for each Premises Residence pistol license initial application is $977.16 (JA337, 384). For renewals, the cost is $346.92 (JA337, 389).

In September 2010, at the Mayor's request, several Council members introduced legislation, City Council Int. No. 313 of 2010, into the New York City Council to change the current application fee structure for firearm licenses to charge different fees for each type of license issued by the NYPD (JA265-266, 336). This legislation was proposed shortly after the NYPD made other changes to make the license application process more efficient and "customer friendly" – i.e., utilizing technology to speed up the application and review process, providing copies of license applications online, accepting credit card payments, and extending the hours of the License Division (JA272-279, 337).

Although not legally required to do so, this legislation proposed to charge applicants a smaller percentage

of the total costs to the NYPD for firearm licenses by specific license type (see JA409-412). Specifically, the proposed legislation sought to amend the fee to be 7% of the total cost to the License Division for all handgun licenses (or a 93% discount), and 5% of the cost for rifles, shotguns, and theatrical permits (see JA409). Ultimately, the City Council Committee on Finance did not move forward with the proposed legislation (JA281-303, 305-306). Instead, the current $340 fee remains, which although in 2004 was designed to cover the full costs associated with processing applications, represents only a fraction of the costs incurred as of 2010 (JA333).

DISTRICT COURT DETERMINATION

By Opinion and Order dated and filed March 26, 2012, the District Court (Koeltl, D.C.J.) denied plaintiffs' motion for summary judgment, granted City defendants' and intervenor's cross-motions for summary judgment, and directed the entry of final judgment dismissing the complaint (SA1-38).

The District Court first addressed the intervenor's standing argument and found that while the individual plaintiffs have standing to challenge the constitutionality of Penal Law § 400.00(14), it was unnecessary to resolve the question of whether the organizational plaintiffs have standing because there is no constitutional violation in this case (SA10-15). The Court then addressed the constitutional arguments.

The District Court rejected plaintiffs' argument that Admin. Code § 10-131(a)(2) violates the Second Amendment because the fee it imposes is excessive and impermissibly burdens the right to keep and bear arms (SA15-31). The Court first evaluated the permissibility of the fee imposed by examining whether the fee was designed to defray, and did not exceed, the administrative costs of regulating the protected activity (SA16-18). Applying this standard, the Court rejected plaintiffs' argument that the fee must be both nominal and designed to defray administrative expenses to be permissible, found that plaintiffs made no showing that the $340 handgun licensing fee is so exorbitant as to deter the exercise of the right to keep and bear arms, and found that plaintiffs offered no evidence disputing or rebutting City defendants' evidence that the fee imposed does not exceed the administrative costs attendant to the licensing scheme (SA19-27).

The Court then analyzed the City's handgun license fee under the means-end scrutiny applicable to laws that burden the exercise of Second Amendment rights and under an intermediate scrutiny standard (SA27-31). The Court concluded that under either standard, the fee would pass muster (id.) The Court concluded that the $340 fee is substantially related to the important governmental interests in promoting public safety and

preventing gun violence because the fee is designed to recover the costs attendant to the licensing scheme (SA30).

The District Court then addressed plaintiffs' argument that Penal Law § 400.00(14) violates the Equal Protection Clause because it imposes an unequal burden on the Second Amendment rights of New York City residents as compared with other citizens of New York State (SA31-38). At the outset, the Court concluded that rational basis review is the appropriate standard of scrutiny to apply because Penal Law § 400.00(14) involves no suspect classification and imposes no burden on the Second Amendment right to keep and bear arms (SA32). The Court explained that it is Admin. Code § 10-131(a)(2), not Penal Law § 400.00(14), that imposes the fee claimed to burden plaintiffs' Second Amendment Rights and that because New York law ensures that these fees will be designed to defray the administrative costs of licensing they are constitutionally permissible (SA33-34). The Court concluded that, since the State statute does not burden the plaintiff's Second Amendment rights, it should not be subjected to heightened scrutiny (SA34). The Court then concluded that allowing New York City to recover the costs incurred by the licensing scheme constitutes a rational basis for the classification drawn by Penal Law § 400.00(14) (SA35).

The District Court entered judgment on March 27, 2012 dismissing the complaint (see JA9).

SUMMARY OF ARGUMENT

New York City's license fee is used to defray administrative costs and is thus constitutionally valid. License fees, even for the exercise of a constitutional right, are permissible. See Cox v. New Hampshire, 312 U.S. 569, 577 (1941) (finding that government can impose fee on certain kinds of expressive activity as long as the charge does not exceed the administrative costs of regulating the activity). The fee here was established to defray the costs of licensing and continues to cover only a portion of those costs.

The Supreme Court has explicitly rejected plaintiffs' argument that a fee must not only be designed to defray administrative costs, but must also be nominal (which plaintiffs equate to small or minimal) to pass constitutional muster. See Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123, 136-137 (1992); see also Appellants' Brief at 56 (arguing that City many not charge anything more than a "nominal" fee as a condition of issuing this license). And plaintiffs failed to provide any evidentiary support for their argument that the fee is so high that it is inherently prohibitive. See Appellants' Brief at 42. To the contrary, the undisputed and unrebutted evidence establishes that the application fees imposed by Admin. Code § 10-131(a)(2) do not exceed the administrative costs attendant to the licensing scheme. Accordingly, the District

Court properly concluded that the fee established by Admin. Code § 10-131(a)(2) is permissible and does not violate the Second Amendment.

To the extent that it is necessary to reach plaintiff's argument that strict scrutiny applies to its Second Amendment claim, which the City argues it is not, the District Court properly concluded that strict scrutiny does not apply. This Court has recently held that heightened scrutiny is appropriate only as to those regulations that substantially burden the Second Amendment. United States v. Decastro, 682 F.3d 160, 164 (2d Cir. 2012). Because the City's residential handgun license fee does not substantially burden plaintiffs' Second Amendment rights, heightened scrutiny is not appropriate in this case. If this Court reaches a contrary conclusion, it should follow the District Court's application of intermediate scrutiny. Under this standard, it is clear that by establishing a fee to defray administrative costs associated with the City's licensing scheme, Admin. Code § 10-131(a)(2) is substantially and directly related to the important government interest in public safety and survives intermediate scrutiny under the Second Amendment.

Finally, plaintiffs' equal protection argument misapprehends the effects of the state law. Penal Law § 400.00(14) does not "exempt" New York City residents from the

otherwise applicable fee range set forth in the statute. Instead, it confers discretion on the City to set its own licensing fees – within or beyond the range applicable to the rest of the State. In doing so, it draws a classification that is not constitutionally suspect and imposes no burden on plaintiffs' Second Amendment rights. Accordingly, plaintiffs' claim that the statute violates the equal protection clause is reviewed under a rational basis standard, which it easily survives. See Romer v. Evans, 517 U.S. 620, 631 (1996) (Court will uphold a legislative classification so long as it neither burdens a fundamental right nor targets a suspect class and bears a rational relation to some legitimate end). Permitting the City to recover the costs incurred by its handgun licensing scheme constitutes a rational basis for the classification drawn by Penal Law § 400.00(14) and thus, the law does not violate the Equal Protection Clause.

ARGUMENT

This Court reviews *de novo* a district court's grant or denial of a summary judgment motion and construes the evidence in the light most favorable to the nonmoving party, drawing all reasonable inferences in that party's favor. See Okin v. Vill. Of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 427 (2d Cir. 2009). Summary judgment is warranted only where "there is no genuine dispute as to any material fact and the movant is

entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

POINT I

NEW YORK CITY'S RESIDENTIAL HANDGUN LICENSE FEE DOES NOT VIOLATE THE SECOND AMENDMENT.

Plaintiffs do not appear to dispute that the Supreme Court's Second Amendment jurisprudence permits handgun licensing schemes. See District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (recognizing prohibitions on possession of firearms by felons and mentally ill, or laws forbidding carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on commercial sale of arms as "presumptively lawful"), McDonald v. City of Chicago, - U.S. -, 130 S. Ct. 3020, 3047 (2010) (affirming these presumptively lawful prohibitions). Nonetheless, plaintiffs contend that the City's residential handgun license fee unconstitutionally burdens their right to keep and bear arms.

Where the City's license fee regulates but does not prohibit the right to bear arms, the appropriate constitutional question is whether the fee exceeds the cost and is thus an impermissible tax.[6] Nothing in Heller or McDonald recognizes a

[6] To the extent that plaintiffs suggest that the City's residential handgun license fee is a tax, not a fee, (see Appellants' Brief at 41-42), this claim is wholly without merit. The undisputed facts demonstrate that the costs of processing

right to have a license to possess a firearm in one's home free from all regulation. And plaintiffs are not challenging the constitutionality of New York City regulations pertaining to the issuance of firearm licenses or the constitutionality of Penal Law Article 400. Thus, it is not necessary to engage in a Second Amendment constitutional scrutiny analysis. Rather, the well-settled rule that fees are permissible if they do not exceed the costs attendant thereto applies here and, as discussed below, the City has amply demonstrated that the cost of a Premises Residence license exceeds the $340 fee. Accordingly, plaintiffs' claim that Admin. Code § 10-131(a)(2) violates the Second Amendment because it imposes a constitutionally impermissible fee fails as a matter of law. See Appellants' Brief at 41-56.

A. The City's Residence Premises License Fee Does Not Run Afoul of the Supreme Court's Fee Jurisprudence.

Plaintiffs acknowledge, as they must, that states and localities can impose license fees to defray costs incurred as result of protected conduct on individuals seeking to exercise their constitutional rights. See Appellants' Brief at 42. Nonetheless, plaintiffs argue that states and localities may not

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Premises Residence pistol license applications exceed the $340 license fee (JA370, 384). See Murdock v. Pennsylvania, 319 U.S. 105, 113-114 (1943) (amount imposed as regulatory measure to defray expenses of policing activities in question, is a fee not a tax).

impose fees for permission to engage in the basic and core aspects of their fundamental rights unless such fees are nominal and that such fees are not permissible when they are prohibitive. Id. at 41-56. There is no merit to this claim.

It is well-settled that states and localities may charge permitting fees for the exercise of constitutional rights, as long as those fees do not exceed the costs thereof. See Cox v. New Hampshire, 312 U.S. at 577; National Awareness Foundation v. Abrams, 50 F.3d 1159, 1165 (2d Cir. 1995) (holding that licensing fee may reflect administrative costs and costs of enforcing the regulation). Thus, so long as the fees are used to defray the administrative costs of processing license applications, they will be upheld. See Mastrovincenzo v. City of New York, 435 F.3d 78, 83, 100 (2d Cir. 2006) (upholding $200 annual licensing fees for street vending as constitutional).

Moreover, as the District Court properly stated, the argument that fees must be nominal in order to be permissible was explicitly rejected by the Supreme Court in Forsyth County, Georgia v. Nationalist Movement, 505 U.S. at 137 (rejecting argument that only nominal charges are constitutionally permissible). Nor does "nominal" necessarily describe fees that are small or minimal. To the contrary, it simply describes a fee that is "a regulatory measure to defray the expenses of policing the activities in question." See Murdock v.

Pennsylvania, 319 U.S. 105, 113-114 (1943).[7] In Cox the Supreme Court affirmed the imposition of a parade license fee that had a permissible range "from $300 to a nominal amount." Cox, 312 U.S. at 576-577. Thus, plaintiffs' contention that the Supreme Court has approved license fees imposed on conduct lying in the core of personal fundamental rights only when they are nominal is incorrect. See Appellants' Brief at 42, 56.

Nor is there any merit to plaintiffs' argument that the fee at issue in this case is constitutionally impermissible because it is inherently prohibitive. See Appellants' Brief at 42, 56. As the District Court properly found, plaintiffs simply made no showing that this is the case (see SA21). The plaintiffs argue that the fee is "plainly exclusionary and prohibitive" because it far exceeds the comparable license fees charged by other jurisdictions but introduced no evidence that the fee has deterred or is likely to deter any individual from exercising his or her Second Amendment rights (see SA22). As the District Court found, "all of the plaintiffs have paid the fee and have not pointed to any particular hardship they faced

[7] Plaintiffs reliance on Murdock, is misplaced. Nothing in Murdock suggests that a fee can only pass constitutional muster if it is both "nominal" and used to "defray costs." See Forsyth County, Ga., 505 U.S. at 136-137, 139-140 Nor does Murdock stand for the proposition that States cannot impose fees on the basic ability to exercise a constitutional right. Murdock explicitly provides that fees that are regulatory measures, as opposed to taxes, are constitutional. 319 U.S. at 113-14, n.8.

in doing so" (SA22). The fact that other jurisdictions charge significantly lower fees simply does not establish that the City's fee of $340 is excessive in light of the City's documented (and undisputed) licensing costs (SA22). See Appellants' Brief at 53-55.

Indeed, courts have upheld licensing fees much higher than New York City's $340 residential handgun fee. The Sixth Circuit recently rejected a First Amendment challenge to a $3,000 licensing fee in 729, Inc. v. Kenton County Fiscal Court, 402 Fed. Appx. 131 (6th Cir. 2010). In that case, the Court found that a license fee as high as $3,000 was constitutionally permissible because it was justified by the cost of licensing the First Amendment protected activity. 729, Inc., 402 Fed. Appx. at 134-35 (license fee was properly determined by examining costs involved in processing of license, including hourly wages of police officers and other staff, as well as equipment and supplies, and dividing those costs among number of applications processed). Thus, even a substantial licensing fee is permissible where it does not exceed the administrative cost. See Forsyth County, Ga., 505 U.S. at 136 (noting that "[a] tax based on the content of speech does not become more constitutional because it is a small tax"); Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta, 219 F.3d 1301, 1324 (11th Cir. 2000) (festival permit fees ranging from

$950 to $6500 based on size of festival were permissible where fees are imposed based upon sliding scale considering relevant factors which impact City's expense in supporting event).

Ultimately, plaintiffs do not dispute the record evidence establishing that the residence premises handgun license fee is justified by the costs of processing license applications, nor could they, as they failed to introduce any facts on this issue, engage in any discovery, or challenge the fee as an invalid tax. The undisputed facts demonstrate that the costs for processing such applications exceed the $340 Premises Residence license fee set forth in Admin. Code § 10-131(a)(2). The legislative history of the $340 fee codified at Admin. Code § 10-131(a)(2) indicates that the fee was passed by the City Council to cover the actual costs of processing, investigating, and issuing the handgun licenses (see JA229-238) and has been set at or below administrative cost (see JA422-427). In addition, the User Cost Analysis performed in 2003 (prior to the 2004 local law amendment) shows that the average cost to the City for each pistol license application was $343.49 (see JA370). The User Cost Analysis for 2010 shows that the cost to the City for each Premises Residence license application was $977.16 (JA384, 389). Thus, the undisputed facts establish that the fee charged by the License Division to process applications for the issuance and renewals of residential

handgun licenses is utilized to defray the regulatory costs incurred by the License Division.

In sum, there is no merit to plaintiffs' argument that, because the fees at issue are imposed directly on the basic ability to possess handguns in the home, such fees must be nominal to be permissible and are impermissible where, as here, are claimed to be prohibitive. Nor do the cases plaintiffs cite discussing fees imposed on First Amendment activities and voting rights support this claim. See Appellants' Brief at 43-52. To the contrary, the Supreme Court has recognized that even in the context of the fundamental rights to free speech, public safety concerns may justify the imposition of a large fee even on protected activities. See Cox, 312 U.S. at 574. And in Bullock v. Carter, 405 U.S. 134 (1972), where the Supreme Court held that the statutory filing-fee scheme at issue denied equal protection of the laws because it utilized the criterion of ability to pay as a condition to being on the ballot, the Supreme Court noted that filing fees could be constitutional if they approximated the cost of processing the candidate's application for a place on the ballot. See Bullock, 405 U.S. at 148 n.29 ("This would be a different case if the fees approximated the cost of processing a candidate's application for a place on the ballot, a cost resulting from the candidate's decision to enter a primary."). Moreover, plaintiffs' argument

assumes that they have an absolute right to possess a handgun in their homes free of regulation, which is not correct, and ignores the fact that the Second Amendment invokes specific public safety concerns not present in the First Amendment or voting contexts. See Heller, 554 U.S. at 626 (right to keep and bear arms is not right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose); McDonald, 130 S. Ct. at 3047 (right to bear arms is not without restrictions). Thus, where, as here, the challenged licensing fee defrays administrative costs associated with the licensing scheme, the fee is a permissible fee imposed on the exercise of constitutionally protected activities and does not violate the Second Amendment.

B. The License Fee At Issue Here Does Not Infringe On Plaintiffs' Second Amendment Rights.

Notwithstanding plaintiffs' brief point arguing that strict scrutiny applies to Second Amendment challenges (Appellants' Brief at 12-23), plaintiffs do not analyze the premises residence license fee statute under this standard of constitutional scrutiny (Appellants' Brief at 41-56). Instead they limit their argument to their claim that Admin. Code § 10-131(a)(2) establishes a constitutionally impermissible fee. See Appellants' Brief at 41-56. In the event, however, that this Court finds it necessary to engage in a level-of-scrutiny

analysis of plaintiffs' challenge to the $340 fee for a Premises Residence license, because the statute only minimally affects plaintiffs' ability to possess a firearm, City defendants urge this Court not to apply any form of heightened scrutiny to plaintiffs' Second Amendment challenge.

This Court recently held that heightened scrutiny is appropriate only as to those regulations that substantially burden the Second Amendment. Decastro, 682 F.3d at 164. This Court explained that:

> Given *Heller's* emphasis on the weight of the burden imposed by the D.C. gun laws, we do not read the case to mandate that any marginal, incremental or even appreciable restraint on the right to keep and bear arms be subject to heightened scrutiny. Rather, heightened scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) 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).

Id. at 166.

In order to determine whether a law substantially burdens Second Amendment rights, this Court found it appropriate to consult principles from other areas of constitutional law, including the First Amendment. Id. at 167. This Court concluded, by analogy, that laws that regulate the availability

of firearms are not a substantial burden on the right to keep and bear arms if adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense. Id. at 167-168. Applying those principles to the challenge at bar, this Court concluded that because the statute at issue prohibiting the transportation into New York of a firearm purchased in another state only minimally affects the ability to acquire a firearm, it is not subject to any form of heightened scrutiny and does not substantially burden Decastro's right to keep and bear arms. Id. at 168.

Here, plaintiffs do not argue and fail to support any assertion that the challenged fee "substantially" burdens or interferes with the exercise of their Second Amendment rights. As noted above, although plaintiffs argue that the fee is "plainly exclusionary and prohibitive" because it far exceeds the comparable license fees charged by other jurisdictions, they introduced no evidence that the fee has deterred or is likely to deter any individual from exercising his or her Second Amendment rights (SA22). See Appellants' Brief at 42, 56. As the District Court found, all of the plaintiffs have paid the fee and have not pointed to any particular hardship they faced in doing so (id.). In addition, the fact that other jurisdictions charge significantly lower fees does not establish that the

City's fee of $340 is either excessive or prohibitive (see SA22). See Appellants' Brief at 53-55.

Moreover, as this Court noted, the fact that the challenged law makes it more costly to acquire a firearm would not, within limits, be a constitutional defect. Decastro, 682 F.3d at 168 (citing Planned Parenthood v. Casey, 505 U.S. 833, 874 (1992) ("The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.") and Kovacs v. Cooper, 336 U.S. 77, 88-89 (1949) (upholding a city ordinance prohibiting use of sound trucks: "That more people may be more easily and cheaply reached by sound trucks, perhaps borrowed without cost from some zealous supporter, is not enough to call forth constitutional protection")). Thus, "a law does not substantially burden a constitutional right simply because it makes the right more expensive or more difficult to exercise." Nordyke v. King, 644 F.3d 776, 787-788 (9th Cir. Cal. 2011), aff'd at 681 F.3d 1041, 1043 n.2 (9th Cir. 2012) (citing Gonzales v. Carhart, 550 U.S. 124, 157-58 (2007); Zablocki v. Redhail, 434 U.S. 374, 387 n.12 (1978) (noting that a law reducing the federal benefits of a couple by twenty dollars on account of their marriage did not "substantial[ly] . . . interfere[ ] with the freedom to marry," because it was

unlikely to "significantly discourage[ ]" any marriage)). Nor does the City's licensing fee impose a substantial burden on plaintiffs' Second Amendment right where it simply declines to use government funds to further subsidize the exercise of that right. See Nordyke, 644 F.3d at 788. Where plaintiffs fail to demonstrate how the fee is "prohibitive" or imposes a "substantial burden" on their Second Amendment rights, there is no constitutional violation here.[8]

If, however, this Court should find that the residential handgun licensing fee substantially burdens the Second Amendment, City defendants urge this Court to review Admin. Code § 10-131(a)(2) under intermediate scrutiny. As properly noted by the District Court, most of the Circuit Courts of Appeal that have addressed the issue have generally concluded that intermediate scrutiny should be applied to firearms restrictions (SA28-29).[9] See, e.g., United States v.

[8] In addition, because plaintiffs commenced this case as an "as-applied" challenge to the license fee statute (see JA22), where all of the named plaintiffs state that they have paid the $340 licensing fee and none of the individual or organizational plaintiffs have stated that they are unable to pay the fee, plaintiffs fail to establish that the fee statute, as applied to them, constitutes an unconstitutional burden (see JA629, 630, 635).

[9] The Ninth Circuit is an exception, having adopted a substantial burden framework for the analysis of firearm regulations as this Court did in Decastro and similarly refraining from deciding precisely what type of heightened scrutiny applies to laws that

Masciandaro, 638 F.3d 458, 469-470 (4th Cir. 2011) (applying intermediate scrutiny to regulation prohibiting the carrying or possession of loaded handgun in a motor vehicle inside a national park); United States v. Reese, 627 F.3d 792, 800 (10th Cir. 2010), cert. denied, 179 L. Ed. 2d 1214; 2011 U.S. LEXIS 3768 (May 16, 2011) (applying intermediate scrutiny to statute prohibiting gun possession for those who have an outstanding order of protection); United States v. Skoien, 614 F.3d 638 (7th Cir. 2010) (en banc) (applying intermediate scrutiny to law prohibiting the possession of firearms by any person convicted of misdemeanor domestic violence crime); United States v. Marzzarella, 614 F.3d 85, 97 (3d Cir. 2010) (applying intermediate scrutiny to law limiting possession of firearms with obliterated serial number because the law did not "severely limit the possession of firearms"). Although this Circuit has not yet weighed in on the appropriate level of scrutiny to apply to laws that substantially burden the Second Amendment, four district courts in this Circuit have applied intermediate scrutiny to laws bearing on the Second Amendment right.[10] See Osterweil v. Bartlett, 819 F. Supp. 2d 72 (N.D.N.Y. May 20,

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substantially burden Second Amendment rights. Nordyke v. King, 644 F.3d at 784-785.

[10] See Decastro, 682 F.3d at 164-165 ("We therefore need not decide the level of scrutiny applicable to laws that do impose such a burden.").

2011) (finding that New York State's gun licensing scheme survived intermediate scrutiny); Kachalsky v. Cacace, 817 F. Supp. 2d 235, 268 (S.D.N.Y. Sep. 2, 2011) (applying intermediate scrutiny to statute requiring proper cause for issuance of a concealed carry pistol license); Kuck v. Danaher, 822 F. Supp. 2d 109, 127 (D. Conn. Sep. 29, 2011) (applying intermediate scrutiny to statute governing issuance of permits to carry a pistol or revolver in public); United States v. Laurent, 2011 U.S. Dist. LEXIS 139907 (E.D.N.Y. Dec. 2, 2011) (applying intermediate scrutiny to statute criminalizing shipping, transportation, or receipt of a firearm, not possession for persons under indictment for a crime punishable by a term of imprisonment exceeding one year). Here, where the challenged law does not effect a ban on the right to keep and bear arms but only imposes a burden on this right, to the extent that this Court finds the burden substantial, which City defendants argue that it is not, intermediate scrutiny is appropriate. See United States v. Laurent, 2011 U.S. Dist. LEXIS 139907, * at *74-75 (intermediate scrutiny appropriate for law that does not impose total ban on gun possession).

Intermediate scrutiny essentially requires that the government interest be important and that the fit between the regulation and the government's interest be reasonable. "To withstand intermediate scrutiny, a statutory classification must

be substantially related to an important governmental objective." Clark v. Jeter, 486 U.S. 456, 461 (1988); Marzzarella, 614 F.3d at 97-98; see also Osterweil, 2011 U.S. Dist. LEXIS 54196 at *27 (quoting Marzarrella). Here, as the District Court correctly noted, the parties do not dispute that the governmental objectives promoted by New York's handgun licensing scheme are to promote public safety and prevent gun violence and that these objectives are important and substantial ones (SA30). See also JA308-315, 317-322 (discussing importance of keeping firearms out of the hands of dangerous persons). The statutory fee is substantially related to these important governmental interests because the fee is designed to recover costs attendant to the licensing scheme, *i.e.* to defray part of the costs of the handgun application investigatory process designed to ensure that firearms do not end up in the hands of dangerous persons.

Moreover, where the license fee does not exceed the cost of licensing, it is plainly "reasonable," and is sufficiently "tailored" to serve the important governmental objective of safety in investigating applicants seeking authorization to possess a firearm. In order for the City to conduct its investigation to protect the public safety, there are attendant costs (see JA336-338). Plaintiffs are incorrect in arguing that "states and localities may *not* charge people for

permission to engage in the basic and core aspects of their fundamental constitutional rights." Appellants' Brief at 42. As this Court just observed in Decastro, within limits, the fact that the statute makes it more costly to possess a firearm would not be a constitutional defect. Decastro, 682 F.3d at 168. Here, because the challenged statute is substantially and directly related to the important government interest in public safety, it survives intermediate scrutiny under the Second Amendment.

Finally, while City defendants do not concede that strict scrutiny is applicable to the Second Amendment challenge raised here, Admin. Code § 10-131(a)(2) passes constitutional muster even under strict scrutiny. At the outset, strict scrutiny should not apply here because, contrary to plaintiffs' argument in their brief, the license fee statute does not impinge on the "core" of the Second Amendment as it does not establish or purport to establish a prohibition or ban on the exercise of plaintiffs' Second Amendment right to possess a handgun in the home for self-defense. See Appellants' Brief at 42, 43-48; compare Heller (ban on guns in the home, weapons must be completely disassembled); with Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011) (applying more rigorous scrutiny "if not quite 'strict scrutiny'" to Chicago's absolute prohibition on firing ranges in the context of law requiring training at a

firing range to qualify for a premises gun license). In this case, the license fee requirement does not amount to a prohibition on the right to have a firearm in the home; it merely regulates, rather than restricts, the right to possess a firearm in the home, and thus, creates a minimal burden on the right. See Ezell, 651 F.3d at 708. Thus, even under the more exacting test of strict scrutiny, because the $340 triennial permit fee is less than the cost of licensing, it meets the least restrictive means test. See Abrams v. Johnson, 521 U.S. 74, 91 (1997) (law will pass strict scrutiny when narrowly tailored to serve a compelling governmental interest).

POINT II

PENAL LAW § 400.00(14) DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

Plaintiffs' challenge under the Equal Protection Clause targets only the State Statute, Penal Law § 400.00(14), and makes no similar claim concerning Admin. Code § 10-131(a)(2) (SA31n11). For this reason, and in order to avoid unnecessary repetition of argument, the City defendants adopt the arguments set forth in the brief of the Attorney General explaining why plaintiffs' equal protection claim fails as a matter of law and only briefly address the issue herein.

Plaintiffs claim that Penal Law § 400.00(14) violates the Equal Protection Clause by exempting New York City residents

from the otherwise applicable fee range set forth in the statute. See Appellants' Brief at 9, 36. Plaintiffs argue that the "differential fee structure" established by Penal Law § 400.00(14) directly burdens their ability to exercise a fundamental right and thereby triggers strict scrutiny. Id. at 10. There is no merit to these claims.

As the District Court properly concluded, while it is true that Penal Law § 400.00(14) distinguishes between New York City (and Nassau County) residents and other New York State citizens by establishing a $10 maximum fee applicable only to the latter group, this indicates only that the law draws a classification, not that this classification burdens a constitutional right (SA33). This classification does not "exempt" the City from the maximum fee set forth in the statute; rather, it confers discretion upon the City to match, exceed, or fall short of the fee range in Penal Law § 400.00(14). Thus, it is not Penal Law § 400.00(14) but rather Admin. Code § 10-131(a)(2) that imposes the fee claimed to burden the plaintiffs' Second Amendment rights.

As the District Court further found, the discretion Penal Law § 400.00(14) confers upon the City to set its own licensing fees is cabined by New York law, which requires that the amount of a license or permit fee not exceed "a sum reasonably necessary to cover the costs of issuance, inspection

and enforcement" and not be "exacted for revenue purposes or to offset the cost of general governmental functions . . . ." ATM One L.L.C. v. Vill. of Freeport, 276 A.D.2d 573, 574 (2d Dept. 2000). Thus, while Penal Law § 400.00(14) permits the City to set its own licensing fees, New York law ensures that these fees will be designed to defray the administrative costs of licensing and will therefore be permissible under the standards articulated in the Supreme Court's fee jurisprudence. Contrary to plaintiffs' allegation in their brief, it does not permit the City to set an "unbounded" fee. Appellants' Brief at 11. The District Court properly concluded that, by authorizing 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 (SA34). See Lyng v. International Union, 485 U.S. 360, 370 (1988) ("Because the statute challenged here has no substantial impact on any fundamental interest and does not affect with particularity any protected class, we confine our consideration to whether the statutory classification is rationally related to a legitimate governmental interest.") (internal quotations and citations omitted).

Applying rational basis review, Penal Law § 400.00(14) plainly passes constitutional muster where the City amply demonstrates that there is a rational relationship between the

disparity of treatment and some legitimate government purpose. See Heller v. Doe, 509 U.S. 312, 320 (1993). Permitting New York City to recover the costs incurred by the licensing scheme constitutes a rational basis for the classification drawn by Penal Law § 400.00(14). The New York State Legislature, in adopting the 1947 Amendment, could reasonably have concluded that the exemption was a means of providing New York City with the flexibility to set licensing fees at a rate that would more closely approximate the specific costs incurred by the City where the sponsor of the 1947 Amendment indicated that the law was designed to "give discretion" to the City Council and "provid[e] the flexibility required to keep costs and receipts balanced" (JA132).[11] Thus, the objective of permitting New York City to recover the costs associated with its handgun licensing scheme constitutes a rational basis for the classification drawn by Penal Law § 400.00(14). See Nordlinger v. Hahn, 505 U.S. 1, 13-14 (1992) (finding that difference in treatment between newer

[11] The plaintiffs argue that this was not the actual objective of the 1947 Amendment, pointing to additional comments by the sponsor of the legislation that the law had the beneficial effects of discouraging some applicants from seeking a handgun license and allowing for "revenue raising taxes." See Appellants' Brief at 5, 40. However, the proper inquiry on rational basis review "is whether there is any conceivable rational basis justifying [the] distinction" and "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 309 (1993).

and older owners under California assessment system rationally furthered a legitimate state interest and did not violate the equal protection clause).

The District Court properly rejected plaintiffs' argument that, because all jurisdictions incur costs through licensing that are far higher than the $3-$10 fee range applicable elsewhere in New York State, the objective of cost recovery cannot justify the disparate treatment of New York City in Penal Law § 400.00(14) (SA37). See Appellants' Brief at 38-41. As the District Court properly found, plaintiffs introduced no evidence that other jurisdictions sought and were denied an exemption from the $10 maximum fee at the time Penal Law § 400.00(14) was amended or at any time thereafter (SA37). Although the New York State Legislature could have chosen to raise fees uniformly across the State, it chose instead to allow only those jurisdictions that made showings of administrative costs to charge higher fees to offset those costs (see JA523-525, seeking authorization for Nassau County to set licensing fees). That was a reasonable means of achieving the legitimate objective of cost recovery (see JA435-436). Thus, Penal Law § 400.00(14) withstands rational basis scrutiny and does not violate the Equal Protection Clause.

Ultimately, even if Penal Law § 400.00(14) could be viewed as disparately burdening the Second Amendment right by

imposing a higher fee on New York City residents, the law would still pass constitutional muster. Several courts have declined to apply strict scrutiny when considering equal protection challenges to laws that disparately burden Second Amendment rights. While noting that strict scrutiny is generally applicable to equal protection challenges to laws that disparately burden fundamental rights, these courts have concluded that the Second Amendment analysis is sufficient to protect these rights and have either declined to conduct a separate equal protection analysis or have subjected the equal protection challenge to rational basis review. See Hightower v. City of Boston, 2012 U.S. App. LEXIS 18445 *, *42-43 (1st Cir. 2012) (applying rational basis review to equal protection claim implicating Second Amendment rights); Nordyke v. King, 681 F.3d at 1043 n.2 (same). In this case, considered under rational basis review or under the Second Amendment analysis already articulated, any burden imposed by the $340 fee is permissible and thus does not violate the Equal Protection Clause.

CONCLUSION

THE JUDGMENT HEREIN SHOULD BE AFFIRMED.

Dated: New York, New York
September 28, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,168 words, including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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