20-0086-cv

United States Court of Appeals
for the
Second Circuit

VICTOR JUZUMAS,

Plaintiff-Appellant,

– v. –

NASSAU COUNTY, NEW YORK,

Defendant-Appellee,

"JOHN DOES 1-5",

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK (CENTRAL ISLIP)

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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I. NASSAU COUNTY FAILS TO BRING ITS POLICY WITHIN THE SCOPE OF § 400.00 (11)

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Section 400.00 (11) (c) does not apply to every pistol license revocation, only those revocations based on one or more of the prohibiting events and conditions enumerated in subsection (a) or (b).

Yet, Nassau County's "Notice of Pistol License Revocation" provides:

> "As directed by New York State Penal Law section 400, and the New York State Secure Ammunitions and Firearm Enforcement Act, **you are prohibited from possessing firearms, rifles, shotguns**."

[A58-A59].

Under the County's policy, the act of suspending or revoking a handgun license transforms the licensee into a "prohibited person" in the absence of a prohibiting event of condition. [A58; A269].

Although the County invokes the "SAFE Act", it was the County's policy that was the "moving force" behind the loss of Appellant's rifles and shotguns, not the SAFE Act.

B. The "at the time of revocation" argument is disingenuous, absent from § 400.00 (11), and demonstrates a separate County policy

In the face of the plain language in the Notice of Revocation [A58], the County attempts to backpedal, explaining that a revoked licensee is only

prohibited from owning longarms "*at the time the license is suspended or revoked*." [County Br. at p. 8; A32].

The affidavit of Lt. Timpano, created after the close of discovery and not subject to cross-examination, attributes language to § 400.00 (11) that does not exist therein. The statute does not limit the prohibition on long gun possession by prohibited persons to "*at the time the license is suspended or revoked*."

The County's appellate brief, not Lt. Timpano's affidavit, claims that the prohibition on long gun possession only applies "at the time of suspension or revocation" and the surrender of long guns are subject to a "subsequent investigation by the Nassau County Police Department …to find out whether the licensee may again possess longarms." [County Br. at p. 8].

The County's after-the-fact justification is contrary to its conduct and the clear and unambiguous language of its Notice of Revocation: "**you are prohibited from possessing firearms, rifles, shotguns**." [A58].

Neither § 400.00 (11) nor the Notice of Revocation mention that the seizure of long guns is "temporary", that an investigation will be conducted, or that the seizure is temporary until it is determined that the licensee is not a "prohibited person".

Likewise, nothing in the County's SAFE Act Bulletin indicates that the seizure of long guns is "temporary", subject to an investigation, or that the long guns will be returned if the licensee is not a "prohibited person". [A269-A270]. In fact, the SAFE Act Bulletin references § 265.20 (a)(1)(f), which provides that the guns will be seized if not surrendered, declared a nuisance and destroyed. [A270].

The County's argument that the surrender of long guns is temporary, subject to a "subsequent investigation" by NCPD to determine whether the licensee may again possess longarms is also illogical. By the time the Notice of Revocation is issued, an investigation has already been conducted. Indeed, the Notice of Revocation reads, "pursuant to an incident that led to the suspension of your pistol license **an investigation has been conducted** by the Pistol License Section." [A58]. (emphasis added).

Either the revocation is based on the occurrence of a *per se* prohibitor to the possession of all firearms, or it is based on a subjective "moral character" or "good cause" determination specific to handguns.

If the grounds for the revocation also constitute a *per se* prohibitor to gun possession, the seizure of long guns would be warranted because the licensee is a "prohibited person" – the very reason for the Legislature to enact subsection (c).

But where the revocation is for "good cause" or "lack of moral character" – grounds that do not apply to the possession of rifles and shotguns - the police have no legal basis to criminalize the possession of, seize, or require the 'surrender' of the licensee's rifles and shotguns.

Magnanimously, "NCPD reviews all incidents involving the surrender of long guns **as soon as possible**". [County Br. at p. 11] (emphasis added). But where the police have no legal basis to divest an individual of his/her private property in the first instance, civil rights violations are not cured by the government's promise that an administrative review will take place when "possible." In the absence of a *per se* prohibiting event or condition, the County has no legal basis to prohibit the possession of rifles and shotguns by every revoked licensee.[1]

Based on the above, the County was enforcing its own policy, not § 400.00 (11).

C. The County's "Overview of the SAFE Act" Bulletin

Nassau County's "Overview of the SAFE Act" Bulletin embodies the County's separate policy:

[1] The County expresses somewhat of a tyrannical view of the police commissioner's role as handgun licensing officer. Attempting to justify its firearm seizure policy, the County goes into a lengthy explanation of the broad discretionary and "exclusive" powers of the Police Commissioner to issue handgun licenses – completely irrelevant to the possession of rifles and shotguns. [County Br. at p. 8]. The next three pages of the County's brief demonstrate with clarity the purpose the Second Amendment serves. [County Br. at pp. 9-11].

> "a person whose handgun license is suspended or revoked **for any reason** is not only required to surrender their license and handguns *but also* their rifles and shotguns to the licensing authority (Nassau County Police Department). Long guns are to be voluntarily surrendered in the manner provided for in subparagraph (f) of subdivision (a) of Penal Law § 265.20."

[A269] (bold emphasis added).

Section § 400.00 (11) does not contain the language "for any reason" – it states "under this section".

II. REVOKED "AT ANY TIME" DOES NOT MEAN "FOR ANY REASON"

A. Pre-SAFE Act Language

The County places great importance on pre-SAFE Act language[2] in § 400.00 (11) to argue that the SAFE Act authorizes every licensing officer to revoke a pistol license "for any reason"[3], and by extension, to revoke the right to possess rifles and shotguns. ["…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."]. [County Br. at p. 4] (emphasis added).

The language cited by the County authorizes any licensing officer to revoke a handgun license "any time" an enumerated prohibiting event occurs. Pre-SAFE Act, that meant revocation upon a conviction of a felony or serious offense, and

[2] See, SAFE Act Bill Jacket for newly enacted language in § 400.00 (11). [A258-A259].
[3] Interestingly, the County relies on the pre-SAFE Act language "at any time" to justify its policy, as published in its *post*-SAFE Act Bulletin, that the suspension or revocation of a handgun license "for any reason" mandates the surrender of all guns. [A269].

suspension or revocation upon the issuance of an order of protection against the licensee.

The statute ensured that prohibited persons were not continuing to be 'lawfully licensed' to possess handguns by authorizing the revocation of a handgun license for convictions of a felony or a serious offense, and gave discretion to the licensing officers to suspend or revoke a license as provided for in section 530.14 of the criminal procedure law or section eight hundred forty-two-a of the family court act.

"At any time" does not mean "for any reason". The statute authorizes, for instance, a Judge in Erie County to (i) revoke a pistol license issued in Westchester County if the licensee was convicted of a felony or serious offense and/or to (ii) suspend or revoke the pistol license if an order of protection was issued against the licensee, which are each *per se* prohibitors to gun possession.

The statute does not authorize any licensing officer to revoke anyone's handgun license "for any reason", i.e., for "moral character" or "good cause" grounds, only those events and conditions enumerated in the statute. In that regard, a judge in Orange County is not authorized to revoke a pistol license issued in Dutchess County upon a licensee's conviction of Petit Larceny because the Orange County judge 'feels' there is "good cause" to revoke the license or that the licensee lacks "good moral character" and would be "ineligible" to obtain a pistol license

under § 400.00 (1) (b), (n).[4] Petit Larceny is not *per se* prohibitor to gun possession and it is not enumerated in § 400.00 (11). The determination to revoke the license would be in the hands of the licensing officer in the issuing county, to wit, Dutchess County.

B. SAFE Act language enumerates the mental health prohibitor, requires communication, and mandates seizure of all guns

With the enactment of the SAFE Act in 2013, the language of § 400.00 (11) was amended to increase notification of information to law enforcement of persons prohibited from possessing firearms because of mental health adjudications and enact provisions to seize guns from prohibited persons. [A220]. § 400.00 (11) (b), (c).

Along with MHL Article 9, § 400.00 (11), *inter alia*, creates a means of communicating information between the Office of Mental Health, Division of Criminal Justice Services, the FBI (NICS database system), and the NY State Police, who then communicate prohibited information to the local handgun licensing officers to ensure the seizure of all firearms and suspension/revocation of handgun licenses of individuals who have become prohibited persons. MHL Article 9; § 400.00 (11).

[4] The licensing officer in the issuing county may not have the same view and may not revoke the pistol license under such circumstances. “Good cause” and “moral character” are subjective determinations unique to each licensing officer.

In amending subsection (11), it was not the Legislature's intention to ban long gun possession with every pistol license revocation. [A211-A266].

III. THE SAFE ACT LANGUAGE IN § 400.00 (11) DEMONSTRATES THAT THE COUNTY WAS ENFORCING ITS OWN SEPARATE POLICY

A. "Under this section"

The SAFE Act created subsection (a), which adding the language "a licensee at any time becoming ineligible to obtain a license under this section".

"Ineligible under this section" means ineligible due to a prohibiting event or conditions enumerated in section (11), not "ineligible under Article 400."

Under the County's policy, any time a licensee becomes "ineligible" to obtain a pistol license under § 400.00 (1), s/he is simultaneously prohibited from lawfully possessing rifles and shotguns. For the County's logic to apply, the language would have to read, "a licensee at any time becoming ineligible under § 400.00 (1)", which is does not.

The County would have the Court interpret § 400.00 (11) to demand the seizure of rifles and shotguns where a license is revoked for "lack of moral character" or "good cause", because the licensee has now become "ineligible" to obtain a handgun license. [County Br. at p. 10].

Had the Legislature meant "ineligible to obtain a handgun license" the newly added words "under this section" would be superfluous. Alternatively, the

Legislature would have specifically referenced § 400.00 (1), which it did not. [A258-A259].

As such, the seizure provisions of section (11) (c) only apply to the events and conditions enumerated in (11) (a) and (b). They do not, as the County asserts, apply where a handgun license is revoked for "moral character" or "good cause" reasons.

If all firearms (handguns, rifles, shotguns) were required to be surrendered with every handgun license revocation, the Legislature would not have added another enumerated prohibitor to § 400.00 (11), as it did in subsection (b) – it would have changed § 400.00 (11) to read, "The revocation of a pistol license shall operate as a forfeiture of all handguns, rifles, and shotguns and constitute a prohibitor to possession of the same."

There is no overarching statutory language that the "act" of being revoked renders a licensee a "prohibited person" whose possession of rifles and shotguns is a crime.

Accordingly, the County was enforcing its own policy, not Penal Law § 400.00 (11).

B. Appellant was revoked for "non-enumerated" reasons

Nassau County revoked Appellant's handgun license for being arrested, convicted of a misdemeanor, and lacking "good moral character." [A58]. None of

the grounds for the revocation of Appellant's handgun license prohibit the possession of long guns in New York State.

The possession of rifles and shotguns in New York is regulated by criminal statutes [see, § 265.00, *et seq*.], not the subjective opinions of a licensing officer.

A handgun licensing officer's subjective reasons for revoking a handgun license, to wit, "good cause" and "moral character" [§ 400.00 (1) (b), (n)], have **zero** effect on the lawful possession of rifles and shotguns[5] because rifles and shotguns are not subject to licensing.

To interpret § 400.00 (11) as prohibiting the possession of rifles and shotguns in the absence of a *per se* prohibiting event or condition constitutes the *de facto* licensing of rifles and shotguns – a result not intended by the Legislature's enactment of the SAFE Act.

IV. THE COUNTY FAILS TO RECONCILE THE NON-APPLICATION OF ITS POLICY TO LONG GUN OWNERS WITHOUT A HANDGUN LICENSE

The County fails to respond to Appellant's argument that, had Appellant not been a pistol license holder, no law required the surrender of his rifles and shotguns or criminalized his possession.

[5]In fact, if Appellant relocated to another county in New York State, the licensing officer for that county may opine that Appellant does *not* lack good moral character and issue a handgun license to Appellant to carry a handgun concealed without any restrictions under the "broad discretionary" authority imbued to pistol licensing officers.

This fact defeats the County's position that it was simply enforcing § 400.00 (11) and not its own policy.

The surrender/seizure of rifles and shotguns under subsection (c) requires a condition precedent – the revocation of a pistol license for the grounds enumerated in (a) or (b). Mandated surrender/seizure of long guns is only triggered where a person's license is suspended or revoked under paragraph (a) or (b).

Without the revocation of a pistol license, the possession of rifles and shotguns by non-licensees remains unaffected except where there exists a *per se* impediment to gun possession.

As such, the County was enforcing its own policy, not § 400.00 (11).

V. FROM THE COUNTY'S OWN STATEMENTS, NOT APPELLANT'S

The County falsely represents, "If no legal impediment exists, NCPD does not automatically prohibit a licensee from possessing long guns even if his or her pistol license is revoked." [County Br. at pp. 11, 14].

According to Lt. Timpano, the County's proffered expert on the Department's firearms policy:

> "Q. Is it the position of the Nassau County Police Department then that if an individual has a pistol license that is suspended or revoked, that they automatically lose their right to possess shotguns and rifles?
> A. That's correct.

> Q. It doesn't matter what the ground was for the suspension or the revocation of their pistol license, is that correct?
> A. That's correct.
> Q. It's the po1icy?
> A. Correct."

[A153 at 6-17; A386, n. 10].

Under the County's policy, the revocation of a pistol license - irrespective of the reason – constitutes a per se impediment to the possession of handguns, rifles, and shotguns. [A58-A59; A153; A268-A273].

The County claims "…plaintiff wrongly asserts that a handgun licensee does not have the opportunity to have a hearing to seek the return of their longarms until after their pistol license is revoked." [County Br. at p. 13].

Lt. Timpano testified,

> "Q. But what about a hearing with respect to their long guns, is that also only available after they -- they had their pistol license revoked or denied?
> A. Yes.
> Q. And what parameters are used to make the determination of whether an individual's long guns can be returned to them aside from whether their pistol license is going to be revoked?
> A. You talking about long guns when they're part of ownership of a pistol license holder?
> Q. Yes.
> A. If their -- if their license is reinstated, then their long guns, as well as their handguns, are returned to them."

[A-185].

The County represents that Appellant falsely claimed "…under the County's policy, the licensee would only be able to lawfully possess long guns *after* they reapplied for and were issued another pistol license..." [County Br. at p. 14].

Lt. Timpano testified,

> "Q. And they can only -- the individual would only be able to lawfully possess long guns after they reapplied for their pistol license and that application was granted?
> A. That is correct."

[A186 at 1-5].

The County's view of § 400.00 (11) imbues the police commissioner with *de facto* licensing authority over rifles and shotguns and radically enhances the power of the police commissioner over longarms.

The County's view is contrary to the Legislature's intent. [A211-A267]. The statutory amendments enacted by the SAFE Act do not require such a result.

VI. APPELLANT WON SUMMARY JUDGMENT AS TO HIS FOURTEENTH AMENDMENT CLAIM, WHICH IS NOT PART OF THIS APPEAL

Appellant was granted summary judgment as to his Fourteenth Amendment claim, which is not part of this appeal. Appellant and the County settled the related issue of damages and statutory attorney's fees by stipulation. [Dkt. Entry 42, 43].

In confusing fashion, the County contends that plaintiff's Fourteenth Amendment claim should be dismissed on 'summary judgment.' [County Br. at

pp. 14-17].

Appellant appealed only from those parts of the district court's decision that were contrary to and/or prejudiced the plaintiff's rights, claims, and interests [A401] and the County filed no notice of cross-appeal. [A6-A7].

The County's Fourteenth Amendment appellate argument is moot, improper, and should be disregarded.

VII. THE COUNTY'S POLICY VIOLATES THE SECOND AMENDMENT

A. The "public safety" argument is untimely

The only opposition the County put forth to Appellant's Second Amendment claim was that any Second Amendment violation suffered by Appellant is attributed to § 400.00 (11), not a Nassau County policy.

"The Nassau County Police Department policy of adhering to the SAFE Act and § 400.00 (11) (c) is constitutional and thus, plaintiff's third cause of action for claimed violation of his Second Amendment rights should be dismissed." [A81-A84].

On appeal, the County improperly advances an alternative "public safety" justification [for its separate policy] that Nassau County Administrative Code § 8.22.0 entitled "Duties of the Police Department," requires the seizure of long guns after a revocation because "it is the duty of the NCPD to preserve public peace, prevent crime, protect the rights of persons and property, and guard public health,

local ordinance." [County Br. at pp. 9-10]. As such, "when NCPD determines that a threat to public safety exists arising out of a pistol licensee's possession of long guns, the licensee is required to surrender his firearms and long guns to the Pistol License Section." [County Br. at pp. 9-10].

Because the County's "public safety" argument is being raised for the first time and was not raised below, it should be disregarded. See, *Krumme v Westpoint Stevens Inc.*, 238 F.3d 133, 142 (2d Cir 2000) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.") citing, *Singleton v. Wulff*, 428 U.S. 106, 120, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976); see also *Vintero Corp. v. Corporacion Venezolana de Fomento*, 675 F.2d 513, 515 (2d Cir. 1982) ("A party who has not raised an issue below is precluded from raising it for the first time on appeal.").

While a subjective belief that a threat exists may constitute "good cause" to revoke a handgun license, unless a crime has been committed or a *per se* prohibiting event or condition exists, NCPD has no legal authority over rifles and shotguns.

Moreover, as discussed in detail below, the Supreme Court has specifically rejected the "interest balancing" approach to Second Amendment analysis, where the rights of the individual are balanced against the public interest. The rejection of "interest balancing" was recently reaffirmed by Justice Thomas in *Rogers v.*

Grewal, infra.

B. The police have no legal duty to protect

Without waiving the objection to the County's untimely argument, the County's "public safety" theory is a pretextual avenue to disarm individuals in lawful possession of firearms.

The County's administrative code is hollow and self-serving. It is well-settled that law enforcement has no legal duty to protect anyone. See, *Pena v Deprisco*, 432 F3d 98, 107-108 (2d Cir 2005) citing, *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 197, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989) ("a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."); see also, *Brown v City of NY*, 786 F App'x 289, 291 (2d Cir 2019) (police failure to interfere when misconduct takes place is insufficient to demonstrate state-created danger for purposes of substantive due process liability).

C. The Supreme Court outright rejected public safety 'interest balancing'

The County's public safety "interest-balancing" justification was affirmatively rejected by the Supreme Court in *District of Columbia v Heller*, 554 U.S. 570 (2008).

Justice Thomas recently reaffirmed the *Heller* majority's rejection of public safety 'interest balancing' in the analysis of Second Amendment violations. See,

Rogers v. Grewal, 140 S. Ct. 1865, 1869, 207 L. Ed. 2d 1059, 1063, 2020 U.S. LEXIS 3248, *9, 28 Fla. L. Weekly Fed. S 340 (U.S. June 15, 2020) (Thomas, J. dissenting from denial of certiorari).

"[A]s I have noted before, many courts have resisted our decisions in *Heller* and *McDonald*." *Id.* at 1866 (citing, *Silvester v. Becerra*, 583 U. S. ___, ___, 138 S. Ct. 945, 200 L. Ed. 2d 293, 299 (2018) (opinion dissenting from denial of certiorari). "Instead of following the guidance provided in *Heller*, these courts minimized that decision's framework. *Id. (*citing, *Gould v. Morgan*, 907 F. 3d 659, 667 (CA1 2018) (concluding that our decisions did not provide much clarity as to how Second Amendment claims should be analyzed in future cases). "They then 'filled' the self-created 'analytical vacuum' with a 'two-step inquiry' that incorporates tiers of scrutiny on a sliding scale." *Id.* (citing, *National Rifle Assn. of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F. 3d 185, 194 (CA5 2012); *Powell v. Tompkins*, 783 F. 3d 332, 347, n. 9 (CA1 2015) (compiling Circuit opinions adopting some form of the sliding-scale framework).

"This approach raises numerous concerns. For one, the courts of appeals' test appears to be entirely made up. The Second Amendment provides no hierarchy of 'core' and peripheral rights. And the Constitution does not prescribe tiers of scrutiny." *Id.* (citing, *Whole Woman's Health v. Hellerstedt*, 579 U. S. ___, ___, 136 S. Ct. 2292, 195 L. Ed. 2d 665, 706 (2016) (Thomas, J., dissenting); see also

Heller II, supra, at 1283, 399 U.S. App. D.C. 314 (Kavanaugh, J., dissenting) (listing constitutional rights that are not subject to means-ends scrutiny).

"Moreover, there is nothing in our Second Amendment precedents that supports the application of what has been described as 'a tripartite binary test with a sliding scale and a reasonable fit.'" *Id.* (citing, *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1117 (SD Cal. 2017), aff 'd, 742 Fed. Appx. 218 (CA9 2018).

"Even accepting this test on its terms, its application has yielded analyses that are entirely inconsistent with *Heller*. There we cautioned, "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all…our constitutional rights must be protected whether or not future legislatures or (yes) even future judges think that scope too broad." *Rogers v Grewal,* 140 S. Ct. at 1867 citing, *Heller*, 554 U. S. at 634-635.

"On that basis, we explicitly rejected the invitation to evaluate Second Amendment challenges under an 'interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other.' [citing, *Heller*, 554 U.S. at 689 (Breyer, J., dissenting]. But the application of the test adopted by the courts of appeals has devolved into just that. [6] In fact, at least one scholar has contended that this

[6] Citing, "*Kachalsky v. County of Westchester*, 701 F. 3d 81, 100 (CA2 2012) (deferring to the legislature's conclusion that "public safety . . . outweighs the need to have a handgun for an unexpected confrontation"); *New York State Rifle & Pistol Assn., Inc. v. New York*, 883

interest-balancing approach has ultimately carried the day, as the lower courts systematically ignore the Court's actual holding in Heller. See Rostron, Justice Breyer's Triumph in the Third Battle Over the Second Amendment, 80 Geo. Wash. L. Rev. 703 (2012). With what other constitutional right would this Court allow such blatant defiance of its precedent?" *Rogers*, 140 S Ct at 1867.

The County's "interest balancing" justification for prohibiting the possession, and requiring the surrender, of rifles and shotguns solely based on the revocation of a handgun license – in the absence of a *per se* prohibiting event or condition – must be rejected as a violation of the Second Amendment.

A contrary holding would remove *all* guns from the protections of the Second Amendment. Indeed, for now the possession of a handgun is viewed in this Circuit as a 'privilege' unprotected by the scope of the Second Amendment, despite the fact that New York's handgun licensing scheme was created under the erroneous belief that the Second Amendment did not apply to the states.

F.3d 45, 64 (CA2 2018) (stating that a "review of state and local gun control" involves a "balancing of the individual's constitutional right to keep and bear arms against the states' obligation to 'prevent armed mayhem'" (quoting *Kachalsky*, supra, at 96)), vacated and remanded, ante, p. ___; *Gould v. Morgan*, 907 F. 3d 659, 676 (CA1 2018) (stating that "courts must defer to a legislature's choices among reasonable alternatives" when the legislature has "take[n] account of the heightened needs of some individuals to carry firearms for self-defense and balance[d] those needs against the demands of public safety"); *Drake v. Filko*, 724 F. 3d 426, 440 (3d Cir 2013) ("refus[ing] . . . to intrude upon the sound judgment and discretion of the State of New Jersey" that only "those citizens who can demonstrate a 'justifiable need' to do so" may carry handguns outside the home)." *Rogers*, 140 S Ct at 1867, n. 1.

Even after *McDonald v Chicago*, 561 U.S. 742, 130 S. Ct. 3020 (2010), New York federal and state courts continued on as if nothing changed – maintaining the second-class status of handgun ownership as a "privilege", not a right worthy of Second Amendment protections. See, *Henry v County of Nassau*, 2020 U.S. Dist. LEXIS 43371, at *25 (E.D.N.Y. Mar. 12, 2020, No. 17-CV-06545 (DRH)(AKT)) (citations omitted) ("numerous courts in this Circuit have previously found that there is no constitutional right to a handgun license in New York State.").

Subjecting rifles and shotguns to the same subjective licensing standards that are applied to handguns – "good cause" and "moral character" – would convert the possession of rifles and shotguns to a 'privilege' – just like handguns – removing *all* guns from the scope of Second Amendment protections.

As such, the County's firearms seizure policy violates the Second Amendment generally and as applied to Appellant.

VIII. THE COUNTY'S FIREARMS SEIZURE POLICY VIOLATED APPELLANT'S FOURTH AMENDMENT RIGHTS

A. The "moving force" was the County's policy

The Notice of Revocation informed Appellant he was "prohibited from possessing firearms, rifles, shotguns." [A58]. Fearful of being prosecuted and arrested, Appellant divested himself of his property.

The County concedes, "once his pistol license was revoked, plaintiff could choose to divest himself of his longarms or face criminal prosecution" but blames § 400.00 (11). [County Br. at p. 14].

The Notice of Revocation, Lt. Timpano's testimony, the SAFE Act Bulletin, and the analysis herein, demonstrate that the County's policy, not the state statute, was the "moving force" behind Appellant's loss of property.

B. The County materially interfered with Appellant's possessory interests

The seizure of property within the meaning of the Fourth Amendment occurs when there is "some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652490 U.S. 296 (1984). For the seizure to be actionable under 42 U.S.C. § 1983, the plaintiff also must show state action. *Id.*

The County ordered Appellant to surrender, transfer, or otherwise divest himself of his property, and remove any guns from the Department's property bureau by transferring ownership to a properly licensed individual or a licensed gun dealer, or request that the Department destroy the firearms. [A58-A59; 268-A273].

It is untruthful for the County to represent that Appellant voluntarily gave his long guns away. The County's policy, as borne out in the Notice of Revocation

and SAFE Act Bulletin, ordered him to get rid of his long guns and informed that he was now legally prohibited from possession long guns. [County Br. at p. 14].

It is disingenuous for the County to posit that Appellant's possessory interest in his long guns was not interfered with because a third party, and not the County, had possession of his guns.

The moving force behind the deprivation of Appellant's property was the County's prohibition on possession and order that he transfer his property. The Notice of Revocation and SAFE Act Bulletin affected Appellant's pistol license and handguns, deprived Appellant of his long guns, and criminalized his future possession of long guns, unless and until he was granted a new pistol license. [A58-A59; A185-A186; 268-A273].

Based on the above, the County's firearms seizure policy violated Appellant's Fourth Amendment rights.

IX. PREEMPTION WAS FULLY BRIEFED BELOW

The County falsely claims that Appellant did not raise the issue of preemption in the court below. [County Br. at pp. 21-22]. Appellant's preemption analysis was fully briefed during summary judgment in the district court. [A99-A108].

The County claims, "no authority is cited" to support Appellant's argument that the County's policy is preempted by the New York State statutory licensing

scheme. [County Br. at pp. 21-22]. To the contrary, Appellant relied on the seminal case involving Nassau County, *Matter of Chwick v Mulvey,* 81 A.D.3d 161 (2d Dep't 2010), which held that New York State's detailed and comprehensive firearms regulatory scheme "leaves no room for local governments to act, nor does it delegate any authority to local governments in the field of firearms regulation." *Matter of Chwick,* 81 A.D.3d at 172. [A99-A108].

In *Chwick,* the Second Department struck down as preempted a Nassau County ordinance criminalizing the possession of "deceptively colored" firearms, holding that the ordinance was preempted by § 400.00, *et seq.* The comprehensive and detailed regulatory language and scheme of § 400.00 demonstrated the Legislature's intent to preempt the field of firearm regulation. [A107]. *Matter of Chwick*, 81 A.D.3d at 172 citing, *Dougal v County of Suffolk*, 102 A.D.2d 531, 533 (2d Dep't 1984) (§ 400.00 leaves no room for local ordinances to operate. Instead, the State statutes give localities detailed instructions concerning the procedures to be employed in licensing firearms.).

With the passage of the SAFE Act in 2013, three years after the Appellate Division's decision in *Chwick*, the Legislature reaffirmed its intention to preempt the field of regulating handguns, rifles, and shotguns. Had the Legislature intended that the revocation of a handgun license – irrespective of the reason for the

revocation – prohibited the handgun licensee from possessing firearms, rifles, shotguns [A58] it would have so stated.

Had the Legislature intended to prohibit the possession of *any* guns upon the revocation of a handgun license – irrespective of the grounds for the revocation – § 400.00 (11) would not have been amended to add the *per se* mental health prohibitor under subsection (b) or the language "becoming ineligible to obtain a license *under this section*". (emphasis added).

The Legislature determined that the only unlawful possession of shotguns and rifles is by individuals who have *per se* statutory prohibitors to firearm possession in the first instance: (i) felony or serious offense conviction; (ii) order or protection, and (iii) "certified not suitable" by reasons if being "judicially adjudicated incompetent" or "confined" to a "hospital or institution for mental illness" "pursuant to judicial authority." See, Penal Law § 265.01 (4); § 265.01 (6); § 265.00 (16).

Should the Court determine that Nassau County enforced its own policy, but that its policy did not violate the Constitution, the policy is a nullity and unenforceable as preempted by § 400.00, *et seq.*

X. THE COUNTY IS LIABLE UNDER *MONELL*

The appellate record and arguments advanced in this appeal establish that Nassau County acted pursuant to its own policy, not the enforcement of § 400.00 (11), which resulted in the violation of Appellant's Constitutional rights. [A58-A59; A268-A273].

CONCLUSION

For the foregoing reasons, the Opinion and Order of the district court dated September 30, 2019 granting Nassau County's motion for summary judgment, and denying Appellant's cross-motion for summary judgment, dismissing his Second Amendment and Fourth Amendment claims and the claim of *Monell* liability, should be reversed and remanded to the district court for further proceedings.

Dated: Scarsdale, New York
September 23, 2020

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)

1. This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 5,099 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: September 23, 2020