12-1578

In the United States Court of Appeals for the Second Circuit

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees,

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor-Appellee,

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

Defendant.

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

PETITION FOR REHEARING *EN BANC*

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INTRODUCTION

The nature and contours of the right to keep and bear arms is a matter of exceptional importance, as the Supreme Court has only recently recognized the Second Amendment as an individual right and incorporated it against the states. This case is the first time that this Court has reviewed a significant burden on the ability of law-abiding, responsible adults to possess handguns in their homes.

In addition, the Panel's decision conflicts with Supreme Court precedents. First, the Panel's characterization of the equal protection burden cannot be reconciled with Supreme Court decisions that have addressed other statutes that delegated authority to state actors. Second, the Supreme Court has rejected fees imposed on the basic ability to exercise a fundamental right.

BACKGROUND

The Second Amendment mandates that "citizens *must be permitted* to use handguns for the core lawful purpose of self-defense." McDonald v. City of Chicago, 130 S. Ct. 3020, 3036 (2010) (quotation and alteration omitted; emphasis added). If a state imposes a license or registration requirement, it *must* issue the requisite license and/or registration to an applicant who is qualified. For example, the D.C. laws at issue in District of Columbia v. Heller, 554 U.S. 570 (2008), prohibited the possession of unregistered guns, and concomitantly prohibited people from registering. See id. at 574. The Supreme Court ordered the following

relief: "Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home." Id. at 635.

In New York, state law prohibits people from possessing handguns (including within their homes) unless they hold licenses issued under Article 400 of the Penal Law. See N.Y. Penal L. §§ 265.01(1), 265.20(3).[1] Article 400 sets forth various requirements for obtaining handgun licenses and "is the exclusive statutory mechanism for the licensing of firearms in New York State." O'Connor v. Scarpino, 638 N.E.2d 950, 951, 83 N.Y.2d 919, 920 (1994). It preempts the field of handgun licensing and prevents localities from enacting inconsistent handgun laws. See Chwick v. Mulvey, 915 N.Y.S.2d 578, 586-87, 81 A.D.3d 161, 171-72 (App. Div. 2010). A locality such as New York City is not free to enact its own handgun licensing regime independent of Article 400.

Article 400 directs localities throughout the state to impose a fee for processing licensing applications – but it provides two different fee standards:

> In [New York City], the city council and in the county of Nassau the Board of Supervisors shall fix the fee to be charged for a license to carry or possess a pistol or revolver and provide for the disposition of such fees. Elsewhere in the state, the licensing officer shall collect and pay into the county treasury the following fees: for each license to carry or possess a pistol or revolver, *not less than three dollars nor*

[1] This case does not concern the right to carry a handgun outside the home. See generally 38 RCNY § 5-23(a) (articulating restrictions attendant a "Residence Premises" handgun license).

> *more than ten dollars* as may be determined by the legislative body of the county. . . .

N.Y. Penal L. § 400.00(14) (emphasis added). Hence, in most of the state, Article 400 requires localities to charge a fee of between $3 and $10, while in New York City (and Nassau County[2]) Article 400 does not impose any limitation on the amount of the fee. The only limitation is the general state-law requirement that license fees not exceed documented attendant administrative costs. See, e.g., Nitkin v. Administrator, 399 N.Y.S.2d 162, 163, 91 Misc. 2d 478, 479 (Supr. Ct. N.Y. Co. 1975), aff'd 389 N.Y.S.2d 1022, 55 A.D.2d 566 (App. Div. 1976), aff'd 371 N.E.2d 535, 43 N.Y.2d 673 (1977).

The result is that most New York localities must finance the bulk of the cost of issuing handgun licenses from public coffers, while New York City remains free to shift the full cost of its licensing regime to individuals who choose to exercise their right. At the present time, New York City charges $340 for a 3-year handgun license. See N.Y.C. Admin. Code § 10-131(a)(2). Because the license fee requirement stands as a complete obstacle to obtaining an Article 400 handgun license, it also stands as a complete obstacle to exercising a recognized "core" of the Second Amendment right.

[2] None of the Plaintiffs holds a Nassau County license.

I. THE STANDARD OF REVIEW FOR LAWS THAT BURDEN THE RIGHT TO KEEP AND BEAR ARMS IS A QUESTION OF EXCEPTIONAL IMPORTANCE

This is the first time that this Court has addressed both the operation of the Equal Protection Clause on laws that impose disparate burdens on the right to keep and bear arms, and also, burdens on the ability of law-abiding adults to keep handguns at home. The scope and contours of the Second Amendment right are matters of exceptional importance for two countervailing reasons: because the ultimate issue is the protection of a fundamental constitutional right; and, because gun laws implicate public safety considerations.

Second Amendment jurisprudence remains nascent, as the Supreme Court first recognized the Second Amendment as an individual right five years ago in Heller, and it first held the right "fully applicable to the States" three years ago in McDonald, 130 S. Ct. at 3026. "The full import of the Second Amendment right and the government's burden to justify the infringement of this right in different contexts remain opaque." Slip Op. at 19 (Walker, J., concurring). This Court has previously observed that the Heller decision may "raise[] more questions than it answers." Kachalsky v. Westchester, 701 F.3d 81, 88 (2d Cir. 2012).

Courts have developed competing approaches to evaluating burdens on the right to keep and bear arms. For example, some courts have looked predominantly to the historical understanding of the right to determine whether burdens are valid, while other courts have used the framework of means-end burden analysis.

Compare United States v. Rene E., 583 F.3d 8, 12-16 (1st Cir. 2009) (federal age restriction to possess handguns upheld because of the "longstanding tradition of prohibiting juveniles from both receiving and possessing handguns"), with Nat'l Rifle Ass'n of Am., Inc. v. BATF, 700 F.3d 185, 196 (5th Cir. 2012) (if federal old age limit to purchase handguns falls within the scope of the Second Amendment, then intermediate scrutiny applies). Some courts have ruled that the level of and rigor of scrutiny depends on the breadth and severity of a burden, see Moore v. Madigan, 702 F.3d 933, 940 (7th Cir. 2012), while others have adopted a more categorical approach. For example, this Court categorically adopted intermediate scrutiny to review burdens on the right to keep and bear arms that apply outside the home in Kachalsky, 701 F.3d at 96.

While this Court has not previously addressed burdens that apply *inside* the home, guidance from other Circuit Courts suggests that a high level of scrutiny should apply. See, e.g., Ezell v. Chicago, 651 F.3d 684, 704 (7th Cir. 2011); United States v. Masciandaro, 638 F.3d 458, 470 (4th Cir. 2011) ("we assume that any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny"); see also Slip Op. at 25 (Walker, J., concurring) ("Courts apply heightened scrutiny when a legislative classification burdens a fundamental right."). After all, it is the right "to

use arms in defense of hearth and home" that the Second Amendment "elevates above all other interests." Heller, 554 U.S. at 635.

Moreover, there is a substantial chance that the *en banc* Court would treat the burden at issue here differently. A pertinent example is the decision of the Court of Appeals for the Seventh Circuit in United States v. Skoien, 587 F.3d 803 (7th Cir. 2009), vacated en banc, 614 F.3d 638 (7th Cir. 2010). The original Seventh Circuit panel concluded that "intermediate scrutiny" should apply to the federal law that disqualifies domestic violence misdemeanants from possessing guns, and it remanded the case for further consideration of whether the government could justify the burden imposed. See id. at 816. However, when the Seventh Circuit reviewed the matter *en banc*, it declined to use a categorical standard of scrutiny, although it did disclaim rational basis review. See Skoien, 614 F.3d at 641-42 ("we need not get more deeply into the 'levels of scrutiny' quagmire"). Based on its review of legislative history, caselaw, studies, and the available procedures for expunging misdemeanor convictions, the court upheld the restriction as being "substantially relat[ed]" to "preventing armed mayhem, . . . an important governmental objective." See id. at 642-45.

II. THE PANEL'S CONCLUSION THAT THE FEE STATUTE "DOES NOT BURDEN" A CONSTITUTIONAL RIGHT CONFLICTS WITH SUPREME COURT DECISIONS

The Panel's characterization of the burden conflicts with Supreme Court decisions that characterize statutory disparities under state law. The Panel majority

characterized the differential fee statute as "not requir[ing] the New York City Council to charge a higher (or lower) fee than other jurisdictions in the State," and it therefore found that the rational basis standard should apply. Slip Op. at 15. However, one member of the Panel found that "[t]he fee disparity burdens the exercise of a fundamental right differently for different New York State residents and therefore demands a heightened level of review." Slip Op. at 20 (Walker, J., concurring); see also id. at 24 (Walker, J., concurring) ("Penal Law § 400.00(14) does not operate in a vacuum; it is applied through local legislation that has the result of a gun owner paying a $340 handgun licensing fee in one New York State jurisdiction and a $10 fee in another.").

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

This classification causes the Plaintiffs injury. But for its exemption from the fee range, the City would not be able to charge the Plaintiffs a $340 fee, or any

other fee greater than $10 (injury). If the nominal-fee-range standard still applied to everyone, then the City would not be able to do this (traceability). Finally, this Court's order re-imposing the nominal-fee-range standard would redress the Plaintiffs' injury (redressability). See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

The Panel did not cite any authority for its conclusion that "beyond setting the $3-10 fee range applicable to most of New York State—which plaintiffs do not contest—Penal Law § 400.00(14) itself does *nothing* to burden anyone's Second Amendment rights." Slip Op. at 15 (emphasis in source). No such authority is known to counsel.

To the contrary, the proposition that different fee standards do not constitute a burden because the City implements the state law and *could* do so in a manner that would not injure the Plaintiffs is inconsistent with the rationales of established Supreme Court precedents. For example, in Bullock v. Carter, 405 U.S. 134 (1972), the Court overturned a Texas state law that conferred broad discretion on local political parties to set the fees for appearing on the ballot in primary elections "as in their judgment is just and equitable." See id. at 138 (quoting statute). Bullock concerned a different issue than that presented here (the denial of equal protection on the basis of ability to pay, and in the context of ballot access) – but what is significant is that the Court held that the *state law* conferring discretion

was itself unconstitutional, and the Court affirmed a lower court's order that enjoined enforcement of the statute itself. See id. at 149. This Court has previously observed that Bullock "found state action, even though the filing fee requirement applied only to primaries and the political parties were free to fix whatever fees they wished." Rockefeller v. Powers, 74 F.3d 1367, 1374 (2d Cir. 1996).

And, in Kadramas v. Dickinson Public Schools, 487 U.S. 450 (1988), the Court rejected the claim that a plaintiff could not challenge a state law that authorized some (but not all) localities to impose fees for school busing services with the following explanation: "The fee that Dickinson is permitted to charge under the 1979 statute is itself a burden rather than a benefit to appellants, and they are not estopped from raising an equal protection challenge to the statute that imposes that burden on them." Id. at 457. Significantly, the statute provided (certain) localities with wholly "optional" authority to impose fees, bounded only by the requirement they not exceed costs. See id. at 454 (quoting statute). The statute did not "require" localities to impose fees. See id.

The fact that the City *might* choose to set the fee within the same range applicable to the rest of the state is neither here nor there. After all, both the local election board in Bullock and the school district in Kadramas *could* have chosen

not to charge fees, or instead, to charge very small fees – which would have resulted in no injury (and hence, no standing) for the plaintiffs in those cases.

III. THE PANEL'S CONCLUSION THAT GREATER-THAN-NOMINAL FEES CAN BE IMPOSED ON PERMISSION TO EXERCISE "CORE" ACTIVITIES CONFLICTS WITH SUPREME COURT PRECEDENT

The Supreme Court has sustained greater-than-nominal license fees only where those fees were imposed on activities lying on the margin of constitutional protection – rather than on the basic ability to exercise the "core" of a constitutional right. In Murdock v. Pennsylvania, 319 U.S. 105 (1943), the Court rejected a municipal law that required peddlers to obtain licenses and pay fees of (for example) $1.50 per day or $7.00 per week before selling goods door-to-door. See id. at 106-07. Key to the Court's resolution was its conclusion that "spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types." Id. a 110; see also Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 385-86 (1990) (quoting this language to characterize Murdock's holding). The fee was invalid because it was "a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment." Murdock, 319 U.S. at 114. The Court explained that the fee did not compensate "for the enjoyment of a privilege or benefit *bestowed by the state*." Id. at 115

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

Likewise, the Court overturned a Minnesota law that imposed a "use tax" (specifically) on the ink and paper used to print newspapers in Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575, 592-93 (1983). The Court explained that "[a] tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest." Id. at 582. Furthermore, the state's interest in collecting revenue was not an adequate interest. See id. at 586.

In the arena of voting rights, the Supreme Court had only sustained *nominal* poll taxes before it struck down poll taxes entirely in Harper v. Virginia Board of Elections, 383 U.S. 663, 666 (1966). For example, the Court had upheld Georgia's $1 poll tax in Breedlove v. Shuttles, 302 U.S. 277 (1939), as a "a familiar form of

taxation, much used in some countries and to a considerable extent here, at first in the Colonies and later in the States." Id. at 281. And it should be observed that part of the Court's rationale was that the "privilege of voting is not derived from the United States, but is conferred by the State." Id. at 283. (Recall that the Constitution vests the right to vote in federal elections with state legislatures.)

The rights of petition and assembly often raise somewhat different issues, as the exercise of these rights often involves the use of public facilities such as streets, sidewalks, and parks. Of course, people generally do not *need* to use public property to engage in the acts of petitioning the government or peaceably assembling, and for that matter, they have no absolute right to do so. Cf. Waller v. City of New York, 933 N.Y.S.2d 541, 545, 34 Misc. 3d 371, 375 (Supr. Ct. N.Y. Co. 2011) (no First Amendment right for Occupy Wall Street participants to remain in Zuccotti Park, even though the park was quasi-public). And, a group that cannot afford a permit, or that refuses to pay a permit fee, is not prohibited from assembling or petitioning – rather, it is prohibited from doing so *on public property*. It is significant that several other Circuits addressing the constitutionality of fees have looked to whether alternative, free public fora were available. See Int'l Women's Day March Planning Comm. v. San Antonio, 619 F.3d 346, 372 (5th Cir. 2010) (finding cost-shifting parade fees permissible in part because "there are procession routes that could be used for free"); see also Sullivan

v. Augusta, 511 F.3d 16, 42 (1st Cir. 2007) (concluding, 2-1, that city did not need to provide an indigency exception for permits to parade on streets because sidewalks and parks could be used for free); Stonewall Union v. Columbus, 931 F.2d 1130, 1137 (6th Cir. 1991) (same conclusion).

The Supreme Court addressed the constitutionality of fees laid on the right of assembly in Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992), which concerned a county law that allowed authorities to impose a fee of up to $1,000 for a permit to hold a march on public streets. See id. at 126-27. The Supreme Court granted certiorari to address the issue of "the constitutionality of charging a fee for a speaker in a public forum," id. at 129, but wound up declining to resolve the question, and instead overturned the county law because of its "variable" nature. Compare id. at 124, with id. at 137-38 (Rehnquist, C.J., dissenting). On the issue of nominality, the Court explained simply that the fee in Murdock "was invalid because it was unrelated to any legitimate state interest." Id. at 137. But again, the fee was unrelated because the "privilege" at issue there was the basic ability to exercise a right secured by the federal Constitution – which is *not* a privilege or benefit that the state makes available in the first place. See Murdock, 319 U.S. at 115.

This Court has repeatedly sustained the use of cost-shifting user fees – but always in the context of activities lying away from the "core" of constitutional

protection. For example, this Court upheld a $5 New York City fee for a sound amplification permit on the rationale that the fee was "less than the actual costs of the municipal service required." U.S. Labor Party v. Codd, 527 F.3d 118, 119 (2d Cir. 1975); see also Turley v. Police Dep't, 167 F.3d 757, 761 (2d Cir. 1999) (upholding $45 fee for amplified sound device). However, the use of a megaphone is not the basic act of "speech," and indeed, municipalities can impose substantial restrictions on amplified sound devices that they could not impose on the basic act of speaking itself. See Kovacs v. Cooper, 336 U.S. 77, 87-88 (1949).

To sustain the City's $340 license fee, the Panel relied on cases that had upheld license fees imposed on non-core activities – specifically, the use of public facilities, and the ability to engage in commercial activities. See Slip Op. pp. 9-10; see also E. Conn. Citizens Action Group v. Powers, 723 F.2d 1050, 1052 (2d Cir. 1983) (use of state-owned railbed for a march); Int'l Women's Day, 619 F.3d at 350 (use of city streets for a march); Nat'l Awareness Found. v. Abrams, 50 F.3d 1159, 1161 (2d Cir. 1995) (registration fee required to work as a "professional fund-raiser"). These activities simply do not support the imposition of substantial fees on the basic ability to exercise the core of an enumerated constitutional right.

CONCLUSION

This case presents a unique opportunity for the *en banc* Court to provide useful guidance in a developing area of the law. The Panel's decision conflicts with decisions of the Supreme Court, and *en banc* review is appropriate.

Dated: July 23, 2013

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

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,531 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B).

2. This brief complies with the typeface requirement of 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 Word 2010 in 14-point Times New Roman type.

Dated: July 23, 2013

s/ David D. Jensen
David D. Jensen
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

On 23 July 2013 I served the foregoing Petition by electronically filing it with the Court's CM/ECF system, which generates a Notice of Filing and effects service upon counsel for all parties in the case.

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

Dated: July 13, 2013

s/ David D. Jensen
David D. Jensen
Attorney for Plaintiffs-Appellants

12-1578-cv
Kwong, et al. v. Bloomberg, et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2012

(Argued: February 1, 2013 Decided: July 9, 2013)

Docket No. 12-1578-cv

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

Plaintiffs-Appellants,

v.

MICHAEL BLOOMBERG, in his official capacity as Mayor of the City of New York, CITY OF NEW YORK,

Defendants-Appellees,

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor-Appellee,

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York,

Defendant.

Before: WALKER, CABRANES, and WESLEY, *Circuit Judges*.

New York State Penal Law § 400.00(14) permits New York City (and Nassau County) to set and collect a residential handgun licensing fee that exceeds the allowable fee collected in other parts of New York State. Currently, the cost to obtain a residential handgun license in New York City is

$340 for a license which lasts for three years. N.Y.C. Admin. Code § 10-131(a)(2); 38 RCNY § 5-28 (requiring renewal of handgun licenses every three years). In this appeal, which follows a grant of summary judgment dismissing the complaint in the United States District Court for the Southern District of New York (John G. Koeltl, *Judge*), we are asked to determine: (1) whether New York City Administrative Code § 10-131(a)(2), which sets the current residential handgun licensing fee in New York City at $340, violates the Second Amendment; and (2) whether New York State Penal Law § 400.00(14), which allows New York City (and Nassau County) to set and collect a residential handgun licensing fee outside the $3-10 range permitted in other jurisdictions in New York State, violates the Equal Protection Clause. We hold that both statutes survive constitutional scrutiny, and therefore affirm the judgment of the District Court.

Judge Walker concurs in the judgment of the Court in a separate opinion.

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SUSAN PAULSON (Francis F. Caputo, Michelle Goldberg-Cahn, *on the brief*), *for* Michael A. Cardozo, Corporation Counsel of the City of New York, New York, NY, *for Defendants-Appellees*.

SIMON HELLER (Barbara D. Underwood, Richard Dearing, *on the brief*), *for* Eric T. Schneiderman, Attorney General of the State of New York, New York, NY, *for Intervenor-Appellee*.

JOSÉ A. CABRANES, *Circuit Judge*:

New York State Penal Law § 400.00(14) permits New York City (and Nassau County) to set and collect a residential handgun licensing fee that exceeds the maximum fee allowable under state law in other parts of New York State. Currently, the cost to obtain a residential handgun license in New York City is $340 for a license which lasts for three years. N.Y.C. Admin. Code § 10-131(a)(2); 38 RCNY § 5-28 (requiring renewal of handgun licenses every three years). In this appeal, which follows a grant of summary judgment dismissing the complaint in the United States District Court

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We hold that both statutes survive constitutional scrutiny, and therefore affirm the March 26, 2012 Opinion and Order of the District Court, which granted summary judgment in favor of the defendants and dismissed the complaint.

BACKGROUND

Plaintiffs are individuals who have been issued residential handgun licenses[3] in New York City, and two organizations, the Second Amendment Foundation and the New York State Rifle & Pistol Association (jointly, "plaintiffs").[4] They bring this action pursuant to 42 U.S.C. § 1983, asserting that: (1) New York City Administrative Code § 10-131(a)(2) ("Admin. Code § 10-

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1 The Second Amendment provides: "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.

2 The Fourteenth Amendment provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

3 In particular, this case involves residential "Premises License[s]," 38 RCNY § 5-23, which allow a license holder to "have and possess [a handgun] in his dwelling." N.Y. Penal Law § 400.00(2)(a). For ease of expression, we refer to these so-called "premises-residence handgun licenses," *see, e.g.*, *Rombom v. Kelly*, 901 N.Y.S.2d 29, 30 (1st Dep't 2010), as "residential handgun licenses."

4 Before the District Court, but not on appeal, the New York Attorney General argued that plaintiffs lacked standing to bring this § 1983 action. The District Court held that the individual plaintiffs who paid $340 and obtained a residential handgun license had standing to bring this action. *Kwong v. Bloomberg*, 876 F. Supp. 2d 246, 251-52 (S.D.N.Y. 2012). We agree. Because we are persuaded that the individual plaintiffs have standing, we need not address the standing arguments, left unresolved by the District Court, regarding the two organizational plaintiffs. *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263-64 (1977) (declining to address whether an organization had standing after concluding that at least one individual plaintiff had standing); *see generally Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149, 156-59 (2d Cir. 2012) (discussing associational standing).

131(a)(2)") violates the Second Amendment by requiring New York City residents to pay $340[5] to obtain a residential handgun license;[6] and (2) New York Penal Law § 400.00(14) ("Penal Law § 400.00(14)") violates the Equal Protection Clause of the Fourteenth Amendment by allowing New York City and Nassau County to charge a higher handgun licensing fee than other jurisdictions in New York State.

A. Factual Background

In New York State, it is illegal to possess a handgun without a valid license, even if the handgun remains in one's residence. *See* N.Y. Penal Law §§ 265.01(1), 265.20(a)(3). In New York City, the New York City Police Department License Division ("License Division") is responsible for processing and issuing residential handgun licenses, as well as verifying that each applicant is eligible to receive such a license. *See id.* § 400.00(1), (4); 38 RCNY §§ 5-01(a), 5-02.

Penal Law § 400.00(14)—one of the statutes challenged by plaintiffs—sets the range of permissible fees that may be charged by localities for firearm licenses in New York State. Although that statute sets the general range of fees at between $3 and $10, it allows the New York City Council and the Nassau County Board of Supervisors to set licensing fees outside of this range. *See* N.Y. Penal Law § 400.00(14). In relevant part, it provides:

> In [New York City], the city council and in the county of Nassau the Board of Supervisors shall fix the fee to be charged for a license to carry or possess a pistol or revolver and provide for the disposition of such fees. Elsewhere in the state, the licensing officer shall collect and pay into the county treasury the following fees: for each license to carry or possess a pistol or revolver, not less than three dollars nor more than ten dollars as may be determined by the legislative body of the county . . . .

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[5] In addition to the $340 licensing fee, the record indicates that applicants are required to pay an additional $94.25 fee for fingerprinting and background checks conducted by the New York State Division of Criminal Justice Services. This fee is paid only for initial applications, not for renewals, and is not contested on appeal.

[6] Although the License Division issues licenses for many different types of firearms, the questions presented in this appeal concern only the fee associated with obtaining a residential handgun license.

Id. Pursuant to Admin. Code § 10-131(a)(2)—the other statute challenged by plaintiffs—New York City currently charges residents $340 for a residential handgun license, which lasts for three years.[7]

The New York City Council has been authorized by state law to set its own licensing fee since 1947, independent of the licensing fee range allowed in other parts of the State. In 1948, the New York City Council set the fee at $10 for an initial handgun license; the maximum fee allowed in other parts of New York State at that time was $1.50. Between 1962 and 2004, the licensing fee in New York City was increased six times. In 2004, Local Law 37 amended Admin. Code § 10-131(a)(2) to change the residential handgun license from a two-year permit with a fee of $170 to the current three-year permit with a fee of $340.[8] In practical terms, the amendment to § 10-131(a)(2) increased the cost for residential license holders of owning a handgun by $28.33 per year.

The amendment to § 10-131(a)(2) also permitted New York City substantially to recoup the cost of processing license applications. In that regard, the New York City Office of Management and Budget ("OMB") prepared a "User Cost Analysis" to accompany the introduction of Local Law 37, and this report showed that in Fiscal Year 2003 the average administrative cost for each handgun license application processed by the License Division was $343.49. *See* Joint App'x 370. The Committee on Finance of the New York City Council submitted a separate report detailing the costs and revenue associated with New York City's handgun licensing scheme. It stated that, although the costs associated with operating the licensing scheme exceeded $6 million per year, the fees collected only amounted to $3.35 million. *See id.* at 230. The report also estimated that the increased licensing

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7 Nassau County currently charges residents $200 for a five-year residential handgun license.

8 Admin. Code § 10-131(a)(2) now provides:

> Every license to carry or possess a pistol or revolver in the city may be issued for a term of no less than one or more than three years. Every applicant for a license to carry or possess a pistol or revolver in the city shall pay therefor, a fee of three hundred forty dollars for each original or renewal application for a three year license period or part thereof, a fee of ten dollars for each replacement application of a lost license.

fees (from $170 per two-year license to $340 per three-year license) would result in an additional $1.1 million in revenue, *id.* at 231, and concluded that the pre-2004 licensing fee "d[id] not reflect the actual costs of licensing," *id.* at 234.

In 2010, the cost of New York City's licensing scheme again was studied by the New York Police Department ("NYPD") in conjunction with the OMB. This most recent study concluded each initial residential handgun application cost the License Division $977.16 to process and that each renewal application cost $346.92. *Id.* at 337, 384, 389.

B. Procedural History

Plaintiffs filed this action on April 5, 2011, against, *inter alia*, Michael Bloomberg (in his capacity as Mayor of New York City) and the City of New York (jointly, "the City"). By a stipulation dated May 19, 2011, the New York Attorney General ("NYAG") intervened to defend Penal Law § 400.00(14)'s constitutionality.

On June 23, 2011, plaintiffs moved for summary judgment prior to the completion of any discovery. The City and the NYAG cross-moved for summary judgment on July 28, 2011.[9] On March 26, 2012, the District Court denied plaintiffs' motion for summary judgment and granted the cross-motions for summary judgment filed by the City and the NYAG. Judgment was entered on March 27, 2012.

With regard to Admin. Code § 10-131(a)(2), the District Court held that the $340 fee did not impermissibly burden plaintiffs' Second Amendment rights under the Supreme Court's "fee jurisprudence" because it was designed to defray, and did not exceed, the administrative costs of regulating an individual's right to bear arms. *See Kwong v. Bloomberg*, 876 F. Supp. 2d 246, 253-58 (S.D.N.Y. 2012). In particular, the District Court noted that "[t]he plaintiffs offer no evidence

[9] The NYAG moved for summary judgment with regard to the part of the action directed at Penal Law § 400.00(14) only.

disputing or rebutting the City Defendants' evidence that the application fees imposed by Admin. Code § 10-131(a)(2) do not exceed the administrative costs attendant to the licensing scheme." *Id.* at 257. The District Court also held that $340 fee was "permissible if analyzed under the means-end scrutiny applicable to laws that burden the exercise of Second Amendment rights." *Id.* at 258. After determining that "intermediate scrutiny" was appropriate because "Admin. Code § 10-131(a)(2) does not effect a ban on handguns but only imposes a fee, [and therefore] the burden on the Second Amendment right is not severe," *id.* at 259, the District Court upheld the fee, finding that it "is substantially related to the[ ] important governmental interests [of promoting public safety and preventing gun violence] because the fee is designed to recover the costs attendant to the licensing scheme," *id.*

With regard to Penal Law § 400.00(14), the District Court rejected plaintiffs' Equal Protection challenge under so-called "rational basis" review. It held that rational basis review was appropriate inasmuch as this state statute (1) did not involve any suspect classification, and (2) did not burden plaintiffs' Second Amendment rights because it *permitted*, rather than *required*, New York City to set a licensing fee higher than most jurisdictions in New York State. *Id.* at 260. The District Court also noted that "[e]ven if Penal Law § 400.00(14) could be viewed as disparately burdening the Second Amendment right by imposing a higher fee on New York City residents, the law would still pass constitutional muster." *Id.* at 261 n.13. Specifically, it stated that "[s]everal courts have declined to apply strict scrutiny [in similar circumstances because they] . . . have concluded that the Second Amendment analysis is sufficient to protect these rights[,] and [these courts] have either declined to conduct a separate equal protection analysis or have subjected the equal protection challenge to rational basis review." *Id.* (citing, *inter alia*, *Nordyke v. King*, 644 F.3d 776, 794 (9th Cir. 2011), *aff'd in relevant part*, 681 F.3d 1041 (9th Cir. 2012) (en banc)).

This appeal followed.

DISCUSSION

"We review an order granting summary judgment *de novo,* drawing all factual inferences in favor of the non-moving party." *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 30 (2d Cir. 2012). Summary judgment is required if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Lyons v. Lancer Ins. Co.*, 681 F.3d 50, 56 (2d Cir. 2012).

A. Admin. Code § 10-131(a)(2) Is Constitutional

The first issue to which we turn is whether the $340 handgun licensing fee imposed by Admin. Code § 10-131(a)(2) violates the Second Amendment, *see* note 1, *ante*, which is "fully applicable to the States" through the Fourteenth Amendment, *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010). The Supreme Court has held that the Second Amendment "confer[s] an individual right to keep and bear arms." *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). It also has recognized, however, that the Second Amendment right to keep and bear arms "[i]s not unlimited, just as the First Amendment's right of free speech [i]s not." *Id.* (citation omitted).

Plaintiffs' central argument against Admin. Code § 10-131(a)(2) is that it cannot survive constitutional scrutiny because the $340 licensing fee places too great a burden on their Second Amendment rights. We disagree.

i. The $340 Fee Is Permissible Under the Supreme Court's "Fee Jurisprudence"

We first consider whether the licensing fee of Admin. Code § 10-131(a)(2) is a permissible licensing fee. The Supreme Court's "fee jurisprudence" has historically addressed the constitutionality of fees charged by governmental entities on expressive activities protected by the First Amendment—such as fees charged to hold a rally or parade. Two district court decisions that have considered the issue in the wake of *Heller* and *McDonald* have used the same analytical framework to consider similar claims involving the exercise of Second Amendment rights. *See Justice*

v. Town of Cicero, 827 F. Supp. 2d 835, 842 (N.D. Ill. 2011); *Heller v. District of Columbia*, 698 F. Supp. 2d 179, 190-92 (D.D.C. 2010), *aff'd in part, rev'd in part on other grounds*, 670 F.3d 1244 (D.C. Cir. 2011). In both of these cases, the courts have upheld the contested licensing or registration fees. We agree that the Supreme Court's First Amendment fee jurisprudence provides the appropriate foundation for addressing plaintiffs' fee claims under the Second Amendment. *See McDonald*, 130 S. Ct. at 3056 (Scalia, J., concurring) (noting similarities between the scope of the First Amendment and the Second Amendment); *Heller*, 554 U.S. at 595 (same); *cf. United States v. Decastro*, 682 F.3d 160, 167 (2d Cir. 2012) ("In deciding whether a law substantially burdens Second Amendment rights, it is therefore appropriate to consult principles from other areas of constitutional law, including the First Amendment (to which *Heller* adverted repeatedly).").

In the First Amendment context, the Supreme Court has held that governmental entities may impose licensing fees relating to the exercise of constitutional rights when the fees are designed "to meet the expense incident to the administration of the [licensing statute] and to the maintenance of public order in the matter licensed." *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941) (quotation marks omitted). Put another way, imposing fees on the exercise of constitutional rights is permissible when the fees are designed to defray (and do not exceed) the administrative costs of regulating the protected activity. *E. Conn. Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1056 (2d Cir. 1983) ("Licensing fees used to defray administrative expenses are permissible, but only to the extent necessary for that purpose."); *see Int'l Women's Day March Planning Comm. v. City of San Antonio*, 619 F.3d 346, 370 (5th Cir. 2010); *Nat'l Awareness Found. v. Abrams*, 50 F.3d 1159, 1165 (2d Cir. 1995) ("Thus, fees that serve not as revenue taxes, but rather as means to meet the expenses incident to the administration of a regulation and to the maintenance of public order in the matter regulated are

constitutionally permissible.");[10] *see also Selevan v. N.Y. Thruway Auth.*, 711 F.3d 253, 259-61 (2d Cir. 2013) (upholding a toll bridge fee as "constitutional[ly] permissib[le]" in the "right to travel" context); *cf. Murdock v. Pennsylvania*, 319 U.S. 105, 113-14 (1943) (striking down a license tax that was "not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question").[11]

The undisputed evidence presented to the District Court demonstrates that the $340 licensing fee is designed to defray (and does not exceed) the administrative costs associated with the licensing scheme. Indeed, the only relevant evidence presented to the District Court consisted of: (1) a report by the Committee of Finance of the New York City Council, stating that the revenue generated by the licensing fees in 2004—before the fee increase—covered just over half of the related expenses and "d[id] not reflect the actual costs of licensing," Joint App'x 230; and (2) a report by the OMB in 2003, noting that the cost per licensing application was $343.49 in 2003 and recommending that the licensing fee be increased to $340 for a three-year license "to recover costs," *id.* at 370. A 2010 User Cost Analysis performed by the OMB also showed that the licensing fee did not exceed the administrative costs of the scheme and only generated roughly 35% of the per-unit costs incurred by the City of New York to process initial residential handgun licenses. *Id.* at 333, 384.

Although plaintiffs are quick to argue that New York City's residential handgun licensing fee is significantly higher than the fee charged in other jurisdictions, this is simply not the test for

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[10] We also observed in *National Awareness Foundation* that a fee is not unconstitutional "simply because the revenues derived therefrom are not limited solely to the costs of administrative activities, such as processing and issuing fees." 50 F.3d at 1166. A licensing fee might also be permissible, for example, when it defrays the cost of enforcing the licensing scheme, and the propriety of such a fee must be evaluated on a case-by-case basis. *Id.*

[11] Plaintiffs argue briefly, in reliance on *Murdock*, that the $340 licensing fee cannot withstand scrutiny because it is not "a nominal fee." This argument, however, specifically has been rejected by the Supreme Court. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 137 (1992) ("This sentence [in *Murdock*] does not mean that an invalid fee can be saved if it is nominal, or that only nominal charges are constitutionally permissible."); *see also Am. Target Adver., Inc. v. Giani*, 199 F.3d 1241, 1248-49 (10th Cir. 2000); *N.E. Ohio Coal. for Homeless v. City of Cleveland*, 105 F.3d 1107, 1110 (6th Cir. 1997). Accordingly, we reject plaintiffs' argument that a fee must be "nominal" for it to be permissible under the Supreme Court's "fee jurisprudence."

assessing the validity of a licensing fee. Even assuming that an otherwise proper fee might be impermissible if it were so high as to be exclusionary or prohibitive, plaintiffs provide nothing beyond unsubstantiated assertions to suggest that the $340 fee for a three-year license reaches this level. Moreover, the facts of this case demonstrate that the $340 fee was not prohibitive or exclusionary as applied to these individual plaintiffs because they all were able to obtain the residential handgun licenses that they sought.[12] In light of these principles and the evidence presented in the record, we hold that the District Court correctly concluded that Admin. Code § 10-131(a)(2) imposes a constitutionally permissible "fee."

ii. The $340 Fee Is Not an Unconstitutional Burden

We next consider whether Admin. Code § 10-131(a)(2)'s $340 fee imposes an unconstitutional burden on the exercise of plaintiffs' Second Amendment rights. In *United States v. Decastro*, we held that the appropriate level of scrutiny under which a court reviews a statute or regulation in the Second Amendment context is determined by how substantially that statute or regulation burdens the exercise of one's Second Amendment rights. 682 F.3d at 164. We further explained that where the burden imposed by a regulation on firearms is a "marginal, incremental *or even appreciable restraint* on the right to keep and bear arms," it will not be subject to heightened scrutiny. *Id.* at 166 (emphasis supplied). "Rather, heightened scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) *operate as a substantial burden* on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes)." *Id.* (emphasis supplied); *see also Nordyke*, 644 F.3d at 786 ("[O]nly

[12] This challenge does not present us with the hypothetical situation where a plaintiff was unable to obtain a residential handgun license on account of an inability to pay the $340 fee. *See United States v. Skoien*, 614 F.3d 638, 645 (7th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 1674 (2011) ("A person to whom a statute properly applies can't obtain relief based on arguments that a differently situated person might present.").

regulations which substantially burden the right to keep and to bear arms trigger heightened scrutiny under the Second Amendment.").[13]

On the facts of this case, we find it difficult to say that the licensing fee, which amounts to just over $100 per year, is anything more than a "marginal, incremental or even appreciable restraint" on one's Second Amendment rights—especially considering that plaintiffs have put forth *no evidence* to support their position that the fee is prohibitively expensive.[14] *See Decastro*, 682 F.3d at 166 (holding that heightened scrutiny is not appropriate where the regulation does not impose a "substantial burden on the ability of [plaintiffs] to possess and use a firearm for self-defense"); *see also Kwong*, 876 F. Supp. 2d at 259 (noting that because "Admin. Code § 10-131(a)(2) does not effect a ban on handguns but only imposes a fee, the burden on the Second Amendment right is not severe"). Indeed, the fact that the licensing regime makes the exercise of one's Second Amendment rights more expensive does not necessarily mean that it "substantially burdens" that right. *See Nordyke*, 644 F.3d at 787-88 ("Similarly, a law does not substantially burden a constitutional right simply because it makes the right more expensive or more difficult to exercise."); *see also Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) ("The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to [exercise the right] cannot be enough to invalidate it."); *cf. Heller*, 554

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[13] Other circuits have applied similar analytical frameworks to review provisions that regulate Second Amendment rights. *See, e.g.*, *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (applying a sliding scale approach to determine the level of scrutiny applicable to laws that burden Second Amendment rights); *Heller v. District of Columbia*, 670 F.3d 1244, 1261-62 (D.C. Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011); *United States v. Reese*, 627 F.3d 792, 801 (10th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 96-97 (3d Cir. 2010). Because the District Court's opinion in the instant case was issued before *Decastro* was decided, it relied on some of these cases from our sister Circuits to determine the appropriate framework under which to analyze plaintiffs' constitutional challenge to Admin. Code § 10-131(a)(2).

[14] As noted above, each individual plaintiff was able to, and did, obtain a residential handgun license.

U.S. at 626-27 ("[N]othing in our opinion should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms.").

But we need not definitively decide that applying heightened scrutiny is unwarranted here[15] because we agree with the District Court that Admin. Code § 10-131(a)(2) would, in any event, survive under the so-called "intermediate" form of heightened scrutiny.[16] Under this test, a regulation that burdens a plaintiff's Second Amendment rights "passes constitutional muster if it is substantially related to the achievement of an important governmental interest." *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012).

We recently observed that "New York has substantial, indeed compelling, governmental interests in public safety and crime prevention." *Id.* at 97. Because the record demonstrates that the licensing fee is designed to allow the City of New York to recover the costs incurred through operating its licensing scheme, which is designed to promote public safety and prevent gun violence, we agree with the District Court that Admin. Code § 10-131(a)(2) easily survives "intermediate

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[15] In his concurring opinion, Judge Walker asserts that Admin. Code § 10-131(a)(2) must be subject to "intermediate scrutiny" because "[a]ny non-nominal licensing fee necessarily constitutes a substantial burden" on one's Second Amendment rights. Concurrence, at 4, *post*. Beyond the lack of legal authority to support this proposition, *see id.*, we find such an assertion particularly problematic on the facts of this case because plaintiffs have put forward *no evidence* to suggest that Admin. Code § 10-131(a)(2) operates as a "substantial burden." Although we are mindful that a hypothetical licensing fee *could be* so high as to constitute a "substantial burden" and that any licensing fee *could* "substantially burden" a hypothetical plaintiff's Second Amendment rights, we are not confronted with a hypothetical fee or a hypothetical plaintiff. Accordingly, we need not—and do not—decide whether heightened scrutiny is appropriate here because we conclude that Admin. Code § 10-131(a)(2) survives "intermediate scrutiny."

Moreover, it is unclear to us where the dividing line between a "nominal" fee and a "non-nominal" fee is located. Judge Walker's concurring opinion provides no answer, and instead of attempting to draw a line between "nominal" and "non-nominal" fees, we think it a far better approach to require plaintiffs to put forth *at least some* evidence to suggest that a fee operates as a "substantial burden." In any event, we emphasize that this disagreement with Judge Walker amounts to an academic exercise inasmuch as we do not decide whether heightened scrutiny is warranted in the circumstances here presented.

[16] Because Admin. Code § 10-131(a)(2) does not ban the right to keep and bear arms but only imposes a burden on the right, we agree with the District Court that strict scrutiny is not appropriate here. *See Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 93-97 (2d Cir. 2012) (applying intermediate scrutiny to a statute that required "proper cause" for the issuance of a concealed carry pistol license because the statute did "not burden the 'core' protection of self-defense"); *Masciandaro*, 638 F.3d at 469-71 (applying intermediate scrutiny to a regulation that prohibited the possession of a loaded handgun in a vehicle in a national park); *Marzzarella*, 614 F.3d at 97 (same, where the regulation limited the possession of firearms with obliterated serial numbers).

scrutiny." *Kwong*, 876 F. Supp. 2d at 259 (finding that Admin. Code § 10-131(a)(2) "is substantially related to the[ ] important governmental interests [of promoting public safety and preventing gun violence] because the fee is designed to recover the costs attendant to the licensing scheme"); *see Bach v. Pataki*, 408 F.3d 75, 91 (2d Cir. 2005), *overruled on other grounds by McDonald*, 130 S. Ct. at 3026 (noting that the State "has a substantial and legitimate interest . . . in insuring the safety of the general public from individuals who, by their conduct, have shown themselves to be lacking the essential temperament or character which should be present in one entrusted with a dangerous instrument" (quotation marks omitted)); *see also Nat'l Awareness Found.*, 50 F.3d at 1167 ("In sum, we conclude that the $80 fee . . . serves the legitimate purpose of defraying the expenses incident to the administration and enforcement of § 173-b(1)."); *cf. Ctr. for Auto Safety, Inc. v. Athey*, 37 F.3d 139, 145 (4th Cir. 1994) (holding that fees on certain types of solicitation were "narrowly tailored to further a legitimate governmental purpose" where the fees were "calibrated to approximate the costs of administering the Statute, and the revenues raised by the fees d[id] not exceed these costs").

For these reasons, we affirm the March 26, 2012 Opinion and Order of the District Court insofar as it concludes that Admin. Code § 10-131(a)(2)'s $340 licensing fee is constitutional.

B. Penal Law § 400.00(14) Is Constitutional

The second issue presented in this appeal is whether Penal Law § 400.00(14), which allows the City of New York (and Nassau County) to set the residential handgun licensing fee outside the $3-10 range permitted in the rest of New York State, violates the Equal Protection Clause. In short, plaintiffs argue that this statutory provision should be reviewed under "strict scrutiny," and should be found to be unconstitutional "to the extent it authorizes the City to impose a fee greater than $10," because it burdens the exercise of a fundamental right. Appellants' Br. 25. We disagree with plaintiffs' views about the appropriate level of "scrutiny" as well as the constitutionality of the Penal Law § 400.00(14).

i. Penal Law § 400.00(14) Is Subject to Rational Basis Review

Although the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike," *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985), it "does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purposes for which the classification is made," *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966).

Here, Penal Law § 400.00(14) simply allows the New York City Council to "fix the fee to be charged for a license to carry or possess a pistol or revolver [in New York City]," while the licensing fee to carry or possess such a firearm outside New York City must be "not less than three dollars nor more than ten dollars as may be determined by the legislative body of the county." N.Y. Penal Law § 400.00(14).[17] But for the purposes of plaintiffs' Equal Protection challenge, it is perhaps more important to summarize what Penal Law § 400.00(14) does not do. It does not require the New York City Council to charge a higher (or lower) fee than other jurisdictions in the State. It does not restrict other jurisdictions from obtaining a legislative exemption from the $3-10 fee range like New York City and Nassau County.[18] And it does not allow a local government to charge any fee amount; all license or permit fees in New York cannot exceed "a sum reasonably necessary to cover the costs of the issuance, inspection and enforcement." *See ATM One L.L.C. v. Inc. Vill. of Freeport*, 714 N.Y.S.2d 721, 722 (2d Dep't 2000) (quotation marks omitted). In other words, beyond setting the $3-10 fee range applicable to most of New York State—which plaintiffs do not contest—Penal Law § 400.00(14) itself does *nothing* to burden anyone's Second Amendment rights.

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17 As noted above, Nassau County also is exempted by this provision from the $3-10 licensing fee range.

18 Moreover, there is no evidence that another local government (other than the City of New York and Nassau County) has sought to set its licensing fee outside of the $3-10 range, as New York City did. Nor is there any evidence that any such a request was rejected by the New York legislature.

In light of what Penal Law § 400.00(14) does (and does not do), we agree with the District Court that rational basis review is appropriate because Penal Law § 400.00(14)'s geographic classification is not suspect, *see City of Cleburne*, 473 U.S. at 440, and the statute itself does not burden a fundamental right, *see Romer v. Evans*, 517 U.S. 620, 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class," the legislative classification will be upheld "so long as it bears a rational relation to some legitimate end.").[19]

ii. Penal Law § 400.00(14) Survives "Rational Basis" Review

Penal Law § 400.00(14) survives rational basis review,[20] which requires only that there be "a rational relationship between the disparity of treatment and some legitimate governmental purpose,"

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[19] To the extent that plaintiffs argue that the fee scheme burdens a fundamental right, it can only be so if it results in New York City (or Nassau County) adopting a fee that itself impermissibly burdens the Second Amendment right. But, as noted above, the $340 licensing fee required by Admin. Code § 10-131(a)(2) survives "intermediate scrutiny," *see* Discussion Section A.ii, *ante*, and Penal Law § 400.00(14) does not involve a suspect classification. In such circumstances, courts have applied "rational basis" review to Equal Protection claims on the theory that the Second Amendment analysis sufficiently protects one's rights. *See, e.g.*, *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 211-12 (5th Cir. 2012); *Hightower v. City of Boston*, 693 F.3d 61, 83 (1st Cir. 2012) ("Given that the Second Amendment challenge fails, the equal protection claim is subject to rational basis review."); *Nordyke v. King*, 681 F.3d 1041, 1043 n.2 (9th Cir. 2012) (en banc) ("As to the Nordykes' equal protection claim, because the ordinance does not classify shows or events on the basis of a suspect class, and because we hold that the ordinance does not violate either the First or Second Amendments, rational basis scrutiny applies."). And while we are mindful that plaintiffs' Equal Protection claim and Second Amendment claim technically challenge different statutes, this fact strikes us as being a distinction without a difference. Because plaintiffs have not shown that New York City officials have set, or are likely to set, a fee that impermissibly burdens the Second Amendment right, there is no indication that the variance in the levels of protection afforded by Penal Law § 400.00(14) in itself burdens a fundamental right.

In his concurring opinion, Judge Walker suggests that our analysis on this point "blinks reality" and "condones a loophole." Concurrence, at 6, *post*. We respectfully disagree. Like *every* Circuit to have addressed this issue, we simply conclude that plaintiffs should not be allowed to use the Equal Protection Clause "to obtain review under a more stringent standard" than the standard applicable to their Second Amendment claim. *See Woollard v. Gallagher*, 712 F.3d 865, 873 n.4 (4th Cir. 2013) ("[T]o accept [the Appellees' equal protection] theory would be to erase, in one broad stroke, the careful and sensible distinctions that the Fourth Circuit and other courts have drawn between core and non-core Second Amendment protections and to ignore the principle that differing levels of scrutiny are appropriate to each." (internal quotation marks omitted)). Put another way, an Equal Protection claim that is based on the alleged burdening of one's Second Amendment rights should not be reviewed in isolation; whether one's Second Amendment rights are impermissibly "burdened" is necessarily informed by the underlying Second Amendment analysis. As New York City's $340 licensing fee survives "intermediate scrutiny," the fact that other localities charge a *lower* fee need not be subject to anything more than "rational basis" review.

[20] Although we conclude that Penal Law § 400.00(14) survives rational basis review, we make no comment on the wisdom of this particular scheme, which limits all but two localities to a small fee range. Of course, such considerations are for the legislature to determine. *See Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 487 (1955) ("The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the

for many of the reasons mentioned above regarding Admin. Code § 10-131(a)(2). *See Heller v. Doe*, 509 U.S. 312, 320 (1993).

Plaintiffs do not dispute that the State has a legitimate interest in allowing New York City to recoup the costs incurred by its regulatory schemes more fully. *See* Appellant's Br. 38-39; *see also Thomas v. Chi. Park Dist.*, 534 U.S. 316, 322 (2002) (approving a municipality's use of permits that were designed, at least in part, "to assure financial accountability for damage caused by [an] event"); *Int'l Women's Day March Planning Comm.*, 619 F.3d at 369 ("It is undisputed that San Antonio has a significant interest in recouping the expenses it incurs from the processions held on its streets."); *Nat'l Awareness Found.*, 50 F.3d at 1167 (concluding that that an $80 fee "serve[d] the legitimate purpose of defraying the expenses incident to the administration and enforcement" of a statutory scheme regarding professional solicitors). Moreover, by providing flexibility to the City of New York to defray the costs of operating this licensing scheme, the State—through Penal Law § 400.00(14)—helps ensure that New York City's licensing scheme is adequately funded, thereby allowing it to function properly. *See Cox*, 312 U.S. at 577 ("The suggestion that a flat fee should have been charged fails to take account of the difficulty of framing a fair schedule to meet all circumstances, and we perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought."); *cf. Avery v. Midland Cnty.*, 390 U.S. 474, 485 (1968) ("The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems."). Indeed, as "[e]very application [under N.Y. Penal Law § 400.00(1)-(4)] triggers a local investigation by police into the applicant's mental health history, criminal history, [and] moral character," *Kachalsky*, 701

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advantages and disadvantages of the new requirement."); *cf. Hearne v. Bd. of Educ. of Chi.*, 185 F.3d 770, 774-75 (7th Cir. 1999) (upholding a statute under rational basis review that treated Chicago differently than the rest of Illinois with regard to certain employment rights for school teachers).

F.3d at 87, helping ensure that the scheme functions properly promotes public safety, *see Bach*, 408 F.3d at 91 (noting that the State "has a substantial and legitimate interest . . . in insuring the safety of the general public from individuals who, by their conduct, have shown themselves to be lacking the essential temperament or character which should be present in one entrusted with a dangerous instrument" (quotation marks omitted)).

For these reasons, we conclude that Penal Law § 400.00(14), which permits New York City and Nassau County to charge a fee outside of the $3-10 range applicable in other jurisdictions in New York State, survives rational basis review and does not violate the Equal Protection Clause.

CONCLUSION

To summarize, we hold that, on the facts presented in this appeal:

(1) Admin. Code § 10-131(a)(2), which sets the residential handgun licensing fee in New York City at $340 for a three-year license, is a constitutionally permissible licensing fee;

(2) Although we are skeptical that Admin. Code § 10-131(a)(2) should be subject to any form of heightened scrutiny, *see United States v. Decastro*, 682 F.3d 160, 164 (2d Cir. 2012), we need not definitively answer that question because we conclude that it survives "intermediate scrutiny" in any event;

(3) Penal Law § 400.00(14), which allows New York City (and Nassau County) to set and collect a residential handgun licensing fee outside the $3-10 range permitted in other jurisdictions in New York State, is subject only to "rational basis" review under the Equal Protection Clause because it "neither burdens a fundamental right nor targets a suspect class." *Romer v. Evans*, 517 U.S. 620, 631 (1996); and

(4) Penal Law § 400.00(14) survives "rational basis" review.

Accordingly, the March 27, 2012 judgment of the District Court is **AFFIRMED**.

12-1578-cv
Kwong v. Bloomberg

JOHN M. WALKER, JR., Circuit Judge, concurring:

This case presents complicated questions in an area of law in which the Supreme Court has provided limited guidance. The full import of the Second Amendment right and the government's burden to justify the infringement of this right in different contexts remain opaque. Thus, it is not entirely surprising that, while I agree with the majority that the two laws at issue here are constitutional, I reach that conclusion by a different route.

I would hold that Administrative Code § 10-131(a)(2), which imposes a non-negligible, indeed significant, initial handgun licensing fee of $340, does not violate the Second Amendment. Although the fee constitutes a substantial burden on the fundamental Second Amendment right to possess a handgun in the home for self-defense, see McDonald v. City of Chicago, 130 S. Ct. 3020, 3036 (2010), and thereby necessitates intermediate scrutiny, the statute survives such heightened review.[1] The government interest at stake—protecting the public safety—is an important one, and the fee is collected solely to recoup the costs of the licensing regime

[1] Because it does not state that the fee definitively constitutes a substantial burden on the Second Amendment right, the majority implies that rational basis review may be sufficient. Since I find that charging a non-nominal fee for the exercise of a right protected by the core of the Second Amendment imposes a substantial burden on a fundamental right, I believe heightened scrutiny of the fee statute is necessary.

that is designed to further that interest. Indeed, because of the heightened public safety concern in the Second Amendment context, I find it unlikely that handgun licensing fees tied to cost recovery would ever fail to meet this heightened standard.

Second, I would hold that Penal Law § 400.00(14) does not violate the Equal Protection Clause, despite the fact that it, in combination with local law, permits the City of New York and Nassau County to impose significantly higher residential handgun licensing fees than other New York counties. The fee disparity burdens the exercise of a fundamental right differently for different New York State residents and therefore demands a heightened level of review. However, the governmental interest at issue here—permitting local discretion in deciding whether and how to recoup costs related to protecting the public safety—justifies this disparity.

A. Administrative Code § 10-131(a)(2) Does Not Violate the Second Amendment

The majority begins its analysis of the constitutionality of Administrative Code § 10-131(a)(2) under the Second Amendment with a discussion of the Supreme Court's First Amendment "fee jurisprudence." It concludes—and I agree—that the $340 licensing charge is not an unconstitutional tax, but rather a constitutionally permissible fee.

The majority then addresses the question of whether the fee is an unconstitutional burden on the Second Amendment. In other words,

does § 10-131(a)(2) impose a substantial burden on the fundamental right to keep a handgun in the home?

As the majority notes, the Second Circuit does not read Supreme Court jurisprudence as "mandat[ing] that any marginal, incremental or even appreciable restraint on the right to keep and bear arms be subject to heightened scrutiny." United States v. Decastro, 682 F.3d 160, 166 (2d Cir. 2012) (determining that a statute that barred the transportation of firearms across state lines required only rational basis review because individuals could apply for licenses to own guns in all states). Instead, we have determined that "heightened scrutiny is triggered only by those restrictions that . . . operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes)." Id. (emphasis added). The majority relies on Decastro's "appreciable restraint" language to suggest we need not apply heightened scrutiny to a licensing fee that "amounts to just over $100 per year." Ante at 10. However, because it ultimately finds that the statute would survive intermediate scrutiny, the majority observes that it need not address the questions of whether the fee is a substantial burden and what level of review is required.

While I agree with the majority that § 10-131(a)(2) survives intermediate scrutiny, I believe that such review is required. The Supreme Court has clarified that a law-abiding citizen's right to

possess a handgun in the home for self-defense is fundamental. See McDonald, 130 S. Ct. at 3036. Any non-nominal licensing fee necessarily constitutes a substantial burden on this right.[2] And, unlike the statute at issue in Decastro, which barred transporting a firearm across state lines, "there are no alternative options for obtaining a license to [have] a handgun." Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 93 (2d Cir. 2012).

Intermediate scrutiny is sufficient, however, because a licensing fee imposes only a burden—not a ban—on this fundamental right. Id. at 93-97. Accordingly, and for substantially the same reasons advanced by the majority, I believe that § 10-131(a)(2) easily survives intermediate scrutiny. Indeed, I would go a step further. As we recently noted, "[t]he regulation of firearms is a paramount issue of public safety, and recent events in [Newtown, Connecticut] are a sad reminder that firearms are dangerous in the

[2] Portions of the majority's opinion might be read as stating that a fee of $100 per year is not a substantial burden. See ante at 12 ("On the facts of this case, we find it difficult to say that the licensing fee, which amounts to just over $100 per year, is anything more than a marginal, incremental or even appreciable restraint on one's Second Amendment rights—especially considering that plaintiffs have put forth *no evidence* to support their position that the fee is prohibitively expensive." (quotation marks omitted)). I do not believe that whether a fee is prohibitive is the appropriate test for evaluating whether it imposes a substantial burden. Although some fees may be so marginal as to be immaterial, a $340 licensing fee is not nominal and therefore constitutes a substantial burden. Certainly, it may be negligible for some individuals, while for others it would present a prohibitively costly barrier to exercising a fundamental right.

wrong hands." Osterweil v. Bartlett, 706 F.3d 139, 143 (2d Cir. 2013). Because of the heightened safety concerns in the Second Amendment context, I would find that handgun licensing fees tied to and limited by cost recovery are generally constitutional under the Second Amendment.

B. Penal Law § 400.00(14), Separately or In Combination with Local Law, Does Not Violate the Equal Protection Clause

The majority reasons that, because Penal Law § 400.00(14) "simply allows the New York City Council to fix the fee to be charged for a license to carry or possess a pistol or revolver in New York City," ante at 15 (quotation marks and alteration omitted), it "itself does *nothing* to burden anyone's Second Amendment [fundamental] rights," ante at 16. Furthermore, the majority notes, § 400.00(14) does not permit New York City and Nassau County to charge any amount they wish; no licensing fee can exceed "a sum reasonably necessary to cover the costs of the issuance, inspection and enforcement." ATM One LLC v. Inc. Vill. of Freeport, 714 N.Y.S.2d 721, 722 (2d Dep't 2000) (quotation marks omitted). Based on its determination that the contested law does not burden any fundamental rights and the fact that the statute's geographic classification is not suspect, the majority concludes that only rational basis review is warranted under the Equal Protection Clause.

This analysis both blinks reality and condones a loophole that permits disparate burdens on a fundamental right for different individuals. Penal Law § 400.00(14) does not operate in a vacuum; it is applied through local legislation that has the result of a gun owner paying a $340 handgun licensing fee in one New York State jurisdiction and a $10 fee in another. This disparate burden of a fundamental right necessitates more exacting scrutiny than rational basis review.[3]

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[3] The majority observes that, if a law is found constitutional under Second Amendment jurisprudence, courts generally apply only rational basis review to associated Equal Protection Clause claims. See ante at 16 n.19 (citing First, Fourth, Fifth, and Ninth Circuit decisions applying rational basis review to an Equal Protection Clause claim after finding that the contested law survived the review required under the Second Amendment). Those cases, which dealt with regulation of conceal-and-carry licenses, handgun ownership by young adults, and firearms possession on public property, did not consider the impact of a law on the core Second Amendment right of gun ownership for defense of the home. Moreover, they provide little, if any, explanation for their decision to short-circuit the usual Equal Protection Clause analysis.

Although the Supreme Court has found that laws which survive review under the Free Exercise jurisprudence receive only rational basis review under an associated Equal Protection Clause claim, see Locke v. Davey, 540 U.S. 712, 720 n.3 (2004); Johnson v. Robinson, 415 U.S. 361, 375 n.14 (1974), these cases are distinguishable. In Locke and Johnson, the plaintiffs argued that they were denied a governmental benefit (scholarship money and educational benefits, respectively) due to their religious-oriented activity (pursuit of a theology degree and conscientious objection, respectively). The Supreme Court upheld both laws after conducting a Free Exercise analysis, noting that the laws posed only "incidental" or "minor" burdens on the plaintiff's Free Exercise rights—if any burden at all. Locke, 540 U.S. at 725; Johnson, 415 U.S. at 385. The Supreme Court then found, in cursory footnotes, that the associated Equal Protection Clause claims required only rational basis review.

Here, in contrast, the contested law creates a disparate

Courts apply heightened scrutiny when a legislative classification burdens a fundamental right. Romer v. Evans, 517 U.S. 620, 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."). However, strict scrutiny does not appear warranted when, as here, an Equal Protection Claim is based on a burdening of a fundamental right that demands only intermediate scrutiny under that right's jurisprudence. See Ramos v. Town of Vernon, 353 F.3d 171, 178-80 (2d Cir. 2003) (applying intermediate scrutiny based on the lack of a suspect class, despite the legislative burdening of a fundamental right, and noting that "the equal protection framework allows for a more discerning inquiry to accommodate competing [governmental and individual] interests"). Accordingly, I believe that this is a situation where intermediate scrutiny is sufficient.

Even if strict scrutiny were applicable, this would be one of those rare situations where strict scrutiny would not be fatal in fact. See Adam Winkler, 59 Vand. L. Rev. 793, 815, 862-63 (2006)

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burden—and a potentially prohibitive burden—on exercising a fundamental right. This requires heightened review under the Equal Protection Clause. I am not suggesting, as the majority implies, that the claim under the Equal Protection Clause should necessarily receive more exacting scrutiny than that under the Second Amendment. See ante at 16 n.19. I read the majority opinion to imply that both claims can be reviewed for rational basis, and I am applying the same standard of review—intermediate scrutiny—to both claims.

(finding that approximately 30 percent of all applications of strict scrutiny result in the challenged law being upheld); United States v. Miles, 238 F. Supp. 2d 297, 301 (D. Me. 2002) (upholding a gun control law under strict scrutiny).

First, there is an important and compelling governmental interest in allowing local governments to be flexible in setting fees to recoup costs related to protecting the public safety if they so choose, even if this results in different localities charging different fees for a constitutionally-protected activity. See Cox v. New Hampshire, 312 U.S. 569, 577 ("The suggestion that a flat fee should have been charged [for a parade license] fails to take account of the difficulty of framing a fair schedule to meet all circumstances, and we perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought." (emphasis added)).

Second, a cost recovery licensing fee is a substantially related and narrowly tailored means of protecting this governmental interest, provided (1) that all localities are free to request and, if they do so, are granted the statutory fee cap exception; and (2) that, as is currently required under § 400.00(14), all localities that set their own fees are subject to the cost recovery ceiling.[4]

[4] The plaintiffs do not challenge the state's calculation of the costs of its licensing regime.

The right to keep and bear arms may be fundamental, but its exercise necessitates costly regulatory actions to protect the public safety. The state and its localities are not obligated to subsidize these costs.

For the above reasons, I believe that Administrative Code § 10-131(a)(2) and Penal Law § 400.00(14)—separately, or in combination with local implementing law—are constitutional, and I concur in the majority's conclusion that the district court's judgment should be affirmed.