12-1578

In the United States Court of Appeals for the Second Circuit

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees,

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor-Appellee,

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

Defendant.

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

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHUI W. KWONG, ET AL.,

Plaintiffs,

- against -

MICHAEL BLOOMBERG, ET AL.,

Defendants.

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11 Civ. 2356 (JGK)

OPINION AND ORDER

JOHN G. KOELTL, District Judge:

This lawsuit challenges the constitutionality of New York City's fee for a residential handgun license as well as the New York State statute that authorizes the City to collect that fee.

Plaintiffs Shui W. Kwong, George Greco, Glenn Herman, Nick Lidakis, Timothy S. Furey, Daniela Greco, and Nunzio Calce ("the individual plaintiffs"), as well as Second Amendment Foundation, Inc. and the New York State Rifle & Pistol Association, Inc. ("the organizational plaintiffs") (collectively "the plaintiffs"), bring this action against the City of New York and Michael Bloomberg, in his official capacity as the Mayor of the City of New York ("the City Defendants"). The Attorney General of the State of New York ("the Intervenor") has intervened in this action.[1]

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[1] Initially, the plaintiffs also sued Eric Schneiderman, in his official capacity as Attorney General of the State of New York. He was subsequently dismissed from the litigation, and the

The plaintiffs bring this action pursuant to 42 U.S.C. § 1983, alleging that two statutes — New York City Administrative Code § 10-131(a)(2) ("Admin. Code § 10-131(a)(2)" or "the City Statute") and New York Penal Law § 400.00(14) ("Penal Law § 400.00(14)" or "the State Statute") — violate their rights under the Second Amendment as incorporated against the States by the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, respectively. Pursuant to the authority granted by Penal Law § 400.00(14), New York City has set the fee for a residential handgun license at $340. The plaintiffs claim that the fee is unconstitutional. The plaintiffs have now moved for summary judgment and the City Defendants and Intervenor cross-moved for summary judgment. For the reasons explained below, the license fee and the implementing statutes are constitutional.

I.

The following facts are undisputed unless otherwise noted.

The individual plaintiffs are residents of New York City who all have paid a $340 fee to apply for a New York City "Premises Residence" handgun license, which allows license holders to possess handguns within a specified dwelling. (Pls.'

Attorney General then intervened in the action to defend the constitutionality of New York Penal Law § 400.00(14).

R. 56.1 Stmt. ¶¶ 9-15; City Defs.' R. 56.1 Resp. ¶¶ 9-15; Intervenor's R. 56.1 Resp. ¶¶ 9-15); N.Y. Penal Law § 400.00(2)(a); 38 RCNY § 5-01. Each individual plaintiff holds a Premises Residence handgun license. (Pls.' R. 56.1 Stmt. ¶¶ 9-15; City Defs.' R. 56.1 Resp. ¶¶ 9-15; Intervenor's R. 56.1 Resp. ¶¶ 9-15.) Plaintiffs Second Amendment Foundation, Inc. ("SAF") and the New York State Rifle & Pistol Association, Inc. ("NYSRPA") are not-for-profit member organizations that aim to promote the exercise and preservation of Second Amendment rights. (Pls.' R. 56.1 Stmt. ¶¶ 17, 19, 22, 25; City Defs.' R. 56.1 Resp. ¶¶ 17, 19, 22, 25; Intervenor's R. 56.1 Resp. ¶¶ 17, 19, 22, 25.) Plaintiffs Lidakis and Calce are members of SAF, plaintiff Greco is a member of NYSRPA, and plaintiff Herman is a member of both organizations. (Pls.' R. 56.1 Stmt. ¶¶ 21, 26; City Defs.' R. 56.1 Resp. ¶¶ 21, 26; Intervenor's R. 56.1 Resp. ¶¶ 21, 26.) SAF and NYSRPA assert claims on their own behalf and on behalf of their members. (Compl. ¶¶ 49, 54.)

The plaintiffs bring this action pursuant to 42 U.S.C. § 1983 alleging a violation of their rights under the Second Amendment and the Equal Protection Clause of the Fourteenth Amendment. The plaintiffs' challenge concerns the $340 fee that New York City imposes for the issuance or renewal of a Premises Residence handgun license that is valid for three years. New York State law makes it illegal to possess a handgun, including

within the home, without a license. N.Y. Penal Law §§ 265.01(1), 265.20(a)(3). New York Penal Law Article 400 provides for several different types of licenses to carry or possess handguns in various places or circumstances, including the Premises Residence handgun license at issue here. N.Y. Penal Law § 400.00(2). The Premises Residence handgun license allows a license holder to "have and possess [a handgun] in his dwelling . . . ." N.Y. Penal Law § 400.00(2)(a).

In order to obtain or renew a Premises Residence handgun license, an individual must apply for the license. N.Y. Penal Law § 400.00(1). The License Division of the New York City Police Department ("NYPD") is the entity responsible for processing applications and issuing handgun licenses, including Premises Residence handgun licenses. (Decl. of Andrew Lunetta ("Lunetta Decl.") ¶¶ 2-3.) Under New York law, "[n]o license shall be issued or renewed . . . except by the licensing officer, and then only after investigation and finding that all statements in a proper application for a license are true." N.Y. Penal Law § 400.00(1). Accordingly, in processing applications, a licensing officer must, among other duties, determine whether the applicant meets the eligibility requirements set forth under New York law; inspect mental hygiene records; and investigate the truthfulness of statements made in the application. (Lunetta Decl. ¶¶ 11-15); N.Y. Penal

Law § 400.00(4). The licensing officer may not approve the application if "good cause exists for the denial of the license." N.Y. Penal Law § 400.00(1)(g).

The plaintiffs challenge two specific statutory provisions related to this licensing scheme. The first provision the plaintiffs challenge — New York Penal Law § 400.00(14) — authorizes the New York City Council ("City Council") to set the fees for the issuance and renewal of all handgun licenses issued in New York City. The statute also confers discretion on the Nassau County Board of Supervisors to set handgun licensing fees in Nassau County, although the plaintiffs do not challenge this portion of the statute.[2] Penal Law § 400.00(14) provides that:

> 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 . . . 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). Thus, while in New York State the license fee is generally capped at a $10 maximum, in New York City, the City Council may set the fee above this rate. Penal

[2] Nassau County currently charges a fee of $200 to apply for a license that is valid for five years. (Pls.' R. 56.1 Stmt. ¶ 48; City Defs.' R. 56.1 Resp. ¶ 48; Intervenor's R. 56.1 Resp. ¶ 48.) The plaintiffs do not challenge the amount of this fee, nor the discretion conferred on Nassau County to set its own fees pursuant to Penal Law § 400.00(14).

Law § 400.00(14) was amended in 1947 by the New York State Legislature to confer this discretion on the City Council to set fees outside the fee range applicable to the rest of the State ("the 1947 Amendment"). 1947 N.Y. Laws Ch. 147, attached as Decl. of Monica A. Connell ("Connell Decl.") Ex. F; Decl. of David D. Jensen ("Jensen Decl.") Ex. 18; Decl. of Michelle Goldberg-Cahn ("Goldberg-Cahn Decl.") Ex. A.

Since 1948, the City Council has enacted legislation establishing fees for the issuance and renewal of licenses to possess and carry handguns. In 1948, the fee in New York City was set at $10 for the initial license and $5 for each renewal license. Local Law No. 32 (1948), attached as Goldberg-Cahn Decl. Ex. B. This fee was increased several times, with the most recent fee increase in 2004. Local Law No. 47 (1962), Local Law No. 78 (1973), Local Law No. 42 (1979), Local Law No. 37 (1985), Local Law No. 51 (1989), Local Law No. 42 (1992), Local Law No. 37 (2004), attached as Goldberg-Cahn Decl. Exs. C, E, F, G, H, I, J. Local Law 37 of 2004 raised the fees from the $170 fee then applicable for a two-year handgun license to the $340 fee for a three-year handgun license that the plaintiffs now challenge.[3] Local Law 37 (2004), attached as Goldberg-Cahn

[3] Handgun license applicants must also pay an additional fee of $94.25 for fingerprinting and background checks conducted by the New York State Division of Criminal Justice Services. (Pls.' R.

Decl. Ex. J. The $340 fee is prescribed by Admin. Code § 10-131(a)(2), which 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 . . . .

N.Y.C. Admin. Code § 10-131(a)(2).

The plaintiffs contend that Admin. Code § 10-131(a)(2) violates the Second Amendment because it imposes an impermissible fee that unconstitutionally burdens the right to keep and bear arms. The plaintiffs also argue that Penal Law § 400.00(14) violates the Equal Protection Clause because it draws a classification between New York City residents and other citizens of New York State that results in a disparate burden on the exercise of New York City residents' Second Amendment rights. The plaintiffs do not challenge the requirement of a license to possess or carry a handgun, the performance of an investigation prior to the issuance of a license, or the imposition of a fee to apply for such a license. In addition, the plaintiffs' action is confined to Premises Residence handgun licenses and does not challenge the application of the $340 fee

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56.1 Stmt. ¶ 30; City Defs.' R. 56.1 Resp. ¶ 30; Intervenor's R. 56.1 Resp. ¶ 30.) The plaintiffs do not challenge this fee.

to other types of handgun licenses. The plaintiffs seek declaratory and injunctive relief. (Compl. ¶ 3.)

The plaintiffs moved for summary judgment in their favor pursuant to Rule 56 of the Federal Rules of Civil Procedure before any discovery in this action had taken place. The City Defendants and the Intervenor both cross-moved for summary judgment. The City Defendants' motion sought dismissal of all causes of action in this suit, while the Intervenor's motion sought dismissal of the second cause of action directed against Penal Law § 400.00(14).

II.

The standard for granting summary judgment is well established. "The court shall grant summary judgment if the movant shows that 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 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Gallo v. Prudential Residential Servs. L.P., 22 F.3d 1219, 1223 (2d Cir. 1994). "[T]he trial court's task at the summary judgment motion stage of the litigation is carefully limited to discerning whether there are genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution." Gallo, 22 F.3d at 1224. The

moving party bears the initial burden of "informing the district court of the basis for its motion" and identifying the matter that "it believes demonstrate[s] the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323. The substantive law governing the case will identify those facts that are material and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Behringer v. Lavelle Sch. for Blind, No. 08 Civ. 4899, 2010 WL 5158644, at *1 (S.D.N.Y. Dec. 17, 2010).

In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citing United States v. Diebold, Inc., 369 U.S. 654 (1962)); see also Gallo, 22 F.3d at 1223. Summary judgment is inappropriate if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party. See Chambers v. T.R.M. Copy Ctrs. Corp., 43 F.3d 29, 37 (2d Cir. 1994). The moving party has the initial burden of demonstrating the lack of a material issue of fact. If the moving party meets its burden, the nonmoving party must produce evidence in the record and "may not rely simply on

conclusory statements or on contentions that the affidavits supporting the motion are not credible . . . ." Ying Jing Gan v. City of New York, 996 F.2d 522, 532 (2d Cir. 1993); see also Scotto v. Almenas, 143 F.3d 105, 114-15 (2d Cir. 1998) (collecting cases); Behringer, 2010 WL 5158644, at *1.

III.

The Intervenor argues that neither the individual plaintiffs nor the organizational plaintiffs have standing to challenge Penal Law § 400.00(14). "Standing is a jurisdictional prerequisite; accordingly, the Court must initially determine whether [the plaintiff] has standing to invoke the jurisdiction of the federal courts to determine the merits of the underlying disputes." Local 851 of Int'l Bhd. of Teamsters v. Thyssen Haniel Logistics, Inc., Nos. 95 Civ. 5179, 02 Civ. 6250, 2004 WL 2269703, at *5 (E.D.N.Y. Sept. 30, 2004) (internal quotation marks and citations omitted)), aff'd sub nom, Local 851 of Int'l Bhd. of Teamsters v. Quinlin, 164 F. App'x 174 (2d Cir. 2006) (summary order); see also Ontario Pub. Serv. Emps. Union Pension Trust Fund v. Nortel Networks Corp., 369 F.3d 27, 34 (2d Cir. 2004).

First, the Intervenor contends that there is no live case or controversy because the individual plaintiffs have not suffered any concrete or actual injury as a result of the

operation of Penal Law § 400.00(14). In order for the individual plaintiffs to establish standing on this motion for summary judgment, they must set forth, by affidavit or other evidence, specific facts demonstrating that: (1) they have suffered an actual or imminent injury in fact, that is concrete and particularized, and not conjectural or hypothetical; (2) this injury is fairly traceable to the defendants' alleged actions; and (3) it is likely that a favorable decision in the case will redress the injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-61 (1992).

The individual plaintiffs in this case have suffered a concrete and actual injury because they have all paid the $340 application fee that is challenged as unconstitutional. The Intervenor's standing argument is thus better understood as an argument that the plaintiffs have failed to satisfy the causation element of standing, rather than the injury-in-fact element. Specifically, the Intervenor argues that the State Statute is not the cause of the plaintiffs' injuries because it is the City Statute, rather than the State Statute, that sets the fee at the higher $340 rate about which the plaintiffs complain.

While the Intervenor is correct that it is the City Statute, rather than the State Statute, that imposes the $340 fee at issue, there exists a sufficient causal nexus between the

City Council's actions and the State Statute to give rise to standing to challenge the latter. Without the exemption provided by the State Statute, the City Council would not have been able to set the handgun licensing fee at the current $340 rate; instead, it would have been confined to the $10 maximum fee governing the rest of the State. While it is true that standing is improper where "the injury complained of is the result of the independent action of some third party not before the court," Bennett v. Spear, 520 U.S. 154, 169 (1997) (internal quotation marks, citations and alterations omitted), a party does "ha[ve] standing to challenge government action that permits or authorizes third-party conduct that would otherwise be illegal in the absence of the Government's action[,]" Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930, 940 (D.C. Cir. 2004); see also Fulani v. League of Women Voters Educ. Fund, 882 F.2d 621, 628 (2d Cir. 1989) (finding sufficient causal nexus for standing where, "[b]ut for the government's refusal to revoke the [defendant's] tax-exempt status, then, the [defendant], as a practical matter, would have been unable to sponsor the allegedly partisan debates which caused the injury of which [the plaintiff] complains"). Here, in the absence of the exemption provided by the State Statute, the City Council could not permissibly have set the handgun licensing fee at the $340 rate the plaintiffs paid. In these circumstances, "the

intervening choices of [the City Council] are not truly independent of" the discretion conferred by the State Statute. Nat'l Wrestling, 366 F.3d at 941; see also Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 438-44 (D.C. Cir. 1998) (plaintiffs' injuries were fairly traceable to agency regulations because, absent those regulations, third party animal exhibitors would not have been permitted to take the actions complained of without violating the law). Moreover, a favorable decision in this case would redress the plaintiffs' injuries because, if the State Statute no longer authorized the exemption, the City Council could no longer permissibly set the handgun licensing fee at the $340 rate about which the plaintiffs complain. Therefore, the individual plaintiffs have standing to challenge the constitutionality of Penal Law § 400.00(14).

The Intervenor next argues that the organizational plaintiffs lack standing to sue. An organizational plaintiff can assert standing either on its own behalf — when it has suffered injury in its own right — or on behalf of its members in a representative capacity, when certain requirements are met. Warth v. Seldin, 422 U.S. 490, 511 (1975); N.A.A.C.P. v. Acusport Corp., 210 F.R.D. 446, 457-58 (E.D.N.Y. 2002). Here, the organizational plaintiffs seek to sue in both capacities. (Compl. ¶¶ 49, 54.) However, because this is a § 1983 action,

the organizational plaintiffs may not sue in a representative capacity for the alleged violations of rights of their members. See, e.g., Nnebe v. Daus, 644 F.3d 147, 156 (2d Cir. 2011); League of Women Voters of Nassau Cnty. v. Nassau Cnty. Bd. of Supervisors, 737 F.2d 155, 160 (2d Cir. 1984); Aguayo v. Richardson, 473 F.2d 1090, 1099-1100 (2d Cir. 1973). Moreover, while the organizational plaintiffs assert standing to sue on their own behalf, it is questionable whether the injury they claim to have suffered — namely, the expenditure of time and resources to challenge the licensing fee — constitutes a sufficient injury for standing purposes. See Kachalsky v. Cacace, No. 10 Civ. 5413, 2011 WL 3962550, at *11 (S.D.N.Y. Sept. 2, 2011) (plaintiff Second Amendment Foundation, Inc.'s allegations that it engaged in education and research activities related to Second Amendment rights were insufficient at motion to dismiss stage to give rise to standing to sue on own behalf). However, because the individual plaintiffs have standing to sue and because, as set forth below, there is no constitutional violation in this case, it is unnecessary to resolve the question of whether the organizational plaintiffs have standing. See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 263-64 (1977) (declining to determine whether standing was proper for organization in light of conclusion that at least

one individual plaintiff had standing). Thus, it is appropriate for the Court to reach the merits of the underlying dispute.[4]

IV.

The plaintiffs argue that Admin. Code § 10-131(a)(2) violates the Second Amendment because the fee it imposes is excessive and impermissibly burdens the right to keep and bear arms.

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. In District of Columbia v. Heller, 554 U.S. 570 (2008), the Supreme Court concluded that the Second Amendment "confer[s] an individual right to keep and bear arms." Id. at 595. While the Court declined to "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment," it made clear that "whatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." Id. at

[4] The City Defendants also contend that the plaintiffs' challenge is not a constitutional one because the plaintiffs can seek redress in the New York State courts in a declaratory judgment action. However, "exhaustion is not a prerequisite to an action under § 1983" and thus this argument is without merit. Patsy v. Bd. of Regents of Fla., 457 U.S. 496, 500-01 (1982).

626, 635; see also McDonald v. City of Chicago, 130 S. Ct. 3020, 3048 (2010). The Second Amendment is "fully applicable to the States" through the Fourteenth Amendment as well as to the federal government. McDonald, 130 S. Ct. at 3026.

A.

The plaintiffs first argue that the $340 fee is impermissible under the standards that govern the imposition of fees on the exercise of constitutionally protected activities — here, the Second Amendment right to keep and bear arms.

The Supreme Court's fee jurisprudence, which has addressed the imposition of fees on expressive activities protected by the First Amendment, makes clear that, while the Government may not tax the exercise of constitutionally protected activities, it may impose a fee designed to defray the administrative costs of regulating the protected activity. In Cox v. New Hampshire, 312 U.S. 569 (1941), the Court found that a state statute requiring marchers to obtain licenses and prepay fees with a permissible range of from a "nominal amount" to $300 a day to parade on public streets was permissible because the fee was "not a revenue tax, but one to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed." Id. at 577 (citation omitted). The Court stated that "[t]here is nothing contrary to the

Constitution in the charge of a fee limited to the purpose stated." Id. In contrast, in Murdock v. Pennsylvania, 319 U.S. 105 (1943), the Court invalidated a city ordinance that, as applied, required religious groups to pay a license fee of $1.50 a day before distributing literature. The Court found the ordinance to be "a flat tax imposed on the exercise of a privilege granted by the Bill of Rights[,]" id. at 113, because the license fee was "not a nominal fee, imposed as a regulatory measure to defray the expense of policing the activities in question[,]" id. at 113-14.

Subsequent cases have thus analyzed the permissibility of fees imposed on the exercise of expressive activities by examining whether those fees were designed to defray, and did not exceed, the administrative costs of regulating the protected activity.[5] See, e.g., Int'l Women's Day March Planning Comm. v. City of San Antonio, 619 F.3d 346, 369-71 (5th Cir. 2010); Sullivan v. City of Augusta, 511 F.3d 16, 37-38 (1st Cir. 2007); Nationalist Movement v. City of York, 481 F.3d 178, 183 (3d Cir. 2007); Mainstream Mktg. Servs., Inc. v. F.T.C., 358 F.3d 1228, 1247-48 (10th Cir. 2004); N.E. Ohio Coal. for Homeless v. City of Cleveland, 105 F.3d 1107, 1109-10 (6th Cir. 1997); Nat'l

[5] The Supreme Court has also explained that the amount of the fee cannot vary based on the content of the speech in question. Forsyth Cnty., Ga. v. Nationalist Movement, 505 U.S. 123, 134-36 (1992). This requirement is not at issue here.

Awareness Found. v. Abrams, 50 F.3d 1159, 1165-66 (2d Cir. 1995); Ctr. for Auto Safety, Inc. v. Athey, 37 F.3d 139, 144-46 (4th Cir. 1994); South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 935 F.2d 868, 897-98 (7th Cir. 1991).

This standard has also been applied by those few courts that have considered fees imposed on the exercise of Second Amendment rights. See Justice v. Town of Cicero, No. 10 Civ. 5331, 2011 WL 5075870, at *7 (N.D. Ill. Oct. 25, 2011) ($25 application fee for registration of firearms was permissible because, "[l]ike the fee in [Cox], [the] registration fee . . . is 'not a revenue tax, but one to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed'" (quoting Cox, 312 U.S. at 577)); Heller v. District of Columbia ("Heller II"), 698 F. Supp. 2d 179, 192 (D.D.C. 2010) (upholding firearm registration requirements, including imposition of fees for registration, fingerprinting and ballistic identification totaling $60, concluding that fees were "intended to compensate the District for the costs of fingerprinting registrants, performing ballistic tests, processing applications and maintaining a database of firearms owners"), aff'd in part, rev'd in part on other grounds, No. 10-7036, 2011 WL 4551558 (D.C. Cir. Oct. 4, 2011); see also D.C. Mun. Regs. tit. 24, § 2320.

1.

The City Defendants contend that the $340 fee is permissible under this standard because it is designed to defray, and does not exceed, the costs of administering New York's handgun licensing scheme. However, the plaintiffs argue that, to be permissible, a fee must not only be designed to defray administrative costs but must also be a "nominal" amount. According to the plaintiffs, the $340 fee is too high to be nominal.

To support their argument that a fee must be "nominal" to be permissible, the plaintiffs point to a statement in Murdock indicating that the fee in question was impermissible because the fee was "not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question . . . ." 319 U.S. at 113-14. The plaintiffs read this statement to mean that a fee must be both nominal and designed to defray administrative expenses to be permissible. However, this argument was explicitly rejected by the Supreme Court in Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123 (1992), where the Court concluded that the courts below had erred in interpreting Murdock in this manner. The Court explained that:

> [t]his sentence [from Murdock] does not mean that . . . only nominal charges are constitutionally permissible. It reflects merely one distinction between the facts in

> Murdock and those in Cox. The tax at issue in Murdock was invalid because it was unrelated to any legitimate state interest, not because it was of a particular size.

Id. at 137.[6] Courts of Appeals have also specifically rejected the argument that a fee imposed on the exercise of constitutionally protected activities must be "nominal" in amount to be permissible.[7] See Am. Target Adver., Inc. v. Giani, 199 F.3d 1241, 1248-49 (10th Cir. 2000) (rejecting plaintiffs' reliance on Murdock for proposition that sheer size of $250 fee rendered it constitutionally excessive); N.E. Ohio Coal. for Homeless, 105 F.3d at 1110 ("[A] more than nominal permit fee is constitutionally permissible so long as the fee is reasonably related to the expenses incident to the administration of the ordinance and to the maintenance of public safety and order."

[6] Indeed, in Cox itself, the Supreme Court affirmed the imposition of a parade license fee that ranged from what it described as "nominal" up to $300. Cox, 312 U.S. at 576. Thus, the Supreme Court did not restrict otherwise permissible license fees to those that were "nominal" in amount.

[7] The plaintiffs contend that the decision of the Court of Appeals for the Second Circuit in Abrams supports the proposition that a fee must be "nominal" to be permissible. While it is true that the district court in Abrams separately analyzed the question of whether the fee was "nominal," 812 F. Supp. 431, 433 (S.D.N.Y. 1993), the Court of Appeals did not separately consider whether the fee was "nominal" and framed the relevant test as whether the costs attendant to a regulatory scheme exceed the fees imposed, 50 F.3d at 1164-66. Moreover, the fee considered to be "nominal" by the district court in Abrams was an $80 annual registration fee. 812 F. Supp. at 432. The $340 fee for a three-year handgun license at issue here, when calculated at an annual rate, is about $113, which is comparable to the $80 annual fee deemed "nominal" by the district court in Abrams.

(internal quotation marks and citation omitted)); Stonewall Union v. City of Columbus, 931 F.2d 1130, 1136 (6th Cir. 1991) (rejecting plaintiffs' reliance on Murdock for proposition that only nominal permit fees are permissible); cf. Coal. for Abolition of Marijuana Prohibition v. City of Atlanta, 219 F.3d 1301, 1323 n.16 (11th Cir. 2000) ("While we do not specifically address [the issue], we note that the majority of our sister circuits have interpreted [Forsyth County] as making it constitutionally permissible for an ordinance regulating constitutionally protected activity to impose a permit fee which is more than nominal . . . .") (collecting cases).

While it is possible to conceive of fees that are impermissible because they are so exorbitant as to deter the exercise of the protected activity, see 729, Inc. v. Kenton Cnty. Fiscal Court, 515 F.3d 485, 503 (6th Cir. 2008) (concluding that the Supreme Court's fee cases "created some limit on the amount the government could charge, based on the potential for a fee to deter protected speech"), there is no showing that the $340 handgun licensing fee qualifies as such a fee. The plaintiffs merely assert that the $340 fee is excessive, which is not sufficient to raise a genuine issue of material fact regarding the permissibility of the fee. See 729, Inc. v. Kenton Cnty. Fiscal Court, 402 F. App'x 131, 133 (6th Cir. 2010) ("Merely asserting that the fee is exorbitant,

without evidentiary support, is insufficient to withstand the County's motion for summary judgment."). There is no evidence that the fee has deterred or is likely to deter any individual from exercising his or her Second Amendment rights; indeed, all of the plaintiffs have paid the fee and have not pointed to any particular hardship they faced in doing so. Courts that have considered the size of a fee in analyzing the fee's permissibility have approved fees significantly higher than the $340 fee at issue here. See id. ($3000 adult business licensing fee was not constitutionally excessive); Coal. for Abolition, 219 F.3d at 1323-24 (festival permit fees ranging from $950 to $6500 based on size of festival were permissible). Furthermore, while the plaintiffs emphasize that other jurisdictions charge significantly lower fees, this does not establish that the $340 fee is excessive. See 729, Inc., 402 F. App'x at 133 (rejecting plaintiffs' argument that amount of licensing fee was unreasonable because other jurisdictions charged lower fees).

The plaintiffs also argue that, because the fees at issue are imposed directly on the basic ability to possess handguns in the home for self defense, any fee must be "nominal" to be permissible. The plaintiffs contend that this situation is distinct from a fee imposed on gun use that is commercial in nature or involves the use of public resources. However, the fee cases do not hold that it is only permissible to impose a

fee when the constitutionally protected activity itself involves the use of public resources or the conferral of a public benefit, as with a parade permit. Instead, these cases have held that fees may also be imposed to cover the costs of a regulatory scheme designed to combat potentially harmful effects of the constitutionally protected activity, such as the potential for fraud arising from charitable solicitations, and have not required that fees imposed in this context be only "nominal." See Giani, 199 F.3d at 1248-49; Abrams, 50 F.3d at 1165-66; Athey, 37 F.3d at 144-46.

Thus, the plaintiffs' argument that the $340 fee imposed by Admin. Code § 10-131(a)(2) is impermissible because it is not "nominal" is without merit.

2.

The plaintiffs also argue that the $340 fee is impermissible because it is not designed to defray the administrative costs of New York's handgun licensing scheme.

The plaintiffs contend that the legislative history of Local Law 37 of 2004, which increased the handgun licensing fee to $340, suggests that the objective of the fee increase was not to defray administrative costs. The plaintiffs emphasize that the Fiscal Impact Statement (FIS) for this law made no mention of the administrative costs attendant to handgun licensing. (Jensen Decl. Ex. 22.) However, the absence of any reference to

administrative costs in the 2004 FIS is not meaningful, because the FIS only provided an estimate of the fiscal impact of the law, rather than purporting to describe the law's purpose. See Jensen Decl. Ex. 22 (detailing impact on revenues and expenditures but providing no description of arguments in favor of or in opposition to the law). That Local Law 37 had the objective of recovering costs attendant to the licensing scheme is reflected in other documents prepared in connection with the legislation. For example, the Report of the Committee of Finance of the New York City Council noted that the revenue collected through licensing application fees was substantially lower than the costs incurred through licensing. (Goldberg-Cahn Ex. K at 2.) In addition, the User Cost Analysis prepared by the New York City Office of Budget Management ("OMB") in 2003 noted that the cost per licensing application was $343.49 while the fee per application was lower and recommended to increase the license fee "to $340 for a three-year license, to recover costs." (Lunetta Decl. Ex. D at 3.) Thus, the plaintiffs' contention that the 2004 fee increase did not have the objective of defraying administrative costs is unpersuasive.

Moreover, there is no genuine dispute that the $340 fee is less than the administrative costs of the licensing scheme. The User Cost Analysis performed by the OMB in 2003 indicates that the average cost to the City at that time for each handgun

license application was $343.49, more than the $340 fee at issue. (Lunetta Decl. Ex. D at 3.) In addition, a User Cost Analysis performed by the OMB in 2010 indicates that the cost to the City for each Premises Residence handgun license application was $977.16 for each initial application and $346.92 for each renewal application. (Lunetta Decl. Ex. F at 3; Ex. G at 3.) Thus, as of 2010, the fee for each Premises Residence handgun license application — the only type of license at issue here — represented only 34.79% of the per-unit costs incurred by the City. (Lunetta Decl. ¶ 19.)

The plaintiffs offer no evidence 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.[8] Instead, even though the plaintiffs initially sought summary judgment, the plaintiffs now argue that, if the Court concludes that the permissibility

[8] The plaintiffs initially argued that the fees recouped from handgun licensing were deposited in their entirety into the NYPD Pension Fund rather than used to defray administrative costs. However, the statutory provision upon which the plaintiffs relied in support of this argument — New York City Admin. Code § 13-203(6) — was amended in 1995 to provide that all fees collected from handgun licensing be paid into the City of New York's General Fund rather than the NYPD's Pension Fund. 1995 N.Y. Laws Ch. 503, attached as Goldberg-Cahn Decl. Ex. L; N.Y.C. Admin. Code § 13-213.1(3)(c). The plaintiffs do not dispute that this amendment had the effect of directing handgun licensing fees to the City's General Fund, rather than to the NYPD Pension Fund. (City Defs.' R. 56.1 Counterstmt. ¶¶ 55-59; Pls.' R. 56.1 Resp. ¶¶ 55-59.).

of the fee turns on this question, the Court should deny the motions for summary judgment and allow discovery. However, in order for a party to resist summary judgment on the grounds that additional discovery is necessary, that party "must submit an affidavit showing (1) what facts are sought to resist the motion and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts." Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 303 (2d Cir. 2003) (internal quotation marks, citation and alterations omitted); see also Contemporary Mission, Inc. v. U.S. Postal Serv., 648 F.2d 97, 107 (2d Cir. 1981). When a party has made such a showing, a district court may then: "(1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fed. R. Civ. P. 56(d).

While the plaintiffs have submitted an affidavit purportedly in compliance with Rule 56(d), this affidavit does not make a specific proffer regarding what discovery the plaintiffs seek, why that discovery would be reasonably expected to create a genuine issue of material fact, or what effort they have made to obtain discovery. The plaintiffs moved for summary judgment without seeking any discovery. The affidavit states

only that: "Plaintiffs submit that discovery is not necessary in light of the issues presented. However, if the Court concludes that the 'cost' basis for the City's $340 fee is a dispositive factor, then discovery regarding the basis for the City's calculations will be essential to oppose the City's motion." (Suppl. Decl. of David D. Jensen at ¶ 6.) The plaintiffs have therefore failed to show that they are entitled to discovery prior to summary judgment. The City Defendants have met their burden of demonstrating that the $340 fee defrays administrative costs attendant to the licensing scheme. Thus, the $340 fee is a permissible fee imposed on the exercise of constitutionally protected activities and does not violate the Second Amendment.

B.

The fee imposed by Admin. Code § 10-131(a)(2) is also permissible if analyzed under the means-end scrutiny applicable to laws that burden the exercise of Second Amendment rights.

The majority of courts considering Second Amendment challenges after Heller have adopted a two-pronged analysis, whereby the court first "ask[s] whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." If the challenged law does impose such a burden, the court "evaluate[s] the law under some

form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid." United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010); see also Heller v. District of Columbia ("Heller II"), No. 10-7036, 2011 WL 4551558, at *5-6 (D.C. Cir. Oct. 4, 2011); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010); United States v. Reese, 627 F.3d 792, 800-01 (10th Cir. 2010); Kachalsky, 2011 WL 3962550, at *20.

In this case, assuming, at the first step, that the $340 fee burdens conduct falling within the scope of the Second Amendment, the fee would pass muster under means-end scrutiny at the second step. Neither Heller nor McDonald prescribed the standard of scrutiny applicable to Second Amendment challenges.[9]

[9] Heller noted that the handgun ban it confronted would be invalid under any level of scrutiny. 554 U.S. at 628-29. Heller did, however, suggest that rational basis review was inappropriate, noting that "[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." Id. at 628 n.27; see also McDonald, 130 S. Ct. at 3047. Many courts have also interpreted Heller as implicitly inconsistent with across-the-board application of strict scrutiny, relying upon Heller's reference to "presumptively lawful regulatory measures" such as "longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . ." Heller, 554 U.S. at 626-27 & n.26. See, e.g., id. at 688 (Breyer, J., dissenting) ("[T]he majority implicitly, and appropriately, rejects [strict scrutiny] by broadly approving a set of laws . . . whose constitutionality under a strict scrutiny standard would be far from clear."); Kachalsky, 2011 WL 3962550, at *25 n.29 (collecting cases).

Most courts have declined to apply strict scrutiny to laws burdening the Second Amendment right. Instead, courts have concluded that, as in the First Amendment context, the level of scrutiny to be applied should vary "depend[ing] on the nature of the conduct being regulated and the degree to which the challenged law burdens the right." Chester, 628 F.3d at 682; see also Heller II, 2011 WL 4551558, at *9; United States v. Masciandaro, 638 F.3d 458, 470 (4th Cir. 2011). Applying this standard, the vast majority of courts have applied intermediate scrutiny to the Second Amendment challenges they have confronted. See, e.g., Masciandaro, 638 F.3d at 471; Chester, 628 F.3d at 683; Reese, 627 F.3d at 801-02; Marzzarella, 614 F.3d at 95-96; Kachalsky, 2011 WL 3962550, at *26; Osterweil v. Bartlett, No. 09 Civ. 825, 2011 WL 1983340, at *8-10 (N.D.N.Y. May 20, 2011); see also United States v. Laurent, No. 11 Cr. 322, 2011 WL 6004606, at *19 (E.D.N.Y. Dec. 2, 2011) (noting majority trend of application of intermediate scrutiny).[10] Likewise, in this case, because Admin. Code § 10-131(a)(2) does not effect a ban on handguns but only imposes a fee, the burden

[10] In Nordyke v. King, 644 F.3d 776 (9th Cir. 2011), reh'g en banc granted, 644 F.3d 774 (9th Cir. 2011), the Court of Appeals for the Ninth Circuit applied a "substantial burden" test whereby only laws that "substantially burden" Second Amendment rights will receive any form of heightened judicial scrutiny, id. at 785-86.

on the Second Amendment right is not severe and intermediate scrutiny is appropriate.

Courts applying intermediate scrutiny in the Second Amendment context have concluded that the asserted governmental objective must be substantial or important and that there must be a reasonable, but not perfect, fit between the challenged regulation and the asserted objective. See, e.g., Marzzarella, 614 F.3d at 98; Chester, 628 F.3d at 683; Reese, 627 F.3d at 802. The parties do not dispute that the governmental objectives promoted by New York's handgun licensing scheme are to promote public safety and prevent gun violence and that these objectives are important and substantial ones. See, e.g., Bach v. Pataki, 408 F.3d 75, 91 (2d Cir. 2005); Kachalsky, 2011 WL 3962550, at *27 (collecting cases); Osterweil, 2011 WL 1983340, at *10. The $340 application fee is substantially related to these important governmental interests because the fee is designed to recover the costs attendant to the licensing scheme. Cf. Athey, 37 F.3d at 145 (fee attendant to licensing program was narrowly tailored to further legitimate governmental purpose where fees were designed to defray costs of program aimed at preventing fraud in charitable solicitations); Abrams, 50 F.3d at 1167 (same). Thus, Admin. Code § 10-131(a)(2) also passes constitutional muster under an intermediate scrutiny analysis and does not violate the Second Amendment. Accordingly, the

City Defendants' motion for summary judgment dismissing the plaintiffs' first cause of action is **granted** and this claim is **dismissed**. The plaintiffs' motion for summary judgment with respect to this claim is **denied**.

V.

The plaintiffs next assert that Penal Law § 400.00(14) violates the Equal Protection Clause because it imposes an unequal burden on the Second Amendment rights of New York City residents as compared with other citizens of New York State.[11]

The Equal Protection Clause commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Supreme Court has made clear that:

> The guarantee of equal protection . . . is not a source of substantive rights or liberties, but rather a right to be free from invidious discrimination in statutory classifications and other governmental activity. It is well settled that where a statutory classification does not itself impinge on a right or liberty protected by the Constitution, the validity of classification must be sustained unless 'the classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective.'

[11] The plaintiffs made it clear at oral argument that they challenged only the State Statute, Penal Law § 400.00(14), under the Equal Protection Clause and not Admin. Code § 10-131(a)(2) that actually sets the amount of the license fee. (Hr'g Tr., 13, Feb. 10, 2012.)

Harris v. McRae, 448 U.S. 297, 322 (1980) (quoting McGowan v. Maryland, 366 U.S. 420 (1961)). However, this presumption of validity "disappears if a statutory classification is predicated on criteria that are, in a constitutional sense, 'suspect,'" such as a race-based classification. Id. Thus, "if 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." Romer v. Evans, 517 U.S. 620, 631 (1996).

Rational basis review is the appropriate standard of scrutiny to apply to Penal Law § 400.00(14) because the law involves no suspect classification[12] and imposes no burden on the Second Amendment right to keep and bear arms. The plaintiffs contend that Penal Law § 400.00(14) does disparately burden the Second Amendment right because, by exempting New York City residents from the $10 maximum fee that applies elsewhere in New York State, the law effectively imposes a higher fee on New York City residents. However, this characterization of the law is incorrect. Penal Law § 400.00(14) does not impose or endorse a higher licensing fee for New York City residents: it merely provides that, in New York City, the City Council may set the

[12] The classification at issue distinguishes between New York City residents and other citizens of New York State. This does not constitute a suspect classification. See City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440-41 (1985).

licensing fee at the level it sees fit. The City Council could choose to set the fee lower than the $3-$10 range applicable to the rest of the State; nothing about Penal Law § 400.00(14) encourages the imposition of a higher fee. While it is true, as the plaintiffs argue, that Penal Law § 400.00(14) distinguishes between New York City residents and other New York State citizens by establishing a $10 maximum fee applicable only to the latter group, this indicates only that the law draws a classification, not that this classification burdens a constitutional right. Thus, it is not Penal Law § 400.00(14) but rather Admin. Code § 10-131(a)(2) that imposes the fee claimed to burden the plaintiffs' Second Amendment rights.

Moreover, the discretion Penal Law § 400.00(14) confers upon the City to set its own licensing fees is cabined by New York law, which requires that the amount of a license or permit fee not exceed "a sum reasonably necessary to cover the costs of issuance, inspection and enforcement" and not be "exacted for revenue purposes or to offset the cost of general governmental functions . . . ." ATM One L.L.C. v. Vill. of Freeport, 714 N.Y.S.2d 721, 722 (App. Div. 2000) (citation omitted). Thus, while Penal Law § 400.00(14) permits the City to set its own licensing fees, New York law ensures that these fees will be designed to defray the administrative costs of licensing and will therefore be permissible under the standards articulated in

the Supreme Court's fee jurisprudence. By permitting the City to set a constitutionally permissible fee, the State Statute cannot be said to burden the plaintiffs' Second Amendment rights and therefore should not be subjected to heightened scrutiny.[13] See Nationalist Movement, 481 F.3d at 183 n.4 (concluding that rational basis review was appropriate for equal protection challenge to permit fee charging residents $50 and non-residents

[13] Even if Penal Law § 400.00(14) could be viewed as disparately burdening the Second Amendment right by imposing a higher fee on New York City residents, the law would still pass constitutional muster. Several courts have declined to apply strict scrutiny when considering equal protection challenges to laws that disparately burden Second Amendment rights. While noting that strict scrutiny is generally applicable to equal protection challenges to laws that disparately burden fundamental rights, these courts have concluded that the Second Amendment analysis is sufficient to protect these rights and have either declined to conduct a separate equal protection analysis or have subjected the equal protection challenge to rational basis review. See Nordyke, 644 F.3d at 794 (applying rational basis review to equal protection claim implicating Second Amendment rights, concluding that "although the right to keep and bear arms for self-defense is a fundamental right, that right is more appropriately analyzed under the Second Amendment"); Woollard v. Sheridan, No. L-10-2068, 2012 WL 695674, at *12 (D. Md. Mar. 2, 2012) (declining to apply strict scrutiny to equal protection challenge that was "essentially a restatement" of Second Amendment claim, concluding that the analysis under the Second Amendment was sufficient to resolve the issue); cf. Hightower v. City of Boston, No. 08-11955, 2011 WL 4543084, at *20 (D. Mass. Sept. 29, 2011) (noting that, if the plaintiff's Second Amendment challenge were ripe, the court would dispose of the plaintiff's related equal protection claim by compressing it with the Second Amendment claim). In this case, considered under rational basis review or under the Second Amendment analysis already articulated, any burden imposed by the $340 fee is permissible and thus does not violate the Equal Protection Clause.

$100, in light of finding that fee was permissible imposition on First Amendment right under Supreme Court's fee jurisprudence).

Penal Law § 400.00(14) plainly passes constitutional muster under rational basis review. A classification will survive rational basis scrutiny "if there is a rational relationship between the disparity of treatment and some legitimate government purpose." Heller v. Doe, 509 U.S. 312, 320 (1993). A classification must be upheld under rational basis review "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Id. (citation omitted). The party challenging the statute bears the burden of showing that there is no reasonable basis for the classification and must "negative every conceivable basis which might support it" in order to prevail. Id. (citation omitted); see also U.S.A. Baseball v. City of New York, 509 F. Supp. 2d 285, 293 (S.D.N.Y. 2007). In addition, a classification need not form a perfect fit between means and ends to survive rational basis review. Heller, 509 U.S. at 321.

Permitting New York City to recover the costs incurred by the licensing scheme constitutes a rational basis for the classification drawn by Penal Law § 400.00(14). See Int'l Women's Day, 619 F.3d at 369 (Government has significant interest in recouping expenses incurred from processions on public streets); Srail v. Vill. of Lisle, Ill., 588 F.3d 940,

946-48 (7th Cir. 2009) (concerns about recouping significant expenses constitute sufficient rational basis to justify disparate treatment). The New York State Legislature, in adopting the 1947 Amendment, could reasonably have concluded that the exemption was a means of providing New York City with the flexibility to set licensing fees at a rate that would more closely approximate the specific costs incurred by the City. The plaintiffs argue that this was not the actual objective of the 1947 Amendment, pointing to comments by the sponsor of the legislation that the law had the beneficial effects of discouraging some applicants from seeking a handgun license and allowing for "revenue raising taxes." (Goldberg-Cahn Decl. Ex. A at 7-8.) However, the proper inquiry on rational basis review "is whether there is any conceivable rational basis justifying [the] distinction" and "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 309, 315 (1993); see also United States v. O'Brien, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."). Moreover, the sponsor of the 1947 Amendment also indicated that the law was designed to "give discretion" to the City Council and "provid[e]

the flexibility required to keep costs and receipts balanced." (Goldberg-Cahn Decl. Ex. A at 7.) Thus, the objective of permitting New York City to recover the costs associated with its handgun licensing scheme constitutes a rational basis for the classification drawn by Penal Law § 400.00(14).

However, the plaintiffs argue that, because all jurisdictions incur costs through licensing that are far higher than the $3-$10 fee range applicable elsewhere in New York State, the objective of cost recovery cannot justify the disparate treatment of New York City in Penal Law § 400.00(14). However, there is no evidence that other jurisdictions sought and were denied an exemption from the $10 maximum fee at the time Penal Law § 400.00(14) was amended or at any time thereafter. The only jurisdiction to have sought such an exemption is Nassau County, seemingly also because of the fact that fees were inadequate to defray administrative costs, and this exemption was also granted. See 1973 N.Y. Laws Ch. 546; Connell Decl. Ex. G at 2-4. The fact that other jurisdictions did not also seek the exemption granted to New York City and Nassau County does not demonstrate that the classification drawn by Penal Law § 400.00(14) is discriminatory or without rational basis. While the New York State Legislature could have chosen to raise fees uniformly across the State, it chose instead to allow the two jurisdictions who made showings of administrative

costs to charge higher fees to offset partially those costs. That was a reasonable means of achieving the legitimate objective of cost recovery. Thus, Penal Law § 400.00(14) withstands rational basis scrutiny and does not violate the Equal Protection Clause. Accordingly, the Intervenor's and City Defendants' motions for summary judgment are **granted** and the plaintiffs' second cause of action under the Equal Protection Clause is **dismissed**. The plaintiffs' motion for summary judgment with respect to this claim is **denied**.

CONCLUSION

The Court has considered all of the arguments of the parties. To the extent not specifically addressed above, the remaining arguments are either moot or without merit. For the reasons explained above, the plaintiffs' motion for summary judgment is **denied**. The cross motions for summary judgment by the City Defendants and the Intervenor are **granted.** The Clerk is directed to enter Judgment dismissing the Complaint. The Clerk is also directed to close all pending motions.

SO ORDERED.

Dated: **New York, New York**
March 26, 2012

John G. Koeltl
United States District Judge

U.S. Constitution, amend. II

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. Constitution, amend. XIV, sec. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

New York Penal Law § 265.00(3), (10)

§ 265.00. Definitions

As used in this article and in article four hundred, the following terms shall mean and include: . . .

3. "Firearm" means (a) any pistol or revolver; or (b) a shotgun having one or more barrels less than eighteen inches in length; or (c) a rifle having one or more barrels less than sixteen inches in length; or (d) any weapon made from a shotgun or rifle whether by alteration, modification, or otherwise if such weapon as altered, modified, or otherwise has an overall length of less than twenty-six inches; or (e) an assault weapon. For the purpose of this subdivision the length of the barrel on a shotgun or rifle shall be determined by measuring the distance between the muzzle and the face of the bolt, breech, or breechlock when closed and when the shotgun or rifle is cocked; the overall length of a weapon made from a shotgun or rifle is the distance between the extreme ends of the weapon measured along a line parallel to the center line of the bore. Firearm does not include an antique firearm. . . .

10. "Licensing officer" means in the city of New York the police commissioner of that city; in the county of Nassau the commissioner of police of that county; in the county of Suffolk the sheriff of that county except in the towns of Babylon, Brookhaven, Huntington, Islip and Smithtown, the commissioner of police of that county; for the purposes of section 400.01 of this chapter the superintendent of state police; and elsewhere in the state a judge or justice of a court of record having his office in the county of issuance. . . .

New York Penal Law § 265.01(1)

§ 265.01. Criminal possession of a weapon in the fourth degree

A person is guilty of criminal possession of a weapon in the fourth degree when:

(1) He or she possesses any firearm, electronic dart gun, electronic stun gun, gravity knife, switchblade knife, pilum ballistic knife, metal knuckle knife, cane sword, billy, blackjack, bludgeon, plastic knuckles, metal knuckles, chuka stick, sand bag, sandclub, wrist-brace type slingshot or slungshot, shirken or "Kung Fu star"; or . . .

New York Penal Law § 265.20(a)(3)

§ 265.20. Exemptions

a. Sections 265.01, 265.02, 265.03, 265.04, 265.05, 265.10, 265.11, 265.12, 265.13, 265.15 and 270.05 shall not apply to: . . .

(3) Possession of a pistol or revolver by a person to whom a license therefor has been issued as provided under section 400.00 or 400.01 of this chapter; provided, that such a license shall not preclude a conviction for the offense defined in subdivision three of section 265.01 of this article. . . .

New York Penal Law § 400.00

§ 400.00. Licenses to carry, possess, repair and dispose of firearms

1. Eligibility. No license shall be issued or renewed pursuant to this section except by the licensing officer, and then only after investigation and finding that all statements in a proper application for a license are true. No license shall be issued or renewed except for an applicant (a) twenty-one years of age or older, provided, however, that where such applicant has been honorably discharged from the United States army, navy, marine corps, air force or coast guard, or the national guard of the state of New York, no such age restriction shall apply; (b) of good moral character; (c) who has not been convicted anywhere of a felony or a serious offense; (d) who has stated whether he or she has ever suffered any mental illness or been confined to any hospital or institution, public or private, for mental illness; (e) who has not had a license revoked or who is not under a suspension or ineligibility order issued pursuant to the provisions of section 530.14 of the criminal procedure law or section eight hundred forty-two-a of the family court act; (f) in the county of Westchester, who has successfully completed a firearms safety course and test as evidenced by a certificate of completion issued in his or her name and endorsed and affirmed under the penalties of perjury by a duly authorized instructor, except that: (i) persons who are honorably discharged from the United States army, navy, marine corps or coast guard, or of the national guard of the state of New York, and produce evidence of official qualification in firearms during the term of service are not required to have completed those hours of a firearms safety course pertaining to the safe use, carrying, possession, maintenance and storage of a firearm; and (ii) persons who were licensed to possess a pistol or revolver prior to the effective date of this paragraph are not required to have completed a firearms safety course and test; and (g) concerning whom no good cause exists for the denial of the license. No person shall engage in the business of gunsmith or dealer in firearms unless licensed pursuant to this section. An applicant to engage in such business shall also be a citizen of the United States, more than twenty-one years of age and maintain a place of business in the city or county where the license is issued. For such business, if the applicant is a firm or partnership, each member thereof shall comply with all of the requirements set forth in this subdivision and if the applicant is a corporation, each officer thereof shall so comply.

2. Types of licenses. A license for gunsmith or dealer in firearms shall be issued to engage in such business. A license for a pistol or revolver, other than an

assault weapon or a disguised gun, shall be issued to (a) have and possess in his dwelling by a householder; (b) have and possess in his place of business by a merchant or storekeeper; (c) have and carry concealed while so employed by a messenger employed by a banking institution or express company; (d) have and carry concealed by a justice of the supreme court in the first or second judicial departments, or by a judge of the New York city civil court or the New York city criminal court; (e) have and carry concealed while so employed by a regular employee of an institution of the state, or of any county, city, town or village, under control of a commissioner of correction of the city or any warden, superintendent or head keeper of any state prison, penitentiary, workhouse, county jail or other institution for the detention of persons convicted or accused of crime or held as witnesses in criminal cases, provided that application is made therefor by such commissioner, warden, superintendent or head keeper; (f) have and carry concealed, without regard to employment or place of possession, by any person when proper cause exists for the issuance thereof; and (g) have, possess, collect and carry antique pistols which are defined as follows: (i) any single shot, muzzle loading pistol with a matchlock, flintlock, percussion cap, or similar type of ignition system manufactured in or before l898, which is not designed for using rimfire or conventional centerfire fixed ammunition; and (ii) any replica of any pistol described in clause (i) hereof if such replica--

(1) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or

(2) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade.

3. Applications.

(a) Applications 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; and, in the case of a license as gunsmith or dealer in firearms, to the licensing officer where such place of business is located. Blank applications shall, except in the city of New York, be approved as to form by the superintendent of state police. An application shall state the full name, date of birth, residence, present occupation of each person or individual signing the same, whether or not he is a citizen of the United States, whether or not he complies with each requirement for eligibility specified in subdivision one of this section and such other facts as may be required to show the

good character, competency and integrity of each person or individual signing the application. An application shall be signed and verified by the applicant. Each individual signing an application shall submit one photograph of himself and a duplicate for each required copy of the application. Such photographs shall have been taken within thirty days prior to filing the application. In case of a license as gunsmith or dealer in firearms, the photographs submitted shall be two inches square, and the application shall also state the previous occupation of each individual signing the same and the location of the place of such business, or of the bureau, agency, subagency, office or branch office for which the license is sought, specifying the name of the city, town or village, indicating the street and number and otherwise giving such apt description as to point out reasonably the location thereof. In such case, if the applicant is a firm, partnership or corporation, its name, date and place of formation, and principal place of business shall be stated. For such firm or partnership, the application shall be signed and verified by each individual composing or intending to compose the same, and for such corporation, by each officer thereof.

(b) Application for an exemption under paragraph seven-b of subdivision a of section 265.20 of this chapter. Each applicant desiring to obtain the exemption set forth in paragraph seven-b of subdivision a of section 265.20 of this chapter shall make such request in writing of the licensing officer with whom his application for a license is filed, at the time of filing such application. Such request shall include a signed and verified statement by the person authorized to instruct and supervise the applicant, that has met with the applicant and that he has determined that, in his judgment, said applicant does not appear to be or poses a threat to be, a danger to himself or to others. He shall include a copy of his certificate as an instructor in small arms, if he is required to be certified, and state his address and telephone number. He shall specify the exact location by name, address and telephone number where such instruction will take place. Such licensing officer shall, no later than ten business days after such filing, request the duly constituted police authorities of the locality where such application is made to investigate and ascertain any previous criminal record of the applicant pursuant to subdivision four of this section. Upon completion of this investigation, the police authority shall report the results to the licensing officer without unnecessary delay. The licensing officer shall no later than ten business days after the receipt of such investigation, determine if the applicant has been previously denied a license, been convicted of a felony, or been convicted of a serious offense, and either approve or disapprove the applicant for exemption purposes based upon such determinations. If the applicant is approved for the exemption, the licensing officer shall notify the appropriate duly constituted police authorities and the applicant. Such exemption

shall terminate if the application for the license is denied, or at any earlier time based upon any information obtained by the licensing officer or the appropriate police authorities which would cause the license to be denied. The applicant and appropriate police authorities shall be notified of any such terminations.

4. Investigation. Before a license is issued or renewed, there shall be an investigation of all statements required in the application by the duly constituted police authorities of the locality where such application is made. For that purpose, the records of the appropriate office of the department of mental hygiene concerning previous or present mental illness of the applicant shall be available for inspection by the investigating officer of the police authority. In order to ascertain any previous criminal record, the investigating officer shall take the fingerprints and physical descriptive data in quadruplicate of each individual by whom the application is signed and verified. Two copies of such fingerprints shall be taken on standard fingerprint cards eight inches square, and one copy may be taken on a card supplied for that purpose by the federal bureau of investigation; provided, however, that in the case of a corporate applicant that has already been issued a dealer in firearms license and seeks to operate a firearm dealership at a second or subsequent location, the original fingerprints on file may be used to ascertain any criminal record in the second or subsequent application unless any of the corporate officers have changed since the prior application, in which case the new corporate officer shall comply with procedures governing the initial application for such license. When completed, one standard card shall be forwarded to and retained by the division of criminal justice services in the executive department, at Albany. A search of the files of such division and written notification of the results of the search to the investigating officer shall be made without unnecessary delay. Thereafter, such division shall notify the licensing officer and the executive department, division of state police, Albany, of any criminal record of the applicant filed therein subsequent to the search of its files. A second standard card, or the one supplied by the federal bureau of investigation, as the case may be, shall be forwarded to that bureau at Washington with a request that the files of the bureau be searched and notification of the results of the search be made to the investigating police authority. The failure or refusal of the federal bureau of investigation to make the fingerprint check provided for in this section shall not constitute the sole basis for refusal to issue a permit pursuant to the provisions of this section. Of the remaining two fingerprint cards, one shall be filed with the executive department, division of state police, Albany, within ten days after issuance of the license, and the other remain on file with the investigating police authority. No such fingerprints may be inspected by any person other than a peace officer, who is acting pursuant to his special duties, or a police officer, except on

order of a judge or justice of a court of record either upon notice to the licensee or without notice, as the judge or justice may deem appropriate. Upon completion of the investigation, the police authority shall report the results to the licensing officer without unnecessary delay.

4-a. Processing of license applications. Applications for licenses shall be accepted for processing by the licensing officer at the time of presentment. Except upon written notice to the applicant specifically stating the reasons for any delay, in each case the licensing officer shall act upon any application for a license pursuant to this section within six months of the date of presentment of such an application to the appropriate authority. Such delay may only be for good cause and with respect to the applicant. In acting upon an application, the licensing officer shall either deny the application for reasons specifically and concisely stated in writing or grant the application and issue the license applied for.

4-b. Westchester county firearms safety course certificate. In the county of Westchester, at the time of application, the licensing officer to which the license application is made shall provide a copy of the safety course booklet to each license applicant. Before such license is issued, such licensing officer shall require that the applicant submit a certificate of successful completion of a firearms safety course and test issued in his or her name and endorsed and affirmed under the penalties of perjury by a duly authorized instructor.

5. Filing of approved applications. The application for any license, if granted, shall be filed by the licensing officer with the clerk of the county of issuance, except that in the city of New York and, in the counties of Nassau and Suffolk, the licensing officer shall designate the place of filing in the appropriate division, bureau or unit of the police department thereof, and in the county of Suffolk the county clerk is hereby authorized to transfer all records or applications relating to firearms to the licensing authority of that county. The name and address of any person to whom an application for any license has been granted shall be a public record. Upon application by a licensee who has changed his place of residence such records or applications shall be transferred to the appropriate officer at the licensee's new place of residence. A duplicate copy of such application shall be filed by the licensing officer in the executive department, division of state police, Albany, within ten days after issuance of the license. Nothing in this subdivision shall be construed to change the expiration date or term of such licenses if otherwise provided for in law.

6. License: validity. Any license issued pursuant to this section shall be valid notwithstanding the provisions of any local law or ordinance. No license shall

be transferable to any other person or premises. A license to carry or possess a pistol or revolver, not otherwise limited as to place or time of possession, shall be effective throughout the state, except that the same shall not be valid within the city of New York unless a special permit granting validity is issued by the police commissioner of that city. Such license to carry or possess shall be valid within the city of New York in the absence of a permit issued by the police commissioner of that city, provided that (a) the firearms covered by such license have been purchased from a licensed dealer within the city of New York and are being transported out of said city forthwith and immediately from said dealer by the licensee in a locked container during a continuous and uninterrupted trip; or provided that (b) the firearms covered by such license are being transported by the licensee in a locked container and the trip through the city of New York is continuous and uninterrupted; or provided that (c) the firearms covered by such license are carried by armored car security guards transporting money or other valuables, in, to, or from motor vehicles commonly known as armored cars, during the course of their employment; or provided that (d) the licensee is a retired police officer as police officer is defined pursuant to subdivision thirty-four of section 1.20 of the criminal procedure law or a retired federal law enforcement officer, as defined in section 2.15 of the criminal procedure law, who has been issued a license by an authorized licensing officer as defined in subdivision ten of section 265.00 of this chapter; provided, further, however, that if such license was not issued in the city of New York it must be marked "Retired Police Officer" or "Retired Federal Law Enforcement Officer", as the case may be, and, in the case of a retired officer the license shall be deemed to permit only police or federal law enforcement regulations weapons; or provided that (e) the licensee is a peace officer described in subdivision four of section 2.10 of the criminal procedure law and the license, if issued by other than the city of New York, is marked "New York State Tax Department Peace Officer" and in such case the exemption shall apply only to the firearm issued to such licensee by the department of taxation and finance. A license as gunsmith or dealer in firearms shall not be valid outside the city or county, as the case may be, where issued.

7. License: form. Any license issued pursuant to this section shall, except in the city of New York, be approved as to form by the superintendent of state police. A license to carry or possess a pistol or revolver shall have attached the licensee's photograph, and a coupon which shall be removed and retained by any person disposing of a firearm to the licensee. Such license shall specify the weapon covered by calibre, make, model, manufacturer's name and serial number, or if none, by any other distinguishing number or identification mark, and shall indicate whether issued to carry on the person or possess on the premises, and if on the

premises shall also specify the place where the licensee shall possess the same. If such 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. Any license as gunsmith or dealer in firearms shall mention and describe the premises for which it is issued and shall be valid only for such premises.

8. License: exhibition and display. Every licensee while carrying a pistol or revolver shall have on his or her person a license to carry the same. Every person licensed to possess a pistol or revolver on particular premises shall have the license for the same on such premises. Upon demand, the license shall be exhibited for inspection to any peace officer, who is acting pursuant to his or her special duties, or police officer. A license as gunsmith or dealer in firearms shall be prominently displayed on the licensed premises. A gunsmith or dealer of firearms may conduct business temporarily at a location other than the location specified on the license if such temporary location is the location for a gun show or event sponsored by any national, state, or local organization, or any affiliate of any such organization devoted to the collection, competitive use or other sporting use of firearms. Any sale or transfer at a gun show must also comply with the provisions of article thirty-nine-DD of the general business law. Records of receipt and disposition of firearms transactions conducted at such temporary location shall include the location of the sale or other disposition and shall be entered in the permanent records of the gunsmith or dealer of firearms and retained on the location specified on the license. Nothing in this section shall authorize any licensee to conduct business from any motorized or towed vehicle. A separate fee shall not be required of a licensee with respect to business conducted under this subdivision. Any inspection or examination of inventory or records under this section at such temporary location shall be limited to inventory consisting of, or records related to, firearms held or disposed at such temporary locations. Failure of any licensee to so exhibit or display his or her license, as the case may be, shall be presumptive evidence that he or she is not duly licensed.

9. License: amendment. Elsewhere than in the city of New York, a person licensed to carry or possess a pistol or revolver may apply at any time to his licensing officer for amendment of his license to include one or more such weapons or to cancel weapons held under license. If granted, a record of the amendment describing the weapons involved shall be filed by the licensing officer in the executive department, division of state police, Albany. Notification of any change of residence shall be made in writing by any licensee within ten days after

such change occurs, and a record of such change shall be inscribed by such licensee on the reverse side of his license. Elsewhere than in the city of New York, and in the counties of Nassau and Suffolk, such notification shall be made to the executive department, division of state police, Albany, and in the city of New York to the police commissioner of that city, and in the county of Nassau to the police commissioner of that county, and in the county of Suffolk to the licensing officer of that county, who shall, within ten days after such notification shall be received by him, give notice in writing of such change to the executive department, division of state police, at Albany.

10. License: expiration, certification and renewal. Any license for gunsmith or dealer in firearms and, in the city of New York, any license to carry or possess a pistol or revolver, issued at any time pursuant to this section or prior to the first day of July, nineteen hundred sixty-three and not limited to expire on an earlier date fixed in the license, shall expire not more than three years after the date of issuance. In the counties of Nassau, Suffolk and Westchester, any license to carry or possess a pistol or revolver, issued at any time pursuant to this section or prior to the first day of July, nineteen hundred sixty-three and not limited to expire on an earlier date fixed in the license, shall expire not more than five years after the date of issuance; however, in the county of Westchester, any such license shall be certified prior to the first day of April, two thousand, in accordance with a schedule to be contained in regulations promulgated by the commissioner of the division of criminal justice services, and every such license shall be recertified every five years thereafter. For purposes of this section certification shall mean that the licensee shall provide to the licensing officer the following information only: current name, date of birth, current address, and the make, model, caliber and serial number of all firearms currently possessed. Such certification information shall be filed by the licensing officer in the same manner as an amendment. Elsewhere than in the city of New York and the counties of Nassau, Suffolk and Westchester, any license to carry or possess a pistol or revolver, issued at any time pursuant to this section or prior to the first day of July, nineteen hundred sixty-three and not previously revoked or cancelled, shall be in force and effect until revoked as herein provided. Any license not previously cancelled or revoked shall remain in full force and effect for thirty days beyond the stated expiration date on such license. Any application to renew a license that has not previously expired, been revoked or cancelled shall thereby extend the term of the license until disposition of the application by the licensing officer. In the case of a license for gunsmith or dealer in firearms, in counties having a population of less than two hundred thousand inhabitants, photographs and fingerprints shall be submitted on original applications and upon renewal thereafter only at six year intervals. Upon

satisfactory proof that a currently valid original license has been despoiled, lost or otherwise removed from the possession of the licensee and upon application containing an additional photograph of the licensee, the licensing officer shall issue a duplicate license.

11. License: revocation and suspension. The conviction of a licensee anywhere of a felony or serious offense shall operate as a revocation of the license. A license may be revoked or suspended as provided for in section 530.14 of the criminal procedure law or section eight hundred forty-two-a of the family court act. Except for a license issued pusuant to section 400.01 of this article, a license may be revoked and cancelled at any time in the city of New York, and in the counties of Nassau and Suffolk, by the licensing officer, and elsewhere than in the city of New York by any judge or justice of a court of record; a license issued pursuant to section 400.01 of this article may be revoked and cancelled at any time by the licensing officer or any judge or justice of a court of record. The official revoking a license shall give written notice thereof without unnecessary delay to the executive department, division of state police, Albany, and shall also notify immediately the duly constituted police authorities of the locality.

12. Records required of gunsmiths and dealers in firearms. Any person licensed as gunsmith or dealer in firearms shall keep a record book approved as to form, except in the city of New York, by the superintendent of state police. In the record book shall be entered at the time of every transaction involving a firearm the date, name, age, occupation and residence of any person from whom a firearm is received or to whom a firearm is delivered, and the calibre, make, model, manufacturer's name and serial number, or if none, any other distinguishing number or identification mark on such firearm. Before delivering a firearm to any person, the licensee shall require him to produce either a license valid under this section to carry or possess the same, or proof of lawful authority as an exempt person pursuant to section 265.20. In addition, before delivering a firearm to a peace officer, the licensee shall verify that person's status as a peace officer with the division of state police. After completing the foregoing, the licensee shall remove and retain the attached coupon and enter in the record book the date of such license, number, if any, and name of the licensing officer, in the case of the holder of a license to carry or possess, or the shield or other number, if any, assignment and department, unit or agency, in the case of an exempt person. The original transaction report shall be forwarded to the division of state police within ten days of delivering a firearm to any person, and a duplicate copy shall be kept by the licensee. The record book shall be maintained on the premises mentioned and described in the license and shall be open at all reasonable hours for inspection

by any peace officer, acting pursuant to his special duties, or police officer. In the event of cancellation or revocation of the license for gunsmith or dealer in firearms, or discontinuance of business by a licensee, such record book shall be immediately surrendered to the licensing officer in the city of New York, and in the counties of Nassau and Suffolk, and elsewhere in the state to the executive department, division of state police.

12-a. State police regulations applicable to licensed gunsmiths engaged in the business of assembling or manufacturing firearms. The superintendent of state police is hereby authorized to issue such rules and regulations as he deems reasonably necessary to prevent the manufacture and assembly of unsafe firearms in the state. Such rules and regulations shall establish safety standards in regard to the manufacture and assembly of firearms in the state, including specifications as to materials and parts used, the proper storage and shipment of firearms, and minimum standards of quality control. Regulations issued by the state police pursuant to this subdivision shall apply to any person licensed as a gunsmith under this section engaged in the business of manufacturing or assemblying firearms, and any violation thereof shall subject the licensee to revocation of license pursuant to subdivision eleven of this section.

12-b. [None]

12-c. Firearms records.

(a) Every employee of a state or local agency, unit of local government, state or local commission, or public or private organization who possesses a firearm or machine-gun under an exemption to the licensing requirements under this chapter, shall promptly report in writing to his employer the make, model, calibre and serial number of each such firearm or machine-gun. Thereafter, within ten days of the acquisition or disposition of any such weapon, he shall furnish such information to his employer, including the name and address of the person from whom the weapon was acquired or to whom it was disposed.

(b) Every head of a state or local agency, unit of local government, state or local commission, public authority or public or private organization to whom an employee has submitted a report pursuant to paragraph (a) of this subdivision shall promptly forward such report to the superintendent of state police.

(c) Every head of a state or local agency, unit of local government, state or local commission, public authority, or any other agency, firm or corporation that employs persons who may lawfully possess firearms or machine-guns without the

requirement of a license therefor, or that employs persons licensed to possess firearms or machine-guns, shall promptly report to the superintendent of state police, in the manner prescribed by him, the make, model, calibre and serial number of every firearm or machine-gun possessed by it on the effective date of this act for the use of such employees or for any other use. Thereafter, within ten days of the acquisition or disposition of any such weapon, such head shall report such information to the superintendent of the state police, including the name and address of the person from whom the weapon was acquired or to whom it was disposed.

13. Expenses. The expense of providing a licensing officer with blank applications, licenses and record books for carrying out the provisions of this section shall be a charge against the county, and in the city of New York against the city.

14. Fees. In the city of New York and the county of Nassau, the annual license fee shall be twenty-five dollars for gunsmiths and fifty dollars for dealers in firearms. In such city, the city council and in the county of Nassau the Board of Supervisors shall fix the fee to be charged for a license to carry or possess a pistol or revolver and provide for the disposition of such fees. 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; for each amendment thereto, three dollars, and five dollars in the county of Suffolk; and for each license issued to a gunsmith or dealer in firearms, ten dollars. The fee for a duplicate license shall be five dollars. The fee for processing a license transfer between counties shall be five dollars. The fee for processing a license or renewal thereof for a qualified retired police officer as defined under subdivision thirty-four of section 1.20 of the criminal procedure law, or a qualified retired sheriff, undersheriff, or deputy sheriff of the city of New York as defined under subdivision two of section 2.10 of the criminal procedure law, or a qualified retired bridge and tunnel officer, sergeant or lieutenant of the triborough bridge and tunnel authority as defined under subdivision twenty of section 2.10 of the criminal procedure law, or a qualified retired uniformed court officer in the unified court system, or a qualified retired court clerk in the unified court system in the first and second judicial departments, as defined in paragraphs [fig 1] a and [fig 2] b of subdivision twenty-one of section 2.10 of the criminal procedure law or a retired correction officer as defined in subdivision twenty-five of section 2.10 of the criminal procedure law shall be waived in all counties throughout the state.

15. Any violation by any person of any provision of this section is a class A misdemeanor.

16. Unlawful disposal. No person shall except as otherwise authorized pursuant to law dispose of any firearm unless he is licensed as gunsmith or dealer in firearms.

17. Applicability of section. The provisions of article two hundred sixty-five of this chapter relating to illegal possession of a firearm, shall not apply to an offense which also constitutes a violation of this section by a person holding an otherwise valid license under the provisions of this section and such offense shall only be punishable as a class A misdemeanor pursuant to this section. In addition, the provisions of such article two hundred sixty-five of this chapter shall not apply to the possession of a firearm in a place not authorized by law, by a person who holds an otherwise valid license or possession of a firearm by a person within a one year period after the stated expiration date of an otherwise valid license which has not been previously cancelled or revoked shall only be punishable as a class A misdemeanor pursuant to this section.

New York City Administrative Code § 10-131(a)

a. Pistols or revolvers, keeping or carrying.

1. The police commissioner shall grant and issue licenses hereunder pursuant to the provisions of article four hundred of the penal law. Unless they indicate otherwise, such licenses and permits shall expire on the first day of the second January after the date of issuance.

2. 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.

3. Every applicant to whom a license has been issued by any person other than the police commissioner, except as provided in paragraph five of this subdivision, for a special permit from the commissioner granting it validity within the city of New York, shall pay for such permit a fee of three hundred forty dollars, for each renewal a fee of three hundred forty dollars, for each replacement of a lost permit a fee of ten dollars.

4. Fees paid as provided herein shall not be refunded in the event that an original or renewal application, or a special validation permit application, is denied by the police commissioner.

5. A fee shall not be charged or collected for a license to have and carry concealed a pistol or revolver which shall be issued upon the application of the commissioner of correction or the warden or superintendent of any prison, penitentiary, workhouse or other institution for the detention of persons convicted or accused of crime or offense, or held as witnesses in criminal cases in the city.

6. The fees prescribed by this subdivision shall be collected by the police commissioner, and shall be paid into the general fund of the city established pursuant to section one hundred nine of the charter, and a return in detail shall be made to the comptroller by such commissioner of the fees so collected and paid over by the commissioner.

7. A fee shall not be charged or collected for the issuance of a license, or the renewal thereof, to have and carry concealed a pistol or revolver which is issued

upon the application of a qualified retired police officer as defined in subdivision thirty-four of section 1.20 of the criminal procedure law, or a qualified retired bridge and tunnel officer, sergeant or lieutenant of the triborough bridge and tunnel authority as defined under subdivision twenty of section 2.10 of the criminal procedure law, or a qualified retired uniformed court officer in the unified court system, or a qualified retired court clerk in the unified court system in the first and second judicial departments, as defined in paragraphs a and b of subdivision twenty-one of section 2.10 of the criminal procedure law or a retired correction officer as defined in subdivision twenty-five of section 2.10 of the criminal procedure law or a qualified retired sheriff, undersheriff or deputy sheriff of the city of New York as defined under subdivision two of section 2.10 of the criminal procedure law. . . .

CERTIFICATE OF SERVICE

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

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

Dated: June 29, 2012

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