12-1578

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., NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INCORPORATED,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees,

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor-Appellee,

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

Defendant.

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

BRIEF FOR INTERVENOR-APPELLEE

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PRELIMINARY STATEMENT

New York law requires individuals to apply for and obtain a license from the county where they reside before carrying or possessing handguns, except that residents of New York City must obtain their license from the City. A state statute requires local police to investigate the truth of statements in a handgun application and to investigate an applicant's criminal history and the like, and allows the issuing local governments to charge a fee for investigating and processing handgun license applications.

A New York statute generally sets a range of three to ten dollars for the licensing fee. At separate times, the governments of two of the State's largest population centers—New York City and Nassau County—asked the New York Legislature to amend the statute so that those fee limits would not apply to license applications submitted in those political subdivisions, thereby allowing them to defray more fully the administrative costs of the licensing process. The state legislature granted both requests. Though New York City and Nassau County are permitted to charge a fee outside the statutory fee range, they remain

subject to a general limitation in New York law prohibiting license fees of this kind from exceeding a local government's administrative costs.

The plaintiffs are (a) seven New York City residents who hold licenses to possess handguns in their homes, after having paid the City's handgun license fee; and (b) two gun rights organizations whose members hold New York City handgun licenses, after having paid the license fee. Plaintiffs assert that the City's handgun license fee violates the Second Amendment and that the state law violates equal protection principles by allowing New York City (and Nassau County) to charge a fee that is not limited by the statutory range that applies to other political subdivisions in New York. The Attorney General of the State of New York has intervened by stipulation of the parties to defend the constitutionality of the state law.

The United States District Court for the Southern District of New York (Koeltl, J.) properly granted summary judgment to the New York City defendants and to the Attorney General as intervenor. The City's brief well demonstrates that its handgun license fee—which undisputedly falls below the City's costs in processing license applications—comports with the Second Amendment. The Attorney

General's brief here solely addresses plaintiffs' equal protection claim challenging the state statute that authorizes local governments to establish and charge a handgun licensing fee.

Plaintiffs' equal protection claim against the state statute was properly rejected by the district court, and should be rejected by this Court as well. First, the state law does not burden Second Amendment rights; it simply authorizes the City to set a license fee outside the range permitted elsewhere in the State—it does not require the City to impose a substantially different or higher fee. If a burden were imposed on Second Amendment rights by the particular fee set by the City, it would be a burden imposed by the City, not by the state statute.

Even if the state statute could be viewed as a source of the higher fee to be paid by city residents, the statute would not interfere with plaintiffs' exercise of Second Amendment rights, so as to require heightened scrutiny. State law prohibits New York City from imposing license fees that exceed its costs of administering the license program. The record indeed shows that the fee set by New York City is less than those costs. Plaintiffs have not suggested that the cost-defraying license fee charged by the City has prevented them from obtaining a handgun

license; to the contrary, the individual plaintiffs all presently hold such licenses. Because the state statute does not significantly burden Second Amendment rights, it is subject to rational basis review under the Equal Protection Clause, which it easily satisfies. The statute is justified by the State's legitimate interest in accommodating New York City's request for the ability to decline to subsidize the licensing program by setting fee levels closer to its actual costs.

ISSUE PRESENTED

Whether Penal Law § 400.00(14) violates the Equal Protection Clause of the Fourteenth Amendment by (1) giving local governments in New York the authority to establish a fee for investigating and processing handgun license applications, and (2) exempting New York City and Nassau County from upper and lower limits on that fee that apply to other local governments, based on specific requests by New York City and Nassau County for the ability to charge fees that better enable them to defray the administrative costs of the licensing program.

STATEMENT OF THE CASE

A. New York's Handgun Licensing Statute

New York law generally prohibits the possession of handguns without a license. N.Y. Penal Law § 265.01(1).[1] State law specifies several types of handgun licenses, including (1) a license for home possession; (2) a license for possession by a merchant in his place of business; and (3) licenses for the carrying of concealed handguns in public. *See id.* § 400.00(2)(a)-(b) & (f). This case involves applications for a license for home possession, known as a "residence handgun license."

1. The investigation and processing of handgun license applications by local governments

Local governments administer the handgun licensing process. An individual seeking a residence handgun license applies to the licensing officer in the city or county where he or she resides. *Id.* § 400.00(3)(a).

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[1] State law does not require a license for most long guns, such as rifles and shotguns. Penal Law § 265.01 prohibits unlicensed possession only of a "firearm," which is defined to include pistols and revolvers; shotguns with barrels less than eighteen inches in length; rifles with barrels less than sixteen inches in length; weapons made from a shotgun or rifle that are less than twenty-six inches long; and assault weapons. *See* Penal Law § 265.00(3).

In most counties, state judges serve as licensing officers, but in New York City, Nassau County, and Suffolk County, designated police officials serve as licensing officers. *Id.* § 265.00(10).

A license applicant must provide basic information such as his or her name, date of birth, residence, current occupation and citizenship. The application must also state whether the applicant has good moral character and whether the applicant has been convicted of any felony or other serious offense. *See id.* § 400.00(1), (3)(a). The application must include a statement regarding any history of mental illness or confinement in a mental health facility. It must also state "such other facts as may be required to show the [applicant's] good character, competency and integrity." *Id.* § 400.00(3)(a).

Once an application is filed, local police authorities must conduct an investigation. The investigation must examine the accuracy of all the statements required in the application, including the applicant's criminal record and mental health history. *Id.* § 400.00(4). New York City reports that its investigation of residence handgun license applicants often includes third-party interviews, contact with various federal, state and city agencies, detailed review of applicants' mental

health history, and several levels of internal police department review. (J.A. 330-332.)

After the licensing investigation is completed, the local police authority reports the results of its investigation to the licensing officer. The licensing officer must then either grant or deny the license, giving written reasons if the license is denied. An applicant may obtain judicial review of the denial of a license in whole or in part by filing a petition under article 78 of the Civil Practice Law and Rules. *See, e.g., Dalton v. Drago*, 72 A.D.3d 1243 (3d Dep't 2010).

2. The handgun licensing fees that may be charged by local governments

Since 1922, the New York State Legislature has authorized local governments to charge a fee for the investigation and processing of applications for firearms licenses (*see* J.A. 473). The permissible fee was originally fixed by statute at fifty cents (J.A. 468 (Ch. 198, 1922 N.Y. Laws 519)), and it has been increased several times over the years.

Thus, in 1938, to address the rising costs of administering gun licenses, the statute was amended to authorize local governments to fix the license fee between 50 cents and $1.50 (J.A. 475 (Ch. 374, 1938 N.Y.

Laws 1069); *see* J.A. 489, 490). This range was increased in 1951 to authorizes fees between 50 cents and $3.00, Ch. 449, 1951 N.Y. Laws 1204, and was increased again a decade later to authorize fees between $3.00 and $5.00, Ch. 295, 1961 N.Y. Laws 1182. In 1984, the fee range was set at its current level, which authorizes local governments to charge a fee between $3 and $10. Ch. 739, 1984 N.Y. Laws 3112. The fee range is codified at Penal Law § 400.00(14).

At separate times, local officials representing two of New York's largest population centers—New York City and Nassau County—requested, and received, permission from the Legislature to charge fees outside the statutory range of $3 to $10 to help defray their costs of investigating and processing license applications. In 1947, the Mayor of New York City urged the Governor to approve a bill that would allow the City to charge a fee outside the statutory range (then $0.50 to $1.50), so that the City Council could "fix a license fee commensurate with the cost of issuance" (J.A. 504). That bill was passed by the Legislature and signed by the Governor (J.A. 496 (Ch. 147, 1947 N.Y. Laws 518)).

In 1973, Nassau County officials complained that administering the handgun licensing process was "time-consuming and expensive" and that the $5.00 fee then allowed was "totally unrealistic compared to the cost" of licensing (J.A. 524). Again, the Legislature amended the statute to authorize Nassau County, like New York City, to fix a handgun license fee outside the statutory range (J.A. 532 (Ch. 546, 1973 N.Y. Laws 1718)). Both New York City and Nassau County remain subject to the limitation in New York decisional law prohibiting license fees imposed by a local government from exceeding the administrative costs of the licensing program. *See, e.g.*, *Matter of ATM One L.L.C. v. Inc. Vill. of Freeport*, 276 A.D.2d 573, 574 (2d Dep't 2000).

New York City and Nassau County together account for almost half of New York's current population. *See* Empire State Dev., NYS Data Center, *Census 2010-Data*, http://www.empire.state.ny.us /NYSDataCenter/Data/Census2010/PL2010Tab2NY.pdf (providing 2010 Census data by county). These two localities each process thousands of handgun license applications annually, whereas most other New York counties process only several dozen applications per year (*see* J.A. 602-607).

B. New York City's Handgun Licensing Fee

In 1948, after the Legislature authorized the City to establish a fee outside the statutory fee range, the City Council set the licensing fee at $10 (the statutory range was then capped at $1.50). (J.A. 144 (Local Law 32 of 1948). The City has increased its handgun licensing fee several times upon findings that the administrative costs of investigating and processing licenses had risen[2] (*see* J.A. 188, 214, 217, 221, 224).

The City's licensing fee stands today at $340 for an initial three-year license, and $340 for each renewal of the license for an additional three-year term.[3] The City Council based its most recent fee increase, in 2004, on a careful review of the administrative costs of operating the license division of the City's police department (NYPD). The NYPD calculated that the total cost of processing each license application as of 2004 was $343.49 (J.A. 369-370). In 2010, the NYPD studied these costs again, finding that the cost of processing each initial residence handgun

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[2] The City Council increased the fee to $20 in 1962; to $30 in 1973; to $50 in 1979; to $100 in 1985; to $135 in 1989; to $170 in 1992; and to $340 in 2004 (J.A. 188, 208, 211, 216, 219, 223, 226).

[3] Nassau County currently charges a $200 fee for a five-year gun license (J.A. 111).

license application had risen to $977.16 (J.A. 337, 384), and that the cost of processing each renewal application was now $346.92 (J.A. 337, 389).

C. The Plaintiffs' Challenge to New York City's Licensing Fee

The seven individual plaintiffs allege that they hold residence handgun licenses issued in New York City. They acknowledge that they have paid the applicable license and renewal fees set by the City Council. (*See* J.A. 53 (Kwong); 55 (Lidakis); 58 (Calce); 61 (G. Greco); 64 (D. Greco); 67 (Herman); 70 (Furey).) None of the individual plaintiffs asserts that he or she suffered any financial hardship in paying the license or renewal fees or suggests that he or she might face any such financial hardship in the future.

The two organizational plaintiffs, Second Amendment Foundation and New York State Rifle & Pistol Association, Inc., are gun rights organizations. They assert that their members have paid the license and renewal fees set by the City. While both organizational plaintiffs assert that some members have complained that the City's licensing fee

is "prohibitive," neither suggests that the fee has actually prevented any member from obtaining a license (J.A. 73, 75).

The complaint asserts two causes of action.[4] First, plaintiffs assert that New York City Administrative Code § 10-131(a)(2), which establishes a $340 fee for issuance of an initial or renewal residence handgun license by New York City, imposes an impermissible burden on plaintiffs' Second Amendment rights (J.A. 21). Second, plaintiffs assert that Penal Law § 400.00(14), authorizing New York City (and Nassau County) to establish handgun licensing fees outside the statutory fee range of $3 to $10, violates the Equal Protection Clause. (J.A. 22).

The complaint requests declaratory and injunctive relief against New York City and Mayor Michael Bloomberg barring them from enforcing Administrative Code § 10-131(a)(2) or from charging a

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[4] The complaint originally named New York City Mayor Michael Bloomberg, the City of New York, and Attorney General Eric Schneiderman as defendants. On May 23, 2011, the parties filed a stipulation dismissing the Attorney General—who has no role in administering the licensing statute—as a defendant, and granting him intervention in the case to defend the constitutionality of § 400.00(14). (J.A. 24; *see also* SA 1-2 n.1.)

handgun license fee in excess of $10 (J.A. 23). The complaint also requests a declaratory judgment that § 400.00(14) is invalid "as applied to allow the imposition of a fee in excess of $10 for the issuance or renewal of a Residence Premises handgun license" (J.A. 23). The complaint does not challenge New York's requirement of a license to possess a handgun in the home, the statutory requirements for obtaining a license, or the scope of the investigation of applicants that the State requires local governments to conduct.

D. The District Court's Grant of Summary Judgment

On March 26, 2012, the district court (Koeltl, J.) granted summary judgment to the city defendants and to the Attorney General as intervenor, finding that both the state licensing fee statute and the city law setting the fee are constitutional. (SA. 2.) Accordingly, the court dismissed both of plaintiffs' causes of action.[5]

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[5] The district court first determined that the individual plaintiffs had standing to bring an equal protection claim against § 400.00(14) because, absent the statutory classification, New York City would be prohibited from setting a handgun license fee above $10 (*see* SA. 12). The district court then determined that the two organizational plaintiffs "may not sue [under 42 U.S.C. § 1983] in a representative capacity for

(*continued on the next page*)

The district court first rejected plaintiffs' argument 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" (SA.16). The court found that "[t]he Supreme Court's fee jurisprudence . . . 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" (SA. 16). The court also found that there was "no genuine dispute that the $340 fee is less than the administrative costs of the licensing scheme," and, indeed, that this fee represented only a fraction of the costs incurred by the City in processing new license applications (SA. 24-25). The court rejected plaintiffs' contention that a fee designed only to defray administrative costs is constitutional only if it is also "nominal" in amount (SA. 19), and found that plaintiffs had made no showing the $340 fee is "so exorbitant as to deter the exercise of the protected activity" (SA. 21).

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the alleged violations of rights of their members," but declined to address their standing to sue in their own behalf (SA. 14).

In the alternative, the district court also upheld the fee under "the means-end scrutiny applicable to laws that burden the exercise of Second Amendment rights" (SA. 27). Because the City's fee law "does not effect a ban on handguns but only imposes a fee" (SA. 29), the district court held that intermediate scrutiny would be the appropriate standard if means-end scrutiny were applied (SA. 30). The court found that the $340 fee would survive intermediate scrutiny "because the fee is designed to recover the costs attendant to the licensing scheme," which licensing scheme furthers important government interests in promoting public safety and preventing gun violence (SA. 30).

Having upheld the City's fee under the Second Amendment, the district court turned to plaintiffs' equal protection claim challenging Penal Law § 400.00(14). The Court held that § 400.00(14) is subject only to rational-basis review under the Equal Protection Clause because the classification it draws—between those seeking handgun licenses within New York City (and Nassau County), and those seeking handgun licenses elsewhere in New York—does not burden the constitutional right protected by the Second Amendment.

The court stated: "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." (SA. 34 (footnote omitted).) The district court then concluded that § 400.00(14) "plainly passes constitutional muster under rational basis review," finding sufficient the statute's promotion of the interest in allowing New York City to recover the costs it incurs in administering the licensing scheme (SA. 35). The court also noted in the alternative that it would hold § 400.00(14) constitutional even if the statute "could be viewed as disparately burdening the Second Amendment right by imposing a higher fee on New York City residents" (SA. 34 n.13).

SUMMARY OF ARGUMENT

New York State's statute authorizing New York City to fix the fee it charges for handgun licenses does not violate the Equal Protection Clause. The statute does not burden plaintiffs' Second Amendment rights at all because the classification it establishes does not require New York City to charge more than the fee charged in other counties in

the State—indeed, New York City could charge *less* than other localities without violating state law.

Even if the statute were viewed as contributing to the higher fee for handgun licenses in New York City compared to other areas, the fee set by the New York City Council does not interfere with plaintiffs' Second Amendment right to possess a handgun in the home for self-defense and therefore does not trigger heightened scrutiny. New York City's fee simply defrays the costs incurred by the City in processing license applications; such fees to offset costs have routinely been sustained by courts as not burdening constitutional rights at all. And no plaintiff has shown an inability to obtain a license; indeed, the individual plaintiffs all presently hold residence handgun licenses. Because plaintiffs' Second Amendment rights are not significantly burdened by the statute's classification, the classification is subject only to rational-basis review. The statute easily survives this deferential standard because it serves the legitimate interest of accommodating New York City's request for the ability to avoid heavily subsidizing the costs of the licensing program.

ARGUMENT

THE STATE'S DELEGATION OF AUTHORITY TO NEW YORK CITY (AND NASSAU COUNTY) TO FIX THE FEE CHARGED FOR HANDGUN LICENSES DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

Plaintiffs do not challenge New York's requirement that individuals obtain a license from the county or city where they reside before possessing a handgun. Nor do they challenge the state statute that imposes substantive eligibility requirements for obtaining a license for the purpose of protecting the public safety. Plaintiffs also do not challenge the statutory provisions requiring local governments to administer the licensing process, including the requirement that local law enforcement officers conduct an appropriate investigation of license applications. Plaintiffs concede, moreover, that New York City's licensing fees are set below the City's costs in investigating and processing license applications, as required by state law. *See, e.g.*, *Matter of ATM One L.L.C.*, 276 A.D.2d at 574; *Matter of Torsoe Bros. Constr. Corp. v. Bd. of Trustees of Inc. Vill. of Monroe*, 49 A.D.2d 461, 465 (2d Dep't 1975). Plaintiffs nonetheless argue that the Constitution restricts the City to charging a much lower licensing fee—a fee that

would require the City to bear nearly all of the costs of the licensing process. In essence, plaintiffs claim a constitutional right to have the City subsidize their possession of a handgun. The Constitution affords them no such right.

As New York City demonstrates in its brief defending its local law, the $340 handgun licensing fee set by the New York City Council does not violate the Second Amendment. Brief for Mayor Michael Bloomberg at 20-36. This is because fees set below the government's cost of administering a permit program are permissible, even when the permit program affects constitutionally protected conduct. *See, e.g., Cox v. New Hampshire*, 312 U.S. 569, 577 (1941) (fees related to conduct protected by the First Amendment); *Nat'l Awareness Found. v. Abrams*, 50 F.3d 1159, 1165 (2d Cir. 1995) (same); *see also Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 100-02 (2d Cir. 2009) (fees related to right to travel).

Plaintiffs' attack on Penal Law § 400.00(14) also fails. The statute does not violate the Equal Protection Clause by permitting New York City and Nassau County, based on the specific request of their local leaders, to charge a fee outside the statutory range of $3 to $10 for handgun licenses that applies to other local governments. Plaintiffs'

equal protection claim rests on the incorrect notion that *any* legislative classification that touches at all on the exercise of a fundamental constitutional right is subject to strict scrutiny under the Equal Protection Clause.[6] That is not the law: as explained below, Penal Law § 400.00(14) is subject only to rational basis review, which it easily satisfies.

A. Penal Law § 400.00(14) Does Not Impose a State-Level Classification That Disadvantages Plaintiffs in the Exercise of Their Second Amendment Rights.

As a threshold point, Penal Law § 400.00(14) does not impose any state-level classification that disadvantages plaintiffs in the exercise of their Second Amendment rights. The district court correctly observed that § 400.00(14) does not require New York City (or Nassau County) to impose a licensing fee above the $10 upper limit of the statutory range.

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[6] Neither the Supreme Court nor this Court has yet addressed whether the Second Amendment right to possess a handgun in the home rises to the level of a fundamental constitutional right. The Court need not reach that question in this case, because Penal Law § 400.00(14) fully comports with the Equal Protection Clause, even assuming that the right to possess a handgun in the home may be classified as a fundamental right under the Constitution.

Section 400.00(14) equally permits the City to charge a fee below the $3 floor that applies to other local governments in New York. It is entirely the decision of the New York City Council whether to set the handgun licensing fee above the statutory range, within that range, or below that range.

Plaintiffs also have not shown that any local government other than those of New York City and Nassau County has asked the Legislature for permission to charge a fee outside the statutory range. As the district court observed, "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" (SA. 37). Because other local governments evidently have not sought the ability to charge a fee outside the statutory range, the fee disparity between handgun licenses issued by New York City (and Nassau County) and those issued by other local

governments is best understood as the product of different decisions made at the local level, not as a product of state-level action.[7]

States are permitted to give local governments the ability to set fees under local licensing programs, even when this may result in different fees being charged by different local governments as to constitutionally protected activities. Thus, in *Cox*, the Court held that a state law requiring a parade permit fee ranging from "$300 to a nominal amount," 312 U.S. at 576, did not violate the First Amendment. The Court rejected the proposition that the State was required to set the same fee statewide because it "fail[ed] to take account of the difficulty of framing a fair schedule to meet all circumstances." *Id.* at 577. The Court "perceive[d] no constitutional

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[7] For related reasons, if plaintiffs were to succeed in their equal protection challenge, the appropriate remedy would not necessarily be to require New York City to charge at most $10 for a handgun license, as plaintiffs evidently assume. Any fee disparity among political subdivisions that may be traceable to state law could also be eliminated by lifting the statutory fee range altogether. *See, e.g.*, *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (describing alternative remedies where statute is found unconstitutional for underinclusiveness). Given that the New York Legislature seemingly has never denied a local government permission to charge a fee outside the statutory range, the latter would seem to be the more appropriate remedy.

ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought." *Id.* at 577. Section 400.00(14) is constitutional for the same basic reason: it reasonably permits local governments to fix a handgun licensing fee and reasonably grants the two political units that have requested exemption from the statutory fee range the authority to fix those fees outside that range, provided the fees do not exceed the costs incurred in administering the licensing program.

B. Section 400.00(14) Is Subject To Rational Basis Review Because It Does Not Jeopardize Plaintiffs' Exercise of Their Second Amendment Rights.

Even if Penal Law § 400.00(14) imposed a state-level classification that affected plaintiffs to some degree in the exercise of their Second Amendment rights, this would not mean that the classification would be subject to strict scrutiny, as plaintiffs argue. The Supreme Court has made clear that a law is not subject to strict scrutiny under the Equal Protection Clause merely because it touches on a fundamental constitutional right; rather, strict scrutiny applies only if the law

interferes with or jeopardizes the plaintiffs' ability to exercise a fundamental right.

Thus, the Supreme Court has said that "[u]nless a statute provokes 'strict judicial scrutiny' because it *interferes with* a 'fundamental right' or discriminates against a 'suspect class,' it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose." *Kadramas v. Dickinson Pub. Schs.*, 487 U.S. 450, 457-58 (1988) (emphasis added). The Court has also stated that "unless a classification warrants some form of heightened review because it *jeopardizes* exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (emphasis added). *See also, e.g., Lyng v. Int'l Union*, 485 U.S. 360, 370 (1988) (statute having no "*substantial impact* on any fundamental interest" subject to rational basis review (emphasis added)). Thus, not every slight burden on a constitutional right triggers strict, or even heightened, judicial scrutiny.

Plaintiffs assert that even a fee that is less than the administrative costs of a licensing program is subject to strict scrutiny "[w]hen a disparate fee structure directly burdens the exercise of a fundamental right" (Br. at 29). But they do not explain how the fee structure of § 400.00(14) "directly burdens" their exercise of Second Amendment rights, beyond their conclusory labeling of New York City's fee as "prohibitive." The district court correctly observed that "[t]here is no evidence that the fee has deterred or is likely to deter any individual from exercising his or her Second Amendment rights" (SA. 22). The individual plaintiffs all presently hold residence handgun licenses, and the organizational plaintiffs have not identified a single member of theirs who has allegedly been prevented from obtaining a residence handgun license due to New York City's fees.[8]

The cases cited by plaintiffs to support their argument involve fee structures posing special First Amendment problems that do not (and cannot) arise in the Second Amendment context. For example, in *Fulani*

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[8] This case therefore does not present the question whether a plaintiff who demonstrated financial hardship could succeed in an as-applied Second Amendment challenge to the City's handgun licensing fee.

v. Krivanek, 973 F.2d 1539 (11th Cir. 1997), the court considered a statutory ten-cent per-signature verification fee imposed on petitions submitted by minor-party individuals seeking to qualify as presidential candidates. That fee could be waived if candidates demonstrated that the fee would impose an "undue burden" on their financial resources, but not if the candidate was from a "minor party." *Id.* at 1540. This unequal availability of the fee waiver, because it was tied to the party affiliation of the putative candidate, was found to violate the Equal Protection Clause at least in part because it imposed a disparate burden based on the "particular viewpoint, [or] *associational preference*" of minor party candidates. *Id.* at 1544. New York's statute classifies based on political subdivision, not on any ground that is constitutionally suspect: the statute does not—and could not—discriminate based on "viewpoint" or "associational preferences." Nor do these First Amendment terms have any meaning in the Second Amendment context.

Another case cited by plaintiffs, *Clear Channel Outdoor, Inc. v. City of St. Paul*, is inapposite because it did not even adjudicate an equal protection claim. No. 02-cv-1060, 2003 WL 21857830, at *1 (D.

Minn. Aug. 4, 2003). The case instead invalidated a differential fee structure *under the First Amendment* for billboards because it constituted "a content-based restriction on noncommercial speech." *Id.* at *6. Again, the First Amendment doctrine limiting the government's ability to impose content-based (and viewpoint-based) restrictions on speech would make no sense in the Second Amendment context. Nor does Penal Law § 400.00(14) draw distinctions on any such ground.

Applying rational-basis review to plaintiffs' equal protection challenge to Penal Law § 400.00(14) also accords with this Court's framework for analyzing claims brought under the Second Amendment itself. The Court has held that a handgun regulation does not merit heightened scrutiny unless the law "substantially burdens Second Amendment rights." *United States v. Decastro*, 682 F.3d 160, 164 (2012). A cost-defraying fee (which is the only level of fee that state law permits New York City to impose) does not constitute a "substantial burden" on Second Amendment rights. Such a fee imposes, at most, a "marginal [or] incremental" burden, *id.*, at least absent a showing of financial hardship. This is because "fees that serve . . . as means to meet the expenses incident to the administration of a regulation and to

the maintenance of public order in the matter regulated are constitutionally permissible." *Nat'l Awareness Found.*, 50 F.3d at 1165. Again, the individual plaintiffs all presently hold residence handgun licenses issued by New York City, after having paid the City's licensing fee.

Plaintiffs are therefore incorrect in suggesting that their equal protection claim requires strict scrutiny or any other form of heightened scrutiny. As the district court noted, several courts have "concluded that the Second Amendment analysis is sufficient to protect [the right to possess firearms] . . . and have either declined to conduct a separate equal protection analysis or have subjected the equal protection challenge to rational basis review" (SA. 34 n.13). The First Circuit and the Ninth Circuit have both adopted the latter approach. *Hightower v. City of Boston*, No. 11-2281, 2012 WL 3734352, at *16 (1st Cir. Aug. 30, 2012) ("Given that the Second Amendment challenge fails, the equal protection claim is subject to rational basis review."); *Nordyke v. King,* 681 F.3d 1041, 1043 n.2 (9th Cir. 2012) (en banc), *petition for cert. filed*, No. 12-275 (Aug. 30, 2012); *see also Dearth v. United States*, No. 09-cv-587, 2012 WL 4458447, at *12 (D.D.C. Sept. 27, 2012). The Supreme Court has taken a similar approach as to other constitutional rights.

See, e.g., Johnson v. Robison, 415 U.S. 361, 375 n.14 (1975) (since challenged statute did not violate fundamental right to free exercise of religion, Court had "no occasion to apply to the challenged classification [under the Equal Protection Clause] a standard of scrutiny stricter than the traditional rational-basis test"). This Court should likewise apply rational-basis review in this case. Otherwise, future plaintiffs would easily circumvent the Court's holding that heightened scrutiny does not apply to handgun regulations absent a substantial burden on Second Amendment rights; they would simply reframe their claims as ones brought under the Equal Protection Clause.

C. Section 400.00(14) Survives Rational Basis Review.

Section 400.00(14) easily survives rational basis review. The courts have consistently upheld as rational state statutes that draw distinctions on the basis of geography or that distinguish among political subdivisions within the state. *Salsburg v. Maryland*, 346 U.S. 545, 552 (1954) (upholding different rules of evidence in different counties within Maryland); *Missouri v. Lewis,* 101 U.S. 22, 30 (1879) (state may establish different systems of state appellate review for

different political subdivisions); *Hearne v. Bd. of Educ. of Chicago*, 185 F.3d 770, 774 (7th Cir. 1999) (upholding statute that gave Chicago public school employees less generous employment rights than similar employees elsewhere in Illinois).

Section 400.00(14)'s distinction between (1) New York City and Nassau County, and (2) the remaining New York counties is rational, first and foremost, because New York City and Nassau County specifically requested that they not be subject to the fee range generally imposed by the statute. A state legislature is permitted to "address[] itself to the phase of [a] problem which seems most acute to the legislative mind." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955). There is no evidence that any jurisdiction other than New York City and Nassau County ever asked the Legislature to exempt it from the statutory fee range. The Legislature reasonably responded to the requests of New York City and Nassau County, both major population centers, for the ability to charge licensing fees that better allow them to defray the administrative costs of the handgun licensing process.

Section 400.00(14) is also rationally drawn for the related reason that New York City and Nassau County face different demographic and budgetary circumstances from most other New York political subdivisions. Because of its enormous population, New York City processes thousands of gun applications per year, far more than any other locality in the State. Its volume of applications results in significant investigative and administrative costs. On average, the City processes 2,612 new handgun license applications and 9,522 renewal applications per year. (J.A. 602-607 (charts showing number of applications for counties and New York City for handgun licenses for years 2007-2009); J.A. 327 (giving average numbers of initial and renewal licenses processed by New York City).) Nassau County also has a very large population, and processes over a thousand license applications per year. Most other counties in New York process fewer than 300 applications annually, and many counties process only a few dozen such applications. (*See* J.A. 602-607.)

The statute thus may reflect a reasonable judgment that the costs to New York City and Nassau County of administering and investigating handgun licensing applications are different from those

faced in other areas of the State, or that New York City and Nassau County are less able or willing to subsidize those costs, given their other budget constraints, than are other political subdivisions. As the sponsor of the bill granting New York City Council the authority to fix license fees stated: "At a time when the City is experiencing so many monetary difficulties it seems that any legitimately based reasons for raising the revenues to the City should be taken advantage of. To put this particular system of applications on a self-sustaining basis, which is one of the basic reasons for the bill's appearance, seems entirely justifiable." (J.A. 507.) The Legislature acted rationally in accommodating the requests by New York City and Nassau County for the ability to defray more fully the administrative costs of their handgun licensing programs.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Oren L. Zeve, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,181 words and complies with the type-volume limitations of Rule 32(a)(7)(B).

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