UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ALFRED G. OSTERWEIL,

Plaintiff, **AFFIRMATION**

-against- 09-CV-0825

GEORGE R. BARTLETT, III, et al., MAD/DRH

Defendants.

Adrienne J. Kerwin, an attorney admitted to practice in the State of New York, affirms under penalty of perjury:

1. I am an Assistant Attorney General of counsel in this matter to Eric T. Schneiderman, Attorney General of the State of New York, attorney for the defendant.

2. I make this affirmation in opposition to plaintiff's motion for attorneys' fees pursuant to 42 USC §1988.

3. A copy of the Second Circuit docket sheet for plaintiff's appeal is annexed hereto at **Exhibit A.**

4. A copy of plaintiff's brief to the Second Circuit is annexed hereto at **Exhibit B**.

5. A copy of defendant's brief to the Second Circuit is annexed hereto at **Exhibit C**.

6. A copy of plaintiff's reply brief to the Second Circuit is annexed hereto at **Exhibit D**.

7. A copy of the non-dispositive opinion of the Second Circuit is annexed hereto at **Exhibit E**.

8. A copy of plaintiff's brief to the New York State Court of Appeals is annexed hereto at **Exhibit F**.

9. A copy of defendant's brief to the New York State Court of Appeals is annexed hereto at **Exhibit G**.

10. A copy of plaintiff's reply brief to the New York State Court of Appeals is annexed hereto at **Exhibit H.**

11. A copy of the opinion of the New York State Court of Appeals is annexed hereto at **Exhibit I**.

12. A copy of the opinion of the Second Circuit is annexed hereto at Exhibit J.

WHEREFORE, the defendant respectfully requests that the court issue an order (1) denying plaintiff's motion for attorneys' fees and costs or, in the alternative, (2) reducing the amount of attorneys' fees sought by the plaintiff and (3) granting the defendant any further relief that the court deems just, proper and equitable.

Dated: Albany, New York
April 7, 2014

s/ Adrienne J. Kerwin
Adrienne J. Kerwin
Bar Roll No. 105154

EXHIBIT A

General Docket
Court of Appeals, 2nd Circuit

Court of Appeals Docket #: 11-2420
Nature of Suit: 3440 CIVIL RIGHTS-Other
Osterweil v. Bartlett
Appeal From: NDNY (SYRACUSE)
Fee Status: Paid

Docketed: 06/14/2011
Termed: 12/23/2013

Case Type Information:
1) Civil
2) Private
3) -

Originating Court Information:
District: 0206-5 : 09-cv-825
Trial Judge: David R. Homer, U.S. Magistrate Judge
Date Filed: 07/21/2009
Date Order/Judgment: 05/20/2011
Date NOA Filed: 06/13/2011

Prior Cases:
None

Current Cases:
None

Panel Assignment: Not available

Alfred G. Osterweil Plaintiff - Appellant	Daniel Louis Schmutter, Esq., - Direct: 732-549-5600 [COR LD NTC Retained] Greenbaum, Rowe, Smith & Davis LLP Metro Corporate Campus One P.O. Box 5600 Woodbridge, NJ 07095 Paul D. Clement, Esq., - [COR NTC Retained] Bancroft PLLC 1919 M Street, NW Washington, DC 20036 David Zachary Hudson, Esq., - Direct: 202-640-6528 [COR NTC Retained] Bancroft PLLC Suite 470 1919 M Street, NW Washington, DC 20036

Andrew M. Cuomo, In his official capacity as Governor of the State of New York Defendant	
Andrew M. Cuomo, In his official capacity as Attorney General of the State of New York Defendant	
George R. Bartlett, III, In his official capacity as Licensing Officer in the County of Schoharie Defendant - Appellee	Frank Brady, - Direct: 518-486-4502 [COR LD NTC Retained] New York State Office of the Attorney General

	The Capitol Albany, NY 12224 Claude S. Platton, Assistant Solicitor General Direct: 212-416-6511 [COR LD NTC Retained] New York State Office of the Attorney General 25th Floor 120 Broadway New York, NY 10271

Alfred G. Osterweil,

Plaintiff - Appellant,

v.

George R. Bartlett, III, In his official capacity as Licensing Officer in the County of Schoharie,

Defendant - Appellee,

David A. Paterson, In his official capacity as Governor of the State of New York, Andrew M. Cuomo, In his official capacity as Attorney General of the State of New York,

Defendants.

06/14/2011	1 12 pg, 137.19 KB	NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellant Alfred G. Osterweil, FILED. [316648] [11-2420]
06/14/2011	2 29 pg, 182.79 KB	DISTRICT COURT ORDER, dated 05/20/2011, RECEIVED.[316661] [11-2420]
06/14/2011	3 1 pg, 123.41 KB	DISTRICT COURT JUDGMENT, dated 05/20/2011, RECEIVED.[316662] [11-2420]
06/14/2011	4 8 pg, 87.6 KB	ELECTRONIC INDEX, in lieu of record, FILED.[316664] [11-2420]
06/16/2011	6 2 pg, 28.63 KB	INSTRUCTIONAL FORMS, to Pro Se litigant, SENT.[316670] [11-2420]
06/21/2011	8 1 pg, 23.62 KB	NOTICE OF APPEARANCE AS SUBSTITUTE COUNSEL, on behalf of -- Andrew M. Cuomo, David A. Paterson and Appellee George R. Bartlett, III, FILED. Service date 06/21/2011 by US mail. [320439] [11-2420]
06/21/2011	9	ATTORNEY, Frank Brady, [8], in place of attorney Eric T. Schneiderman, SUBSTITUTED.[320619] [11-2420]
06/21/2011	10 1 pg, 67.34 KB	FORM D, on behalf of Appellant Alfred G. Osterweil, FILED. Service date 06/22/2011 by CM/ECF.[321201] [11-2420]
08/16/2011	12 2 pg, 39.54 KB	ORDER, dismissing appeal effective 09/06/2011, unless appellant Alfred G. Osterweil submits a acknowledgment and notice of appearance form, copy to pro se appellant, FILED.[366772] [11-2420]
09/06/2011	13 1 pg, 116.31 KB	NOTICE OF APPEARANCE, on behalf of Appellant Alfred G. Osterweil, FILED. Service date 09/06/2011 by CM/ECF. [383226] [11-2420]
09/07/2011	18	ATTORNEY, Daniel Louis Schmutter for Alfred G. Osterweil, in case 11-2420 , [13], ADDED.[383710] [11-2420]
09/22/2011	21 1 pg, 39.35 KB	ORDER, dismissing appeal effective 10/06/2011, unless appellant Alfred G. Osterweil submits Form C, FILED.[398109] [11-2420]
10/05/2011	22 42 pg, 1.2 MB	FORM C, on behalf of Appellant Alfred G. Osterweil, FILED. Service date 10/05/2011 by CM/ECF.[410146] [11-2420]
10/06/2011	26 1 pg, 37.13 KB	NEW CASE MANAGER, Deborah Holmes, ASSIGNED.[410421] [11-2420]
10/06/2011	28 1 pg, 35.37 KB	FORM D, on behalf of Appellant Alfred G. Osterweil, FILED. Service date 10/06/2011 by CM/ECF.[410954] [11-2420]
10/06/2011	29 1 pg, 141.17 KB	CAMP CONFERENCE ORDER: Type of Conference: In-Person, Scheduled Date of Conference: 10/31/2011, Start Time: 3:00 PM, endorsed by Lisa J. Greenberg, FILED.[411022] [11-2420]
10/11/2011	31	SCHEDULING NOTIFICATION, on behalf of Appellant Alfred G. Osterweil, informing Court of proposed due date 01/05/2012, RECEIVED. Service date 10/11/2011 by CM/ECF.[413963] [11-2420]
10/12/2011	32 2 pg, 56.78 KB	DEFECTIVE DOCUMENT, SCHEDULING NOTIFICATION, [31], on behalf of Appellant Alfred G. Osterweil, FILED.[414952] [11-2420]
10/12/2011	33 1 pg, 25.04 KB	SCHEDULING NOTIFICATION, on behalf of Appellant Alfred G. Osterweil, informing Court of proposed due date 01/05/2012, RECEIVED. Service date 10/12/2011 by CM/ECF.[415473] [11-2420]
10/14/2011	34	CURED DEFECTIVE SCHEDULING NOTIFICATION [32], [33], on behalf of Appellant Alfred G. Osterweil, FILED.[417022] [11-2420]
10/14/2011	37 2 pg, 39.29 KB	SO-ORDERED SCHEDULING NOTIFICATION, setting Appellant Alfred G. Osterweil Brief due date as 01/05/2012;. Joint Appendix due date as 01/05/2012, FILED.[418153] [11-2420]
10/18/2011	38 1 pg, 146.64 KB	CAMP CONFERENCE ORDER: Type of Conference: Amended Telephonic, Scheduled Date of Conference: 10/31/2011, Start Time: 3:00 PM, endorsed by Lisa J. Greenberg, FILED.[420460] [11-2420]
12/09/2011	40 1 pg, 34.01 KB	NOTICE, for the submission of additional paper copies of the appendix or joint appendix, SENT.[468564] [11-2420]
12/09/2011	41 5 pg, 175.84 KB	MOTION, to extend time, on behalf of Appellant Alfred G. Osterweil, FILED. Service date 12/09/2011 by CM/ECF. [469393] [11-2420]
12/15/2011	47 1 pg, 18.27 KB	MOTION ORDER, granting motion to extend time [41] filed by Appellant Alfred G. Osterweil, by RKW, FILED. [474256][47] [11-2420]

01/13/2012	48 2 pg, 46.82 KB	NOTICE OF APPEARANCE AS SUBSTITUTE COUNSEL, on behalf of Appellant Alfred G. Osterweil, FILED. Service date 01/13/2012 by CM/ECF. [498236] [11-2420]
01/26/2012	49 1 pg, 32.18 KB	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellant Alfred G. Osterweil, FILED. Service date 01/26/2012 by CM/ECF. [507960] [11-2420]
01/26/2012	50 1 pg, 32.21 KB	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellant Alfred G. Osterweil, FILED. Service date 01/26/2012 by CM/ECF. [508046] [11-2420]
01/26/2012	51	ATTORNEY, Daniel Louis Schmutter for Alfred G. Osterweil, in case 11-2420 , [48], ADDED.[508216] [11-2420]
01/26/2012	52	ATTORNEY, Paul D Clement for Alfred G. Osterweil, in case 11-2420 , [49], ADDED.[508219] [11-2420]
01/26/2012	53	ATTORNEY, David Zachary Hudson for Alfred G. Osterweil, in case 11-2420 , [50], ADDED.[508227] [11-2420]
01/26/2012	54 1 pg, 36.82 KB	ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellant Alfred G. Osterweil, FILED. Service date 01/26/2012 by CM/ECF.[508579] [11-2420]
01/26/2012	55 54 pg, 254.34 KB	BRIEF, on behalf of Appellant Alfred G. Osterweil, FILED. Service date 01/26/2012 by CM/ECF.[509365] [11-2420]
01/26/2012	56 183 pg, 5.05 MB	JOINT APPENDIX, volume 1 of 1, on behalf of Appellant Alfred G. Osterweil, FILED. Service date 01/26/2012 by CM/ECF.[509379] [11-2420]
02/07/2012	63 1 pg, 34.06 KB	SCHEDULING NOTIFICATION, on behalf of Appellee George R. Bartlett, III, informing Court of proposed due date 04/26/2012, RECEIVED. Service date 02/07/2012 by CM/ECF.[519844] [11-2420]
02/07/2012	66 2 pg, 39.44 KB	SO-ORDERED SCHEDULING NOTIFICATION, setting Appellee George R. Bartlett, III Brief due date as 04/26/2012, FILED.[520043] [11-2420]
02/15/2012	67	EXTRA PAPER COPIES, Joint Appendix, Volumes, on behalf of Appellant Alfred G. Osterweil, RECEIVED. [525800] [11-2420]--[Edited 02/15/2012 by DH]
04/18/2012	68 131 pg, 1.98 MB	MOTION, to certify question, on behalf of Appellee George R. Bartlett, III, FILED. Service date 04/18/2012 by CM/ECF. [584194] [11-2420]
04/18/2012	69 37 pg, 460.03 KB	MOTION, to extend time, on behalf of Appellee George R. Bartlett, III, FILED. Service date 04/18/2012 by CM/ECF. [584231] [11-2420]
04/24/2012	72 9 pg, 81.35 KB	OPPOSITION TO MOTION to extend time [69], on behalf of Appellant Alfred G. Osterweil, FILED. Service date 04/24/2012 by CM/ECF. [588839][72] [11-2420]
04/27/2012	77 1 pg, 154.71 KB	MOTION ORDER, denying motion to extend time. Appellee shall file his brief within sixty days from the date of this order, [69] filed by Appellee George R. Bartlett, III; referring motion to certify question [68] filed by Appellee George R. Bartlett, III, by DC, FILED. [593136][77] [11-2420]
04/30/2012	79 18 pg, 102.57 KB	OPPOSITION TO MOTION to certify question [68], on behalf of Appellant Alfred G. Osterweil, FILED. Service date 04/30/2012 by CM/ECF. [594808][79] [11-2420]
06/01/2012	81 2 pg, 72.68 KB	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellee George R. Bartlett, III, FILED. Service date 06/01/2012 by CM/ECF. [625388] [11-2420]
06/01/2012	82	ATTORNEY, Simon Heller for George R. Bartlett III, in case 11-2420 , [81], ADDED.[625481] [11-2420]
06/26/2012	83 50 pg, 181.61 KB	BRIEF, on behalf of Appellee George R. Bartlett, III, FILED. Service date 06/26/2012 by CM/ECF. [648135] [11-2420]
07/03/2012	86 1 pg, 127.74 KB	ORAL ARGUMENT STATEMENT LR 34.1 (a), on behalf of filer Attorney Mr. Simon Heller for Appellee George R. Bartlett, III, FILED. Service date 07/03/2012 by CM/ECF. [654291] [11-2420]
07/06/2012	88 1 pg, 32.36 KB	ORAL ARGUMENT STATEMENT LR 34.1 (a), on behalf of filer Attorney Mr. Daniel Louis Schmutter, Esq. for Appellant Alfred G. Osterweil, FILED. Service date 07/06/2012 by CM/ECF. [656913] [11-2420]
07/10/2012	90 32 pg, 183.32 KB	REPLY BRIEF, on behalf of Appellant Alfred G. Osterweil, FILED. Service date 07/10/2012 by CM/ECF. [659580] [11-2420]
08/16/2012	92	CASE CALENDARING, for the week of 10/22/2012, B, PROPOSED.[694298] [11-2420]
08/30/2012	93	CASE CALENDARING, for argument on 10/26/2012, B Panel, SET.[707777] [11-2420]

09/07/2012	95 2 pg, 81.62 KB	ARGUMENT NOTICE, to attorneys/parties, TRANSMITTED.[713103] [11-2420]
09/07/2012	96 1 pg, 40.14 KB	NOTICE OF HEARING DATE ACKNOWLEDGMENT, on behalf of Appellant Alfred G. Osterweil, FILED. Service date 09/07/2012 by CM/ECF. [713745] [11-2420]
09/18/2012	97 1 pg, 35.5 KB	NOTICE OF HEARING DATE ACKNOWLEDGMENT, on behalf of Appellee George R. Bartlett, III, FILED. Service date 09/18/2012 by CM/ECF. [723068] [11-2420]
09/24/2012	99 1 pg, 37.7 KB	ORDER, dated 09/24/2012, referring motion to certify a question of state law, FILED.[728138] [11-2420]
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11/14/2012	101 1 pg, 34.19 KB	REQUEST FOR ARGUMENT CD, with fee, RECEIVED.[782902] [11-2420]
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01/29/2013	103 14 pg, 40.85 KB	NON- DISPOSITIVE OPINION, question certified to the New York Court of Appeals, by DJ, FILED.[829365] [11-2420]--[Edited 01/29/2013 by DH]--[Edited 01/29/2013 by DH]
01/29/2013	105 26 pg, 916.74 KB	ORDER, certifying question to the New York State Court of Appeals, FILED.[829429] [11-2420]
01/29/2013	107 14 pg, 295.38 KB	CERTIFIED ORDER, dated 01/29/2013, to New York Court of Appeals, FILED.[830188] [11-2420]
02/08/2013	112 3 pg, 131.73 KB	LETTER, dated 02/01/2013, on behalf of New York State Court of Appeals, RECEIVED. Service date 02/04/2013 by US mail.[841751] [11-2420]
02/26/2013	114 3 pg, 97.83 KB	LETTER, dated 02/19/2013, on behalf of, State of New York Court of Appeals RECEIVED. Service date 02/21/2013 by US mail.[857646] [11-2420]
04/30/2013	116	ARGUMENT CD, TRANSMITTED.[922838] [11-2420]
05/28/2013	117 2 pg, 94.12 KB	LETTER, dated 05/24/2013, regarding scheduling, on behalf of State of New York Court of Appeals, , RECEIVED. Service date 05/28/2013 by US mail.[963080] [11-2420]
08/19/2013	119 5 pg, 221.5 KB	LETTER, dated 08/19/2013, re: letter to counsel, on behalf of State of New York Court of Appeals, RECEIVED. Service date 08/19/2013 by US mail.[1024845] [11-2420]
10/15/2013	121 1 pg, 57.36 KB	NOTICE OF APPEARANCE AS SUBSTITUTE COUNSEL, on behalf of Appellee George R. Bartlett, III, FILED. Service date 10/15/2013 by CM/ECF. [1065223] [11-2420]
10/15/2013	122	ATTORNEY, Claude S. Platton, [121], in place of attorney Simon Heller, SUBSTITUTED.[1065273] [11-2420]
12/20/2013	123 11 pg, 82.98 KB	LETTER, on behalf of Appellee George R. Bartlett, III, RECEIVED. Service date 12/20/2013 by CM/ECF. [1120183] [11-2420]
12/23/2013	126 1 pg, 37.02 KB	NEW CASE MANAGER, Yana Segal, ASSIGNED.[1120616] [11-2420]
12/23/2013	127 6 pg, 90.84 KB	OPINION, vacating decision of the district court and remanding the case, per curiam (DJ, JMW, S.D. O'CONNOR), FILED.[1120624] [11-2420]
12/23/2013	128 4 pg, 276.02 KB	CERTIFIED OPINION, dated 12/23/2013, to NDNY (SYRACUSE), ISSUED.[1120629] [11-2420]
12/23/2013	132 1 pg, 160.69 KB	JUDGMENT, FILED.[1121267] [11-2420]
01/14/2014	133 1 pg, 415.18 KB	JUDGMENT MANDATE, ISSUED.[1133212] [11-2420]

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EXHIBIT B

11-2420 cv

In the

United States Court of Appeals

for the Second Circuit

Alfred G. Osterweil,

Plaintiff - Appellant,

v.

George R. Bartlett, III,
In his official capacity as Licensing Officer in the County of Schoharie,

Defendant – Appellee,

David A. Paterson, in his official capacity as
Governor of the State of New York; Andrew M. Cuomo, in his official capacity as
Attorney General of the State of New York,

Defendants.

On Appeal from the United States District Court
for the Northern District of New York (Syracuse)

BRIEF FOR APPELLANT ALFRED G. OSTERWEIL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Appellant hereby certifies that none of the parties to this case are corporate entities.

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*Citations upon which Appellant primarily relies are marked with asterisks.

JURISDICTIONAL STATEMENT

This case was originally filed in the United States District Court for the Northern District of New York on July 21, 2009. A7.[1] The District Court had subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 as it involves claims arising under 42 U.S.C. § 1983 and the Constitution. On May 20, 2011, the District Court entered a final judgment disposing of all claims. A180; *see* A151 (2011 WL 1983340). Plaintiff-Appellant filed a timely notice of appeal on June 13, 2011. A181. This Court has appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 & 1294.

STATEMENT OF ISSUES PRESENTED

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the Supreme Court of the United States made clear that the Second Amendment to the United States Constitution guarantees the fundamental right of an individual to possess a handgun in his home for the purpose of self-defense. According to New York State, however, an individual can only have one such home. Thus, according to New York, if you own a home in New York and live there with your family, but that home is not your primary residence, you have no right to possess a handgun for self-defense.

---

[1] Citations to the District Court docket (No. 09-CV-00825) are designated "Doc." followed by the appropriate document number and page number, and citations to the Joint Appendix are designated "A__."

Plaintiff-Appellant Alfred G. Osterweil ("Mr. Osterweil") owns a home in New York, but only lives in that home part of the year. Because of that fact, he was denied a license to keep a handgun in his New York home. This case requires the Court to decide:

1. Whether the District Court erred by holding that New York's statutory scheme denying handgun permits to all individuals whose "primary residence" is in another State does not violate the fundamental Second Amendment right to keep and bear arms in defense of hearth and home.

2. Whether in light of the recognition in *Heller* and *McDonald* of the fundamental nature of Second Amendment rights, the Equal Protection Clause permits New York to distinguish between domiciliary residents and non-domiciliary residents when it comes to the right to keep and bear arms in the home.

STATEMENT OF THE CASE

Mr. Osterweil is a part-time resident of Schoharie County, New York. Although Mr. Osterweil owns a home in Schoharie, pays property taxes on that home, and spends several months there each year, his "domicile" is in Louisiana. Mr. Osterweil applied for and was denied a license to keep a handgun in his New York home. The licensing officer, George R. Bartlett, III ("Bartlett"), based his denial of Mr. Osterweil's request on his part-time resident status: New York law only provides for the issuance of home handgun licenses to "residents," where

"residence" means "domicile," of which there can be only one. A7; *see* N.Y. Penal Law § 400.00(3)(a).

Mr. Osterweil filed this suit against Bartlett and other state officials pursuant to 42 U.S.C. § 1983, alleging that New York's domicile requirement, which denies part-time residents the ability to obtain a permit to possess a handgun in their homes, abridges his fundamental Second Amendment right to keep and bear arms. A7. The complaint further alleged that New York's treatment of part-time residents, as compared to those domiciled in New York, violates the Equal Protection Clause of the Fourteenth Amendment. A7.

The Honorable Mae A. D'Agostino, United States District Court Judge for the Northern District of New York, granted summary judgment in favor of defendants. A180. Notwithstanding *Heller*'s clear recognition of a Second Amendment right to possess a firearm in the home and *McDonald*'s recognition of the Second Amendment's status as a fundamental right fully applicable against state action, the court applied intermediate scrutiny and held that the New York domicile requirement serves the "significant interest" of "allow[ing] the government to monitor its licensees more closely and better ensure public safety," and that "there is a substantial relationship between New York's residency requirement and the government's" interest. A169–A171. The District Court also

concluded that "New York's different treatment of nonresidents does not violate the Equal Protection Clause." A172.

Mr. Osterweil now appeals the District Court's judgment.

STATEMENT OF FACTS

Mr. Osterweil is a retired attorney who previously served in the U.S. Army. A108. For a number of years, Mr. Osterweil lived with his family full time on a 21-acre plot of land in Schoharie County at 310 Rossman Fly Road, Summit, New York. A14. While in Schoharie, Mr. Osterweil served as a commissioner on the Summit Fire District Board of Commissioners and as an unpaid member of the Board of Directors of the Western Catskills Revitalization Corporation. After he retired, he decided to split his time between New York and Louisiana. He now spends the majority of his time in Louisiana and is domiciled there. Mr. Osterweil keeps a .22-caliber revolver in his Louisiana home for purposes of self-defense. A107, A110.

On May 21, 2008, Mr. Osterweil applied to Schoharie County officials for a New York State pistol license pursuant to Penal Law § 400.00(2)(a), without which he may not lawfully possess a handgun in his home under New York law. A7; A25 ¶ 2.[2] To obtain a license, an applicant must meet several requirements.

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[2] New York law imposes a general ban on handgun possession. N.Y. Penal Law §§ 265.01(1), 265.02(4), 265.20. In order to legally possess a handgun, one must

The licensing process begins with the submission of an application to the local licensing officer.[3] § 400.00(3). The applicant must be over 21 years of age, of good moral character, not have a history of crime or mental illness, and there must not exist any other "good cause" for denying the license. § 400.00(1). The application triggers a local investigation probing the applicant's mental health and criminal history, moral character, and, in some circumstances, whether there is a "need" for the requested license. § 400.00(4). The investigating authority also takes the applicant's fingerprints and uses that information to check for criminal history through the New York State Division of Criminal Justice Services ("DCJS"), the National Crime Information Center ("NCIC"), and the Federal Bureau of Investigation. *See ibid*; A57. The New York licensing law also states that an application for "a license to carry or possess a pistol or revolver" "shall be made . . . to the licensing officer in the city or county . . . where the applicant

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qualify for an enumerated statutory exemption from that prohibition. Having a § 400.00(2)(a) license provides such an exemption. It should be noted, however, that the constitutional validity of presumptively banning the exercise of a fundamental right (here, the possession of a handgun for self-defense within the home) and then creating "an exception" to the ban by way of a licensing scheme is a question that is not before the court in this case.

[3] The identity of the licensing officer varies from place to place under New York law. In many places, the licensing officer is the state "judge or justice of a court of record having his office in the county of issuance." § 265.00(10). In some instances, the police commissioner or sheriff plays the role. *Ibid.*

resides, is principally employed or has his principal place of business as merchant or storekeeper." § 400.00(3)(a).

Mr. Osterweil's home-handgun license application set this statutory machinery in motion. The Schoharie County Sheriff initiated the required investigation. A25 ¶ 3. He verified the information set forth in Mr. Osterweil's application, contacted his references, conducted a background check using state information resources and the NCIC, and obtained and submitted Mr. Osterweil's fingerprints to the DCJS and the FBI. A25 ¶ 3.

On June 24, 2008, the Sheriff sent a letter to Mr. Osterweil informing him that he needed to come to the Sheriff's office "to correct and/or complete some information" on his application. A25–A26 ¶ 4. In a letter sent on June 25, 2008, Mr. Osterweil informed the Sheriff that since he had applied for the permit he had purchased a home in Louisiana that he intended to use as his primary residence, and that he would now use his Schoharie residence for only part of the year. A26 ¶ 5. The letter inquired whether under such circumstances Mr. Osterweil was still eligible for a permit. A26 ¶ 5.

On August 13, 2008, the DCJS advised the Sheriff that it was unable to determine whether Mr. Osterweil had a criminal record because of "the poor quality of the fingerprint impressions received." A26 ¶ 8. And on July 31, 2008, the FBI similarly determined that "the quality of the characteristics" of Mr.

Osterweil's fingerprints was "too low to be used." A26 ¶ 9. A second set of fingerprints submitted by Mr. Osterweil were similarly insufficient to permit analysis. A26–A27 ¶ 11.

On February 18, 2009, the Sheriff informed Mr. Osterweil that he was forwarding his application to Bartlett. A27 ¶ 13. In a February 20, 2009 letter, Bartlett informed Mr. Osterweil of what he viewed as the two major obstacles to his application: (1) the absence of fingerprints that could be used by the DCJS and FBI, and (2) his residency. A27 ¶ 14. Mr. Osterweil responded with a letter on March 3, 2009, explaining to Bartlett various techniques that could be employed to address individuals with "worn fingerprints" and pointing out that the Sheriff failed to use such techniques. A27 ¶ 16.

After several exchanges between Mr. Osterweil and Bartlett, Bartlett issued a decision on May 29, 2009, denying Mr. Osterweil's request for a pistol permit. A134 (Exh. 21). Bartlett determined that Mr. Osterweil's application was incomplete because the Sheriff was never able to finish the statutorily required investigation due to the fingerprint issue. But that was not the reason for Bartlett's denial of Mr. Osterweil's application. Bartlett rejected Mr. Osterweil's request after concluding that pistol permits may not be issued to "non-residents," and that Mr. Osterweil was a "non-resident" under New York law. A143–A144 & n.2 (citing *Mahoney v. Lewis*, 199 A.D.2d 734, 735 (N.Y. App. Div. 1993) ("we

expressly have held that 'where a statute prescribes "residence" as a qualification for a privilege or the enjoyment of a benefit, the word is equivalent to "domicile". . . .'"). Bartlett further determined that New York's residency requirement was consistent with *Heller*. A145–A150.

Bartlett never concluded that Mr. Osterweil lacked the necessary character or qualifications to obtain a home handgun license. The license denial was predicated entirely on the conclusion that Mr. Osterweil is domiciled in Louisiana and therefore is not a New York resident, notwithstanding that Mr. Osterweil owns a home in New York and lives there part of the year with his wife, that he has family in Summit, and that Mr. Osterweil and his wife have participated and continue to participate in social, political, and community affairs in Schoharie County, including remaining as dues-paying members of the Summit Snow Riders, a local social group, and the Summit Conservation Club. A123.

Mr. Osterweil filed suit pursuant to 42 U.S.C. § 1983 against Bartlett, David A. Patterson, then Governor of the State of New York, and Andrew M. Cuomo, then Attorney General of the State of New York. A7. As relevant here, Mr. Osterweil's complaint alleged that the defendants denied him his fundamental Second Amendment right to keep and bear arms by denying his license request and that this denial ran afoul of the Equal Protection Clause. A10–A11.

After the defendants other than Bartlett were dismissed from the suit, Doc. 15, both Mr. Osterweil and Bartlett moved for summary judgment.[4] A14, A22. The District Court ruled against Mr. Osterweil. A151. First, the District Court addressed the level of scrutiny applicable to Mr. Osterweil's constitutional claims. The District Court concluded that "fundamental constitutional rights are not invariably subject to strict scrutiny," and that strict scrutiny was inappropriate here. A164. After reviewing a series of post-*Heller* cases, the District Court held "that intermediate scrutiny is the appropriate level of scrutiny for this case." A168. The court went on to conclude that the government had a "significant interest" in "monitor[ing] its licensees . . . [to] better ensure public safety," and that "there is a substantial relationship between New York's residency requirement and" achieving that interest. A164–A171. The District Court also concluded that "New York's different treatment of nonresidents does not violate the Equal Protection Clause." A172.

SUMMARY OF ARGUMENT

I. The decision below is fundamentally inconsistent with the Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and

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[4] Mr. Osterweil's Second Amendment claims were initially dismissed. He filed a motion for reconsideration after the Supreme Court issued its decision in *McDonald v. Chicago*, 130 S. Ct. 3020 (2010), and Mr. Osterweil's Second Amendment claims were reinstated. Doc. 22, 26.

McDonald v. Chicago, 130 S. Ct. 3020 (2010). *Heller* made clear that the Second Amendment protects individual rights as a general matter and the right to keep and bear a handgun for self-protection in the home in particular. *McDonald* recognized that the right protected by the Second Amendment is not just an individual one, but a fundamental right protected against intrusion from state and local governments via its incorporation through the Fourteenth Amendment. Those decisions make clear that the result here is indefensible—not one word in either decision suggests that the Second Amendment is a part-time right such that a lawful, but not full-year, resident may be denied an ability to possess a handgun in the home—and that the District Court applied a legal standard that provides insufficient protection for the right.

Restrictions on the right to keep and bear arms are subject to strict scrutiny. That conclusion follows directly from both *McDonald*'s holding that the right to keep and bear arms is a fundamental right and from *Heller*'s rejection of rational basis scrutiny and an "interest-balancing" approach, which was simply intermediate scrutiny by another name.

The District Court's reasons for applying only intermediate scrutiny to New York's ban on home handgun possession by part-time residents are unavailing. The District Court suggested that not every law that impedes a fundamental right is subject to strict scrutiny and cited First Amendment cases applying intermediate

scrutiny to prove the point. But Justice Breyer also cited First Amendment intermediate scrutiny cases to support his "interest-balancing" approach, and the majority rejected that standard as insufficiently protective of the right. What is more, New York's ban on part-time residents' possession in the home is no mere time, place, and manner restriction. It is a complete prohibition on the core right recognized in *Heller*.

Contrary to the District Court's conclusion, *Heller*'s "list of presumptively lawful regulatory measures" is in no way inconsistent with the application of strict scrutiny. A169. Presumptions can be rebutted, and there are certainly laws that would survive even the strictest of scrutiny or that would not be entitled to Second Amendment protection because the conduct at issue falls outside the scope of that protection. In all events, *Heller*'s underlying logic—that the right to keep and bear arms is fundamental and that restrictions on the right require strict scrutiny—is wholly consistent with its dictum that certain types of restrictions, such as bans on possession by felons and the mentally ill, are "presumptively lawful," *Heller*, 554 U.S. at 627 & n.26. In the end, given the general rule that restrictions on fundamental constitutional rights are subject to strict scrutiny and *McDonald*'s unequivocal holding that Second Amendment rights are fundamental, the contention that restrictions on Second Amendment rights should be permitted

under a less-demanding standard reduces to the contention that the right to keep and bear arms is a lesser right. It is not, and *McDonald* settles the matter.

New York's law amounts to a total prohibition of the exercise of the core right protected by the Second Amendment, and is thus unconstitutional. As interpreted and applied by the District Court, New York's handgun licensing scheme effectively eviscerates the right of part-time residents to defend their New York homes using handguns. Citing New York case law, the court concluded that "[n]onresidents without in-state employment are completely excluded from the [State's] license-application procedure," and thus conclusively prohibited from keeping a handgun in their home. A159. That complete ban cannot be squared with *Heller*, which made clear that the core purpose of the Second Amendment right is to allow "law-abiding, responsible citizens to use arms in defense of hearth and home" where the need for self-defense "is most acute." 554 U.S. at 628, 635.

Defense of home is not less vital or constitutionally protected when the hearth is only fired up during a part of the year. If anything, the constitutional right is more vital for part-time residents because part-time residences tend to be more rural and the absence of full-time occupants can make them attractive targets for criminal activity. Moreover, "handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Heller*, 554 U.S. at 629. The New York law makes it impossible for

part-time residents like Mr. Osterweil to use handguns "for the core lawful purpose of self-defense and is hence unconstitutional." *Ibid.*

Heller's dispositive treatment of bans on handguns in the home demands reversal of the District Court's decision. But the New York ban on home handgun possession by part-time residents also fails strict scrutiny. The New York law prevents part-time residents who are not domiciliaries from possessing handguns in their homes based on a purported interest in monitoring licensees. But there is no time limit linked to the domicile requirement, as domicile is largely determined by the subjective basis of a person's intent. Indeed, one could be domiciled in New York and spend little-to-no time there. So, a New York domiciliary can have a license to have a handgun in their home spending nearly no time there, and a non-domiciliary who spends nearly all of his time in New York cannot. That the law elides such a broad swath of conduct relevant to its stated monitoring interest completely undermines the assertion that the interest is compelling and clearly demonstrates that the law lacks the necessary narrow tailoring to withstand scrutiny. Furthermore, there is no evidence that the residency requirement in and of itself does anything to further the State's asserted interests.

What is more, categorically excluding *all* non-domiciliaries is certainly not the least restrictive means of achieving the State's monitoring and public safety goals. The part-time resident possession ban is not limited to those individuals

who pose a heightened threat to others, or to circumstances that for some other reason might create a particularly acute danger. Moreover, there are myriad other ways that the State could achieve its goals short of an illegitimate and unnecessary categorical ban.

Indeed, New York's ban on part-time resident home handgun possession fails even intermediate scrutiny, properly applied. The District Court found a "substantial relationship between New York's residency requirement and the government's significant interest" primarily because the "State is in a considerably better position to monitor residents' eligibility for firearm licenses as compared to nonresidents." A170. But it is not at all clear that this is true, as Mr. Osterweil's case demonstrates. Beyond his residency and issues with his fingerprints—an issue not unique to "nonresidents"—Mr. Osterweil would have easily qualified for a license under § 400.00. Nothing about his part-time resident status made it more cumbersome to ascertain his eligibility. And the court engaged in no meaningful consideration of the fit between the State's claimed interest and the contours of its regulatory scheme. It is also critical to recognize that New York's policy works a complete ban on a part-time resident's possession in the home. New York does not defer to licensing decisions of the domiciliary state or provide any alternative through which the State's purported interests could be addressed. *Heller* makes

crystal clear that a complete ban is not a constitutional option when it comes to handguns in the home.

II. New York's ban on non-resident handgun possession suffers from a second fatal flaw: it violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. When "state laws impinge on personal rights protected by the Constitution" "strict scrutiny" applies, and such laws "will be sustained only if they are suitably tailored to serve a compelling state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

As already discussed, the State lacks a compelling interest to justify imposing a complete ban on part-time residents' constitutional right to possess handguns in their home, and has no adequate justification for treating full-time residents and part-time residents differently. Mr. Osterweil has the same interest in protecting his family when staying at his home in Schoharie as do his New York-domiciled neighbors down the street. What is more, the facts of Mr. Osterweil's case show that the conclusion the District Court relied on—that it is harder to obtain information about nonresidents—is incorrect. Other than usable fingerprints, Bartlett had all the information he needed to decide whether Mr. Osterweil was deserving of a handgun license. The only thing standing between Mr. Osterweil and the license he desired was his part-time residency.

STANDARD OF REVIEW

This case presents "purely legal questions concerning the scope of the" Second Amendment and the Equal Protection Clause of the Fourteenth Amendment, and is thus subject to de novo review. *Maslow v. Bd. of Elections in City of N.Y.*, 658 F.3d 291, 295–96 (2d Cir. 2011). Because the District Court granted Bartlett's motion for summary judgment, any factual issues are construed in the light most favorable to Mr. Osterweil, the non-moving party. *Jeffreys v. City of N.Y.*, 426 F.3d 549, 553 (2d Cir. 2005).

ARGUMENT

I. New York's Ban On Home Handgun Possession By Part-Time State Residents Violates the Second Amendment.

The Second Amendment provides that "A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court recognized that the Second Amendment protects the individual right to keep and bear arms in the home and for self-defense. And in *McDonald v. Chicago*, 130 S. Ct. 3020, 3021, 3050 (2010), the Court concluded that "the Second Amendment right recognized in *Heller*" was a fundamental right that was fully applicable to the States. Those two precedents taken together should have made it crystal clear that New York's complete ban on a Mr. Osterweil's ability to possess a handgun for defense of his New York

property was unconstitutional. But those clear precedents did not stop the District Court from treating Second Amendment rights as second-class rights, wrongly applying intermediate scrutiny to a law that substantially burdens fundamental rights, and upholding a law that categorically and impermissibly bans home handgun possession by part-time residents.

A. New York's Ban On Home Handgun Possession By Part-Time State Residents Is, At A Minimum, Subject To Strict Scrutiny.

After *District of Columbia v. Heller* and *McDonald v. Chicago*, it should be clear that restrictions on the right to keep and bear arms are subject to strict scrutiny. Although a number of courts have resisted that conclusion and applied intermediate scrutiny or reserved strict scrutiny for invasions of the "core" of the right, the implications of *Heller* and *McDonald* are clear. That conclusion flows directly from *McDonald*'s holding that the right to keep and bear arms is incorporated through the Fourteenth Amendment because of its fundamental nature and from *Heller*'s rejection of rational basis scrutiny and an "interest-balancing" approach, which was simply intermediate scrutiny by another name.

When a law interferes with "fundamental constitutional rights," it is subject to "strict judicial scrutiny." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 15 (1973); *see Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983) ("strict scrutiny [is] applied when government action impinges upon a fundamental right protected by the Constitution"). Supreme Court precedent is

replete with such statements. *See, e.g.*, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 n.14 (1985) ("governments are entitled to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied"); *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting) ("the standard of review that [is] appropriate" for "a fundamental right" is "strict scrutiny") (internal quotation marks omitted); *Reno v. Flores*, 507 U.S. 292, 302 (1993) (due process "forbids the government to infringe certain 'fundamental' liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest"); *Foucha v. Lousiana*, 504 U.S. 71, 115 (1992) (Thomas, J., dissenting) ("Certain substantive rights we have recognized as 'fundamental'; legislation trenching upon these is subjected to 'strict scrutiny' . . . ."); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("classifications affecting fundamental rights . . . are given the most exacting scrutiny"); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution . . . ."). And this Court has recognized that it "must evaluate policies with strict scrutiny if they . . . implicate a fundamental right." *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 99 n.6 (2d Cir. 2009).[5]

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[5] Of course, the levels-of-scrutiny framework does not govern if an enumerated

McDonald removed all doubt about the fundamental nature of the right to keep and bear arms, declaring that "the right to bear arms was fundamental to the newly formed system of government." 130 S. Ct. at 3037; *see id.* at 3042 ("[T]he Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."); *id.* at 3041 ("Evidence from the period immediately following the ratification of the Fourteenth Amendment only confirms that the right to keep and bear arms was considered fundamental."); *id.* at 3037 ("The right to keep and bear arms was considered no less fundamental by those who drafted and ratified the Bill of Rights."); *id.* at 3040 (39th Congress' "efforts to safeguard the right to keep and bear arms demonstrate that the right was still recognized to be fundamental"); *id.* at 3041 ("In debating the Fourteenth Amendment, the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection.").

Indeed, whether the right to keep and bear arms is fundamental was the basic question presented in *McDonald*. The Court stated that in deciding "whether the Second Amendment right to keep and bear arms is incorporated in the concept of due process, . . . we must decide whether the right to keep and bear arms is

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right directly suggests its own standard, such as the Fourth Amendment's prohibition on "unreasonable searches," or is by its terms absolute where it applies, such as the Sixth Amendment's guarantee that the accused "shall enjoy," *inter alia*, the right to confront witnesses.

fundamental to our scheme of ordered liberty." *Id.* at 3036 (emphasis omitted). And the same basic question featured prominently in *Heller*. The first sentence of the Court's analysis of this question in *McDonald* states that "*Heller* points unmistakably to [an affirmative] answer." *Id.*[6] *Heller* explained that, "[b]y the time of the founding, the right to have arms had become fundamental for English subjects." 554 U.S. at 593. It was this fundamental "pre-existing right" that the Second Amendment "codified." *Id.* at 592 (emphasis omitted). Accordingly, the right to keep and bear arms—like any other fundamental right—should be subject to strict scrutiny.

Heller did not explicitly state that "strict scrutiny" is required of laws that restrict the rights protected by the Second Amendment. That is because the *Heller* court eschewed levels of scrutiny in favor of an approach that focused more directly on history, which provided a clear answer as to the constitutionality of the ordinance before the Court in *Heller*. As *Heller* explained, "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban." 554 U.S. at 629; *see also id.* at 634. Nonetheless, *Heller* points

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[6] Importantly, Justice Thomas joined this part of the opinion of the Court and agreed that the Second Amendment right is fundamental. *See id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment) ("[T]he plurality opinion concludes that the right to keep and bear arms applies to the States through the Fourteenth Amendment's Due Process Clause because it is 'fundamental' to the American 'scheme of ordered liberty' . . . . I agree with that description of the right.").

clearly to strict scrutiny as the level of scrutiny that would be required within a levels-of-scrutiny framework or when history does not provide a definitive answer, and *McDonald*'s incorporation holding eliminated any potential doubt on that score. *Heller* may leave room for debate about when to apply strict scrutiny and when a *sui generis* historical approach should be applied, but *Heller* and *McDonald* leave no room for debate about what level of scrutiny applies when levels of scrutiny are applicable.

That strict scrutiny applies to laws that substantially burden Second Amendment rights is confirmed by the approaches that the Supreme Court rejected in *Heller* and *McDonald*. *Heller* explicitly and definitively rejected not only rational basis review, *id.* at 628 n.27, but also the "interest-balancing" approach endorsed by Justice Breyer—which is intermediate scrutiny by another name. *See id.* at 634; *McDonald*, 130 S. Ct. at 3050 (plurality op.) ("while [Justice Breyer's] opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion"). Justice Breyer called his approach "interest-balancing" because of his view that the government's interest in regulating firearms—some version of protecting public safety—would always be important or compelling. Thus, in his view, whether the level of scrutiny applied was strict (requiring a compelling government interest) or intermediate (requiring only an important interest), the government interest would always qualify, and the analysis would

really turn on a search for the appropriate degree of fit, which Justice Breyer described as interest-balancing. *See Heller*, 554 U.S. at 689–90 (Breyer, J., dissenting).

Semantics aside, Justice Breyer's approach in substance was simply intermediate scrutiny. Justice Breyer relied (*see id.* at 690) on cases such as *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), and *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), which explicitly apply intermediate scrutiny. Even more revealingly, Justice Breyer invoked *Burdick v. Takushi*, 504 U.S. 428 (1992), the case on which the United States principally relied in advocating that the Court adopt intermediate scrutiny. *See* Brief for the United States as Amicus Curiae at 8, 24, 28, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 157201. Justice Breyer's interest-balancing amounted to intermediate scrutiny, and the Court rejected it (and reaffirmed that rejection in *McDonald*).

Heller and *McDonald* make clear that the kind of reasonableness review that applies in the intermediate scrutiny context is so malleable that it provides "no constitutional guarantee at all." *Heller*, 554 U.S. at 634. A standard rejected by both *Heller* and *McDonald* as categorically underprotective of Second Amendment rights clearly cannot govern analysis of regulations that substantially burden such

rights, and it was entirely inappropriate for the District Court to apply intermediate scrutiny to Mr. Osterweil's Second Amendment challenge.

The District Court's reasons for applying intermediate scrutiny to New York's ban on home handgun possession by part-time residents are unavailing. The District Court first observed that "fundamental constitutional rights are not invariably subject to strict scrutiny." A164. In support of this proposition, the District Court cited First Amendment cases and noted that in some instances "content-neutral restrictions on the time, place and manner of speech are subject to a form of intermediate scrutiny." A164. But the court's invocation of the First Amendment actually underscores the case for strict scrutiny. It can hardly be denied that the default mode of analysis for a direct government restriction of free speech is strict scrutiny. *See Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358 (2009); *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188 (2007). To be sure, the Court has over the years developed a more relaxed standard for certain kinds of restrictions that, based on judicial experience, can be subject to a different test. But none of that assists Bartlett. One context where strict scrutiny does not apply (at least currently) is so-called commercial speech. And for just that reason, Justice Breyer invoked a commercial speech case—*Thompson*—for his balancing-approach version of intermediate scrutiny. The Court rejected that standard as

insufficiently protective. Justice Breyer also invoked *Turner*, another First Amendment intermediate scrutiny case. Once again, the Court rejected it.

The time, place, and manner cases invoked by the District Court are even more obviously inapposite. Those cases by definition involve limitations—not complete bans like that at issue here—and time, place, and manner restrictions must "leave open ample alternative channels for communication" to be constitutional. If they do not leave open such alternatives, the consequence is not that strict scrutiny applies; such restrictions are per se unconstitutional. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The District Court followed the bad example of a handful of other courts, and applied a standard endorsed by Justice Breyer, but rejected by the majority of the Court. Given the complete ban on Mr. Osterweil's ability to possess a handgun to protect his New York home, the appropriate First Amendment analog is the default mode of analysis for government efforts to ban a category of speech—strict scrutiny applies.

Next, taking a cue from Justice Breyer's *Heller* dissent, *see* 554 U.S. at 687–88, the District Court concluded that *Heller*'s "list of presumptively lawful regulatory measures is at least implicitly inconsistent with strict scrutiny." A159. Not so. *Heller*'s underlying logic—that the right to keep and bear arms is fundamental and that restrictions on the right require strict scrutiny—is wholly

consistent with its dictum that certain types of restrictions, such as bans on possession by felons and the mentally ill and "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," are "presumptively lawful," *id.* at 626–27 & n.26.

First, a State obviously has a compelling interest in prohibiting firearm possession by violent felons and the insane. The interest in keeping private firearms out of certain truly sensitive places may be compelling as well. Thus, it was of no great moment that the *Heller* Court suggested that in future cases the government might easily prove that laws prohibiting firearm possession by convicted felons, or possession in sensitive places like courthouses or prisons, satisfy strict scrutiny. Because "[t]he fact that strict scrutiny applies says nothing about the ultimate validity of any particular law" predicting that such restrictions will be upheld is in no way inconsistent with requiring strict scrutiny. *Johnson v. California*, 543 U.S. 499, 515 (2005) (internal quotation marks omitted); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 n.6 (1992) (stating that in the First Amendment context "presumptive invalidity does not mean invariable invalidity"). Courts should not overread *Heller*'s "presumptively lawful" dictum to mean any more than that.

Second, it is possible that the *Heller* Court may have been stating merely that, based on its preliminary understanding of the relevant history, such

restrictions appear to fall outside the bounds of the right as understood at the time of the Framing, with future cases available to test that proposition and refine the precise contours of the right. *See* 554 U.S. at 635 ("The First Amendment contains the freedom-of speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different . . . . [T]here will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.").[7] Indeed, in his concurring opinion in *McDonald*, Justice Scalia specifically explained that "[t]he traditional restrictions [on the right to keep and bear arms] go to show the scope of the right, not its lack of fundamental character." *McDonald*, 130 S. Ct. at 3056 (Scalia, J., concurring).

The need for strict scrutiny of restrictions on the rights protected by the Second Amendment is hardly undermined by the recognition that there may be

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[7] *See also United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) ("That *some* categorical limits are proper is part of the original meaning . . . ."); *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) ("[T]he identified restrictions [could be] presumptively lawful because they regulate conduct outside the scope of the Second Amendment . . . [or] because they pass muster under any standard of scrutiny."); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1449 (2009) ("Sometimes, a constitutional right isn't violated by a restriction because the restriction is outside the terms of the right as set forth by the constitution.").

categories of conduct relating to keeping and bearing arms that fall outside the scope of the Second Amendment. After all, the fact that there are categories of unprotected speech is hardly a justification for applying less than strict scrutiny to laws that restrict protected speech. *See, e.g.*, *R.A.V.*, 505 U.S. at 382–83 ("From 1791 to the present . . . our society . . . has permitted restrictions upon the content of speech in a few limited areas . . . . We have recognized that 'the freedom of speech' referred to by the First Amendment does not include a freedom to disregard these traditional limitations."). Just as "a limited categorical approach has remained an important part of our First Amendment jurisprudence," *id.* at 383, *Heller*'s suggestion that certain categories of historically supported restrictions are lawful is entirely consistent with recognizing that restrictions on rights that are protected by the Second Amendment must be subjected to strict scrutiny.

The District Court also heavily relied on a case from the Third Circuit, *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), which declined to apply strict scrutiny. A165–A167. But *Marzzarella* is inapposite. *Marzzarella* addressed a law prohibiting possession of a gun with an obliterated serial number and struck it down under intermediate scrutiny. 614 F.3d at 97. In doing so, the court recognized that the statute at issue "does not severely limit the possession of firearms," and that the "District of Columbia's handgun ban is an example of a law at the far end of the spectrum of infringement on protected Second Amendment

rights . . . . It did not just regulate possession of handguns; it prohibited it, even for the stated fundamental interest protected by the right—the defense of hearth and home." *Ibid.* Indeed, the Third Circuit *did* apply strict scrutiny to the serial number obliteration law after applying intermediate scrutiny, presumably because it was not sure that even a law that "does not severely limit the possession of firearms" should be subjected to anything less. *Id.* at 97, 99. The wisdom of the Third Circuit's distinction and approach notwithstanding, it is safe to say that the *Marzzarella* court would not have applied intermediate scrutiny to New York's ban on handgun possession in the homes of part-time residents, and that the District Court was wrong to rely on *Marzzarella* (and cases relying on *Marzzarella*) in so doing.

In the end, given the general rule that restrictions on fundamental constitutional rights are subject to strict scrutiny, the contention that restrictions on Second Amendment rights should be permitted under a less-demanding standard reduces to the contention that the right to keep and bear arms is a lesser right. It is not. Any such contention would have been deeply misguided before *McDonald*, and in light of *McDonald* no such contention is even remotely tenable.

First, the Court has reiterated that it is improper to prefer certain enumerated constitutional rights while relegating others to a lower plane: No constitutional right is "less 'fundamental' than" another, and there is "no principled basis on

which to create a hierarchy of constitutional values . . . ." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982); *accord Ullman v. United States*, 350 U.S. 422, 428–29 (1956) ("To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution.").

Second, the Court has applied this rule against "disrespect[ing] the Constitution" in the specific context of the right to keep and bear arms and has emphatically rejected repeated attempts to deprive that right of the same dignity afforded other fundamental rights. *Ullman*, 350 U.S. at 428–29. *Heller* admonished that "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." 554 U.S. at 634. And *Heller* explained that the "Second Amendment is no different" from the First Amendment in that it was the product of interest-balancing by the people themselves. *Id.* at 635. In *McDonald*, confronted with the argument that the Second Amendment right, even though an individual, enumerated right as held by *Heller*, should be deemed less than fundamental, the Court rejected that argument in the plainest terms: "what [respondents] must mean is that the Second Amendment should be singled out for special—and specifically unfavorable—treatment. We reject that suggestion." 130 S. Ct. at 3043. (plurality op.); *see also*

id. at 3044 (rejecting plea to "treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees").

It is accordingly too late in the day to argue that the right to keep and bear arms is less fundamental than the other individual rights enumerated in the Constitution. There is consequently no basis to review restrictions on that right under anything less demanding than the strict scrutiny that governs challenges to restrictions on other fundamental rights. *Heller*'s historical approach was no less demanding than ordinary strict scrutiny, and certain types of restrictions may be conducive to that approach. But to the extent that a levels-of-scrutiny analysis is to apply, the scrutiny must be strict.

B. New York's Ban On Home Handgun Possession By Part-Time State Residents Substantially and Unconstitutionally Burdens Second Amendment Rights.

New York's law amounts to a total prohibition of the exercise of the core right protected by the Second Amendment, and is thus unconstitutional. As interpreted and applied by the District Court, New York's handgun licensing scheme effectively eviscerates the right of part-time residents to defend their New York homes using handguns. Citing New York case law, the court concluded that "[n]onresidents without in-state employment are completely excluded from the [State's] license-application procedure," and thus conclusively prohibited from

keeping a handgun in their home. A159; *see* N.Y. Penal Law §§ 265.01(1), 265.02(4), 265.20, 400.00.[8] As the District Court recognized, "New York courts have limited resident applications to persons who are New York domiciliaries," A159 n.2; *see Mahoney v. Lewis*, 199 A.D.2d 734, 735 (N.Y. App. Div. 1993) ("we have expressly held that 'where a statute prescribes 'residence' as a qualification for a privilege or the enjoyment of a benefit, the word is equivalent to 'domicile' . . . . '"), where "domicile" is defined as a person's "true and permanent home, to which he has at all times the intention of, sooner or later, returning"—where a person "owns a home, maintains voter and motor vehicle registration, and . . . holds a job." *In re Davies*, 506 N.Y.S.2d 626, 628–29 (Oswego Cnty. Ct., N.Y. 1986) (internal quotation marks omitted).[9] Those definitions may work for

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[8] The New York Supreme Court, Appellate Division, Third District, has upheld the State's general licensing scheme against a *Heller*-based challenge, holding that "article 265 does not effect [a] complete ban on handguns and is, therefore, not [a] 'severe restriction' improperly infringing upon . . . Second Amendment rights." *People v. Perkins*, 62 A.D.3d 1160, 1161 (N.Y. App. Ct. 2009). Whatever the merits of that conclusion, it certainly cannot apply to article 265's application to affect a complete ban on possession of handguns in the homes of part-time residents.

[9] It is not at all clear that *Mahoney*'s evaluation of § 400's residency requirement remains good law in *Heller*'s wake. The *Mahoney* court stated that "we expressly have held that 'where a statute prescribes "residence" as a qualification for a privilege or the enjoyment of a benefit, the word is equivalent to "domicile" . . . . .'" and that "possession and use of a pistol are not vested rights but privileges." 199 A.D.2d at 735. The *Mahoney* court's rights/privilege distinction, on which its residence/domicile distinction at least in part relied, was critically

some other licensing schemes, but it is not good enough when it comes to a fundamental right. If an individual lawfully owns a home and pays taxes on that home, a state cannot deny the homeowner the constitutional right to protect him on the ground that his legal domicile lies elsewhere.

This complete ban on home handgun possession by part-time New York residents who are not "domiciliaries" cannot be squared with *Heller*. *Heller* held that the District of Columbia's ban on handgun possession in the home violated the Second Amendment. *Heller*, 554 U.S. at 635. In so doing, the Court stated that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation," and that the core purpose of the right is to allow "law-abiding, responsible citizens to use arms in defense of hearth and home" where the need for self-defense "is most acute." *Id.* at 592, 628, 635. "[H]andguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Heller*, 554 U.S. at 629.

The New York law makes it impossible for part-time residents like Mr. Osterweil to use handguns "for the core lawful purpose of self-defense and is

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undermined by *Heller*. What is more, *Mahoney*'s domicile requirement may have been wrongly applied to Mr. Osterweil in the first place. *Mahoney* stated that New York's residency requirement necessitated "more than mere ownership of land." *Id.* Mr. Osterweil is not a mere New York land owner; for part of the year, he actually resides in New York and remains involved in the Summit, New York community.

hence unconstitutional." *Heller*, 554 U.S. at 630. "[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home." *Heller*, 554 U.S. at 636; *see McDonald*, 130 S. Ct. at 3044 ("[T]he Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home."); *id.* at 3048 (The right to keep and bear arms is "valued because the possession of firearms [i]s thought to be essential for self-defense."). There is no reason to think that the part-time nature of Mr. Osterweil's occupancy of his New York home should impact the calculus. The Second Amendment is not a second-class right, nor is it a part-time one. An individual living part-time in a home has no less need for self-protection and may in fact have an even greater need. Second homes are often more rural, and the fact that such homes are not constantly inhabited can make them attractive targets for criminal activity.

The scope of Mr. Osterweil's Second Amendment right to defend his hearth and home cannot be eviscerated by an arbitrary temporal distinction. *Heller* did not base its holding on how many months out of the year a person lives in his home, where he is registered to vote, or where he has his driver's license. As explained in *Heller*, and reaffirmed in *McDonald*, the right to keep and bear arms arises from the fundamental right of self-defense, which is most acute in the home.

The fundamental right of self-defense is no less acute because one has more than one home, or spends less than twelve months per year in one's home. To be sure, those likely to cause a confrontation or illegally enter a home will be neither impressed nor deterred by the part-time nature of a person's occupancy.[10]

Lest there be any doubt, the New York law at issue here is quite unlike the "longstanding prohibitions on the possession of firearms" that the Court suggested might be acceptable, such as bans on the possession of firearms by felons, the mentally ill, and minors, as well as "laws forbidding the carrying of firearms in sensitive places," "or laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626–27. Nor is it an effort to defer

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[10] The Founding-era sources on which *Heller* relied do not suggest that the part-time nature of Mr. Osterweil's occupancy is of any constitutional relevance. "Justice James Wilson interpreted the Pennsylvania Constitution's arms-bearing right, for example, as a recognition of the natural right to defense 'of one's person or house'—what he called the law of 'self preservation.'" *Heller*, 554 U.S. at 585 (quoting 2 Collected Works of James Wilson 1142, & n.x (K. Hall & M. Hall eds. 2007); *see id.* at 594 (quoting 1 Blackstone 136, 139 (1765)).

And surely the Founders themselves would not have drawn such a distinction. In Federalist paper No. 46, James Madison wrote of what "citizens with arms in their hands" can accomplish. The Federalist No. 46 (James Madison). Madison, a Virginian, would have been shocked to find that his right to possess a weapon was somehow less sacrosanct during his temporary stays in the Capitol for public service than when in his permanent home outside Montpelier, Virginia. *See* Irving Brant, The Fourth President: A Life of James Madison (1970); *cf. Heller v. District of Columbia*, No. 10-7036, 2011 WL 4551558, at *23 (D.C. Cir. Oct. 4, 2011) (Kavanaugh, J., dissenting) ("*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition . . . .").

to the licensing decision of another state, whether positive or negative. A part-time resident fully licensed in his state of domicile still cannot lawfully possess a handgun in his New York home. New York's law amounts to a total prohibition of the exercise of the core right protected by the Second Amendment. And the fact that this ban is the product of a regulatory scheme and not a specific legislative prohibition is of no moment; "a statute which, under the pretense of regulating, amounts to a destruction of the right . . . [is] clearly unconstitutional." *Id.* at 629.

Heller's dispositive treatment of bans on handguns in the home demands reversal of the District Court's decision. But the New York ban on home handgun possession by part-time residents also fails strict scrutiny. The District Court more or less conceded as much, admitting that "prohibiting gun possession by nearly all nonresidents might not be the most precisely focused means to achieve th[e State's] end[s]." A171. Such a conceded lack of focus is fatal under strict scrutiny.

Under strict scrutiny, a law infringing a constitutional right must be narrowly tailored to serve a compelling government interest. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). To be narrowly tailored, a law must actually advance the compelling interest it is designed to serve, and be the least restrictive means of achieving that advancement. *See Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 226 (1989); *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). Burdening a significant amount of conduct not implicating the

asserted interest is evidence that the law at issue is inadequately tailored. When applying strict scrutiny, the challenged law is presumed invalid, and the government bears the burden of rebutting that presumption. *Playboy Entm't Grp.*, 529 U.S. at 817.

The interest that the State advanced below in support of the home handgun ban, and that the District Court concluded was "important" and "substantial," was the interest in "allow[ing] the government to monitor its licensees more closely and better ensure public safety." A169. Neither of those interests is sufficient. The interest of the government in monitoring its licensees cannot itself be a compelling interest in any republic worthy of the name. A licensing process with adequate monitoring might be a means to some other compelling end, but it cannot be an end in itself. Public safety, on the other hand, may be compelling, but it is far too general to suffice for constitutional analysis. And combining the two interests does not solve the problem.

When a law or regulation fails to cover a substantial swath of conduct implicating the asserted compelling interest, such underinclusiveness not only demonstrates the absence of narrow tailoring, but also serves as evidence that the interest is not significant enough to justify the regulation. *See Carey v. Brown*, 447 U.S. 455, 465 (1980); *see also Fla. Star v. B.J.F.*, 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring) ("[A] law cannot be regarded as protecting an interest of the

highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.") (citation and internal quotation marks omitted). Here, the New York law prevents part-time residents who are not domiciliaries from possessing handguns in their homes. But there is no time limit linked to the domicile requirement. One could be domiciled in New York and spend little-to-no time there. So, a New York domiciliary can have a license to have a handgun in their home spending nearly no time there, and a non-domiciliary who spends substantially more time in New York cannot. This completely undermines the assertion that the State's interest in monitoring its licensees is compelling.[11]

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[11] This Court addressed New York's licensing requirement in *Bach v. Pataki*, 408 F.3d 75, 88 (2d Cir. 2005). In *Bach*, a Virginia resident sought a permit to carry a pistol while visiting his parents. *Id.* at 76. When Bach learned he was not eligible for such a license, he filed suit against the State officials responsible for administering the licensing scheme. *Id.* at 77. *Bach* is, at best, of marginal relevance here. First of all, *Bach* held that the Second Amendment right to keep and bear arms "imposes a limitation on only federal, not state, legislative efforts," and disposed of Bach's Second Amendment claim on that ground. *Id.* at 85–86. Thus *Bach*'s views on the scope and nature of Second Amendment rights are outdated. Second, the facts at issue in Bach are quite different from this case. Mr. Osterweil owns a home in New York and spends part of the year living in that home. The same cannot be said of Bach, who the Court deemed a "mere visitor[]." *Id.* at 92. Finally, though *Bach* concluded that "New York's interest in monitoring gun licensees"—"an interest in continually obtaining relevant behavioral information"—"is substantial and [] New York's restriction of licenses to residents and persons working primarily within the State is sufficiently related to th[at] interest," *id.* at 88, 91, that conclusion was clearly infected by the Court's misapprehension of Second Amendment rights. And, in any event, the Court described the State's interest as "substantial," not "compelling," and thus *Bach*—

Even assuming, however, that the State does have a compelling interest in ensuring public safety through monitoring its licensees, the New York part-time resident handgun possession ban is not narrowly tailored to serve that interest. First, as just discussed, there is a profound mismatch between the asserted interest and the actual requirement. Second, there is no evidence that the residency requirement in and of itself does anything to further the State's public safety interest. The application process that an individual must go through to obtain a handgun possession permit in New York is robust. The required investigation involves checking references, consulting FBI databases, and taking fingerprints. *See* N.Y. Penal Law § 400.00(4). The application package is reviewed by a licensing officer, often a judge. *Ibid.* It is hard to imagine what added benefit excluding part-time residents from obtaining licenses could add. Moreover, the logical answer to any legitimate concerns with the ability to monitor those domiciled elsewhere would be deference to the licensing decision of the state of domicile. But this New York will not do. New York cannot simultaneously insist that it must do its own independent licensing process for property owners domiciled elsewhere and that those domiciled elsewhere need not apply.

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even if it were still good law—would dictate that the State's monitoring interest fails strict scrutiny.

What is more, categorically excluding *all* non-domiciliaries is certainly not the least restrictive means of achieving the State's monitoring and public safety goals. The part-time resident possession ban is not limited to those individuals who pose a heightened threat to others, or to circumstances that for some other reason might create a particularly acute danger to the public. Moreover, there are myriad ways that the State could achieve its goals—such as periodically consulting the national and comprehensive NCIC database that it already consults during licensing, requiring annual application updates from part-time residents, or cooperating with the law enforcement organs of other states—short of its illegitimate and unnecessary categorical ban. Indeed, the New York licensing law contemplates that there are available and useful mechanisms for monitoring out-of-state behavior: Penal Law § 400.00(11) provides that a handgun license can be suspended upon conviction for a felony or serious offense "anywhere."

Furthermore, despite the District Court's contrary conclusion, New York's ban on part-time resident in-home handgun possession fails even intermediate scrutiny. The District Court found a "substantial relationship between New York's residency requirement and the government's significant interest" primarily because the "State is in a considerably better position to monitor residents' eligibility for firearm licenses as compared to nonresidents." A170. But it is not at all clear that this is true, as Mr. Osterweil's case demonstrates. Beyond his residency and issues

with his fingerprints—an issue not unique to "nonresidents"—Mr. Osterweil would have easily qualified for a license under § 400.00. Nothing about his part-time resident status made it more cumbersome to ascertain his eligibility.

It appears that the District Court only found otherwise based on its decision to ignore *Heller*'s warnings and insert its own policy concerns into the analysis. *See* A170 (listing studies detailing the "well-documented" "harm caused by gun violence"). In doing so, the District Court effectively rendered its ultimate ruling a foregone conclusion. Having already decided that firearms are dangerous, the court had little difficulty in summarily declaring that the State's interest in monitoring was "'significant, 'substantial,' or 'important,'" and that there was "a substantial relationship between New York's residency requirement and the government's significant interest." A170. The court all but eliminated the government's burden to demonstrate that a restriction on a fundamental right is constitutional—a burden of proof that should have applied even under the "intermediate scrutiny" analysis that the District Court purported to apply. *See, e.g.*, *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) ("[U]nless the conduct at issue is not protected by the Second Amendment at all, the Government bears the burden of justifying the constitutional validity of the law."). But even more to the point, the District Court's analysis is reminiscent of the interest-balancing approach

advocated by Justice Breyer and rejected by the Court. When it comes to balancing general public safety concerns with the right to possess a handgun for self-protection in the home, the Constitution itself has done all the interest-balancing that is necessary. *See Heller*, 554 U.S. at 635.

In fact, the District Court appears to have applied a level of scrutiny even less protective of Second Amendment rights than Justice Breyer's rejected approach in *Heller*. Justice Breyer presumed that the government would always have a compelling or important interest in regulating Second Amendment rights, meaning courts should focus on the reasonableness of the fit between the regulation and the government's interest. *See Heller*, 554 U.S. at 687–91 (Breyer, J., dissenting). But the District Court did Justice Breyer one better. Once the court concluded that the government had an important interest in monitoring licensees, it deemed that interest sufficient to sustain an outright ban on possession by part-time residents. The court engaged in no meaningful consideration of the fit between the State's interest and its regulatory scheme.

Only the District Court's decision to apply a test less demanding than the unequivocally rejected "interest-balancing" test could explain the result below. A per se ban on home gun ownership for part-time residents would violate any meaningful conception of the Second Amendment or intermediate scrutiny. Courts would not tolerate for one second a regime that granted free speech or the privilege

against self-incrimination only to a State's full-time residents. The Second Amendment is no different. Under any appropriate standard of review, this Court should reverse the District Court's judgment.

II. New York's Residency Requirement Arbitrarily Burdens The Fundamental Rights Of Part-Time State Residents In Violation Of The Equal Protection Clause.

New York's ban on non-resident handgun possession suffers from a second fatal flaw: it violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Equal Protection Clause commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

When "state laws impinge on personal rights protected by the Constitution" "strict scrutiny" applies, and such laws "will be sustained only if they are suitably tailored to serve a compelling state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *see Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) ("[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized."). For example, in *Kramer v. Union Free School District*, 395 U.S. 621, 626–29 (1969), the Court struck down a law limiting the right to vote in school district elections to property owners and parents of school children, finding

that the classification failed under strict scrutiny. The Court explained that where fundamental rights are concerned, the issue is not whether the legislative judgment and resulting classification had some basis, but whether the distinctions "do in fact sufficiently further a compelling state interest to justify denying the franchise to appellant and members of his class." *Id.* at 633.

The District Court recognized that "[w]here a statute burdens a fundamental right . . . it is subject to heightened scrutiny under the Fourteenth Amendment's Equal Protection Clause." A172 (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)). After stating the appropriate standard, however, the court proceeded to give Mr. Osterweil's equal protection claim short shrift. The Court simply stated: "it is clear that New York state residents and nonresidents are not similarly situated in terms of the state's ability to obtain information about and monitor the potential licensee's eligibility or continued eligibility for a firearm's license. As such, New York's different treatment of nonresidents does not violate the Equal Protection Clause." A172. But that amounts to no more than saying that the State has a rational basis for its classification; it is not an explanation of why strict scrutiny is satisfied.

As already discussed, the State lacks a compelling interest in denying part-time residents the right to possess handguns in their home, and thus there is no justification for treating full-time residents and part-time residents differently. Mr.

Osterweil has the same interest in protecting his family when staying at his home in Schoharie as do his domiciliary neighbors down the street. Again, if anything, his lack of year-round occupation may enhance the need for self-protection. Moreover, any state policy for non-domiciliaries that was remotely consistent with the Equal Protection Clause would include deference to the state of domicile as an important component. New York does nothing of the sort. It makes no difference whether a part-time resident is fully licensed in the state of domicile. No matter how many days they spend in their New York home, which is treated like all others for taxing purposes, they have no ability to lawfully possess a handgun for self-defense in that home.

What is more, the facts of Mr. Osterweil's case show that the conclusion the District Court relied on—that it is harder to obtain information about nonresidents—is incorrect. Other than usable fingerprints, Bartlett had all the information he needed to decide whether Mr. Osterweil was deserving of a handgun license. The only thing standing between Mr. Osterweil and the license he desired was his part-time residency.

The Equal Protection Clause "keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Mr. Osterweil has the same fundamental right to

possess a gun in defense of his New York residence as his New York neighbors. Holding otherwise is clearly a violation of the Equal Protection Clause.[12]

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

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[12] In *People v. Bounsari*, 915 N.Y.S.2d 921 (Rochester City Ct., 2011), a New York court held that N.Y. Penal Law § 261.01(5)—which makes it a crime for a non-citizen to "possess[] any dangerous or deadly weapon"—was unconstitutional. In *Bounsari*, the State "stipulated that the law's constitutionality must be evaluated under a strict scrutiny analysis," but then "did not proffer any state interest, let alone a compelling state interest, to justify New York's discriminatory law." 915 N.Y.S.2d at 923. After considering possible justifications for the law, the court concluded that "[t]here is no conceivable reason that aliens should be distinguished from citizens to achieve the law's otherwise legitimate public safety objectives." *Id.* *See Chan v. City of Troy*, 559 N.W.2d 374 (Mich. Ct. App. 1996) (Michigan law allowing only U.S. citizens to obtain pistol permits unconstitutional); *State v. Chumphol*, 634 P.2d 451 (Nev. 1981) (Nevada law prohibiting aliens from possessing concealable arms unconstitutional). It would be strange indeed if lawful resident aliens, who happen to be residents of New York, are entitled to greater rights under the Second Amendment than U.S. citizens who are also residents of New York, but for only part of the year.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), the undersigned certifies that the brief complies with the applicable type-volume limitations. The brief contains 11,200 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This certificate relies upon Microsoft Word 2010's word count feature; the program used in drafting this brief. The brief complies with the typeface requirements for Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Words' word processing program in 14-point Times New Roman font.

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EXHIBIT C

11-2420

United States Court of Appeals for the Second Circuit

ALFRED G. OSTERWEIL,

Plaintiff-Appellant,

v.

GEORGE R. BARTLETT, III, in his official capacity as Licensing Officer in the County of Schoharie

Defendant-Appellee,

DAVID A. PATERSON, in his official capacity as Governor of the State of New York, ANDREW M. CUOMO, in his official capacity as Attorney General of the State of New York,

Defendants.

On Appeal from the United States District Court for the Northern District of New York

BRIEF FOR APPELLEE

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Dated: June 26, 2012

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PRELIMINARY STATEMENT

Under New York law an individual seeking a license to possess a handgun must apply for the license in the county[1] "where the applicant resides, is principally employed or has his principal place of business as merchant or storekeeper." Penal Law § 400.00(3)(a). One New York intermediate appellate court—but not the New York Court of Appeals—has interpreted the statutory phrase "where the applicant resides" to mean "where the applicant is domiciled," with the result that that an applicant who is applying for a license on the basis of his place of residence rather than his place of business must be domiciled in New York. *Matter of Mahoney v. Lewis*, 199 A.D.2d 734, 735 (3d Dep't 1993). This decision pre-dated by nearly two decades the Supreme Court's holdings in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), that the Second Amendment guarantees an individual right to possess a handgun for self-defense in the home that may not be infringed by the States.

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[1] In the case of New York City, the application must be made to the city licensing officer, who by statute is the city police commissioner. Penal Law § 265.00(10).

Plaintiff Alfred Osterweil applied for a license in Schoharie County, New York, to possess a handgun for "target practice and hunting." At the time of the application, Osterweil was domiciled in Schoharie County, and he filed his application with Judge George R. Bartlett, a Schoharie County judge serving in his administrative capacity as firearms licensing officer, and the defendant in this case. While the license application was pending, Osterweil changed his domicile from New York to Louisiana, and so notified the firearms licensing officer. Judge Bartlett denied the license on the ground that Osterweil averred that he was not domiciled in New York. (Schoharie County lies within the jurisdiction of the Appellate Division, Third Department—the court that decided *Mahoney*.)

Rather than seek judicial review of that determination in the state courts—which could have reconsidered *Mahoney* in light of *Heller*—Osterweil filed suit against Bartlett in the United States District Court for the Northern District of New York. Osterweil's complaint alleges that the denial of the license violated his federal and state constitutional rights including, specifically, his Second Amendment right to bear arms. The complaint does not seek injunctive relief against

the enforcement of any provision of New York's statutes regulating firearms; nor does it seek a declaration that any such provision was unconstitutional. Instead, the complaint requests a federal court order directing issuance of "the type of permit originally applied for" (J.A. 11).

The district court (D'Agostino, J.), granted summary judgment to Bartlett. The court construed New York law to prohibit Osterweil as a nondomiciliary from obtaining a license as a New York resident. It then rejected Osterweil's arguments that the denial of his application violated his Second Amendment right because it found that limiting handgun licenses to domiciliaries "allows the government to monitor its licenses more closely and better insure public safety," and that this interest satisfied the intermediate scrutiny applicable to Osterweil's claim (J.A. 169). The court also rejected Osterweil's claims under the Equal Protection Clause, which it construed to include claims under the Privileges and Immunities and Due Process Clauses as well. Finally, the court declined to exercise jurisdiction over Osterweil's state-law claims.

Before deciding this appeal, this Court should certify to the New York Court of Appeals the question whether a person "resides" in a

place within the meaning of Penal Law § 400.00(3)(a) only if the person is domiciled there, or whether a part-time resident domiciled elsewhere also "resides" in a place for purposes of that statute. *See* Second Cir. Local Rule § 0.27; N.Y. Ct. of Appeals Rule [22 N.Y.C.R.R.] § 500.27. This question is "an unsettled and significant question of state law that will control the outcome" of this case, as required by Second Circuit Local Rule § 0.27, and it is a "determinative question[] of New York law . . . for which no controlling precedent of the Court of Appeals exists," as required by New York Court of Appeals Rule § 500.27(a). This Court should not decide a constitutional challenge to a state statute predicated on an interpretation of that statute that is likely incorrect.

The New York Court of Appeals has never construed the residency provision of Penal Law § 400.00(3)(a), and is likely not to construe it as imposing a domicile requirement for several reasons, as set forth below. First, the statute uses the language of residence rather than domicile. Second, the Third Department's 1993 *Mahoney* decision construing Penal Law § 400.00(3)(a) to impose a domicile requirement was issued well before *Heller* and *McDonald*, and was premised on a view of the Second Amendment that has now been rejected. Third, the New York

Court of Appeals would likely be guided by the principle that statutes should generally be construed to avoid constitutional doubts. For all these reasons, the phrase "where the applicant resides" in Penal Law § 400.00(3)(a) is best construed to include individuals who reside in New York seasonally and are domiciled elsewhere. If the New York Court of Appeals so construes the statute, appellant's constitutional challenge will be moot and this court will have no occasion to reach the constitutional issues Osterweil seeks to raise on this appeal.

In the event that the Court declines to certify the state law question, it should affirm the decision in this case on the merits, on the ground that any domicile requirement, to the extent one exists, would not violate the Second Amendment as applied to Osterweil's license application.[2] Osterweil applied for a license to possess a handgun for the purpose of target practice and hunting (J.A. 41), and not for the

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[2] Alternatively, this Court could perhaps reach its own conclusion that New York's firearm licensing law requires residence rather than domicile in New York, and affirm on that ground, but in light of a decision to the contrary from an intermediate state appellate court, certification of the question to the state Court of Appeals would be more prudent and more respectful of the primary responsibility of the state courts for the construction of state law. *See Portalatin v. Graham*, 624 F.3d 69, 89-90 (2d Cir. 2010) (en banc).

purpose of self-defense in his Schoharie County residence. This Court has ruled that rational basis review applies to laws regulating gun possession that do not substantially burden the Second Amendment right to possess a handgun in the home for self-defense. If possession of a firearm for the purpose of target practice and hunting is protected by the Second Amendment at all, a domicile requirement for handgun licenses for that purpose would burden that right at most peripherally. The domicile requirement for a New York license would of course not bar a part-year resident from possessing a handgun for target practice and hunting in the State of his domicile. Nor would a domicile requirement bar a part-year New York resident from using firearms for target practice and hunting, because no license is required in New York to possess a long gun, such as a shotgun or rifle. Because of this minimal burden, rational basis review would apply, and the State's interests in investigating and monitoring the activities of those holding a handgun license would easily provide a rational basis for imposing a domicile requirement, if New York law indeed imposed such a requirement. Even if Osterweil's application were construed as an application to possess a handgun at his New York house for the

purposes of self-defense, the appropriate level of scrutiny is intermediate scrutiny, and the state interests in monitoring the activities of those holding a handgun license—which this Court has deemed substantial—would justify a domicile requirement.

ISSUES PRESENTED

Penal Law § 400.00(3)(a) requires persons seeking a handgun license to apply for a license in the city or county "where the applicant resides." The questions presented are:

1. Whether the court should certify to the New York Court of Appeals the question whether that provision requires only New York residence and not New York domicile, when the New York Court of Appeals has never construed the provision and the interpretation described above (a) is consistent with the statutory text, (b) avoids the constitutional question Osterweil seeks to raise here, and (c) was rejected only by a single intermediate state appellate court in reliance on a view of the law that has since been repudiated by *Heller* and *McDonald*, namely, that possession of a handgun is a privilege and not a right.

2. Whether the district court properly determined that, if New York requires an applicant for a handgun license to be domiciled in New York, that requirement is constitutional under the Second and Fourteenth Amendments as applied to Osterweil's application for a handgun license.

STATEMENT OF THE CASE

A. New York's Residency Requirement for Handgun Licenses

New York law makes it a misdemeanor to possess an unlicensed handgun (or other designated firearm), loaded or unloaded, in any location, Penal Law § 265.01, and makes it a class C felony to possess an unlicensed loaded handgun (or other designated firearm) outside the home, *id.* § 265.03(3). Long guns—including most rifles and shotguns—are excluded from these prohibitions.[3] Consequently, the possession and

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[3] Penal Law § 265.00(3) defines "firearm" to include pistols and revolvers; shotguns with barrels less than eighteen inches in length; rifles with barrels less than sixteen inches in length; "any weapon made from a shotgun or rifle" with an overall length of less than twenty-six inches; and assault weapons.

carrying of long guns—commonly used for hunting—are not generally prohibited or subject to licensing in New York.

Licensed handguns are also exempted from the Penal Law's prohibitions on possession of firearms. *Id.* § 265.20(a)(3).[4] The law specifies the types of licenses available that authorize possession of a pistol or revolver. The licenses generally include: (1) a license to "have and possess in his dwelling by a householder"; (2) a license to "have and possess in his place of business by a merchant or storekeeper"; (3) a license to "have and carry concealed while so employed by a messenger employed by a banking institution or express company"; and (4) a license to "have and carry concealed, without regard to employment or place of possession, by any person when proper cause exists for the issuance thereof." *Id.* § 400.00(2)(a)-(c) & (f).[5] A "carry concealed" license may be restricted to specific purposes set forth in the license

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[4] Other exemptions from the prohibition also exist, *inter alia*, for persons in state and federal military service and peace and police officers. Penal Law § 265.20(1).

[5] The remaining categories include licenses for certain state judges, certain state and local prison employees, and possessors and carriers of certain antique pistols. Penal Law § 400.00(2)(d), (e) & (g).

application, such as use in target practice or hunting. *Matter of O'Connor v. Scarpino*, 83 N.Y.2d 919, 921 (1994).

Section 400.00 also sets forth the standards for obtaining a handgun license. Applications for a handgun license are made to firearms licensing officers, Penal Law § 400.00(3)(a), who, in most of New York, are state judges. Penal Law § 265.00(10).[6] An applicant may obtain judicial review of the denial of a license in whole or in part by filing a petition under article 78 of the Civil Practice Law and Rules. *See, e.g., Matter of Dalton v. Drago*, 72 A.D.3d 1243 (3d Dep't 2010).

Penal Law § 400.00(3)(a) requires that an application for a handgun license must be submitted in the city or county "where the applicant resides, is principally employed or has his principal place of business as merchant or storekeeper." In 1993, the Appellate Division, Third Department addressed the meaning of the statutory language requiring applications, except those seeking use of a handgun during employment or operation of a shop, to be filed "where the applicant

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[6] In New York City, Nassau County, and Suffolk County, designated police officials serve as licensing officers. Penal Law § 265.00(10).

resides." The court concluded that this language required an applicant to file for a license in the city or county of his domicile, meaning the residence he intends to be his fixed and permanent home. In reaching that holding, the court relied heavily on the notion that possession of a firearm is a privilege, not a right. *Mahoney*, 199 A.D.2d at 735.

The New York Court of Appeals has never had occasion to construe the meaning of § 400.00(3)(a), and no court in New York, including the Third Department, has addressed the meaning of the provision after the United States Supreme Court's rulings in *Heller* and *McDonald*.

B. Statement of Facts

1. Plaintiff Alfred Osterweil

Plaintiff Alfred Osterweil is a retired attorney (J.A. 17). As of March 2009, he owned four houses—two in Summit, New York, and two in Many, Louisiana—all of which he considered "his home" (J.A. 18). Sometime between May 21, 2008, and June 25, 2008, Osterweil changed his primary residence from New York to Louisiana (J.A. 46). Since then, he has continued to retain at least one house in Summit, New York for use as a "summer home" (*see* J.A. 14). Although the record is sparse

concerning the use and occupation of the Summit house, Osterweil has affirmed that his adult daughter lived in the house during a recent winter (J.A. 21).

2. Osterweil's Application for a Handgun License

In May 2008, when his primary residence was in Summit, New York, Osterweil submitted an application for a handgun license to the Sheriff's Department in Schoharie County, where Summit is located (J.A. 9, 25). Osterweil checked the box on the application for a "premises" license, but wrote in space provided on the application that he sought the license for the purpose of "target practice and hunting" (J.A. 41).

A few weeks later, the Sheriff informed Osterweil that he needed to "complete and/or correct" his application. The Sheriff explained that a "premises" license would be valid only "inside the residence" for which he applied, and that Osterweil's desire to use a handgun for "target practice and hunting" would require him to obtain a "carry concealed" license (J.A. 44).

On June 25, 2008, Osterweil told the Sheriff that he had purchased a home in Louisiana and intended to make Louisiana his "primary residence." Osterweil inquired whether this change in his residency status would disqualify him from obtaining a permit, stating that if it would, he saw "no sense in correcting the application" to clarify that he was seeking a concealed-carry permit (J.A. 46.)

Thereafter, Osterweil, the Sheriff, and Judge Bartlett, the firearm licensing officer for Schoharie County, exchanged several letters regarding Osterweil's application. Osterweil was informed that his fingerprints had been determined to be unusable (due to low quality) by both the Federal Bureau of Investigation and the New York State Division of Criminal Justice Services (J.A. 35). *See* Penal Law § 400.00(4) (requiring officer investigating applicant for firearms license to take the applicant's fingerprints and send one copy to the State Division of Criminal Justice Services and one to the Federal Bureau of Investigation for criminal records searches). Judge Bartlett advised Osterweil that, in addition to the lack of fingerprint quality, his out-of-state domicile might pose an obstacle to licensure (J.A. 79-80). On several occasions between March and May 2009, the judge offered to

permit Osterweil to appear before him for a hearing, but Osterweil expressed no real interest in doing so (*see* J.A. 36-37).

On May 29, 2009, Judge Bartlett issued a decision and order denying Osterweil's application for a handgun license on the ground that Osterweil was not domiciled in New York (J.A. 144). Because Schoharie County is located within the Third Department, Judge Bartlett cited the *Mahoney* decision as controlling on the meaning of the residency provision in § 400.00(3)(a). The judge rejected Osterweil's claim that New York's residency requirement, as previously construed by the Third Department, violated the Second Amendment under the Supreme Court's decision in *Heller* (J.A. 143-150). Judge Bartlett did not decide whether the quality of Osterweil's fingerprints would also prevent him from obtaining a license or determine whether Osterweil had satisfied all other requirements for licensure under New York law (J.A. 150 n.3).

Osterweil did not seek judicial review of Judge Bartlett's decision in the state courts. Thus, Osterweil did not seek to have the Third Department reconsider its earlier ruling in light of *Heller*—let alone seek to have the New York Court of Appeals address for the first time

the proper construction of the residency provision in Penal Law § 400.00(3)(a).

C. Procedural History

1. The Complaint

The complaint, filed by Osterweil *pro se*, asserts causes of action under the Second Amendment and the Equal Protection Clause of the Fourteenth Amendment, as well as claims under "the New York Constitution and Civil Rights Laws" (J.A. 10-11), against Bartlett in his official capacity as licensing officer.[7] The complaint requests an order directing that the defendants "provide plaintiff with the type of permit originally applied for, for costs of suit and such other damages and relief as the Court deems reasonable and appropriate" (J.A. 11).[8]

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[7] The complaint also named then-Governor David A. Paterson and then-Attorney General Andrew M. Cuomo in their official capacities. Both defendants were dismissed by Memorandum Decision and Order dated February 24, 2010. (See Dkt. No. 15.) Osterweil's brief on appeal does not challenge the dismissal of these two defendants.

[8] Osterweil's appellate brief does not say whether he intends to pursue his request for money damages. Any claim for damages clearly fails as a matter of law based on Eleventh Amendment and qualified immunity defenses (*see* J.A. 13). The Eleventh Amendment bars damages against a state official sued in his official capacity, *Gan v. City*

(*continued on the next page*)

2. The District Court's Grant of Summary Judgment to Defendant Bartlett

The district court granted summary judgment to Bartlett on all claims. Citing *Mahoney*, the court assumed that the statutory residency requirement operated as a domicile requirement (J.A. 159-160). The court held that intermediate scrutiny was the appropriate legal standard for analyzing Osterweil's Second Amendment claim (J.A. 169), and held that the statute satisfied intermediate scrutiny because "there is a substantial relationship between New York's residency requirement and the government's significant interest" in monitoring eligibility for firearms licenses (J.A. 170). The district court then rejected Osterweil's equal protection claim, finding that "New York state residents and nonresidents are not similarly situated in terms of the state's ability to

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of N.Y., 996 F.2d 522, 529 (2d Cir. 1993), and Bartlett would be entitled to qualified immunity for his actions in his individual capacity, given that no clearly established law at the time even suggested that Bartlett's actions violated the Second Amendment, *see Blumenthal v. Crotty*, 346 F.3d 84, 102-03 (2d Cir. 2003).

obtain information about and monitor the potential licensee's eligibility or continued eligibility for a firearms license" (J.A. 172).[9]

Osterweil filed a notice of appeal. After Osterweil submitted his brief, Bartlett filed a motion asking this Court to certify to the New York Court of Appeals the dispositive legal question whether the statutory residency provision is properly construed as a domicile requirement, particularly in light of the decisions in *Heller* and *McDonald*. Circuit Judge Chin referred the motion to the merits panel (Dkt. No. 77).

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[9] The district court construed other claims by Osterweil, couched by him as equal protection claims, as claims that denial of his license application violated his right to travel under the Privileges and Immunities Clause and his right to substantive and procedural due process (J.A. 172 n.11). The district court rejected each, and Osterweil has not pursued any of these arguments on appeal. *See Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal."). The court declined to exercise supplemental jurisdiction over Osterweil's state-law claims (J.A. 178).

SUMMARY OF ARGUMENT

Appellant Osterweil's arguments in this appeal rest on two fundamentally incorrect premises. First, he is proceeding as if New York State's highest court has authoritatively construed the residency language of Penal Law § 400.00(3)(a) as a domicile requirement that bars him from obtaining his handgun license. Second, he is litigating this appeal as if he had applied for a handgun license for the purpose of self-defense in the home, when in fact he sought a handgun license for target practice and hunting.

Osterweil's false premise regarding a domicile requirement is based on a construction of New York's firearms license-application statute made by a single intermediate state appellate court years before *Heller* and *McDonald*, which construction relied on the absence of a Second Amendment right to possess a handgun. That construction is unlikely to be adopted by the New York Court of Appeals now because it raises doubts about the constitutionality of the statute. Thus, this Court should certify to the New York Court of Appeals this unsettled, significant, and dispositive question of state law. Certification would avoid both the unnecessary decision of hypothetical constitutional

questions, and potential conflict with the State's highest court on a matter of state law.

In the event that the Court declines to certify the case to the New York Court of Appeals, it should affirm the district court's grant of summary judgment on the merits. The Second Amendment right at issue here is not the core right recognized in *Heller* and *McDonald*: the right to possess a handgun in the home for self-defense. Instead, the interest actually at issue on the facts of this case is Osterweil's interest, as reflected in his handgun license application, in possessing a handgun for target practice and hunting. Under this Court's recent decision in *United States v. Decastro*, rational-basis review applies unless a law imposes a "substantial burden" on Second Amendment rights. No. 10-3773, 2012 WL 1959072 (2d Cir. June 1, 2012). A New York domicile requirement, as applied to Osterweil, would impose no such substantial burden, because it would not prevent him from possessing a handgun for target practice and hunting in the State of his domicile, and would permit him to use long guns for target practice and hunting during his summers in New York. Consequently, rational-basis review would apply, and New York's interest in facilitating effective investigation and

monitoring of persons holding New York handgun licenses would easily suffice to sustain the law.

Even if a domicile requirement, as applied to Osterweil's request for a handgun license for target practice and hunting, were deemed to impose a substantial burden on his Second Amendment right to self-defense of the home, the law would at most be reviewed under intermediate scrutiny. And a domicile requirement applied to Osterweil would survive intermediate scrutiny because it serves the substantial state interest in monitoring the activities of firearms licensees, especially given Osterweil's inability to produce usable fingerprints for a criminal background check.

ARGUMENT

POINT I

THIS COURT SHOULD CERTIFY TO THE NEW YORK COURT OF APPEALS THE QUESTION WHETHER "RESIDES" MEANS "IS DOMICILED" IN PENAL LAW § 400.00(3)(a)

A. The Court of Appeals Should Be Given the Opportunity to Construe Penal Law § 400.00(3)(a).

Osterweil's constitutional arguments are premised on the notion that the residency provision in Penal Law § 400.00(3)(a) requires an applicant for a firearm license to be domiciled in New York. This question has never been definitively resolved under New York law, however. Defendant Bartlett understandably felt constrained by the Third Department's 1993 *Mahoney* decision to apply the statute as a domicile requirement. But the New York Court of Appeals has never construed § 400.00(3)(a), and no New York court, including the Third Department, has addressed the meaning of the provision since the Supreme Court decided *Heller* and *McDonald*. This Court should certify to the New York Court of Appeals the question whether § 400.00(3)(a) imposes a domicile requirement, because the answer to that question may well eliminate the need to decide whether a domicile requirement,

if New York law imposed one, would comport with the Second Amendment.

The general standards governing certification are well established in this Circuit. "In determining whether to certify a question our Court considers . . . : (1) the absence of authoritative state interpretations of the state statute; (2) the importance of the issue to the state . . . ; and (3) the capacity of certification to resolve the litigation." *Morris v. Schroder Capital Mgmt. Int'l,* 445 F.3d 525, 531 (2d Cir. 2006) (quotation marks and citations omitted). All three factors point decisively toward certification here. First, there is no authoritative state court decision construing Penal Law § 400.00(3)(a): the New York Court of Appeals has never addressed the issue, and, as explained below, the reasoning of the Third Department's 1993 *Mahoney* decision has been called into serious question by the Supreme Court's decisions in *Heller* and *McDonald*. Second, the issue is of great importance to the State because the proper interpretation of § 400.00(3)(a) is essential to the day-to-day administration of New York's regulation and licensing of handguns. *See Tunick v. Safir*, 209 F.3d 67, 78 (2d Cir. 2000) (certifying where question of law concerned "more than [New York's] generic

interest in enforcement of its laws," and instead "entail[ed] core governmental functions"). Third, if the Court of Appeals were to hold that the residency provision does not impose a domicile requirement, but rather permits part-year residents owning property in New York to apply for a handgun license, this litigation would thereby be resolved.[10]

This Court has recognized that certification serves particularly critical federalism interests in cases like this one, where a state statute implemented by state officials is under federal constitutional challenge, and the state courts have not yet had the opportunity to resolve questions of statutory interpretation that bear directly on the constitutional issues raised. In such cases, certification allows the Court to avoid deciding the constitutionality of a state statute "unnecessarily

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[10] Even if the putative domicile requirement of Penal Law § 400.00(3)(a) were eliminated, whether by statutory interpretation or constitutional adjudication, Osterweil would nevertheless not be entitled to the relief he requested—an order directing issuance of a handgun license—because it has not yet been determined whether he satisfies all valid statutory requirements for eligibility. For example, because of the low quality of his fingerprints, a state official has not completed an investigation of "all statements . . . in the application," Penal Law § 400.00(4), including a criminal background search to verify that Osterweil has not been convicted of "a felony or a serious offense," *id.* § 400.00(1)(c).

or prematurely," and prevent "the potential for 'friction-generating error' between the federal and state court systems.'" *Tunick*, 209 F.3d at 72, 77 (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997)).

Certification has the further benefit in these cases of allowing the canon of constitutional avoidance to come into play. Where a state law is at issue, "only the state court can ultimately determine whether a saving interpretation is appropriate under the canons of interpretation of the particular state whose statutes it is called upon to construe." *Id.* at 75. "[S]tate law [may] allow state courts to rewrite state statutes to a degree that would be impermissible for federal courts dealing with federal laws." *Id.* at 76. The "question of the extent to which the state court can go when interpreting its own laws is paradigmatically one of state law, and it is one that federal courts are singularly unsuited to answer." *Id.*

These same considerations of comity and federalism also animate the well-established doctrine of *Pullman* abstention. Indeed, "[c]ertification today covers territory once dominated by . . . '*Pullman* abstention.'" *Arizonans*, 520 U.S. at 75; *accord Nicholson v. Scopetta*,

344 F.3d 154, 168 (2d Cir. 2003) (quoting *Arizonans*). The *Pullman* doctrine holds that a federal court "must abstain from [its] equity jurisdiction when a federal constitutional ruling could be avoided 'by a controlling decision of a state court,' and a state court decision can be pursued consistent 'with full protection of the constitutional claim.'" *Nicholson,* 344 F.3d at 167 (quoting *R.R. Comm'n v. Pullman Co.,* 312 U.S. 496, 500–01 (1941)).

Because both factors are present here, abstention would be appropriate were certification not available. But certification is available under the rules of the New York Court of Appeals, Rule § 500.27, and certification is preferable to abstention because it permits a faster resolution of the proper construction of New York's residency provision by allowing the case to be sent directly to the state's highest court. *See Tunick*, 209 F.3d at 79 ("[T]he delay created by certification is almost never as great as that imposed by abstention."). This Court has recognized that it "may elect to certify, rather than abstain" where it would be more efficient to do so, *Nicholson*, 344 F.3d at 168, and for efficiency reasons it should opt to certify, not abstain, here.

There is little risk that any delay due to certification would harm Osterweil's asserted constitutional rights. He has acknowledged that he uses his New York house only as a "summer house" (J.A. 16), and it seems unlikely that this case can be decided before the end of the summer of 2012, whether or not this Court certifies the dispositive legal question to the state high court. And Osterweil's interest in using handguns for target practice and hunting in New York in the summer of 2013 will not be affected by the time it may take for this Court to certify the question to the Court of Appeals and to receive from that Court any answer it may choose to provide.

B. The Residency Provision in Penal Law § 400.00(3)(a) Is Better Construed Not To Impose a Domicile Requirement.

Certification is especially appropriate here, because the procedure not only respects the authority of the state courts to construe state law, but also will likely avoid the constitutional challenge that Osterweil seeks to present. First, the plain language of Penal Law § 400.00(3)(a) may easily be construed not to impose a domicile requirement. The statutory text—which requires an applicant to apply for a handgun license "where the applicant resides"—is readily construed to allow an

application to be submitted in a city or county where the applicant owns a part-time residence, even if the residence is not the applicant's domicile. Thus, if the issue is presented to the state courts, the canon of constitutional avoidance alone may well settle the matter. *See, e.g., Alliance of Am. Insurers v. Chu*, 77 N.Y.2d 573, 585 (1991) (canon requires New York Court of Appeals "to avoid interpreting a statute in a way that would render it unconstitutional if such a construction can be avoided").

Even without invoking the avoidance canon, § 400.00(3)(a) is better read not to impose a domicile requirement. By its terms, the phrase "where the applicant resides" specifies the place where a license application must be filed, not a substantive requirement for licensure as such. Penal Law § 400.00(1), governing eligibility for firearms licenses, contains numerous substantive eligibility requirements, but no requirement of domicile in New York. The residency provision in § 400.00(3)(a) thus seems to serve primarily the purpose of requiring a person to apply for a handgun license where the license would be used, where the application can be best investigated, and where officials may monitor the presence of firearms in their communities.

The location of a person's part-time residence in New York is an appropriate and convenient place for the person to apply for a handgun license, regardless of whether the residence is also the person's domicile. Thus, although it is reasonable to construe the phrase "where the applicant resides" as effectively imposing a state residency requirement—someone who does not reside in any city or county of the State cannot apply to any licensing officer—the likely purpose of the phrase is satisfied without construing it to impose a requirement that the applicant be domiciled in New York.

Furthermore, the primary reason that the Third Department previously gave for construing the residency provision as a domicile requirement is no longer valid. The court in *Mahoney* recognized that "the technical distinction [between domicile and residency] is well appreciated." 199 A.D.2d at 735. The court nonetheless construed the residency provision to require domicile on the ground that possession of a firearm is a privilege, not a right. *Id.* The Supreme Court's decisions in *Heller* and *McDonald* squarely refute any such notion. *Heller*, 554 U.S. at 576-626; *McDonald*, 130 S. Ct. at 3026. This intervening change in law alone makes it highly unlikely that the Court of Appeals—or

indeed, even the Third Department itself—would today adopt *Mahoney*'s construction of the residency provision in Penal Law § 400.00(3)(a).

POINT II

EVEN IF § 400.00(3)(a) REQUIRED APPLICANTS TO BE DOMICILED IN THE STATE, IT WOULD BE CONSTITUTIONAL AS APPLIED TO OSTERWEIL'S LICENSE APPLICATION

Osterweil's standing under *Bach v. Pataki,* 408 F.3d 75, 82 (2d Cir. 2005), to bring a constitutional challenge to the licensing officer's denial of his application is doubtful at best. Under *Bach*, a person challenging a licensing scheme must first apply for the license unless such an application would be futile. *Id.* at 83. Osterweil failed to pursue his application by seeking state court review of the continuing validity of the domicile requirement adopted in *Mahoney*. The purpose of generally requiring an application for a license before challenging a licensing scheme is to "prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Id.* at 82 (quotation marks and citations omitted). When Osterweil's license application was addressed at the administrative review level,

the Supreme Court's decision in *Heller* had already cast strong doubt on *Mahoney*'s reasoning. Thus, seeking state court review of the licensing officer's decision would have been far from futile: it might have led to reconsideration by the Third Department itself in light of *Heller*'s recognition of an individual right to bear arms, and state court review might have clarified the type of license Osterweil actually sought—whether he sought a license for premises, or for concealed carrying for the purpose of hunting and target practice. Now, due to Osterweil's failure to pursue his application through state court review, this Court is faced with a dispute that may well be predicated on an incorrect view of the New York statute at issue. Thus, under *Bach*, Osterweil lacks standing.

Even if Osterweil has standing, his arguments on the merits of his constitutional challenge fall short. First, he repeatedly invokes the Second Amendment right of an individual to possess a firearm in his home for the purpose of self-defense. But these arguments may well be misplaced, because Osterweil did not seek a handgun license for the purpose of self-defense in the home. *See Decastro*, 2012 WL 1959072, at *7 (rejecting availability of overbreadth analysis in Second Amendment

case). Rather, he sought a "premises" license for use in target practice and hunting—a type of license that does not exist—and his complaint sought an order directing issuance of "the type of permit originally applied for" (J.A. 11).

Consequently, if this statute were deemed to contain a domicile requirement, its constitutionality could be at issue here not as applied to a license for possession of a handgun in the home for self-defense, as Osterweil now contends, but rather as applied to the license he sought—a license for possession of a handgun for the purpose of target practice and hunting. As applied to a license for target-practice and hunting, as explained below, there can be no doubt that a domicile requirement would be constitutional. Alternatively, even if Osterweil's application were viewed as seeking a license for self-defense of his New York house, a domicile requirement would be constitutionally permissible as to Osterweil.

A. Rational Basis Scrutiny Applies To The Extent Osterweil's Application Requested A License for Target Practice and Hunting.

Osterweil initially filed an application for a "premises" license, explaining his purpose as "target practice and hunting," which is not a purpose consistent with a premises license. He never corrected this internally inconsistent application. To the extent his application is properly viewed as seeking a license to carry a weapon for the purpose of target practice and hunting, it plainly falls outside the core concerns of the Second Amendment as elaborated in *Heller* and *McDonald*. These decisions established that "the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense." *McDonald*, 130 S. Ct. at 3050.

In *Decastro*, decided after *Heller* and *McDonald,* this Court considered a federal statute that similarly did not directly implicate the right of self-defense in the home. *Decastro* addressed a Second Amendment challenge to 18 U.S.C. § 922(a)(3), which prohibits, with certain exceptions, the transport of a firearm purchased outside a person's State of residence into the State of residence. 2012 WL 1959072, at *1. This Court observed that *Heller* and *McDonald*

approved laws prohibiting the carrying of firearms in sensitive places and regulating the commercial sale of arms, and concluded therefore that "time, place and manner restrictions may not significantly impair the right to possess a firearm for self-defense, and may impose no appreciable burden on Second Amendment rights." *Id.* at *4. Moreover, the Court stated that *Heller* and *McDonald* emphasize "the practical impact of a challenged regulation on the ability of citizens to possess and use guns for the core lawful purpose of self-defense." *Id.* Accordingly, this Court determined that "heightened scrutiny [under the Second Amendment] 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 an use a firearm for self-defense (or for other lawful purposes)." *Id.* at *5.[11] The Court further held that a "law that regulates the availability of

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[11] *Decastro* found this "substantial burden" trigger for heightened scrutiny consistent with the treatment of "other fundamental constitutional rights," such as the right to marry, the right to vote, the right to choose an abortion, and the right to free speech. 2012 WL 1959072, at *5-*6.

firearms is not a substantial burden . . . if adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense." *Id.* at *6.

Under *Decastro*, rational basis scrutiny, not any form of heightened scrutiny, would apply here, because any domicile requirement, as applied to Osterweil's application for a license restricted to target practice and hunting, would not substantially burden his Second Amendment rights. A domicile requirement would bar Osterweil only from possessing a handgun for target practice and hunting during the summer months that he spends in New York (to the extent any of his planned hunting would be permitted in the summer). New York's domicile requirement would obviously not bar him from target practice and hunting during the majority of the year, which he apparently spends in his domicile of Louisiana or elsewhere outside New York. Nor would a domicile requirement for handgun licenses used for target practice and hunting bar Osterweil from possessing a long gun during summers in New York for use in target practice or hunting (*see* J.A. 148 ("New York law allows a non-resident, such as the applicant, to possess long guns")). The record contains no evidence that establishes, or even suggests, that Osterweil requires (for some reason)

a handgun, rather than a long gun, for any planned target practice and hunting in New York. Particularly in light of the absence of any assertion of a self-defense purpose in his application for a license, the availability of adequate alternatives for Osterweil to pursue target practice and hunting means that any domicile requirement, as applied to Osterweil, would not be subject to heightened scrutiny under *Decastro*. Osterweil does not suggest that a domicile requirement would fail rational basis scrutiny, and, indeed, for reasons explored more fully below, because a domicile requirement would satisfy intermediate scrutiny, it would also satisfy rational basis scrutiny.

B. If Osterweil's Application Were Viewed as Seeking a License for Use Only on His Own Premises For Self-Defense, At Most Intermediate Scrutiny Would Apply and It Would be Satisfied By A Domicile Requirement.

Even if Osterweil's Second Amendment right to possess a handgun in his New York house for self-defense were at issue here—and his actual license application leaves that question in doubt—a domicile requirement, as applied to Osterweil, would satisfy the applicable intermediate scrutiny.

1. Intermediate scrutiny applies to a regulation that substantially burdens Second Amendment rights.

As this Court has observed, in both *Heller* and *McDonald*, the Supreme Court "declined to announce the precise standard of review applicable to laws that infringe the Second Amendment because the laws at issue . . . would be unconstitutional '[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights.'" *Decastro*, 2012 WL 1959072, at *4 (quoting *Heller*, 554 U.S. at 628-29). As discussed above, under *Decastro*, heightened scrutiny is reserved for "regulations that burden the Second Amendment right substantially." *Id.* at *5.

Assuming that Osterweil sought a handgun license for self-defense in his New York house, the appropriate level of heightened scrutiny would be at most intermediate scrutiny, as the district court found here. Osterweil's brief urges this Court to apply strict scrutiny, but does not cite a single case supporting application of strict scrutiny, even with respect to the "core" home self-defense component of the Second Amendment right. Nor has Osterweil cited a single case holding that strict scrutiny applies to a regulation of handgun possession in

each of several houses that an individual owns. On the contrary, strict scrutiny is not the appropriate standard of review even for regulations that substantially burden the "core" Second Amendment right of self-defense in the home. *See Heller*, 554 U.S. at 688 (Breyer, J., dissenting) (observing that Court's opinion rejects strict scrutiny "by broadly approving a set of laws . . . whose constitutionality under a strict scrutiny standard would be far from clear"). Because Osterweil has presented no authority and no persuasive argument supporting application of strict scrutiny to a domicile requirement applied to a handgun license for self-defense in one of several houses an individual owns, this Court should apply at most intermediate scrutiny.

2. A domicile requirement applied to Osterweil would satisfy intermediate scrutiny because it would serve important state interests.

To satisfy intermediate scrutiny, a state regulation "must be substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Application of a domicile requirement to Osterweil's application easily satisfies this test.

As is the case with many handgun laws, New York's licensing regime aims to protect the public safety and prevent handgun crime.

The state interests in public safety and crime prevention are undoubtedly compelling. *See United States v. Salerno*, 481 U.S. 739, 748 (1987); *Schall v. Martin*, 467 U.S. 253, 264 (1984); *see also Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 376 (1997) (content-neutral injunction against First Amendment conduct justified by government interest in "public safety and order"). Indeed, plaintiff's brief concedes (Br. at 36) that the state interest in public safety "may be compelling."

These interests would justify applying a domicile requirement to Osterweil's license application, if New York law did so. In *Bach v. Pataki*, this Court specifically discussed the important interests served by the residency provision in Penal Law § 400.00(3)(a). 408 F.3d at 91. The Court there rejected a challenge to the residency provision brought under the Second Amendment and the Privileges and Immunities Clause of article IV of the Constitution. *Bach* did not address whether the residency provision would be constitutional if applied as a domicile requirement, because the plaintiff in that case was neither a resident nor a domiciliary of New York. *See id.* at 76.

To be sure, *Bach* rejected the plaintiff's Second Amendment claim on the ground that the Second Amendment does not apply to state laws regulating gun possession, *id.* at 84, and the Supreme Court's decisions in *Heller* and *McDonald* have overruled that holding. Nonetheless, this Court's analysis in *Bach* regarding the purposes served by New York's residency requirement, which it undertook in addressing the plaintiff's challenge under the Privileges and Immunities Clause,[12] remains accurate and persuasive. In addition, as explained below, the Court's analysis in *Bach* would apply in large part to a domicile requirement, not only to a simple residency requirement.

The Court's analysis in *Bach* demonstrates that a domicile requirement would satisfy intermediate scrutiny. *Bach* identified a

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[12] *Bach*'s analysis of the importance of the State's interest in monitoring licensees' activities, as well as the tailored connection between that interest and a residency requirement, is contained in the Court's discussion of Bach's right to travel claim arising under the Privileges and Immunities Clause. Under that Clause, when a State discriminates against citizens of another State, it may successfully defend that discrimination by showing a "substantial reason" for the discrimination and a reasonably tailored relationship between "'the degree of discrimination exacted and the danger sought to be averted by enactment of the discriminatory statute.'" *Bach*, 408 F.3d at 88 (quoting *Blumenthal*, 346 F.3d at 94).

substantial state interest in treating residents and nonresidents differently for the purpose of obtaining a handgun license. This interest also justifies treating domiciliaries and nondomiciliaries differently, because a part-time resident's activities outside the State are just as much beyond the State's control as are those of a visitor. The Court recognized that the State's monitoring interest "in continually obtaining relevant behavioral information" about individuals licensed to possess firearms is substantial and justifies treating non-residents differently from residents in its firearm licensing statutes. *Bach*, 408 F.3d at 91. The State has a reduced ability to monitor both nonresidents and part-time residents for two main reasons. First, "[t]he State can only monitor those activities that actually take place in New York. Thus, New York can best monitor the behavior of those licensees who spend significant amounts of time in the State." *Id.* at 92. Here, the record does not establish how much time Osterweil spends in New York, even during the summer. Second, "other States . . . cannot adequately play the part of monitor for the State of New York or provide it with a stream of behavioral information approximating what New York would gather" because "[t]hey do not have the incentives to do so." *Id.* The Court in

Bach also found New York's "nonresident distinction" in its firearm licensing statutes to be "tailored to the State's [substantial] monitoring interest." *Id.* at 94. A requirement that treats domiciliaries differently from nondomiciliaries with only seasonal residence in New York would also be tailored to the monitoring interest; a part-time resident may spend even less time in the State than a visitor.

Bach's analysis, applied to Osterweil, means that the denial of his license application on nondomicile grounds would survive intermediate scrutiny. Indeed, if anything, New York's substantial interest in monitoring is even stronger with respect to Osterweil. First, as the district court observed, Osterweil's vacation house in New York "is no longer his 'home'" (J.A. 169). Indeed, the record does not disclose how much time he spends in the house he owns in Schoharie County; on the contrary, the record suggests that his adult daughter has used the house as her residence (*see* J.A. 124). It may be that Osterweil himself spends only a handful of days a year in New York. Second, Osterweil has not provided fingerprints usable by the federal and state governments. In the absence of what his own brief calls "usable fingerprints" (Br. at 44), New York is yet more limited in its ability to

monitor Osterweil's activities—especially his out-of-state activities—than it was in its ability to monitor the plaintiff in *Bach*, and the State's justification for denying Osterweil a handgun license would be correspondingly stronger than the interests discussed in *Bach*.

Thus, as applied to Osterweil and on this record, a domicile requirement would survive intermediate scrutiny because it would serve the State's substantial interest in monitoring the activities of firearms licensees.

POINT III

A DOMICILE REQUIREMENT, AS APPLIED TO OSTERWEIL, DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

Osterweil claims that a domicile requirement, applied to him and his application for a target-practice and hunting license, violates the Equal Protection Clause because it treats him differently from a person who is domiciled in New York, and that this different treatment fails strict scrutiny. But Osterweil, as a part-time resident of New York, is not similarly situated to a person domiciled in New York. Indeed, because of his "worn fingerprints" (J.A. 143), Osterweil himself is not

even similarly situated to other part-time residents of New York whose fingerprints are usable by criminal justice agencies. This difference between Osterweil and the vast majority of other applicants for handgun licenses alone means that there is no equal protection violation because he is not similarly situated to persons domiciled in New York.

Even if Osterweil were similarly situated to other applicants, he has provided no support for applying strict scrutiny to his equal protection claim. As shown *supra*, at most intermediate scrutiny would apply to Osterweil's Second Amendment claim. There is no justification for apply a higher level of scrutiny to Osterweil's equal-protection claim, which is premised on a classification based on his Second Amendment right, than would be applied to the underlying constitutional right itself. *Cf. Hayden v. Paterson*, 594 F.3d 150, 170 (2d Cir. 2010) (felon disenfranchisement statute not subject to strict scrutiny even though it affects fundamental right to vote).

CONCLUSION

For the foregoing reasons, the Court should grant the State's motion for certification of a controlling question of law to the New York Court of Appeals or, in the alternative, affirm the judgment of the district court.

Dated: June 26, 2012
New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Oren L. Zeve, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 8,311 words and complies with the type-volume limitations of Rule 32(a)(7)(B).

/s/ Oren L. Zeve
Oren L. Zeve

EXHIBIT D

11-2420 cv

In the

United States Court of Appeals

for the Second Circuit

Alfred G. Osterweil,

Plaintiff - Appellant,

v.

George R. Bartlett, III,
In his official capacity as Licensing Officer in the County of Schoharie,

Defendant – Appellee,

David A. Paterson, in his official capacity as
Governor of the State of New York; Andrew M. Cuomo, in his official capacity as
Attorney General of the State of New York,

Defendants.

On Appeal from the United States District Court
for the Northern District of New York (Syracuse)

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INTRODUCTION AND SUMMARY

Appellee Bartlett's brief is notable for what it concedes. Bartlett concedes "that the Second Amendment guarantees an individual right to possess a handgun for self-defense in the home that may not be infringed by the States." Bartlett Br. 1; *see id.* at 18–19. Bartlett admits that this right likely extends to protect home handgun possession for "individuals who reside in New York seasonally and are domiciled elsewhere." *Id.* at 5. Bartlett also appears to accept that if either strict scrutiny or the categorical approach of *Heller* applies to the New York law at issue here, the law cannot survive. *Id.* at 35–42.

That Bartlett and Mr. Osterweil agree on the nature and scope of the Second Amendment right should make this an easy case for this Court to resolve. Indeed, Bartlett dedicates only a few pages of his brief to an actual defense of the domicile requirement, and all of that depends on the assumption that the law is subject to a standard of review far more lenient than that compelled by *Heller* and *McDonald*. Instead, Bartlett uses the balance of his brief to raise a host of meritless arguments in an attempt to distract this Court from reaching the core—and easily answered—question presented: whether the Second Amendment protects the right of a part-time New York resident to possess a handgun in his home. Bartlett urges this Court to certify the question to the New York State Court of Appeals so that the New York court can consider the impact of the Federal Constitution on the

prevailing view in the New York courts. He also asserts that Mr. Osterweil lacks standing to bring this suit based on the denial of his license, and—in an argument newly crafted on appeal—that what Mr. Osterweil really wanted was a handgun for target practice, which is afforded minimal Second Amendment protection.

None of these efforts to keep this Court from deciding the merits of the federal constitutional question presented here is valid, and the merits of the constitutional question are straightforward. Despite his best efforts, Bartlett cannot explain away the fact that denying an in-home handgun license to a part-time resident is inconsistent with the Second Amendment and the Supreme Court's recent decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). As those cases make clear, the Second Amendment right, especially when it comes to self-defense in the home, is fundamental. It is not a seasonal right that can be denied during the summer, or limited to full-year residents. The Supreme Court has made clear that any law that categorically bans the possession of handguns in the home is unconstitutional. That is exactly what the New York law at issue here, as interpreted and applied by the District Court, does and thus that law is invalid.

ARGUMENT

I. Because This Case Turns On The Scope Of Mr. Osterweil's Federal Constitutional Rights, Certification Is Unnecessary.

The primary issue in this case is whether Mr. Osterweil can be denied the right to possess a handgun in his New York home consistent with the Second Amendment. This Court does not need to certify that federal constitutional question to the New York State Court of Appeals. As Mr. Osterweil argued in his motion opposing certification, *see* Doc. 79[1], this case requires interpreting the scope of the Second Amendment right to bear arms, the Supreme Court's decisions in *Heller* and *McDonald* fleshing out that right, and the Equal Protection Clause of the Federal Constitution. This Court—not the New York State Court of Appeals—is the appropriate forum for the resolution of these issues.

Despite the federal constitutional issue at the heart of this case, Bartlett argues that certification is necessary, for the most part repeating the arguments contained in his motion for certification. *See* Doc. 68. Bartlett first argues that the New York State Court of Appeals should be given the opportunity to decide the issue, suggesting that "critical federalism interests" require certification. Bartlett Br. 23. But federalism interests are at their nadir when it comes to considering

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[1] Citations to the District Court docket (No. 09-CV-00825) are designated "N.D.N.Y. Doc."; citations to the docket in this case on appeal (No. 11-2420) are designated "Doc."; and citations to the Joint Appendix are designated "A__."

federal constitutional limits on state action under the Fourteenth Amendment. By incorporating the fundamental protections of the Bill of Rights, including the Second Amendment, and requiring states to treat persons equally, the Fourteenth Amendment restricts state action, rather than preserving some special role for state courts. To be sure, the constitutional violation of Mr. Osterweil's rights was accomplished by Bartlett's application of New York law. That does not mean, however, that this Court must certify the underlying constitutional question to a New York court. Bartlett concedes that the scope of state law before *Heller* and *McDonald* was well-settled, and that a change in federal constitutional law is the primary basis for reconsidering those decisions. In light of the primacy of the federal constitutional questions, certification makes no sense here.

Next, Bartlett submits that certification is warranted because the validity of New York's handgun licensing regime "is of great importance to the State." *Id.* at. 22. But respect for Mr. Osterweil's fundamental constitutional rights is even more important to Mr. Osterweil, and federal courts exist to protect and adjudicate such federal rights. In all events, "importance to the State" is hardly a sufficient basis for certification. Indeed, because this Court only "resort[s] to certification sparingly," *Highland Capital Mgmt. v. Schneider*, 460 F.3d 308, 316 (2d Cir. 2006), certification is "not proper" unless the issue presents a complex question of New York law, there is a split in authority regarding the issue in the state courts, or

there is insufficient state law precedent available to guide this Court's appraisal of the matter, *Tinelli v. Redl*, 199 F.3d 603, 606 n.5 (2d Cir. 1999). *See DiBella v. Hopkins*, 403 F.3d 102, 111 (2d Cir. 2005); *City of New York v. Golden Feather Smoke Shop, Inc.*, 597 F.3d 115, 127 (2d Cir. 2010). This dispute has none of those attributes. The issue at the heart of the case is a straightforward matter of federal constitutional law and the only precedents necessary to decide the case are *Heller* and *McDonald*.

Bartlett also suggests that certification is required here because the New York State Court of Appeals may opt to apply the cannon of constitutional avoidance to N.Y. Penal Law § 400.00(3)(a)'s residency requirement and thus save the statute. But the case that Bartlett cites for this proposition—*Tunick v. Safir*, 209 F.3d 67 (2d Cir. 2000)—critically undermines it. In *Tunick*, this Court expressly recognized that it was inappropriate to certify a case simply because a plaintiff challenges a state law on constitutional grounds, the state's highest court has not issued an authoritative interpretation of the statute, and the constitutional question could potentially be avoided by adopting a specific reading of the state statute at issue. *Id.* at 73–74. So it is here. Just because the New York State Court of Appeals *might* construe § 400.00(3)(a) in a manner that makes that statute consistent with the Second Amendment does not mean that this Court *must* certify the question.

Relatedly, Bartlett contends that if the New York State Court of Appeals interprets § 400.00(3)(a) to allow "individuals who reside in New York seasonally" to obtain handgun licenses, Mr. Osterweil's "constitutional challenge will be moot and this court will have no occasion to reach the constitutional issues Osterweil seeks to raise on this appeal." Bartlett Br. at 5. But Bartlett's primary contention is that it is the Federal Constitution as authoritatively construed in *Heller* and *McDonald* that would cause the New York Court of Appeals to reconsider *In re Mahoney v. Lewis*, 199 A.D.2d 734 (N.Y. App. Div. 1993). Thus, this is not a case of true constitutional avoidance—at least one court will have to consider the federal constitutional question, and there is no sound reason that it should not be this Court. Bartlett emphasizes the scenario where the New York Court of Appeals reinterprets New York law in light of *Heller* and *McDonald.* But the alternative outcome underscores the centrality of the federal constitutional question and the inappropriateness of certification in this case. If the New York State Court of Appeals holds that nothing in *Heller*, *McDonald*, or the Second Amendment more broadly, counsels against adopting the same view of New York law as that espoused in *Mahoney*, and adopted by Bartlett and the District Court, this Court would then have to address the same Second Amendment questions, creating the very real risk of a split in authority on the scope of Second Amendment rights in a single case. That possibility of different resolutions of the same Second

Amendment issues (albeit considered in a constitutional avoidance posture by the New York court and directly by this Court) demonstrates why the real issue in this case is a constitutional one—not an issue of state law—that should be decided by this Court. To the extent that the concern informing whether certification is appropriate is "[t]he potential for the '"friction-generating error" between the federal and state court systems,'" *Tunick*, 209 F.3d at 94 (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997)), as Bartlett suggests, the possibility of not just friction but diametrically opposed views of the same constitutional question counsels against certification, not for it.

As Mr. Osterweil pointed out in his opposition to Bartlett's certification motion, certification in this case will also result in an intolerable and unnecessary delay in vindicating his constitutional right to possess a handgun in his New York home—a right made manifestly clear by *Heller* and *McDonald*. And this Court has recognized that "the effect of certification, and its attendant delay, on the constitutional right here asserted . . . . cannot be ignored." *Tunick*, 209 F.3d at 87. Bartlett attempts to downplay the ongoing irreparable harm caused by the continuing delay in this case, concluding that "[t]here is little risk that any delay due to certification would harm Osterweil's asserted constitutional rights." Bartlett Br. 26. This is so, Bartlett contends, because Mr. Osterweil uses his New York home only in the summer, this case will not be decided this summer—certification

or not—and that the case, even with certification, will be decided by the summer of 2013. First and foremost, Bartlett misapprehends the nature of constitutional rights and grossly underestimates the seriousness with which the law views the violation of those rights. *Cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Conn. Dep't of Envtl. Prot. v. OSHA*, 356 F.3d 226, 231 (2d Cir. 2004) (same). Mr. Osterweil applied for the license at the crux of this case more than four years ago. For Bartlett to suggest that any added delay will not exacerbate the injury that Mr. Osterweil has already suffered reveals just how little value Bartlett assigns to Second Amendment rights.

What is more, it is not at all clear that the factual premise underlying Bartlett's ill-founded timing argument is correct. "In New York, the average time from the Court of Appeals' receipt of a request for certification to determining whether to accept is 38 days and the average time from certification to resolution is approximately seven months." N.Y. State Bar Ass'n, Certification of Questions of State Law in the Second Circuit 6 (2007), *available at* http://www.nysba.org/Content/ContentFolders4/CommercialandFederalLitigationSection/ComFedReports/AppPracCertofQuestions2ndCircuit.pdf. So if the Court does decide to certify the question after argument, which could be months from now, and the New York Court of Appeals accepts certification and decides the question in a manner inconsistent with Mr. Osterweil's Second Amendment rights, it is optimistic to

think that this case will come to a close before summer 2013. But if certification is to occur, this Court should do everything it can to expedite proceedings to minimize any further delay in the recognition of Mr. Osterweil's constitutional rights.

As an alternative to certification, Bartlett briefly suggests that if the Court does not certify, it should consider abstaining under the *Pullman* doctrine. Bartlett Br. 24–25. Abstention would be wholly inappropriate here. Even if the necessary preconditions for *Pullman* abstention were met—and they are not—abstention would not be the proper course. As this Court has recognized, "important federal rights can outweigh the interests underlying the *Pullman* doctrine." *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 385 (2d Cir. 2000) (internal quotation marks and brackets omitted). And when the wrong alleged is a violation of constitutional rights, as it is here, "the weight of the" "issues involved counsels against abstaining." *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 100 (2d Cir. 2004).

But more fundamentally, neither certification nor abstention is necessary because, as Bartlett concedes, "the Second Amendment guarantees an individual right to possess a handgun for self-defense in the home that may not be infringed by the States," Bartlett Br. 1, and Bartlett's denial of Mr. Osterweil's application for an in-home handgun license violates that right. This Court does not need to ask

the New York State Court of Appeals to tell it what Bartlett admits, the Second Amendment compels, and *Heller* and *McDonald* make plain.

II. Bartlett's Attempts To Distract This Court From Addressing The Constitutional Issue At The Heart Of This Case Are Unavailing.

Although the Second Amendment issue at the heart of this case—whether *Heller* extends to the homes of part-time residents—is straightforward, Bartlett distorts the facts and the law in an effort to distract the Court from addressing that straightforward question. After devoting a significant portion of his brief to arguing for certification on the premise that *Heller and McDonald* are game-changing decisions that will cause the New York courts to revisit their approach to residence, Bartlett shifts gears and asserts that denying Mr. Osterweil's license was not constitutionally problematic notwithstanding *Heller* and *McDonald.* But Bartlett can accomplish this about-face only by distorting the record and suggesting that Mr. Osterweil lacks standing, or that this case involves hunting and target practice rather than protection of the home.

Little ink need be wasted on Bartlett's standing argument. Mr. Osterweil applied for and was denied a license to possess a handgun in his home in violation of his constitutional right to bear arms and he has standing to challenge that denial in federal court. *Cf. Baker v. Carr*, 369 U.S. 186, 205–07 (1962); *Jackson-Bey v. Hanslmaier*, 115 F.3d 1091, 1096 (2d Cir. 1997). Bartlett elides this obvious conclusion, and instead questions Mr. Osterweil's standing on the basis of *Bach v.*

Pataki, 408 F.3d 75 (2d Cir. 2005). But *Bach* distinguishes itself. In *Bach*, this Court held that Bach had standing to challenge New York's handgun licensing requirement even though he did *not* apply for a license. As Mr. Osterweil applied for a license and was denied that license, he has standing *a fortiori*. To the extent that *Bach* is relevant to the question of Mr. Osterweil's standing in this case at all, it is to show that Mr. Osterweil would have had standing even if he had not applied for a license. Because the prevailing view of New York law required that one be a domiciliary to obtain an in-home handgun license, Mr. Osterweil "had nothing to gain . . . by completing and filing an application." *Bach*, 408 F.3d at 82–83. But Mr. Osterweil did apply for a license, and that application was denied. Because the grounds of that denial were inconsistent with Mr. Osterweil's fundamental Second Amendment right, he has standing to challenge that denial.

Moving on from his standing argument, Bartlett next asserts—for the first time in this litigation—that Mr. Osterweil's Second Amendment right to bear arms was not violated when his license application was denied because he sought that license for "target practice and hunting," not self-defense. This argument is forfeited and flawed both legally and factually.

There is no need for this Court to consider this newly-minted argument on appeal. There is nothing remotely jurisdictional that would justify this Court excusing Bartlett's failure to raise this argument earlier. *See Bogle-Assegai v.*

Connecticut, 470 F.3d 498, 504 (2d Cir. 2006) ("[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal.") (internal quotation marks omitted).

Of course, the real reason that Bartlett did not raise this argument is that it was crystal clear through the course of the back and forth in the application process that Mr. Osterweil wanted to possess a handgun for, *inter alia,* use on his New York premises for self-protection. When Mr. Osterweil filled out his "State of New York Pistol/Revolver Application," he was instructed to indicate whether he was applying for a license to "carry concealed," "possess on premises," or "possess/carry during employment." A41. He put an "X" in the "possess on premises" box—the form at issue instructs the applicant to "check only one." A41. As New York law explains, a "possess on premises" permit authorizes an individual to "have and possess" "a pistol or revolver" "in his dwelling." N.Y. Penal Law § 400.00(2)(a).

The right to have and possess a pistol or revolver in one's dwelling—what Mr. Osterweil asked the State's permission to do—is the core right that the Second Amendment protects. The Second Amendment states that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend II. That Amendment confers an individual right to "possess and carry weapons in case of confrontation," *Heller*, 554 U.S. at 592, and it is "valued because the possession of

firearms [i]s thought to be essential for self-defense," *McDonald*, 130 S. Ct. at 3048. The Founders and Framers "of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty" *because* it is essential to self-defense. *Id.* at 3042. An individual need not proclaim that he needs a weapon to defend himself in order to be entitled to his Second Amendment right. Nor does the fact that he may want to use the firearm for other purposes as well in any way detract from his constitutional right to possess the firearm for self-defense purposes. The right ensures that he is able to do so should the need arise. Thus Mr. Osterweil did not need to explain to the State why he was invoking his right to possess a handgun in his home. That he sought to do so suffices to bring his request fully within the core of what the Second Amendment protects.

The absurd result of applying Bartlett's logic helps demonstrate the point. Under Bartlett's view of the Second Amendment, he could deny the application of any individual seeking an in-home handgun permit if that person did not write "for self-defense purposes" on the application. The Second Amendment contains no such requirement, and neither *Heller* nor *McDonald* even hint that a citizen must attest to their intent to use a gun to protect their home to be entitled to the core right that the Second Amendment protects.

In any event, by the time Bartlett denied Mr. Osterweil's application for an in-home hand-gun license on May 29, 2009, it was crystal clear that Mr. Osterweil sought that license not only for "target practice and hunting," but to protect his hearth and home. This reality presumably explains why this argument did not surface during the earlier stages of the litigation. Mr. Osterweil applied for the license in question on May 21, 2008. A9; A25 ¶ 2. In a letter to Bartlett on July 10, 2008, Mr. Osterweil stated that he sought the "license to purchase and hold a handgun." A52. In that same letter, Mr. Osterweil informed Bartlett that *Heller* "stat[ed] that the Second Amendment was adopted to permit all citizens to own and bear arms to protect them in their homes." *Id.* Mr. Osterweil then inquired "[i]f the amendment was meant to permit me to protect myself in my home, is it not logical to assume that I have the same right in a second home?" *Id.*

Mr. Osterweil reiterated these points in a letter to Bartlett on March 4, 2009, stating that he was entitled to a license because "[t]he entire purpose of the Second Amendment [is] . . . to [e]nsure the safety of each individual in his home." A97. Though he was not required to do so, Mr. Osterweil clearly communicated to Bartlett why he wanted to possess a handgun in his New York home: to protect his family.[2]

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[2] Furthermore, in his summary judgment motion in the District Court, Mr. Osterweil invoked his "fundamental right to be secure in one's home," arguing that

But Bartlett's argument is not only forfeited and factually flawed, it is legally beside the point. The right protected by the Second Amendment neither requires that citizens declare their intended use for a firearm nor circumscribes the use of a firearm for hunting, target-shooting, or self-protection purposes.[3] Any firearm can be used for target shooting, and such practice only makes the firearm more useful for other purposes, such as self-defense and hunting. Moreover, one of the key insights of *Heller* is that firearms that were useful for militia use or hunting purposes were also useful for the self-defense justification of the Framers for treating the Second Amendment as a fundamental, individual right. *See Heller*, 554 U.S. at 636–37.

This Court recently recognized the general point in *United States v. Decastro*, No. 10-3773, 2012 WL 1959072, at *4 (2d Cir. June 1, 2012). As this

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a state's attempt "to limit Plaintiff to being armed to protect his family in only one of his homes would be in direct conflict with the overriding concept and thrust of the Second Amendment." N.D.N.Y. Doc. 30 at 5–6. Bartlett did not respond to this motion by arguing that Mr. Osterweil never invoked this right. Instead, consistent with his view of this case (until now), he argued that Mr. Osterweil's license was appropriately denied because he was not domiciled in New York. *See* N.D.N.Y. Doc. 33-4 at 8–12.

[3] To the extent that any factual issue as to Mr. Osterweil's motivation to apply for a license is relevant, properly before this Court, and in doubt, because the District Court granted Bartlett's motion for summary judgment, any doubt as to a factual issue must be resolved in Mr. Osterweil's favor. *See Jeffreys v. City of New York*, 426 F.3d 549, 553 (2d Cir. 2005).

Court stressed, *Heller* and *McDonald* "emphasized the practical impact of a challenged regulation on the ability of citizens to possess and use guns for the core lawful purpose of self-defense." *Decastro*, 2012 WL 1959072, at *4. As a practical matter, were the State able to prohibit an individual from engaging in target practice with a handgun, that would significantly hinder that individual's ability to "use guns for the core lawful purpose of self-defense." *Id.* And as a constitutional matter, the protective ambit that attaches to a fundamental constitutional right necessarily includes the protection of the activities necessary to effectually exercise that right. *Cf. Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877–78 (1990).[4]

The Court of Appeals for the Seventh Circuit has also recognized as much. In *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011), that Court stated that "[t]he right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective." Thus, preventing individuals "from engaging in target practice . . . . is a serious encroachment on the

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[4] Bartlett contends that a state law prohibiting individuals from obtaining handgun licenses to engage in target practice would be subject to rational basis review. Bartlett Br. 32. That is clearly wrong. "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." *Heller*, 554 U.S. 628 n.27.

right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense." *Id.* at 708.[5]

III. New York's Ban On In-Home Handgun Possession By Part-Time State Residents Violates The Second Amendment.

After Bartlett's attempts to distract this Court from the core question in this case are discarded, the resolution of the core constitutional question—to which Bartlett dedicates but a few pages of his brief—is straightforward. The District Court in this case held that under New York's licensing regime individuals like Mr. Osterweil—part-time residents who are non-domiciliaries—"are completely excluded from the [State's] license-application procedure." A159. That categorical ban is flatly inconsistent with *Heller*'s holding and its pronouncement that the Second Amendment protects the fundamental right of "law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 628.

A. A Complete Ban On In-Home Handgun Possession Cannot Survive *Heller.*

As explained in Mr. Osterweil's opening brief, in the wake of *Heller*, New York's ban on in-home handgun possession by part-time residents cannot stand.

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[5] As *Ezell* noted, this understanding of the Second Amendment right is confirmed by the historical sources upon which *Heller* relied. *See* 651 F.3d at 704. *Heller* quoted Thomas Cooley's 1868 Treatise on Constitutional Limitations, stating that the right "to bear arms implies something more than the mere keeping; it implies the learning to handle and use them . . . ." 554 U.S. at 617–18.

Osterweil Br. 30–42. *Heller* invalidated a District of Columbia law categorically banning such possession. 554 U.S. at 635. The New York law's proscription is limited to part-year residents, but it is no less categorical or severe. It prohibits an entire class of law-abiding individuals who would otherwise be able to possess handguns in their home from doing so based on the fact that they are not domiciled in New York. Neither the Second Amendment nor *Heller* draws a distinction between part-time and full-time residents. *Heller* and *McDonald* in no way suggest that a citizen's right to protect his hearth and home is limited to one home and one hearth. Nor is the need for self-defense in any way reduced for part-time residents. If anything, the fact that residents are not present year round may make part-time residences particularly attractive targets for thieves and make the self-defense right particularly important. *See* Osterweil Br. 12, 33. Bartlett makes no real response to the argument that the categorical approach of *Heller* dooms a categorical rule of denying permits to part-time residents. Bartlett attempts to dilute the standard of review and justify its ban under rational basis or intermediate scrutiny, but that ignores the reality that *Heller*'s categorical approach dooms the New York law without needing to reach the level of scrutiny question. A requirement that one must be domiciled in a state in order to exercise his fundamental right to protect his home cannot be squared with the Second Amendment as interpreted in *Heller*.

B. New York's Ban On In-Home Handgun Possession By Part-Time Residents Fails Strict Scrutiny.

Bartlett likewise fails to advance any sort of argument that a domicile requirement could survive such scrutiny. Instead, he asserts that strict scrutiny is inappropriate in this case for two reasons. First, Bartlett argues that Mr. Osterweil's opening brief does "not cite to a single case supporting application of strict scrutiny, even with respect to the 'core' home self-defense component of the Second Amendment right." Bartlett Br. 36. Not so. Citations to *Heller* and *McDonald*—Supreme Court cases demanding the application of strict scrutiny in this case if a level of scrutiny is needed—are plentiful in Mr. Osterweil's opening brief. *Heller* and *McDonald* clearly establish that to the extent that levels-of-scrutiny analysis is necessary to resolve the question in this case, the scrutiny must be strict. Osterweil Br. 17–30. Moreover, the absence of citations to cases beyond *Heller* and *McDonald* only underscores the extreme nature of New York's denial of Second Amendment rights to part-time residents.

Bartlett's second, broader argument is that "strict scrutiny is not the appropriate standard of review even for regulations that substantially burden the 'core' Second Amendment right of self-defense in the home." Bartlett Br. 37. By Bartlett's lights, this conclusion is compelled by *Heller* because in Justice Breyer's *Heller* dissent he noted that the majority opinion rejects strict scrutiny "by broadly

approving a set of laws . . . whose constitutionality under a strict scrutiny standard would be far from clear." 554 U.S. at 688.

Bartlett makes at least two mistakes. First, he misapprehends the interaction between majority and dissenting opinions (both in the Supreme Court and courts more generally). The former are authoritative, the latter are not. Indeed, dissenting opinions are notorious for sometimes exaggerating the consequences of the majority and other times minimizing differences that are in fact significant. The best source for the meaning of a majority decision is the majority decision. And the Court's opinion in *Heller* squarely rejected the application of rational basis and intermediate scrutiny when Second Amendment rights are burdened. *Id.* at 628 n.27, 634. That means that neither level of scrutiny is appropriate. The fact that Justice Breyer, in dissent, suggests that the majority rejected the application of strict scrutiny reveals nothing more than the dissenters' opinion.

Second, Bartlett implicitly makes the same error as Justice Breyer. The fact that *Heller* listed some laws that may not offend the Second Amendment—such as laws banning the possession of firearms in sensitive places—does not undermine the application of strict scrutiny generally, let alone when it comes to regulations affecting possession in the home. *See Heller*, 554 U.S. at 626–27 & n.26. "The fact that strict scrutiny applies says nothing about the ultimate validity of any particular law," *Johnson v. California*, 543 U.S. 499, 515 (2005) (internal

quotation marks omitted), and thus anticipating in dictum that some laws will likely be valid says nothing about the applicability of strict scrutiny.

As the Court pointed out in *Heller* in rejecting Justice Breyer's "'interest-balancing' approach"—otherwise known as "intermediate scrutiny"—the Second Amendment right to bear arms is a fundamental right and there is "no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest balancing' approach." *Heller*, 554 U.S. at 634–35. This Court recently recognized the fundamental nature of the Second Amendment right in *Decastro*, stating that the Second Amendment right is a right that is "fundamental to our scheme of ordered liberty." 2012 WL 1959072, at *5. And "when government action impinges upon a fundamental right protected by the Constitution"—as it does here—strict scrutiny applies. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983).

Again, Bartlett does not engage in an analysis of how denying Mr. Osterweil's application for an in-home handgun license could possibly survive strict scrutiny. The justifications that Bartlett offers in making his intermediate scrutiny arguments make clear that it cannot. Bartlett contends that the domicile requirement is justified by two state interests. The first is New York's interest in protecting "the public safety" and preventing "handgun crime." Bartlett Br. 37. If protecting public safety and preventing handgun crime were interests sufficient to

allow the State to prevent in-home handgun possession, then the District of Columbia handgun ban would still be on the books. It is not. As *Heller* made clear, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." 554 U.S at 636. Banning handgun possession in the home in the name of public safety is one of them.

Next, citing this Court's decision in *Bach*, Bartlett contends that the State has an interest in "monitoring" its licensees sufficient to justify the restraint that New York law imposes on Mr. Osterweil's Second Amendment right. Bartlett Br. 40. But whatever validity that argument has in the context of an individual merely passing through a State, the possession of an in-state residence provides a basis for the imposition of all manner of state regulations and responsibilities that the state can sufficiently monitor. The State cannot simply throw up its hands and suggest the job becomes too difficult in a context when it implicates a fundamental constitutional right. Moreover, as argued in Mr. Osterweil's opening brief, the fact that New York allows domiciliaries who may spend little-to-no time in New York to obtain in-home handgun licenses critically undermines Bartlett's argument that the state has a substantial interest in withholding licenses from part-time residents. *See* Osterweil Br. 36–37. For this reason, New York's ban fails even intermediate scrutiny.

Perhaps in recognition of the weakness of these arguments as a general matter, Bartlett attempts to invoke the fact that Mr. Osterweil "has not provided fingerprints usable by the federal and state governments" as highlighting the importance of the State's monitoring interest as applied to Mr. Osterweil specifically. Bartlett Br. 41. That argument is misplaced. According to Bartlett himself, he denied Mr. Osterweil's request for a "license on the ground that Osterweil averred that he was not domiciled in New York." Bartlett Br. 2. Mr. Osterweil's worn fingerprints had nothing to do with the reason that his license application was ultimately denied and they have nothing to do with the case as it appears before this Court.

At the end of the day, whether it be because it is fatally inconsistent with *Heller* or because it cannot survive strict scrutiny (or even intermediate scrutiny), denying Mr. Osterweil a license to possess a handgun in his New York home violates the Second Amendment.[6]

IV. New York's Ban On In-Home Handgun Possession By Part-Time State Residents Violates The Equal Protection Clause.

New York's ban on in-home handgun possession is also constitutionally problematic because it treats similarly situated individuals differently, in violation

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[6] Bartlett's effort to invoke rational basis review fails for all the reasons that his effort to recharacterize Mr. Osterweil's application for a premises license as limited to target-shooting and hunting fails. *See supra* pp. 11–16.

of the Equal Protection Clause. U.S. Const. amend. XIV, § 1. Here again, strict scrutiny applies: when the state draws distinctions as to who can and cannot exercise a fundamental right, those distinctions must further a compelling state interest. *See Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626–29 (1969). As explained, New York's proffered interest in protecting the public safety and monitoring its licensees is insufficient to justify restraining the exercise of a fundamental right. Therefore, New York's differential treatment of domiciliaries and part-time residents with respect to the exercise of that right violates the Equal Protection Clause.

In a manner similar to his shrugging off of strict scrutiny analysis, Bartlett does not seriously contend that the State has a compelling interest in treating Mr. Osterweil differently from his New York neighbors. Bartlett points out an obvious difference between Mr. Osterweil and New York domiciliaries: the domiciliaries are domiciled in New York and Mr. Osterweil is not. Bartlett Br. 42–43. But to state the difference is not to explain why it matters or what interest is sufficiently compelling to allow one group to exercise its fundamental constitutional rights and not the other.

Bartlett raises the same "fingerprints" canard in opposing Mr. Osterweil's equal protection challenge as he raised in support of the State's monitoring interest. Bartlett Br. 42. That argument is no more relevant here. Again, Bartlett confuses

the issue of the constitutional validity of the State's domicile requirement with the other requirements that must be met for a domiciliary to obtain a license. The only requirement at issue here is the State's domicile requirement and that requirement runs afoul of the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

Respectfully submitted,

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July 10, 2012

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), the undersigned certifies that the brief complies with the applicable type-volume limitations. The brief contains 6,014 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This certificate relies upon Microsoft Word 2010's word count feature; the program used in drafting this brief. The brief complies with the typeface requirements for Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Words' word processing program in 14-point Times New Roman font.

Dated: July 10, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2012, I electronically filed with the Clerk's Office of the United States Court of Appeals for the Second Circuit this Reply Brief for Appellant Alfred G. Osterweil and further certify that the parties' counsel will be notified of, and receive, this filing through the Notice of Docket Activity generated by this electronic filing.

Dated: July 10, 2012

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EXHIBIT E

11-2420
Osterweil v. Bartlett

UNITED STATES COURT OF APPEALS
For the Second Circuit

August Term, 2012

Argued: October 26, 2012 Decided: January 29, 2013

Docket No. 11-2420-cv

- -

ALFRED G. OSTERWEIL,

Plaintiff-Appellant,

v.

GEORGE R. BARTLETT, III,

Defendant-Appellee.

- -

Before: JACOBS, Chief Judge, WALKER, Circuit Judge, AND O'CONNOR, U.S. Supreme Court Justice (Ret.)

- -

Part-time New York resident, who is not a domiciliary of the State, appeals from the grant of summary judgment denying injunctive relief from New York's statutory handgun licensing requirement. The United States District Court for the Northern District of New York (D'Agostino, J.) concluded that the statute limits the grant of handgun licenses to domiciliaries of the State. We hold that certification of this statute's interpretation to the New York Court of Appeals is warranted.

Question Certified.

PAUL D. CLEMENT, Bancroft PLLC, Washington, D.C. (D. Zachary Hudson, Bancroft PLLC, Washington, D.C.; Daniel L. Schmutter, Greenbaum, Rowe, Smith & Davis

LLP, Woodbridge, New Jersey, on the brief), for Plaintiff-Appellant.

SIMON HELLER, Assistant Solicitor General, New York State Office of the Attorney General, New York, New York, for Defendant-Appellee.

O'Connor, Supreme Court Justice (Ret.): This case asks us to evaluate the constitutionality of certain aspects of New York's handgun licensing regime. As we explain, we believe we should not reach that question before certifying a predicate question of state law to the New York Court of Appeals.

I

Appellant Alfred Osterweil applied for a handgun license in May 2008. Following the directions of New York Penal Law § 400.00(3)(a), he applied for a license "in the city or county . . . where [he] resides."[1] At that time, his house in Summit, New York--part of Schoharie County--was still his primary residence and domicile. While his application was pending, however, Osterweil moved his primary residence to Louisiana, keeping his home in Summit as a part-time vacation residence.

[1] In relevant part, New York Penal Law § 400.00(a)(3) provides that

> [a]pplications shall be made and renewed, in the case of a license to carry or possess a pistol or revolver, to the licensing officer in the city or county, as the case may be, where the applicant resides, is principally employed or has his principal place of business as merchant or storekeeper.

He then sent a letter to the Schoharie licensing authorities inquiring whether this move made him ineligible for a license. A46. Shortly thereafter, in July 2008, Osterweil sent another letter suggesting that if his change of domicile foiled his license application, a constitutional problem would result. A52-A53. This second letter came after the United States Supreme Court held in District of Columbia v. Heller, 544 U.S. 570 (2008), that the Second Amendment protects an individual right to bear arms, and that the core of this right is the right to self-defense in the home.

Osterweil's application was eventually forwarded to appellee George Bartlett, a judge of the county court in Schoharie and licensing officer for the county. He interpreted § 400.00(3)(a)'s apparent residence requirement as a domicile requirement, relying on a 1993 decision from New York's Appellate Division, Third Department holding that, "as used in this statute, the term residence is equivalent to domicile." Mahoney v. Lewis, 199 A.2d 734, 735 (3d Dep't 1993). Because Osterweil "ha[d] candidly advised the Court that New York State is not his primary residence and, thus not his domicile," Judge Bartlett denied the license. See A144.

Judge Bartlett further concluded that a domicile requirement was constitutional under the Second Amendment, even after Heller, because of the State's interest in monitoring its

handgun licensees to ensure their continuing fitness for the use of deadly weapons. A145-A149. He applied New York precedent suggesting that the State's licensing regime would not violate Heller "'so long as it is not enforced in an arbitrary and capricious manner.'" A150 (citation omitted). Osterweil could have sought review of that determination in the state courts by means of an Article 78 proceeding, see, e.g., Mahoney, 199 A.D.2d at 735, but he did not.[2]

Instead, he filed a federal suit alleging that New York's domicile requirement violated the Second and Fourteenth Amendments and seeking, among other remedies, an injunction ordering the State to give him a license. See A11. The district court first determined that intermediate scrutiny was appropriate for the Second Amendment issue, and then held that a domicile requirement satisfied intermediate scrutiny because "the law allows the government to monitor its licensees more closely and better ensure the public safety." 819 F. Supp. 2d 72, 85 (N.D.N.Y. 2011). It further held that New York's restrictions did not violate the Equal Protection Clause or any

[2] Judge Bartlett's decision appears to have been taken in an administrative capacity; in other cities or counties, this role is fulfilled by non-judicial personnel. Accordingly, the State has not argued that Judge Bartlett's denial of the license is a judicial decision with any preclusive effect in this litigation, and we deem any such argument forfeit.

other part of the Fourteenth Amendment. Id. at 86-90. It thus granted summary judgment to the State.

On appeal to this Court, Osterweil maintains that a domicile requirement for handgun ownership is unconstitutional. The State's primary response, however, is that there is no domicile requirement under New York law. It argues that New York's highest court has never held that the law requires domicile, that the text speaks only of residence, that the New York Court of Appeals would likely apply only a residence requirement as a matter of constitutional avoidance, and that if the statute is construed as requiring only residence, "this litigation would thereby be resolved." Appellee's Br. 23. It thus urges that we certify the domicile-or-residence question to the New York Court of Appeals, or apply Pullman abstention and decline to decide the case at all. See R.R. Comm'n v. Pullman Co., 312 U.S. 496 (1941). As discussed below, we agree that the state-law issue that the State identifies is a predicate to a serious constitutional question, and that certification is the appropriate course.

II

Under Second Circuit Local Rule 27.2, we may certify to the New York Court of Appeals "determinative questions of New York law [that] are involved in a case pending before [us] for which no controlling precedent of the Court of Appeals exists." See

also N.Y. Const. Art. 6, § 3(b)(9) & N.Y. Comp. Codes R. & Regs. tit. 22, § 500.27(a). Before we certify such a question, we must answer three others: "(1) whether the New York Court of Appeals has addressed the issue and, if not, whether the decisions of other New York courts permit us to predict how the Court of Appeals would resolve it; (2) whether the question is of importance to the state and may require value judgments and public policy choices; and (3) whether the certified question is determinative of a claim before us." Barenboim v. Starbucks Corp., 698 F.3d 104, 109 (2d Cir. 2012). Here, we answer each in favor of certification.

First, it is clear that the New York Court of Appeals has not answered the question before us. Neither party identifies a decision of that Court interpreting the word "resides" in this statute, or illuminating whether the Court would be likely to impose a residence requirement or a domicile requirement. Indeed, that Court has never held that this statute imposes even a residence requirement. As the State noted at oral argument, § 400.00(3)(a) is phrased in the form of a procedural rule about where to file to get a license, not a limitation on who may get one.

Recourse to that Court's broader opinions regarding residence requirements makes the water murkier, not clearer. It has sometimes equated residence with domicile, and sometimes

not.[3] Indeed, it has said that "[t]he sense in which these words are used in a particular statute may depend upon the nature of the subject-matter of the statute as well as the context in which the words are used." Rawstorne v. Maguire, 192 N.E. 294, 295 (N.Y. 1934); see also id. ("We are told that the Legislature used the words 'residing within the State' as synonymous with 'domiciled within the State.' Doubtless such words are frequently used . . . as if they had the same meaning, but they are not identical . . . ."). Thus, the New York Court of Appeals has not told us how to interpret this particular statute, and has clarified only that the question we face is one of judgment that involves interpreting the intent of the state legislature. Id. That job is surely best left to the state courts, especially when they "'stand willing to address questions of state law on certification from a federal court.'" Arizonans for Official English v. Ariz., 520 U.S. 43, 79 (1997) (quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 510 (1985) (O'Connor, J., concurring)).

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[3] Compare, e.g., People v. Platt, 22 N.E. 937, 938 (N.Y. 1889) (in statute listing qualifications for political office, residence means domicile); with Rawstorne v. Maguire, 192 N.E. 294, 295 (N.Y. 1934) (refusing to "limit the provisions for substituted service upon persons 'residing within the State' to those who not only reside, but are domiciled here"); see also Matter of Contento v. Kohinke, 42 A.D.2d 1025, 1025 (N.Y. 3d Dep't 1973) ("[T]he term 'reside' (or 'residence') is not one that can be given a uniform definition wherever it appears in legislation, but must be construed in relationship to the particular statute involved.").

Of course, we need not certify a question when we can "'predict how the highest court of the forum state would resolve the uncertainty or ambiguity.'" State Farm Mut. Auto. Ins. Co. v. Mallela, 372 F.3d 500, 505 (2d Cir. 2004) (quoting Travelers Ins. Co. v. 633 Third Assocs., 14 F.3d 114, 119 (2d Cir. 1994)). Here, the language is plain, the State itself urges that § 400.00(3)(a) imposes only a residence requirement, and a serious constitutional controversy results from any other view, see infra at 11. Yet we think it best here to resist the State's invitation to construe the statute ourselves. See Appellee's Br. 5 n.2. We have said that it is appropriate to predict what the New York Court of Appeals will do from "the decisions of other New York courts," Barenboim, 698 F.3d at 109 (emphasis added), not based on our instinct that the Court of Appeals will find those courts' decisions unconvincing or overcome by events. For us to adopt an anticipated construction of a state statute based on our own reading of the text and the current constitutional landscape would put state officials like Judge Bartlett in a particularly hard spot in the next case, uncertain whether to follow the binding decision of the Third Department in Mahoney or the all-fours decision of a federal circuit court. Indeed, any ruling we might make on this state law question would not be binding on New York state courts and thus has the potential for sowing confusion. See, e.g., Oneida

Indian Nation of N.Y. v. Pifer, 43 A.D.3d 579, 581 (3d Dep't 2007) ("Federal court rulings on issues of state law are not binding on state courts") (citing In re 1616 Second Ave. Rest., 550 N.E.2d 910, 913 (N.Y. 1990)). One of the chief virtues of certification is that it avoids such pitfalls.

Next, we ask whether the question "is of importance to the state" and whether it is the kind of question that "may require value judgments and public policy choices." Barenboim, 698 F.3d at 109. It certainly is, and it certainly does. The regulation of firearms is a paramount issue of public safety, and recent events in this circuit are a sad reminder that firearms are dangerous in the wrong hands. See James Barron, Gunman Massacres 20 Children at School in Connecticut; 28 Dead, Including Killer, N.Y. Times, Dec. 15, 2012, at A1. Questions like the one before us require a delicate balance between individual rights and the public interest, and federal courts should avoid interfering with or evaluating that balance until it has been definitively struck. Moreover, the New York Court of Appeals has made clear that the question whether to read "residence" as requiring residence or domicile requires interpretation of the value and policy judgments of the state legislature. This is accordingly an area of state concern in which the principles of cooperative federalism hold greatest sway.

Finally, we ask whether the state-law question is dispositive. We certify here on the understanding that it is. The State has represented that, if "resides" in § 400.00(3)(a) means only resides and does not also mean domicile, then Osterweil would meet this requirement and "this litigation would thereby be resolved." Appellee's Br. 23. Of course, it is possible that the Court of Appeals will say that the word "resides" in § 400.00(a)(3) imposes some other requirement akin to domicile that is a barrier to Osterweil's license. It would then remain for us to decide the constitutional question, but even then we benefit from certification because "construction by the state judiciary . . . might . . . at least materially change the nature of the problem." Bellotti v. Baird, 428 U.S. 132, 147 (1976) (quotation marks omitted).

III

Notwithstanding that certification gives him an extra chance to get his license, Osterweil prefers that we stick with Mahoney's domicile-only rule and evaluate its constitutionality. He argues that an important federal constitutional right is at stake, that certification will engender needless delay, and that the presence of an issue of constitutional avoidance will actually exacerbate state federal tension by having both a state court and a federal court opine on a constitutional question in the same case. We find these arguments unconvincing.

To begin, we agree with both parties that there is a serious constitutional question in this case. This Court has recently held that "Second Amendment guarantees are at their zenith within the home," Kachalsky v. County of Westchester, 701 F.3d 81, 89 (2d Cir. 2012), and a domicile requirement will operate much like the bans struck down in Heller and McDonald v. Chicago, 130 S. Ct. 3020 (2010), for part-time New York residents whose permanent homes are elsewhere. At the same time, this Court has acknowledged that the ground opened by Heller and McDonald is a "vast 'terra incognita'" that "has troubled courts since Heller was decided." Kachalsky, 701 F.3d at 89 (quoting United States v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011) (Wilkinson, J.)). It is open to Osterweil to make his domicile in New York, so even a domicile requirement may not be the kind of absolute ban that the U.S. Supreme Court has already addressed, and some regulation of itinerant handguns is clearly valid. See Kachalsky, 701 F.3d at 100 ("[E]xtensive state regulation of handguns has never been considered incompatible with the Second Amendment or, for that matter, the common-law right to self-defense."). Thus, we would confront a serious and very difficult question of federal constitutional law if required to evaluate a domicile requirement.

The presence of a serious constitutional question is a good reason to certify, however, not a reason to race ahead. The

Supreme Court has made clear that certification is the appropriate course when a narrowing construction of state law that avoids the federal question is possible--even, and perhaps especially, when important federal rights are at stake. Arizonans, 520 U.S. at 78; Bellotti, 428 U.S. at 147 (certification is appropriate where the "state statute is susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication.'") (quoting Harrison v. NAACP, 360 U.S. 167, 177 (1959)). In so doing, the Court has "[w]arn[ed] against premature adjudication of constitutional questions . . . when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." Arizonans, 520 U.S. at 79. The prospect of disagreement over the seriousness of a constitutional question is always present when a federal court certifies in a case like this one, but this has always led the Supreme Court to counsel in favor of certification, not against it. Osterweil cites no case from the Supreme Court, this Court, or any other, where certification was disapproved because a state court might take a different view of a federal constitutional question in adopting a limiting construction or in refusing to do so.

As for timing, while some delay from certification is inevitable, the State has assured us that it will seek to expedite the process. Moreover, Pullman abstention--the other course available here--would take even longer. As a case that involves "unsettled state law issues . . . preliminary to consideration of a federal constitutional question," this case falls within the heartland of Pullman abstention. See Hart & Wechsler, The Federal Courts & The Federal System 1062-1063 (6th ed. 2009) (collecting cases); Pullman, 312 U.S. at 499-501. Certification now "covers territory once dominated by . . . Pullman abstention" precisely because it "allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." Arizonans, 520 U.S. at 75. Yet given that Pullman abstention would have been appropriate before certification, and that certification is far faster and more convenient for all involved, we have less cause for concern over delay.

Finding that certification is appropriate, we therefore certify the following question to the New York Court of Appeals:

> Is an applicant who owns a part-time residence in New York but makes his permanent domicile elsewhere eligible for a New York handgun license in the city or county where his part-time residence is located?

The New York Court of Appeals may, of course, reformulate or expand upon this question as it deems appropriate.

It is hereby **ORDERED** that the Clerk of the Court transmit to the Clerk of the New York Court of Appeals a certificate in the form attached, together with a copy of this opinion and a complete set of the briefs, appendices, and record filed by the parties in this Court. This panel will retain jurisdiction to decide the case once we have had the benefit of the views of the New York Court of Appeals or once that court declines to accept certification. Finally, we order the parties to bear equally any fees and costs that may be requested by the New York Court of Appeals.

CERTIFICATE

The following question is hereby certified to the New York Court of Appeals pursuant to Second Circuit Local Rule 27.2 and New York Compilation of Codes, Rules and Regulations, title 22, section 500.27(a), as ordered by the United States Court of Appeals for the Second Circuit:

> Is an applicant who owns a part-time residence in New York but makes his permanent domicile elsewhere eligible for a New York handgun license in the city or county where his part-time residence is located?

No. 119
Alfred G. Osterweil,
Appellant,
v.
George R. Bartlett, III,
Respondent.

Daniel Louis Schmutter, for appellant.
Francis A. Brady, III, for respondent.

* * * * * * * * * * * * * * * *

Certification of a question by the United States Court of Appeals for the Second Circuit, pursuant to section 500.27 of this Court's Rules of Practice, accepted and the issues presented are to be considered after briefing and argument. Chief Judge Lippman and Judges Graffeo, Read, Smith, Pigott and Rivera concur.

Decided February 19, 2013

EXHIBIT F

To be Argued by:
PAUL D. CLEMENT
(Time Requested: 10 Minutes)

Appeal No. CTQ-2013-00001

Court of Appeals

of the

State of New York

ALFRED G. OSTERWEIL,

Appellant,

– against –

GEORGE R. BARTLETT, III, in his Official capacity as Licensing Officer in the County of Schoharie,

Respondent.

ON APPEAL FROM THE QUESTION CERTIFIED BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN DOCKET NO. 11-2420-CV

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JURISDICTIONAL STATEMENT

This case was originally filed pro se in the United States District Court for the Northern District of New York on July 21, 2009. A7. The District Court had subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 as it involved claims arising under 42 U.S.C. § 1983 and the Constitution. On May 20, 2011, the District Court entered a final judgment disposing of all claims. A180; *see* A151. Plaintiff-Appellant filed a timely notice of appeal on June 13, 2011. A181. The United States Court of Appeals for the Second Circuit had appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 & 1294. The Second Circuit certified one question to the New York Court of Appeals pursuant to New York Court of Appeals Rule 500.27 and Second Circuit Rule 27.2:

> Is an applicant who owns a part-time residence in New York but makes his permanent domicile elsewhere eligible for a New York handgun license in the city or county where his part-time residence is located?

A197. This Court accepted the certified question on February 19, 2013. A198.

PRELIMINARY STATEMENT

The Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), marked a watershed moment in Second Amendment jurisprudence. Resolving a question that had been the subject of ongoing debate for the better part of a century, the Court concluded that the text, structure, and history of the Second Amendment confirm that it "confer[s] an individual right to keep and bear arms." *Id.* at 595. Two years later, the Court made clear in *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010), that this individual right is a fundamental one that applies with full force to the States.

Given that *Heller*'s holding was contrary to the law that had governed most of the Nation, including the State of New York, see *People v. Abdullah*, 870 N.Y.S.2d 886 (Crim. Ct., Kings County 2008), one would have expected to see states and municipalities respond by examining their laws to determine whether they were consistent with the fundamental individual right the Supreme Court recognized. Instead, many states have doubled down. The nearly five years since *Heller* was decided have been marked by intransigence if not outright defiance of the Court's decision. States continue to enforce pre-*Heller* regulatory regimes, premised on the mistaken belief that the Second Amendment does not protect an individual right, as if nothing happened.

The State of New York's conduct in this litigation is a prime example. Appellant Alfred G. Osterweil ("Mr. Osterweil") was denied a license to keep a handgun in his New York home because he is a part-time resident of the State. Although *Heller* came down before his permit request was denied and *McDonald* issued during the District Court proceedings, the State steadfastly maintained that those decisions did not change the reality that, as a part-time resident, Mr. Osterweil had no right to possess a handgun for defense of his home. Indeed, while Mr. Osterweil litigated pro se in federal district court, New York was quite happy to fight tooth and nail for a ban on home handgun possession by part-time New York residents despite the lack of cogent basis to distinguish *Heller*. Only after Mr. Osterweil retained counsel on appeal did New York begrudgingly recognize some tension between the denial of Mr. Osterweil's permit and *Heller*'s teaching that the core purpose of the Second Amendment right is to allow "law-abiding, responsible citizens to use arms in defense of hearth and home" where the need for self-defense "is most acute." 554 U.S. at 628, 635.

Even then, however, the State of New York did not simply concede that the Second Amendment and a ban on issuing licenses to part-time residents were fundamentally incompatible. Instead, the State continued to defend a policy banning premises licenses for part-time residents, while suggesting that certification to this Court would be appropriate. The time has come for this Court

to make clear what should have been obvious the day *McDonald* confirmed that *Heller* was fully applicable to the laws of New York: a ban on part-time residents' possession of handguns for defense of hearth and home is fundamentally incompatible with *Heller* and the Second Amendment. New York statutory law, which speaks of residence and not domicile, does not compel a contrary view and thus must be interpreted consistently with the Second Amendment.

STATEMENT OF FACTS

Mr. Osterweil is a retired attorney who previously served in the U.S. Army. A108. For a number of years, Mr. Osterweil lived with his family full-time on a 21-acre plot of land in Schoharie County in Summit, New York. A15. While in Schoharie, Mr. Osterweil served as a commissioner on the Summit Fire District Board of Commissioners and as an unpaid member of the Board of Directors of the Western Catskills Revitalization Corporation. After he retired, he decided to split his time between New York and Louisiana. He now spends the majority of his time in Louisiana and is domiciled there. Mr. Osterweil keeps a .22-caliber revolver in his Louisiana home for purposes of self-defense. A109, A110.

On May 21, 2008, Mr. Osterweil applied to Schoharie County officials for a New York State pistol license pursuant to N.Y. Penal Law § 400.00(2)(a), without which he may not lawfully possess a handgun in his home under New York law.

A7; A25 ¶ 2.[1] To obtain a license, an applicant must meet several requirements. The licensing process begins with the submission of an application to the local licensing officer.[2] § 400.00(3). The applicant must be over 21 years of age, of good moral character, not have a history of crime or mental illness, and there must not exist any other "good cause" for denying the license. § 400.00(1). The application triggers a local investigation probing the applicant's mental health and criminal history, moral character, and, in some circumstances, whether there is a "need" for the requested license. § 400.00(2). The investigating authority also takes the applicant's fingerprints and uses that information to check for criminal history through the New York State Division of Criminal Justice Services ("DCJS"), the National Crime Information Center ("NCIC"), and the Federal Bureau of Investigation. *See id*; A57. The New York licensing law also states that an application for "a license to carry or possess a pistol or revolver" "shall be made . . . to the licensing officer in the city or county . . . where the applicant resides, is

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[1] As this Court is well aware, New York law imposes a general ban on handgun possession. N.Y. Penal Law §§ 265.01(1), 265.02(4), 265.20. In order to legally possess a handgun, one must qualify for an enumerated statutory exemption from that prohibition. Having a § 400.00(2)(a) license provides such an exemption.

[2] The identity of the licensing officer varies from place to place under New York law. In many places, the licensing officer is the state "judge or justice of a court of record having his office in the county of issuance." § 265.00(10). In some instances, the police commissioner or sheriff plays the role. *Id.*

principally employed or has his principal place of business as merchant or storekeeper." § 400.00(3)(a).

Mr. Osterweil's home-handgun license application set this statutory machinery in motion. The Schoharie County Sheriff initiated the required investigation. A25 ¶ 3. He verified the information set forth in Mr. Osterweil's application, contacted his references, conducted a background check using state information resources and the NCIC, and obtained and submitted Mr. Osterweil's fingerprints to the DCJS and the FBI. A25 ¶ 3.

On June 24, 2008, the Sheriff sent a letter to Mr. Osterweil informing him that he needed to come to the Sheriff's office "to correct and/or complete some information" on his application. A25–A26 ¶ 4. In a letter sent on June 25, 2008, Mr. Osterweil informed the Sheriff that since the time he had submitted his original permit application he had purchased a home in Louisiana that he intended to use as his primary residence, and that he would now use his Schoharie residence for only part of the year. A26 ¶ 5. The letter inquired whether under such circumstances Mr. Osterweil was still eligible for a permit. A26 ¶ 5.

On February 18, 2009, the Sheriff informed Mr. Osterweil that he was forwarding his application to Bartlett. A27 ¶ 13. As relevant here, in a February 20, 2009 letter, Bartlett informed Mr. Osterweil that his non-resident status would likely prevent the issuance of a home handgun license. A27 ¶ 14.

After several exchanges between Mr. Osterweil and Bartlett, Bartlett issued a decision on May 29, 2009, denying Mr. Osterweil's request for a pistol permit. A134 (Exh. 21). Bartlett concluded that pistol permits may not be issued to "non-residents," and that Mr. Osterweil was a "non-resident" under New York law. A143–A144 & n.2. That conclusion was primarily based on Bartlett's application of *In re Mahoney v. Lewis*, 605 N.Y.S.2d 168 (App. Div., 3d Dep't 1993), which held that § 400.00(3) requires that an individual be a New York domiciliary to be eligible for a handgun license. *See id.* at 168–69 ("we expressly have held that 'where a statute prescribes "residence" as a qualification for a privilege or the enjoyment of a benefit, the word is equivalent to "domicile"'" (quoting *State of New York v. Collins*, 435 N.Y.S.2d 161, 162 (App. Div., 3d Dep't 1981)). Bartlett further determined that New York's domicile requirement was consistent with *Heller*. A145–A150.

Bartlett never concluded that Mr. Osterweil lacked the necessary character or qualifications to obtain a home handgun license. The license denial was predicated entirely on the conclusion that Mr. Osterweil is domiciled in Louisiana and therefore is not a New York resident, notwithstanding that Mr. Osterweil owns a home in New York and lives there part of the year with his wife, that he has family in Summit, and that Mr. Osterweil and his wife have participated and continue to participate in social, political, and community affairs in Schoharie

County, including remaining as dues-paying members of the Summit Snow Riders, a local social group, and the Summit Conservation Club. A123.

Mr. Osterweil, proceeding pro se, filed suit pursuant to 42 U.S.C. § 1983 against Bartlett, David A. Patterson, then Governor of the State of New York, and Andrew M. Cuomo, then Attorney General of the State of New York. A7–A8. Bartlett and his co-defendants were represented by the New York State Department of Law and the Office of the Attorney General of the State of New York. As relevant here, Mr. Osterweil's complaint alleged that the defendants denied him his fundamental Second Amendment right to keep and bear arms by denying his license request based on his part-time resident status and that this denial ran afoul of the Equal Protection Clause. A10–A11.

After the defendants other than Bartlett were dismissed from the suit, A200, both Mr. Osterweil and Bartlett moved for summary judgment.[3] A14, A22. The New York Attorney General's Office argued that *Heller* and *McDonald* did not call into question state law "limiting its residency-based permits to domiciliaries" and that limiting home handgun possession to domiciliaries was consistent with "long-standing New York precedent." A219–A220 (citing *Mahoney*). The New York Attorney General's Office told the federal court that Mr. Osterweil's

[3] Mr. Osterweil's Second Amendment claims were initially dismissed. He filed a motion for reconsideration after the Supreme Court issued its decision in *McDonald*, and Mr. Osterweil's Second Amendment claims were reinstated.

contention that the Second Amendment protected his right to keep a handgun in his New York home was predicated on a misreading of *Heller* and *McDonald*. A218. The District Court was convinced by New York's arguments and ruled against Mr. Osterweil, holding that limiting home handgun licenses to domiciliaries did not violate the Second Amendment or the Equal Protection Clause. A164–A172.

Mr. Osterweil retained counsel and appealed the District Court's denial of his constitutional rights. Just eight days before New York's brief was due to the Second Circuit (and a full 83 days after Mr. Osterweil's attorneys filed their opening brief) New York filed a motion asking the Second Circuit to certify the following question to this Court: "Does the applicant residency requirement in New York's pistol permit statute, N.Y. Penal Law § 400.00(3), require not merely residency but domicile in the State of New York?" A254. In sharp contrast to the views it expressed in federal district court, New York opined that "[f]ollowing the Supreme Court's recent and dramatic shift in Second Amendment jurisprudence, there is reason to question whether the Court of Appeals would" conclude that New York law requires domicile as a precondition for a home handgun license. A251; *see* A236 (Bartlett Affirmation admitting that the "continuing vitality" of New York precedent "requir[ing] not merely residence but domicile" to be eligible for a handgun license "has been cast in doubt by subsequent Supreme Court jurisprudence"). After that motion was referred to the merits panel, New York

reiterated its view that a domicile requirement was constitutionally suspect in its brief on the merits and again requested certification. *See* A264 (admitting that the Second Amendment right likely extends to protect home handgun possession for "individuals who reside in New York seasonally and are domiciled elsewhere"); A188 (noting New York's argument in the Second Circuit "that the New York Court of Appeals would likely apply only a residence requirement" in light of *Heller* and *McDonald*). At the same time, however, New York also argued—in seeming conflict with the premise of its request for certification—that a domicile requirement would be constitutional under intermediate scrutiny.

Despite the ongoing denial of Mr. Osterweil's constitutional rights, the Second Circuit certified the following question to this Court:

> Is an applicant who owns a part-time residence in New York but makes his permanent domicile elsewhere eligible for a New York handgun license in the city or county where his part-time residence is located?

A197. This Court accepted the certified question. A198.[4]

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[4] New York represented to the Second Circuit that Mr. Osterweil's Second Amendment right to protect his New York home, which has now been continuously violated for nearly *five years*, would not be affected by certification as he only uses his New York home in the summer and the matter would be resolved before the summer of 2013. A285. As Mr. Osterweil's reply brief is not even due until June 25, 2013—and as Mr. Osterweil pointed out in response to the State's flawed contention, *see* A317–A318 ("it is optimistic to think that this case will come to a close before summer 2013" if certification occurs)—New York was obviously wrong. In all events, we respectfully request that this Court expedite consideration of this matter in light of the ongoing denial of Mr. Osterweil's

SUMMARY OF ARGUMENT

Mr. Osterweil applied for a license to possess a handgun in his New York home nearly five years ago. Bartlett's denial of that request, which was defended by the State of New York and signed off on by a federal district court, was predicated on the view that N.Y. Penal Law § 400.00(3) prohibits home handgun possession by part-time New York residents not domiciled in New York. Bartlett, New York, and the District Court all should have known better: a categorical ban on home handgun possession by part-time residents directly conflicts with the Second Amendment right to keep and bear arms and the guarantee of equal protection under the law.

Heller made clear that the Second Amendment protects individual rights as a general matter and the right to keep and bear a handgun for self-protection in the home in particular. *McDonald* recognized that the right protected by the Second Amendment is not just an individual one, but a fundamental right protected against intrusion from state and local governments. Those decisions make clear that the policy applied by the state official here—a ban on home handgun possession by part-time residents—is indefensible. Not one word in either decision suggests that the Second Amendment is a part-time right such that a lawful, but not full-year, resident may be denied an ability to possess a handgun in the home.

Second Amendment rights based on what the State all but concedes is a misconstruction of New York law.

As Justice O'Connor recognized in her opinion certifying the question to this Court, a ban on home handgun possession by part-time residents is tantamount to a complete prohibition of the exercise of the core right protected by the Second Amendment. A domicile requirement effectively eviscerates the right of part-time residents to defend their New York homes using handguns. Such a ban—which mirrors the ban struck down in *Heller*—cannot stand. Defense of home is not less vital or constitutionally protected when the hearth is only fired up during a part of the year. If anything, the constitutional right is more vital for part-time residents because part-time residences tend to be more rural and the absence of full-time occupants can make them attractive targets for criminal activity.

Heller leaves no doubt that a ban like that imposed on Mr. Osterweil violates the Second Amendment under any level of scrutiny; it is simply antithetical to the constitutional right. Given the State's track record it is unclear exactly what interests it will assert in this Court. The ones it has trotted out to this point fail to justify a categorical ban on home handgun possession by part-time residents. An interest in monitoring licensees cannot justify such a severe restriction on a fundamental right. And a generic interest in public safety and crime prevention cannot justify an absolute ban. If it could, the law struck down in *Heller* would still be in force.

Were that not enough, a ban on home handgun possession by part-time residents runs afoul of the Equal Protection Clause. Part-time residents like Mr. Osterweil have just as much of a right to protect their hearth and home as their full-time resident neighbors. Indeed, the part-time nature of Mr. Osterweil's residence may make his need for home handgun possession when he is in-residence even greater.

In sum, the ban on part-time residents' possession of handguns for self-protection in the home applied by the state official is fundamentally incompatible with the Second Amendment and *Heller*. New York law, which speaks only of residence, not domicile, does not compel this clearly unconstitutional result. The certified question should be answered in the affirmative.

ARGUMENT

I. A Ban On Home Handgun Possession By Part-Time State Residents Violates The Second Amendment.

The Second Amendment provides that "A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II; *see* N.Y. Civil Rights Law, art. 2, § 4 ("A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms cannot be infringed."); *People v. Perkins*, 880 N.Y.S.2d 209, 210 (App. Div., 3d Dep't 2009) (a violation of the Second Amendment is "by extension" a violation of Civil Rights Law § 4). In

District of Columbia v. Heller, 554 U.S. 570 (2008), the Supreme Court recognized that the Second Amendment protects the fundamental right of "law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 628. And in *McDonald v. Chicago*, 130 S. Ct. 3020, 3021, 3050 (2010), the Court concluded that "the Second Amendment right recognized in *Heller*" was a fundamental right that was fully applicable to the States. Those two precedents taken together make it crystal clear that a complete ban on home handgun possession by part-time residents like that applied to Mr. Osterweil is unconstitutional.

A. A Ban On Home Handgun Possession By Part-Time State Residents Prevents The Exercise Of The Core Right Identified In *Heller* And Is Thus Unconstitutional.

A complete ban on home handgun possession by part-time New York residents cannot be squared with *Heller*. *Heller* held that the District of Columbia's ban on handgun possession in the home violated the Second Amendment. *Heller*, 554 U.S. at 635. In so doing, the Court stated that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation," and that the core purpose of the right is to allow "law-abiding, responsible citizens to use arms in defense of hearth and home" where the need for self-defense "is most acute." *Id.* at 592, 628, 635. "[H]andguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Id.* at 629.

The proscription applied to Mr. Osterweil is limited to part-year residents, but it is no less categorical or severe than the ban struck down in *Heller*. As Justice O'Connor's opinion certifying the question to this Court recognized, "a domicile requirement will operate much like the bans struck down in *Heller* and *McDonald* . . . for part-time New York residents whose permanent homes are elsewhere." A194. Such a requirement prohibits an entire class of law-abiding individuals who would otherwise be able to possess handguns in their homes "for the core lawful purpose of self-defense" from doing so based on the bare fact that they are not domiciled in New York. *Heller*, 554 U.S. at 630. But neither the Second Amendment nor *Heller* draws a distinction between part-time and full-time residents. "[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home." *Heller*, 554 U.S. at 636; *see McDonald*, 130 S. Ct. at 3044 ("[T]he Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home."); *id.* at 3048 (The right to keep and bear arms is "valued because the possession of firearms [i]s thought to be essential for self-defense.").

There is no reason to think that the part-time nature of Mr. Osterweil's occupancy of his New York home should impact the calculus. The Second Amendment is not a second-class right, nor is it a part-time one. An individual

living part-time in a home has no less need for self-protection and, in fact, may have an even greater need for protection when in-residence. Second homes are often more rural than primary residences, and the fact that such homes are not constantly inhabited can make them attractive targets for criminal activity.

The scope of Mr. Osterweil's Second Amendment right to defend his hearth and home cannot be eviscerated by an arbitrary temporal distinction. *Heller* did not base its holding on how many months out of the year a person lives in his home, where he is registered to vote, or where he has his driver's license. As explained in *Heller*, and reaffirmed in *McDonald*, the right to keep and bear arms arises from the fundamental right of self-defense, which is most critical in the home. The fundamental right of self-defense is no less acute because one has more than one home, or spends less than twelve months per year in one's home. Those likely to cause a confrontation or illegally enter a home will be neither impressed nor deterred by the part-time nature of a person's occupancy.

Lest there be any doubt, a domicile requirement is quite unlike the "longstanding prohibitions on the possession of firearms" that the *Heller* Court suggested might be acceptable, such as bans on the possession of firearms by felons, the mentally ill, and minors, as well as "laws forbidding the carrying of firearms in sensitive places," "or laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626–27. Nor would a domicile

requirement reflect an effort to defer to the licensing decision of another state, whether positive or negative. Under the ban applied to Mr. Osterweil, a part-time resident fully licensed in his state of domicile still would not be able to lawfully possess a handgun in his New York home.[5]

The Second Amendment right, especially when it comes to self-defense in the home, is fundamental; it is not a seasonal right that can be denied during the summer, or limited to full-year residents. The Supreme Court has made clear that any law that categorically bans the possession of handguns in the home is unconstitutional. That is exactly what the law at issue here, as interpreted and applied to Mr. Osterweil during the last five years, does and it is thus unconstitutional.

B. A Ban On Home Handgun Possession By Part-Time State Residents Fails Under Any Arguably Applicable Standard of Scrutiny.

Heller's dispositive treatment of bans on handguns in the home mandates that any law requiring domicile as a precondition for home handgun possession is unconstitutional. The Court can thus follow *Heller*'s lead and find the policy

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[5] The New York Supreme Court, Appellate Division, Third District, has upheld the State's general licensing scheme against a *Heller*-based challenge, holding that "article 265 does not effect a complete ban on handguns and is, therefore, not a 'severe restriction' improperly infringing upon . . . Second Amendment rights." *Perkins*, 880 N.Y.S.2d at 210. Whatever the merits of that conclusion, it provides no support for the argument that the complete ban applied to Mr. Osterweil is somehow permissible.

applied here unconstitutional without specifying a level of scrutiny. Like the law in *Heller*, the policy applied to Mr. Osterweil is unconstitutional because it is antithetical to the core Second Amendment right. In all events, a ban on home handgun possession by part-time residents also fails any arguably applicable level of scrutiny.

"In *Heller*, the Supreme Court concluded that the Second Amendment codifies a pre-existing 'individual right to possess and carry weapons in case of confrontation." *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 88 (2d Cir. 2012) (quoting *Heller*, 554 U.S. at 592). That right was "fundamental to the newly formed system of government" at the Founding, *McDonald*, 130 S. Ct. at 3037, and is "fundamental to our scheme of ordered liberty," *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012). *See McDonald*, 130 S. Ct. at 3042 ("[T]he Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."); *id.* at 3041 ("Evidence from the period immediately following the ratification of the Fourteenth Amendment only confirms that the right to keep and bear arms was considered fundamental."); *id.* at 3037 ("The right to keep and bear arms was considered no less fundamental by those who drafted and ratified the Bill of Rights."); *id.* at 3040 (39th Congress' "efforts to safeguard the right to keep and bear arms demonstrate that the right was still recognized to be fundamental"); *id.* at

3041 ("In debating the Fourteenth Amendment, the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection.").

When a law interferes with "fundamental constitutional rights," it is subject to "strict judicial scrutiny." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 15 (1973); *see, e.g.*, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983) ("strict scrutiny [is] applied when government action impinges upon a fundamental right protected by the Constitution"); *Anonymous v. City of Rochester*, 13 N.Y.3d 35, 45 (Ct. App. 2009) (laws "interfering with the exercise of" a fundamental right are "subject to strict scrutiny"); *Hernandez v. Robles*, 7 N.Y.3d 338, 375 (Ct. App. 2006) (when a law "burdens a fundamental right . . . it is subjected to strict scrutiny"). A law survives strict scrutiny only when it is narrowly tailored to serve a compelling government interest. *See People v. Bounasri*, 915 N.Y.2d 921, 922 (Rochester City Ct. 2011). To be narrowly tailored, a law must actually advance the compelling interest it is designed to serve, and be the least restrictive means of achieving that advancement. *See Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 226 (1989); *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). Burdening a significant amount of conduct not implicating the asserted interest is evidence that the law at issue is inadequately tailored. When applying strict scrutiny, the challenged law is presumed invalid, and the

government bears the burden of rebutting that presumption. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000).[6]

A domicile requirement like the one applied to Mr. Osterweil comes nowhere close to withstanding strict scrutiny. In the Second Circuit, New York argued that "a domicile requirement" "serves the substantial state interest in monitoring the activities of firearms licensees . . . ." A279. The State also noted its "interests in public safety and crime prevention." A297. Those interests fall well short of justifying the ban accomplished by a domicile requirement.

First and foremost, by arguing that "a domicile requirement" "serves the *substantial* state interest in monitoring the activities of firearms licensees," *id.* at 20 (emphasis added), New York essentially conceded that such a requirement would not serve a *compelling* interest as required to survive strict scrutiny. In all events, such a contention would be unavailing. The interest of the government in monitoring its licensees cannot itself be a compelling interest in any republic worthy of the name. A licensing process with adequate monitoring might be a means to some other compelling end, but it cannot be an end in itself.

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[6] That strict scrutiny applies to laws that substantially burden Second Amendment rights is confirmed by the approaches that the Supreme Court rejected in *Heller* and *McDonald*. *Heller* explicitly and definitively rejected not only rational basis review, 554 U.S. at 628 n.27, but also the "interest-balancing" approach endorsed by Justice Breyer—which is intermediate scrutiny by another name. *See id.* at 634; *McDonald*, 130 S. Ct. at 305 (plurality op.) ("while [Justice Breyer's] opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion").

In the Second Circuit, New York contended that *Bach v. Pataki*, 408 F.3d 75 (2d Cir. 2005), justified its reliance on an interest in monitoring licensees. Not so. *Bach* stated that New York had a "substantial and legitimate interest"—not a compelling one—"in monitoring gun licensees" in the context of a "mere visitor[']s" challenge to the State's licensing laws. *Id.* at 87, 91–92. Whatever validity that argument has in the context of an individual merely passing through a State, the possession of an in-state residence provides a basis for the imposition of all manner of state regulations and responsibilities that the state can sufficiently monitor. The State cannot simply throw up its hands and suggest the job becomes too difficult when a fundamental right is implicated.[7]

An asserted interest in promoting public safety and preventing crime fares no better. To be sure, the Second Circuit has recognized that the State of "New York has [a] substantial, indeed compelling, governmental interest[] in public

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[7] *Bach* held that the Second Amendment right to keep and bear arms "imposes a limitation on only federal, not state, legislative efforts," and disposed of Bach's Second Amendment claim on that ground. *Bach*, 408 F.3d at 84–86. Thus *Bach*'s views on the scope and nature of Second Amendment rights are outdated. Moreover, though *Bach* concluded that "New York's interest in monitoring gun licensees"—"an interest in continually obtaining relevant behavioral information"—"is substantial and [] New York's restriction of licenses to residents and persons working primarily within the State is sufficiently related to th[at] interest," *id.* at 87, 91, that conclusion was clearly infected by the Court's misapprehension of Second Amendment rights. And, in any event, the Court described the State's interest as "substantial," not "compelling," and thus *Bach*—even if it were still good law—would dictate that the State's monitoring interest fails strict scrutiny.

safety and crime prevention." *Kachalsky*, 701 F.3d at 97. But that interest cannot be invoked in support of the domicile requirement applied to Mr. Osterweil. If protecting public safety and preventing handgun crime were interests sufficient to allow the State to prevent home handgun possession, then the District of Columbia handgun ban would still be on the books. It is not. As *Heller* made clear, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." 554 U.S at 636. Banning handgun possession in the home in the name of public safety and crime prevention is one of them.

When a law or regulation fails to cover a substantial swath of conduct implicating the asserted compelling interest, such underinclusiveness not only demonstrates the absence of narrow tailoring, but also serves as evidence that the interest is not significant enough to justify the regulation. *See Carey v. Brown*, 447 U.S. 455, 465 (1980); *see also Fla. Star v. B.J.F.*, 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring) ("[A] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.") (citation and internal quotation marks omitted). A domicile requirement prevents part-time residents who are not domiciliaries from possessing handguns in their homes. But there is no time limit linked to the domicile requirement. One could be domiciled in New York and spend little-to-no time there. So, a New York domiciliary can have a license to have a handgun in

their home spending nearly no time there, and a non-domiciliary who spends substantially more time in New York cannot. That completely undermines the assertion that the State's interest in monitoring its licensees is compelling.

Even assuming against fact and logic that the State did have a compelling interest in ensuring public safety through monitoring its licensees, a part-time resident handgun possession ban would not be narrowly tailored to serve that interest. First, as just discussed, there is a profound mismatch between the asserted interest and the actual requirement. Second, the State has not provided evidence—not even while Mr. Osterweil was proceeding pro se—that a residency requirement in and of itself does anything to further its public safety interest. The application process that an individual must go through to obtain a home handgun possession permit in New York is robust. The required investigation involves checking references, consulting FBI databases, and taking fingerprints. *See* N.Y. Penal Law § 400.00(4). The application package is reviewed by a licensing officer, often a judge. *Id.* It is hard to imagine what benefit excluding part-time residents from obtaining licenses could add. Moreover, the logical answer to any legitimate concerns with the ability to monitor those domiciled elsewhere would be deference to the licensing decision of the state of domicile, not a categorical ban in direct conflict with *Heller*.

What is more, excluding *all* non-domiciliaries is certainly not the least restrictive means of achieving the State's monitoring and public safety goals. A part-time resident possession ban would not be limited to those individuals who pose a heightened threat to others, or to circumstances that for some other reason might create a particularly serious danger to the public. Moreover, there are myriad ways that the State could achieve its goals—such as periodically consulting the national and comprehensive NCIC database that it already consults during licensing, requiring annual application updates from part-time residents, or cooperating with the law enforcement organs of other states—short of an illegitimate and unnecessary categorical ban. Indeed, New York licensing law contemplates that there are available and useful mechanisms for monitoring out-of-state behavior: N.Y. Penal Law § 400.00(11) provides that a handgun license can be suspended upon conviction for a felony or serious offense "anywhere."

A domicile requirement would fail intermediate scrutiny for much the same reasons. Under that test, a regulation "passes constitutional muster if it is substantially related to the achievement of an important governmental interest." *Kachalsky*, 701 F.3d at 96. Back when Mr. Osterweil was proceeding pro se and New York was zealously advocating for a domicile requirement, at the State's urging the District Court found a "substantial relationship between New York's residency requirement and the government's significant interest" primarily because

the "State is in a considerably better position to monitor its residents' eligibility for firearm licenses as compared to nonresidents." A170. But it is not at all clear that this is true, as Mr. Osterweil's case demonstrates. Beyond some issues not unique to nondomiciliaries (i.e., issues with worn fingerprints) Mr. Osterweil would have easily qualified for a license under § 400.00. Nothing about his part-time resident status made it more cumbersome to ascertain his eligibility. And as already described, there is no relationship, let alone a substantial one, between a domicile requirement and the State's general interests in public safety and crime prevention.

Any contention that a domicile requirement is constitutionally permissible reduces to the contention that the right to keep and bear arms—which the Supreme Court has made clear is a fundamental right—is a lesser right. It is not. The Court has repeatedly stressed that it is improper to prefer certain enumerated constitutional rights while relegating others to a lower plane: No constitutional right is "less 'fundamental' than" another, and there is "no principled basis on which to create a hierarchy of constitutional values . . . ." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982); *accord Ullman v. United States*, 350 U.S. 422, 428–29 (1956) ("To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution."). *Heller* admonished that the "very enumeration of the" Second Amendment "right takes

out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." 554 U.S. at 634. And *Heller* explained that the "Second Amendment is no different" from the First Amendment in that it was the product of interest-balancing by the people themselves. *Id.* at 635. Courts would not tolerate for one second a regime that granted free speech or the freedom of association only to a State's full-time residents. The Second Amendment is no different.

As the Supreme Court recently reaffirmed, constitutional rights are nowhere more sacrosanct than in the home. *See Florida v. Jardines*, No. 11-564, slip op. at 4 (U.S. Mar. 26, 2013). At the end of the day, whether it be because it is fatally inconsistent with *Heller* or because it cannot survive strict scrutiny (or even intermediate scrutiny), a ban on home handgun possession by part-time residents like that applied to Mr. Osterweil violates the Second Amendment.

II. A Ban On Home Handgun Possession By Part-Time State Residents Violates The Equal Protection Clause.

A ban on part-time resident home handgun possession suffers from a second fatal flaw: it violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Equal Protection Clause commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *Plyler v. Doe*, 457 U.S. 202, 212, 216 (1982). When "state laws

impinge on personal rights protected by the Constitution" in discriminatory fashion "strict scrutiny" applies, and such laws "will be sustained only if they are suitably tailored to serve a compelling state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *see Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) ("[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized.").

As already discussed, New York lacks a compelling interest in denying part-time residents the right to possess handguns in their home, and thus there is no justification for treating full-time residents and part-time residents differently. Mr. Osterweil has the same interest in protecting his family when staying at his home in Schoharie as do his domiciliary neighbors down the street. Again, if anything, his lack of year-round occupation may enhance the need for self-protection when he is in-residence. Moreover, any state policy for non-domiciliaries that was remotely consistent with the Equal Protection Clause would include deference to the state of domicile as an important component. The New York law as applied to Mr. Osterweil does nothing of the sort. It makes no difference whether a part-time resident is fully licensed in his state of domicile. No matter how many days they spend in their New York home, which is treated like all others for taxing and other

regulatory purposes, nondomiciliaries are barred from lawfully possessing a handgun for self-defense in that home.

People v. Bounasri, 915 N.Y.S.2d 921 (Rochester City Ct., 2011), is instructive. The *Bounasri* Court held that N.Y. Penal Law § 261.01(5)—which makes it a crime for a non-citizen to "possess[] any dangerous or deadly weapon"—violated the constitutional right to equal protection. After considering possible justifications for the law, the court concluded that "[t]here is no conceivable reason that aliens should be distinguished from citizens to achieve the law's otherwise legitimate public safety objectives." 915 N.Y.S.2d at 923. The same is true of a law that baselessly distinguishes between part-time residents and domiciliaries. It would be strange indeed if lawful resident aliens, who happen to be residents of New York and may be aliens precisely because their true domicile is in a foreign nation, are entitled to greater rights under the Second Amendment than U.S. citizens who are also residents of New York, but for only part of the year.

Given the fundamental nature of the Second Amendment right to possess handguns for defense of hearth and home, the only practical explanation for a policy limiting that right to domiciliaries is that non-domiciliaries do not vote in the state elections that ultimately produce state policies. But that suggests the presence—not the absence—of an equal protection violation. The Framers

enshrined certain rights to put them beyond policy debate and the Fourteenth Amendment ensured that such fundamental rights would be enjoyed throughout the Republic. Discriminating against part-time residents when it comes to such a fundamental right flies in the face of the constitutional rights we all enjoy equally by virtue of the Fourteenth Amendment. Mr. Osterweil has the same fundamental right to possess a gun in defense of his New York residence as his New York neighbors. The contrary policy applied to Mr. Osterweil is clearly a violation of the Equal Protection Clause.

III. This Court Should Construe New York Law Governing Home Handgun Possession As Not Requiring Domicile.

As relevant here, N.Y. Penal Law § 400.00(3)(a) provides that:

> [a]pplications shall be made and renewed, in the case of a license to carry or possess a pistol or revolver, to the licensing officer in the city or county, as the case may be, *where the applicant resides*, is principally employed or has his principal place of business as merchant or storekeeper.

(emphasis added). Despite the fact that Mr. Osterweil "resides" part-time in his New York home, this provision was construed by state authorities to require domicile and applied to deny Mr. Osterweil the license he requested. But the statute does not obviously require domicile and any doubt should be resolved against a domicile requirement given the grave constitutional concerns that such a requirement would raise.

First, and most obviously, the word domicile does not appear in § 400.00(3)(a). The statute merely requires that an applicant apply for a license to possess a handgun "in the city or the county where . . . the applicant resides." *Id.* Mr. Osterweil plainly resides in the county in which he applied for the license, just not all-year-long.

Second, while New York courts frequently construe the terms "reside" and "residence" as used in New York law to mean "domicile," see, e.g., *Longwood Central School District v. Springs Union Free School District*, 1 N.Y.3d 385, 388 (Ct. App. 2004), that is not always the case. As Justice O'Connor noted, New York courts have recognized that "'the term "reside" (or "residence") is not one that can be given uniform definition wherever it appears in legislation, but must be construed in relationship to the particular statute involved.'" A190 n.3 (quoting *Matter of Contento v. Kohinke*, 42 A.D.2d 1025, 1025 (App. Div., 3d Dep't 1973)). Sometimes "resides" just means "resides"—domicile is not required.

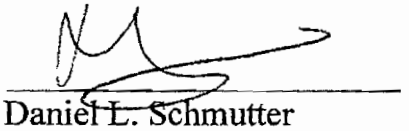
This is clearly one of those times, especially given the constitutional problems a domicile requirement would pose. This Court's precedents require it "to avoid interpreting a statute in a way that would render it unconstitutional if such a construction can be avoided . . . ." *Alliance of Am. Insurers v. Chu*, 77 N.Y.2d 573, 585 (Ct. App. 1991). Tying whether an individual can possess a handgun in his home to that individual's status as a domiciliary is flatly

inconsistent with both the Second Amendment and the Equal Protection Clause. Accordingly, this Court should interpret N.Y. Penal Law § 400.00(3) to allow individuals who—like Mr. Osterweil—"reside" in New York, but are not New York domiciliaries, to possess handguns in their homes.

CONCLUSION

For the foregoing reasons, this Court should answer the certified question in the affirmative and hold that a ban on home handgun possession by part-time residents violates the Second Amendment and the Equal Protection Clause and that N.Y. Penal Law § 400.00(3) makes home handgun possession permits available to part-time New York residents.

Respectfully submitted,



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May 7, 2013

EXHIBIT G

Appeal No. CTQ-2013-00001

To be argued by:
SIMON HELLER
10 minutes requested

On Certification from the U.S. Court of Appeals for the Second Circuit

State of New York
Court of Appeals

ALFRED G. OSTERWEIL,

Appellant,

-against-

GEORGE R. BARTLETT, III, &c,

Respondent.

BRIEF FOR RESPONDENT

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Dated: June 5, 2013

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PRELIMINARY STATEMENT

In a federal action challenging a provision in New York's handgun licensing statute, Penal Law § 400.00(3)(a), under the Second Amendment to the United States Constitution, the United States Court of Appeals for the Second Circuit has certified to this Court the following question of New York law:

> Is an applicant who owns a part-time residence in New York but makes his permanent domicile elsewhere eligible for a New York handgun license in the city or county where his part-time residence is located?

This question arises because Alfred Osterweil's application for a handgun license was denied by Judge George Bartlett, the Schoharie County firearms licensing officer, on the ground that Osterweil was not domiciled in New York. Osterweil has challenged that denial on Second Amendment grounds in federal court. Because the proper interpretation of the relevant statute is in question, the Second Circuit has asked for an authoritative construction of the statute before considering the constitutional challenge to it.

New York's firearms licensing statute provides that an application for a handgun license must "be made and renewed . . . to the licensing officer in the city or county . . . where the applicant resides, is principally employed, or has his principal place of business as merchant or storekeeper." Penal Law § 400.00(3). Judge Bartlett denied the application at issue here in reliance on a 1993 decision of the Appellate Division, Third Department, construing the term "resides" in that statute to mean "is domiciled." *Matter of Mahoney v. Lewis,* 199 A.D.2d 734, 735 (3d Dep't 1993). Both parties to this action now urge this Court to answer the certified question by rejecting that holding, and instead construing the statute to authorize the issuance of a handgun license to a New York resident who is not domiciled in New York.

Mahoney's interpretation of the statute should be rejected for several reasons. First, the Third Department based its decision in part on the view that possession of a handgun is a privilege, not a right, *id.* at 735. But the United States Supreme Court has now squarely rejected that view in *McDonald v. City of Chicago*, 130 S.

Ct. 3020 (2010). Thus, one of the fundamental underpinnings of *Mahoney* has been removed, and for that reason alone the continuing vitality of the decision is doubtful. Second, a domicile requirement would raise serious constitutional questions under *District of Columbia v. Heller,* 554 U.S. 570 (2008), and *McDonald,* and this Court should construe the statute to avoid such questions. And third, apart from constitutional considerations, the text, purpose, and history of the statute strongly support a construction of the statute that makes residents who are not domiciled in New York eligible for handgun licenses.

Osterweil urges this Court to hold expressly that a domicile requirement *would* violate the Second Amendment (*see* Br. for Appellant at 13-31) but that question is not properly before this Court. The Court's precedents make clear that acceptance of a certified question brings to this Court only the certified question of state law, and not the federal constitutional claims that may depend on the answer to that question. Moreover, the doctrine of constitutional avoidance counsels a court to *avoid* constitutional questions, and not to decide them unnecessarily.

QUESTION PRESENTED

Is an applicant who owns a part-time residence in New York but makes his permanent domicile elsewhere eligible for a New York handgun license in the city or county where his part-time residence is located?

STATEMENT OF THE CASE

A. New York's Handgun Licensing Statute

New York law makes it a misdemeanor to possess an unlicensed handgun (or other designated firearm), loaded or unloaded, in any location, Penal Law § 265.01, and makes it a class C felony to possess an unlicensed loaded handgun (or other designated firearm) outside the home, *id.* § 265.03(3).[1] Long guns, including most rifles and shotguns, are excluded from these prohibitions. So the possession and carrying of long guns—

[1] Unless otherwise indicated, all Penal Law citations refer to the law prior to enactment of the N.Y. SAFE Act, ch. 1 (2013).

commonly used for hunting—are not generally prohibited or subject to licensing in New York.[2]

Licensed handguns are exempted from the Penal Law's prohibitions on possession of firearms. *Id.* § 265.20(a)(3).[3] Penal Law § 400.00(2) lists the types of licenses that authorize possession of a pistol or revolver, which include: (1) a license to "have and possess in his dwelling by a householder"; (2) a license to "have and possess in his place of business by a merchant or storekeeper"; (3) a license to "have and carry concealed while so employed by a messenger employed by a banking institution or express company"; and (4) a license to "have and carry concealed, without regard to employment or place of possession, by any person when proper cause exists for the issuance thereof." *Id.*

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[2] Penal Law § 265.00(3) defines "firearm" to include pistols and revolvers; shotguns with barrels less than eighteen inches in length; rifles with barrels less than sixteen inches in length; "any weapon made from a shotgun or rifle" with an overall length of less than twenty-six inches; and assault weapons.

[3] Other exemptions from the prohibition also exist, *inter alia*, for persons in state and federal military service, and for peace and police officers. Penal Law § 265.20(a)(1).

§ 400.00(2)(a)-(c) & (f).[4] A "carry concealed" license may be restricted to specific purposes set forth in the license application, such as use in target practice or hunting. *Matter of O'Connor v. Scarpino*, 83 N.Y.2d 919, 921 (1994).

Penal Law § 400.00(3) governs the application process for licenses, and contains the provision whose construction is at issue here. In most counties, licensing officers are judges; in New York City, and in Nassau and Suffolk counties, police officials act as licensing officers. Penal Law § 265.00(10). As part of a detailed paragraph prescribing the method of applying for a handgun license, § 400.00(3) states that an application for a handgun license must be made in the city or county "where the applicant resides, is principally employed or has his principal place of business as merchant or storekeeper." The legislative history shows that the precursor to this provision was added to the statute to prevent New York City residents from forum-shopping

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[4] The remaining categories include licenses for certain state judges, certain state and local prison employees, and possessors and carriers of certain antique pistols. Penal Law § 400.00(2)(d), (e) & (g).

by obtaining pistol permits from judges in counties outside the City where, at the time, "little or no investigation" of the applicant preceded issuance of a license. Letter from Edward P. Mulrooney, N.Y. City Police Comm'r, to Governor Franklin D. Roosevelt (Aug. 29, 1931), *reprinted in Public Papers of Governor Franklin D. Roosevelt*, 1931, at 184 (1937); *see also* Message to the Legislature (Sept. 1, 1931), *reprinted in Public Papers, supra,* at 182, 183 (recommending that Legislature adopt proposals in the Mulrooney letter).

Penal Law § 400.00(1) lists the eligibility requirements for a handgun license. Generally, an applicant must: (1) be twenty-one years of age or older; (2) have good moral character; (3) have no convictions for felonies or serious offenses; (4) state whether he or she has ever suffered a mental illness or been confined to a health-care facility because of mental illness; and (5) have no prior revocation of a license or current judicial order of protection. In

addition, there must not be "good cause" to deny a license. Penal Law § 400.00(1)(a)-(e), (g).[5]

Domicile is not listed as a precondition to eligibility for a handgun license. To the contrary, a separate provision specifically contemplates issuance of licenses to persons not usually resident in New York. Penal Law § 400.00(7) instructs that when a license "is issued to an alien, or to a person not a citizen of and usually a resident in the state, the licensing officer shall state in the license the particular reason for the issuance and the names of the persons certifying to the good character of the applicant." *Id.* § 400.00(7).

B. Statement of Facts

As of March 2009, Alfred Osterweil owned four houses—two in Summit, New York, and two in Many, Louisiana—all of which he considered his "home" (A. 18). Sometime between May 21,

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[5] Persons honorably discharged from the United States armed forces or the New York national guard are exempt from the age restriction. Penal Law § 400.00(1)(a). Westchester county applicants, except such honorably discharged service members, must also pass a firearms safety course. *Id.* § 400.00(1)(f).

2008, and June 25, 2008, Osterweil changed his primary residence from New York to Louisiana (*see* A. 34, 46). Since then, he has continued to retain at least one house in Summit, New York for use as a "vacation home" (*see* A. 14). The record contains little information as to the amount of time Osterweil spends annually in New York.

1. Osterweil's Application for a Handgun License

In May 2008, when his primary residence was in Summit, New York, Osterweil submitted an application for a handgun license to the Sheriff's Department in Schoharie County, where Summit is located (A. 9, 25). Osterweil checked the box on the application for a "premises" license—which is meant to designate an application for the statutory "householder" license—but he wrote in a space provided on the application that he sought the license for the purpose of "target practice and hunting" (A. 41). A few weeks later, the Sheriff informed Osterweil that he needed to "complete and/or correct" his application. The Sheriff explained that a premises license would be valid only "inside the residence"

for which he applied, and that Osterweil's desire to use a handgun for "target practice and hunting" would require him to obtain a "carry concealed" license. (A. 44.)

In June 2008, Osterweil told the Sheriff that he had purchased a home in Louisiana and intended to make Louisiana his primary residence. Osterweil inquired whether this change in his residency status would disqualify him from obtaining a permit, stating that if it would, he saw "no sense in correcting the application" to clarify whether he was seeking a concealed-carry license or a premises license. (A. 46.)

Thereafter, Osterweil, the Sheriff, and Judge Bartlett exchanged several letters regarding Osterweil's application. Osterweil was informed that his fingerprints had been determined to be unusable (due to low quality) by both the Federal Bureau of Investigation and the New York State Division of Criminal Justice Services (A. 35). *See* Penal Law § 400.00(4) (requiring officer investigating applicant for firearms license to take the applicant's fingerprints and send one copy to the State Division of Criminal Justice Services and one to the Federal Bureau of Investigation

for criminal records searches). Judge Bartlett advised Osterweil that, in addition to the lack of fingerprint quality, his out-of-state domicile might pose an obstacle to licensure (A. 79-80).

2. The Denial of Osterweil's License Application

On May 29, 2009, Judge Bartlett issued a decision and order denying Osterweil's application for a handgun license on the ground that Osterweil was not domiciled in New York (A. 144, 150; *see* A. 135-150). Judge Bartlett cited the *Mahoney* decision from the Third Department as controlling on the meaning of the residency provision in § 400.00(3)(a). In *Mahoney*, the court confirmed the denial of a concealed-carry license to a New Jersey domiciliary who also owned property in New York, holding that the residency language of § 400.00(3)(a) "is equivalent to domicile and requires something more than mere ownership of land." 199 A.D.2d at 735. This holding was based on the court's view that the residency language constituted a "qualification for a privilege," and that the "possession and use of a pistol are not vested rights but privileges." *Id.* (quotation marks omitted). Judge Bartlett's

denial of Osterweil's license was a direct application of *Mahoney*'s domicile requirement. The judge also rejected Osterweil's claim that the statute's residency language, as construed by *Mahoney* to require domicile, violated the Second Amendment under the Supreme Court's decision in *Heller* (A. 143-150). Judge Bartlett did not decide whether the quality of Osterweil's fingerprints would independently prevent him from obtaining a license or determine whether Osterweil had satisfied the other requirements for licensure under New York law (A. 150 n.3).

Osterweil did not seek review of Judge Bartlett's decision in a C.P.L.R. article 78 proceeding, as he could have done. *See, e.g., Matter of Dalton v. Drago*, 72 A.D.3d 1243 (3d Dep't 2010). Thus, Osterweil did not ask the Appellate Division, Third Department to reconsider *Mahoney*'s interpretation of the residency language in Penal Law § 400.00(3)(a)—something Judge Bartlett did not have the authority to do. Nor did Osterweil ask this Court to provide an authoritative construction of the statute—something this Court has not previously been asked to do.

C. The Federal Court Proceeding

Instead of pursuing state-court review of the denial of his license—review that could have resulted in a rejection of *Mahoney*'s domicile interpretation as early as 2009—Osterweil filed a complaint in the United States District Court for the Northern District of New York, asserting causes of action under the Second Amendment and the Equal Protection Clause of the Fourteenth Amendment, as well as claims under "the New York Constitution and Civil Rights Laws" (A. 10-11), against Bartlett in his official capacity as licensing officer (*see* A. 8-11; *see also* A. 187). The complaint requests an order directing that the defendants "provide plaintiff with the type of permit originally applied for, for costs of suit and such other damages and relief as the Court deems reasonable and appropriate" (A. 11).

1. The District Court's Grant of Summary Judgment to Bartlett

By suing in federal court, Osterweil delayed for several years any possibility of obtaining a New York appellate court decision re-examining § 400.00(3). Because this Court does not accept

certification of questions of New York law from federal district courts, certification to this Court became possible only after federal district court proceedings were concluded and Osterweil's federal litigation was on appeal. Osterweil's choice to launch federal litigation against Bartlett rather than seek state-court review of Bartlett's decision meant that the parties litigated this case in the federal district court within the framework of *Mahoney*.

The district court granted summary judgment to Judge Bartlett on all claims. Citing *Mahoney*, the court assumed that the statutory residency requirement operated as a domicile requirement (A. 159-160). The court held that intermediate scrutiny was the appropriate legal standard for analyzing Osterweil's Second Amendment claim (A. 168-169), and held that the statute satisfied intermediate scrutiny because "there is a substantial relationship between New York's residency requirement and the government's significant interest" in monitoring eligibility for firearms licenses (A. 170). The district court then rejected Osterweil's equal protection claim, finding that "New York state residents and nonresidents are not similarly

situated in terms of the state's ability to obtain information about and monitor the potential licensee's eligibility or continued eligibility for a firearms license" (A. 172).[6]

2. Osterweil's Appeal to the Second Circuit

Osterweil filed a notice of appeal. In April 2012, after Osterweil submitted his brief, Bartlett filed a motion asking the Second Circuit to certify to this Court the following dispositive legal question: "Does the applicant residency requirement in New York's pistol permit statute, N.Y. Penal Law § 400.00(3), require not merely residency but domicile in the State of New York?" Osterweil opposed this motion. (Opp'n to Mot., ECF No. 72.) The motion was referred to the Second Circuit merits panel. (Mot. Order, ECF No. 77.) Bartlett repeated the request for certification

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[6] The district court construed other federal claims by Osterweil, couched by him as equal protection claims, as claims that denial of his license application violated his right to travel under the Privileges and Immunities Clause and his right to substantive and procedural due process, and rejected each claim (A. 172 n.11). The district court declined to exercise supplemental jurisdiction over Osterweil's state-law claims (A. 178). He abandoned all these arguments in his federal appeal.

in his brief on the merits and described some of the reasons that the residence language in the statute would best be read to require only residence (A. 280-288). In his reply brief and at oral argument, Osterweil again opposed certification (A. 312-319).

After oral argument on the merits of Osterweil's appeal, the Second Circuit, in an opinion by Justice O'Connor, certified to this Court the question of the proper construction of the residence phrase in Penal Law § 400.00(3)(a) (A. 184-197). The court found that each of the factors it examines in deciding whether to certify a question of law favored certification. First, the court observed that this Court has never construed the residency language of § 400.00(3)(a), and that "[r]ecourse to [the] Court's broader opinions regarding residence requirements makes the water murkier, not clearer" (A. 189). The Second Circuit also rejected the option of construing the statute itself by predicting how this Court would construe it because doing so would "put state officials like Judge Bartlett in a particularly hard spot in the next case, uncertain whether to follow the binding decision . . . in *Mahoney* or the all-fours decision of a federal circuit court" (A. 191). Second,

the Second Circuit found that the construction of the statute was an issue of great importance to the State because "regulation of firearms is a paramount issue of public safety" (A. 192). Third, the court found that the certified question would be dispositive, noting that if this Court construed the statute to require only residence and not domicile, that construction would resolve the controversy in this case, and even if this Court adopted a domicile construction, the federal court would still benefit from the precise construction placed on the statute by this Court (A. 193)/ Finally, the Second Circuit rejected Osterweil's argument that the Circuit should address the constitutionality of a domicile requirement without certification, in order to avoid delay and the risk that both this Court and the Second Circuit would "opine on a constitutional question in the same case." (A. 193.)

This Court accepted certification on February 19, 2013 (A. 198).[7]

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[7] The State asked this Court to expedite the proceedings, consistent with representations made to the Second Circuit. (*See* A. 196.) Osterweil made a similar request. While this Court

(*continued on next page*)

ARGUMENT

THE RESIDENCY LANGUAGE OF THE HANDGUN LICENSING STATUTE SHOULD NOT BE CONSTRUED TO IMPOSE A DOMICILE REQUIREMENT

Constitutional concerns loom large in this litigation, and we will address them in due course. But in fact a straightforward analysis of the statute answers the certified question independent of those constitutional questions. This Court has long observed that the terms "residence" and "domicile" are "not identical." *Antone v. Gen. Motors Corp.*, 64 N.Y.2d 20, 28 (1984). "[W]hile a person can have but one domicile, he can have more than one residence." *Id.*

A person is a "resident" if he or she has "a significant connection with some locality in the State as the result of living there for some length of time during the course of a year." *Id.* at 30. Thus, a person who owns or rents an abode in a county or city

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accepted certification on February 19, 2013, within three weeks of the Second Circuit order, Osterweil did not file his brief until May 7, 2013—too late for the case to be calendared before the summer recess.

of the State and actually lives there "for some length of time during the course of a year" is a resident for that part of the year.[8]

On the other hand, "[e]stablishment of a domicile in a State generally requires a physical presence in the State *and* an intention to make the State a *permanent* home." *Id.* at 28 (emphasis added). Thus, a person who is a New York domiciliary is necessarily a resident of the State, but a person may be a domiciliary of another State (or another nation) and nonetheless be a resident of New York. Finally, persons who are merely visiting the State or in transit through the State, and who thus lack "a fixed and permanent abode or dwelling-place for the time

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[8] While Osterweil asserts that he is a part-year resident, the record here does not establish the length of time each year that Osterweil lives in the house or houses he owns in New York. If this Court construes the statute to require only residence and not domicile, thereby removing the only obstacle challenged by Osterweil in this federal lawsuit, his application for a permit will still require the licensing officer to resolve at least two questions not answered on the current record: whether in fact he continues to reside in his New York house or houses on a part-time basis, and whether he can produce readable fingerprints as required to enable the Division of Criminal Justice Services to conduct Osterweil's criminal background check. *See* Penal Law § 400.00(4).

being," are neither residents nor domiciliaries. *Matter of Wrigley*, 8 Wend. 134, 140 (1831).

This Court has held that when a statute uses the term "resides," rather than "is domiciled," this choice of language presumptively demonstrates that the Legislature intended to impose a residency requirement, not a domicile requirement. *See Antone*, 64 N.Y.2d at 29. This presumption may be overcome in particular cases where "the nature of the subject-matter of the statute as well as the context in which the words are used," *Rawstorne v. Maguire*, 265 N.Y. 204, 208 (1934), or where legislative history, *Antone*, 64 N.Y.2d at 29, establishes that the Legislature meant for statutory language phrased in terms of residency to impose the more restrictive requirement of domicile. Consequently, this Court has in some contexts construed "residence" to mean "domicile." *See, e.g., Matter of Hosley v. Curry*, 85 N.Y.2d 447, 451 (1995).

Here, the text of Penal Law § 400.00(3) uses the language of residence rather than domicile: it requires applications for handgun licenses not based on employment or operation of a

business to be filed "where the applicant resides." The context, purpose, and history of the statutory language confirm, rather than rebut, the presumption that a residence requirement was intended. And if there were any doubt on the point, the principle that statutes should be construed in a manner that avoids constitutional questions would resolve it in favor of a residency requirement.

A. The Context, Structure, and History of the Statute Support a Requirement of Residency and Not Domicile.

In order to obtain a premises or concealed-carry license to possess a handgun, an applicant must file his or her application in the county or city where he or she "resides." The statute's use of residency language establishes a presumption against a domicile construction, and nothing in the structure of legislative history of the statute rebuts that presumption. Instead, the context, structure and history of the statute strongly support construing the statute as requiring only residency.

The context of the language concerning residency does not suggest that the Legislature meant the language to be read as

requiring domicile. As the Second Circuit observed, the statutory context shows that the phrase is simply "a procedural rule about *where to file* to get a license, not a limitation on *who may get one*" (A. 189 (emphasis in original)). The phrase is not located in the eligibility subsection of the statute, but rather in the subsection governing the procedural requirements for handgun license applications. The statute therefore imposes a venue requirement for license applications. This forum-selection purpose does not support reading "resides" as "is domiciled," since persons may conveniently and appropriately apply for a handgun license in the city or county of their place of residence, whether or not they are domiciled there.

The history of the statutory language confirms that a residency requirement, not a domicile requirement, is intended. For two decades after New York's handgun licensing statute was passed in 1911, the statute contained no language regarding residency or domicile. Residency language was added to the statute in 1931 in order to address the problem of New York City residents obtaining licenses in counties outside the city where

there was less thorough investigation of applicants. Letter from Mulrooney, *supra*; *see also* Message to the Legislature, *supra*, (recommending that Legislature adopt proposals in the Mulrooney letter). The history of the 1931 amendment confirms that the residency language was designed as a venue provision—to prevent forum-shopping by applicants—not as a way to bar part-time residents of the State from obtaining licenses altogether in New York.

Penal Law § 400.00(7) further refutes any contention that the Legislature meant to impose a domicile requirement for handgun licenses. Section 400.00(7) expressly contemplates that handgun licenses may be issued to "an alien, or to a person not a citizen of and usually a resident in the state" and directs the licensing officer, in such case, to state in the license "the particular reason for the issuance and the names of the persons certifying to the good character of the applicant."[9]

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[9] If Osterweil otherwise qualifies for a handgun license (see n.8, *supra*), the requirement means that his license would include the names of the character references he provided on his

(continued on next page)

The 1993 decision of the Third Department in *Mahoney* provides no persuasive reason to read the statutory language regarding residency as specifying a domicile requirement. *Mahoney* did not undertake an analysis of the structure of Penal Law § 400.00, and completely overlooked the language in § 400.00(7) expressly acknowledging that handgun licenses may be issued to aliens and to persons who are not citizens of and usually resident in the State. *Mahoney* also incorrectly assumed that the phrase "where the applicant resides" should be treated as a qualification for licensure, even though it does not appear in the subsection of the statute listing substantive eligibility requirements. And *Mahoney* construed the residency language of the statute to mean domicile based in part on the notion that possession of a handgun is a privilege rather than a right. That notion has now been squarely repudiated by the Supreme Court,

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application, and would state the reason for issuance of the license—presumably either self-defense in his New York home or target practice and hunting (*see* A. 41). This information is ordinarily furnished by all license applicants; the quoted provision requires only that they be listed on the license for an alien or "a person not a citizen of and usually a resident in the state."

which in *Heller* recognized an individual's right to possess a handgun in his home for purposes of self-defense, and in *McDonald* made clear that the right recognized in *Heller* is enforceable against the States.

For all these reasons, *Mahoney* was wrongly decided, and should not be adopted by this Court as the law of New York.

B. The Canon of Constitutional Avoidance Further Supports the Construction of the Statute To Require Residence, Not Domicile.

Even if the text, structure, and history of Penal Law § 400.00 left room for doubt, which they do not, the statute should be construed to require only residence and not domicile under the principle that statutes should be construed so as to avoid serious constitutional questions. This Court has stressed that "[n]o statute should be declared unconstitutional if by any reasonable construction it can be given a meaning in harmony with the fundamental law." *People ex rel. Simpson v. Wells*, 181 N.Y. 252, 257 (1905). *See also, e.g., Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin.*, 20 N.Y.3d 586, 593 (2013). This canon of construction is dispositive here.

The Second Circuit's opinion makes clear that a domicile requirement would present "a serious and very difficult question of federal constitutional law" (A. 194). Osterweil goes several steps further, arguing at length that a domicile requirement would clearly be unconstitutional, and even urging this Court actually to decide that federal constitutional question in this appeal. For purposes of this case, however, it suffices to conclude that a domicile requirement would present a serious constitutional question, and that the statute may reasonably be read as imposing only a residency requirement. *See, e.g., People v. Finkelstein*, 9 N.Y.2d 342, 345 (1961). It is not necessary to decide the constitutional question that would be presented by a different interpretation of the statute, and indeed to do so would violate the basic principle that courts should avoid the unnecessary decision of constitutional questions. *Lyng* v. *Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988); *Ashwander* v. *TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring); *People v. Felix*, 58 N.Y.2d 156, 161, *appeal dismissed for want of substantial federal question*, 464 U.S. 802 (1983).

Osterweil's further contentions are not properly before the Court. This Court's response to a question certified by the Second Circuit "should be dispositive of the precise law query as transmitted" to the Court. *Rooney v. Tyson*, 91 N.Y.2d 685, 690 (1998). This means that "[e]verything else—including especially the relevant application and actual decision of the case—is, of course, within the *exclusive* juridical competence of the Second Circuit Court of Appeals." *Id.* (emphasis added). Indeed, because this Court's authority to answer questions certified by a federal appeals court derives from a state constitutional provision limiting authorizing the court "to answer questions of New York law," N.Y. Const. art. VI, § 3(b)(9), the Court's "province is bounded by 'questions of *New York law* . . . which may be determinative,'" *Engel v. CBS, Inc.*, 93 N.Y.2d 195, 207 (1999) (emphasis added). Consequently, there is no basis for the Court to resolve questions of federal constitutional law in this appeal.

If this Court were inclined to reach those questions, notwithstanding the weighty reasons not to do so, it would find that the issues are more complex and the questions more difficult

than suggested by Osterweil. In particular, Osterweil claims that a domicile requirement would be invalid under *Heller* and *McDonald* as an absolute ban on home possession of handguns. Br. at 14-17. But a New York domicile requirement would not be an absolute ban because, as the Second Circuit noted, "[i]t is open to Osterweil to make his domicile in New York" (A. 194), and because a New York domicile requirement would not limit Osterweil's ability to possess a handgun in his Louisiana homes.[10] Moreover, *Heller* and *McDonald* plainly leave room for reasonable regulation of handgun possession, *see Heller*, 554 U.S. at 626-27 & n.26; *McDonald*, 130 S. Ct. at 3047, and the exclusion of a non-resident from licensure serves important state interests in monitoring the conduct of licensees, and thus survives intermediate scrutiny. *See Bach v. Pataki*, 408 F.3d 75, 91-92 (2d Cir. 2005). *Cf. Peterson v. Martinez*, 707 F.3d 1197, 1223 (10th Cir. 2012) (Lucero, J., concurring) (citing *Bach* with approval).

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[10] Indeed, Osterweil states in his brief (at 4) that he keeps a revolver in his Louisiana home.

Under more recent Second Circuit precedent, moreover, no heightened scrutiny is given to statutes regulating firearms where "adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense." *United States v. Decastro*, 682 F.3d 160, 168 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 838 (2013). A court could find that Osterweil's needs for home self-defense or hunting during limited periods of residency in New York are met by possession of a long gun, which under New York law does not require a license.

Osterweil accordingly overstates the strength of the constitutional arguments against a domicile requirement. But this Court need not, should not, and indeed cannot answer any federal constitutional question in this appeal on certified questions of New York law. The issue of statutory construction presented here is definitively resolved under the principle that statutes should be interpreted to avoid serious constitutional questions, to any extent that the issue is not already resolved by the text, structure, and history of the statute showing that it imposes only a residency requirement, not a domicile requirement.

CONCLUSION

For the foregoing reason, this Court should answer the certified question in the affirmative.

Dated: New York, NY
June 6, 2013

Respectfully submitted,

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EXHIBIT H

To be Argued by:
DANIEL L. SCHMUTTER
(Time Requested: 10 Minutes)

Appeal No. CTQ-2013-00001

Court of Appeals

of the

State of New York

ALFRED G. OSTERWEIL,

Appellant,

– against –

GEORGE R. BARTLETT, III, in his Official capacity as Licensing Officer in the County of Schoharie,

Respondent.

ON APPEAL FROM THE QUESTION CERTIFIED BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN DOCKET NO. 11-2420-CV

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INTRODUCTION AND SUMMARY OF ARGUMENT

The State's approach to this case is a study in contradiction. In federal district court—where Mr. Osterweil litigated pro se—the State insisted that New York law contains a domicile requirement. The State now belatedly contends only residence is required. The State once championed *In re Mahoney v. Lewis*, 605 N.Y.S.2d 168 (App. Div., 3d Dep't 1993), as reflecting a "long-standing" requirement of New York Law, A220, but now belatedly argues that "*Mahoney* was wrongly decided" and "provides no persuasive reason" for requiring domicile, State Br. 24-25. The State argued in the U.S. Court of Appeals for the Second Circuit that *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), marked a "dramatic shift in Second Amendment jurisprudence" that may render a domicile requirement unconstitutional. A251. The State now contends that *Heller* and *McDonald* are, in fact, distinguishable from the law as applied to Mr. Osterweil, and yet this Court should nonetheless abandon the "long-standing" rule of *Mahoney*. The State argues that the Court should construe N.Y. Penal Law § 400.00(3) as not requiring domicile in order to avoid Second Amendment problems, but then asserts that a domicile requirement can survive intermediate scrutiny because it serves the State's interest in monitoring its licensees.

Mr. Osterweil and the State thus agree that the certified question should be answered in the affirmative, but little more. The State's attempt to dodge the blame for the ongoing denial of Mr. Osterweil's constitutional rights blinks reality. It is the State that opposed Mr. Osterweil's attempt to vindicate his rights in federal court, while he litigated pro se, and the State that then dragged its feet once it decided to change course after Mr. Osterweil obtained counsel. The State's argument that a ban on home handgun possession by part-time residents might be permissible under the Second Amendment—either because it is distinguishable from the bans at issue in *Heller* and *McDonald* or because it can survive intermediate scrutiny—amounts to a refusal to acknowledge the holdings of *Heller* and *McDonald* and the fundamental nature of Second Amendment rights. And the State's contention that this Court should avoid Second Amendment issues altogether even while recognizing that "[c]onstitutional concerns loom large in this litigation," State Br. 18, is as inexplicable as it is unexplained.

Denying an in-home handgun license to a part-time resident is incompatible with the Second Amendment and the Supreme Court's decisions in *Heller* and *McDonald*. As those cases make clear, the Second Amendment right, especially when it comes to self-defense in the home, is fundamental. It is not a seasonal right that can be denied during the summer, or limited to full-year residents. The Supreme Court has held that a law that categorically bans the possession of

handguns in the home is unconstitutional. When it comes to part-time residents, that is exactly what a domicile requirement does. As a result, this Court should answer the certified question in the affirmative and hold that, consistent with the Second Amendment, § 400.00(3) requires residence and not domicile.

ARGUMENT

I. The Ongoing Violation Of Mr. Osterweil's Second Amendment Right To Possess A Handgun In His Part-Time Residence Must Come To An End.

The violation of Mr. Osterweil's constitutional right to possess a handgun in defense of his home is longstanding and remains ongoing; he applied for a license to keep a handgun in his New York home more than five years ago, and he has been continuously denied that license. There is nothing obscure or fairly debatable about the responsibility for this denial of fundamental constitutional rights. It was a state official who denied Mr. Osterweil's license application and the State was perfectly happy to give a full-throated defense to that denial while Mr. Osterweil litigated pro se in District Court. Accordingly, the State adds insult to constitutional injury by insinuating that it is really Mr. Osterweil's fault that his Second Amendment rights have been continuously denied for half a decade.

The State's efforts to avoid the blame for the continuing denial of Mr. Osterweil's constitutional rights are wholly unavailing. The State faults Mr. Osterweil for attempting to vindicate his federal constitutional rights in federal

court, and suggests that had Mr. Osterweil instead pursued administrative review of his license denial through a state court proceeding, this case might have been over years ago. *See* State Br. 13-14. One of the many problems with that argument is that the State only changed its view of the law after Mr. Osterweil hired counsel on appeal in the Second Circuit. There is no reason to believe that the State would have taken a different position on the meaning of § 400.00(3) in state court than it did in the federal district court. The State nowhere suggested in its district court papers that its argument was somehow forum dependent.

Relatedly, the State suggests that the delay in vindicating Mr. Osterweil's constitutional rights is explicable, at least in part, by the unavailability of certification until Mr. Osterweil appealed his case to the Second Circuit. But the State's endorsement of *Mahoney* and a domicile requirement in the federal district court was unqualified, and was in no way labeled a stop-gap measure until certification could be sought. Not once did the State inform the federal district court or Mr. Osterweil—then litigating pro se—that it thought *Mahoney* misread § 400.00(3), or that a correction of *Mahoney* would be promptly sought via certification.

And, of course, certification was not promptly sought once it became available. The State's attempt to claim it is a victim of circumstance is critically undermined by the reality that it waited almost a year to seek certification once it

became a viable option. Mr. Osterweil filed his notice of appeal to the Second Circuit on June 13, 2011. *See* A6. The State could have filed a motion to certify a question to this Court that same day. *See* Advisory Grp. to N.Y. State & Fed. Judicial Council, Practice Handbook on Certification of State Law Questions by the U.S. Court of Appeals for the Second Circuit to the N.Y. State Court of Appeals 3 (2d ed. 2006) ("Motions to certify questions of state law may be filed with the Clerk of Court any time after the notice of appeal has been filed . . . ."). Instead, the State waited until April 18, 2012, to seek certification—a full 10 months after it could have filed a certification motion, 83 days after Mr. Osterweil's attorneys filed their opening brief, and eight days before the State's brief was due. The blame for the ongoing denial of Mr. Osterweil's constitutional rights rests with the State and the State alone.

The State may have already foreshadowed its next delay tactic. The State's brief to this Court notes that Mr. Osterweil owns two homes in Summit, New York, but then states that the "record contains little information as to the amount of time Osterweil spends annually in New York." State Br. 9. Later, in a footnote, the State mentions that "[w]hile Osterweil asserts that he is a part-year resident, the record here does not establish the length of time each year that Osterweil lives in the house or houses he owns in New York" and whether he "continues to reside in his New York house or houses on a part-time basis" will need to be determined.

State Br. 19 n.8. Reading between the lines it will be unsurprising if the next step in the State's resistance to the clear implications of *Heller* and *McDonald* will be to contend that Mr. Osterweil does not spend enough time "residing" in New York to qualify for a premises possession permit under New York law. While that position would be flatly inconsistent with the State's representations to the Second Circuit, *see* Add-4 (Tr. of Oral Arg. 22) (a ruling in Mr. Osterweil's favor "would remove the bar that he's challenging in this case"); Add-8 ("if the statute authorizes issuance of licenses to part-time residents . . . then there would be no bar on that ground to Mr. Osterweil's license"); Add-9 ("I see no reason to think that [the state official] would find other means to further deny a license"), consistency has not been the hallmark of the State's litigation strategy in this case.

The more than five-year denial of Mr. Osterweil's constitutional rights must come to an end. In addition to answering the certified question in the affirmative, this Court should take steps to ensure that the State can no longer put off the vindication of Mr. Osterweil's Second Amendment rights.

II. A Ban On Home Handgun Possession By Part-Time State Residents Violates The Second Amendment.

A. A Ban On Home Handgun Possession By Part-Time State Residents Categorically Prohibits The Exercise Of The Core Second Amendment Right Identified In *Heller*.

As described in Mr. Osterweil's opening brief, *Heller* and *McDonald* make plain that a complete ban on home handgun possession by part-time New York

residents is unconstitutional. *See* Osterweil Br. 14-17. While the State appears to acknowledge as much at one point, State Br. 3, it nonetheless contends that a domicile requirement like that imposed on Mr. Osterweil is not the same as the bans struck down in *Heller* and *McDonald.* The State contends that "a New York domicile requirement would not be an absolute ban" like those addressed by the Supreme Court because (1) Mr. Osterweil could make his domicile in New York and be eligible for a handgun premises possession permit and (2) a New York domicile requirement does "not limit [Mr.] Osterweil's ability to possess a handgun in his Louisiana homes." State Br. 28.

Little ink need be wasted on the State's efforts to undermine the dispositive nature of *Heller* and *McDonald.* The State's contention that a domicile requirement does not amount to a categorical ban because Mr. Osterweil can change his domicile only underscores how little the State values Second Amendment rights. Presumably even the State would recognize that a ban on free speech or free exercise is no less categorical because those denied their fundamental rights could always move elsewhere. And, of course, Messrs. Heller and McDonald could have equally avoided the categorical bans at issue by moving elsewhere.

In all events, as Justice O'Connor recognized in her opinion certifying the question to this Court, "a domicile requirement will operate much like the bans

struck down in *Heller* and *McDonald* . . . for part-time New York residents whose permanent homes are elsewhere." A194. Given the reality that Mr. Osterweil is a part-year resident, the question is whether the Second Amendment permits the State to deny him any ability to obtain a handgun for self-defense in his part-time residence. The answer clearly supplied by *McDonald* and *Heller* is no. And the State's suggestion that Mr. Osterweil could always move and re-establish his New York domicile is reminiscent of the law student who wants to change the hypothetical. But there is nothing hypothetical about the denial of Mr. Osterweil's Second Amendment rights. He is, in fact, a part-time resident of New York, and *Heller* and *McDonald* entitle him to relief. There is certainly no hint in either *Heller* or *McDonald* that part-time and full-time residents should be treated differently for Second Amendment purposes. The Second Amendment guarantees the right of "law-abiding, responsible citizens to use arms in defense of hearth and home" where the need for self-defense "is most acute." *Heller*, 554 U.S. at 592, 628, 635. The fundamental right of self-defense is no less acute because one has more than one home, or spends less than twelve months per year in one's home. As far as the Second Amendment is concerned, part-time and full-time residents and residences are identical.

The State's argument that a domicile requirement does not amount to a categorical ban because non-domiciliaries can possess handguns in the state where

they are domiciled fares no better. That Heller might have been able to possess a handgun in a home outside of Washington, D.C., did not impact the Supreme Court's analysis. The same should be true here. "[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home." *Id.* at 636. It does not matter whether the home is a part-time or full-time residence.

The State also argues that "[a] court could find that Osterweil's needs for home self-defense . . . during limited periods of residency in New York are met by possession of a long gun, which under New York law does not require a license." State Br. 29. In the pantheon of arguments squarely foreclosed by *Heller*, the argument that long guns suffice has to rank very near the top. Defenders of the District of Columbia handgun ban argued this point at length and to no avail. The State may disagree with *Heller*, but *Heller* is the law: "handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." 554 U.S. at 629. Accordingly, the State's contention that the constitutional harms done by a categorical part-time resident

home handgun ban are somehow ameliorated by the availability of long guns is a constitutional nonstarter.[1]

Heller and *McDonald* control here—a categorical ban on home handgun possession by part-time residents is unconstitutional.

B. A Ban On Home Handgun Possession By Part-Time State Residents Fails Under Any Arguably Applicable Standard Of Scrutiny.

After its failed attempt to distinguish a part-time resident handgun ban from the prohibitions at issue in *Heller* and *McDonald*, the State asserts that such a ban could "survive[] intermediate scrutiny" because "the exclusion of a non-resident from licensure serves important state interests in monitoring the conduct of licensees." State Br. 28. Not so.

Setting aside the obvious and inherent conflict between the State's argument in favor of constitutional avoidance and its contention that a domicile requirement is not unconstitutional, the State makes two mistakes. First, to the extent that levels-of-scrutiny analysis is necessary to decide whether a part-time resident

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[1] The State also notes that "*Heller* and *McDonald* plainly leave room for reasonable regulation of handgun possession," State Br. 28, citing the portions of those decisions discussing bans on the possession of firearms by felons, the mentally ill, and minors, as well as "laws forbidding the carrying of firearms in sensitive places," *Heller*, 554 U.S. at 626-27. The precise meaning of this language in *Heller* has been the subject of considerable debate. But one thing is beyond debate: a ban on possession of handguns in the home is not a "reasonable regulation of handgun possession." That is the unequivocal holding of *Heller*, and it is dispositive here.

handgun ban is constitutional, the scrutiny must be strict.[2] As Mr. Osterweil explained in his opening brief, the Second Amendment right to possess and carry firearms is a fundamental right and laws abrogating fundamental rights are subject to strict scrutiny. Osterweil Br. 18-20.

The State's argument that intermediate scrutiny applies to categorical bans on home handgun possession like that at issue in *Heller* was rejected by *Heller* itself. *Heller* explicitly and definitively rejected the "interest-balancing" approach endorsed by Justice Breyer—which is intermediate scrutiny by another name. *Heller*, 554 U.S. at 634; *McDonald*, 130 S. Ct. at 3050 (plurality op.) ("while [Justice Breyer's] opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion"). Justice Breyer called his approach "interest-balancing" because of his view that the government's interest in regulating firearms—some version of protecting public safety—would always be important or compelling. Thus, in his view, whether the level of scrutiny applied was strict (requiring a compelling government interest) or intermediate (requiring only an important interest), the government interest would always qualify, and the analysis would really turn on a search for the appropriate degree of fit, which

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[2] This Court could of course "follow *Heller*'s lead and find the policy applied here unconstitutional without specifying a level of scrutiny. Like the law in *Heller*, the policy applied to Mr. Osterweil is unconstitutional because it is antithetical to the core Second Amendment right." Osterweil Br. 17-18.

Justice Breyer described as interest-balancing. *See Heller*, 554 U.S. at 689-90 (Breyer, J., dissenting).

Semantics aside, Justice Breyer's approach in substance was simply intermediate scrutiny. Justice Breyer relied (*see id.* at 690) on cases such as *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), and *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), which explicitly apply intermediate scrutiny. Even more tellingly, Justice Breyer invoked *Burdick v. Takushi*, 504 U.S. 428 (1992), the case on which the United States principally relied in advocating that the Court adopt intermediate scrutiny. *See* Brief for the United States as Amicus Curiae 8, 24, 28, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 157201. Justice Breyer's interest-balancing was simply intermediate scrutiny by another name, and the Court rejected it (and reaffirmed that rejection in *McDonald*). *See* Add-6 (observing that the State's argument that something other than strict scrutiny applies to a domicile requirement is "essentially [the] position . . . that Justice Breyer took in . . . and was rejected by the Supreme Court by the majority" in *Heller* (Walker, J.)).

In all events, a ban on part-time resident home handgun possession fails under both strict and intermediate scrutiny.[3] The State effectively concedes that a

[3] Not even the State is so bold as to argue that something less than intermediate scrutiny applies. Any argument to that effect is foreclosed by *Heller*. *See* 554 U.S. at 628 n.27 ("If all that was required to overcome the right to keep and bear arms

part-time resident handgun ban fails strict scrutiny by not even attempting to address strict scrutiny in its brief. *See* State Br. 28. And the "important state interest[] in monitoring the conduct of licensees" that the State cites is not a compelling interest that can justify the ban under strict scrutiny. State Br. 28. Monitoring licensees might play a part in achieving some other compelling end, but it cannot be an end in itself.

What is more, any claim to a compelling interest in monitoring licensees rings hollow in light of the fact that domiciliaries who may spend little-to-no time in New York are eligible for premises possession permits. There is no time limit linked to the domicile requirement as enforced against Mr. Osterweil. As a result, a New York domiciliary can have a license to have a handgun in his home spending nearly no time there, and a non-domiciliary who spends substantially more time in New York cannot. That mismatch makes any claim that some compelling interest related to monitoring licensees is served in a tailored way by a part-time resident handgun ban untenable.

For much the same reasons, an asserted interest in monitoring licensees cannot support a ban on home handgun possession by part-time residents under intermediate scrutiny. The State has never provided or cited to any evidence—which is clearly the State's burden under any form of heightened scrutiny, *see City*

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was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.").

of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 438-40 (2002)—that a ban on home handgun possession by part-time residents actually promotes its claimed interest in monitoring (or any other interest for that matter). That may be because there is no evidence to support the claim. New York licensing law already contemplates that there are available and useful mechanisms for monitoring out-of-state behavior: N.Y. Penal Law § 400.00(11) provides that a handgun license can be suspended upon conviction for a felony or serious offense "anywhere." Moreover, as noted in Mr. Osterweil's opening brief, the answer to any concerns with effectively monitoring those domiciled elsewhere would be deference to the licensing decision of the state of domicile, not a categorical ban that is flatly inconsistent with *Heller*.[4]

The notion that an interest in monitoring licensees justifies the severe restriction on Second Amendment rights enforced against Mr. Osterweil is fatally undermined by the State's own arguments. The State urges this Court to hold that New York law "authorize[s] the issuance of a handgun license to a New York resident who is not domiciled in New York." State Br. 2. As the State notes, "this Court has in some contexts construed 'residence' to mean 'domicile,'" such as when "'the nature of the subject-matter of the statute'" counsels in favor of "the

[4] As explained in Mr. Osterweil's opening brief, *Bach v. Pataki*, 408 F.3d 75 (2d Cir. 2005), cannot justify the State's reliance on an asserted interest in monitoring its licensees. *See* Osterweil Br. 21; *see also* Add-1 (noting that *Bach* was decided "under a different regime" and "before *Heller*" (Walker, J.)).

more restrictive requirement of domicile." State Br. 20. If the State's interest in monitoring its licensees is as strong as it asserts—strong enough to justify burdening a fundamental constitutional right—one would think that the State would argue that this is one of the times that a statutory residence requirement actually requires domicile. That it is not critically undermines the State's asserted interest. *See* Add-36 (noting that the State's argument that § 400.00(3) does not require domicile is in conflict with its argument that a domicile requirement serves the State's monitoring interest (Walker, J.)).

A ban on home handgun possession by part-time residents like that applied to Mr. Osterweil is fatally inconsistent with *Heller* and can survive neither strict nor intermediate scrutiny.[5]

III. This Court Should Construe New York Law Governing Home Handgun Possession As Not Requiring Domicile.

This Court should interpret N.Y. Penal Law § 400.00(3) to allow individuals who—like Mr. Osterweil—"reside" in New York, but are not New York domiciliaries, to possess handguns in their homes. *See* Osterweil Br. 29-31. Tying an individual's ability to possess a handgun in his home to that individual's status as a domiciliary is flatly inconsistent with both the Second Amendment and the Equal Protection Clause. This Court's precedents require it "to avoid interpreting a

[5] A ban on part-time resident home handgun possession also violates the Equal Protection Clause of the Fourteenth Amendment. *See* Osterweil Br. 26-29. The State does not argue otherwise.

statute in a way that would render it unconstitutional if such a construction can be avoided," *Alliance of Am. Insurers v. Chu*, 77 N.Y.2d 573, 585 (Ct. App. 1991), and a clearly unconstitutional construction can be avoided here. While New York courts often construe "residence" and "reside" to mean "domicile," *see, e.g.*, *Longwood Cent. School Dist. v. Springs Union Free School Dist.*, 1 N.Y.3d 385, 388 (Ct. App. 2004), that is not always the case. Accordingly, this court should construe § 400.00(3) to require only residency.

Despite the State's contention that a part-time resident home handgun ban would likely be permissible under the Second Amendment, the State also argues that this Court should interpret § 400.00(3) "to require only residence and not domicile under the principle that statutes should be construed so as to avoid serious constitutional questions." State Br. 25. As explained, the state is only half right. But for the fact that applying the rule of *Mahoney* would flatly violate the Second Amendment, there would be no reason for this Court to move away from that long-established construction of New York law. The reason to abandon the rule of *Mahoney* is the Second Amendment as construed in *Heller* and *McDonald*. And no principle of sound judicial decisionmaking counsels in favor of the State's suggestion, *see* State Br. 26, that this Court should obscure that the reason for it to construe the statute in Mr. Osterweil's favor is the constitutional arguments that he has been making consistently throughout this litigation.

New York law does not compel the odd approach to constitutional avoidance that New York advocates. The relevant statutory provision provides that "[t]he courts should not strike down a statute as unconstitutional unless such statute clearly violates the Constitution." N.Y. Stat. Law § 150 (McKinney). And the leading case cited by the State provides that "'[n]o statute should be declared unconstitutional if by any reasonable construction it can be given a meaning in harmony with the fundamental law.'" State Br. 25 (quoting *People ex rel. Simpson v. Wells*, 181 N.Y. 252, 257 (1905)). Neither the relevant statute nor relevant case law says that "when a case involves a constitutional issue that drives the statutory analysis courts should avoid acknowledging the constitutional issue."

The fact that this case comes to the Court on certification rather than direct appeal should not impact the Court's approach to constitutional avoidance. Contrary to the State's suggestion, *see* State Br. 27, nothing in the New York constitutional provision authorizing this Court to answer certified questions makes it somehow inappropriate to consider the Second Amendment implications of a domicile requirement. The relevant constitutional provision states that this Court may "answer questions of New York law"—it does not forbid this Court from considering constitutional issues in the course of answering those questions. N.Y. Const. art. VI, § 3(b)(9). Indeed, the New York statutory provision outlining certification procedures expressly contemplates that a certified question may

involve constitutional issues: "If the constitutionality of an act of the Legislature of this State is involved in a certification to which the State of New York or one of its agencies is not a party, the clerk of the court shall notify the Attorney General . . . ." N.Y. Comp. Codes R. & Regs. tit. 22, § 500.27(f). This provision is not at issue here because the State has been directly involved in this case for more than four years, but it makes clear that constitutional issues are not off limits on certification.

Deciding whether the canon of constitutional avoidance should be applied necessarily requires consideration of the constitutional issues to be avoided. The Supreme Court's approach to constitutional avoidance in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), is instructive. In *Catholic Bishop*, the Court held that the National Labor Relations Act did not authorize the NLRB to exercise jurisdiction over lay faculty members at church-operated schools largely because holding otherwise might have required invalidating the statute on First Amendment grounds. The Court arrived at that decision only after an in-depth consideration of the contours of the constitutional rights at stake. *See id.* at 501-504; *id.* at 504 ("We see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow" and thus must decide whether the Act can be read to avoid such problems.); *see also Edward J. DeBartolo Corp. v.*

Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575-76 (1988) (thoroughly exploring the relevant constitutional issues in the process of deciding whether those issues could be avoided). The *Catholic Bishop* Court did not adopt a particular interpretation of the statute at issue based on some amorphous fear that doing otherwise might violate the Constitution in an unspecified way. Instead, the court reviewed the relevant constitutional arguments, expressly acknowledged that one interpretive approach would be constitutionally problematic, and then adopted an interpretation consistent with the Constitution.

That approach makes sense. The contention that a court must alter its interpretation of a statute merely because a litigant raises a constitutional issue, and without further review of the constitutional claim, is an invitation to litigants to raise frivolous constitutional arguments to obtain desired interpretive results and tantamount to an assertion that courts should abdicate their judicial responsibility to interpret statutes in cases involving constitutional claims. The former is ill-advised and the latter is plainly wrong. A court should allow its interpretation of a statute to be impacted by the Constitution only after determining whether a specific interpretation of that statute would run afoul of the Constitution.

In this case, there is more than mere tension between the view of § 400.00(3) pressed by the State in federal district court and imposed by the state official to deny Mr. Osterweil's license application—a domicile requirement and the Second

Amendment right to keep and bear arms in defense of hearth and home are incompatible. Accordingly, this Court should hold that, at least in this case, "resides" simply means "resides."[6]

CONCLUSION

For the foregoing reasons, this Court should answer the certified question in the affirmative and hold that a ban on home handgun possession by part-time residents violates the Second Amendment and the Equal Protection Clause and that N.Y. Penal Law § 400.00(3) makes home handgun possession permits available to part-time New York residents.

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[6] The State also asserts that the Court need not resort to constitutional avoidance because "the context, structure and history" of § 400.00(3) "strongly support construing the statute as requiring only residency," State Br. 21, 25, which begs the question why the State did not argue as much in federal district court, where Mr. Osterweil litigated this case pro se, or in the Second Circuit, where the State conceded that the federal appellate court had the power to decide the question of whether § 400.00(3) requires domicile to the extent the issue was "clear cut," Add-6.

Respectfully submitted,

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June 24, 2013

ADDENDUM

11-2420 cv

In the

United States Court of Appeals

for the Second Circuit

Alfred G. Osterweil,

Plaintiff – Appellant,

v.

George R. Bartlett, III,
In his official capacity as Licensing Officer in the County of Schoharie,

Defendant – Appellee,

David A. Paterson, in his official capacity as
Governor of the State of New York; Andrew M. Cuomo, in his official capacity as
Attorney General of the State of New York,

Defendants.

EXCERPTS FROM
TRANSCRIPT OF ORAL ARGUMENT
May 23, 2013

essentially the same, first of all, constitutional question in the same case.

WALKER: Can we -- you know, you don't have unlimited time here and I wondered if we could move to the justification that the state is offering here of this monitoring practice. There was a decision by our court a number of years ago that I think Judge Newman wrote the opinion in which he addressed this question. But that was under a different regime. That was before Heller, correct?

MR. CLEMENT: That was both before Heller and equally importantly in the context of a nonresident. And so whatever the strength of the argument is with somebody who has no connection to the state of New York other than the fact they wanna visit -- I think that case involved somebody who wanted to visit family in New York --

WALKER: -- yeah.

MR. CLEMENT: -- I think it's a very different situation when you have somebody who

has a part-time residence here. In this case in particular, Mr. Osterweil -- this used to be his full-time residence. So he continues to maintain very significant ties to the community. The ability to -- to monitor him, I think it's actually far superior to somebody who could be a technical domiciliary but actually spend most of their time some place else, but just they have their intention to return to New York. I mean, you think about a college student --

WALKER: -- so I take it that your -- your basic point that he -- he wants a gun to keep in his home to protect his home and family, which is at the heart of the second amendment guarantee that has been expounded in these two Supreme Court cases. But there was some talk here about the possibility he might want it for target practice or hunting as well. And I wonder if that changes the -- the mix, it changes the calculus. Are there core -- sort of core issues, core uses of a gun that really

are protected by the right instead of less core uses that might -- might -- might receive a lesser degree of protection?

MR. CLEMENT: Well, there -- there -- certainly the core that was protected in Heller and McDonald and then I think there's an open question as to how far that extends.

WALKER: Uh-huh.

MR. CLEMENT: And the seventh circuit, for example, in the Azoe (phonetic) case has already held that something like target practice is protected within the core of the right, because, you know, the last thing you want is a bunch of people with the right to possess arms that don't know how to shoot.

WALKER: Hunting may be different.

MR. CLEMENT: Hunting I suppose could be different. You know, I'd be happy to argue why hunting is still protected.

WALKER: Right.

MR. CLEMENT: But the point is I do think that that's an issue that is both forfeited and

wasn't required to submit an article 78.

MR. HELLER: I'm not suggesting that he was required to --

JACOBS: -- I mean, it's enough -- I mean, how many litigations does he really have to go through in order to get a license to have a handgun?

MR. HELLER: I don't think he needs to go through additional litigations regarding the domicile requirements because this court can now by certification obtain a -- the proper reading of the statute which would remove the bar that he's challenging in this case. And I also wanna address the claim of delay.

O'CONNOR: Well, specifically, what do you suggest this court do?

MR. HELLER: Specifically this court should certify the meeting of the residence language in subsection three.

WALKER: In which case the state will take the position before the New York Court of Appeals that there's no domiciliary

requirement, is that -- is that what you're saying?

MR. HELLER: That's correct that that's what the statute means.

WALKER: And there's nothing of course that would compel us to certify. If the question's open and shut we could just decide the question ourselves, too.

MR. HELLER: The court could do that, of course. And I think the -- the statute but for the Mahoney decision, the statute on its face would achieve that.

JACOBS: So between -- what you're saying is we should certify it in order to ask the New York Court of Appeals which end is up.

MR. HELLER: Well, I think --

JACOBS: -- you're saying it's easy as pie. Why would we need to bother them?

MR. HELLER: I think the reason to certify is to put an end to any doubt. But this court could, as we suggested in our brief and footnote, decide the question itself if it

views the -- the question's clear cut, of course.

WALKER: Moving -- moving to the substance, leaving the certification out, you're arguing here that there is no strict scrutiny test -- that strict scrutiny is not the appropriate test here, and that it's some -- some lesser form of scrutiny. Is that correct?

MR. HELLER: That's right.

WALKER: And you're taking essentially a position, were you not, that Justice Breyer took in -- in -- in and -- and was rejected by the Supreme Court by the majority where he used a balancing of interest?

MR. HELLER: I don't think we're taking the position that puts specifically Justice Breyer took. We're taking the position that the majority, I think, of virtually every court of appeals to address the appropriate standard of review is taken, which is they've come down in the end and found that intermediate scrutiny is

the appropriate standard.

WALKER: Well, I -- okay. So maybe that's true but if there's -- how many cases -- and you can correct me on this 'cuz you're more aware of this than I am -- how many of these cases involve possession of the gun in the home for personal protection as opposed to other uses? It seems to me that if Heller stands for anything, it stands for the right of a person to have a gun in their home, assuming all the other qualifications are met, they're not felons and so forth, and they appropriately get an appropriate permit, to have a gun in their home, for -- for defense purposes. That's the core right here. And under those circumstances have these cases applied intermediate or less of scrutiny to that kind of context.

MR. HELLER: I don't think any of those courts have looked at severe restrictions on possession of handguns in the home other than Heller and McDonald.

WALKER: Right.

part-time or fractional or some short period of -- some fragment of the year, that -- that there's no constitutional right to -- to possess a firearm to protect that particular home.

MR. HELLER: Well --

JACOBS: -- which would seem to present a constitutional question that the New York Court of Appeals couldn't resolve.

MR. HELLER: If -- if the statute authorizes issuance of licenses to part-time residents, as we believe it does on its face, then there would be no bar on that ground to Mr. Osterweil's license. That may go beyond what the constitution requires --

JACOBS: -- I don't see Judge Bartlett issuing the license. I mean, it's not like he's pushing on an open door. I mean, you're here. We're all here. It's because -- because of -- the license will not issue.

MR. HELLER: I think the only -- Judge Bartlett's only reason for stated reason for

denying this license was he felt bound by the Mahoney decision.

O'CONNOR: What are you saying? I can't hear you.

MR. HELLER: The only --

O'CONNOR: -- the only reason --

MR. HELLER: -- the only reason that Judge Bartlett, the licensing officer, denied this license is because he felt bound by the Mahoney decision. I see no reason to think that he would find other means to further deny a license, assuming Mr. Osterweil pursues the license application. There --

(The recording was concluded.)

MR. HELLER: You know, he would clarify whether it's for target practice and for hunting or for -- for a use on his premises or perhaps the overlap over both. And assuming he can provide fingerprints, which he hadn't been able to do, presumably the license would be issued.

WALKER: Well, you seem to want

MR. HELLER: He -- I don't think Mr. Osterweil, as far as I know, has made no effort to try to get fingerprints taken again. The judge --

JACOBS: -- he tried it was two or three times, based on my recollection.

MR. HELLER: I think it was -- I believe -- it may have been three, but I think it was perhaps two times. In any event, I do think that there's no bar to Mr. Osterweil making a renewed application at any time for a license if he wants one if he wants it. Or --

WALKER: -- so the other thing I wonder is why -- because of the position that you're taking, you're not -- it seems to me that you're -- that it reflects upon the state's view of the -- of the efficacy of the monitoring regime rational. Apparently there's no need to monitor Mr. Osterweil even though he's a -- domiciled in Louisiana, because they can -- they can -- if it's a part-time resident, that's fine. And if a part-time

resident is here for two or three months we'll give him the permit. Now, whatever happened to the monitoring regime that you -- that you press in your papers?

MR. HELLER: The monitoring interest, the interest in monitoring that we press in our papers justifies this if indeed it's a domicile requirement, and that's because of course it's the more -- the more time a person spends in the state, the easier it is for the state to monitor possible disqualifying activity --

WALKER: -- but we know that domiciliaries need not spend much time in the state. Mr. Clement gave the example of a student. There can be other examples. A person who's a traveling sales man and so forth.

MR. HELLER: That's right, but typically a domiciliary has important ties to the state, driver's license in the state, identifying information linking him or her to the state, paying taxes in the state.

WALKER: All I'm saying is you're gonna monitor the domicile that comes to -- domiciliary who comes here part-time, but you're not gonna bother to -- to monitor and you can't monitor effectively -- presumably somebody who has a residence here is not domiciled elsewhere, a little -- but he's only in the residence for a couple of weeks a year. It just -- it seems like -- like an ill-fitting suit of clothes, the monitoring rational under those circumstances.

MR. HELLER: I think the more -- again, the more -- the more time a person spends in the state, even if they're a part-time resident, the greater the ability of the state to monitor -- monitor their activities.

WALKER: Yeah. But you'll give a permit to somebody who's not -- not here a lot, as I understand it, under your -- under your rational.

MR. HELLER: Well, I think the statute authorizes issuance of licenses to someone who

is a resident of the state even if they're a part-time resident.

JACOBS: But -- but the -- the more you argue that, the question is how much time someone --

(The recording was concluded.)

JACOBS: -- spends in the state the less important it becomes whether someone is a domiciliary, because there are people who are imprisoned for life in one state who are still domiciled in the state that they were in before they committed their crime. And there are people who are living in Europe who sold their American homes, they're -- 'cuz they're working abroad for their employer, could be for four or five years and they're still domiciled in Illinois or Indiana or whatever. So your argument is really coming down to part-time presence rather than the -- the -- the question we started with, which is the construal of a statute, which is what the New York Court of Appeals would be best situated to do.

MR. HELLER: Again, I think the New York Court of Appeals is likely to say that this statute does not require domicile, New York domicile, that someone who lives in a residence for some portion of time in New York is eligible to obtain a firearms license. That -- that resolves the question that Mr. Osterweil has posed in this case.

JACOBS: Yeah, but that -- yeah, but --

MR. HELLER: -- and disposes of -- of this litigation.

JACOBS: But presumably Judge Bartlett has already arrived at this conclusion, you have arrived at this conclusion, and he feels bound -- that just means that the New York Court of Appeals has to do some work in order to satisfy Judge Bartlett, which I don't think will be their point of view.

MR. HELLER: Well, it may be that they -- that they of course can decline to -- to answer --

JACOBS: -- (inaudible).

CERTIFICATE OF TRANSCRIBER

I, Jackie A. Scheer, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that said proceedings were transcribed to the best of my ability from the audio recording as provided; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise in its outcome.

Jackie Scheer

JACKIE A. SCHEER

EXHIBIT I

No. 167

Alfred G. Osterweil,
Appellant,
v.
George R. Bartlett, III,
Respondent.

Daniel L. Schmutter, for appellant.
Claude S. Platton, for respondent.

PIGOTT, J.:

The United States Court of Appeals for the Second Circuit, by certified question, asks us to decide whether an applicant who owns a part-time residence in New York but makes his permanent domicile elsewhere is eligible for a New York

handgun license in the city or county where his part-time residence is located. We answer the certified question in the affirmative, on the basis of the relevant statute. As we explain below, it is therefore unnecessary for us to decide the constitutional issues raised by appellant.

I.

Appellant Alfred G. Osterweil, a resident of Summit, New York, a town in Schoharie County, applied on May 21, 2008 for a New York State pistol/revolver license pursuant to Penal Law § 400.00. The Schoharie County Sheriff initiated the required background investigations (see Penal Law § 400.00 [4]). On June 25, in the course of correspondence on an unrelated matter, Osterweil informed the Sheriff that he had bought a home in Louisiana and that he intended to "make that state my primary residence," while keeping "a vacation property here in Schoharie County." Osterweil asked whether he would still be eligible for a handgun license.

Osterweil's letter raised an important question. Penal Law § 400 (3) (a) provides that "[a]pplications shall be made and renewed, in the case of a license to carry or possess a pistol or revolver, to the licensing officer in the city or county, as the case may be, where the applicant resides, is principally employed or has his principal place of business as merchant or storekeeper" (emphasis added).

At the heart of Osterweil's query is the distinction

between residence and domicile. Generally, establishing residence "turns on whether [one] has a significant connection with some locality in the State as the result of living there for some length of time during the course of a year" (Antone v General Motors Corp., Buick Motor Div., 64 NY2d 20, 30 [1984]), whereas "[e]stablishment of a domicile in a [place] generally requires a physical presence in the [place] and an intention to make the [place] a permanent home" (id. at 30), i.e. intent to remain there for the foreseeable future. It follows that an individual can have more than one residence, but only one domicile (see id. at 28). Osterweil maintained a residence in Schoharie County, but could no longer claim it as his domicile. Therefore, if a New York domicile is required for a handgun license, the statute makes him ineligible.

The Sheriff forwarded Osterweil's application and query to respondent George R. Bartlett, III, Schoharie County Court Judge and also the county's licensing officer. Osterweil submitted an affidavit to Judge Bartlett, stating that he and his wife continued to play a role in "social, political and community affairs" in Summit, even though they no longer made their primary residence there. He also cited the United States Supreme Court's recent decision in District of Columbia v Heller (554 US 570 [2008]), in which the Supreme Court struck down a District of Columbia law banning the possession of handguns in the home, holding that "the absolute prohibition of handguns held and used

for self-defense in the home" is unconstitutional under the Second Amendment (id. at 636; see also McDonald v City of Chicago, 130 S Ct 3020 [2010]).

In May 2009, Judge Bartlett denied Osterweil's application for a handgun license, relying on Penal Law § 400 (3) (a) and an Appellate Division decision, Mahoney v Lewis (199 AD2d 734 [3d Dept 1993]), which held that "as used in this statute the term residence is equivalent to domicile" (id. at 735). Judge Bartlett further ruled that such a domicile requirement was constitutional, under Heller, as a lawful regulatory measure.

II.

In July 2009, Osterweil commenced this action pursuant to 42 USC § 1983 in the United States District Court for the Northern District of New York, alleging that Judge Bartlett had violated his Second Amendment right to keep and bear arms and his Fourteenth Amendment right to equal protection, by denying his license application on the ground of his domicile. He sought an injunction ordering the State to grant his application. Judge Bartlett, represented by the Attorney General's office, and Osterweil each moved for summary judgment.

On May 20, 2011, the District Court granted Judge Bartlett summary judgment, rejecting Osterweil's Second Amendment and Fourteenth Amendment claims (see Osterweil v Bartlett, 819 F Supp 2d 72, 85-87 [NDNY 2011]). On appeal, before the United States Court of Appeals for the Second Circuit, Osterweil

reiterated his position that a domicile requirement for handgun possession is unconstitutional. The Attorney General now argued that Penal Law § 400 (3) (a) does not in fact contain a domicile requirement, obviating the need to reach the constitutional issues. On January 29, 2013, the Second Circuit, in an opinion by retired United States Supreme Court Justice Sandra Day O'Connor, certified the following question to us:

> "Is an applicant who owns a part-time residence in New York but makes his permanent domicile elsewhere eligible for a New York handgun license in the city or county where his part-time residence is located?" (Osterweil v Bartlett, 706 F3d 139, 145 [2d Cir 2013]).

We accepted the certified question, pursuant to section 500.27 of our Rules of Practice (20 NY3d 1058 [2013]), and now answer it in the affirmative.

III.

In this unusual case, both appellant and respondent would have us answer the certified question in the affirmative. However, respondent asks us to answer the question purely on the basis of the statute, whereas appellant urges us to rule that the law cannot require domicile for handgun license eligibility because that would be unconstitutional.

We take a straightforward approach to this dispute. If Penal Law § 400 (3) (a) does not require domicile, then there is no need to decide the constitutionality of a hypothetical statute that requires domicile. The question concerning the meaning of

the statute at issue - the question certified to us - must be answered prior to any question concerning its constitutional validity. This is not a case in which we are faced with an ambiguous statute requiring us to favor an interpretation that renders it constitutional over constructions that would invalidate it.

IV.

Penal Law § 400 (3) (a) states that applications for a license to carry a pistol or revolver "shall be made and renewed . . . to the licensing officer in the city or county, as the case may be, where the applicant resides, is principally employed or has his principal place of business as merchant or storekeeper." The applicant's residence is referred to in the context of delineating the procedure whereby an individual files an application for a license. The applicant is instructed to apply to the licensing officer in the city or county where he resides (or is principally employed, etc.). The plain language of the statute is not consistent with the theory that the law requires an applicant to establish domicile as an eligibility requirement. Were it so, we would expect to see the manner of proof of domicile set out in the statute.

Moreover, the legislative history of the statutes that underlay Penal § 400 evinces an intent to ensure that an applicant for a handgun license applies in his place of residence, rather than an intent to limit licenses to applicants

who make their domicile in New York. The residency language was added to the Penal Law by Chapter 792 of the Laws of 1931. Former Penal Law § 1897 was amended by adding a subdivision, 9-a, which read as follows:

> "No license shall be issued by the police commissioner of the city of New York except to a resident of that city. Outside of the city of New York, no license shall be issued by a judge or justice of a court of record except to a resident of the county in which the office of such judge or justice is located. A license may be issued, however, to a qualified person principally employed in such city or county and to a merchant or storekeeper having his principal place of business in such city or county" (L 1931, ch. 792, § 4; see 1931 McKinney's Session Laws of NY at 2390).

At the beginning of September 1931, the month in which this law was passed, Governor Roosevelt wrote to the Legislature, sitting in extraordinary session, attaching a letter he had received from the Police Commissioner of New York City. The Police Commissioner recommended that then Penal Law § 1897 be amended to ensure "[t]hat permits to carry a pistol upon the person or to be kept upon the premises be issued only by the police commissioner or chief of police of any city in this State and in the rural communities by the sheriff of the county" (Letter from Edward P. Mulrooney, New York City Police Commissioner, to Governor Franklin D. Roosevelt [Aug 29, 1931], reprinted in Public Papers of Governor Franklin D. Roosevelt, 1931 at 184 [1937]). Commissioner Mulrooney spelled out the reasons:

> "Many persons of unsavory reputation, or with criminal records, are apprehended in [New York City] and are found in the possession of pistol permits issued by a judge or justice of a court of record in other counties of the State.
>
> In [New York City] permits are issued by the police commissioner only after the applicant is fingerprinted, photographed and investigated, whereas in other counties of the State, permits are issued with little or no investigation . . ." (id.).

Summarizing the issue, Governor Roosevelt wrote that "[i]t is a fact that the present issuing of revolver permits by judges anywhere in the State is working badly, and permits must be more carefully guarded" (Message to the Legislature [September 1, 1931], reprinted in Public Papers of Governor Franklin D. Roosevelt, 1931 at 183).

This history indicates that the residence language was introduced to prevent New York City residents from obtaining handgun permits in counties where, at the time, investigations of applicants were much less thorough than in the City. It is therefore evident that the law was originally designed to ensure that licenses were obtained where applicants resided, and to discourage "forum-shopping," rather than to exclude certain applicants from qualifying at all.

The corresponding residence language in today's Penal Law § 400 (3) (a) is derived from former Penal Law § 1903, which was added in 1963 (L 1963, ch. 136, § 8; see 1963 McKinney's Session Laws of NY at 155), and then adopted in the revised Penal Law provisions of 1965 (L 1965, ch. 1030; see 1965 McKinney's

Session Laws of NY at 1691). Appellant points to no legislative history from the 1960s suggesting that the relevant intent of the Legislature was different then from what it had been in 1931. We conclude that there was no intent by the Legislature to exclude applicants on the basis of domicile.

Finally, and most conclusively, Penal Law § 400.00 itself contemplates that licenses may be issued to individuals who do not make their domicile in New York. When a license to carry or possess a pistol or revolver "is issued to an alien, or to a person not a citizen of and usually a resident in the state, the licensing officer shall state in the license the particular reason for the issuance and the names of the persons certifying to the good character of the applicant" (Penal Law § 400.00 [7]). Since a handgun license may be issued, under the statute, to a person who is "not . . . usually a resident" in New York State, it is clear that there is no requirement of domicile.

V.

Because we hold that Penal Law § 400.00 (3) (a) does not preclude an individual who owns a part-time residence in New York but makes his permanent domicile in another state from applying for a New York handgun license, we have no occasion to decide whether a contrary law would be unconstitutional.

Accordingly, the certified question should be answered in the affirmative.

* * * * * * * * * * * * * * * * *

Following certification of a question by the United States Court of Appeals for the Second Circuit and acceptance of the question by this Court pursuant to section 500.27 of the Rules of Practice of the New York State Court of Appeals, and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified question answered in the affirmative. Opinion by Judge Pigott. Chief Judge Lippman and Judges Graffeo, Read, Smith, Rivera and Abdus-Salaam concur.

Decided October 15, 2013

EXHIBIT J

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

October Term, 2012

(Argued: October 26, 2012 Decided: December 23, 2013)

Docket No. 11-2420-cv

- -x

ALFRED G. OSTERWEIL,

Appellant,

- v.-

GEORGE R. BARTLETT, III,

Appellee.

- -x

Before: JACOBS, WALKER, Circuit Judges, AND O'CONNOR, U.S. Supreme Court Justice (Ret.)*.

Counsel: PAUL D. CLEMENT, Bancroft PLLC, Washington, D.C. (D. Zachary Hudson, Bancroft PLLC, Washington, D.C.; Daniel L. Schmutter, Greenbaum, Rowe, Smith & Davis LLP, Woodbridge, New Jersey, on the brief), for Plaintiff-Appellant.

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* The Honorable Sandra Day O'Connor, Associate Justice (Ret.) of the United States Supreme Court, sitting by designation.

SIMON HELLER, Assistant Solicitor General, New York State Office of the Attorney General, New York, New York, for Defendant-Appellee.

PER CURIAM:

Appellant Alfred Osterweil applied for a handgun license in May 2008. Following the directions of New York Penal Law § 400.00(3)(a), he applied for a license "in the city or county . . . where [he] resides."[1] His house in Schoharie County, New York, was then his primary residence and domicile, but while his application was pending, Osterweil moved his primary residence to Louisiana, keeping his home in Schoharie County as a part-time vacation residence.

Osterweil's application was eventually forwarded to appellee George Bartlett, a judge of the county court in Schoharie County and licensing officer for the county. He interpreted § 400.00(3)(a)'s apparent residence requirement as a domicile requirement, relying on a 1993 decision from New York's Appellate Division, Third Department, holding that, "as used in this statute, the term residence is equivalent to domicile." Mahoney v. Lewis, 199 A.D.2d 734, 605 N.Y.S.2d 168 (3d Dep't 1993). Because Osterweil "ha[d] candidly advised the Court that New York State is not his primary residence and, thus not his domicile," Judge Bartlett denied the license. Judge Bartlett further concluded that a domicile requirement was constitutional under the Second Amendment, notwithstanding District of Columbia v. Heller, 554 U.S. 570 (2008), because of the State's interest in monitoring its handgun licensees to

[1] In relevant part, New York Penal Law § 400.00(3)(a) provides that "[a]pplications shall be made and renewed, in the case of a license to carry or possess a pistol or revolver, to the licensing officer in the city or county, as the case may be, where the applicant resides, is principally employed or has his principal place of business as merchant or storekeeper."

ensure their continuing fitness for the use of deadly weapons.

Following the denial of his application, Osterweil filed suit in the United States District Court for the Northern District of New York, alleging that New York's domicile requirement violated the Second and Fourteenth Amendments and seeking, among other remedies, an injunction ordering the State to give him a handgun license. The district court granted summary judgment to the State, holding in relevant part that the domicile requirement satisfied intermediate scrutiny because "the law allows the government to monitor its licensees more closely and better ensure the public safety." Osterweil v. Bartlett, 819 F. Supp. 2d 72, 85 (N.D.N.Y. 2011).

On appeal, the State maintained that section 400.00(3)(a) does not, in fact, impose a domicile requirement. If no such requirement existed, there would, we reasoned, be no need to reach the sensitive constitutional question presented by this appeal. To allow the New York Court of Appeals to resolve for itself the existence of a domicile requirement, we certified the following question to that Court:

> Is an applicant who owns a part-time residence in New York but makes his permanent domicile elsewhere eligible for a New York handgun license in the city or county where his part-time residence is located?

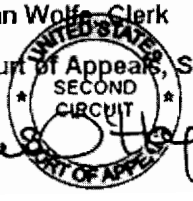
Osterweil v. Bartlett, 706 F.3d 139, 145 (2d Cir. 2013).

On October 15, 2013, the New York Court of Appeals answered the certified question in the affirmative. In Osterweil v. Bartlett, - NY3d -, 2013 NY Slip Op 6637 (Oct. 15 2013), the Court held that "Penal Law § 400.00(3)(a) does not preclude an individual who owns a part-time residence in New York but makes his permanent domicile in another state from applying for a New York handgun license." Id. at *5. The Court found this conclusion clear from the plain statutory language, which refers only to an applicant's residence and which expressly contemplates issuance of a

handgun to a nondomiciliary. See id. at *3, *5; Penal Law § 400.00(7). Moreover, the Court observed, "the law was originally designed to ensure that licenses were obtained where applicants resided, and to discourage 'forum-shopping,' rather than to exclude certain applicants from qualifying at all." Osterweil, - NY3d -, 2013 NY Slip Op 6637, at *5.

Accordingly, New York Penal Code § 400.00(3)(a) imposes no requirement that Osterweil be domiciled in New York to obtain a handgun license there; his status as a part-time resident is sufficient. The State's briefing represented that, if the verb "resides" in § 400.00(3)(a) refers only to residence and does not require domicile, then Osterweil would satisfy this requirement and "this litigation would thereby be resolved." Appellee's Br. 23. We agree.

Given this conclusion, we decline to reach the constitutional question raised by Osterweil's appeal, which is based on a flawed reading of the licensing statute. We hereby vacate the decision of the District Court and remand for further proceedings consistent with this opinion.



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ALFRED G. OSTERWEIL,

Plaintiff,

-against- 09-CV-0825

GEORGE R. BARTLETT, III, et al., MAD/DRH

Defendants.

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR ATTORNEYS FEES AND COSTS

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Date: April 7, 2014

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APPENDIX

PRELIMINARY STATEMENT

This action was commenced by the plaintiff, Alfred G. Osterweil, *pro se*, by the filing of a complaint on or about July 21, 2009 alleging violations of his Second Amendment rights pursuant to 42 USC §1983 stemming from a denial of plaintiff's application for a gun license based on plaintiff's domicile being located outside of New York State. See Dkt. No. 1. After a motion to dismiss the complaint was granted in part, an answer was filed and served on behalf of the remaining defendant, Schoharie County Judge George R. Bartlett, III. See Dkt. No. 27. Thereafter, cross-motions for summary judgment were made by the parties. See Dkt. Nos. 30, 33. Plaintiff's motion was denied in its entirety, and Judge Bartlett's cross-motion was granted in its entirety. See Dkt. No. 36. On or about June 13, 2011, the plaintiff filed a notice of appeal, pro se. See Dkt. No. 39.

WORK PERFORMED ON PLAINTIFF'S APPEAL

Law firms Bancroft, PLLC and Greenbaum, Rowe, Smith & Davis, LLP appeared in the United States Court of Appeals for the Second Circuit on behalf of the plaintiff on January 26, 2012, see Kerwin aff. at Exhibit A, Dkt. Nos. 48-53, and a brief was submitted on the same date. See id. at No. 55. On April 18, 2012, Judge Bartlett filed (1) a motion to certify a question, see id. at No. 68, and (2) a motion to extend Judge Bartlett's time to submit his responding appellate brief. See id. at No. 69. On April 24, 2012, plaintiff filed opposition to defendant's motion to extend time, see id. at No. 72, and the court issued an order denying defendant's motion to extend time on April 27, 2012. See id. at No. 77. On April 30, 2012, plaintiff filed his opposition to defendant's motion to certify a question. See id. at No. 79.

On June 26, 2012, defendant filed his responding appellate brief. See id. at No. 83. A reply brief was filed on behalf of the plaintiff on July 10, 2012. See id. at No. 90. Oral argument was held on October 26, 2012, see id. at No. 100, and by non-dispositive opinion dated January 29, 2013, the Second Circuit certified the following question:

> Is an applicant who owns a part-time residence in New York but makes his permanent domicile elsewhere eligible for a New York handgun license in the city or county where his part-time residence is located?

See id. at No. 103. See also Kerwin aff. at Exh. E.

A brief was filed with the New York State Court of Appeals on behalf of plaintiff on or about May 7, 2013 very briefly addressing the certified question, with the other approximately twenty-seven pages arguing under the Second Amendment. See Kerwin aff. at Exh. F. Judge Bartlett's thirty page brief was filed on or about June 5, 2013 arguing that the certified question should be answered in the affirmative. See Kerwin aff. at Exh. G. A twenty-one page reply brief was filed on behalf of the plaintiff on June 24, 2013. See Kerwin aff. at Exh. H. Oral argument was held before the New York State Court of Appeals on September 12, 2013. In its decision dated October 15, 2013, the New York State Court of Appeals answered the certified question in the affirmative and did not address any constitutional issue. See Kerwin aff. at Exh. I. The Second Circuit then issued its opinion vacating the decision of this court based solely on the answer to its certified question by the New York State Court of Appeals, and without deciding plaintiff's constitutional question because Judge Bartlett's denial of petitioner's firearm license was based on a "flawed reading of the licensing statute." See Kerwin aff. at Exh. J.

By mandate dated January 14, 2014, the Second Circuit Court of Appeals remanded the case back to the District Court. See Dkt. No. 42. Upon remand, this court dismissed plaintiff's complaint in accordance with the opinion of the Second Circuit because the "impediment to Plaintiff obtaining a New York State handgun license is no longer present." See Dkt. No. 46.

Counsel for plaintiff, who represented the plaintiff on appeal only, now seek attorneys' fees in the amount of $189,294.28 and costs in the amount of $5375.03 pursuant to 42 USC §1988.

ARGUMENT

POINT I

PLAINTIFF IS NOT A PREVAILING PARTY

"Section 1988(b) permits reasonable attorney's fees and costs to be awarded to a 'prevailing party' in any action or proceeding in connection with enforcing the provisions of 42 USC §1983." Garcia v. Yonkers School District, 561 F3d 97, 102 (2d Cir. 2009). In this case, the constitutional question was never addressed by the United States Court of Appeals or the New York State Court of Appeals. See Kerwin aff. at Exhs. I and J. Instead, the case was decided on an interpretation of New York State statutory law – an avenue that the plaintiff opposed. That resolution of the constitutional issue was the intended goal of this litigation is evidenced by the fact that the "client" for whom counsel performed legal work in this case was the National Rifle Association, not Alfred Osterweil. See Schmutter decl. at Exh. A. In fact, in his time entries, attorney Schmutter refers to communications with "client" separately from communications with "Mr. Osterweil." See e.g. Schmutter decl. at Exh. A, entry 1/29/13. While attorney Schmutter's time entries show that the National Rifle Association (Chistopher Conte,

Litigation Counsel) is being billed for the fees and costs associated with this case, the headings of the time records attached to the declaration of attorney Clement appear to have been omitted, and no client information appears on those records. See Clement decl. at Exh. A. Further, there are far more time entries associated with communication with Christopher Conte, litigation counsel for the National Rifle Association, than with Mr. Osterweill. See id.; Schmutter decl. at Exh. A. Finally, there is nothing in this record showing that the defendant has personally incurred any financial loss or liability in connection with this litigation other than the fees associates with filing his complaint. See Osterweil decl.

Even if the court finds that the plaintiff actually achieved his desired result – consideration of his application for a handgun license as a non-domiciliary -- on the facts of this particular case, the plaintiff cannot be treated as a prevailing party, because to do so would be unjust. Wilder v. Bernstein, 72 FSupp 1324, 1329 (SDNY 1989) (special circumstances can make an award of attorneys' fees unjust. The plaintiff sought a constitutional finding and opposed deciding the case on New York State statutory grounds, and there is no evidence that he has suffered any attorney's fees or costs beyond the initial filing fee. To award attorneys' fees in this case would be contrary to the intent of Section 1988, which is to encourage the pursuit of civil rights cases by citizens, not special interest groups, which are funded through dues and other avenues for the purpose of bringing law suits.

POINT II

THE ATTORNEYS' FEES SOUGHT BY THE PLAINTIFF ARE UNREASONABLE AND EXCESSIVE

Even if, *arguendo*, the court determined that the plaintiff is a prevailing party under section 1988, plaintiff has failed to submit any information sufficient to ascertain the reasonableness of plaintiff's fee application herein. When evaluating the reasonableness of an attorney's fee application, the court must determine (1) whether the number of hours spent by the attorneys was reasonable and (2) whether the rates sought in the application are reasonable. Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 522 F3d 182, 190 (2d Cir. 2008). The fees sought by plaintiff's attorneys are not only unreasonable, but shockingly excessive. The plaintiff seeks to be compensated for legal work performed in connection with his appeal only in the amount of $183,919.25.

A. The Rates Are Unreasonable

The rates sought by the plaintiffs are outrageously unreasonable. Under 42 USC §1988, prevailing parties are entitled to recover attorneys' fees using the prevailing rates in the judicial district in which the trial court sits. In re Agent Orange Prod. Liab. Litig., 818 F2d 226, 232 (2d Cir. 1987). As recently as 2012, the Second Circuit has continued to hold that the hourly rates of $210 for experienced attorneys, $150 for attorneys with more than four years' experience, $120 for attorneys with less than four years' experience and $80 for paralegals are properly applied as the prevailing rates in this District. Lore v. City of Syracuse, 670 F3d 127, 176 (NDNY 2012) (affirming the continued use of the rates set forth in Arbor Hill Concerned Citizens Neighborhood Assoc. v. County of Albany, 2005 WL 670307, *7 (NDNY 2005)).

First, plaintiff has failed to provide information about the experience level of attorneys who provided services in this case. Attorney Clement submitted a declaration attaching the time records spent on this case by the law firm of Bancroft PLLC. In his declaration, attorney Clement describes his own legal experience and that of associate attorney Z. Zachary Hudson, but fails to articulate how many years of experience attorney Hudson has reached. See Clement decl. at ¶25. However, according to its time entries, Bancroft PLLC seeks to recover fees for work performed by attorneys Erin E. Murphy, see Dkt. No. 48-3 at p. 24, and Kelsi B. Corkran, see id., at hourly rates of $575 and $625 respectively. There is no information in any of plaintiffs' submissions relating to the years of experience of these two attorneys.

Similarly, attorney Schmutter submitted a declaration attaching the time records spent on this case by the law firms of Farer Fersko and Greenbaum, Rowe, Smith & Davis LLP. See Schmutter decl. at Exh. A. In that declaration, attorney Schmutter describes his own legal experience and that of his partner, Raymond Brown. See id. at ¶¶22-23. However, according to its time entries, Greenbaum, Rowe, Smith and Davis LLP seeks to recover fees for work performed by attorneys Marjan F. Disler, see Dkt. No. 48-2, p. 21, 29, and Irene Hsieh, see id. at p. 36, at hourly rates of $210 and $240, respectively. See id. at pp. 21, 29, 36. In light of the absence of any evidence speaking to the experience level of these attorneys, the court should apply the lowest attorney rate when calculating the fees sought for the work done by them.

Second, the rates sought by plaintiff for all of the other attorneys and staff involved in this case are excessive. The declarations submitted by plaintiff's counsel in support of plaintiff's legal fee application seek the following rates: (1) partner Paul D. Clement at $1100 per hour; (2) associate attorney D. Zachary Hudson at $425 per hour; (3) partner Daniel L. Schmutter at $350

per hour; (4) partner Raymond Brown at $500 per hour; (5) paralegal Tracy A. Fego at $185 per hour; and (8) paralegal Kaitlin Luzzi at $185 per hour. In light of the prevailing rates in this district, these rates -- particularly those of attorneys Clement, Hudson and Brown -- are significantly excessive. In light of the work that needed to be performed on this non-complex appeal, and the lack of experience of attorneys Clement, Hudson and Brown in New York State practice – when the ultimate issue in this case was one of New York State statutory construction – plaintiff has failed to justify the application of rates in excess of the prevailing rates in this district. As a result, the amount of attorneys' fees must be significantly reduced.

B. The Number of Hours Spent Are Unreasonable

"In determining the number of hours for which fees should be awarded, the Court should not compensate counsel for hours that are 'excessive, redundant, or otherwise unnecessary'," and "has discretion simply to deduct a reasonable percentage of the number of hours claimed as a practical means of trimming fat from a fee application." Rodriguez v. McLoughlin, 84 FSupp2d 417, 425 (SDNY 1999). To ascertain how much attorney time should be compensated, the court first looks to the time spent on each category of tasks. Tucker v. City of New York, 704 FSupp2d 347, 354 (SDNY 2010). As discussed in detail below, the amount of hours for which the plaintiff seeks compensation is excessive.

1. *Combined and Non-specific Time Entries*

The time entries offered by plaintiff in support of his fee application include entries in which various tasks are combined together. "Fee applicants should not 'lump several services or tasks into one time sheet entry because it is then difficult . . . for a court to determine the

reasonableness of the time spent on each of the . . . services or tasks provided. It is the responsibility of the applicant to make separate time entries for each activity.'" Williamsburg Fair Housing Committee v. New York City Housing Auth., 2005 US Dist LEXIS 5200, **26-27 (SDNY 2005) (internal quotation marks omitted) (attached). Accordingly, "'[m]ixed-class entries are properly excluded since, without more detail, a court cannot determine the proper compensation.'" Id. at *27.

The time records submitted by plaintiff include a large amount of mixed entries, which must be excluded from any calculation of time spent on the appeal in this case. Specifically, the following entries from Bancroft LLP should be excluded:

> 1/19/12 Draft brief; review recent New York case law on gun control; review New York case law on gun control; review New York gun control statutory regime, see Dkt. No. 48-3 at p. 15;
>
> 1/20/12 Complete draft brief; review record and revise facts section of brief; proofread brief; e-mail brief to P. Clement, see id. at p. 16;
>
> 1/23/12 revise brief; coordinate appearance of P. Clement and Z. Hudson with D. Schmutter, see id.;
>
> 1/24/12 Communicate with D. Schmutter regarding joint appendix; adjust brief cites to match joint appendix; revise and edit brief, see id.;
>
> 1/25/12 revise and edit brief to incorporate edits and suggestions from other attorneys; review Judge Kavanaugh's dissent in Heller II; redact appendix, see id.;
>
> 1/26/12 Conduct final edits and read-through of brief; coordinate filing with D. Schmutter; coordinate printing and filing with case manager; communicate with P. Clement about finalizing brief and logistical issues, see id. at p. 17;
>
> 4/23/12 Prepare for and participate in conference call with client; research stay and extension standards and motion format;

draft and edit stay opposition; send draft to P. Clement; review P. Clement's edits; send draft to client, see id.;

4/23/12 Prepare for and participate in conference call regarding response to State's certification and stay motions; edit opposition to stay, see id. at p. 18;

4/25/12 Research NY attorney general enforcement discretion; research NY and Second Circuit law on constitutional avoidance and certification; review NY residence and domicile cases; begin drafting motion opposition; edit drafted preliminary statement and statement of facts, see id.;

4/26/12 Complete draft of argument section; review Bartlett's motion materials; edit draft and send to P. Clement, see id.;

4/30/12 Read and edit P. Clement's draft; circulate to group; set up cite-check; incorporate cite-check changes; coordinate submission of certification opposition; review final certification opposition, see id.;

7/01/12 Review briefs filed to date; develop matrix categorizing new arguments presented by Bartlett, see id.;

7/05/12 Review appellee brief; review certification case law; review Pullman doctrine case law; review waiver case law; review Heller and McDonald; review standing case law; review district court opinion; review all district court filings; review joint appendix, see id. at p. 19;

7/06/12 Complete review of district court documents; review Decastro and Ezell cases; review Ezell briefs; draft outline; complete rough draft of brief, see id.;

7/07/12 Draft introduction and summary; complete draft of brief; add and edit citations; e-mail draft to P. Clement; conduct additional research on Pullman and waiver to address P. Clement's concerns; incorporate and proofread P. Clement's edits; send draft brief to D. Schmutter, see id.;

7/10/12 Review District Court docket for Bartlett's past fingerprint-related arguments; exchange e-mails regarding brief; review cases cited in brief; review District Court opinion; review

Bartlett brief; review cite-check changes; edit brief; complete final draft of brief; send final draft to D. Schmutter, see id.;

10/05/12 Review case materials; assemble materials for oral argument preparation; e-mail P. Clement regarding moot, see id. at p. 20;

10/23/12 Review briefs in preparation for moot; review relevant Second Amendment case law; review relevant New York case law; review certification cases; exchange e-mails with attorneys regarding moot; prepare questions for moot, see id. at p. 23;

10/24/12 Discuss case with K. Corkan and E. Murphy; review joint appendix materials; prepare for and participate in moot; type up questions for moot; conduct additional research on certification for P. Clement, see id.;

10/24/12 Review materials on NY attorney general authority; review additional certification case law; review case law on authority of federal courts to interpret state statutes; construct case timeline; send research results and time line to P. Clement, see id. at p. 24;

1/30/13 Review opinion and orders; review materials on certification process; exchanges e-mails regarding certification and timing, see id. at p. 29;

2/12/13 Exchange e-mails regarding letter to NY Court of Appeals; review certification and stay oppositions; draft letter to NY Court of Appeals; exchange e-mails with P. Clement regarding same, see id.;

4/09/13 Review briefing order; review NY Court of Appeals rules; review briefing in recently certified cases, see id. at p. 30;

4/10/13 Build brief outline; review materials filed in Second Circuit; review relevant NY case law and statutory provisions, see id.;

4/11/13 Review relevant NY case law; review appendix materials; draft brief, see id.;

4/12/13 Draft brief; revise draft; speak to court regarding

brief and appendix requirements; edit brief, see id.;

4/13/13 review recent Second Amendment decisions; revise draft, see id.;

4/18/13 Exchange emails regarding brief; develop additional constitutional avoidance material; edit revised brief; forward brief to D. Schmutter, see id. at p. 31;

4/19/13 Exchange e-mails with P. Clement regarding brief; review recent Supreme Court opinions for material on sanctity of the home; review briefing order; review cite check; discuss logistics with D. Schmutter and case manager, see id.;

4/21/13 Review prepared briefing materials; revise citations to match new appendix; enter cite check changes; revise brief; send revised brief to P. Clement, see id.;

4/22/13 Review updated brief; send to D. Schmutter; review updated appendix; exchange e-mails with D. Schmutter and case manager regarding brief; coordinate filing of brief; review electronic filing requirements; send final brief and appendix to D. Schmutter, see id. at p. 32,

4/30/13 Exchange e-mails regarding brief and appendix issues; review NY Court of Appeals rules; assemble additional appendix materials, see id.;

5/01/13 Exchange e-mails regarding brief and appendix issues; review briefing order; review NY Court of Appeals rules; discuss brief and appendix issues with NY Court of Appeals clerk's office; review and redact updated appendix; address pro hac issues, see id.;

5/06/13 Review redactions; make additional redactions to appendix; update brief cover and brief appendix citations; exchange e-mails regarding pro hac vice motions; discuss redaction issues with case manager; review updated brief and appendix, see id. at p. 33;

5/07/13 Discuss pro hac issues with clerk's office; discuss filing with case manager; exchange e-mails regarding brief, appendix and filing deadlines; review final appendix and brief; coordinate submissions of appendix and brief; exchange e-mails

with D. Schmutter regarding same, see id.;

6/10/13 Review state response brief; review opening brief; review NY Court of Appeals rules; review potential arguments in favor of not filing a reply brief; review argument transcript; discuss strategy with P. Clement, see id. at p. 34;

6/12/13 Review constitutional avoidance materials; review materials on certification jurisdiction; review materials on certification procedures; review district court and Second Circuit briefing, see id.;

6/17/13 Review additional Second Amendment materials; draft responses to State's timing arguments; draft responses to State's arguments attempting to distinguish Heller; draft responses to State's intermediate scrutiny arguments; review and edit Second Circuit transcript for potential inclusion as an addendum, *see* id. at pp. 34-35;

6/18/13 Review state cases on argument forfeiture; draft response to State's constitutional avoidance arguments; draft introduction and summary of argument; complete rough draft of brief; edit draft, see id. at p. 35; and

6/24/13 Revise brief; review cite check changes; proofread brief; coordinate filing of brief. See id.

Similarly, the following entries by Farer Fersko/Greenbaum, Rowe, Smith & David LLP should be excluded because they included various tasks:

6/23/11 Prepared initial filings. Corresponded with Paul Clement re: [redacted]. Examined documents from Al Osterweil, see Dkt. No. 48-2 at p. 10;

9/02/11 Prepared Notice of Appearance. Conferred with Court re: filing deadline, see id. at p. 12;

10/06/11 Corresponded with Christopher Conte and Paul Clement re: [redacted]. Examined response, see id. at p. 13;

10/12/11 Examined correspondence from State re: CAMP conference. Correspond with clients re: [redacted], see id. at p. 14;

1/13/12 Prepare Appellate brief; Examine Second Circuit rules re: brief preparation and filing, see id. at p. 15;

1/16/12 Prepare brief; Examine rules of Second Circuit re. brief length and filing, see id.;

1/19/12 Confer with Mr. Hudson re: [redacted]; Prepare brief and appendix, see id.;

1/23/12 Prepare appendix; Examine record re: appendix; Confer with Mr. Brady re: appendix and issues in case; Correspond with Mr. Hudson re: [redacted]; Examine draft brief from Mr. Clement; Correspond with Mr. Clement re: [redacted], see id.;

1/24/12 Prepare joint appendix; Examine issues re: [redacted]; Examine correspondence from Mr. Osterweil re: [redacted], see id.;

1/25/12 Examine issues re: appendix and filing brief and appendix; Confer with Mr. Brady re: Joint Appendix; Confer and correspond with Mr. Hudson re: [redacted], see id.;

1/27/12 Confer and correspond with Paul Clement re: [redacted]; Confer with Case Manager re: designation of counsel; Examine issues re: [redacted], see id. at p. 16;

4/12/12 Confer with Mr. Brady re: motion to certify question of law; Confer with Christopher Conte re: [redacted]; Correspond with Paul Clement re: [redacted], see id. at p. 19;

4/18/12 Examine motions of State to certify question of law and stay briefing schedule; Examine appellate rules re: motions; Correspond with Christopher Conte and Paul Clement re: [redacted], see id.;

4/20/12 Examine issues re: [redacted]; Confer with Christopher Conte; Correspond with Al Osterweil re: [redacted], see id. at p. 20;

4/23/12 Examine issues re: [redacted]; Conference call with Christopher Conte, Paul Clement and Zac Hudson re: [redacted]; Prepare opposition to stay, see id.;

4/24/12 Prepare and file opposition to motion for stay;

Correspond with clients re: [redacted]; Examine issues re: [redacted], see id.;

4/30/12 Draft opposition to motion for certification; Prepare revisions and comments; Examine revised draft and prepare comments; Prepare revisions and final version of opposition; Filed opposition; Correspond with Al Osterweil and all co-counsel re: [redacted]; Examine rules re: filing opposition to motion, see id.;

6/26/12 Examine State's brief and prepare analysis for co-counsel and client; Examine recent case law, see id. at p. 21;

7/03/12 Prepare Oral Argument Statement; Examine Oral Argument Statement of State; Examine State's brief, see id. at p. 26;

7/08/12 Examine State's brief and case law; Examine draft reply and prepare comments, see id.;

7/09/12 Correspond with Paul Clement re: [redacted]; Examine correspondence from Al Osterweil re: [redaction]; Correspond with Al Osterweil, see id.;

7/10/12 Examine reply brief; File reply brief; Correspond with Al Osterweil re: [redacted], see id;

8/21/12 Examine issues re: [redaction]; Correspond with clients and co-counsel re: [redacted], see id. at p. 28;

1/29/13 Examine opinion of Second Circuit; Confer with client re: [redacted]; Confer with Al Osterweil re: [redacted]; Confer with Reuters re: decision, see id. at p. 31;

2/20/13 Examine order from court re: certification; Correspond with court re: briefing schedule; Correspond with client and co-counsel re: [redaction], see id. at p. 32;

4/19/13 Examine draft brief and prepare comments; Confer with Zac Hudson re: [redacted]; Correspond with Simon Heller re: appendix; Confer and correspond with Al Osterweil re: [redacted]; Examine issues re: e-filing brief and appendix, see id. at p. 35;

4/22/13 Prepare brief and appendix for filing; Examine correspondence from New York State re: appendix; Examine final

> draft of brief; Correspond with Zac Hudson re: [redacted], see id.;
>
> 2/04/14 Confer with Zac Hudson re: [redacted]; prepare for call with Court; Conference call with Court re: status of case; Correspond with clients and co-counsel re: [edacted]; Examine issues re: [redacted]; see id. at p. 47;
>
> 3/06/14 Prepare declaration of Daniel L. Schmutter; Examine issues re: fee apoplication; Examine issues re: Brief, see id.;
>
> 7/03/14 Prepare Declaration of Daniel L. Schmutter; Prepare Declaration of Al Osterweil; Examine issues re: fee application; Prepare notice and motion; Prepare revisions to Brief; Confer with Court re: procedures; Examine issues re: fee motion procedures; Confer with Rob McNally and Zac Hudson re: fee application, see id. at pp. 47-48.

Plaintiff should not be compensated for any of the work documented in these entries because it is impossible to decipher how much time was actually spent on each task contained in the entries. The difficulty that such "lumping" of tasks into single time entries causes is illustrated by attempting to examine the amount of time spent on categories of tasks, as outlined below. Such an examination is impossible when time entries like those listed above are used. As a result, when discussing the categories of tasks below, defendant uses the full amount of time listed for the group of tasks that includes the task being evaluated since it is not the defendant's job to figure out how much of the lump time was spent on each task.

Further, many of the time entries relied upon by the plaintiff fail to provide the detail necessary to evaluate their reasonableness. This is most clearly illustrated by all of attorney Schmutter's redacted time entries, which include only a verb and fail to state – at all – what the substance of the tasks included. Similarly, some entries attached to the declaration of attorney Clement also fail to include sufficient detail. Time entries that begin with such phrases as

"conference with," "call to" and "email to" are typically deemed to be too vague to be compensated. Tucker, 704 FSupp2d at 356. Therefore, all entries that fail to include sufficient detail should be excluded from any calculation of fees.

2. *Overstaffing*

While seeking compensation to pay attorneys in New Jersey (law firms of Farer Fersko and, subsequently, Greenbaum, Rowe, Smith & David LLP) and Washington D.C. (law firm of Bancroft LLP), plaintiff has submitted absolutely no justification for this overstaffing. On behalf of Farer Fersko and Greenbaum, Rowe, Smith & David LLP, attorney Daniel L. Schmutter seeks fees and expenses in the amount of $54,952.07. See Dkt. No. 48-2 at p. 8. Examination of attorney Schmutter's time entries reveals that all of the work done by attorney Schmutter (1) was duplicative of the work done by the Bancroft attorneys, (2) involved review of documents prepared by Bancroft attorneys, (3) involved consultation with Bancroft attorneys and (4) constituted minor and/or administrative tasks that could have been done by paralegals or administrative staff. See Schmutter decl. at Exh. A. It is "proper to reduce a fee request when two or more attorneys have duplicated each other's work, since some of the work was unnecessary and the time claimed was unreasonable." Williams v. New York City Housing Auth., 975 FSupp 317 326-27 (SDNY 1992). Since plaintiff has failed to justify the need for attorney Schmutter's work on this case, and the time entries submitted by attorney Schmutter fail to show the need for the participation of another attorney, plaintiff's motion should be denied to the extent that it seeks compensation for any work done by attorney Schmutter.

The overstaffing of the case is also demonstrated by the countless time entries for consultation and communication among the various lawyers. This was not a complex case. The parties agreed on the facts, and the issues argued were pursuant, initially, to the Second Amendment and, ultimately, New York State statutory construction. No matter how "important" the plaintiff deems the issues involved, the legal issues, themselves, were not complex. "[U]sing multiple attorneys in a simple case, which this certainly was, poses the serious potential – fully realized in this instance – for duplication and overstaffing." Tucker, 704 FSupp2d at 355. "A reasonably experienced attorney handling [plaintiff's] lawsuit should have required little, if any, consultation with other counsel…." Id. Like in Tucker, the time records submitted here "reflect a vast number of communications with others, mainly other attorneys, with no or little explanation of the subject of the communications, much less their necessity." Id. There "was no compelling need for a reasonably experienced attorney to engage in extended consultations with multiple attorneys . . ." Id. at 355-56. Accordingly, plaintiff should not be compensated for the significant time spent by attorneys communicating with each other.

3. *Drafting and Editing of Briefs and Legal Memorandum*

Most of the time for which payment is sought on behalf of the Bancroft firm relates to the drafting, almost entirely by associate attorney Hudson, of appellate briefs to the Second Circuit and New York State Court of Appeals, and legal memoranda to the Second Circuit in connection with the defendant's motions for certification and a stay. The amount of time spent drafting, reviewing and editing is excessive, particularly in light of counsel's experience relied upon to justify the use of the excessive rates discussed above.

a. Appellant's Brief to the Second Circuit (12/12/11 to 1/26/12)

Plaintiff's brief to the Second Circuit was forty-five pages long, and advanced only constitutional issues pursuant to the Second Amendment and Equal Protection Clause. See Kerwin aff. at Exh. B. Specifically, plaintiff argued to the Second Circuit that the denial of plaintiff's gun license based on an interpretation of New York State Penal Law section 400.00(7) that licenses may not be granted to individuals whose domicile is not located in New York State violated plaintiff's rights under the Second and Fourteenth Amendments. See id.

Approximately 46.77 hours is billed for drafting and editing plaintiff's appellate brief to the Second Circuit by the main drafter, attorney Hudson. See Clement decl. at Exh. A, entries for 1/18/12, 1/19/12, 1/20/12, 1/23/12, 1/25/12, 1/26/12. Additionally, 21.2 hours is billed for drafting and editing of the brief by attorneys Clement and Schmutter. See Celement decl. at Exh. A, entries for 1/22/12, 1/23/12, 1/24/12; Schmutter decl. at Exh. A, entries for 1/13/12, 1/16/13, 1/17/13, 1/18/13, 1/19/13, 1/23/13. Accordingly, plaintiff seeks to be compensated for 67.97 hours of attorney time for preparing and editing the substance of his initial appellate brief. Under no circumstances can so many hours be required to prepare an appellate brief by experienced appellate attorneys.

b. Oppositon to Defendant's Motions (4/18/12 to 4/30/12)

Plaintiff opposed both defendant's motion for a stay/to extend time and motion to certify a question. In fact, plaintiff opposed the certification of the question so that his claims could be adjudicated on constitutional grounds, and not State statutory ones. Approximately thirty-two hours is billed for the drafting and editing of plaintiff's papers in opposition to respondent's motions. See Clement decl. at Exh. A, entries for 4/23/12, 4/25/12, 4/26/12, 4/30/12; Schmutter decl. at Exh. A, entries for 4/23/12, 4/24/12, 4/30/12.

c. Reply Brief to the Second Circuit (6/26/12 to 7/10/12)

In his responding brief, Judge Bartlett spent five pages arguing that the certified question be answered in the affirmative, and thirty pages addressing the Second and Fourteenth Amendment issues raised in plaintiff's brief. In a twenty-one page reply brief, the plaintiff also spent five pages arguing that the certified question should be argued in the affirmative, and twelve pages again making the same constitutional arguments made in his appellate brief. Approximately 33 hours is billed for the drafting and editing of plaintiff's Reply Brief. See Clement decl. at Exh. A, entries for 7/6/12, 7/7/12, 7/10/12; Schmutter decl. at Exh. A, entries for 7/8/12, 7/10/12. This is excessive in that plaintiff advanced few, if any, new arguments in its reply brief. The only question certified by the Second Circuit to be decided by the New York State Court of Appeals was

> Is an applicant who owns a part-time residence in New York but makes his permanent domicile elsewhere eligible for a New York handgun license in the city or county where his part-time residence is located?

See id. at No. 103. See also Kerwin aff. at Exh. E. No constitutional issue was before the New York State Court of Appeals. Notwithstanding, plaintiff spent thirteen pages making constitutional arguments – mostly verbatim from his Second Circuit brief. Approximately 41.3 hours is billed for drafting and editing plaintiff's brief to the New York State Court of Appeals. See Clement decl. at Exh. A, entries for 4/11/13, 4/12/13/, 4/13/13, 4/14/13, 4/17/13, 4/18/13, 4/21/13, 4/22/13, 5/6/13, 5/7/13; Schmutter decl. at Exh. A, entries for 4/19/13, 4/22/13. This is excessive since the plaintiff regurgitated portions of his Second Circuit brief, and spent unnecessary time writing on an issue not even before the court. Further, the issue before the court was one of statutory construction, which is not a complex issue.

d. Reply Brief to the New York State Court of Appeals (6/5/13 to 6/24/13)

Plaintiff's reply brief was twenty pages and again focused mostly on the Second Amendment issue not before the court. See Kerwin aff. at Exh. H. Approximately 27.25 hours were billed for drafting and editing plaintiff's reply brief. See Clement decl. at Exh. A, entries for 6/17/13, 6/18/13, 6/19/13, 6/22/13, 6/24/13; Schmutter decl. at Exh. A, entry for 6/24/13. This is excessive because plaintiff made few, if any, new arguments and continued to advance constitutional arguments not before the court.

Based on this analysis, the plaintiff seeks to be compensated for over 200 hours spent by attorneys drafting, reviewing and editing. Such an amount of hours is highly excessive. Therefore, the legal fees sought by the plaintiff to pay for drafting, reviewing and editing should be drastically reduced.

4. Researching and Brief Preparation

Plaintiff also seeks a significant amount of fees in connection with (1) legal research conducted by attorneys and paralegals, (2) review of both plaintiff's own prior arguments and the arguments contained in respondent's submissions to both appellate courts and (3) court rules. The amount of time researching and preparing is particularly troubling given the fact that attorneys – charging outrageously high fees as discussed above -- not admitted to practice in New York had to learn New York law on this plaintiff's dime when an attorney admitted to practice in New York was also retained in this case. Approximately 190.05 hours were billed for researching and preparing to draft the briefs and legal memoranda discussed above. See Clement decl. at Exh. A, entries for 12/12/11, 12/13/11, 1/4/12, 1/16/12, 1/17/12, 1/19/12, 1/2/12, 4/19/12, 4/21/12, 4/23/12, 4/24/12, 4/25/12, 7/1/12, 7/3/12, 7/5/12, 7/6/12, 7/7/12, 7/10/12, 1/30/13, 2/12/13, 4/4/13, 4/11/13, 4/12/13, 4/13/13, 4/16/13, 6/10/13, 6/11/13, 6/12/13, 6/17/13, 6/18/13; Schmutter decl. at Exh. A, entries for 1/13/12, 1/16/12, 1/25/12, 1/31/12, 2/1/12, 2/3/12, 2/8/12, 2/27/12, 2/29/12, 4/13/12, 4/16/12, 4/18/12, 4/24/12, 6/26/12, 6/27/12, 4/19/13, 4/19/13, 6/7/13, 6/24/12. It is inconceivable that the highly experienced attorneys on this appeal needed to spend as much time researching as they did drafting and editing. As a result, the legal fees sought by plaintiff for work done researching and preparing to draft the briefs and legal memoranda should be drastically reduced.

5. Preparation for Oral Argument

Plaintiff also seeks compensation for the time spent on preparing to argue before the Second Circuit and the New York State Court of Appeals. Specifically, plaintiff seeks to be compensated for 64.2 hours spent by attorneys preparing for and participating in oral argument before the Second Circuit, see Clement decl. at Exh. A, entries 9/7/12 to 10/26/12; Schmutter decl. at Exh. A, entry for 8/31/12, and for 75.3 hours spent preparing for and participating in oral argument before the New York State Court of Appeals. See Clement decl. at Exh. A, entries 8/21/13 to 9/12/13; Schmutter decl. at Exh. A, entries 6/24/13 to 9/12/13. Spending almost 140 hours preparing for two oral arguments is outrageously excessive, and any compensation for such preparation should be significantly reduced.

6. Administrative/Paralegal Tasks

Similarly, plaintiff also seeks compensation for administrative tasks performed by attorneys. Such tasks include preparing and review of appendixes, preparing and filing of forms to the various courts, and coordinating filing and service. Plaintiff also seeks compensation for time spent by attorneys checking cites and citation form. Work that may be done by clerical or paralegal staff should not be compensated at attorney rates. Tucker, 704 FSupp2d at 356-57. Therefore, all attorney time for which the plaintiff seeks compensation spent on clerical or paralegal-level tasks should be significantly reduced. Id. at 257.

7. Legal Fee Application

Reasonable time spent on a legal fee application typically ranges between 8% and 24% of the time spent on the case. Reiter v. Metropolitan Transportation Authority of the State of New York, 2007 US Dist LEXIS 71008, *63 (SDNY 2007) (attached). As discussed above, plaintiff is not entitled to be compensated for a significant amount of hours. Therefore, any award of attorneys' fees allowed for preparation of the legal fee application should be compared against the total amount of hours for which the court permits the plaintiff to recover fees and adjusted to fall within the reasonable range.

8. Pro Hac Vice Application and Costs

Defendant should not have to pay the plaintiff's fees associated with attorney Clement's and Hudson's admission to the New York State Court of Appeals for this case. While it is within the court's discretion whether to permit attorneys' fees for work done on an attorney's admission application, such fees should not be permitted in this case since plaintiff was represented by attorney Schmutter, who is admitted to practice in New York. Access 4 All, Inc. v. 135 West Sunrise Realty Corp., 2008 US Dist LEXIS 91674, *31 (EDNY 2008) (attached). It should also be noted that attorney Schmutter, and not attorneys Clement or Hudson, appeared in the Court of Appeals for oral argument. In the same vein, the plaintiff is not entitled to be reimbursed for such as admission fees or for certificates of good standing. Therefore, plaintiff's application for costs should be reduced accordingly.

CONCLUSION

For the reasons discussed above, plaintiff's motion for attorneys' fees and costs should be denied or, in the alternative, the amount of attorneys' fees and costs requested should be drastically reduced.

Dated: Albany, New York
April 7, 2014

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TO: Daniel L. Schmutter, Esq. (via ECF)

APPENDIX

ACCESS 4 ALL, INC., a Florida not for profit corporation, and NELSON M. STERN, individually, Plaintiffs, - against - 135 WEST SUNRISE REALTY CORP., a New York Corporation, Defendant.

CV 06-5487 (AKT)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

2008 U.S. Dist. LEXIS 91674

September 30, 2008, Decided
September 30, 2008, Filed

COUNSEL: [*1] For Access 4 All, Inc., a Florida not for profit corporation, Nelson M. Stern, Individually, Plaintiffs: Lawrence A. Fuller, Thomas B. Bacon, LEAD ATTORNEYS, Fuller, Fuller & Associated, P.A., North Miami, FL; Nelson Michael Stern, LEAD ATTORNEY.

For 135 West Sunrise Realty Corp., a New York Corporation, Defendant: Andrew E. Curto, Forchelli, Curto, Schwartz, Mineo, Carlino & Cohn, LLP, Mineola, NY.

JUDGES: A. KATHLEEN TOMLINSON, United States Magistrate Judge.

OPINION BY: A. KATHLEEN TOMLINSON

OPINION

ORDER

A. KATHLEEN TOMLINSON, Magistrate Judge:

I. PRELIMINARY STATEMENT

Before the Court is a motion by Plaintiffs Access 4 All, Inc. and Nelson M. Stern's for attorney's fees, costs, and expert witness fees [DE 20]. The parties have consented to my jurisdiction for all purposes, in accordance with 28 U.S.C. § 636(c) and Federal Rule of Civil Procedure 73 [DE 23]. After a thorough review of the arguments presented in Plaintiffs' papers in support of their motion [DE 20, 25], and Defendant 135 West Sunrise Realty Corp.'s opposition [DE 24], and for the reasons set forth below: (1) Plaintiffs' motion for attorney's fees is GRANTED to the extent set forth herein; (2) Plaintiffs' motion for costs is GRANTED and Plaintiffs [*2] shall be awarded costs in the amount of $ 1,702.74; and (3) Plaintiffs' motion for expert witness fees is GRANTED to the extent that Plaintiffs are awarded $ 4,637.25.

II. BACKGROUND

Plaintiffs commenced this action against Defendant in October 2006 seeking declaratory and injunctive relief, as well as attorney's fees, costs, and litigation expenses, pursuant to 42 U.S.C. § 12205. Plaintiffs alleged that Defendant violated Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 *et seq.* ("ADA"), because "architectural barriers" existed at Defendant's shopping center (the "Premises") which denied Plaintiff and other similarly situated disabled individuals "access to full enjoyment of the goods, services, facilities, privileges, advantages and/or accommodations" of the facility. Compl. PP 3, 6, 13.

Defendant interposed its Answer on April 12, 2007 [DE 9]. On May 22, 2007, Defendant requested an adjournment of the initial discovery planning conference because the parties were "conducting extensive settlement negotiations." [DE 12]. An initial conference was held on July 11, 2007, and following a telephone status conference on August 7, 2007, I noted the following in a Civil Conference [*3] Minute Order:

> Based upon the July 19, 2007 letter of Defendant's counsel [DE 18] as well as the discussion with the parties during today's conference, it appears that this case has been settled in principle and that the parties will be entering into a consent judgment, with the exception of one issue. That issue involves attorney's fees in the case, which the parties have agreed to submit to the Court for a determination.

[DE 19].

On or about August 31, 2007, the parties executed a Settlement Agreement. See Decl. in Opp. to Pl.'s Application for Attorneys' Fees, Expenses & Costs (hereinafter "Curto Decl."), Ex. A. The Settlement Agreement provided that "Defendant does not admit the allegations of the Plaintiffs' Complaint, but recognizes that the Plaintiffs might prevail and receive some of the relief on the merit of their claim." *Id.* In consideration for resolving the litigation, Defendant agreed to (1) make 13 physical modifications to the Premises to ensure compliance with the ADA; (2) evict a certain tenant of the Premises and to ensure that the portion of the Premises at issue complied with the ADA when it was re-leased to a new tenant; and (3) implement a policy "maintaining in [*4] operable working condition those features that are required to be readily accessible to and usable by persons with disabilities." *Id.*

The Settlement Agreement also provided as follows:

* * * *

> 2. The parties are unable to agree as to the amount, if any, that Defendant shall pay as attorneys' fees, litigation expenses, expert's fees and costs. This issue shall be determined by the Magistrate Judge. Defendant expressly waives the defense of standing, but reserves the right to challenge the issue of the calculation of Plaintiffs' reasonable attorney fees, costs, expert fees and litigation expenses.
>
> 3. The parties hereby agree and will request the Court approve and enter this Agreement, providing for retention of jurisdiction by the Court to enforce, as necessary, the terms of the Agreement.

Id. Also on August 31, 2007, the parties filed a Stipulation of Discontinuance that discontinued the action with prejudice and provided, in relevant part:

> IT IS HEREBY FURTHER STIPULATED AND AGREED that the parties will refer to the Magistrate Judge the determination of the amount, if any, that Defendant shall pay as and for attorneys' fees, litigation expenses, expert's fees and costs in this action pursuant [*5] to a Settlement Agreement ("Agreement") executed between the parties, and that the Court shall retain jurisdiction to enforce, as necessary, the terms of said Agreement.

[DE 21]. The Court "so ordered" the Stipulation of Discontinuance [DE 28].

III. PREVAILING PARTY STATUS

As a threshold matter, the Court must determine whether Plaintiffs are "prevailing parties" entitled to an award of attorney's fees, costs, and litigation expenses pursuant to the ADA. *See* 42 U.S.C. § 12205. [1]

> 1 "In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs . . . ." 42 U.S.C. § 12205.

A. Parties' Contentions

Plaintiffs highlight that the Settlement Agreement expressly provides that the Court will retain jurisdiction to enforce its terms, Pls.' Verified Application for Att'ys Fees, Litigation Expenses & Costs & Incorp. Mem. of Law ("Pls. Mem.") at 3-4. The Stipulation of Discontinuance also contains this express retention of jurisdiction and states that "the parties will refer to the Magistrate Judge the determination [*6] of the amount, if any, that Defendant shall pay as and for attorneys' fees," Pls.' Reply in Supp. of Verified Application for Att'ys Fees, Litigation Expenses & Costs & Add'l Verification ("Reply Mem.") at 2, 3. Plaintiffs argue that the Second Circuit's decision in *Roberson v. Giuliani*, 346 F.3d 75 (2d Cir. 2003) controls, and because the Court retained enforcement jurisdiction over an otherwise private settlement agreement, Plaintiffs are properly considered a prevailing party. Reply Mem. at 2-3.

Defendant argues first that the parties entered into a private settlement agreement in which Defendant did not admit liability and "whereby Defendant voluntarily agreed to ameliorate the alleged ADA violations in exchange for discontinuance of the action." Mem. of Law in Opp'n to Pls.' Application for Att'ys Fees, Litigation

Expenses and Costs ("Def. Mem.") at 2. As such, Defendant contends, "filing of the suit served as a mere 'catalyst' to the [ADA-compliant] changes being made" and so "Plaintiffs cannot be classified as 'prevailing parties.'" *Id.* at 3. Defendant also argues that "although the Settlement Agreement is mentioned in the Stipulation of Discontinuance, the terms of same are [*7] not incorporated therein." *Id.* at 4.

B. Legal Standard and Analysis

The Second Circuit has held that "in order to be considered a 'prevailing party' . . . a plaintiff must not only achieve some 'material alteration of the legal relationship of the parties,' but that change must also be judicially sanctioned." *Roberson v. Giuliani*, 346 F.3d 75, 79-80 (2d Cir. 2003) (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604-05, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). The Supreme Court has found that "enforceable judgments on the merits" and "settlement agreements enforced through a consent decree" constitute sufficient "material alteration[s] of the legal relationship of the parties" to justify attorney's fee awards. *Buckhannon*, 532 U.S. at 604-05. A private settlement agreement, by contrast, does not "entail the judicial approval and oversight involved in consent decrees," and is not, alone, a sufficient "material alteration" of the parties' legal relationship to justify an award of attorney's fees. *See id.* at 604 n.7.

More recently, the Second Circuit held that "the two forms of relief identified by the Supreme Court [in *Buckhannon*] as justifying prevailing party status," namely, [*8] a judgment on the merits or a court-ordered consent decree, were merely "examples" and were not the exclusive types of "judicial action that could convey prevailing party status." *Roberson*, 346 F.3d at 80-81. Accordingly, "judicial action other than a judgment on the merits or a consent decree can support an award of attorney's fees, so long as such action carries with it sufficient judicial imprimatur." *Id.* at 81 (collecting cases from other circuits that also rejected a narrow reading of *Buckhannon*).

In *Roberson*, the parties entered into a settlement agreement resolving the Section 1983 class action claims in the Complaint. *Id.* at 77-78. The agreement provided that it would not become effective if the court's order discontinuing the action "does not include a provision retaining jurisdiction over enforcement." *Id.* at 78. The agreement also stated that "[t]he issue of plaintiffs' entitlement to an award of attorneys' fees and costs and disbursements is reserved for later determination upon application to the Court . . . ." *Id.* Subsequently, the parties executed a Stipulation and Order of Discontinuance that acknowledged that the parties had entered into a settlement agreement dismissing [*9] plaintiffs' claims with prejudice. The Stipulation and Order of Discontinuance also provided that the court "shall retain jurisdiction over the settlement agreement for enforcement purposes," but the terms of the settlement agreement were not otherwise incorporated. *Id.*

The Second Circuit found that "the district court's retention of jurisdiction in this case is not significantly different from a consent decree and entails a level of judicial sanction sufficient to support an award of attorney's fees." *Id.* at 82; *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994) (noting in dicta that "if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal -- either by separate provision [such as a provision 'retaining jurisdiction' over the settlement agreement] or by incorporating the terms of the settlement agreement in the order . . . a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist."). When the lower court in *Roberson* "retained jurisdiction according to the procedures approved in *Kokkonen*, it gave judicial sanction [*10] to a change in the legal relationship of the parties," and so the plaintiffs were properly considered "prevailing parties" entitled to an award of attorney's fees. *See Roberson*, 346 F.3d at 83. *Accord A.R. v. N.Y. City Dep't of Educ.*, 407 F.3d 65, 78 (2d Cir. 2005) (applying *Buckhannon* and *Kokkonen* to find administrative agency's dismissal of action that contained endorsement of settlement agreements rendered plaintiffs "prevailing parties" entitled to attorney's fees); *Am. Disability Ass'n, Inc. v. Chmielarz*, 289 F.3d 1315, 1320-21 (11th Cir. 2002) (finding that "if the district court either incorporates the terms of the settlement into its final order of dismissal or expressly retains jurisdiction to enforce a settlement, it may thereafter enforce the terms of the parties' agreement . . . [, which] clearly establishes a 'judicially sanctioned change in the legal relationship of the parties,' . . . sufficient to render [plaintiff] a 'prevailing party'" entitled to attorney's fees in an ADA action).

Here, the Stipulation of Discontinuance contained a separate provision stating that "the Court shall retain jurisdiction to enforce, as necessary, the terms of said [Settlement] Agreement" [*11] [DE 21]. Thus, as was the case in *Roberson*, the parties' compliance with the terms of the Settlement Agreement became a part of the Court's Order endorsing the Stipulation of Discontinuance, and "a breach of the [Settlement Agreement] would be a violation of the order." *See Kokkonen*, 511 U.S. at 381. Defendant's argument that the parties entered into a private settlement agreement without the requisite "judicial imprimatur" is misplaced. As Defendant notes in its opposition brief, the Settlement Agreement "provides

that the Court retain jurisdiction to enforce the terms thereof." Def. Mem. at 5. What Defendant does not acknowledge in its brief, however, is that this specific provision allowing the Court to retain jurisdiction to enforce the Settlement Agreement is repeated in the Stipulation of Discontinuance. Based on the precedent set by the Second Circuit in *Roberson*, I find that this Court's express retention of jurisdiction over the enforcement of the Settlement Agreement -- a provision drafted by the parties and obviously agreed to by them -- constitutes a "judicially sanctioned change in the legal relationship of the parties." Consequently, Plaintiffs are properly considered [*12] "prevailing parties" entitled to an award of attorney's fees. *See Roberson*, 346 F.3d at 79.

IV. AMOUNT OF ATTORNEY'S FEES TO BE AWARDED

A. Legal Standard

Having established that Plaintiffs are "prevailing parties" under the ADA, the Court must now determine the "reasonable attorney's fee" to which they are entitled. *See* 42 U.S.C. § 12205. The approach most recently espoused by the Second Circuit to determine appropriate attorneys' fees in federal litigation uses as a standard a "presumptively reasonable fee." *Arbor Hill Concerned Citizens v. County of Albany*, 522 F.3d 182, 190 (2d Cir. 2008), *amending* 493 F.3d 110 (2d Cir. 2007); [2] *see also Barfield v. N.Y. City Health & Hospitals Corp.*, 537 F.3d 132, 151 (2d Cir. 2008) (reiterating the "presumptively reasonable fee" standard). This presumptively reasonable fee should represent "what a reasonable, paying client would be willing to pay" for legal services rendered, and a court should consider the following factors in its calculation:

> [T]he complexity and difficulty of the case, the available expertise and capacity of the client's other counsel (if any), the resources required to prosecute the case effectively (taking account of the resources [*13] being marshaled on the other side but not endorsing scorched earth tactics), the timing demands of the case, whether the attorney had an interest (independent of that of his client) in achieving the ends of the litigation or initiated the representation himself, whether the attorney was initially acting *pro bono* (such that a client might be aware that the attorney expected low or non-existent remuneration), and other returns (such as reputation, etc.) the attorney expected from the representation.

Arbor Hill, 522 F.3d at 184.

> 2 The Second Circuit has recommended abandoning the term "lodestar" as its meaning has "shifted over time, and its value as a metaphor has deteriorated to the point of unhelpfulness." *Id.*

The "presumptively reasonable fee" is comprised of a "reasonable hourly rate multiplied by a reasonable number of expended hours." *Finkel v. Omega Commc'n Services, Inc.*, 543 F. Supp. 2d 156, 2008 WL 552852, at *6 (E.D.N.Y. 2008). "The party seeking reimbursement of attorneys' fees must demonstrate the reasonableness and necessity of hours spent and rates charged." *Id.* (citing *N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136 (2d Cir. 1983)).

B. Procedural [*14] Setting and Timing of Settlement in this Case

Before turning to the issue of what constitutes a "presumptively reasonable fee," the Court needs to address the procedural posture of this case. Subsequent to the Complaint being filed on October 11, 2006 and served on December 11, 2006, the parties entered into a Stipulation on April 3, 2007 extending Defendant's time to answer the Complaint to April 12, 2007. An Order was issued on April 16, 2007 directing the parties to appear before me on June 1, 2007 for the Initial Conference and further directing the parties to submit on ECF, in advance of the conference, their joint proposed discovery plan.

On May 21, 2007, the parties filed a joint letter requesting an adjournment of the June 1, 2007 Initial Conference because "the parties are conducting extensive settlement negotiations intended to fully resolve the dispute" and noting that both sides had already conducted a "mutual inspection of the subject premises" [DE 12]. That application was granted on May 25, 2007 and the Initial Conference was adjourned to July 6, 2007. In that May 25 Order, I directed the parties to make their Rule 26(a) initial disclosures. Based on a scheduling conflict [*15] of one of the attorneys, the conference was re-scheduled to July 11, 2007.

The day before the July 11 scheduled conference, Defendant's counsel filed a letter to the Court advising that "all matters with regard to this case have been resolved, except for the issue of attorney's fees sought by Plaintiffs' counsel" [DE 14]. Counsel indicated that the parties would be appearing on July 11, 2007 to seek the Court's guidance with regard to resolving that outstanding issue.

After meeting with the parties on July 11, 2007, it was clear to me that there were several issues concerning the settlement proposal with which the parties were still at odds. Defendant's counsel raised an issue concerning a defense of standing and I directed Defendant's counsel to confer with his client and to report back to me in writing within ten (10) days. I further directed the parties to resolve dates for the discovery plan and to file the same on ECF by July 19, 2007, which they did. *See* DE 15, 16. On July 19, 2007, Defendant's counsel notified the Court that Defendant was waiving the defense of standing [DE 18] and asked the Court to schedule a conference since the parties had agreed to all of the terms of settlement, [*16] except the issue of attorney's fees.

I held a telephone conference with the parties on August 7, 2007 at which time they advised that they were entering into a consent judgment, with the exception of the attorney's fee issue, which the parties agreed to submit to the Court for determination [DE 19]. The parties further informed that they had discussed and consented to having this case heard before me for all purposes, pursuant to 28 U.S.C. § 636(c). In light of that development, I set a briefing schedule for Plaintiff's motion for attorney's fees and costs. Formal consent to my jurisdiction was filed by the parties on September 13, 2007 and signed by the assigned district judge on September 19, 2007. The parties then filed the motion papers which are the subject of this Order. The Court directed no discovery in this case beyond the Rule 26(a) automatic disclosures. In addition, the Initial Conference was never held. These procedural facts are significant as they apply to the parties' positions in this fee application.

C. Reasonable Hourly Rate

To determine reasonable hourly rates, the Court must refer to "the prevailing [market rates] in the community for similar services by lawyers of [*17] reasonably comparable skill, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 896 n.11, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984). The Court must consider the factors enumerated by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) [3] and must remain mindful that "a reasonable, paying client wishes to spend the minimum necessary to litigate the case effectively." *Arbor Hill*, 522 F.3d at 190.

> 3 The *Johnson* factors are: "(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the attorney's customary hourly rate; (6) whether the fee is fixed or contingent; (7) the time limitation imposed by the client or the circumstances; (8) the amount involved in the case and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." *Johnson*, 488 F.2d at 717-19.

"Overall, hourly rates for attorneys approved in recent Eastern District [*18] of New York cases have ranged from $ 200 to $ 350 for partners, $ 200 to $ 250 for senior associates, $ 100 to $ 150 for junior associates, and $ 70 to $ 80 for legal assistants." *Hyeon Soon Cho v. Koam Med. Servs. P.C.*, 524 F. Supp. 2d 202, 207 (E.D.N.Y. 2007) (awarding fees in FLSA and New York Labor Law case based on $ 250 hourly rate for partner, $ 150 hourly rate for associate, and $ 75 hourly rate for legal assistant) (collecting cases, including *Corbett v. Reliance Moving & Storage, Inc.*, No. 1:00-cv-07656, 2007 U.S. Dist. LEXIS 96747 (E.D.N.Y. May 30, 2007) (unpublished) (awarding an hourly rate of $ 250 per partner, $ 200 per senior associate, $ 150 per junior associate, and $ 70 per legal assistant for work performed in a straightforward ERISA matter)).

1. Lawrence Fuller, Esq.

Attorney Fuller graduated from the University of Miami School of Law in 1974 and has been a member of the Florida Bar for more than 32 years. Pls. Mem. at 6-7, Ex. 2. In addition to extensive experience as a trial attorney in numerous state and federal courts, Attorney Fuller has worked on matters involving the enforcement of the ADA since approximately March 2001. *Id.*, Ex. 2. Plaintiffs request that the Court set Attorney Fuller's hourly rate [*19] at $ 385 per hour. *Id.* at 6. Plaintiffs contend that this requested hourly rate is justified based upon "the excellent results obtained in bringing the Defendant's property in compliance with the ADA." *Id.* at 8.

Plaintiffs cites to an award of attorney's fees in *Access 4 All, Inc. v. Jarel East End Hotel Corp.*, a similar ADA action that was brought in this District, in support of its request that the Court set Attorney Fuller's hourly rate at $ 385. *Id.*, Ex. 1. In an order dated December 19, 2005, District Judge Feuerstein awarded Attorney Fuller an hourly rate of $ 300 based upon his 31 years of experience as a practicing attorney and his four years of experience litigating ADA claims. *Id.* In *Access 4 All, Inc. v. Park Lane Hotel, Inc.*, No. 04 Civ. 7174, 2005 U.S. Dist. LEXIS 34159, 2005 WL 3338555, at *5 (S.D.N.Y. Dec. 7, 2005), another ADA "architectural barrier" case brought by Attorney Fuller and his firm, Magistrate Judge Francis awarded Attorney Fuller an hourly rate of $ 350 based upon his "qualifications, the quality of the work performed in this case, and the range of hourly rates approved in similar cases in this district." *See also*

Access 4 All, Inc. v. Hi 57 Hotel, LLC, No. 04 Civ. 6620, 2006 U.S. Dist. LEXIS 2695, 2006 WL 196969, at *5 (S.D.N.Y. Jan. 26, 2006) [*20] (awarding Attorney Fuller $ 350 per hour in similar ADA action).

Plaintiffs also cite to cases outside this district in which Attorney Fuller was awarded hourly rates of $ 300 and $ 325. Pls. Mem at 5 (citing *Disabled Patriots v. Regency Centers, L.P.*, No. 1:04-cv-0419-RWS, 2005 U.S. Dist. LEXIS 44851 (N.D. Ga. 2005) ($ 300 per hour); *Betancourt v. 3600 Centerpoint Parkway Investments, LLC*, No. 03-72868 (E.D. Mich. 2004) ($ 325 per hour)). Finally, Plaintiffs state that courts within this district have awarded at least one civil rights litigator with comparable experience and reputation an hourly rate of $ 300. Pls. Mem. at 5.

Finally, Plaintiffs submit an affidavit from Todd Shulby, Esq., an attorney licensed to practice in Florida who has handled "hundreds of civil rights actions." *Id.*, Ex. 7. Attorney Shulby states that his "current reasonable hourly rate" is $ 325 and that he has recently received attorney's fee awards at the $ 325 per hour rate. *Id.*

Defendant responds that Attorney Fuller's requested $ 385 hourly rate is excessive and is not in line with the hourly rates awarded in this district for attorneys with his level of experience and reputation. Def. Mem. at 15-16. Defendant points out that in each of [*21] the cases cited by Plaintiffs, the court awarded Attorney Fuller an hourly rate of substantially less than the $ 385 per hour that they request here. *Id.* at 16. Defendant also asserts that Attorney Shulby's affidavit should be given little or no weight by the Court because it contains merely his "subjective opinion of the reasonableness of the fees requested" and "shows no indication that Mr. Shulby is familiar with the facts or procedural history of this case." *Id.* at 17 (emphasis deleted). The Court agrees.

The Court finds that based upon the evidence submitted by Plaintiffs and upon a review of the *Arbor Hill* and *Johnson* factors, Attorney Fuller's requested hourly rate of $ 385 is well above the average hourly rate for similar cases in this District. Plaintiffs have submitted no proof that $ 385 is Attorney Fuller's customary hourly rate or that he was "able to bill any other client for the kind of litigation services rendered on behalf of plaintiffs at the claimed rates." *See Cho*, 524 F. Supp.2d at 208. In addition, neither the case law cited by Plaintiffs nor the affidavit submitted by Attorney Shulby support Plaintiffs' claim that Attorney Fuller should be compensated at $ 385 [*22] per hour. The highest hourly rate awarded to Attorney Fuller in the referenced cases was $ 350, and Attorney Shulby acknowledges that his highest customarily charged and awarded fee for this type of case is $ 325.

Additionally, Plaintiffs have failed to address the relative difficulty and complexity of litigating the issues of this case, aside from the conclusory assertion that counsel achieved "excellent results." Pls. Mem. at 8. The Court, left to make such determinations based on its own experience, finds that Plaintiffs' ADA claims regarding the "architectural barriers" that existed at the Premises were relatively straightforward and did not involve novel or complex theories or argument. Moreover, looking at the pleading filed here, it is clear that wholesale portions are duplicated from prior cases brought by Plaintiffs.

Based on the evidence submitted regarding the prevailing market rates and due to the straightforward nature of Plaintiffs' ADA claims, the Court finds that an hourly rate of $ 385 for Attorney Fuller is not warranted in this case. I particularly note Judge Feuerstein's observation which took into account Attorney Fuller's four years of experience litigating ADA [*23] cases (now seven years) in the context of his 31 years as a practicing attorney. *See Jarel East End Hotel Corp.*, Pls. Mem., Ex. 1 at 7. Accordingly, the Court will adjust Attorney Fuller's hourly rate for this matter to $ 300 per hour. Such adjustment brings Attorney Fuller's hourly rate more in line with the prevailing market rate within this district. *See Finkel*, 543 F. Supp. 2d 156, 2008 WL 552852 at *6 (awarding partner $ 225 per hour in ERISA/LMRA action); *Coated Fabrics Co. v. Mirle Corp.*, No. 06 CV 5415, 2008 U.S. Dist. LEXIS 3470, 2008 WL 163598, at *7 (E.D.N.Y. Jan. 16, 2008) ("Hourly rates approved in recent Eastern District of New York cases have ranged from $ 200 to $ 375 for partners. . . ."); *Cho*, 524 F. Supp. 2d at 208 (awarding partner $ 250 per hour in straightforward wage litigation); *Merrill Lynch Bus. Fin. Services Inc. v. Brook-Island Med. Associates, P.C.*, No. 06 CV 5912, 2007 U.S. Dist. LEXIS 66595, 2007 WL 2667454, at *6 (E.D.N.Y. Aug. 16, 2007) (awarding solo practitioner with 22 years experience $ 250 per hour)

2. *Thomas Bacon*

Attorney Thomas Bacon graduated from The American University, Washington College of Law in 1989 and has been an attorney for 18 years, most recently as a solo practitioner and then, as of February 2006, an associate [*24] with Fuller, Fuller & Associates, P.A. Pls. Mem. at 6, Ex. 2. Attorney Bacon, along with Attorney Fuller, has "handled hundreds of lawsuits seeking to force property owners to bring their property into ADA compliance and remove barriers to access." *Id.* at 7. Plaintiffs request the Court award Attorney Bacon an hourly rate of $ 350 for his work on this matter.

Plaintiffs do not submit any citations to cases in this district in which Attorney Bacon was awarded an hourly rate of $ 350, [4] nor do they submit any evidence that $ 350 is his customarily charged rate or that this hourly

rate was ever actually charged to, or paid by, his clients in similar cases. Plaintiffs again rely on the "excellent results obtained" as justification for this requested hourly rate, and again cite Attorney Shulby's affidavit which sets forth his opinion that such an hourly rate is reasonable. Pls. Mem. at 7, Ex. 7. The Court finds these assertions to fall short of the mark.

> 4 Plaintiffs do note that Attorney Bacon was awarded an hourly rate of $ 325 in *Access 4 All, Inc. v. Absecon Hospitality Corporation*, Civil Action No. 04-6060 (D.N.J. 2007). Pls. Mem. at 6.

Defendants oppose Plaintiffs request for a $ 350 [*25] hourly rate for Attorney Bacon's work as being excessive and not in line with the prevailing market rates. The Court agrees. Moreover, the Court finds that the routine nature of this case warrants a reduction in Attorney Bacon's fee, given the breadth of Attorney Fuller's experience and position as lead counsel. *See Access 4 All, Inc. v. Grandview Hotel Limited Partnership*, No. 04 Civ. 4368, 2005 U.S. Dist. LEXIS 42539 (Dec. 20, 2005) (Orenstein, J.) The prevailing hourly rate is this district for senior associates is $ 200 to $ 250, *Cho*, 524 F. Supp. 2d at 207, and Plaintiffs have submitted no evidence to justify any departure from these market rates. Accordingly, the Court exercises its discretion to reduce the hourly rate awarded to Attorney Bacon to $ 250 per hour in order to bring it in line with the prevailing market.

3. Nelson Stern, Esq.

Attorney Stern acts as both a named plaintiff and co-counsel for Plaintiff Access 4 All, Inc. [5] The only evidence submitted in support of Attorney Stern's qualifications is the length of time that he has worked as a practicing attorney and member of the New York Bar -- 17 years. Pls. Mem. at 6, 7. Although not cited by Plaintiffs, the Court notes that in *Hi 57 Hotel, LLC.*, [*26] Attorney Stern was awarded an hourly rate of $ 350 for his work on a similar ADA matter. 2006 U.S. Dist. LEXIS 2695, 2006 WL 196969 at *3. Finally, Plaintiffs rely on the "excellent results obtained" by their counsel in support of their request that this Court award Attorney Stern an hourly rate of $ 400 for his work on this case. Pls. Mem. at 6, 7.

> 5 As Magistrate Judge Maas noted in *Hi 57 Hotel, LLC*, Attorney Stern's dual role exempts him from the general rule that an attorney filing a lawsuit as a pro se plaintiff may not recover attorney's fees. *See Hi 57 Hotel, LLC.*, 2006 U.S. Dist. LEXIS 2695, 2006 WL 196969 at *2 n.1.

This Court agrees with the Defendant's assertion that the requested $ 400 hourly rate for Attorney Stern is beyond the appropriate market rate for an attorney of his experience in this district. *See* Def. Mem. at 15. Likewise, Attorney Stern for all appearances served the role of local counsel (in addition to his being a Plaintiff) in this matter, as reflected by his time entries. *See* Pls. Mem., Ex. 4. Again, Plaintiffs do not cite any cases in which Attorney Stern was awarded an hourly rate of $ 400, nor do they submit any evidence that $ 400 is his customarily charged rate or that this hourly rate was ever actually charged [*27] to, or paid by, his clients in similar cases. Based upon the evidence submitted by Plaintiffs, the Court finds that $ 225 is an appropriate hourly rate for the work performed by Attorney Stern in this matter.

4. Paralegal

Although not specified in Plaintiffs' Memorandum of Law, it appears from the attorney time sheets submitted to the Court that Plaintiffs request that paralegal work be compensated at an hourly rate of $ 115. *See* Pls. Mem., Ex. 3. Defendants oppose this billing rate as excessive. Def. Mem. at 16.

Based upon the Court's review of the time records and the paralegal's duties in connection with this case, the Court finds that an hourly rate of $ 75, a rate normally awarded in this district for paralegal work (and awarded in two recent 2008 cases), is appropriate. *See Coated Fabrics Co.*, 2008 U.S. Dist. LEXIS 3470, 2008 WL 163598 at *8 (approving $ 75 per hour fee for paralegal work); *Finkel*, 543 F. Supp. 2d 156, 2008 WL 552852 at *6 (finding $ 75 per hour fee for paralegals to be "reasonable and appropriate"); *Cho*, 524 F. Supp. 2d at 208 (approving $ 75 per hour fee for legal assistant's work on wage and hour case).

D. Reasonable Number of Hours

To determine whether the number of hours spent by Plaintiffs' counsel were reasonable, [*28] the Court must "use [its] experience with the case, as well as [its] experience with the practice of law, to assess the reasonableness of the hours spent . . . in a given case." *Fox Indus., Inc. v. Gurovich*, No. CV 03-5166, 2005 U.S. Dist. LEXIS 42232, 2005 WL 2305002, at *2 (E.D.N.Y. Sept. 21, 2005) (quoting *Clarke v. Frank*, 960 F.2d 1146, 1153 (2d Cir. 1992)). A court should "exclude hours that were 'excessive, redundant, or otherwise unnecessary' to the litigation . . . ." *Cho*, 524 F. Supp. 2d at 209 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)). "In lieu of making minute adjustments to individual timekeeping entries, a court may make across-the-board percentage cuts in the number of hours claimed, 'as a practical means of trimming

fat from a fee application.'" *Heng Chan v. Sung Yue Tung Corp.*, No. 03 Civ. 6048, 2007 U.S. Dist. LEXIS 33883, 2007 WL 1373118, at *5 (S.D.N.Y. May 8, 2007) (quoting *In re "Agent Orange" Prod. Liability Litig.*, 818 F.2d 226, 237 (2d Cir. 1987)).

A party seeking an award of attorney's fees bears the burden to document "the hours reasonably spent by counsel, and thus must support its request by providing contemporaneous time records reflecting, for each attorney and legal assistant, the date, the hours expended, [*29] and the nature of the work done." *Cho*, 524 F. Supp. 2d at 209 (internal citations, quotation marks, and alteration omitted).

1. Vague and Block-billed Time Entries

Defendant contends that many of the time entries are block-billed, vague, and provide insufficient detail as to the exact nature of the tasks performed. Def. Mem. at 14-15. The Second Circuit has clearly held that an attorney's contemporaneous time records "should specify, for each attorney, the date, the hours expended, and *the nature of the work done.*" *Carey*, 711 F.2d at 1148 (emphasis added). The burden is on Plaintiffs' counsel to submit time records "from which the court may determine the nature of the work done, the need for it, and the amount of time reasonably required." *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1265 (2d Cir. 1987).

Initially, Defendant argues that "Plaintiff Stern's only submission in support of the Application is his one-page 'timesheet' consisting of 'vague and incomplete' task descriptions." Def. Mem. at 14, 25. The Court agrees. Upon review of the invoice, Pls. Mem., Ex. 4, Attorney Stern's October 13, 2006 time entry reflecting one hour spent to "Review initial pleading and file [*30] same" is the only time entry of which the Court can make any sense. Accordingly, of the 4.4 hours charged by Attorney Stern some of which time apparently was devoted to the *pro hac vice* motion of Attorney Bacon, the Court will award attorney's fees for this one hour time entry only.

With respect to Plaintiffs' remaining counsel, the Court agrees that Attorneys Fuller and Bacon could have amplified some of the time entries, such as "phone call(s) with opposing counsel" and "preparing letter to Defendant." Attorneys, however, are not required to provide the Court with a detailed accounting of each minute spent performing a task in the case. Rather, the records produced should be specific enough to assess the amount of work performed. *See Hensley*, 461 U.S. at 437 n.12. Having evaluated the records of the Fuller firm, the Court finds that these time entries though vague in some instances are not so abstruse that the Court is unable to determine the nature of the work performed. Accordingly, no reduction of hours will be made on this basis.

2. Billing Related to Attorney Bacon's Pro Hac Vice Motion

Defendant argues that it was not necessary to move for Attorney Bacon's *pro hac vice* admission [*31] in the first instance because Attorney Fuller is admitted to practice in this district and because Attorney Stern could have acted as local counsel. Def. Mem. at 18. It is within the Court's discretion whether to award attorney's fees for a *pro hac vice* motion. *See Pretlow v. Cumberland County Bd. of Social Services*, No. Civ. 04-2885, 2005 U.S. Dist. LEXIS 35547, 2005 WL 3500028, at *6 (D.N.J. Dec. 20, 2005). I decline to do so here. Moreover, the fact that Plaintiffs chose to utilize Florida counsel rather than equally qualified ADA counsel in this District was entirely up to Plaintiffs. Defendant is not required to pay for that choice. Accordingly, the Court declines to award any attorney's fees for the preparation of the *pro hac vice* motion. Accordingly, 1.3 hours attributable to Attorney Fuller on October 31 and November 7, 2006 and two-tenths of an hour attributable to Attorney Bacon on October 6, 2006 will be deducted from the attorney's fee award. [6]

6 The Court has already disallowed recovery for the four-tenths of an hour Attorney Stern spent in connection with the *pro hac vice* motion. *See* Section IV(D)(1).

3. Discovery-Related Work Done While Engaging in Settlement Discussions

Defendant contends that Attorney [*32] Fuller "needlessly" billed 2.9 hours on March 30, 2007 in connection with the preparation of discovery documents and Rule 26(a) disclosures "even though issue had not yet been joined, and he continued to bill for correspondence regarding discovery issues after opposing counsel pointed out that this was needlessly running up the bill pending settlement." Def. Mem. at 19. Plaintiffs contend that it was necessary to perform such "initial discovery work" because it was unclear when, if ever, settlement would be accomplished and "counsel would have been remiss to hold the prosecution of this case in abeyance while a defendant drags settlement negotiations along for a period of several months." Reply Mem. at 10. The Court agrees that Plaintiffs did not act unreasonably by conducting such initial discovery efforts, and does not find the time expended on such efforts to be unreasonable. Accordingly, the Court declines to reduce Plaintiffs' requested fee award on this basis.

4. Pre-Litigation Work

Defendant argues that attorney's fees for the 3.2 hours spent by Attorney Fuller and Attorney Bacon on "pre-litigation" background work should not be recoverable. Def. Mem. at 19; *see* Pl. Mem., Ex. [*33] 3 (Attorney Fuller's September 14, 15, 22, and October 5, 2006 time entries and Attorney Bacon's August 23, September 6, 2006 time entries). Plaintiffs argue that this work, including "initial investigation of Plaintiff's claims, determination of property ownership, determination [of] whether the Defendant's premises was the subject of prior or pending ADA actions, etc.," was part of their general investigation of "the veracity of Plaintiffs' claims" as mandated by Rule 11. Reply Mem. at 10. The Court agrees that the time spent on this pre-litigation work was reasonable, *compare Lake v. Schoharie County Comm'r of Soc. Servs.*, No. 9:01-CV-1284, 2006 U.S. Dist. LEXIS 49168, at *26-27 (N.D.N.Y. May 16, 2006) (finding the more than 81 hours spent on initial investigation of a civil rights claim brought under Section 1988 to be excessive), and appears to have been expended in furtherance of the litigation. The Court will, however, deduct one-quarter hour from Attorney Fuller's September 15, 2006 time entry for his phone call with Ms. Durbin, Plaintiffs' expert, as this does not correspond with Ms. Durbin's invoice and time records. See Section VI, below.

Moreover, the Court does not find that [*34] Attorney Bacon's expenditure of two hours to draft the Complaint in this case is excessive. *See* Def. Mem. at 22. While the Court recognizes that the Complaint is very similar to the complaint filed in *Access 4 All, Inc. v. Grandview Hotel Limited Partnership*, No. 04 Civ. 4368, 2006 U.S. Dist. LEXIS 15603, at *10 (E.D.N.Y. Mar. 6, 2006) (and, indeed, contains much of the same language and phrasing), the Court also notes that some work had to be put into the drafting of the Complaint to make it applicable to this particular case. Two hours was not an unreasonable amount of time to do so, and the Court will not reduce these requested hours.

5. Work Done by Multiple Attorneys

Defendant argues "[i]t is excessive in itself that three experienced attorneys participated in this straightforward action especially given that all three of the attorneys have been involved in numerous similar, if not identical, cases." Def. Mem. at 20. Although Defendant cites Attorney Fuller's attendance at the July 11, 2007 initial conference as an example, the Court finds that Attorney Fuller did not charge for his time spent to travel to or attend this conference. *See* Reply Mem. at 11-12. In addition, although [*35] both Attorney Bacon and Attorney Stern billed for time spent in connection with the Rule 34 inspection notice, the Court has already determined that this time charged by Attorney Stern will not be compensated. *See* Section IV, C, 1, above. Finally, the fact that Attorney Fuller and Attorney Bacon both participated in settlement negotiations does not automatically mean that their work was duplicative. *See Kapoor v. Rosenthal*, 269 F. Supp. 2d 408, 414 (S.D.N.Y. 2003) ("Multiple attorneys are allowed to recover fees on a case if they show that the work reflects the distinct contributions of each lawyer."). Accordingly, the Court will not reduce the hours requested on this basis.

6. The Instant Fee Application

Defendant contends that the time spent by Plaintiffs preparing this attorney's fee application is excessive. In general, when a plaintiff is awarded reasonable attorney's fees, the plaintiff is also entitled to an award of reasonable attorney's fees in connection with the time spent to prepare the fee application. *See, e.g., Weyant v. Okst*, 198 F.3d 311, 316 (2d Cir. 1999); *Valley Disposal, Inc. v. Cent. Vermont Solid Waste Mgmt. Dist.*, 71 F.3d 1053, 1059 (2d Cir. 1995); *Davis v. City of New Rochelle*, 156 F.R.D. 549, 560 (S.D.N.Y. 1994). [*36] In considering this issue, the Court notes that Plaintiffs' counsel has done many fee applications prior to this one and were not dealing with novel or complex issues. The Court has reviewed the time entries in connection with the fee application by Plaintiffs' counsel which indicate that Attorney Bacon spent 8.2 hours drafting the initial fee application and 11.2 hours drafting the reply, while Attorney Fuller spent one-half an hour reviewing the fee application. The Court finds these hours to be excessive, especially in light of the numerous prior fee applications drafted by Plaintiffs' counsel. Accordingly, the 19.4 total hours spent by Attorney Bacon will be reduced by half to 9.7 hours.

7. Travel Time

Defendant objects to Attorney Bacon's May 16, 2007 time entry which reflects three hours charged at his full hourly rate for "Travel to New York City for inspection" [7] and 4.6 hours billed for "Local travel to inspection, attending inspection and meeting with expert." Def. Mem. at 22. It is well-established that within this circuit, time charged by an attorney for travel will be reimbursed at half of the attorney's hourly rate. *Duke v. County of Nassau*, No. 97-CV-1495, 2003 U.S. Dist. LEXIS 26536, 2003 WL 23315463, at *5 (E.D.N.Y. Apr. 14, 2003) [*37] ("[A]ll time entries which account for travel time will be compensated at fifty percent of the attorney's general billing rate."); *Connor v. Ulrich*, 153 F. Supp. 2d 199, 203 (E.D.N.Y. 2001) ("[C]ourts in this circuit customarily reimburse attorney's for travel time at fifty percent of their hourly rates.") (internal quotation marks omitted). In Attorney Bacon's second entry, it is impossible to determine what portion of the 4.6 hours was devoted to "local travel." Accordingly, the entire 7.6 hours billed on May 16, 2007 will be compensated at $ 112.50

(or half of the $ 225 per hour rate the Court finds appropriate for Attorney Bacon, see Section IV, B, 2, above).

> 7 Plaintiffs note that although it took Attorney Bacon six hours to travel to New York, he charged only three of those hours to Plaintiffs and charged the remaining three hours to another unrelated client. Reply Mem. at 13.

E. Calculation of Presumptively Reasonable Fee

Based upon the Court's adjusted reasonable hourly rates and adjusted reasonable number of hours, the presumptively reasonable attorney's fees in connection with Plaintiffs' ADA claim are $ 18,465, and are calculated as follows:

Attorney/Legal Intern	Hourly Rate	No. of Hours Requested	No. Of Hours Awarded	Award
Lawrence Fuller	$ 300	18.7	17.15	$ 5,145
Thomas Bacon	$ 250	52.9	43	$ 10,750
Thomas Bacon	$ 112.50 (travel rate)	7.6	7.6	$ 855
Nelson Stern	$ 225	4.4	1	$ 225
Paralegal	$ 75	2.3	2.3	$ 172.50
Total				$ 17,147.50

F. [*38] Overall Reduction of Presumptively Reasonable Fee

Defendant argues that the Court should exercise its discretion to reduce or decline to award attorney's fees because Plaintiffs and their counsel are "professional litigants" who have commenced 24 reported ADA actions in New York, Florida, Ohio, Massachusetts, and Texas, and who have filed 84 ADA-related actions in New York since 2003. Def. Mem. at 8-9. Defendant asserts that an award of the full amount of attorney's fees requested is not warranted here because "important public policy interest[s] are served by preventing a proliferation of suits brought under the auspices of aiding the disabled, but [are] in reality commenced solely for the purposes of churning out billable hours." Def. Mem. at 11-12 (collecting cases from Florida district courts in which courts criticized ADA-litigation "cottage industry").

Most persuasive to the Court is Defendant's citation to *Access 4 All, Inc. v. Grandview Hotel Limited Partnership*, No. 04 Civ. 4368, 2006 U.S. Dist. LEXIS 15603, at *10 (E.D.N.Y. Mar. 6, 2006), a decision in which District Judge Platt reviewed a Report and Recommendation by Magistrate Judge Orenstein awarding attorney's fees to Plaintiff [*39] Access 4 All, another individual plaintiff, and their counsel Fuller, Fuller & Associated, P.A. The court noted that the plaintiffs and their attorneys

> . . . have pursued dozens of Title III actions against various hotels in federal courts throughout New York, New Jersey, Massachusetts, and D.C. These cases involve identical legal issues and similar factual issues. The duplicitous nature of the litigation warrants a reduction in the law firm's fee award.

Id. In particular, the court found that the complaint filed in *Grandview Hotel Limited Partnership* "contain[ed] the same boilerplate language as Complaints the firm filed" in at least two other cases. 2006 U.S. Dist. LEXIS 15603 at *11. After comparing the Complaint filed in this action to the complaint filed in *Grandview Hotel Limited Partnership*, this Court concludes that the two pleadings contain most of the same "boilerplate language," and the Court has taken note of the evidence submitted by Defendant with respect to the numerous other similar ADA actions filed by Plaintiffs and their counsel, both within and outside this district. Curto Decl., Ex. C.

As the court in *Grandview Hotel Limited Partnership* noted, "[w]hen confronted with such a situation, a [*40] court may choose to (i) cut the number of hours billed, (ii) reduce the amount of the fee, or (iii) disallow the entire amount." 2006 U.S. Dist. LEXIS 15603 at *12 (choosing to reduce counsel's hourly rate from $ 250 per hour, awarded by Magistrate Judge Orenstein, to $ 150 per hour based upon "the garden variety nature of this action and its lack of complexity). The Court finds that an overall reduction of 15% of the attorney's fees awarded is appropriate in this instance. Accordingly, the presumptively reasonable fee of $ 17,147.50 is hereby

reduced by 15% (or $ 2,572.13). Plaintiffs are hereby awarded attorney's fees in the amount of $ 14,575.37.

V. COSTS

The ADA provides that "[i]n any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs . . . ." 42 U.S.C. § 12205. Pursuant to Federal Rule of Civil Procedure 54(d), "[u]nless a federal statute, these rules, or a court order provides otherwise, costs -- other than attorney's fees -- should be allowed to the prevailing party." Local Civil Rule 54.1 provides that taxable [*41] costs include monies expended for trial transcripts, deposition transcripts "if the deposition was used or received in evidence at the trial," and witness fees and mileage for witnesses that testify at trial. Plaintiffs seeks a total of $ 2,702.74 in costs for the Fuller firm (which accounts for all the costs itemized in Exhibit 3 less the expert report fees, which are dealt with in Section VI, below) and seeks $ 300 in costs for Attorney Stern, see Pls. Mem., Ex. 4.

The Court maintains sole discretion whether to allow taxation of costs. *LoSacco v. City of Middletown*, 71 F.3d 88, 92 (2d Cir. 1995). Plaintiffs, as the prevailing party, bear the burden to justify the taxation of costs. *John & Kathryn G. v. Bd. of Educ. of Mount Vernon Pub. Sch.*, 891 F. Supp. 122, 123 (S.D.N.Y. 1995).

With respect to the costs incurred by the Fuller firm, Defendant objects to a May 9, 2007 $ 250 expense for "Travel: Meal(s) & Tip(s) & Ground Transportation incurred by attorney," because it does not correspond to any time entry or task performed by Attorney Fuller or Attorney Bacon on that date. Def. Mem. at 23. The Court agrees with Defendant and declines to reimburse Plaintiffs for this cost. Defendant [*42] also objects to a July 8, 2007 $ 250 expense for "Travel: Airfare and miscellaneous expenses for hearing," because the Fuller firm did not provide supporting documentation and because Plaintiffs did not explain why Attorney Fuller had to travel to attend the initial conference hearing when Attorney Stern resides locally. *Id.* The Court finds that this is a reasonable cost, especially considering that Attorney Fuller did not bill for his time to travel or attend this hearing. Accordingly, the Court will reimburse Plaintiffs for this cost.

Defendant also objects to the $ 750 "Re-Inspection Fee(s) to disability group." *Id.* at 24. Although Plaintiffs do not explain what a "re-inspection fee" is, the Court presumes that it is "for 'the reinspection contemplated after the Defendant completes the repairs of the existing barriers to access, to confirm that ADA violations have been corrected.'" *Park Lane Hotel, Inc.*, 2005 U.S. Dist. LEXIS 34159, 2005 WL 3338555 at *5 (same Plaintiff Access 4 All, Inc. represented by the Fuller firm). The Court agrees with the *Park Lane Hotel* court that "there is no basis for assessing against the defendant the costs of monitoring compliance where the monitoring entity has not been identified [*43] and the work has not been performed." *Id.* Accordingly, the Court declines to reimburse Plaintiffs for this $ 750 cost.

Finally, Plaintiffs seek reimbursement for a $ 300 "New case service" charge levied by Attorney Stern. Plaintiffs have provided absolutely no evidence or explanation as to what this cost is or why it is necessary. Accordingly, the Court declines to reimburse Plaintiffs for this $ 300 cost.

The Court finds Defendant's remaining objections to Plaintiffs' request for costs to be without merit. Therefore, Plaintiffs will be awarded $ 1,702.74 in costs.

VI. EXPERT FEES

"Under the ADA, a court may award a plaintiff its expert witnesses' reasonable fees as a litigation expense." *Access 4 All, Inc. v. Hi 57 Hotel, LLC*, No. 04 Civ. 6620, 2006 U.S. Dist. LEXIS 2695, 2006 WL 196969, at *4 (S.D.N.Y. Jan. 26, 2006). *See also* 42 U.S.C. §§ 12117(a), 12205; *Access 4 All, Inc. v. Park Lane Hotel, Inc.*, No. 04 Civ. 7174, 2005 U.S. Dist. LEXIS 34159, 2005 WL 3338555, at *5 (S.D.N.Y. Dec. 7, 2005) (noting the court's discretion to award expert witness fees to prevailing parties under the ADA). Plaintiffs seek reimbursement for expert witness fees in the amount of $ 5,512.50 for two reports prepared by Carol Durbin. Pl. Mem. at 9-10, Ex. 8, 9. Plaintiffs [*44] contend that based upon Ms. Durbin's credentials, $ 175 is a reasonable hourly rate for her services, *id.* at 10, Ex. 10, and has submitted an invoice detailing her activities in connection with these two reports. *Id.*, Ex. 11.

Defendant contends initially that Plaintiffs should not be permitted to recover these expert witness fees because "[t]here was no need for expert witnesses because immediately after issue was joined, the parties commenced settlement negotiations," and so there was no pretrial discovery or motion practice. Def. Mem. at 24. Defendant also argues that Plaintiffs' use of an expert located in Florida rather than a "local expert" diminishes their entitlement to expert fees. *Id.* Finally, Defendant contends that Ms. Durbin's hourly rate of $ 175 is excessive. *Id.*

The Court disagrees with Defendant's contention that there was "no need" for Ms. Durbin's expert reports. Clearly, Plaintiffs relied upon Ms. Durbin's facility inspections and reports in initiating and litigating this case. *See Hi 57 Hotel, LLC*, 2006 U.S. Dist. LEXIS 2695,

2006 WL 196969 at *4. Accordingly, Plaintiffs may recover the expert witness fees requested, with the following modifications. Ms. Durbin's August 21, 2006 Invoice contains [*45] an entry for "Meeting with plaintiff's counsel" on August 8, 2006 that does not correspond with any of the submitted attorneys' invoices. Accordingly, the amount of awarded expert fees will be reduced by $ 350 (2 hours x $ 175 hourly rate). In addition, while the Court finds Ms. Durbin's hourly rate of $ 175 to be reasonable, *see id.* (awarding expert fees based upon Ms. Durbin hourly rate of $ 175), the Court does not, in its discretion, find that Ms. Durbin's six hours of travel time should be compensated at her regular $ 175 hourly rate. Rather, the Court finds it appropriate to compensate Ms. Durbin's travel time at $ 87.50 per hour, or half of her hourly rate. *See Silberman v. Innovation Luggage, Inc.*, No. 01 Civ. 7109, 2002 U.S. Dist. LEXIS 14832, 2002 WL 1870383, at *2 (S.D.N.Y. Aug. 13, 2002) (compensating expert witness for travel time at half his regular rate). Accordingly, the amount of awarded expert fees will be further reduced by $ 525 (six hours of travel time x $ 87.50 reduction from normal hourly rate).

Therefore, Plaintiffs' application for expert fees is GRANTED and Plaintiff is awarded $ 4,637.25 in expert fees.

VII. CONCLUSION

Based on the foregoing, Plaintiffs' attorney's fee application is hereby [*46] GRANTED to the extent set forth above, and Plaintiffs are awarded $ 14,575.37 in attorney's fees. Plaintiffs' request to tax costs and expert fees is also hereby GRANTED and Plaintiffs are awarded $ 1,702.74 in costs and $ 4,637.25 in expert fees.

SO ORDERED.

Dated: Central Islip, New York

September 30, 2008

/s/ A. Kathleen Tomlinson

A. KATHLEEN TOMLINSON

U.S. Magistrate Judge

FOCUS - 1 of 3 DOCUMENTS

JOHN REITER, Plaintiff, -v.- METROPOLITAN TRANSPORTATION AUTHORITY OF THE STATE OF NEW YORK, MTA NEW YORK CITY TRANSIT, and MYSORE L. NAGARAJA, P.E., Individually and as Senior Vice President and Chief Engineer, Defendants.

01 Civ. 2762 (GWG)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2007 U.S. Dist. LEXIS 71008

September 25, 2007, Decided
September 26, 2007, Filed

PRIOR HISTORY: Reiter v. MTA N.Y. City Transit Auth., 457 F.3d 224, 2006 U.S. App. LEXIS 18229 (2d Cir. N.Y., 2006)

COUNSEL: [*1] For Plaintiff: Gregory G. Smith, Esq., Gregory Smith & Associates, New York, NY.

For Defendant New York City Transit Authority: Steven M. Stimell, Esq., Jay P. Warren, Esq., Bryan Cave LLP, New York, NY.

JUDGES: GABRIEL W. GORENSTEIN, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: GABRIEL W. GORENSTEIN

OPINION

OPINION AND ORDER

GABRIEL W. GORENSTEIN, UNITED STATES MAGISTRATE JUDGE

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John [*2] Reiter brought this action in April 2001 against his employer, the New York City Transit Authority ("NYCTA"); his former supervisor Mysore L. Nagaraja; and the Metropolitan Transportation Authority of the State of New York. Following a jury trial, he obtained damages and injunctive relief based on retaliatory conduct that he suffered as an employee of the NYCTA. Reiter has made an application for attorney's fees. The parties have consented to disposition of this matter by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). I.

INTRODUCTION

A. *Factual Background*

1. *Reiter's 2003 Fee Application*

The vast majority of the claims Reiter originally made in his complaint were dismissed as a result of a summary judgment motion by defendant. *Reiter v. Metro. Transp. Auth.*, 2002 U.S. Dist. LEXIS 18537, 2002 WL 31190167 (S.D.N.Y. Sept. 30, 2002) (JGK) ("*Reiter I*"). The remaining claim, for retaliation, was the subject of a jury trial held in 2003. The jury found that the NYCTA had unlawfully retaliated against Reiter when it demoted him in response to his filing a complaint with the Equal Employment Opportunity Commission and awarded him $ 140,000 in pain and suffering, a sum the trial court later reduced to $ 10,000 [*3] on defendants' motion for remittitur. *See Reiter v. Metro. Transp. Auth. of N.Y.*, 2003 U.S. Dist. LEXIS 17391, 2003 WL 22271223, at *6, 8-11 (S.D.N.Y. Sept. 30, 2003) (JGK) ("*Reiter II*"). After trial, Reiter moved for equitable relief pursuant to 42 U.S.C. 2000e-5(g)(1), including, *inter alia*, reinstatement. The Court granted reinstatement, but denied the remainder of Reiter's demand for equitable relief. 2003 U.S. Dist. LEXIS 17391, [WL] at *13-16. In November 2003, Reiter moved for attorney's fees and costs.[1]

1 *See* Motion for Attorney's Attorney's [sic] Fees and Costs, filed Nov. 12, 2003 (Docket # 93) ("Pl. First Mot."); Affirmation [of Gregory G. Smith] in Support of Motion for Attorney's Fees and Expenses, dated Nov. 12, 2003 (attached to Pl. First Mot.) ("Smith Aff."); Affirmation [of Janet Lennon] in Support of Motion for Attorney's Fees and Expenses, dated Nov. 12, 2003 (attached to Pl. Mot.) ("Lennon Aff."); Affirmation [of Charlesa E. London] in Support of Motion for Attorney's Fees and Expenses, dated Nov. 12, 2003 (attached to Pl. First Mot.) ("London Aff."); Memorandum of Points and Authorities in Support of Motion for Attorney's Fees and Expenses, filed Nov. 12, 2003 (Docket # 94) ("Pl. First me."); Affirmation of Steven M. Stimell in [*4] Opposition to Plaintiff's Motion for Attorneys' Fees and Costs, filed Mar. 3, 2004 (Docket # 104); Defendant's [sic] Memorandum of Law in Opposition to Plaintiff's Motion for Attorney's Fees and Costs, filed Mar. 3, 2004 (Docket #

105) ("Def. First Mem."); Plaintiff's Memorandum of Law in Reply in Further Support of His Motion for Attorneys' Fees and Costs, filed May 3, 2004 (Docket # 112) ("Pl. First Reply Mem."); Declaration of Gregory G. Smith in Further Support of Plaintiff's Application for Attorneys' Fees and Costs, filed May 3, 2004 (Docket # 113).

In the 2003 application, Reiter sought $ 457,155 in fees for 1,713.30 hours of work performed by three attorneys who represented him during his court proceedings as well as court costs. *See* Pl. First Mot. Reiter arrived at that figure by presenting a total of 1,713.30 hours at a rate of $ 350 per hour for work by attorneys Gregory Smith and Janet Lennon and $ 150 per hour for attorney Charlesa London. In ruling on that application, this Court concluded that Reiter could not recover fees incurred subsequent to the Offer of Judgment made by the defendants. *See Reiter v. Metro. Transp. Auth.*, 224 F.R.D. 157, 169 (S.D.N.Y. 2004) (GWG) [*5] (*"Reiter III"*). As to the work of Reiter's counsel prior to that date, the Court concluded that Reiter's counsel had presented insufficient evidence as to an appropriate fee for his services and awarded a fee of $ 200 per hour to Smith and Lennon based on the $ 175 per hour fee set forth in Reiter's retainer agreement as adjusted for inflation. *See Reiter v. Metro. Transp. Auth.*, 224 F.R.D. 157, 2004 WL 2072369, at *8 (S.D.N.Y. Sept. 2004) (GWG) (*"Reiter IV"*). As a result, judgment was entered for $ 17,075.42 in attorney's fees and costs.

2. *Appeal*

Reiter appealed the judgment, and the Second Circuit affirmed in part and reversed and remanded in part. The Second Circuit ruled that Reiter was entitled to attorney's fees that arose after the Offer of Judgment. *Reiter v. MTA New York City Transit Auth.*, 457 F.3d 224, 229-32 (2d Cir. 2006) (*"Reiter V"*), *cert. denied*, 127 S. Ct. 1331, 167 L. Ed. 2d 84 (2007). In addition, the Second Circuit concluded that this Court had not given "appropriate weight" to evidence in the record that Reiter's attorneys had "set the retainer rate because, in part, they were offering a discount to a plaintiff in a civil rights case." *Id.* at 233. Accordingly, it remanded the case for "additional [*6] consideration" of the appropriate rate for plaintiff's attorneys. *Id.*

3. *Reiter's Current Fee Application*

Following remand, Reiter supplemented his previous motion for attorney's fees to include time spent for the 2003 fee application, the appeal to the Second Circuit, and the supplemental fee application itself. Reiter now seeks an award of $ 877,575.00 in attorney's fees - for 2,056 hours of work performed by Smith, Lennon, and London. Pl. Supp. Mem. at 1. He has raised the hourly rate for which he seeks compensation to $ 500 per hour for the work performed by Smith and Lennon and $ 300 per hour for work by London. *See* 2003 U.S. Dist. LEXIS 17391, [WL] at 1 n.1. The defendants challenge the rates claimed in Reiter's supplemental fee application as well as the hours sought.[2]

2 *See* Notice of Supplemental Motion for Attorneys' Fees, filed on Nov. 30, 2006 (Docket # 126); Affirmation [of Gregory Smith], filed Nov. 30, 2006 (Docket # 127) ("Supp. Smith Aff."); Memorandum of Points and Authorities in Support of Supplemental Motion for Attorney's Fees and Expenses, filed Nov. 30, 2006 (Docket # 128) ("Pl. Supp. Me."); Defendant's [sic] Memorandum of Law in Opposition to Plaintiff's Supplemental Motion for Attorney's Fees, [*7] filed Jan. 22, 2007 ("Docket # 130) ("Def. Supp. Mem."); Declaration of Jay P. Warren, dated Jan. 18, 2007 ("Warren Decl.") (attached to Def. Supp Mem.); Declaration of Steven M. Stimell, dated Jan. 18, 2007 (attached to Def. Supp. Mem.) ("Stimell Supp. Decl."); Smith Affirmation in Further Support of Supplemental Fees and Expenses, filed Mar. 13, 2007 (Docket # 133) ("Smith Supp. Reply Aff."); Plaintiff's Reply Memorandum of law in Further Support of His Supplemental Attorney's Fees and Costs Application, dated Mar. 12, 2007 (Docket # 133) ("Pl. Supp. Reply Me."); Letter from Jay P. Warren, dated Mar. 21, 2007 (Docket # 134) ("Sur-reply"); Letter from Gregory G. Smith, dated Apr. 6, 2007 (Docket # 132) ("Sur-Sur-Reply").

II. *DISCUSSION*

42 U.S.C. § 2000e-5(k) provides that a "prevailing party" in an action under Title VII may recover, in the court's discretion, "a reasonable attorney's fee (including expert fees) as part of the costs." *See, e.g., Am. Fed'n of State, County & Mun. Employees v. County of Nassau*, 96 F.3d 644, 650 (2d Cir. 1996) ("An award of fees under Title VII is within the discretion of the trial court . . . ." (internal quotation marks and citation omitted), *cert. denied*, [*8] 520 U.S. 1104, 117 S. Ct. 1107, 137 L. Ed. 2d 309 (1997). The jury's verdict in Reiter's favor makes him a "prevailing party" and, because there are no "special circumstances" justifying a denial of fees, he is entitled to recover reasonable attorney's fees as part of the costs assessed against the defendants. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414-415, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975) (discussing *Newman v. Piggie Park Enters.*, 390 U.S. 400, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968)).

As the Second Circuit noted in its recent decision in *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 493 F.3d 110 (2d Cir. 2007), "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate . . . ." *Id.* at 114 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)). This figure has commonly been referred to as the "lodestar" -- a term that *Arbor Hill* eschews in favor of the term "presumptively reasonable fee." *Id.* at 111.

A. *Reasonable Hourly Rate*

Arbor Hill made clear that a "reasonable" hourly rate is "what a reasonable, paying client would be willing to [*9] pay . . . ." *Id.* at 112. Thus, "the district court (unfortunately) bears the burden of disciplining the market, stepping into the shoes of the reasonable, paying client, who wishes to pay the least amount necessary to litigate the case effectively." *Id.* In addition, the rate to be set for Reiter's attorneys must be "'in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Reiter V*, 457 F.3d at 232 (quoting *Blum v. Stenson*, 465 U.S. 886, 896 n.11, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984)).

To determine an appropriate hourly rate, *Arbor Hill* directs that a court should engage in the following process

> the district court, in exercising its considerable discretion, [is] to bear in mind *all* of the case-specific variables that we and other courts have identified as relevant to the reasonableness of attorney's fees in setting a reasonable hourly rate. The reasonable hourly rate is the rate a paying client would be willing to pay. In determining what rate a paying client would be willing to pay, the district court should consider, among others, the *Johnson* factors; it should also bear in mind that a reasonable, paying client wishes to [*10] spend the minimum necessary to litigate the case effectively. The district court should also consider that such an individual might be able to negotiate with his or her attorneys, using their desire to obtain the reputational benefits that might accrue from being associated with the case. The district court should then use that reasonable hourly rate to calculate what can properly be termed the "presumptively reasonable fee."

493 F.3d at 117-18 (emphasis in original). The "*Johnson* factors" are those originally laid out in the case of *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), *abrogated on other grounds, Blanchard v. Bergeron*, 489 U.S. 87, 92-93, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989). These factors are:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the attorney's customary hourly rate; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved in the case and the results obtained; (9) the experience, reputation, and ability of [*11] the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Arbor Hill, 493 F.3d at 114 n.3 (citing *Johnson*, 488 F.2d at 717-19).

Arbor Hill specifically identified the following factors to be considered in determining what a reasonable, paying client would be willing to pay:

> the complexity and difficulty of the case, the available expertise and capacity of the client's other counsel (if any), the resources required to prosecute the case effectively (taking account of the resources being marshaled on the other side but not endorsing scorched earth tactics), the timing demands of the case, whether the attorney had an interest (independent of that of his client) in achieving the ends of the litigation or initiated the representation himself, whether the attorney was initially acting *pro bono* (such that a client might be aware that the attorney expected low or non-existent remuneration), and other returns (such as reputation, etc.) the attorney expected from the representation.

Id. at 112.

The fee applicant bears the burden of establishing the reasonableness of the hourly rates requested-in [*12] particular, by producing satisfactory evidence that the requested rates are in line with those prevailing in the community. *Blum*, 465 U.S. at 895 n.11; *601 W. Assocs. LLC v. Kleiser-Walczak Constr. Co.*, 2004 U.S. Dist. LEXIS 8920, 2004 WL 1117901, at *3-4 (S.D.N.Y. May 18, 2004).

In his original application, submitted in November 2003, Smith sought $ 350 per hour for himself (and Lennon) and $ 150 per hour for London. *See* Pl. First Mot. Smith now requests hourly rates of $ 500 for himself and Lennon, and $ 300 for London. *See* Pl. Supp. Mem. at 1 n.1. Reiter states that even if "$ 350 per hour was the prevailing rate in the Southern District of New York when plaintiff made his first fee application," *see* Pl. Supp. Reply Mem. at 5, "[t]wo plus years have since passed and arguably the rates in the Southern District of New York have gone up." *Id.*

Reiter's own briefing with respect to the *Johnson* factors or any other factors relied upon by the Second Circuit has been cursory: he did not review them at all in his initial memorandum of law and reviews them in just one of his submissions, and there only briefly. *See* Pl. First Reply Mem. at 17-19. While we have considered all the *Johnson* factors as well as the other factors [*13] summarized in *Arbor Hill*, some of them do not support either an increase or a decrease in the hourly rate and/or have not been argued or briefed by the parties. Thus, we discuss below only those most pertinent to our conclusion as to the appropriate hourly rate.

Specifically, we discuss in separate sections below (1) the difficulty of the case-which encompasses the novelty and complexity of the issues and the level of skill required to perform the legal services properly; (2) information as to counsel's customary hourly rates; (3) counsel's experience, reputation, and abilities; and (4) awards in similar cases. With respect to the results obtained, we follow what has been the prevailing practice in this Circuit and consider this question in a later section that discusses whether there should be an adjustment in the presumptively reasonable fee based on limited success. *See* section II.B.1.d below.

1. *Difficulty of the Case*

At the outset, the Court notes that this case involved a single plaintiff and the testimony of seven witnesses, including plaintiff and his wife, over a six-day trial. *Reiter II*, 2003 U.S. Dist. LEXIS 17391, 2003 WL 22271223, at *1, 5. As is discussed further below, the Court had previously dismissed [*14] many of Reiter's claims and allowed but a single retaliation claim to go to the jury. *See Reiter I*, 2002 U.S. Dist. LEXIS 18537, 2002 WL 31190167, at *14. The only monetary damages Reiter sought from the jury was compensation for pain and suffering. *Reiter II*, 2003 U.S. Dist. LEXIS 17391, 2003 WL 22271223, at *1. Questions of equitable relief were decided by the district judge. 2003 U.S. Dist. LEXIS 17391, [WL] at *13-16.

There is nothing to suggest that this case was particularly novel or complex. No discovery or other disputes were the subject of any court briefing until the summary judgment motions were filed -- an event that took place approximately eight months after the defendants answered. Plaintiff deposed six witnesses. *See id.* Notably, Reiter made this case more complex than it needed to be given that, following discovery, he pursued numerous claims that were ultimately dismissed by the district court. *See generally Ricard v. Kraft Gen. Foods, Inc.*, 1993 U.S. Dist. LEXIS 21062, 1993 WL 385129, at *3 (S.D.N.Y. Mar. 16, 1993) ("It is not generally speaking, a good litigation tactic to attempt to ride several different legal causes of action at trial . . . . [This] approach . . . increas[es] the information which must be reviewed in order to determine whether a genuine issue of material fact [*15] exists."), *aff'd*, 17 F.3d 1426 (2d Cir. 1994). Finally, no inference of complexity should be taken from the fact that the case was originally filed in 2001. The discovery period of approximately six months was in line with, if not shorter than, the discovery period in many cases of this type. The trial was not lengthy. The vast bulk of time spent since the filing of the complaint has been devoted to the dispute over attorney's fees.

2. *Counsel's Customary Rates*

One of the *Johnson* factors that seems particularly helpful in determining the maximum ceiling of "what a reasonable, paying client would be willing to pay," *see Arbor Hill*, 493 F.3d at 112, for a particular attorney's services is that attorney's "customary hourly rates." *Id.* at 114 n.3 (citing *Johnson*, 488 F.2d at 718). In calculating "what rate a paying client would be willing to pay," *id.* at 112, a paying client normally would have no reason to pay more than the attorney's customary rate.

In plaintiff's original application, he supplied no information as to his own customary rates. Defendants in their opposition papers argued that there were a number of deficiencies in plaintiff's application, including that there was no evidence [*16] that his lead counsel, Smith, "actually" charged clients anything more than $ 200 per hour. Def. First Mem. at 15. In his reply papers, plaintiff cursorily argued the *Johnson* factors, *see* Pl. First Reply Mem. at 17-19, but still gave no evidence as to his attorney's "customary hourly rate."

After remand from the Second Circuit, the Court held a conference at which it informed Smith that he

needed "to provide evidence of what you actually charged clients," and, more broadly, that the Court had "not been given help . . . as to what . . . a proper rate is, other than what [is] contained in case law," *see* Transcript, dated Oct. 30, 2006 (Docket # 137), at 4, 6-7 -- referring to Reiter's citation of case law as the exclusive evidence that he had provided as to the market rate for his counsel's services.

In the supplemental briefing, Reiter and the defendants submitted some of Smith's retainer agreements in criminal cases. Defendants have appended three of Smith's retainer agreements, dated April 12, 2005, May 4, 2005, and July 16, 2006, which all provide for payment of a flat fee for certain services in defending a criminal case but also specify hourly rates for additional services of between [*17] $ 250 to $ 350 per hour. Def. Supp. Mem. at 6-7; *see also* Smith Retainer Agreements (appended to Smith Affirmation in Response to Letter Written by Jay P. Warren, dated Nov. 20, 2006) (reproduced as Ex. A to Warren Decl.). Smith has one retainer agreement for a "complex criminal tax case" currently pending in this district that calls for $ 350 per hour for all pre-trial services and for disposition of the case prior to trial and $ 450 per hour for the trial of the case. Pl. Supp. Reply Mem. at 8-9; *see also* Letter from Gregory G. Smith, dated Apr. 26, 2007 (Docket # 136) (retainer agreement for representation on a 2007 criminal drug conspiracy charge; flat rate but "in case of dispute," $ 450/hour in and out of court). There is no evidence as to whether the hourly billable rate was actually paid to Smith on any of these cases.

In any event, these rates may be appropriate with respect to payment to Smith on criminal matters but not with respect to civil cases. As is described further in the next section, Smith has extensive criminal experience but, as of 2001 -- the date Reiter retained Smith -- little civil experience. As a result, his hourly rate for criminal cases is of limited utility [*18] for purposes of determining an appropriate rate in this civil case. Notably, plaintiff has supplied no agreements with respect to any civil cases for any of the three attorneys in this matter. Nor have these counsel even asserted that they have ever been paid an hourly rate for civil cases.

3. *Experience of Attorneys*

To support his originally-sought rates, Reiter submitted London and Lennon's resumes as well as affidavits from all three attorneys which described their experience in general terms. *See* Smith Aff.; Lennon Aff.; London Aff.; *see also* Resumes (reproduced in Ex. 1 of Pl. First Mot.). Both Smith and Lennon have significant criminal experience. Smith was admitted in 1988, and worked in the New York County District Attorney's Office from that year until 1995. *See* Smith Aff. P 4. Lennon has been practicing since 1981: she has spent time at the Office of the Special Narcotics Prosecutor, the New York County District Attorney's Office, and the New York City Police Department. *See* Lennon Resume. As to their experience in civil matters, the record is sparse. Smith's affidavit gives only the most generic descriptions of his civil experience. Smith Aff. P 4. He offers no discussion [*19] of his experience in employment cases -- such as descriptions or number of cases filed prior to bringing Reiter's suit, or any other details of what these litigations entailed. Both attorneys indicate only that they "completed several employment discrimination cases in the Southern and Eastern Districts of New York[,] all but the instant case settling out of court for money damages." Pl. Reply Mem. at 16. Smith was admitted to the federal court bar only in 1998 -- three years before the litigation began. Def. First Mem. at 19.

Less information has been provided concerning London. It would appear from her resume that she was admitted to the New York State Bar in either 2000 or 2001 and that, prior to becoming employed with Smith's solo practice in September 2001, she worked at a New York City firm handling largely criminal matters. *See* Resume of Charlesa E. London, undated (reproduced in Ex. 1 to Pl. First Mot.), at 1. [3]

> 3 While Smith and Lennon themselves offer no useful description of their civil experience, the additional information provided by defendants shows that it was very limited as of 2001. *See* Def. Supp. Mem. at 7 n.3.

The lack of significant experience of Reiter's attorneys [*20] in employment discrimination matters is important to the analysis of rates inasmuch as this Court can only award the prevailing market rate for counsel of "similar experience and skill" to Reiter's counsel. *Farbotko v. Clinton County*, 433 F.3d 204, 209 (2d Cir. 2005).

4. *Survey Evidence/Awards in Other Cases*

Reiter has submitted a survey published in 2005 by the National Law Journal which lists fee rates for large law firms in Manhattan. *See* Ex. 4 to Supp. Smith Aff. Reiter argues that the rates at Manhattan's largest law firms are "the best evidence for assessing the market rate here in the Southern District of New York." Pl. Supp. Reply Mem. at 10. There are several problems with this contention. First, the focus on the rates charged by the most expensive firms in this district is inappropriate given that the rate at which counsel is to be compensated here is the rate that would be paid by a "reasonable, paying client, *who wishes to pay the least amount necessary to litigate the case effectively*." *Arbor Hill*, 493 F.3d at 112 (emphasis added). Reiter has not shown that the

rates charged by the large firms in these surveys are the sort of rates that a reasonable plaintiff in an employment [*21] discrimination suit would pay.

Next, Reiter has submitted no evidence that these firms are in the relevant market for determining his attorney's rates. Reiter must show that these large firms are providing "similar services" and that their lawyers are of "'reasonably comparable skill, experience, and reputation.'" *Reiter*, 457 F.3d at 232 (quoting Blum, 465 U.S. at 896 n.11). Reiter has not shown that his counsel have the same "skill, experience, and reputation" in the area of civil litigation as the attorneys in these firms. Id. As noted in the previous section, as of 2001, counsel had extremely limited experience in civil litigation, let alone employment litigation. Nor has Reiter shown that his counsel's firm, which appears to have been essentially a solo practice during the relevant time period, has the "reputation" accorded to the firms listed in the survey.

Whether it justifies their rates or not, the fact is that the large firms listed on the survey have acquired a reputation that allows them to command high rates in the market. Many other firms, in particular smaller firms that may be providing equally capable services, simply do not command anywhere near such rates when it [*22] comes to areas such as employment law litigation.

This Court's knowledge of the range in rates charged by practitioners is based on its own experience largely as a result of its participation in settlement conferences where attorney rates are frequently revealed in private discussions with the Court. *See generally McDonald ex rel Prendergast v. Pension Plan of the NYSA-ILA Pension Trust Fund*, 450 F.3d 91, 96-97 (2d Cir. 2006) ("A district court may also use its knowledge of the relevant market when determining the reasonable hourly rate.") (citing *Miele v. New York State Teamsters Conference Pension & Ret. Fund*, 831 F.2d 407, 409 (2d Cir. 1987)); *Farbotko*, 433 F.3d at 209 (court may consider its "own familiarity with the rates prevailing in the district").

The Court recognizes that high rates have been awarded to counsel at smaller firms where counsel is highly experienced in a particular area of litigation. *See, e.g., Bernier v. Papagianopolous*, 2006 WL 2819590, at *1-2 & n.2 (S.D.N.Y. Oct. 2, 2006) ("an experienced litigator in this area" compensated at $ 400/hour); *Ashkinazi v. Sapir*, 2005 U.S. Dist. LEXIS 8889, 2005 WL 1123732, at *3 (S.D.N.Y. May 10, 2005) ($ 425/hour for partner in small firm who had 26 years [*23] of experience and specialized in employment law); *Raniola v. Bratton*, 2003 U.S. Dist. LEXIS 7199, 2003 WL 1907865, at *6 n.9 (S.D.N.Y. Apr. 21, 2003) ($ 400/hour for "experienced" attorney at a small firm). [4] But case law is also replete with instances where experienced attorneys have been awarded lower rates. *See Tlacoapa v. Carregal*, 386 F. Supp. 2d 362, 370 (S.D.N.Y. 2005) ($ 250/hour for lead attorney and $ 125/hour for junior attorney at small firm of three full-time attorneys); *Pascuiti v. New York Yankees*, 108 F. Supp. 2d 258, 266 (S.D.N.Y. 2000) (awarding $ 250/hour for attorneys with almost 30 years experience in civil rights litigation); *see also Cowan v. Ernest Codelia, P.C.*, 2001 U.S. Dist. LEXIS 185, 2001 WL 30501, at *10 (S.D.N.Y. Jan. 12, 2001) (awarding a sole practitioner who had been an "active civil rights litigator for many years" an hourly rate of $ 250), *aff'd*, 50 Fed. Appx. 36 (2d Cir. 2002). In *Pascuiti*, the court surveyed case law on hourly rates and found that as of 2000, "the range of fees in this District for 'seasoned civil rights litigators,' particularly those in small firms, is between $ 200/hr and $ 300/hr." 108 F. Supp. 2d at 266. The Court notes that a recent survey of case law found that "[w]ithin the [*24] last five years, courts have approved rates ranging from $ 250 to $ 425 per hour for work done by partners in small firms in this district." *Access 4 All, Inc. v. Park Lane Hotel, Inc.*, 2005 U.S. Dist. LEXIS 34159, 2005 WL 3338555, at *4 (S.D.N.Y. Dec. 7, 2005).

4 Reiter's citation to other cases where high rates were awarded, *see* Pl. Supp. Reply Mem. at 5-7, typically involved attorneys with significant civil rights experience. *See, e.g., Sheehan v. Metro. Life Ins. Co.*, 450 F. Supp. 2d 321, 328 (S.D.N.Y. 2006)($ 425/hour reasonable for partner with "decades of experience," who delivered an "effective and thoroughly professional performance")' *Kuper v. Empire Blue Cross & Blue Shield*, 2003 WL 233350111, at *9-10 (S.D.N.Y. Dec. 18, 2003) ($ 425/hour reasonable for attorney with "thirty-five years of litigation experience in the fields of labor and employment law, particularly employment discrimination"), *adopted by*, 2004 U.S. Dist. LEXIS 635, 2004 WL 97685 (S.D.N.Y. Jan. 20, 2004); *New York State NOW v. Pataki*, 2003 U.S. Dist. LEXIS 7272, 2003 WL 2006608, at *2-3 (S.D.N.Y. Apr. 30, 2003) ($ 400/hour and $ 430/hour reasonable for two attorneys who "both have more than 30 years of experience with civil rights and labor and employment law").

Smith does [*25] not represent himself or either of his associates on this case to be "seasoned civil rights litigators" such that they could command a higher rate. Nor has Smith pointed to any evidence suggesting that their practice has garnered a reputation as a leader in any area of the law, received public recognition, or even been involved in significant litigation in the employment law area. Based on the evidence before the Court, Smith's hourly rate must fall at the far lower end of the scale of

reasonable rates for employment discrimination litigators.

5. *Summary*

Reiter has failed to meet his burden "to produce satisfactory evidence in addition to the attorney's own affidavits showing that the requested rates are at the prevailing market level." *Paulino v. Upper W. Side Parking Garage, Inc.*, 1999 U.S. Dist. LEXIS 7544, 1999 WL 325363, at *3 (S.D.N.Y. May 20, 1999) (citing, *inter alia, Blum*, 465 U.S. at 896 n.11). The Court's task has been made particularly difficult because Smith has not submitted evidence with respect to what other employment discrimination attorneys with his level of experience charge for an hourly rate. *See ACE Ltd. v. CIGNA Corp.*, 2001 U.S. Dist. LEXIS 17014, 2001 WL 1286247, at *5 (S.D.N.Y. Oct. 22, 2001) ("Ideally, . . . evidence [*26] [as to hourly rate] should include affidavits from attorneys with similar qualifications stating the precise fees typically charged and paid, during the relevant time period, in the relevant market.") (internal quotation omitted) (citing *Nat'l Helicopter Corp. of Am. v. City of New York*, 1999 U.S. Dist. LEXIS 11702, 1999 WL 562031, at *6 (S.D.N.Y. July 30, 1999)); *Altman v. Port Auth.*, 879 F. Supp. 345, 353 (S.D.N.Y. 1995) (attorney requesting fees "submitted affidavits from three attorneys with substantial experience in employment discrimination cases" who attested to appropriateness of the requested hourly rates).

Based on all the factors discussed above, especially including Smith's relative inexperience in civil litigation in general and employment litigation in particular, the Court concludes that a current rate of $ 275 per hour for Smith would be appropriate. While Lennon seemingly has greater civil trial experience than Smith, *see* Pl. Supp. Reply Mem. at 7, it is not significantly greater and thus a rate of $ 275 per hour would be an appropriate [5] current rate for her as well. Reiter's November 2003 application reflects that he sought only $ 150 per hour for London's time, which was less than half the rate [*27] being sought by Reiter and Lennon. In light of London's inexperience, and the determination that Smith and Lennon should command $ 275 per hour, the Court concludes that $ 150 per hour would be an appropriate current rate for Lennon. *See, e.g., Tlacoapa*, 386 F. Supp. 2d at 370 ($ 125/hour for junior attorney) (citing *Lawson v. City of New York*, 2000 U.S. Dist. LEXIS 15709, 2000 WL 1617014, at *4-5 (S.D.N.Y. Oct. 27, 2000)). Certainly, there are practitioners who charge more than these rates. But, in this Court's experience, practitioners with experience similar to Smith and Lennon, particularly those in solo practices and smaller firms, charge these rates or even less in some instances. The Court finds that the rates it awards here are "what a reasonable, paying client would be willing to pay," *Arbor Hill*, 493 F.3d at 112, particularly keeping in mind the client "wishes to pay the least amount necessary to litigate the case effectively." *Id.*[6]

5 A current rate is being applied as it is well-established that where, as here, litigation spans a number of years, the reasonable hourly rate should be adjusted to account for "the delay factor, either by basing the award on current rates or by adjusting the fee based on [*28] historical rates to reflect its present value." *Missouri v. Jenkins*, 491 U.S. 274, 282, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989)(internal quotation marks and citation omitted); *accord Raniola*, 2003 U.S. Dist. LEXIS 7199, 2003 WL 1907865, at *6.

6 Defendants make various arguments that scattered hours submitted by plaintiff should be billed at a lesser rate because they involved paralegal rather than attorney tasks. *See* Def. Supp. Mem. at 23-24. Because the Court is engaging in across the board reductions of hours, *see* section II.B.1.b & section II.B.2.b-c below, it will exercise its discretion to not subtract hours or reduce rates for the relatively minor number of hours might be characterized as involving non-attorney tasks.

The Court notes further that it rejects the defendants' argument, Def. Supp. Mem. at 24, n.22, that time spent by London reading and digesting deposition transcripts were necessarily those of a paralegal. The same is true for the preparation of trial notebooks. *See Raniola*,2003 U.S. Dist. LEXIS 7199, 2003 WL 1907865, at *5 & n.8 ("a very junior attorney . . . was properly assigned to [handle the trial notebooks], particularly in view of the fact that the plaintiff's attorneys were all either single practitioners or belonged to a very small firm . . . [*29] [and] larger firms are more likely to have a staff of paralegals").

B. Reasonable Hours

The second step in computing the "presumptively reasonable fee" -- which we shall occasionally refer to as the "lodestar" -- is the calculation of reasonable hours.

It is well established that "any attorney . . . who applies for court-ordered compensation in this Circuit . . . must document the application with contemporaneous time records . . . specifying, for each attorney, the date, the hours expended, and the nature of the work done." *New York State Assoc. for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1148 (2d Cir. 1983); *accord Sowemimo v. D.A.O.R. Sec., Inc.*, 2000 U.S. Dist. LEXIS

9180, 2000 WL 890229, at *4 (S.D.N.Y. June 30, 2000), *aff'd*, 1 Fed. Appx. 82 (2d Cir. 2001). The Court's task is to make "a conscientious and detailed inquiry into the validity of the representations that a certain number of hours were usefully and reasonably expended." *Lunday v. City of Albany*, 42 F.3d 131, 134 (2d Cir. 1994). The critical inquiry is "whether, at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures." *Grant v. Martinez*, 973 F.2d 96, 99 (2d Cir. 1992), *cert. denied*, 506 U.S. 1053, 113 S. Ct. 978, 122 L. Ed. 2d 132 (1993); [*30] *accord Nike, Inc. v. Top Brand Co.*, 2006 U.S. Dist. LEXIS 76543, 2006 WL 2946472, at *5 (S.D.N.Y. Feb. 27, 2006), *adopted by*, 2006 U.S. Dist. LEXIS 76540, 2006 WL 288443 (S.D.N.Y. Oct. 6, 2006). In addressing this question, courts should not, however, engage in "an *ex post facto* determination of whether attorney hours were necessary to the relief obtained." *Grant*, 973 F.2d at 99.

Additionally, the law requires that if a court finds that claimed hours are "excessive, redundant, or otherwise unnecessary," it should exclude those hours from its "lodestar" calculation. *Hensley*, 461 U.S. at 434; *accord Quaratino v. Tiffany & Co.*, 166 F.3d 422, 426 n.6 (2d Cir. 1999); *Gierlinger v. Gleason*, 160 F.3d 858, 876 (2d Cir. 1998); *Luciano v. Olsten Corp.*, 109 F.3d 111, 116-17 (2d Cir. 1997); *In re Stock Exch. Options Trading Antitrust Litig.*, 2006 U.S. Dist. LEXIS 87825, 2006 WL 3498590, at *11 (S.D.N.Y. Dec. 4, 2006). In addition, in cases where the documentation of hours is "vague or incomplete," the court may also reduce the award. *E.g., Rosso v. Pi Mgmt. Assocs., L.L.C.*, 2006 U.S. Dist. LEXIS 27127, 2006 WL 1227671, at *2 (S.D.N.Y. May 3, 2006) (citing *In re Painewebber Ltd. P'ships Litig.*, 2003 U.S. Dist. LEXIS 13377, 2003 WL 21787410, at *4 (S.D.N.Y. Aug. 4, 2003)).

However, the Supreme Court noted in *Hensley* that "[t]here is no precise [*31] rule or formula for making these determinations." 461 U.S. at 436. And, because "it is unrealistic to expect a trial judge to evaluate and rule on every entry in an application," a court may apply an across-the-board percentage cut "as a practical means of trimming fat from a fee application." *Carey*, 711 F.2d at 1146.

We now examine the hours expended with respect to the two fee applications submitted by Reiter: (1) the first application, which covered the period from the beginning of the case until the entry of the original judgment; and (2) the second application, which covers the period following entry of judgment (including the appeal) through the present.

1. *First Application: Time Expended Through Judgment*

Reiter's first application relates to the work performed in this case through the entry of judgment on October 24, 2003. (Docket # 92). Reiter seeks a total of 1,713.30 hours of attorney time. *See* Pl. First Mot.; *see also* Def. Supp. Mem. at 3. The defendants argue that certain of the hours sought should be eliminated, *see* Def. Supp. Mem. at 15-23; *see also* Def. First Mem. at 22-25; others should be reduced, *see* Def. Supp. Mem. at 23-25; *see also* Def. First Mem. at 31; and that [*32] the hours in general should be subject to an across-the-board reduction for inefficient and excessive expenditures of time. *See* Def. Supp. Mem. at 25-33; Def. First Mem. at 25-32. In response to these objections, Reiter explains that, in order to be successful against "a much larger adversary[,] . . . it was necessary for plaintiff's attorneys to devote a lot of time, energy and effort throughout the course of this litigation . . ." Pl. Supp. Reply Mem. at 7. Although Reiter addresses many of the defendants' objections, Reiter does not challenge defendants' calculations as to how much time the fee application allots to different tasks-an exercise Reiter himself did not perform. Thus, except where otherwise noted, the Court accepts as accurate the summary of time set forth in defendants' papers.

a. *Hours to be Eliminated*

Defendants proffer several categories of time they argue should be eliminated entirely as compensable hours. Def. Supp. Mem. at 15-23. We have considered all of them and discuss the following categories below: (1) over 400 hours expended on the plaintiff's motion for summary judgment, *see* Def. Supp. Mem. at 15-17; (2) more than 70 hours spent on two motions to strike, [*33] *see id.* at 18-19; *see also* Def. First Mem. at 24; and (3) several summary time entries that are "inconsistent with contemporaneous records." *See* Def. Supp. Mem. at 21-22; Def. First Mem. at 22-25.

i. Time Spent on Plaintiff's Motion for Summary Judgment. Both parties submitted motions for summary judgment to Judge Koeltl. Reiter does not dispute that the time spent on his own motion totaled 477.1 hours (Smith--102 hours; Lennon--123.6 hours; London--251.5 hours). *See* Def. First Mem. at 22-24. This does not include the nearly 230 hours that plaintiff spent in opposing defendants' motion for summary judgment. Def. Supp. Mem. at 15. Defendants argue that "no reasonable attorney, having completed discovery, could believe there were no material disputed facts with regard to whether retaliation was a motivating factor for the TA's decision to transfer plaintiff . . . ." *Id.* at 17. Alternatively, defendants contend that much of the time spent on plaintiff's summary judgment motion is duplicative of the 230 hours spent opposing defendants' motion for summary judgment. *Id.* at 15.

In support of this expenditure of time, Reiter states that he had a "good faith basis," Pl. Reply Mem. at 19, to bring [*34] the motion and that the motion gave "Judge Koeltl the opportunity to review the evidence to determine whether or not a trial could have been avoided upon a finding that defendants' stated reason was a subterfuge and defendants did not have a legitimate business reason justifying plaintiff's demotion." Pl. Supp. Reply Mem. at 17-18. However, Reiter simply does not address the question of whether he could have reasonably believed, following discovery, that defendants could not dispute material facts in plaintiff's motion. In denying Reiter's motion, Judge Koeltl dedicated a single paragraph to it, noting that:

> [the] motion merely recounts facts already presented in the plaintiff's response to the defendants' summary judgment motion. These responses provide no basis to decide as a matter of law that the plaintiff is entitled to judgment, and are sufficient only to deny the defendants' motion on the last retaliation claim.

Reiter I, 2002 U.S. Dist. LEXIS 18537, 2002 WL 31190167, at *11. That Reiter could not prevail on his motion should have been clear given that defendants had offered three non-discriminatory reasons for the NYCTA's decision to transfer Reiter in 2000. *See id.* While Reiter argues that these reasons [*35] were "subterfuge," *see* Pl. Supp. Reply Mem. at 18, he makes no effort to justify his claimed belief that there was no genuine dispute of fact on this point. Reiter himself admits the case was an "entirely fact intensive, circumstantial case." Pl. First Reply Mem. at 15.

For these reasons, the Court will eliminate the 477.1 hours attributable to plaintiff's motion for summary judgment. [7]

> 7 A further reason justifying this elimination is the fact that Reiter's expenditure of more than 700 hours dedicated to summary judgment motion practice is extraordinary. It is equivalent to a single attorney working 8 hours a day exclusively on the motions, 5 days a week, for more than 4 months. Having examined the papers relevant to these motions available in the Court file, the Court finds this amount of time excessive. Notably, courts of this jurisdiction have rejected fee requests relating to a single motion as "excessive" based on much less time than what Reiter has claimed. *See, e.g., Blumenschine v. Prof'l Media Group, LLC*, 2007 U.S. Dist. LEXIS 23448, 2007 WL 988192, at * 17 (D. Conn. Mar. 30, 2007)(136.2 hours spent researching and drafting plaintiff's summary judgment motion disallowed because the motion "was denied on [*36] all grounds"; all but one ninth of the time plaintiff spent opposing the defendant's motion for summary judgment disallowed; and 24.35 hours dedicated to the reply disallowed); *Brady v. Wal-Mart Stores, Inc.*, 455 F. Supp. 2d 157, 212 (E.D.N.Y. 2006)(200 hours plaintiff spent on successful effort to oppose summary judgment is unreasonable; 10% reduction); *Nike*, 2006 U.S. Dist. LEXIS 76543, 2006 WL 2946472, at *7-8 (more than 241.5 hours on a motion for summary judgment is "excessive" and "not commensurate with this kind of memorandum;" 25% reduction granted; *See Spray Holdings v. Pali Fin. Group, Inc.*, 277 F. Supp. 2d 323, 325-26 (S.D.N.Y. 2003) (123.75 hours on a motion to dismiss is "excessive on its face;" 15% reduction applied). Based on this excessive amount of time, we include the approximately 230 hours attributable to plaintiff's opposition of the defendants' motion for summary judgment on the list of items reflecting excessive hours. *See* section II.B.1.b.iv below.

ii. *Time Spent on Plaintiff's Two Motions to Strike.* Reiter filed two motions to strike during the course of summary judgment briefing. *See Reiter*, 2002 U.S. Dist. LEXIS 18537, 2002 WL 31190167, at *14; *see also* Motion to Strike, filed Mar. 26, 2002 (Docket # 28) ("First [*37] Mot. to Strike"); Motion to Strike, filed May 25, 2002 (Docket # 39) ("Second Mot. to Strike"). Defendants have calculated, and Reiter does not dispute, that nearly 75 hours were spent on these two motions (Smith--12 hours; Lennon--7.5 hours; London--55.25 hours). *See* Def. Supp. Mem. at 19; Def. First Mem. at 24.

First, on March 26, 2002, Reiter moved to strike portions of the defendants' papers in support of the motion for summary judgment. *See* First Mot. to Strike. Judge Koeltl denied this motion as "untimely" and on the merits. *Reiter I*, 2002 U.S. Dist. LEXIS 18537, 2002 WL 31190167, at *14. Plaintiff justifies the expenditure of time on this motion largely on the ground that Judge Koeltl found, in ruling on the defendants' motion for sanctions, that Reiter's motion to strike had not been "entirely baseless" or brought in bad faith. *See* Pl. Supp. Reply Mem. at 19; *see also Reiter I*, 2002 U.S. Dist. LEXIS 18537, 2002 WL 31190167, at *14. Judge Koeltl's ruling, however, does not address whether it was reasonable for plaintiff to have brought the motion.

Reiter filed his second motion to strike also during the pendency of the summary judgment motions. *See* Second Mot. to Strike. Specifically, Reiter sought to

strike as irrelevant a letter submitted [*38] to the Court by defense counsel that had attached the State Supreme Court decision denying Reiter's Article 78 motion. *See* Second Mot. to Strike. But, as Judge Koeltl found, the State Supreme Court's decision related to Reiter's federal due process claim and, indeed, the claim was dismissed based on the state court decision. *Reiter I*, 2002 U.S. Dist. LEXIS 18537, 2002 WL 31190167, at *13; *see also* Memorandum Endorsement, dated May 28, 2002 (Docket # 40) (finding motion to strike was not "necessary").

In conclusion, the motions to strike related to the summary judgment proceedings were simply unnecessary. In any event, inasmuch as they were intertwined with the summary judgment motions, and the time spent on those motions was excessive to begin with, no additional time will be permitted for them. [8]

8 Because of this ruling, it is unnecessary to address defendants' contention that London's "typing time" should be eliminated as "secretarial" work. *See* Def. Supp. Mem. at 22. It appears that this time is attributable solely to the motions for summary judgment and the motions to strike. *See id.*, at 22 n.18.

iii. Time Summaries That Do Not Match Contemporaneous Records. Reiter concedes that "9.9 hours of Mr. Smith's time [*39] . . . should be disallowed because the requested time is not supported by contemporaneous records." Pl. Supp. Reply Mem. at 21 (citing Def. [Supp.] Mem. at 22). [9] Likewise, Reiter withdraws his request for compensation for London's time on June 13, 2001, November 7, 2001, and September 2, 2003--totaling 6.5 hours--because "there are no contemporaneous time records" for those days. Pl. Supp. Reply Mem. at 21.

9 This includes 3.4 hours of Smith's time for September 10 and 18, 2001, and 6.5 hours of Smith's work on September 4-5, 2003. Pl. Supp. Reply Mem. at 20. He also concedes that ".9 hours controls for his June 29, 2001 entry.": *Id.* at 21.

Reiter further "concedes" that there is no contemporaneous record for London's work on September 5, 2002, but asks that the Court compensate her 11.5 hours nonetheless. *See id.*; *see also* Declaration of Charlesa E. London, dated Mar. 12, 2007 (attached as Ex. 3 to Supp. Smith App.), P 16. Reiter acknowledges, however, that the "specific time is not stated." *Id.* Inasmuch as the law is clear in this Circuit that applications for attorney's fees must be based on contemporaneous time records, the Court eliminates 11.5 hours attributable to London's work. [*40] *Carey*, 711 F.2d at 1147 ("contemporaneous time records are a prerequisite for attorney's fees in this Circuit.").

Reiter has conceded that certain hours should be compensated at a 50% rate because they involve travel time. *See* Pl. Supp. Reply Mem. at 23. Instead, for the sake of simplicity, we have simply subtracted 50% of the hours involved. This amounts to: Smith--5.15 hours; Lennon--.5 hours; London--3.25 hours. Def. Supp. Mem. at 24.

iv. Summary of Time To Be Eliminated. Based upon the above, the amounts attributable to each attorney are as follows:

	Smith	Lennon	London
Billed Hours	720.50	712.50	
Hours for Summary	47.00 (motion)	76.70 (motion	176.75 (motion)
Judgment Motion	55.00 (reply)	46.90 (reply)	74.75 (reply)
Hours on First Mot.	12.00	5.8	37.25
to Strike			
Hours on Sec. Mot.	--	1.7	18.00
to Strike			
Hours Without Adequate	9.90	--	18.00
Records			
Travel Time	5.15	0.5	3.25
Total Hours After	591.45 hours	148.70	384.50 hours
Elimination			

See Pl. First Mot. at 1; Def. First Mem. at 22-25; Def. Supp. Mem. at 15-20; 21-22.

b. *Percentage Reduction*

i. *Background.* The defendants make a number of other arguments that the hours claimed by Reiter's counsel are unreasonable--some relating to specifically identified hours, *see, e.g.,* Def. [*41] Supp. Mem. at 25-27 nn. 26-29, and some seeking across-the-board reductions (30% for Smith and 50% for Lennon and London). *See, e.g.,* Def. Supp. at 25, 28-33. We now consider whether there should be a percentage reduction with respect to hours not attributable to the summary judgment motion or the motion to strike (or the other hours eliminated in the previous section).

The Second Circuit has stated that a district court is not required to "set forth item-by-item findings concerning what may be countless objections to individual billing items." *Lunday,* 42 F.3d at 134. Rather, as already discussed, a court may use a percentage deduction "'as a practical means of trimming fat from a fee application.'" *McDonald ex rel Prendergast,* 450 F.3d at 96 (quoting *Carey,* 711 F.2d at 1146). "Particularly where the billing records are voluminous, it is less important that judges attain exactitude, than that they use their experience with the case, as well as their experience with the practice of law, to assess the reasonableness of the hours spent." *Alveranga v. Winston,* 2007 U.S. Dist. LEXIS 96749, 2007 WL 595069, at *5 (E.D.N.Y. Jan. 29, 2007) (internal quotations and citations omitted); *accord Saunders v. Salvation Army,* 2007 U.S. Dist. LEXIS 22347, 2007 WL 927529, at *3 (S.D.N.Y. Mar. 27, 2007) [*42] ("Rather than comb through detailed time sheets, a court can "exclude excessive and unreasonable hours from its fee computation by making an across-the-board reduction in the amount of hours."). Case law is replete with instances where courts have made percentage reductions in the amounts requested. *See, e.g., Alveranga,* 2007 U.S. Dist. LEXIS 96749, 2007 WL 595069, at *6 (40%); *Sec. Exch. Comm. v. Goren,* 272 F. Supp. 2d 202, 213 (E.D.N.Y. 2003) (30%); *Elliott v. Bd. of Educ.,* 295 F. Supp. 2d 282, 286 (W.D.N.Y. 2003) (10%); *Tokyo Electron Ariz., Inc. v. Discreet Indus. Corp.,* 215 F.R.D. 60, 64-65 (E.D.N.Y. 2003) (10%) *Rotella v. Bd. of Educ.,* 2002 U.S. Dist. LEXIS 507, 2002 WL 59106, at *6 (E.D.N.Y. Jan. 17, 2002) (20%-30%); *Sabatini v. Corning-Painted Post Area Sch. Dist.,* 190 F. Supp. 2d 509, 522 (W.D.N.Y. 2001) (15%); *Quinn v. Nassau County Police Dep't,* 75 F. Supp. 2d 74, 78 (E.D.N.Y. 1999) (20%-30%); *Perdue v. City Univ.,* 13 F. Supp. 2d 326, 346 (E.D.N.Y. 1998) (20%); *Am. Lung Ass'n v. Reilly,* 144 F.R.D. 622, 631 (E.D.N.Y. 1992) (40%).

A reduction may be applied for "vagueness, inconsistencies, and other deficiencies in the billing records." *Kirsch v. Fleet St., Ltd.,* 148 F.3d 149, 173 (2d Cir. 1998) (20% reduction). In addition, a reduction [*43] may be applied based on limited success obtained. *Hensley,* 461 U.S. at 437 (court "may simply reduce the award to account for the limited success"); *accord Patterson v. Balsamico,* 440 F.3d 104, 124 n.13 (2d Cir. 2006).

We now discuss the circumstances that relate to the request for an across-the-board reduction.

ii. Pursuit of Unsuccessful Claims. We begin by addressing the extent to which there should be a reduction based on plaintiff's pursuit of a number of theories and claims that were ultimately rejected. [10] The defendants correctly note that Reiter was not successful on a number of claims. *See* Def. Supp. Mem. at 28-32; *see also generally Reiter I,* 2002 U.S. Dist. LEXIS 18537, 2002 WL 31190167. But, as defendants themselves concede, *see* Def. First Mem. at 28, hours spent on unsuccessful claims may be awarded if the claims are "'inextricably intertwined' and 'involve a common core of facts' . . ." *Quaratino,* 166 F.3d at 425 (quoting *Reed v. A.W. Lawrence & Co.,* 95 F.3d 1170, 1183 (2d Cir. 1996)); *accord Murphy v. Lynn,* 118 F.3d 938, 952 (2d Cir. 1997) ("A plaintiff's lack of success on some of his claims does not require the court to reduce the lodestar amount where the successful and the unsuccessful claims [*44] were interrelated and required essentially the same proof."), *cert. denied,* 522 U.S. 1115, 118 S. Ct. 1051, 140 L. Ed. 2d 114 (1998) (citation omitted). With the exception of plaintiff's due process claim, [11] it does not appear that any of the unsuccessful claims pursued by plaintiff involved exploration during the course of discovery of facts that would not also have been explored anyway as a result of Reiter's pursuit of his successful retaliation claim. *See* Def. Supp. Mem. at 31.

10 While arguably any reduction based on pursuit of unsuccessful claims could be applied after the lodestar figure has been calculated, *see, e.g., Kassim v. City of Schenectady,* 415 F.3d 246, 255-56 (2d Cir. 2005), it is of no mathematical significance whether such a reduction is made based on the attorney's hourly rate, the number of reasonable hours, or the product of these two figures.

11 Reiter argued that "the appeals process that he used to review his Year 1999 performance evaluation violated his due process rights. [He] claim[ed] that the NYCTA failed to follow its own internal procedures when he proceeded through the appeals process." *See Reiter I,* 2002 U.S. Dist. LEXIS 18537, 2002 WL 31190167, at *13.

In defense of these claims, Reiter provides a "brief background [*45] statement" to "demonstrate[] the interrelationship of the claims made . . . in his complaint." Pl. Supp. Reply Mem. at 26. The facts given as background, however, fail to describe the events connected to his due process claim. Thus, he has failed to show that

this claim was factually and legally related to any of his other claims. *See* Pl. Reply Mem. at 19-22; Pl. Supp. Reply Mem. at 26-27. Nor does Reiter describe the extent to which he spent time pursuing this claim. Consequently, some reduction in hours is warranted for this claim. The time records submitted make it impossible to determine how much was attributable to this particular claim. Thus, a percentage reduction is the only way to account for it.

iii. Time Spent After the NYCTA Offered to Reinstate Reiter. Defendants next seek to eliminate all attorney hours expended between August 14 and September 9, 2003, because they reflect an effort to get Reiter reinstated to a position that had job responsibilities additional to the ones he originally had. *See* Def. Supp. Mem. at 20-21. The NYCTA notes that it had offered to reinstate Reiter to his former position as Deputy Vice President of Engineering Services, an offer he initially [*46] rejected. *See* Letter from Stephen M. Stimell to Judge Conboy, dated Aug. 4, 2003 (reproduced as Ex. A to Supp. Stimell Decl.).

It appears that during this period Reiter's counsel dedicated some 76.75 hours (Smith--48 hours and London--28.75 hours), both in and out of court to: (1) prepare for and attend two proceedings before Judge Koeltl; (2) meet with Reiter; (3) research various issues of equitable relief; (4) seek a permanent injunction; and (5) draft Reiter's equitable relief submission, including affidavits. *See* Hourly Worksheets 2001-2003 (reproduced as Ex. 2 of Pl. Mot.). The issues raised in relation to equitable relief included requests not merely related to reinstatement but also with respect to (1) back pay; (2) front pay; (3) seven vacation days to compensate for the time spent at trial; and (4) prejudgment interest. *See Reiter II,* 2003 U.S. Dist. LEXIS 17391, 2003 WL 22271223, at *13-16.

With respect to reinstatement, Reiter asserts that his efforts were justified because the NYCTA "offered to reinstate plaintiff to what was then a watered down version of his original position," and that he fought only to "be restored to his original position with his original responsibilities[.]" Pl. Supp. Reply Mem. [*47] at 20. Judge Koeltl's decision makes clear, however, that Reiter sought to be reinstated to an enhanced VP Engineering position, essentially a promotion. *See Reiter II,* 2003 U.S. Dist. LEXIS 17391, 2003 WL 22271223, at *12. The decision also reflects that in August 2003, the NYCTA "agreed that [Reiter] could be returned to his prior position as DVP Engineering Services with the core responsibilities he had prior to the transfer." *Id.* Given that much of what Reiter was seeking was unnecessary, the fees sought for this phase of the case are excessive.

iv. Evidence of Excessive Time Spent. There are a number of individual examples of entries that reflect excessive time spent on various tasks. For example: (1) on April 21, 2001, 3 hours by Smith preparing waivers of service for deposition witnesses; (2) on June 23, 2001, 2.5 hours by Smith drafting five deposition notices; (3) 80.25 hours total by the three attorneys for reviewing and digesting deposition transcripts, *see* Def. Supp. Mem. at 26 & nn. 27-29; (4) 19.25 hours of London's time spent over two weeks on "research relating to and drafting voir dire," *see id.* at 27; *see also* London's Hourly Worksheets Nov. 14, 2002-Nov. 27, 2002; and (5) 230 hours attributable [*48] to opposing the defendants' motion for summary judgment. *See* section II.B.1.a.i & n.8 above (discussion of his motion for summary judgment); *see generally* Hourly Worksheets 2001-2003. The Court agrees that these hours are beyond what was required for the tasks involved.

v. Vague Entries. Plaintiff's application contains a number of vague entries. Most notably, there are a number of entries listed only as "[t]rial [p]reparation," which together amount to close to 90 hours. *See* Smith's Hourly Worksheets, Jan. 13, 2003-Jan. 22, 2003; Lennon's Hourly Worksheets, Jan. 10, 2001 & Jan. 14, 2001; London's Hourly Worksheets, Jan. 10, 2003 & Jan. 17, 2003. Where there are vague entries of this kind, sometimes referred to as "block billing," the entries make it impossible for the Court to determine if the "trial preparation" involved compensable tasks (such as drafting questions for witness examinations) or non-compensable tasks (such as photocopying of exhibits). *See, e.g., Molefi v. Oppenheimer Trust,* 2007 U.S. Dist. LEXIS 10554, 2007 WL 538547, at *7-8 (E.D.N.Y. Feb. 15, 2007) ("because block billing renders it difficult to determine whether, and/or the extent to which, the work done by . . . attorneys is duplicative or [*49] unnecessary, courts apply percentage cuts where there is a substantial amount of block billing in a fee request.") (15% reduction) (internal quotations and citations omitted); *Williamsburg Fair Hous. Comm. v. N.Y. City Hous. Auth.,* 2007 U.S. Dist. LEXIS 11328, 2007 WL 486610, at *5 (S.D.N.Y. Feb. 14, 2007) ("Where, as here, time entries are duplicative or vague, an across-the-board reduction in the number of hours spent, with a concomitant decrease in the fee award, is well within the court's discretion.") (approximately 50% reduction); *accord Alveranga,* 2007 U.S. Dist. LEXIS 96749, 2007 WL 595069, at *5 & n.13 (where "entries in plaintiff's fee application combine tasks in a way that makes it difficult for the Court to assess whether the time logged was reasonable," percentage reduction was justified); *Klimbach v. Spherion Corp.,* 467 F. Supp. 2d 323, 332 (W.D.N.Y. 2006) (10% reduction for numerous "block entries"); *Aiello v. Town of Brookhaven,* 2005 U.S. Dist. LEXIS 11462, 2005 WL 1397202, at *3 (E.D.N.Y. June 13, 2005) (time entries "rife with vague entries for 'conferences,' 'meetings,' and 'research,' without any further explanation of those ser-

vices," making it difficult to "parse out whether the number of hours spent on the work performed was reasonable") (10% [*50] reduction). Accordingly, some reduction is required by this circumstance as well.

c. *Conclusion as to Percentage Reduction*

There is also a larger problem with respect to the hours being sought for the first fee application in this case. This case was not an unusually complex one. It involved approximately six depositions by plaintiff, no discovery disputes that involved formal motion practice; and a six-day trial. *See* Def. First Mem. at 2. With the elimination of time related to Reiter's summary judgment motion, his two motions to strike and the lack of contemporaneous records, as described in section II.B.1.a. above, the overall number of hours sought for the first fee application is still 1,124.65 hours. A review of case law suggests that even this figure is higher than what has been claimed or allowed in employment discriminations case with a single plaintiff and a short trial. *See, e.g., Blumenschine,* 2007 U.S. Dist. LEXIS 23448, 2007 WL 988192, at *15 (994.8 hours billed by six attorneys and a paralegal in association with a six-day jury trial); *Petrovits v. New York City Transit Auth.,* 2004 U.S. Dist. LEXIS 174, 2004 WL 42258, at *6 (S.D.N.Y. Jan. 7, 2004) (court approved 885.22 hours for two attorneys and six-day jury trial).

After [*51] considering each of the circumstances discussed in section II.B.1.b.i through section II.B.1.b.v above, the Court concludes that the hours remaining after the eliminations in section II.B.1.a. above should be reduced by 15% for each attorney. Accordingly counsel's reasonable hours for their work from March 7, 2000 through entry of judgment following the jury trial are as follows: (1) Smith--502.73 hours; (2) Lennon--126.40 hours; and (3) London--326.83 hours. The total, 955.96 hours, while still high, is in line with a reasonable number of hours to expend on a case of this kind.

d. *The Request for Overall Reduction for Lack of Success*

Arriving at this total "does not end the inquiry," however. *Hensley,* 461 U.S. at 434. There are other considerations that may lead a court to adjust the fee upward or downward. *Id.* The lodestar figure may be adjusted on the basis of the "results obtained." *Id.* "Indeed 'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" *Farrar v. Hobby,* 506 U.S. 103, 114, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992) (quoting Hensley, 461 U.S. at 436). [12] Thus, where a party prevails, but obtains far lesser relief than might have been expected, case [*52] law reflects that a court consider an adjustment in the lodestar amount. *See, e.g., Parrish v. Sollecito,* 280 F. Supp. 2d 145, 173 (S.D.N.Y. 2003) (where plaintiff was awarded $ 500,000 in punitive damages, but received $ 15,000 in compensatory damages, "far less than she sought[,]" award was reduced by 10%).

> 12 Once again, it does not matter mathematically whether the reduction is taken against the hours expended alone or against the hours expended multiplied by the hourly rate.

As was noted in *Kassim v. City of Schenectady:*

> a district judge's authority to reduce the fee awarded to a prevailing plaintiff below the lodestar by reason of the plaintiff's "partial or limited success" is not restricted either to cases of multiple discrete theories or to cases in which the plaintiff won only a nominal or technical victory.

415 F.3d 246, 256; *accord Farrar,* 506 U.S. at 114 (requiring court to consider "'the amount of damages awarded as compared to the amount sought'" in evaluating the reasonableness of a claim for attorney's fees) (quoting *City of Riverside v. Rivera,* 477 U.S. 561, 585, 106 S. Ct. 2686, 91 L. Ed. 2d 466 (1986) (Powell, J., concurring)); *Access 4 All,* 2005 U.S. Dist. 34159, 2005 WL 3338555, at *6 ("in the Second Circuit, fees may be [*53] reduced based on the limited success of the plaintiff, even if the case was litigated on the basis of a single, unitary theory, and even if the plaintiff recovered more than nominal relief.") (citing *Kassim,* 415 F.3d at 253-55). Defendants argue that a reduction should be taken based on the degree of success obtained by Reiter. *See* Def. Supp. Mem. at 40-41.

Reiter's complaint did not reflect specific amounts sought for damages. His arguments with respect to pain and suffering damages at trial, however, were sufficient to convince the jury to award him $ 140,000 in such damages. These damages were reduced, however, to $ 10,000 by remittitur. *See Reiter II,* 2003 U.S. Dist. LEXIS 17391, 2003 WL 22271223, at *8-11. For equitable relief, Reiter was reinstated to his former position as he sought but was denied a number of other items, specifically: (1) seven vacation days he used to attend this trial; (2) back pay for missed raises or pension benefits; and (3) prejudgment interest. [13] 2003 U.S. Dist. LEXIS 17391, [WL] at *13-16. He also did not obtain a permanent injunction to prevent future retaliation. 2003 U.S. Dist. LEXIS 17391, [WL] at *15. As noted, Reiter's main victory was that he was awarded reinstatement to his former position. While this represents a substantial degree [*54] of success, it certainly does not reflect complete success on his claims given the other categories of damages or relief pursued by Reiter.

13 Reiter was also denied front pay, but it appears that he sought this pay only in the event he was not given reinstatement. *See* Sur-Reply at 3.

Plaintiff argues that his "primary objective in his litigation was reinstatement." *See* Sur-Sur-Reply at 3. Indeed, language in *Kassim* suggests that a court should consider the plaintiff's "main objective" in analyzing the degree of success. *See* 415 F.3d at 255. The Court finds it difficult to determine precisely what the "main objective" was in this case. Certainly, to the extent plaintiff was seeking damages, his case was largely a failure. But to the extent he was seeking reinstatement, it was a success. Notably, this was not a case--as is true of many employment discrimination suits--where plaintiff was without a job and thus reinstatement was critical to his livelihood. Rather, plaintiff had a job at precisely the same salary of the job to which he sought reinstatement. In these circumstances, the Court concludes that money damages was the more important--if not the main--objective to Reiter. While no [*55] significant reduction is warranted, the Court concludes that the 15% reduction suggested by defendants, see Def. Supp. Mem. at 41, is too high. It concludes, rather, that Reiter should obtain 90% of the fees he seeks, and thus the Court reduces the award by 10% based on Reiter's limited success. The total number of hours for each attorney is: (1) Smith--452.46 hours; (2) Lennon--113.76 hours; and (3) London--294.15 hours.

e. *Conclusion as to First Application*

Plaintiff should be awarded $ 199,828.75 with respect to the First Fee Application. This figure is derived from the following calculations:

Smith:	452.46 hours x $ 275	$ 124,426.50
Lennon:	113.76 hours x $ 275	$ 31,284.00
London:	294.15 hours x $ 150	$ 44,122.50
TOTAL:	860.37 hours	$ 199,833.00

2. *Second Application: Entry of Judgment to Present*

Plaintiff seeks fees from the date of the judgment against him through the present, a period that encompasses the preparation of his first fee application, the Court's ruling on that fee application, Reiter's appeal of the ruling, and the preparation of the supplemental fee application. Since filing the application, Reiter has submitted time sheets reflecting hours spent on additional work: (1) researching [*56] and drafting his reply memorandum; (2) reviewing defendants' application for a writ of certiorari; and (3) responding to defendants' Sur-Reply. *See* Hourly Worksheets (reproduced as Ex. 4 to Smith Supp. Reply Aff.); *see also* Sur-Sur-Reply, at 1 (Hourly Worksheets attached).

It is settled that the time spent on a fee application is itself compensable. *See, e.g., Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1183-84 (2d Cir. 1996); *Valley Disposal, Inc. v. Cent. Vt. Solid Waste Mgmt. Dist.*, 71 F.3d 1053, 1059 (2d Cir. 1995). However, "if the fee claims are exorbitant or the time devoted to presenting them is unnecessarily high, the judge may refuse further compensation or grant it sparingly." *Valley Disposal*, 71 F.3d at 1059 (citing *Gagne v. Maher*, 594 F.2d 336 (2d Cir. 1979), *aff'd on other grounds*, 448 U.S. 122, 100 S. Ct. 2570, 65 L. Ed. 2d 653 (1980)). The Court has attempted to piece together the various time records-a task that Reiter himself did not perform--and concludes that Reiter seeks fees for 474.2 hours for attorneys on the fee application. This breaks down as follows:

	Smith	Lennon	London
First Fee Application	103 [14]	29.3	---
Appeal	110.2	32.3	---
Second Fee Application	44	13.5	---
Supplemental Reply	62.9	56.7	13.50
Writ of Certiorari	4.50	--	--
Sur-Sur-Reply	4.30	--	
Total	328.90	131.80	13.50

14 This [*57] figure removes six hours that Smith says he expended on paralegal tasks. *See* Pl. Supp. Mem. at 1 n.1 (six hours of paralegal work). These hours are added back in at the rate of $ 100 per hour as reflected in section II.B.2.c below. The hours billed for secretarial services are discussed in the next section.

See Def. Supp. Mem. at 34-35; Sur-Reply at 1; Sur-Sur-Reply Hourly Worksheets, Jan.-Mar. 2007 (reproduced as Ex. 4 to Smith Supp. Reply Aff.). Defendants make numerous challenges to these fees. *See* Def. Supp. Mem. at 34-39; *see also* Sur-Reply.

a. *Hours to Be Eliminated*

Certain hours submitted by Reiter on this application should not be compensated. First, Smith spent 17.3 hours on a motion to reconsider this Court's elimination of 8.1 hours of his time. *See* Def. Supp. Mem. at 35-36. This includes 9.3 hours on a motion to reconsider the decision and another 8 hours on the objections to the denial of this motion. *Id.* at 35. This time is not compensable for two reasons. As defendants note, "[e]xpending 17.3 hours to recover 8.1 hours is unreasonable." Def. Supp. Mem. at 36. Moreover, no reasonable attorney would have moved for reconsideration initially. The subject of the motion for reconsideration--the [*58] elimination of certain hours--was a topic that Reiter had not addressed in the briefing on the original motion and thus he had plainly waived any objection. As this Court held and the Second Circuit affirmed: "Reiter had the opportunity to address this discrepancy in his reply papers yet did not do so." *Reiter IV*, 224 F.R.D. 157, 2004 WL 2072369, at *3; *see also Reiter V*, 457 F.3d at 233 n.2.

Second, the 8 hours (Smith--5.5; Lennon--2.5) Reiter spent researching the viability of appealing this Court's November 15, 2006 Order is unreasonable. *See* Order (Docket # 124). That Order required only that Reiter respond to defendants' discovery requests on the subject of his fee application. Reiter's argument that the Order "might violate a previous Order[,]" *see* Pl. Supp. Reply Mem. at 30, and/or presented "an issue of privilege and confidentiality," *id.*, was addressed in this Court's denial of Reiter's motion for reconsideration. *See* Memorandum Endorsement, dated November 16, 2006 (Docket # 125). As the Court then explained: Reiter was free to file a privilege log. *Id.* Thus, any time Reiter spent "researching the implications of disclosing other representation," Pl. Supp. Reply Mem. at 30, was unnecessary [*59] and should not be compensated. Accordingly, 5.5 hours of Smith's time and another 2.5 hours of Lennon's time will be deducted from the hours sought.

Third, defendants contend that 13 hours a Ms. St. Villiere spent typing Smith's contemporaneous billing notes should be eliminated as secretarial duties. *See* Def. Supp. Mem. at 35. While Reiter responds that Villiere was hired as a paralegal, *see* Pl. Supp. Reply Mem. at 29, this fails to address the contention that the tasks she performed were secretarial. Defendants correctly point out, *see* Def. Supp. Mem. at 22-23, 35, that secretarial time is compensable only if it is the custom in the market in which fees were sought to bill such time separately, *Missouri*, 491 U.S. at 296-97--a point that Reiter has not addressed in his papers. In any event, case law supports exclusion of this time. *See, e.g., Marisol A. v. Giuliani*, 111 F. Supp. 2d 381, 390 (S.D.N.Y. 2000) ("secretarial services are part of overhead and are not generally charged to clients"); *Ginsberg v. Valhalla Anesthesia Assocs., P.C.*, 1998 U.S. Dist. LEXIS 387, 1998 WL 19997, at *4 n.3 (S.D.N.Y. Jan. 20, 1998). [15]

15 The Court rejects defendants' argument that Reiter should not have researched [*60] the question of whether the district court had jurisdiction to award fees for hours spent on the appeal. Def. Supp. Mem. at 36. Also, the court will allow the 1.5 hours spent by Lennon at the 2006 status conference. *See Carey*, 711 F.2d at 1146 ("Under section 1988, prevailing parties are not barred as a matter of law from receiving fees for sending a second attorney to depositions or an extra lawyer into court to observe and assist.").

In sum, the amounts attributable to each attorney following the elimination of these hours are as follows:

	Smith	Lennon	London	Secretary
Billed Hours	328.90	131.80	13.50	13.00
Motion to Reconsider	17.30	--	--	--
Objections to Court's	5.50	2.50	--	--
Nov. 15, 2006 Order				
Typing	--	--	--	13.00

	Smith	Lennon	London	Secretary
Total Hours After Elimination	306.10	129.30	13.50	0

b. Claims as to Excessive Hours

The defendants have pointed to a number of areas in which apparently excessive hours have been sought. *See* Def. Supp. Mem. 37-39. The Court agrees that the following items appear to be greater than what could reasonably have been required:

1. 12.8 hours (Smith--6.9; Lennon--5.9) searching files in response to defendants' 2006 discovery requests. *Id.* at 37.

2. 68.7 hours (Smith--50.1; Lennon--18.6) of research performed [*61] by Smith and Lennon in 2003 in connection with the first fee application and the appeal, *see id.* at 38, and 25.6 additional hours (Smith--21.4; Lennon--4.2) of research performed by Smith and Lennon from 2004-2006. *Id.* at 39. The Court finds this excessive in light of the nature of the briefing produced by the plaintiff. [16]

3. 28 hours for strategy discussions between Smith and Lennon from 2003-2006. *See id.* at 37.

4. 43.3 hours (Smith--37.6; Lennon--5.7) spent preparing for oral argument before the Second Circuit. *Id.* at 37.

5. 5.4 hours of Lennon's time reviewing Smith's 2003 reply brief. *See id.* at 39; *see also* Sur-Reply at 2.

6. 126.2 hours (56--Smith; 56.7--Lennon; 13.5--London) for drafting Reiter's supplemental reply brief on the current motion. *See* Hourly Worksheets from January 22-March 13, 2007 (reproduced as Ex. 4 to Smith Supp. Reply Aff.). While new arguments were made in the supplemental reply brief, the fact that there were "approximately 400 pages" of exhibits, *see* Sur-Sur-Reply, at 2, is of little significance in that the exhibits attached consisted largely of past filings in this matter, past letters between the parties, a transcript, as well as affirmations and past [*62] complaints from plaintiff's counsel--in other words, documents with which Reiter's counsel was presumably familiar. *See Trs. of Local 807 Labor-Management Health & Pension Funds v. River Trucking & Rigging, Inc.*, 2005 U.S. Dist. LEXIS 31083, 2005 WL 3307080, at *4 (E.D.N.Y. Dec. 2, 2005) ("42.25 hours is an unreasonable amount of time to have spent researching and drafting the Reply Brief").

[17]

16 This second category of research encompasses the time Smith and Lennon spent researching market rates in connection with both the first and second fee application. *See* Def. Supp.Mem. at 38-39. As defendants note, the 7.8 hours spent on March 27, 2004 is excessive, *inter alia*, because it "yielded one case cited in the First Application,. . . which this Court rejected as inapposite[]," *see id.*, and the remaining 13.6 hours spent on researching this issue for the second fee application yielded "three cases, one National Law Journal article, and one bankruptcy case report. . . ." *Id.* at 39.

17 In addition, 4.5 hours of Lennon's time recorded as "rev'd file" on November 1, 2003 is hopelessly vague and supports a reduction. *See* Def. Supp.Mem. at 36.

In addition, there is the question of whether the 448.9 hours remaining in the fee [*63] application following the elimination of hours reflected in the previous section is appropriate in light of the hours reasonably expended on the case as a whole.

A frequently cited case, *Davis v. City of New Rochelle*, 156 F.R.D. 549 (S.D.N.Y. 1994), found that the award courts had made for time spent on fee applications ranged between 8% and 24% of the award for time spent on the case itself. *Id.* at 561. More recent cases are similarly within this range. *See, e.g., Baird v. Boies, Schiller & Flexner LLP*, 219 F. Supp. 2d 510, 525 (S.D.N.Y. 2002) (awarding on fee application 10% of total attorney's fees awarded); *see also cf. Irish v. City of New York*, 2004 U.S. Dist. LEXIS 3770, 2004 WL 44454, at *8 (S.D.N.Y. Mar. 10, 2004) (awarding six hours for work on fee application where 210 hours in overall fees or 3%). Thus, in one recent case, a litigant sought 33% of the overall fees as expenses for the fee application. *See*

Knoll v. Equinox Fitness Clubs, 2006 U.S. Dist. LEXIS 76577, 2006 WL 2998754, at *3-4 (S.D.N.Y. Oct. 20, 2006). Based on the fact that the fee sought was large in proportion to the fees involved in the underlying case, the court reduced the award to "approximately ten percent of the main fee award." 2006 U.S. Dist. LEXIS 76577, [WL] at *4.

In terms of raw hours, [*64] the 448.9 hours at issue are far greater than what courts have found to be a reasonable expenditure of time for an attorney's entire fee application. *See, e.g., Brady*, 455 F. Supp. 2d at 212 (rejecting 257 hours spent on fee litigation as "surprisingly high"); *Murray v. Comm'r of N.Y. Dep't of Educ.*, 354 F. Supp. 2d 231, 241 (E.D.N.Y. 2005) (150 hours for fee application is "grossly amplified" and noting that even in a complex case, a fee application should take about 30 hours). The Court recognizes that these cases, unlike Reiter's, do not involve an appeal and thus the Court will not reduce this figure simply to come in line with cases that involved only district court work. Nonetheless, the Court notes that, with the hours attributed to the appeal subtracted from the total the number of hours sought for the fee application--331.79 hours--is unreasonable in light of all the factors discussed above. It represents an attorney working 40 hour weeks for more than 8 weeks. Having carefully examined the submissions from plaintiff, the Court find that these hours far exceed what is appropriate.

c. *Conclusion as to the Second Application*

In light of all the reasons given above, the Court will reduce [*65] the time sought by each counsel for the second fee application by 40%. Accordingly, the totals allowed for each attorney on the second fee application are as follows:

Smith:	183.66 hours x $ 275	$ 50,506.50
Lennon:	77.58 hours x $ 275	$ 21,334.50
London:	8.1 hours x $ 150	$ 1,215.00
TOTAL:	269.34 hours	$ 73,056.00

We add to this figure $ 600 to account for the paralegal time expended by Smith for a total of $ 73,656.00 in fees.

C. Expenses and Costs

An award of attorney's fees should "'include those reasonable out-of-pocket expenses incurred by attorneys and ordinarily charged to their clients.'" *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 763 (2d Cir. 1998) (quoting *United States Football League v. Nat'l Football League*, 887 F.2d 408, 416 (2d Cir. 1989)); *accord id.*, 143 F.3d at 763 (citing *Kuzma v. IRS*, 821 F.2d 930, 933-34 (2d Cir. 1987)). Case law reflects that the expenses recoverable under Title VII and other fee-shifting statutes are not limited to the costs taxable by statute and rule such as 28 U.S.C. § 1920; Fed. R. Civ. P. 54(d)(1); and Local Civil Rule 54.1. *See, e.g., Disney Enters., Inc. v. Merchant*, 2007 U.S. Dist. LEXIS 26400, 2007 WL 1101110, at *8 (N.D.N.Y. Apr. 10, 2007); *Raniola*, 2003 U.S. Dist. LEXIS 7199, 2003 WL 1907865, at *7-8; [*66] *Shannon v. Fireman's Fund Ins. Co.*, 156 F. Supp. 2d 279, 304-05 (S.D.N.Y. 2001).

Costs associated with mailings, photocopies, and court fees are compensable. *See, e.g., Molefi*, 2007 U.S. Dist. LEXIS 10554, 2007 WL 538547, at *8; *Levy v. Powell*, 2005 U.S. Dist. LEXIS 42180, 2005 WL 1719972, at *12 (E.D.N.Y. July 12, 2005) (allowing recovery of costs for "photocopies, deposition transcripts, expert witness fees, travel, filing fees, messenger services, mailings, and facsimiles."); *Lawson ex rel. Torres v. City of New York*, 2000 U.S. Dist. LEXIS 15709, 2000 WL 1617014, at *5 (S.D.N.Y. Oct. 27, 2000) (reimbursing, as part of attorney's fee award, costs for photocopying and transcripts). A litigant may not, however, recover for expenditures associated with "routine office overhead." *Pinner v. Budget Mortgage Bankers, Ltd.*, 336 F. Supp. 2d 217, 222 (E.D.N.Y. 2004), aff'd, 169 Fed. Appx. 599 (2d Cir. 2006).

1. *Costs Related to the First Fee Application*

Reiter requests expenses relating to the period covered by the first fee application totaling $ 12,090.72. *See* Pl. Reply Mem. at 23; Pl. Supp. Reply Mem. at 39. Defendants find these costs to be "excessive," Def. Supp. Mem. at 43, and object to the following elements of Reiter's stated costs:

1. photocopies (commercial)	$ 818.27
2. photocopies (at office)	$ 585.20
3. postage	$ 161.02
4. courier	$ 85.00
5. local facsimile	$ 48.00
6. stenographer fee	$ 433.35

See [*67] *id.* at 43-44; *see also* Pl. Supp. Reply Mem. at 39-41.

The defendants argue that $ 1,403.47 for photocopies should be excluded because "there is no indication that these copies were 'used or received in evidence'" as required by the Local Rule, and in any event, "$ 585.20 was for making 2,926 copies on November 12, 2003, long after dispositive motions had been made and after the trial was completed." Def. Supp. Mem. at 43-44; *see also* Sur-Reply at 2. As already noted, however, a plaintiff recovering expenses is not limited to costs taxable by statute or rule. Also, the expenditure occurred shortly before the fee application and Reiter represents that the materials copied "includ[e], but [are] not limited to, correspondence, notes, complaint(s) and motions," *see* Receipt, dated Nov. 12, 2003 (reproduced in Ex. 3 to Pl. First Mot.), accumulated "during the course of and in furtherance of Plaintiff's litigation." *See* Pl. Supp. Reply Mem. at 40.

Defendants' reliance on Local Civil Rule 54.1(c) to defeat Reiter's claims for postage and courier services, *see* Def. Supp. Mem. at 44, is also misplaced. *Kuzma*, 821 F.2d at 933 (photocopying, postage, covers, exhibits, typing, transportation and parking [*68] fees "clearly represent the reasonable costs of litigation"); *see also Disney*, 2007 U.S. Dist. LEXIS 26400, 2007 WL 1101110, at *9 ("While such items as delivery charges and postage are not typically regarded as taxable costs under 28 U.S.C. § 1920, . . . they are recoverable under a fee shifting statute . . . .") (citations omitted).

With respect to facsimile charges, defendants argue that "there is no basis to charge $1 per fax where the cost incurred is that of a local telephone call." *See* Def. Supp. Mem. at 43. Reiter has not come forth with evidence that such charges are currently "ordinarily charged" to clients. Accordingly, this charge will be eliminated.

Finally, the defendants cite to Local Civil Rule 54.1(c)(2) to argue that a "stenographer fee . . . is not chargeable to the [defendants]" because "it appears that the deposition transcript of Joseph Siano was not relied on by the Court in ruling on dispositive motions and was not used at trial." *Id.* at 44. Once again, defendants incorrectly rely on an irrelevant rule and thus their objection must be rejected.

Accordingly, following the reduction of the $ 48.00 charge for faxes, the recoverable costs associated with the Reiter's First Application total $ [*69] 12,042.72.

2. *Costs Related to the Second Fee Application*

Reiter also seeks payment of the $ 3,397.60 in costs stemming from his appeal which the Second Circuit awarded to him, *see* Order, dated Sept. 5, 2006 (reproduced as Ex. 6 to Supp. Smith Aff.), "plus $ 208.80 in copying costs, [a] $ 14.57 Staples charge and $ 17.04 [in] Federal Express fees." Pl. Supp. Reply Mem. at 42. Defendants do not contest that they owe the $ 3,397.60 awarded by the Second Circuit, *see* Def. Supp. Mem. at 43, although it is unclear as of this time whether this sum has been paid. [18] They assert that there is no basis to allow additional expenses given the Second Circuit's award of costs. *See* Def. Supp. Mem. at 44. But, once again, this argument ignores the fact that costs awarded generally by statute or rule differ from those available in an attorney's fees application. Accordingly, plaintiffs are entitled to an award of these expenses.

18 It apparently had not been paid as of the filing of plaintiff's reply memorandum. *See* Pl. Supp. Reply Mem. at 42.

In sum, defendants shall reimburse Reiter $ 3,638.01 for costs incurred during the Second Fee Application.

Conclusion

Accordingly, Reiter's application (Docket ## [*70] 93,126) is granted. He is entitled to an award as follows:

Attorney's fees for the first application:	$ 199,833.00
Attorney's fees for the second application:	$ 73,656.00

Costs for the first application:	$ 12,042.72
Costs for the second application:	$ 3,638.01
TOTAL	$ 289,169.73

Because the record is unclear as to the extent to which defendants have paid some of these fees or costs already, the parties are directed to confer on this question and to present, within 10 days, an appropriate judgment for entry by the Court. [19]

19 To the extent the parties believe the Court has made any mathematical or calculation errors in this Opinion, such errors should be brought to the Court's attention by means of a letter at the same time.

Dated: September 25, 2007

New York, New York _

GABRIEL W. GORENSTEIN

United States Magistrate Judge

WILLIAMSBURG FAIR HOUSING COMMITTEE, et al., Plaintiffs, - against - NEW YORK CITY HOUSING AUTHORITY, et al., Defendants , - and - UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH, INC., et al., Intervenor-Defendants

76 Civ. 2125 (RWS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2005 U.S. Dist. LEXIS 5200

March 31, 2005, Decided
April 4, 2005, Filed

SUBSEQUENT HISTORY: On reconsideration by, Costs and fees proceeding at, Motion granted by Williamsburg Fair Hous. Comm. v. New York City Hous. Auth., 2005 U.S. Dist. LEXIS 19401 (S.D.N.Y., Sept. 9, 2005)

PRIOR HISTORY: Williamsburg Fair Hous. Comm. v. Ross-Rodney Hous. Corp., 599 F. Supp. 509, 1984 U.S. Dist. LEXIS 22440 (S.D.N.Y., 1984)

COUNSEL: [*1] Attorneys for Plaintiff: ALAN LEVINE, ESQ. New York, NY; PUERTO RICAN LEGAL DEFENSE & EDUCATION FUND, INC. New York, NY, By: FOSTER MAER, ESQ. Of Counsel.

Attorneys for Defendants: RICARDO ELIAS MORALES, ESQ., General Counsel, NEW YORK CITY HOUSING AUTHORITY, New York, NY, By: GARY NESTER, ESQ. NANCY M. HARNETT, ESQ. CORINA L. LESKE, ESQ. ELISSA M. KRELL, ESQ. Of Counsel.

JUDGES: ROBERT W. SWEET, U.S.D.J.

OPINION BY: ROBERT W. SWEET

OPINION

Sweet, D.J.,

The Williamsburg Fair Housing Committee *et al.* (the "Plaintiffs") have moved for an award of attorneys' fees and expenses in this class action commenced against one of the defendants in this action, The New York City Housing Authority ("NYCHA"). NYCHA has moved for an order striking Plaintiffs' motion. For the reasons set forth, Plaintiffs' motion is granted in part as set forth below, and NYCHA's motion is denied.

Prior Proceedings

A. *The Present Motions*

Plaintiffs' application for attorneys' fees and expenses was originally filed on February 5, 2003. After extensions of time had been granted so that the parties could engage in settlement discussions, NYCHA's opposition to this motion was filed on July 16, 2003. Additional [*2] efforts to reach a settlement were made, and Plaintiffs' reply brief was filed on June 18, 2004. On July 7, 2004, NYCHA submitted a letter brief seeking to strike Plaintiffs' application for attorneys' fees and expenses. Both motions were marked as fully submitted without oral argument on November 1, 2004. Additional briefing was subsequently submitted by NYCHA and from the Plaintiffs.

B. *Prior History Of This Action*

This class action was commenced on May 11, 1976 by non-white individuals who alleged that as a result of a system of racial, ethnic and religious quotas operated by NYCHA, Plaintiffs and members of their class were denied access to low-income public housing in certain housing developments and publicly financed apartments -- *i.e.*, Jonathan Williams Plaza, Independence Towers, Taylor-Wythe Houses, 115-123 Division Avenue, and

Bedford Gardens (the "Williamsburg Developments") -- in the Williamsburg section of Brooklyn, New York. According to the complaint, this quota system violated NYCHA regulations; regulations of the United States Department of Housing and Urban Development, 24 CFR § 1.4(b)(2)(ii); and §§42 U.S.C. 1981, [*3] 1982, 1983, and 3604(b).

On May 5, 1978, the Honorable Charles H. Tenney approved a Consent Decree executed by the parties that provided in pertinent part as follows:

> Non-white applicants for rentals at Jonathan Williams Plaza, Independence Towers and 115-123 Division Avenue will be given preference until 32% of the dwelling units in those developments are rented to non-white families. At Bedford Gardens the goal for the adjustment period is that 35% of the apartments shall be rented to non-whites. The completion of the initial renting of apartments at [Roberto] Clemente Plaza ("Clemente Plaza") [1] will see that development rented 51% to non-whites and 49% to whites. The 60% white/40% non-white ratio at Taylor-Wythe Houses will not be changed.

Williamsburg Fair Housing Committee v. New York City Housing Authority, 450 F. Supp. 602, 607 (S.D.N.Y. 1978).

> 1 Construction of Clemente Plaza was completed only after Plaintiff's original action was brought. *Williamsburg*, 450 F. Supp. at 607.

[*4] In 1989, the Plaintiffs filed a contempt motion challenging NYCHA's continuing use of racial preferences in violation of the 1978 Consent Decree.

On April 19, 1991, Judge Tenney so ordered a Stipulation and Settlement executed by the parties (the "1991 Stipulation") that provided apartments to 190 non-whites who had been denied public housing in the Williamsburg Developments because of their race.

In early 1993, the Plaintiffs reviewed tenant information and NYCHA reports with respect to vacancy rates and turnover rates for apartments in the Williamsburg Developments. Based on this review, the Plaintiffs concluded: (1) that there had been a significant decline in the vacancy rate among white-occupied apartments and (2) that as a result of the transfer of white-occupied apartments to other white tenants, the rate of desegregation in the Williamsburg Developments had been significantly slowed.

In January, 1995, the Plaintiffs submitted an order to show cause that the Court declined to sign. Instead, the submission was treated as a motion for: (1) an order holding the defendants in civil contempt, (2) a temporary restraining order, and (3) expedited discovery. The Plaintiffs' motion [*5] papers alleged, *inter alia*, that NYCHA

> wrongfully threatened to evict and sanction tenants, rigged tenant elections, denied use of common facilities, ignored complaints of death threats and physical assaults by Hasidic tenants on non-Hasidic tenants, delayed life threatening [apartment] repairs, and otherwise coerced, intimidated, threatened and interfered with tenants on account of race, color, national origin and religion.

(Declaration of Foster Maer signed January 31, 1995 ("Maer Decl."), at P 3.) The motion also alleged that NYCHA (1) "waged a war" against a group of African-American and Latino residents organized under the name Concerned Residents by "threatening" to evict them (*id.* P 8), (2) ignored or condoned "physical assaults and death threats made by Hasidic tenants against the group's members and supporters" (*id.*), and (3) wrongfully denied Concerned Residents' requests to meet in the NYCHA community center. (*Id.* at PP 61-67).

On June 5, 1996, the February, 1995 motion was dismissed for failure to prosecute with leave granted to renew on the original papers. [2]

> 2 By Order dated June 21, 1995, the Court rejected plaintiffs' motion for a preliminary injunction with respect to use of the community center at Taylor-Wythe Houses by Concerned Citizens. On June 11, 1997, Plaintiffs withdrew the allegations that NYCHA refused to repair "life-threatening" conditions in minorities' apartments. (Letter from Foster Maer of June 11, 1997, at 1.)

[*6] In the fall of 1996, an effort was commenced to explore the possibility of settling the dispute concerning the transfer of apartments among white tenants. Meetings were held and correspondence was exchanged. These efforts were unsuccessful and the parties subsequently engaged in discovery and motion practice.

On February 20, 1998, NYCHA moved to terminate the Consent Decree, and in May, 1998, Plaintiffs cross-moved for contempt and other relief. The Plaintiffs also met with counsel for HUD in an effort to settle the

litigation, and they sought the assistance of certain Latino officials and activists.

In November, 1998, with HUD Chief Administrative Law Judge Alan Heifetz ("Heifetz") acting as a mediator, NYCHA and the Plaintiffs resumed negotiations. After more than two years of settlement discussions between Plaintiffs and NYCHA, the parties reached an agreement. Further negotiations ensued, and a Settlement Agreement was executed by the parties [3] on May 30, 2002.

> 3 Pursuant to a request by NYCHA, the United Jewish Organizations of Williamsburg, Inc. ("UJO") was included as a signatory to the Settlement Agreement.

[*7] Pursuant to the Court's standard motion practice, a Fed. R. Civ. P. 23(e) fairness hearing was held on Wednesday, September 25, 2002. That same day, the Settlement Agreement was so ordered by the Court.

The Settlement Agreement provided for: (1) the immediate termination as to NYCHA of both the 1978 Consent Decree and the 1991 Stipulation; (2) changes to NYCHA's lease-succession rules; (3) an independent arbiter, selected by the parties, to oversee lease successions for a period of three years and sixty days after entry of the Court's endorsement of the Settlement Agreement; (4) a special waiting list for up to 70 persons who between 1991 and 1993 may not have had the opportunity to request an apartment in the Williamsburg Developments; and (5) the offer of 150 Section 8 housing vouchers [4] to current Williamsburg Development residents. All of the provisions of the Settlement Agreement are race-neutral.

> 4 The vouchers were offered pursuant to Section 8(o) of the United States Housing Act of 1937. *See* 42 U.S.C. § 1437f.

[*8] Discussion

Pursuant to the Civil Rights Attorneys Fees Award Act of 1976, 42 U.S.C. § 1988, [5] Plaintiffs seek an award of $ 1,381,005.00 in attorneys' fees associated with: (1) the investigation that commenced in 1993 of reports concerning the alleged illegal transfer among white tenants of apartments in the Williamsburg Developments; (2) attempts to work with NYCHA to address this alleged transfer problem; (3) the prosecution of plaintiffs' January, 1995 motion and May, 1998 cross-motion; (4) opposition to defendants' February, 1998 motion; and (5) negotiations culminating in the September, 2002 Settlement Agreement.

> 5 Section 1988 provides, in pertinent part, that "in any action or proceeding to enforce a provision of sections 1981, . . . 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs ... ." 42 U.S.C. § 1988(b).

[*9] In opposition to Plaintiffs' application, NYCHA argues that the Settlement Agreement does not qualify as a judgment, consent decree, or any other document entitling the Plaintiffs to attorneys' fees because: (1) the Court did not dictate its terms; (2) in contrast to the 1978 Consent Decree and the 1991 Stipulation, in which the Court explicitly retained jurisdiction, the Settlement Agreement delegated oversight responsibility to a private arbiter; and (3) the Court's review of the Settlement Agreement, while fully compliant with Fed. R. Civ. P. 23(e) on judicial approval of class action settlements, did not rise to the level of scrutiny applied to a consent decree.

A. The Plaintiffs Are Prevailing Parties

1. The Second Circuit Has Adopted A Broad Construction Of The Term "Prevailing Party"

NYCHA has argued that Plaintiffs are not entitled to attorneys' fees pursuant to Section 1988(b) because they do not meet the Supreme Court's definition of "prevailing parties." *See Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 604, 149 L. Ed. 2d 855, 121 S. Ct. 1835 (2001). The [*10] *Buckhannon* court held that "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur*" to justify an award of attorneys' fees pursuant to the fee-shifting provisions of either the Fair Housing Amendment Act, 42 U.S.C. § 3613(c)(2), or the Americans with Disabilities Act, 42 U.S.C. § 12205. *Id.* at 605.

NYCHA has interpreted *Buckhannon* to hold that litigants are entitled to "prevailing party" status only if they have "[secured] a judgment on the merits or a court-ordered consent decree." (Def. Mem. Opp. Pl's Application Attys.' Fees and Expenses, at 13.)

NYCHA's interpretation of *Buckhannon* has been rejected by the Second Circuit. *See Preservation Committee of Erie County v. Federal Transit Administration*, 356 F.3d 444, 452 (2d Cir. 2004) (adopting the view that "*Buckhannon* does not limit fee awards to enforceable judgments on the merits or consent decrees.") Rather, the Second Circuit has read *Buckhannon* to hold that "status as a "prevailing party" is conferred [*11] whenever there is a 'court ordered change [in] the legal relationship between [the plaintiff] and the defendant' or a 'material alteration of the legal relationship of the parties.'" *Id.* (quoting *Texas State Teachers Ass'n v. Garland Inde-*

pendent School Dist, 489 U.S. 782, 792, 103 L. Ed. 2d 866, 109 S. Ct. 1486 (1989) (alterations in original) (internal citations omitted)); *see also Torres v. Walker*, 356 F.3d 238, 244 (2d Cir. 2004) (stating that "according to the [*Buckhannon*] Court, to be a prevailing party, there must be a 'judicially sanctioned change in the legal relationship of the parties' that bears the 'necessary judicial *imprimatur*.'") (quoting *Buckhannon*, 532 U.S. at 605); *Roberson v. Giuliani* 346 F.3d 75, 79-80 (2d Cir. 2003) (stating that "in order to be considered a 'prevailing party' after *Buckhannon*, a plaintiff must not only achieve some 'material alteration of the legal relationship of the parties,' but that change must also be judicially sanctioned") (quoting *Buckhannon*, 532 U.S. at 604); *New York State Federation of Taxi Drivers, Inc. v. Westchester County Taxi and Limousine Com'n*, 272 F.3d 154, 158 (2d Cir. 2001) (*per curiam* [*12]) (same).

2. The Settlement Agreement Materially Altered the Legal Relationship Of The Parties

NYCHA has not, and cannot, seriously challenged that the Settlement Agreement satisfies the first prong of *Buckhannon*'s "prevailing party" test -- *i.e.*, whether the legal relationship of the parties has been materially altered. As described above, the Settlement Agreement mandated that NYCHA: (1) modify its rules concerning the succession of tenancies; (2) for a period of three years and sixty days, submit to Heifetz documentation concerning all apartments for which NYCHA has approved lease successions; (3) abide by Heifetz' determination concerning the legitimacy of any such lease succession; (4) offer 150 Section 8 housing vouchers to tenants of the Williamsburg Developments; (5) revise its waiting list for the Williamsburg Developments so as to afford a priority to certain persons who were affected by the practices that were the subject of this litigation; and (6) share responsibility for lease successions with the Plaintiffs.

Based on the foregoing, it is determined that the Settlement Agreement materially altered the legal relationship of the parties.

3. The [*13] ***Settlement Agreement Carries Sufficient Judicial Imprimatur To Justify An Award Of Attorneys' Fees***

As described above, in order to establish that they are entitled to attorneys' fees pursuant to Section 1988, Plaintiffs must demonstrate not only that some material alteration of the legal relationship between the parties was achieved, but also that the relief so provided carried sufficient judicial *imprimatur*. *See Roberson*, 346 F.3d at 80.

a. The Settlement Agreement Disposed Of The Under-lying Action With Respect To NYCHA

The Plaintiffs argue that sufficient judicial imprimatur exists with respect to the Settlement Agreement because the lawsuit has not been dismissed and is still pending. There is at least some authority from this district to support the general proposition that judicial imprimatur exists with respect to a partial settlement where "the underlying litigation continued in full force" and the parties to the agreement "remained before the Court." *Brandner Corp. v. V-Formation, Inc.*, 2004 U.S. Dist. LEXIS 27848, No. 96 Civ. 3163 (JSR), 2004 WL 1945761, at *2 (S.D.N.Y. Mar. 4, 2004).

Here, NYCHA is not before the Court in connection with the [*14] underlying litigation. The Settlement Agreement states explicitly that it shall have the effect of dismissing Plaintiffs' action against NYCHA. Paragraph one of the Settlement Agreement states as follows:

> The Consent Decree entered on May 5, 1978, the Stipulation and Order dates April 17, 1991, and the underlying action are hereby dissolved, extinguished, and for all purposes terminated and dismissed as to NYCHA; and all rights, duties and obligations as to NYCHA created thereunder shall cease to exist. All pending motions and cross-motions are hereby withdrawn with prejudice.

(09/25/02 Settlement Agreement at P 1.) Since NYCHA is not currently before the Court, there is no basis for recognition of judicial imprimatur pursuant to the rule suggested by the Brandner court.

b. The Settlement Agreement Did Not Expressly Retain The District Court's Enforcement Jurisdiction

The Second Circuit has held that in the context of a stipulation of settlement, a district court's express retention of enforcement jurisdiction over the agreement is a sufficient demonstration of judicial *imprimatur* to convey prevailing party status on the plaintiff. *See Torres*, 356 F.3d at 245 [*15] (holding that a so-ordered stipulation of dismissal failed to satisfy the *Buckhannon* judicial *imprimatur* requirement in part because the court had not expressly retained jurisdiction over enforcement of the terms of settlement); *Roberson*, 346 F.3d at 84 (holding that a dismissal in which the court expressly retained jurisdiction to enforce the settlement terms satisfied the *Buckhannon* judicial *imprimatur* requirement) (citing *Kokkonen v. Guardian Life Ins. of America*, 511 U.S. 375, 128 L. Ed. 2d 391, 114 S. Ct. 1673 (1994)).

However, the Settlement Agreement contains no such term expressly retaining the Court's enforcement

jurisdiction. Rather, the Settlement Agreement merely lists the terms of the settlement.

Plaintiffs argue that the mere fact that the Court so ordered the Settlement Agreement is sufficient judicial *imprimatur* to justify an award of attorneys' fees under 42 U.S.C. § 1988. This argument has been flatly rejected by the Second Circuit. See *Torres*, 356 F.3d at 244 (stating that the "'so ordered' stipulation of dismissal in this case does not carry with it a 'sufficient judicial imprimatur' to [*16] warrant treatment as a monetary judgment . . . .")

c. ***The Settlement Agreement Physically Incorporated The Terms Of Settlement And There Is Other Evidence That The Court Intended To Place Its Imprimatur On The Settlement***

The Second Circuit has stated that judicial *imprimatur* can be found where the court physically incorporates the terms of settlement into its order and there is also some other evidence that the court intended to place its *imprimatur* on the settlement. *Id.* at 244-45 n.6. As stated above, the document so ordered by the Court on September 25, 2002 enumerated all terms of the agreement in their entirety.

Moreover, there is ample evidence that the Court intended to place its *imprimatur* on this settlement: The Court held multiple conferences to assist in reaching a settlement, participated in an effort to resolve contested issues, and reviewed the settlement as required by Fed. R. Civ. P. 23(e). Also, a fairness hearing was held and the Court approved the Settlement Agreement immediately after such hearing.

d. ***The Settlement Agreement Created Obligations To Be Performed And Enforced By*** [*17] ***The Court***

Judicial *imprimatur* can also be found where a so-ordered stipulation of settlement (1) contains "obligations of the court that [are] beyond the power of the parties to perform and that [can] be enforced only by the [court]" and (2) where the court has "carefully reviewed the terms of the [settlement] . . . . " *Torres*, 356 F.3d at 245 (citing *Geller v. Branic Int'l Realty Corp.*, 212 F.3d 734 (2d Cir. 2000)).

As described above, the Settlement Agreement provided for specified amendments to NYCHA's lease-succession rules. To ensure YCHA's enforcement of the amended lease-succession rules, the Settlement Agreement also specified the following procedure for the periodic review of decisions by NYCHA to approve lease-succession applications concerning rental units in the Williamsburg Developments. The Settlement Agreement provided as follows:

> Within 30 calendar days of the end of each calendar quarter, NYCHA will forward to Alan W. Heifetz, Esq. ("Heifetz") a list of those units at [the Williamsburg Developments] at which, during the quarter, and subject to the terms of this agreement, persons have been advised that [*18] their application for lease succession have been approved. The list shall be accompanied by the document and information upon which NYCHA relied both to evaluate and to grant the request for succession ("Administrative Record"). ...
>
> Pursuant to this Settlement Agreement, Heifetz shall review each decision to grant succession at the developments ... . Heifetz shall determine on the basis of the Administrative Record as a whole whether a decision to grant succession is without a reasonable basis. ...
>
> If Heifetz finds that a decision to grant succession is without a reasonable basis, he shall advise NYCHA in writing of his findings and the specific reasons therefor no later than 45 days after the close of all submissions. NYCHA shall send the affected person a copy of Heifetz's finding which, by reason of NYCHA's agreement to be bound by that finding, shall constitute NYCHA's final and binding determination of the person's remaining family member claim. Nothing contained herein shall abrogate any rights the affected person may otherwise have to challenge the final and binding determination in a court of competent jurisdiction, nor shall anything contained herein be deemed to [*19] confer upon the affected person any right to sue Heifetz.

(Settlement Agreement at P 5.)

The above-described provisions relating to post-approval review of lease successions are sufficient to establish judicial *imprimatur*. First, since the above-described review process is not subject to oversight by NYCHA, [6] it is an obligation that is beyond the power of the parties to perform. *See Torres*, 356 F.3d at 245. Second, in his capacity as arbiter selected by the parties, Heifetz performs a function that, pursuant to the Settlement Agreement, would otherwise be required of this Court. Therefore, maintenance of the post-approval review process is functionally equivalent to an obligation

undertaken by the Court, and it can be enforced only by the Court. *See id.* In the event that NYCHA fails to provide to Heifetz the required lease-succession information, it would be this Court's obligation to determine whether a civil contempt order is warranted. *See Hester Indus., Inc. v. Tyson Foods, Inc.*, 160 F.3d 911, 917 n.2 (citing *Kokkonen*, 511 U.S. at 375).

> 6 The Settlement Agreement makes clear that Heifetz does not act on behalf of NYCHA, HUD or any other administrative agency. Paragraph 14 states that "it is the parties' and Heifetz's understanding that Heifetz is participating in these proceedings solely by virtue of the parties' agreement and is not serving in any official capacity or pursuant to any statute or regulation."

[*20] Finally, it is undisputed that this court has carefully reviewed the terms of the Settlement Agreement, as required by the Second Circuit. *See Torres*, 356 F.3d at 245. As described above, the Court undertook a review of the settlement terms as required by Rule 23(e), and it so ordered the Settlement Agreement only after a fairness hearing was conducted.

e. Preservation Coalition Does Not Bar Plaintiffs' Recovery of Attorneys' Fees

According to NYCHA, the Second Circuit's decision in *Preservation Coalition*, 356 F.3d 444, bars Plaintiffs' recovery of attorneys' fees. In *Preservation Coalition*, an historic preservation organization alleged that various federal and state agencies had violated the National Historic Preservation Act, the National Environmental Policy Act, and the Transportation Act by failing to consider and address the impact of developing an area of Buffalo's waterfront on an historic Erie Canal terminus. *See Preservation Coalition*, 356 F.3d at 448. In particular, the historic preservation organization challenged a Final Environmental Impact Statement ("FEIS") as inadequate because it failed to [*21] consider a subsequently excavated historic slip wall, and moved for an injunction against further construction and a writ of mandamus ordering the agencies to prepare a Supplemental Environmental Impact Statement ("SEIS"). *See id.*

The district court denied the injunction, but ordered the agencies to prepare an SEIS to address the issues raised by the discovery of the slip wall. *See id.* Thereafter, the district court entered a stipulation and order which memorialized the parties agreement that the development project should include the newly discovered slip wall; dismissed the historic preservation organization's claims; vacated the district court's prior orders; required the agencies to prepare a new FEIS, which the historic preservation organization reserved the right to challenge; and thereafter awarded fees and costs of approximately $ 167,000. *See id.*, at 449.

On appeal, the Second Circuit affirmed in part and vacated in part, holding that the historic preservation organization could only recover fees for obtaining the Court-ordered SEIS, but not for any work thereafter, including the stipulation and order that settled the litigation. The [*22] Second Circuit explained that:

> We agree with appellants that, under *Buckhannon* -- which was decided after the settlement was reached -- appellee is not entitled to recover the fees and costs associated with obtaining the Stipulation and Order that dismissed the case with prejudice. The effect of the Stipulation and Order was to vacate the district court's orders providing for ongoing judicial involvement and to begin the environmental review process anew. This Stipulation and Order is functionally a private settlement agreement that the Supreme Court concluded does not provide prevailing party status to a plaintiff because, by its own terms, it eliminated the ongoing judicial oversight in favor of restarting the review process from scratch.

Id. at 451.

Preservation Coalition is distinguishable on its facts. There, the stipulation and order that settled the litigation merely provided that the parties would submit themselves to an environmental review process conducted and enforced by the relevant administrative agencies. The district court undertook no obligation of its own. In contrast, here the Court has taken on an obligation -- *i.e.* [*23] , the obligation to engage in post-approval review of lease successions -- that is beyond the power of the parties to perform and can only be enforced by the Court.

Furthermore, although the *Preservation Coalition* court indicated that stipulation and order that settled the litigation enumerated the terms of the settlement, id. at 449, it did not indicate that there was additional evidence that the district court intended to place its judicial *imprimatur* on the settlement. In contrast and as described above, there is ample evidence here beyond the mere enumeration of settlement terms in the Settlement Agreement to demonstrate that Court intended to place its imprimatur on the settlement between the parties.

Based on the foregoing, it is determined that the Settlement Agreement carried adequate judicial *imprimatur*

to satisfy the second prong of the *Buckhannon* test for prevailing party status.

B. *NYCHA Is Ordered To Pay Attorneys' Fees In The Amount Of $ 187,680*

Where an award of fees is found to be warranted pursuant to federal law, a court begins by determining the "lodestar amount." This "lodestar" is "'properly calculated by multiplying the [*24] number of hours reasonably expended on the litigation times a reasonable hourly rate.'" *Quaratino v. Tiffany & Co.*, 166 F.3d 422, 424 (2d Cir. 1999) (quoting *Blanchard v. Bergeron*, 489 U.S. 87, 94, 103 L. Ed. 2d 67, 109 S. Ct. 939 (1989)). The lodestar includes time spent in preparation of a fee application. *Valley Disposal, Inc. v. Central Vermont Solid Waste Management Dist.*, 71 F.3d 1053, 1059 (2d Cir. 1995).

In calculating the lodestar, the district court typically perform a three-step process: (1) it determines the reasonable hourly rate for each attorney; (2) it excludes excessive, redundant, or otherwise unnecessary hours; and (3) it excludes hours dedicated to severable unsuccessful claims. *See generally Hensley v. Eckerhart*, 461 U.S. 424, 433-35, 440, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983); *Quaratino*, 166 F.3d at 425. In a fourth step, the Court may choose to provide a reduction of the lodestar depending upon a prevailing party's limited success. *See Hensley*, 461 U.S. at 440.

Based on the extensive submissions of the parties, two issues are here presented: the amount of time appropriately expended [*25] and the applicable hourly rate.

1. *Requirements Concerning Records Submitted In Support of Section 1988 Fee Applications*

"The burden is on counsel [requesting fees] to keep and present records from which the court may determine the nature of the work done, the need for it, and the amount of time reasonably required . . . ." *F. H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1265 (2d Cir. 1987). It is well established that pursuant to 42 U.S.C. § 1988(b), "it is necessary for the Court to examine contemporaneous billing records, time sheets or other documented, authentic, and reliable time records." *Murray v. Comm'r of N.Y. Dep't of Educ.*, 354 F. Supp. 2d 231, 238 (E.D.N.Y. 2005). As stated by one court of this district:

> In order to recover attorney's fees, the prevailing party must submit time records specifying, "for each attorney, the date, the hours expended, and the nature of the work done." *New York State Ass'n for Retarded Children v. Carey*, 711 F.2d 1136, 1148 (2d Cir. 1983). Although time records need not contain great detail and specificity, attorneys should identify the general [*26] subject matter of their work. [*Hensley*, 461 U.S. at 437 n.12]. If "the time records submitted in support of a fee application lack sufficient specificity for the Court to assess the reasonableness of the amount charged in relation to the work performed, the Court is justified in reducing the hours claimed for those entries." *Mautner v. Hirsch*, 831 F. Supp. 1058, 1077 (S.D.N.Y. 1993), *aff'd in part, rev'd in part*, 32 F.3d 37 (2d. Cir. 1994) (citations omitted); *see also Ragin v. Harry Macklowe Real Estate Co.*, 870 F. Supp. 510, 520, (S.D.N.Y. 1994) (reducing lodestar by thirty percent due in part to vague time entries such as "telephone call to S. Berger," "review Macklowe files," and "conference with T. Holzman").

Williams v. New York City Housing Authority, 975 F. Supp. 317, 327 (S.D.N.Y. 1997).

Fee applicants should not "'lump several services or tasks into one time sheet entry because it is then difficult . . . for a court to determine the reasonableness of the time spent on each of the . . . services or tasks provided. ... It is the responsibility of the applicant to make separate [*27] time entries for each activity.'" *Wilder v. Bernstein*, 975 F. Supp. 276, 286 (S.D.N.Y. 1997) (quoting *In re Poseidon Pools of America, Inc.*, 180 B.R. 718, 731 (Bankr. E.D.N.Y. 1995) (internal quotations and citation omitted)).

"Mixed-class entries are properly excluded since, without more detail, a court cannot determine the proper compensation." *Hutchinson v. McCabee*, 2001 U.S. Dist. LEXIS 11927, No. 95 Civ. 5449 (JFK), 2001 WL 930842, at *4 (S.D.N.Y. Aug. 15, 2001); *see also Beberaggi v. New York City Transit Auth.*, 1994 U.S. Dist. LEXIS 1638, No. 93 Civ. 1737 (SWK), 1994 WL 48805, at *3 (S.D.N.Y. Feb. 17, 1994) (deducting hours from fee request in part because plaintiff's counsel's time sheets do not specify the amount of time spent on each separate task"); *Williams*, 975 F. Supp. at 327 (rejecting billing entries where, among other things, attorneys mixed legitimate requests with requests for non compensable work).

Finally, the Second Circuit has stated that "any attorney -- whether a private practitioner or an employee of a nonprofit law office -- who applies for court-ordered compensation . . . must document the application with contemporaneous [*28] time records." *Carey* 711 F.2d

at 1148. "'Attorney affidavits which set forth all charges with the required specificity but which are reconstructions of the contemporaneous records satisfy the rationale underlying *Carey* . . . .'" *Cruz v. Local Union No. 3 of the IBEW*, 34 F.3d 1148, 1160 (2d Cir. 1994) (quoting *David v. Sullivan*, 777 F. Supp. 212, 223 (E.D.N.Y. 1991)). However, such typed reconstructions fail to satisfy Carey if they contain more detail than the original records. *See, e.g., People ex rel. Vacco v. RAC Holding, Inc.*, 135 F. Supp. 2d 359, 364 n.1 (N.D.N.Y. 2001)

2. Certain Records Submitted By Plaintiffs' Counsel Are Impermissibly Vague

Here, certain of the time entries are impermissibly vague in that they: (1) do not adequately describe the subject matter of the tasks purportedly performed; (2) fail to adequately differentiate tasks that are compensable at different rates; and (3) combine compensable and non-compensable tasks into single entries.

Many time entries fail to indicate the subject matter of telephone calls, conferences, and documents reviewed and drafted, or otherwise [*29] provide context by referring to specific issues or events in the case. With respect to the records submitted by Plaintiffs' attorney Foster Maer, there is significant over-reliance on generic descriptions such as "research," "telephone conference," "conf w AL," "TC NC," "mtg w/GC," "Prep record, litigation," "ltr. to HS," "memo/law," and "fee prep." (*See* Declaration of Gary Nester signed July 15 2003 ("Nester Decl."), at Ex. CC.) Similarly, the time records of Plaintiffs' attorney Alan Levine also contain a significant number of time entries bearing generic labels such as "Tel NC," "ltrs to NC," "motion to compel," "brief and affs.," and "memo." (*See* Affirmation of Alan Levine signed February 15, 2003 ("Levine Aff."), at Ex. A.)

Furthermore, a review of the records submitted reveals that certain paralegal work (*e.g.*, reviewing tenant files and drafting file summaries) was combined with attorney work (*e.g.*, drafting court documents and preparing for conferences).

A number of entries combine compensable with non compensable tasks including publicity efforts, lobbying, and clerical work. For example, Levine's 4.5 hour time entry for July 23, 1998 combined an unspecified [*30] amount of time spent drafting a letter "for JAF to White House Staff" with various telephone conferences and the review of tenant files. (*See* Levine Aff. Ex. A.) Moreover, reimbursement was sought for 391.65 hours spent on tasks that Plaintiffs' attorneys admit are not compensable. (*See* Nester Dec. Ex. EE; Affirmation of Foster Maer signed on February 5, 2003 ("Maer Aff."), at P 67; Levine Aff. P 51a).

3. Plaintiffs' Counsel May Not Recover Fees Evidenced Only By Non-Contemporaneous Time Entries

In support of their fee application, Plaintiffs' counsel submitted typed versions of the original handwritten records. Upon NYCHA's request, Plaintiffs' counsel also produced the handwritten notes that were made contemporaneously with the events reflected therein. (*See* Nester Decl. PP 59-60 & Exs. U-V.) A comparison of the two sets of records for Levine shows that the typed records do not merely transcribe the handwritten records. Rather, they provide greater detail about the nature of the work, increase the number of hours attributed to certain tasks, and add new entries in some instances. (*See* Nester Decl. PP 64-66 & Ex. X.) "Such 'hindsight review' is not an [*31] adequate substitute for contemporaneous time records." *Broad. Music, Inc. v. R Bar of Manhattan, Inc.*, 919 F. Supp. 656, 661 (S.D.N.Y. 1996) (quoting *Ward v. Brown*, 899 F. Supp. 123, 130 (W.D.N.Y. 1995)).

4. NYCHA's Calculation Of Hours Is Adopted

For the reasons set forth above, NYCHA's calculation of the time expended by Plaintiffs' counsel is adopted. That calculation is as follows:

Time Expended by Maer and His Associates		
Task	Hours	
	Maer	Associates
Discovery (Tenant Files)	--	250
Discovery (Depositions)	83.6	--
1998 Cross Motion	24	16
Settlement	111.2	--
Fee Application	29.1	19.4
Total Hours:	247.9	285.4
Time Expended by Levine and His Associates		
Task	Hours	
	Levine	Associates

1998 Cross-Motion	24	16
Settlement	185	--
Fee Application	13.5	9
Total Hours:	222.5	25

5. Applicable Hourly Rates

An hourly rate of $ 350 is sought by the Plaintiffs for the work performed by Foster Maer. An hourly rate of $ 375 is sought by the Plaintiffs for work performed by Alan Levine. The parties agree that $ 150 is the appropriate hourly rate for work performed [*32] by the associates of both Maer and Levine.

The Second Circuit has stated that "attorney's fees are to [be] awarded with an eye to moderation, seeking to avoid either the reality or the appearance of awarding windfall fees." *Carey*, 711 F.2d at 1139 (internal quotations omitted). The need to avoid the appearance of awarding a windfall takes on added importance when the defendant is a public agency. *See, e.g., Santa Fe Natural Tobacco Co. v. Spitzer*, 2002 U.S. Dist. LEXIS 5384, Nos. 00 Civ. 7274 (LAP), 00 Civ. 7750 (LAP), 2002 WL 498631, at *5 (S.D.N.Y. Mar. 29, 2002).

The rates to be used in calculating the lodestar are the market rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 896 n.11, 79 L. Ed. 2d 891, 104 S. Ct. 1541 (1984); *see also Kirsch v. Fleet Street Ltd.*, 148 F.3d 149, 172 (2d Cir. 1998); *Luciano v. Olsten Corp.*, 109 F.3d 111, 115 (2d Cir. 1997).

In determining the prevailing market rate in the community, the following factors should be considered: (1) the experience, reputation and ability of the attorneys, [*33] (2) the customary fee charged by counsel and their actual billing practice, (3) whether the fee is fixed or contingent, and (4) what courts have awarded to other counsel with similar backgrounds in similar cases. *See Williamsburg Fair Housing Committee v. Ross-Rodney Housing Corp.*, 599 F. Supp. 509, 516 (S.D.N.Y. 1984).

Levine has been a full-time civil rights litigator and educator for approximately thirty-eight years, and he has a private practice devoted exclusively to civil rights matters. He is also part-time special counsel to the Puerto Rican Legal Defense and Education Fund ("PRLDEF"), where he participates in and consults on federal civil rights litigation. He is an adjunct professor of law at Brooklyn Law School, and he has previously taught at the Benjamin N. Cardozo School of Law and the New York University School of Law. For five years, he was an associate professor of Hofstra University School of Law, where he was the director of the school's constitutional law clinic. He has served as class counsel in a number of significant civil rights cases in state and federal courts.

Maer has been a full-time public interest litigator for approximately twenty-five [*34] years. After graduating from Northeastern University School of Law, he was awarded a Reginald Heber Smith Community Law Fellowship (1978-80), and he worked for Connecticut Legal Services through 1981, serving as the managing attorney for his last year there. In 1981, Maer went to work for The Legal Aid Society in New York City as a staff attorney. He was counsel on a number of significant cases. In 1989, he began working at Brooklyn Legal Services Corporation A ("BLSA"). As the director of legal work, he had primary responsibility for overseeing the legal work of 15 staff attorneys and 4 paralegals at the Williamsburg office. He has litigated numerous cases concerning environmental and land-use issues. He served as counsel in the instant case. In 1996 Maer began working part-time at PRLDEF and BLSA. In the beginning of 2000, he began working full-time at PRLDEF.

This Court has awarded an experienced civil rights attorney with 18 years experience an hourly rate of $ 375. *See Davis v. N.Y. City Hous. Auth.*, 2002 U.S. Dist. LEXIS 23738, Nos. 90 Civ. 628 (RWS), I92 Civ. 4873 (RWS), 2002 WL 31748586, at *3 (S.D.N.Y. Dec. 6, 2002); *see also R.E. v. N.Y. City Bd. of Educ.*, 2003 U.S. Dist. LEXIS 58, No. 02 Civ. 1067 (DC), 2003 WL 42017, at *3 (S.D.N.Y. Jan. 6, 2003) [*35] (awarding $ 375 per hour to a lawyer experienced in IDEA cases); *Baird v. Boies, Schiller & Flexner LLP*, 219 F. Supp. 2d 510, 523 (S.D.N.Y. 2002) (awarding an experienced employment discrimination lawyer an hourly rate of $ 375); *Green v. Torres*, 2002 U.S. Dist. LEXIS 8096, No. 98 Civ. 8700 (JSR), 2002 WL 922174, at *1 (S.D.N.Y. May 7, 2002) (awarding an experienced civil rights lawyer $ 400 per hour); *Marisol A. v. Giuliani*, 111 F. Supp. 2d 381, 386 (S.D.N.Y. 2002) (awarding $ 375 to the lead attorney in a civil rights case). Furthermore, a recent billing survey made by the *National Law Journal* shows that senior partners in New York City charge as much as $ 750 per hour and junior partners charge as much as $ 490 per hour. *See In Focus: Billing; A Firm-by-Firm Sampling of Billing Rates Nationwide*, National Law Journal, December 6, 2004, at 22.

On the basis of their experience and comparable awards, a reasonable hourly

rate for both Maer and Levine is $ 375 an hour.

6. *Lodestar Calculation*

Maer and Levine billed a total of 470.4 hours in connection with the above-described motions. Based on an hourly [*36] rate of $ 375, they generated fees in the amount of $ 176,400.

The associates of Maer and Levine billed a total of 310.4 in connection with the above-described motions. Based on an hourly rate of $ 150, they generated fees of $ 46,560.

7. ***Reduction Of Lodestar To Reflect Plaintiffs' Partial Success***

As reflected in the Settlement Agreement, the Plaintiffs were only partially successful with respect to the above-described motions. Therefore, a reduction in the lodestar is warranted. *See Hensley*, 461 U.S. at 440. For this reason, the amount of fees that are recoverable will be reduced by $ 35,280.

Conclusion

The Plaintiffs' motion for a fee award is granted in part, and NYCHA's motion to strike the application is denied. Based upon the submissions to date, a fee award in the amount of $ 187,680 is appropriate.

Because the parties may well have anticipated only a decision on the prevailing party issue, leave is granted for any additional submissions within thirty (30) days.

It is so ordered.

New York, NY

March 31, 2005

ROBERT W. SWEET

U.S.D.J.