No. 12-_____

In The
Supreme Court of the United States

ALAN KACHALSKY, CHRISTINA NIKOLOV, JOHNNIE NANCE, ANNA MARCUCCI-NANCE, ERIC DETMER, AND SECOND AMENDMENT FOUNDATION, INC.,

Petitioners,

v.

SUSAN CACACE, JEFFREY A. COHEN, ALBERT LORENZO, ROBERT K. HOLDMAN, AND COUNTY OF WESTCHESTER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Second Amendment secure a right to carry handguns for self-defense outside the home?

2. Do state officials violate the Second Amendment by denying handgun carry licenses to responsible, law-abiding adults for lack of "proper cause" to bear arms for self-defense?

RULE 29.6 DISCLOSURE STATEMENT

No parent or publicly owned corporation owns 10% or more of the stock in Second Amendment Foundation, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Alan Kachalsky, Christina Nikolov, Eric Detmer, Anna Marcucci-Nance, Johnnie Nance, and Second Amendment Foundation, Inc. ("SAF") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this matter.

DECISIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit, reprinted in the Appendix (App.) at 1, is published at 701 F.3d 81. The decision of the United States District Court for the Southern District of New York, reprinted at App. 45, is published at 817 F. Supp. 2d 235.

JURISDICTION

The Court of Appeals entered its judgment on November 27, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Second Amendment to the United States Constitution 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."

Relevant provisions of the New York Penal Law are reprinted in the Appendix.

INTRODUCTION

A "right" that may not be exercised absent a government official's discretionary determination that an individual has "proper cause" to exercise it, is not much of a right.

New York remains among the minority of states in which the "right to carry weapons in case of confrontation," *District of Columbia* v. *Heller*, 554 U.S. 570, 592 (2008), remains illusory. State law treats the carrying of handguns for self-defense not as a right, but as an administrative privilege lying beyond the reach of most people. Asserting that bearing arms is too dangerous to allow as a matter of course, New York forbids responsible, law-abiding adults from carrying handguns for self-defense unless they first demonstrate a "proper cause" to do so. By definition, "proper cause" must exceed the self-defense interest citizens ordinarily hold.

It is difficult to imagine federal courts sustaining the denial of the right to speak, the right to worship, or the right to terminate a pregnancy whenever the government asserts that these activities contravene

the public interest, and thus may not be conducted absent an extraordinary "proper cause." But as this case demonstrates, the Second Amendment is still relegated to uniquely lower status in some courts. The view that Justice Breyer's dissent has emerged as *Heller*'s controlling opinion is not entirely without merit. Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703 (2012).

The decision below defies *Heller* in several key respects. In so doing, it conflicts with federal appellate opinions finding *Heller* of greater precedential value.

A clear split now exists among the federal circuit courts, and between the court below and state courts of last resort, on profoundly important and recurring issues of Second Amendment law.

The court below stands among those holding that the Second Amendment has no practical impact beyond the threshold of one's home. Reasons for this conclusion vary – the right to bear arms outside the home is alleged to be non-adjudicable by lower courts, *Heller* is alleged to be limited to its facts, or as the lower court reasoned, the "core" self-defense interest identified in *Heller* is alleged to be limited to the home, such that rational basis review (styled as intermediate scrutiny, but rational basis review nonetheless) governs elsewhere.

In contrast, the Seventh Circuit has now twice invalidated restrictions on Second Amendment rights

outside the home. That court asserts that the right is equally important outside the home as inside, and has declared that regardless of location, higher-than-intermediate scrutiny must apply to infringements of law-abiding, responsible adults' core Second Amendment rights. It rejected the Second Circuit's decision here, and specified that ordinary people concerned about crime in rough neighborhoods should be able to carry handguns for self-defense – the very state of affairs precluded by New York's "proper cause" prerequisite to the bearing of arms.

The opinion below also conflicts with state high court approaches to securing the right to bear arms. Without acknowledging contrary decisions of state appellate courts, the court below rejected application of prior restraint doctrine to handgun licensing. Considering that prior restraint doctrine more logically applies in these circumstances, is more deferential to the democratic process than means-ends scrutiny, and is less prone to abuse, this split merits this Court's attention as well.

These splits of authority are profound and well-developed. Considering the subject at hand – the ability of responsible, law-abiding people to access constitutionally protected means of self-defense against violent crime – the Court should move expeditiously to resolve these conflicts. This case provides an excellent vehicle to address these important constitutional questions.

STATEMENT OF THE CASE

1. Petitioners brought this action in the United States District Court for the Southern District of New York, challenging as a Second Amendment violation New York's requirement that they prove "proper cause" to obtain a permit to carry a handgun for self-defense. The District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

In New York, the possession of a loaded handgun outside one's home or place of business constitutes "Criminal Possession of a Firearm in the Second Degree," a class C felony. N.Y. Penal Law § 265.03(3). The prohibition makes no distinction regarding the manner in which handguns would be carried, openly or concealed, but it exempts individuals holding an appropriate license. N.Y. Penal Law § 265.20(a)(3). For most New Yorkers who are not otherwise barred from possessing and carrying weapons, the only theoretically available license to carry handguns in public for self-defense is a license "to have and carry concealed, without regard to employment or place of possession, by any person *when proper cause exists* for the issuance thereof." N.Y. Penal Law § 400.00(2)(f) (emphasis added). "Proper cause" is neither defined by the Legislature, nor has the Legislature set forth standards for determining when "proper cause" exists.

Licensing officials enjoy "broad discretion . . . to determine whether 'proper cause' exists to issue a carry-concealed pistol license and may deny, revoke,

or limit a pistol license for any 'good cause,' a determination that will not be disturbed unless it is arbitrary and capricious." *Bando* v. *Sullivan*, 290 A.D.2d 691, 692, 735 N.Y.S.2d 660, 661 (3d Dep't 2002) (citations omitted).

> The term "proper cause" denotes a legitimate reason, a circumstance or combination of circumstances justifying the granting of a *privilege*. A generalized desire to carry a concealed weapon to protect one's person and property does not constitute "proper cause."

In re O'Connor, 585 N.Y.S.2d 1000, 1003 (Westchester Cty. Ct. 1992) (citations omitted) (emphasis added). To obtain a so-called "full carry" license, not restricted to activities such as target practice or hunting, applicants must demonstrate "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." *Bando*, 290 A.D.2d at 693, 735 N.Y.S.2d at 662 (citations omitted).

Each individual Petitioner sought a handgun carry license for the purpose of self-defense. Each application was rejected by one of the Respondent licensing officials for lack of "proper cause," pursuant to Respondent County of Westchester's recommendations. App. 131-47.

2. On September 2, 2011, the District Court entered an opinion and order denying Respondents' motions to dismiss the case on an array of non-substantive theories, denying Petitioners' motion for summary judgment, granting the individual

Respondents' motion for summary judgment, and entering summary judgment sua sponte for Respondent County.[1]

The District Court held that the interest in home self-defense "permeates" *Heller* "and forms the basis for its holding – which, despite the Court's broad analysis of the Second Amendment's text and historical underpinnings, is actually quite narrow." App. 92-93.

Holding that the Second Amendment does not extend beyond the home, the District Court dismissed this Court's interpretation of the term "bear arms" as meaning to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Heller*, 554 U.S. at 584 (citation omitted). Reasoned the District Court,

> [t]his textual interpretation does not stand on its own, however, but rather appears within the context of, and is provided solely to support, the Court's holding that the Second Amendment gives rise to an individual right, rather than a collective right connected to service in a militia.

App. 101.

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[1] The District Court found Petitioner Second Amendment Foundation, Inc. lacked standing, app. 74-75, a finding the Court of Appeals would find unnecessary to review. App. 4 n.2.

In the alternative, the District Court held that the "proper cause" requirement passed "intermediate scrutiny." App. 122. "[I]t is the job of the legislature, not the Court, to weigh the conflicting evidence and make policy choices (within constitutional parameters)." App. 124 (citations omitted).

Petitioners timely appealed.[2] The Second Circuit found that "*Heller* provides no categorical answer to this case. And in many ways, it raises more questions than it answers." App. 14. Acknowledging that "the plain text of the Second Amendment does not limit the right to bear arms to the home," the court conceded that "the Amendment must have *some* application in the very different context of the public possession of firearms." App. 16 & n.10.

The lower court did not describe the right further, let alone delineate its scope. The court found unhelpful the allegedly "highly ambiguous history and tradition" relating to the carrying of handguns for self-defense. App. 20. And it dismissed Petitioners' argument that New York's "proper cause" requirement afforded Respondents unbridled discretion in the licensing of a fundamental right. App. 21-24.

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[2] Respondent County cross-appealed to preserve its argument, not resolved by the District Court, that its investigation and determination of "proper cause" could not give rise to liability alongside that of the ultimate decision-making defendants. The Second Circuit did not reach this argument. App. 4 n.2.

Instead, the court below assumed, without elucidation, "that the Second Amendment applies to this context," app. 24, and that "some form of heightened scrutiny would be appropriate [because] New York's proper cause requirement places substantial limits on the ability of law-abiding citizens to possess firearms for self-defense in public." App. 25. Yet the lower court found that the "core" self-defense interest secured by the Second Amendment is limited to the home. *Id.* For this reason, and because the carrying of arms outside the home has traditionally been regulated, the lower court held it would apply "intermediate scrutiny." App. 33.

Upholding the "proper cause" requirement under "intermediate scrutiny," the lower court offered that "'substantial deference to the predictive judgments of [the legislature]' is warranted." *Id.* (quoting *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 195 (1997)). "The Supreme Court has long granted deference to legislative findings regarding matters that are beyond the competence of courts." App. 33-34 (citations omitted).

> In the context of firearm regulation, the legislature is "far better equipped than the judiciary" to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks. Thus, our role is only "to assure that, in formulating its judgments, [New York] has drawn reasonable inferences based on substantial evidence."

App. 34 (citations omitted).

The lower court acknowledged that the costs and benefits of bearing arms are disputed, and "recognize[d] that many violent crimes occur without any warning to the victims." App. 38. But it was enough that New York could point to some evidence justifying its position.

> It is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments. Indeed, assessing the risks and benefits of handgun possession and shaping a licensing scheme to maximize the competing public-policy objectives, as New York did, is precisely the type of discretionary judgment that officials in the legislative and executive branches of state government regularly make.

Id.

Addressing Petitioners' argument that individuals cannot be forced to prove a "need" to exercise a "right," the lower court criticized Petitioners for making a "crude comparison" between the Second Amendment and other rights. App. 40. The lower court insisted that Second Amendment rights enjoy lesser status than other rights. App. 40-41.

Disregarding this Court's definition of "bear arms," the lower court observed that "there is no right to engage in self-defense with a firearm until the objective circumstances justify the use of deadly force." App. 41 (footnote and citation omitted).

> Plaintiffs counter that the need for self-defense may arise at any moment without

> prior warning. True enough. But New York determined that limiting handgun possession to persons who have an articulable basis for believing they will need the weapon for self-defense is in the best interest of public safety and outweighs the need to have a handgun for an unexpected confrontation. New York did not run afoul of the Second Amendment by doing so.

App. 41-42.

The lower court then declared that Petitioners could not rebut a presumption in favor of the law's constitutionality. App. 42. And it rejected an over-breadth challenge to the "proper cause" requirement upon asserting that such challenges are limited to the First Amendment and, in any event, that the law was properly applied against Petitioners. App. 43.

REASONS FOR GRANTING THE PETITION

I. The Federal Courts of Appeals and State High Courts Are Divided Over Whether the Second Amendment Protects the Use of Firearms Outside the Home.

"[A] considerable degree of uncertainty remains as to the scope of [the Second Amendment] right beyond the home and the standards for determining whether and how the right can be burdened by governmental regulation." *United States* v. *Masciandaro*, 638 F.3d 458, 467 (4th Cir. 2011). If, "in many ways,

[*Heller*] raises more questions than it answers," app. 14, the conflicting answers supplied by the lower courts urgently call for this Court's intervention.

The court below ostensibly assumed that Petitioners' challenge implicated the Second Amendment. But the lower court rendered symbolic its homage to the Second Amendment by cabining any effect this right might have to the home. It thus applied a conclusive presumption of constitutionality to uphold the "proper cause" requirement that effectively bans virtually all New Yorkers from bearing arms.

The decision below thus functions identically to those of courts that either read *Heller* as being limited to its facts,[3] or for whatever reason refuse to directly

[3] See, e.g. *Commonwealth* v. *Perez*, 952 N.E.2d 441, 451 (Mass. App. Ct. 2011) ("The Second Amendment does not protect the defendant in this case because he was in possession of the firearm outside his home") (footnote omitted); *United States* v. *Tooley*, 717 F. Supp. 2d 580, 596 (S.D. W. Va. 2010) ("possession of a firearm outside of the home or for purposes other than self-defense in the home are not within the 'core' of the Second Amendment right as defined by *Heller*"); *Wooden* v. *United States*, 6 A.3d 833, 841 (D.C. 2010) ("Neither self-defense as such, nor even self-defense in the home of another (with a weapon carried there), is entitled to such protection, as we have read *Heller*"); *Mack* v. *United States*, 6 A.3d 1224, 1236 (D.C. 2010) ("*Heller* did not endorse a right to carry weapons *outside* the home"); *Little* v. *United States*, 989 A.2d 1096, 1101 (D.C. 2010) ("appellant was outside of the bounds identified in *Heller*, *i.e.,* the possession of a firearm in one's private residence for self-defense purposes"); *People* v. *Dawson*, 934 N.E.2d 598, 605-06 (Ill. App. Ct. 2010) ("*Heller* specifically limited its ruling to interpreting the amendment's protection of the right to possess handguns in the

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adjudicate Second Amendment controversies arising outside the home.[4]

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home, not the right to possess handguns outside of the home in case of confrontation"); *People* v. *Perkins*, 62 A.D.3d 1160, 1161, 880 N.Y.S.2d 209, 210 (3d Dep't 2009) (no Second Amendment right where "defendant was not in his home"); *State* v. *Knight*, 241 P.3d 120, 133 (Kan. Ct. App. 2010) (*Heller* "turned solely on the issue of handgun possession in the home . . . It is clear that the Court was drawing a narrow line regarding the violations related solely to use of a handgun in the home for self-defense purposes"); *People* v. *Yarbrough*, 169 Cal. App. 4th 303, 313-14, 86 Cal. Rptr. 3d 674, 682 (2008) (statute proscribing public gun carrying does not implicate *Heller*); *Moreno* v. *New York City Police Dep't*, No. 10 Civ. 6269, 2011 U.S. Dist. LEXIS 76129 at *7-*8 (S.D.N.Y. May 9, 2011) ("*Heller* has been narrowly construed, as protecting the individual right to bear arms for the specific purpose of self-defense within the home"); *Young* v. *Hawaii*, Civ. No. 12-00336, 2012 U.S. Dist. LEXIS 169260 at *30 (D. Haw. Nov. 29, 2012), *appeal pending*, No. 12-17808 (9th Cir. filed Dec. 14, 2012) ("the Second Amendment right articulated by the Supreme Court in *Heller* and *McDonald* establishes only a narrow individual right to keep an operable handgun at home for self-defense. The right to carry a gun outside the home is not part of the core Second Amendment right") (citations omitted).

[4] *Williams* v. *State*, 10 A.3d 1167, 1177 (Md. 2011) ("If the Supreme Court . . . meant its holding [in *Heller* and *McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010)] to extend beyond home possession, it will need to say so more plainly"); *cf. Masciandaro*, 638 F.3d at 475 ("On the question of *Heller*'s applicability outside the home environment, we think it prudent to await direction from the Court itself"); *Hightower* v. *City of Boston*, 693 F.3d 61, 72 & n.8 (1st Cir. 2012) (interest in carrying concealed handguns outside the home "distinct" from *Heller*'s "core," but declining to "reach the issue of the scope of the Second Amendment as to carrying firearms outside the vicinity of the home without any reference to protection of the home").

The aversion to enforcing the Second Amendment manifested by some of the lower courts is difficult to overstate. The District of New Jersey, for example, faced with a challenge to that state's identical law, simply declared the entire Second Amendment field outside the home a nuisance from which it would shield government lawyers. "Given the considerable uncertainty regarding if and when the Second Amendment rights should apply outside the home, this Court does not intend to place a burden on the government to endlessly litigate and justify every individual limitation on the right to carry a gun in any location for any purpose." *Piszczatoski* v. *Filko*, 840 F. Supp. 2d 813, 829 (D.N.J. 2012), *appeal pending*, No. 12-1150 (3d Cir. filed Jan. 16, 2012).

But a growing number of federal and state courts recognize that the Second Amendment has substantial operative effect outside the home, and often do not hesitate to strike down laws or otherwise limit governmental conduct trenching upon the right to bear arms in public settings.[5] As one District Court surmised,

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[5] See, e.g. *Ezell* v. *City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) (striking down gun range ban as "a serious encroachment on the right to maintain proficiency in firearm use"); *United States* v. *Weaver*, No. 2:09-CR-00222, 2012 U.S. Dist. LEXIS 29613, at *13 (S.D. W. Va. Mar. 7, 2012) ("the Second Amendment, as historically understood at the time of ratification, was not limited to the home"); *Woollard* v. *Sheridan*, 863 F. Supp. 2d 462, 471 (D. Md. 2012), *appeal pending*, No. 12-1437 (4th Cir. filed Apr. 2, 2012) ("the right to bear arms is not limited to the

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> [t]he fact that courts may be reluctant to recognize the protection of the Second Amendment outside the home says more about the courts than the Second Amendment. Limiting this fundamental right to the home would be akin to limiting the protection of First Amendment freedom of speech to political speech or college campuses.

Weaver, 2012 U.S. Dist. LEXIS 29613, at *14 n.7.

Notably, the District of Maryland struck down that state's requirement, practically identical to New York's "proper cause" prerequisite, that handgun carry license applicants demonstrate a "good and substantial reason," Md. Public Safety Code § 5-306(a)(5)(ii), for carrying a handgun for self-defense. *Woollard* v. *Sheridan*, *supra*, 863 F. Supp. 2d 462. Applying a more robust version of "intermediate scrutiny" than seen below, *Woollard* placed on Maryland's government the

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home"); *Bateman* v. *Perdue*, No. 5:10-CV-265-H, 2012 U.S. Dist. LEXIS 47336 at *10-*11 (E.D.N.C. Mar. 29, 2012) ("[a]lthough considerable uncertainty exists regarding the scope of the Second Amendment right to keep and bear arms, it undoubtedly is not limited to the confines of the home"); *People* v. *Yanna*, Nos. 304293, 306144, 2012 Mich. App. LEXIS 1269, at *11 (Mich. Ct. App. June 26, 2012) ("a total prohibition on the open carrying of a protected arm . . . is unconstitutional"); *In re Brickey*, 70 P. 609 (Idaho 1902); *cf. Dickens* v. *Ryan*, 688 F.3d 1054, 1085 (9th Cir. 2012) (Reinhardt, J., dissenting) ("Carrying a gun, which is a Second Amendment right . . . cannot legally lead to a finding that the individual is likely to murder someone; if it could, half or even more of the people in some of our states would qualify as likely murderers").

burden of proving that a "good and substantial reason" prerequisite to the exercise of fundamental rights is reasonably adapted to a legitimate governmental interest. As Maryland, like New York, could do no more than assert that carrying handguns is socially harmful, the court found the "good and substantial" requirement wanting:

> At bottom, this case rests on a simple proposition: If the Government wishes to burden a right guaranteed by the Constitution, it may do so provided that it can show a satisfactory justification and a sufficiently adapted method. The showing, however, is always the Government's to make. A citizen may not be required to offer a "good and substantial reason" why he should be permitted to exercise his rights. The right's existence is all the reason he needs.

Woollard, 863 F. Supp. 2d at 475.

The federal courts' divergent Second Amendment approaches may also lead to different outcomes under the Fourth Amendment. Viewing the Second Amendment as limited to the home, the District of Massachusetts had no trouble upholding an investigatory stop based upon suspicion that an individual carried a handgun. *United States* v. *Hart*, 726 F. Supp. 2d 56 (D. Mass. 2010). The Eastern District of Pennsylvania took a different view: "as some individuals are legally permitted to carry guns pursuant to the Second Amendment of the Constitution, a reasonable suspicion that an individual is carrying a gun, without

more, is not evidence of criminal activity afoot." *United States* v. *Garvin*, Crim. No. 11-480-01, 2012 U.S. Dist. LEXIS 76540, at *10 (E.D. Pa. May 31, 2012).

The Seventh Circuit's decision in *Moore* v. *Madigan,* Nos. 12-1269, 12-1788, 2012 U.S. App. LEXIS 25264 (7th Cir. Dec. 11, 2012), striking down Illinois' prohibition of the carrying of handguns in public, brings this split into sharp relief at the federal appellate level.

To be sure, unlike Illinois, New York exempts a relative handful of privileged people from its prohibition. But the distinction between the two legal regimes is largely academic. "[A] constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions." *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958) (citation omitted). In neither State can it be maintained that people enjoy a right to carry a handgun for self-defense.

The Seventh Circuit expects that ordinary Chicagoans will soon be able to carry handguns for self-defense. *Moore*, 2012 U.S. App. LEXIS 25264, at *12. But given Chicago's "thumbing of the municipal nose at the Supreme Court" with respect to the Second Amendment, *Ezell*, 651 F.3d at 712 (Rovner, J., concurring in the judgment), serious efforts to evade *Moore*, delaying relief in that case indefinitely, would be unsurprising. Indeed, prominent voices supportive

of Illinois' prohibition have suggested that the state's legislature subvert the Seventh Circuit's decision by adopting New York's illusory permitting scheme. Short of "find[ing] a way to continue banning concealed carry while rewriting the law to satisfy the appeals court . . . the Legislature could consider a narrowly crafted law, such as that in New York, which has concealed carry in theory but does not grant many permits." *Editorial: Madigan Should Appeal Gun Ruling*, CHICAGO SUN-TIMES (Dec. 11, 2012), available at http://www.suntimes.com/opinions/16952377-474/editorial-madigan-should-appeal-gun-ruling.html (last visited Jan. 2, 2012).

Such evasions would be misguided. *Moore* explicitly rejected each of the three central tenets underlying the Second Circuit's decision. The court below held the Second Amendment's "core" interest was limited to the home, allowing for a fundamentally different, deferential approach to legislation impacting the right outside the home.[6] The Seventh Circuit disagreed: "The Supreme Court has decided that the

[6] It is far from clear that limiting the Second Amendment's "core" to the home requires presuming the constitutionality of laws regulating the bearing of arms beyond the home. Nonetheless, Petitioners note that five other circuits agree with the court below that the Second Amendment's "core" is limited to the home. See *Hightower*, 693 F.3d at 72; *United States* v. *Greeno*, 679 F.3d 510, 517 (6th Cir. 2012); *United States* v. *Staten*, 666 F.3d 154, 158 (4th Cir. 2011); *United States* v. *Barton*, 633 F.3d 168, 170 (3d Cir. 2011); *United States* v. *Reese*, 627 F.3d 792, 800 (10th Cir. 2010).

amendment confers a right to bear arms for self-defense, which is as important outside the home as inside." *Moore*, 2012 U.S. App. LEXIS 25264, at *29. Rejecting the decision below, the Seventh Circuit rebuffed the Second Circuit's "suggestion that the Second Amendment should have much greater scope inside the home than outside simply because other provisions of the Constitution have been held to make that distinction." *Id.* at *26. "[T]he interest in self-protection is as great outside as inside the home." *Id.* "To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*." *Id.* at 12.

Giving short shrift to this Court's interpretation of "bear arms" as meaning the right to be "armed and ready . . . in a case of conflict with another person," *Heller*, 554 U.S. at 584 (citation omitted), app. 41, the lower court refused to recognize that "the need to have a handgun for an unexpected confrontation" could possibly outweigh the state's belief that carrying handguns is dangerous per se. App. 42. In contrast, the Seventh Circuit read *Heller* straight, declining to distinguish between the prospect of confrontation inside and outside the home. *Heller* "says that the amendment 'guarantee[s] the individual right to possess and carry weapons in case of confrontation.' 554 U.S. at 592. Confrontations are not limited to the home." *Moore*, 2012 U.S. App. LEXIS 25264, at *8. The Seventh Circuit decried a prohibition on "carrying ready-to-use guns outside the home." *Id.* at *22.

Finally, the lower court applied what it described as "intermediate scrutiny" to uphold New York's proper cause requirement, app. 33, notwithstanding its acknowledgment of "the rather unremarkable proposition that where a state regulation is entirely inconsistent with the protections afforded by an enumerated right – as understood through that right's text, history and tradition – it is an exercise in futility to apply means-ends scrutiny." App. 15 n.9.[7]

But the Seventh Circuit undertook the categorical approach, disclaiming the use of "degrees of scrutiny." *Moore*, 2012 U.S. App. LEXIS 25264, at *26-*27. Moreover, the Seventh Circuit rejected the lower court's invocation of "intermediate scrutiny." Referencing its decision upholding, under intermediate scrutiny, the federal firearms prohibition imposed on domestic violence misdemeanants, the Seventh Circuit held Illinois "would have to make a stronger showing in this case than the government did in [*United States* v. *Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc)], because the curtailment of gun rights was much narrower: there the gun rights of persons convicted of domestic violence, here the gun rights of

[7] The lower court should have reflected on this statement. A regulation presuming that carrying handguns for self-defense is a privilege to which most people are not entitled, and which requires individuals carry the burden of proving their justification for carrying handguns, "is entirely inconsistent with the protections afforded by an enumerated right" to bear arms.

the entire law-abiding adult population of Illinois." *Moore*, 2012 U.S. App. LEXIS 25264, at *21.

Moore was not the Seventh Circuit's first declaration that laws impacting the right of responsible, law-abiding adults to bear arms outside the home would be analyzed under higher than intermediate scrutiny. Striking down Chicago's gun range ban, the Seventh Circuit offered that "[h]ere, in contrast [with *Skoien*], the plaintiffs *are* the 'law-abiding, responsible citizens' whose Second Amendment rights are entitled to full solicitude under *Heller*, and their claim comes much closer to implicating the core of the Second Amendment right." *Ezell*, 651 F.3d at 708. Given these facts, and the severity of the challenged provision, "a more rigorous showing than that applied in *Skoien* should be required, if not quite 'strict scrutiny.'" *Id.*

The Seventh Circuit's refusal to diminish the self-defense interest outside the home, its adherence to this Court's definition of "bear arms" as including the right to prepare for possible as opposed to likely or imminent confrontations, and its repeated invocation of higher-than-intermediate scrutiny to adjudicate the Second Amendment rights of responsible, law-abiding people outside the home, could not possibly sustain New York's "proper cause" requirement.

This split of authority, impacting the fundamental right to bear arms for self-defense in two of the nation's three most populous cities, is ripe for resolution. To the extent that the split concerns a limitation of the Second Amendment's "core" to the home, it

encompasses seven circuits. *Supra*, n.6. This Court would not benefit from further disagreement among the lower courts, which are asking for additional guidance in this area. App. 13; *supra*, n.4.

II. The Second Circuit, and the High Courts of Several States, are Split Regarding the Application of Prior Restraint Doctrine to Secure the Right to Bear Arms.

> [A]n ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Staub v. *City of Baxley,* 355 U.S. 313, 322 (1958).

As the right to bear arms stands among "the freedoms which the Constitution guarantees," *id.*, Petitioners argued that New York's "proper cause" requirement is among the impermissible "illusory 'constraints'" on licensing discretion amounting to "little more than a high-sounding ideal." *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 769-70 (1988); see, e.g. *Largent* v. *Texas*, 318 U.S. 418, 422 (1943) (striking down ordinance allowing speech permit where mayor "deems it proper or advisable").

The lower court mistakenly asserted that prior restraint doctrine is exclusively a rule of substantive First Amendment protection. App. 21-22; *accord*

Hightower, 693 F.3d at 81; *Woollard*, 863 F. Supp. 2d at 472.[8] It further erred in offering that because "proper cause" purportedly offers a standard of sorts, Petitioners "simply do not like the *standard*," app. 23, and cannot claim the law authorizes unbridled discretion. *Contra Beal* v. *Stern*, 184 F.3d 117, 126 n.6 (2d Cir. 1999).[9] And the lower court cited Professor Powe's article suggesting the application of prior restraint in Second Amendment cases, L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311 (1997), as an example of "problems with efforts to associate firearms with the First Amendment's prohibition on prior restraint." App. 22.[10]

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[8] This Court has not apparently limited "freedoms which the Constitution guarantees," *Staub*, 355 U.S. at 322, to First Amendment rights. See, e.g. *Kent* v. *Dulles*, 357 U.S. 116, 128-29 (1958) (Fifth Amendment right of international travel: Secretary of State lacks "unbridled discretion to grant or withhold a passport").

[9] "The existence of standards does not in itself preclude a finding of unbridled discretion, for the existence of discretion may turn on the looseness of the standards or the existence of a condition that effectively renders the standards meaningless as to some or all persons subject to the prior restraint."

[10] "Possibly the Second Amendment can best be understood to incorporate a common law rule against prior restraints." Powe, 38 WM. & MARY L. REV. at 1384. "The individual rights theory [of the Second Amendment] offers fewer such interpretive problems, especially with the analogy to the common law rule against prior restraints." *Id.* at 1386. "[T]he rule against prior restraints offers a sound meaning [for the Second Amendment]." *Id.* at 1402.

But for purposes of certiorari, the lower court's most significant flaw in discussing the prior restraint issue was its failure to acknowledge, let alone address, contrary precedent revealing that the lower court "decided an important federal question in a way that conflicts with a decision by a state court of last resort." Sup. Ct. R. 10(a).

The use of prior restraint doctrine to safeguard the right to bear arms dates at least to 1922, when Michigan's Supreme Court struck down a state law leaving to a Sheriff's discretion the licensing of handgun possession by immigrants. "The exercise of a right guaranteed by the Constitution cannot be made subject to the will of the sheriff." *People* v. *Zerillo*, 189 N.W. 927, 928 (Mich. 1922). "The [provision] making it a crime for an unnaturalized, foreign-born resident to possess a revolver, unless so permitted by the sheriff, contravenes the guaranty of such right in the Constitution of the State and is void." *Id.*

More recently, Rhode Island's Supreme Court upheld a discretionary handgun carry licensing scheme because state law offered a separate, non-discretionary licensing mechanism. *Mosby* v. *Devine*, 851 A.2d 1031, 1047 (R.I. 2004). Nonetheless, that court offered that it

> will not countenance any system of permitting under the Firearms Act that would be committed to the unfettered discretion of an executive agency . . . One does not need to be an expert in American history to understand the fault inherent in a gun-permitting system

> that would allow a licensing body carte blanche authority to decide who is worthy of carrying a concealed weapon. The constitutional right to bear arms would be illusory, of course, if it could be abrogated entirely on the basis of an unreviewable unrestricted licensing scheme.

Id. at 1050.

Directly on-point, Indiana's intermediate appellate court utilized prior restraint principles to reject a licensing official's claim that a "proper reason" requirement allowed him to deny handgun carry license applications for an insufficient self-defense interest. The official lacked "the power and duty to subjectively evaluate an assignment of 'self-defense' as a reason for desiring a license and the ability to grant or deny the license upon the basis of whether the applicant 'needed' to defend himself." *Schubert* v. *DeBard*, 398 N.E.2d 1339, 1341 (Ind. Ct. App. 1980).

> Such an approach contravenes the essential nature of the constitutional guarantee. It would supplant a right with a mere administrative privilege which might be withheld simply on the basis that such matters as the use of firearms are better left to the organized military and police forces even where defense of the individual citizen is involved.

Id. (footnote omitted).

Prior restraint's close association with the First Amendment is no reason to reject the doctrine's application to the Second Amendment. "Both *Heller* and

McDonald suggest that First Amendment analogues are more appropriate [than abortion analogues], and on the strength of that suggestion, we and other circuits have already begun to adapt First Amendment doctrine to the Second Amendment context." *Ezell*, 651 F.3d at 706-07 (citations omitted); see also *Parker* v. *District of Columbia*, 478 F.3d 370, 399 (D.C. Cir. 2007) ("The protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment") (citation omitted); *United States* v. *Marzzarella*, 614 F.3d 85, 89 n.4 (3d Cir. 2010) ("the structure of First Amendment doctrine should inform our analysis of the Second Amendment").

Judicial minimalism offers another point in favor of the prior restraint doctrine. Rather than pass judgment on a legislature's balancing of regulatory concerns against constitutional values, it is less intrusive upon, and more deferential to the democratic process, for courts to merely require in the first instance that licensing criteria be "narrow, objective and definite." *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 151 (1969). Means-ends scrutiny may be useful in evaluating focused, objectively-defined licensing standards, but it is of little use when the governmental interest said to be advanced is an interest in suppressing the right itself.

Of course, prohibiting states from subjecting the right to arms to *unbridled* licensing discretion would not eliminate all discretionary licensing decisions.

In *Woollard*, Petitioner SAF did not challenge Maryland's provision allowing police discretion to deny handgun carry licenses where an investigation reveals applicants have "exhibited a propensity for violence or instability." Md. Public Safety Code § 5-306(a)(5)(i); see also *Kuck* v. *Danaher*, 822 F. Supp. 2d 109 (D. Conn. 2011) (upholding Connecticut's "suitable person" standard for handgun carry licenses, Conn. Gen. Stat. § 29-28(b), where licensing discretion is limited, subject to meaningful review, and unsuitability is determined by reference to an applicant's demonstrated conduct); see also *Mosby*, 851 A.2d at 1047-48.

State courts have long understood the difference between a system in which licensing officials may articulate a reason for denying a handgun license, consistent with legitimate, objectively-described criteria and subject to real procedural safeguards – and a system like New York's, where officials determine nothing less than whether an individual deserves to exercise his or her rights. This Court should likewise acknowledge this distinction, thereby safeguarding the right to bear arms without necessarily passing judgment on any objectively defined law regulating the carrying of handguns in the interest of public safety.

III. The Court Below Decided an Important Question of Law In a Manner Contrary to This Court's Precedent.

The lower court's opinion is not merely impossible to reconcile with decisions of the Seventh Circuit,

state courts of last resort, and various other lower courts. In several key respects, the lower court's opinion directly contradicts this Court's holdings in *Heller* and *McDonald*.

The lower court disregarded *Heller*'s instructions that "bear arms" means the right to be "armed and ready . . . in a case of conflict with another person." *Heller*, 554 U.S. at 584 (citation omitted), and that the Second Amendment secures "the individual right to possess and carry weapons in case of confrontation." *Id.* at 592. Dismissing Petitioners' concern that "the need for self-defense may arise at any moment without prior warning," app. 41, the lower court held that the legislature could disregard the interest in being armed against "unexpected confrontation." App. 42. After all, reasoned the lower court, "there is no right to engage in self-defense with a firearm until the objective circumstances justify the use of deadly force." App. 41 (citation omitted).

Under this logic, neither Otis McDonald nor Dick Heller had any right to purchase a handgun until burglars invaded their respective homes. City officials could conclude that their citizens' fear of unexpected confrontation notwithstanding, the supposed dangers of home handgun possession outweighed any interest in keeping handguns – at least for people without "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." *Bando*, 290 A.D.2d at 693, 735 N.Y.S.2d at 662 (citations omitted).

That reasoning is plainly incompatible with this Court's pronouncements regarding the meaning of the Second Amendment. Standing alone, the lower court's rejection of this Court's definition of "bear arms" warrants reversal. But there is more.

The lower court declared: "*Heller* explains that the 'core' protection of the Second Amendment is the 'right of law abiding, responsible citizens to use arms in defense of hearth and home.' *Heller*, 554 U.S. at 634-35." App. 25.

This appears to be, at best, an overstatement. Three times, *Heller* succinctly describes the Second Amendment's "core" interest, to wit: (1) the Second Amendment's "core lawful purpose [is] self-defense," *Heller*, 554 U.S. at 630; (2) "self-defense . . . was the *central component* of the right itself," *id.* at 599; (3) "the inherent right of self-defense has been central to the Second Amendment right." *Id.* at 628. Nothing in these terse definitions of the Second Amendment's "core" limits the self-defense interest to the home.

Moreover, *McDonald* apparently excludes a home-limitation from *Heller*'s essential holding. "[I]n [*Heller*], we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, and we struck down a District of Columbia law that banned the possession of handguns in the home." *McDonald*, 130 S. Ct. at 3026. The syntax is clear: the holding, relating to self-defense, was applied in a factual setting arising inside the home.

Other language in *Heller* and *McDonald* appears to exclude such a profound limitation on the Amendment's operative scope. The "policy choices [taken] off the table" by the Second Amendment "*include* the absolute prohibition of handguns held and used for self-defense in the home." *Heller*, 554 U.S. at 636 (emphasis added). But "since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field. . . ." *Id.* at 635. Neither does stating that "the need for defense of self, family, and property is *most acute*" in the home, *Heller*, 554 U.S. at 628 (emphasis added), and that the Second Amendment right is secured "*most notably* for self-defense within the home," *McDonald*, 130 S. Ct. at 3044 (emphasis added), suggest that the right is practically limited to the home.

And, of course, there is *Heller*'s exposition of early state constitutional arms-bearing provisions, 554 U.S. at 584-86, which were often applied to secure the carrying of handguns in public;[11] its reliance upon authorities referencing defensive actions

[11] See, e.g. *State* v. *Reid*, 1 Ala. 612 (1840) (interpreting Ala. Const. of 1819, art. I, § 27); *State* v. *Huntly*, 25 N.C. (3 Ired.) 418, 423 (1843) (N.C. Declaration of Rights § 17 (1776); *Simpson* v. *State*, 13 Tenn. 356, 360 (1833) (Tenn. Const. of 1796, art. XI, § 26); *State* v. *Rosenthal*, 55 A. 610, 611 (Vt. 1903) (Vt. Const. c. 1, art. 16 (1777).

outside the home;[12] and its discussion of time, place and manner restrictions on the carrying of handguns.[13]

The lower court crafted its "home" limitation via an extended elliptical quotation that proves incompatible with *Heller*'s logic. It began by borrowing from *Heller*'s response to Justice Breyer's dissent, that "[w]e know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach." *Id.* at 634. To this use of "core," the lower court appended language borrowed from the lengthy paragraph's end, that "whatever else it leaves to future evaluation, [the Second Amendment] surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635.

But it is not a fair reading of *Heller* to suggest that interest-balancing inquiries may be substituted for "the scope [the Second Amendment was] understood to have when the people adopted [it]," *Heller*, 554 U.S. at 634-35 – the theory this Court rejected in the context of the lower court's elliptical citation – whenever the arms at issue are outside the home.

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[12] See, e.g. *Heller*, 554 U.S. at 588 n.10 (quoting Charles Humphreys, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY 482 (1822)).

[13] See *Heller*, 554 U.S. at 626-27 & n.26.

Yet that is exactly how the lower court's opinion proceeds. Having read the carrying of handguns outside the home out of the Second Amendment's "core," the lower court invokes cases such as *Turner Broadcasting* (heavily relied upon by Justice Breyer's *Heller* dissent) to engage in the free-standing interest-balancing approach *Heller* forbids. Notwithstanding the invocation of "intermediate scrutiny," here that analysis amounted only to rational basis review, as the lower court applied a presumption of constitutionality to sustain New York's "proper cause" prerequisite:

> To be sure, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U.S. at 636. But there is also a "general reticence to invalidate the acts of [our] elected leaders." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2579 (2012). "'Proper respect for a coordinate branch of government' requires that we strike down [legislation] only if 'the lack of constitutional authority to pass [the] act in question is *clearly demonstrated*.'" *Id.*

App. 42 (emphasis added) (citation omitted).

The enumeration of rights in the Constitution is designed to bar elected leaders from enacting certain policy choices. Accordingly, even in Second Amendment cases, "[s]ignificantly, intermediate scrutiny places the burden of establishing the required fit squarely upon the government." *United States* v. *Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (citing *Bd. of Trs.* v. *Fox*,

492 U.S. 469, 480-81 (1989)). Placing that burden on the government is incompatible with requiring that individuals "clearly demonstrate" an act's unconstitutionality. "There may be narrower scope for operation of the presumption of constitutionality [i.e., narrower than that provided by rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments. . . ." *Heller*, 554 U.S. at 629 n.27 (quoting *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, n.4 (1938)).

The lower court's reliance upon *NFIB* is misplaced. Whatever else the Affordable Care Act concerned, it did not implicate a fundamental, enumerated right to refrain from buying health insurance. Stating that Congress is presumed to have acted within an enumerated grant of legislative power – a "permissive reading of these powers," *NFIB*, 132 S. Ct. at 2579 – is hardly the same as declaring that legislatures are presumed to honor individual rights where those rights are profoundly impacted. *NFIB* overruled neither the constitutional doctrine announced in *Carolene Product*'s fourth footnote, nor *Heller*'s application of that doctrine to the Second Amendment.

Applying a presumption of constitutionality to a law acknowledged to substantially burden Second Amendment rights would be error enough, but the lower court also turned on its head this Court's admonition that when it comes to the Second Amendment, judges are not required to "make difficult

empirical judgments in an area in which they lack expertise." *McDonald*, 130 S. Ct. at 3050.

Quite obviously, the import of this statement, and of *Heller*'s description of what the Third Branch of Government may not do, *Heller*, 554 U.S. at 634, is that judges cannot substitute their own assessment of policy choices for the balance struck by the People in ratifying a constitutional provision. This Court did not suggest that because criminology is beyond the ken of judges, courts should rubber-stamp any legislative rationale advanced to sustain laws infringing Second Amendment freedoms.

Nor did the lower court defer to any predictive legislative judgment. As New York's legislature has not defined "proper cause," the lower court deferred to the whims of licensing officials purporting to predict who might have a "special need" to carry a gun for self-defense.

The lower court's declaration that "overbreadth challenges are generally limited to the First Amendment context," app. 43, is wrong. To be sure, overbreadth challenges are limited to "relatively few settings, and, generally, on the strength of specific reasons weighty enough to overcome our well-founded reticence." *Sabri* v. *United States*, 541 U.S. 600, 609-10 (2004). But examples of these settings include "free speech, right to travel, abortion [and] legislation under § 5 of the Fourteenth Amendment. . . . Outside these limited settings, and absent a good reason, we do not extend an invitation to bring overbreadth

claims." *Id.* at 610 (citations and internal parentheses omitted).

The Second Amendment's status as a fundamental right would appear to be "a good reason" for placing it on par with, for example, the right to have an abortion – and for questioning vastly overbroad firearms regulations infringing the rights of an entire population on the pretext, always available, that miscreants may be disarmed. After all, numerous individuals in Washington, D.C. and Chicago may properly be denied access to handguns, but that fact did not justify barring handguns to those populations at large. Facial challenges are generally not limited to the standard of *United States* v. *Salerno*, 481 U.S. 739 (1987), but are also available where a law lacks a "plainly legitimate sweep." *Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (citation omitted); *United States* v. *Stevens*, 130 S. Ct. 1577, 1587 (2010).[14]

Of course, the lower court sensed that its logic would never be applied to other rights alleged to be fundamental. Taking umbrage at Petitioners' argument that individuals cannot be forced to prove a "need" for their *rights*, the lower court asserted that "a crude comparison" between the Second Amendment and other rights "highlights Plaintiffs'

[14] The Second Circuit recognized this standard applies in Second Amendment cases. *United States* v. *Decastro*, 682 F.3d 160, 168 (2d Cir. 2012).

misunderstanding of the Second Amendment." App. 40. Allegedly, "[s]tate regulation under the Second Amendment has always been more robust than of other enumerated rights." *Id.* And allegedly, "handguns have been subject to a level of state regulation that is stricter than any other enumerated right." App. 41.

These sweeping statements would be subject to significant dispute. But for purposes of certiorari, it suffices to observe that Petitioners' "crude" understanding of the Second Amendment is informed by Justice Alito's opinion in *McDonald*, which rejected the argument "that the Second Amendment differs from all of the other provisions of the Bill of Rights because it concerns the right to possess a deadly implement and thus has implications for public safety." *McDonald*, 130 S. Ct. at 3045. "The right to keep and bear arms . . . is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category." *Id. McDonald* also rejected the argument "that the right to keep and bear arms is unique among the rights set out in the first eight Amendments" owing to the impetus for its ratification. *Id.* at 3047.

That the lower court would assail comparisons of the Second Amendment to other fundamental rights underscores the very high level of resistance to *Heller* and *McDonald* it exemplified. The decision should not

be left standing, lest it encourage additional erosion of Second Amendment rights in the lower courts.

CONCLUSION

Respectfully, this Court's decisions in *Heller* and *McDonald*, like the Second Amendment to which they gave operative force, were not published with an asterisk. "[W]hen a lower court perceives a pronounced new doctrinal trend in Supreme Court decisions, it is its duty, cautiously to be sure, to follow not to resist it." *Perkins* v. *Endicott Johnson Corp.*, 128 F.2d 208, 218 (2d Cir. 1942), *aff'd*, 317 U.S. 501 (1943) (footnotes omitted).

This Court should answer the lower courts' recurring requests for additional guidance in this area, and resolve the splits of authority regarding the essential question of the Second Amendment's application in public settings.

Petitioners respectfully pray that the Court grant the petition.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2012

(Argued: August 22, 2012
Decided: November 27, 2012)

Docket Nos. 11-3642 (Lead)
11-3962 (XAP)

ALAN KACHALSKY, CHRISTINA NIKOLOV, JOHNNIE NANCE, ANNA MARCUCCI-NANCE, ERIC DETMER, SECOND AMENDMENT FOUNDATION, INC.,

Plaintiffs-Appellants-Cross-Appellees,

- v. -

COUNTY OF WESTCHESTER,

Defendant-Appellee-Cross-Appellant,

SUSAN CACACE, JEFFREY A. COHEN, ALBERT LORENZOR [sic], ROBERT K. HOLDMAN,

Defendants-Appellees.

Before:

KATZMAN, WESLEY, LYNCH, *Circuit Judges*.

Plaintiffs-Appellants appeal from a September 2, 2011 Opinion and Order of the United States District Court for the Southern District of New York (Seibel,

J.), granting Defendants-Appellees summary judgment. Plaintiffs seek declaratory and injunctive relief under 42 U.S.C. § 1983, barring New York State handgun licensing officials from requiring that applicants prove "proper cause" to obtain licenses to carry handguns for self-defense pursuant to New York Penal Law section 400.00(2)(f). They argue that application of section 400.00(2)(f) violates the Second and Fourteenth Amendments to the Constitution. Because the proper cause requirement is substantially related to New York's compelling interests in public safety and crime prevention, we affirm.

AFFIRMED.

ALAN GURA, Gura & Possessky, PLLC, Alexandria, VA, *for Plaintiffs-Appellants-Cross-Appellees*.

THOMAS G. GARDINER, Sr. Assistant County Attorney (James Castro-Blanco, Chief Deputy County Attorney, *on the brief*), *for* Robert F. Meehan, County Attorney for the County of Westchester, Westchester, NY, *for Defendant-Appellee-Cross-Appellant.*

SIMON HELLER, Assistant Solicitor General (Barbara D. Underwood, Solicitor General, Richard Dearing, Deputy Solicitor General, *on the brief*), *for* Eric T. Schneiderman, Attorney General of the State of New York, New York, NY, *for Defendants-Appellees*.

WESLEY, *Circuit Judge*:

This appeal presents a single issue: Does New York's handgun licensing scheme violate the Second Amendment by requiring an applicant to demonstrate "proper cause" to obtain a license to carry a concealed handgun in public?

Plaintiffs Alan Kachalsky, Christina Nikolov, Johnnie Nance, Anna Marcucci-Nance, and Eric Detmer (together, the "Plaintiffs") all seek to carry handguns outside the home for self-defense. Each applied for and was denied a full-carry concealed-handgun license by one of the defendant licensing officers (the "State Defendants"[1]) for failing to establish "proper cause" – a special need for self-protection – pursuant to New York Penal Law section 400.00(2)(f). Plaintiffs, along with the Second Amendment Foundation ("SAF"), thereafter filed this action to contest New York's proper cause requirement. They contend that the proper cause provision, on its face or as applied to them, violates the Second Amendment as interpreted by the Supreme Court in *District of Columbia v. Heller,* 554 U.S. 570 (2008).

The State Defendants moved for summary judgment. The district court granted that motion and granted Defendant County of Westchester summary judgment *sua sponte*. *Kachalsky v. Cacace,* 817

[1] The State Defendants include Susan Cacace, Jeffrey A. Cohen, Albert Lorenzo, and Robert K. Holdman.

F. Supp. 2d 235, 273-74 (S.D.N.Y. 2011). The district court found that SAF lacked standing to sue on its own behalf or on behalf of its members. *Id.* at 251. Addressing the merits, the district court concluded that the concealed carrying of handguns in public is "outside the core Second Amendment concern articulated in *Heller*: self-defense in the home." *Id.* at 264. In the alternative, the district court determined that the proper cause requirement would survive constitutional scrutiny even if it implicated the Second Amendment. *Id.* at 266-72. For the reasons that follow, we affirm.[2]

I

A

New York's efforts in regulating the possession and use of firearms predate the Constitution. By 1785, New York had enacted laws regulating when and where firearms could be used, as well as restricting the storage of gun powder. *See, e.g.,* Act of Apr. 22, 1785, ch. 81, 1785 Laws of N.Y. 152; Act of Apr. 13, 1784, ch. 28, 1784 Laws of N.Y. 627. Like most other

[2] Because we affirm the dismissal of Plaintiffs' suit, we do not address whether SAF has standing. Where, as here, at least one plaintiff has standing, jurisdiction is secure and we can adjudicate the case whether the additional plaintiff has standing or not. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 263-64 (1977). We also do not address Defendant County of Westchester's contention that it is not a proper party to this case.

states, during the nineteenth century, New York heavily regulated the carrying of concealable firearms. In 1881, New York prohibited the concealed carrying of "any kind of fire-arms." 1881 Laws of N.Y., ch. 676, at 412. In 1884, New York instituted a statewide licensing requirement for minors carrying weapons in public, *see* 1884 Laws of N.Y., ch. 46, § 8, at 47, and soon after the turn of the century, it expanded its licensing requirements to include all persons carrying concealable pistols, *see* 1905 Laws of N.Y., ch. 92, § 2, at 129-30.

Due to a rise in violent crime associated with concealable firearms in the early twentieth century, New York enacted the Sullivan Law in 1911, which made it unlawful for any person to possess, without a license, "any pistol, revolver or other firearm of a size which may be concealed upon the person." *See* 1911 Laws of N.Y., ch. 195, § 1, at 443 (codifying N.Y. Penal Law § 1897, ¶ 3); *see also* N.Y. Legislative Service, *Dangerous Weapons – "Sullivan Bill,"* 1911 Ch. 195 (1911). A study of homicides and suicides completed shortly before the law's enactment explained: "The increase of homicide by shooting indicates . . . the urgent necessity of the proper authorities taking some measures for the regulation of the indiscriminate sale and carrying of firearms." *Revolver Killings Fast Increasing,* N.Y. Times, Jan. 30, 1911 (quoting N.Y. State Coroner's Office Report). As a result, the study recommended that New York

> should have a law, whereby a person having a revolver in his possession, either concealed

> or displayed, unless for some legitimate purpose, could be punished by a severe jail sentence. . . . [A] rigid law, making it difficult to buy revolvers, would be the means of saving hundreds of lives.

Id. (quoting N.Y. State Coroner's Office Report).

The Sullivan Law survived constitutional attack shortly after it was passed. *People ex rel. Darling v. Warden of City Prisons,* 154 A.D. 413, 422 (1st Dep't 1913). Although the law was upheld, in part, on what is now the erroneous belief that the Second Amendment does not apply to the states, the decision provides additional background regarding the law's enactment:

> There had been for many years upon the statute books a law against the carriage of concealed weapons. . . . It did not seem effective in preventing crimes of violence in this State. Of the same kind and character, but proceeding a step further with the regulatory legislation, the Legislature has now picked out one particular kind of arm, ***the handy, the usual and the favorite weapon of the turbulent criminal class,*** and has said that in our organized communities, our cities, towns and villages where the public peace is protected by the officers of organized government, the citizen may not have that particular kind of weapon without a permit, as it had already said that he might not carry it on his person without a permit.

Id. at 423 (emphasis added).

In 1913, the Sullivan Law was amended to impose a statewide standard for the issuance of licenses to carry firearms in public. 1913 Laws of N.Y., ch. 608, at 1627-30. To obtain a license to carry a concealed pistol or revolver the applicant was required to demonstrate "good moral character, and that proper cause exists for the issuance [of the license]." *Id.* at 1629. One hundred years later, the proper cause requirement remains a feature of New York's statutory regime.

B

New York maintains a general prohibition on the possession of "firearms" absent a license. *See* N.Y. Penal Law §§ 265.01-265.04, 265.20(a)(3). A "firearm" 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; "any weapon made from a shotgun or rifle" with an overall length of less than twenty-six inches; and assault weapons. N.Y. Penal Law § 265.00(3). Rifles and shotguns are not subject to the licensing provisions of the statute.[3]

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[3] The possession of rifles and shotguns is also regulated. Subject to limited exceptions, it is unlawful to possess a rifle or shotgun "in or upon a building or grounds, used for educational purposes, of any school, college or university . . . or upon a school bus." N.Y. Penal Law § 265.01(3). It is also unlawful for a person under the age of sixteen to possess a rifle or shotgun unless he or she has a hunting permit issued pursuant to the environmental

(Continued on following page)

Section 400.00 of the Penal Law "is the exclusive statutory mechanism for the licensing of firearms in New York State."[4] *O'Connor v. Scarpino,* 83 N.Y.2d 919, 920 (1994) (Mem.); *see* N.Y. Penal Law § 265.20(a)(3). Licenses are limited to those over twenty-one years of age, of good moral character, without a history of crime or mental illness, and "concerning whom no good cause exists for the denial of the license." N.Y. Penal Law § 400.00(1)(a)-(d), (g).

Most licenses are limited by place or profession. Licenses "shall be issued" to possess a registered handgun in the home or in a place of business by a merchant or storekeeper. N.Y. Penal Law § 400.00(2)(a)-(b). And licenses "shall be issued" for a messenger employed by a banking institution or express company to carry a concealed handgun, as well as for certain state and city judges and those employed by a prison or jail. § 400.00(2)(c)-(e).

This case targets the license available under section 400.00(2)(f). That section provides that a license "shall be issued to . . . have and carry [a firearm] concealed . . . by any person when proper cause exists for the issuance thereof." N.Y. Penal Law § 400.00(2)(f). This is the ***only*** license available to

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conservation law. N.Y. Penal Law § 265.05; *see also* N.Y. Envtl. Conserv. Law § 11-0929.

[4] The prohibition on carrying rifles and shotguns on school grounds, in a school building, and on a school bus also applies to those licensed to carry a firearm under section 400.00. N.Y. Penal Law §§ 265.20(3), 265.01(3).

carry a concealed handgun "without regard to employment or place of possession." *Id.* Given that New York bans carrying handguns openly, applicants – like Plaintiffs in this case – who desire to carry a handgun outside the home and who do not fit within one of the employment categories must demonstrate proper cause pursuant to section 400.00(2)(f).

"Proper cause" is not defined by the Penal Law, but New York State courts have defined the term to include carrying a handgun for target practice, hunting, or self-defense. When an applicant demonstrates proper cause to carry a handgun for target practice or hunting, the licensing officer may restrict a carry license "to the purposes that justified the issuance."[5] *O'Connor,* 83 N.Y.2d at 921. In this regard, "a sincere desire to participate in target shooting and hunting . . . constitute[s] a legitimate reason for the issuance of a pistol permit." *In re O'Connor,* 585 N.Y.S.2d 1000, 1003 (Westchester Cty. Ct.1992) (citing *Davis v. Clyne,* 58 A.D.2d 947, 947 (3d Dep't 1977)).

To establish proper cause to obtain a license without any restrictions – the full-carry license that Plaintiffs seek in this case – an applicant must

[5] A license restricted to target practice or hunting permits the licensee to carry concealed a handgun "in connection" with these activities. *In re O'Connor,* 585 N.Y.S.2d 1000, 1003 (Westchester Cty. Ct.1992). For instance, a license restricted to target practice permits the licensee to carry the weapon to and from the shooting range. *Bitondo v. New York,* 182 A.D.2d 948, 948 (3d Dep't 1992).

"demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." *Klenosky v. N.Y City Police Dep't,* 75 A.D.2d 793, 793 (1st Dep't 1980), *aff'd on op. below,* 53 N.Y.2d 685 (1981). There is a substantial body of law instructing licensing officials on the application of this standard. Unlike a license for target shooting or hunting, "[a] generalized desire to carry a concealed weapon to protect one's person and property does not constitute 'proper cause.'" *In re O'Connor,* 585 N.Y.S.2d at 1003 (citing *Bernstein v. Police Dep't of City of New York,* 85 A.D.2d 574, 574 (1st Dep't 1981)). Good moral character plus a simple desire to carry a weapon is not enough. *Moore v. Gallup,* 293 N.Y. 846 (1944) (per curiam), *aff'g* 267 A.D. 64, 66 (3d Dep't 1943); *see also In re O'Connor,* 585 N.Y.S.2d at 1003. Nor is living or being employed in a "high crime area[ ]." *Martinek v. Kerik,* 294 A.D.2d 221, 221-22 (1st Dep't 2002); *see also Theurer v. Safir,* 254 A.D.2d 89, 90 (1st Dep't 1998); *Sable v. McGuire,* 92 A.D.2d 805, 805 (1st Dep't 1983).

The application process for a license is "rigorous" and administered locally. *Bach v. Pataki,* 408 F.3d 75, 79 (2d Cir. 2005). Every application triggers a local investigation by police into the applicant's mental health history, criminal history, moral character, and, in the case of a carry license, representations of proper cause. *See* N.Y. Penal Law § 400.00(1)-(4). As part of this investigation, police officers take applicants' fingerprints and conduct a series of background

checks with the New York State Division of Criminal Justice Services, the Federal Bureau of Investigation, and the New York State Department of Mental Hygiene. N.Y. Penal Law § 400.00(4). Upon completion of the investigation, the results are reported to the licensing officer. *Id.*

Licensing officers, often local judges,[6] are "vested with considerable discretion" in deciding whether to grant a license application, particularly in determining whether proper cause exists for the issuance of a carry license. *Vale v. Eidens,* 290 A.D.2d 612, 613 (3d Dep't 2002); *see also Kaplan v. Bratton,* 249 A.D.2d 199, 201 (1st Dep't 1998); *Unger v. Rozzi,* 206 A.D.2d 974, 974-75 (4th Dep't 1994); *Fromson v. Nelson,* 178 A.D.2d 479, 479 (2d Dep't 1991). An applicant may obtain judicial review of the denial of a license in whole or in part by filing a proceeding under Article 78 of New York's Civil Practice Law and Rules. A licensing officer's decision will be upheld unless it is arbitrary and capricious. *O'Brien v. Keegan,* 87 N.Y.2d 436, 439-40 (1996).

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[6] Except in New York City, Nassau County, and Suffolk County, a "licensing officer" is defined as a "judge or justice of a court of record having his office in the county of issuance." N.Y. Penal Law § 265.00(10). "Licensing officer" is defined in New York City as "the police commissioner of that city"; in Nassau County as "the commissioner of police of that county"; and in Suffolk County as "the sheriff of that county except in the towns of Babylon, Brookhaven, Huntington, Islip and Smithtown, the commissioner of police of that county." *Id.*

C

Each individual Plaintiff applied for a full-carry license under section 400.00(2)(f). Four of the five Plaintiffs made no effort to comply with New York's requirements for a full-carry license, that is, they did not claim a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession. Plaintiff Kachalsky asserted that the Second Amendment "entitles him to an unrestricted permit without further establishing 'proper cause.'" J.A. 33. He noted: "[W]e live in a world where sporadic random violence might at any moment place one in a position where one needs to defend onself [sic] or possibly others." J.A. 33-34. Plaintiffs Nance and Marcucci-Nance asserted that they demonstrated proper cause because they were citizens in "good standing" in their community and gainfully employed. J.A. 43-44, 48-49. Plaintiff Detmer asserted that he demonstrated proper cause because he was a federal law enforcement officer with the U.S. Coast Guard.[7] J.A. 39. Unlike the other Plaintiffs, Plaintiff Nikolov attempted to show a special need for self-protection by asserting that as a transgender female, she is more likely to be the victim of violence. J.A. 36. Like the other applicants, she also asserted that being a law-abiding citizen in itself entitled her to a full-carry license. *Id.*

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[7] Plaintiffs Nance, Marcucci-Nance, and Detmer have carry licenses limited to the purpose of target shooting. Their applications sought to amend their licenses to full-carry licenses.

Plaintiffs' applications were all denied for the same reason: Failure to show any facts demonstrating a need for self-protection distinguishable from that of the general public. J.A. 34 (Kachalsky), 37 (Nikolov), 39 (Detmer), 43-44 (Nance), 48-49 (Marcucci-Nance). Nikolov's contention that her status as a transgender female puts her at risk of violence was rejected because she did not "report . . . any type of threat to her own safety anywhere." J.A. 36. Plaintiffs aver that they have not reapplied for full-carry licenses because they believe it would be futile, and that they would carry handguns in public but for fear of arrest, prosecution, fine, and/or imprisonment.[8] J.A. 75, 77, 79, 81, 83, 85.

II

Invoking *Heller,* Plaintiffs contend that the Second Amendment guarantees them a right to possess and carry weapons in public to defend themselves from dangerous confrontation and that New York cannot constitutionally force them to demonstrate proper cause to exercise that right. Defendants

[8] Plaintiff Kachalsky was the only Plaintiff who appealed the denial of his full-carry license application. The Appellate Division, Second Department affirmed the denial, holding that Kachalsky "failed to demonstrate 'proper cause' for the issuance of a 'full carry' permit." *Kachalsky v. Cacace,* 65 A.D.3d 1045 (2d Dep't 2009). The New York Court of Appeals dismissed Kachalsky's application for leave to appeal "upon the ground that no substantial constitutional question [was] directly involved." *Kachalsky v. Cacace,* 14 N.Y.3d 743, 743 (2010).

counter that the proper cause requirement does not burden conduct protected by the Second Amendment. They share the district court's view that the Supreme Court's pronouncement in *Heller* limits the right to bear arms for self-defense to the home.

Heller provides no categorical answer to this case. And in many ways, it raises more questions than it answers. In *Heller,* the Supreme Court concluded that the Second Amendment codifies a pre-existing "individual right to possess and carry weapons in case of confrontation." 554 U.S. at 592. Given that interpretation, the Court struck down the District of Columbia's prohibition on the possession of usable firearms in the home because the law banned "the quintessential self-defense weapon" in the place Americans hold most dear – the home. *Id.* at 628-29.

There was no need in *Heller* to further define the scope of the Second Amendment or the standard of review for laws that burden Second Amendment rights. As the Court saw it, "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban." *Id.* at 629. Because the Second Amendment was directly at odds with a complete ban on handguns in the home, the D.C. statute ran roughshod over that right. Thus, the Court simply noted that the handgun ban would be unconstitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." *Id.* at 628. *Heller* was never meant

"to clarify the entire field" of Second Amendment jurisprudence.[9] *Id.* at 635.

Two years after *Heller,* the Supreme Court held that the Second Amendment's protections, whatever their limits, apply fully to the states through the Fourteenth Amendment. *McDonald v. City of Chicago,* 130 S. Ct. 3020, 3026, 3042 (2010). In *McDonald,* the Court struck down a Chicago law that banned handguns in the home. *Id.* at 3050. But it also reaffirmed *Heller's* assurances that Second Amendment rights are far from absolute and that many longstanding handgun regulations are "presumptively lawful." *Heller* 554 U.S. at 627 n.26; *see McDonald,* 130 S. Ct.

[9] A number of courts and academics, take the view that *Heller's* reluctance to announce a standard of review is a signal that courts must look solely to the text, history, and tradition of the Second Amendment to determine whether a state can limit the right without applying any sort of means-end scrutiny. *See Heller v. District of Columbia,* 670 F.3d 1244, 1271-74 (D.C. Cir. 2011) (Kavanaugh, *J.,* dissenting); *see also* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda,* 56 UCLA L. Rev. 1443, 1463 (2009); Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis,* 84 N.Y.U. L. Rev. 375, 405 (2009). We disagree. *Heller* stands for the rather unremarkable proposition that where a state regulation is entirely inconsistent with the protections afforded by an enumerated right – as understood through that right's text, history, and tradition – it is an exercise in futility to apply means-end scrutiny. Moreover, the conclusion that the law would be unconstitutional "[u]nder any of the standards of scrutiny" applicable to other rights implies, if anything, that one of the conventional levels of scrutiny would be applicable to regulations alleged to infringe Second Amendment rights.

at 3047. The Court also noted that the doctrine of "incorporation does not imperil every law regulating firearms." *McDonald,* 130 S. Ct. at 3047.

What we know from these decisions is that Second Amendment guarantees are at their zenith within the home. *Heller,* 554 U.S. at 628-29. What we do not know is the scope of that right beyond the home and the standards for determining when and how the right can be regulated by a government. This vast "*terra incognita*" has troubled courts since *Heller* was decided. *United States v. Masciandaro,* 638 F.3d 458, 475 (4th Cir. 2011) (Wilkinson, *J.,* for the Court). Although the Supreme Court's cases applying the Second Amendment have arisen only in connection with prohibitions on the possession of firearms in the home, the Court's analysis suggests, as Justice Stevens's dissent in *Heller* and Defendants in this case before us acknowledge, that the Amendment must have ***some*** application in the very different context of the public possession of firearms.[10] Our analysis proceeds on this assumption.

A

Plaintiffs contend that, as in *Heller,* history and tradition demonstrate that there is a "fundamental right" to carry handguns in public, and though a state may regulate open or concealed carrying of handguns,

[10] The plain text of the Second Amendment does not limit the right to bear arms to the home.

it cannot ban ***both***. While Plaintiffs concede that state legislative efforts have long recognized the dangers presented by both the open and concealed carrying of handguns in public places, they contend that states must suffer a constitutionally imposed choice between two equally inadequate alternatives. Thus, according to Plaintiffs, "access to [New York's] only available handgun carry license can[not] be qualified by 'proper cause.' "[11] Appellants' Br. at 38.

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[11] Plaintiffs' argument is premised, in part, on *Heller's* enunciation of certain "longstanding" regulatory measures, including concealed carry bans, that the Court deemed "presumptively lawful." *Heller,* 554 U.S. at 626-27; *see also McDonald,* 130 S. Ct. at 3047 (plurality opinion) (same). Thus, plaintiffs contend that regulations that are not similarly "longstanding" are not valid restrictions on Second Amendment rights. We do not view this language as a talismanic formula for determining whether a law regulating firearms is consistent with the Second Amendment. While we find it informative, it simply makes clear that the Second Amendment right is not unlimited.

Moreover, even if this language provided a "test" for determining the validity of a handgun regulation, it is not self-evident what that test might be. The "longstanding" prohibitions on the possession of firearms by felons and the mentally ill were identified as "presumptively lawful," *Heller,* 554 U.S. at 626-27 and n. 26, but these laws were not enacted until the early twentieth century, *see* Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit,* 60 Hastings L.J. 1371, 1374-79 (2009). New York's proper cause requirement is similarly "longstanding" – it has been the law in New York since 1913. 1913 Laws of N.Y., ch. 608, at 1627-30.

To be sure, some nineteenth-century state courts offered interpretations of the Second Amendment and analogous state constitutional provisions that are similar to Plaintiffs' position. In *State v. Reid,* the Supreme Court of Alabama upheld a prohibition on the concealed carrying of "any species of fire arms" but cautioned that the state's ability to regulate firearms was not unlimited and could not "amount[ ] to a destruction of the right, or . . . require[ ] arms to be so borne as to render them wholly useless for the purpose of defence." 1 Ala. 612, 1840 WL 229, at *2-3 (1840). Relying on *Reid,* the Supreme Court of Georgia held that a statute prohibiting the carrying of concealed pistols was unconstitutional insofar as it also "contains a prohibition against bearing arms *openly.*" *Nunn v. State,* 1 Ga. 243, 1846 WL 1167, at *11 (1846) (emphasis in original).[12] And in *State v. Chandler,* the Supreme Court of Louisiana upheld a concealed-carry ban because "[i]t interfered with no man's right to carry arms . . . in full open view." 5 La. Ann. 489, 1850 WL 3838, at *1 (1850) (internal quotation marks omitted).[13]

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[12] *Nunn* is cited in Justice Scalia's majority opinion in *Heller* as an example of state court responses to handgun regulatory efforts within the states. *Heller,* 554 U.S. at 629.

[13] Notably, *Chandler* and *Reid* conflict with Plaintiffs' position, at least in part. Plaintiffs contend that a state may choose to ban open carrying so long as concealed carrying is permitted. But both *Chandler* and *Reid* suggest that open carrying ***must*** be permitted. The *Reid* court explained:

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But this was hardly a universal view. Other states read restrictions on the public carrying of weapons as entirely consistent with constitutional protections of the right to keep and bear arms. At least four states once banned the carrying of pistols and similar weapons in public, both in a concealed or an open manner. *See, e.g.,* Ch. 96, §§ 1-2, 1881 Ark. Acts at 191-92; Act of Dec. 2, 1875, ch. 52, § 1, 1876 Wyo. Terr. Comp. Laws, at 352; Ch. 13, § 1, 1870 Tenn. Acts at 28; Act of Apr. 12, 1871, ch. 34, § 1, 1871 Tex. Gen. Laws at 25. And the statutes in Texas, Tennessee, and Arkansas withstood constitutional challenges. *See, e.g., Fife v. State,* 31 Ark. 455, 1876 WL 1562, at *4 (1876); *English v. State,* 35 Tex. 473, 1872 WL 7422, at *3 (1871); *Andrews v. State,* 50 Tenn. 165, 1871 WL 3579, at *11 (1871).[14]

> Under the provision of our constitution, we incline to the opinion that the Legislature cannot inhibit the citizen from bearing arms openly, because it authorizes him to bear them for the purposes of defending himself and the State, and it is only when carried openly, that they can be efficiently used for defence.

1840 WL 229, at *5; *see also Chandler,* 1850 WL 3838, at *1.

[14] These cases were decided on the basis of an interpretation of the Second Amendment – that pistols and similar weapons are not "arms" within the meaning of the Second Amendment or its state constitutional analogue – that conflicts with the Supreme Court's present reading of the Amendment. *Fife,* 1876 WL 1562, at *4; *English,* 1872 WL 7422, at *3; *Andrews,* 1871 WL 3579, at *11. For instance, the Texas court construed the Second Amendment as protecting only the "arms of a militiaman or soldier," which include "the musket and bayonet . . . holster pistols and carbine . . . [and] side arms."

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It seems apparent to us that unlike the situation in *Heller* where "[f]ew laws in the history of our Nation have come close" to D.C.'s total ban on usable handguns in the home, New York's restriction on firearm possession in public has a number of close and longstanding cousins.[15] *Heller,* 554 U.S. at 629. History and tradition do not speak with one voice here. What history demonstrates is that states often disagreed as to the scope of the right to bear arms, whether the right was embodied in a state constitution or the Second Amendment. *Compare Bliss v. Commonwealth,* 12 Ky. 90, 1822 WL 1085, at *3 (1822) (concluding that a prohibition on carrying concealed weapons was unconstitutional), *with Aymette v. State,* 21 Tenn. 154, 1840 WL 1554, at **4-6 (1840) (citing to *Bliss* but reaching the opposite conclusion).

Even if we believed that we should look solely to this highly ambiguous history and tradition to determine the meaning of the Amendment, we would find that the cited sources do not directly address the specific question before us: Can New York limit handgun licenses to those demonstrating a special

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1872 WL 7422, at *3. To refer to the non-military style pistols covered by the statute as necessary for a "well-regulated militia" was, according to the court, "simply ridiculous." *Id.* Similarly, the Tennessee court invalidated the statute to the extent it covered revolvers "adapted to the usual equipment of a solider [sic]." *Andrews,* 1871 WL 3579, at *11.

[15] The extensive history of state regulation of handguns in public is discussed in detail in Part II.B.

need for self-protection? Unlike the cases and statutes discussed above, New York's proper cause requirement does not operate as a complete ban on the possession of handguns in public. Analogizing New York's licensing scheme (or any other gun regulation for that matter) to the array of statutes enacted or construed over one hundred years ago has its limits.

Plaintiffs raise a second argument with regard to how we should measure the constitutional legitimacy of the New York statute that takes a decidedly different tack. They suggest that we apply First Amendment prior-restraint analysis in lieu of means-end scrutiny to assess the proper cause requirement.[16] They see the nature of the rights guaranteed by each amendment as identical in kind. One has a right to speak and a right to bear arms. Thus, just as the First Amendment permits everyone to speak without obtaining a license, New York cannot limit the right to bear arms to only some law-abiding citizens. We are hesitant to import ***substantive*** First Amendment principles wholesale into Second Amendment jurisprudence. Indeed, no court has done so. *See, e.g., Woollard v. Sheridan,* 863 F. Supp. 2d 462, 472 (D. Md. 2012); *Piszczatoski v. Filko,* 840 F. Supp. 2d 813, 835-36 (D.N.J. 2012).

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[16] Plaintiffs also contend that New York's requirement that license applicants be "of good moral character" is an unconstitutional prior restraint. Because, as Plaintiffs admit, this provision was not challenged in their complaint or below, we choose not to consider it here.

We recognize that analogies between the First and Second Amendment were made often in *Heller*. 554 U.S. at 582, 595, 606, 635. Similar analogies have been made since the Founding. *See, e.g., Commonwealth v. Blanding,* 20 Mass. 304, 314 (1825) ("The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction."). Notably, these analogies often used the states' power to regulate firearms, which was taken as unassailably obvious, to support arguments in favor of upholding limitations on First Amendment rights. But it would be as imprudent to assume that the principles and doctrines developed in connection with the First Amendment apply equally to the Second, as to assume that rules developed in the Second Amendment context could be transferred without modification to the First. Endorsing that approach would be an incautious equation of the two amendments and could well result in the erosion of hard-won First Amendment rights. As discussed throughout, there are salient differences between the state's ability to regulate each of these rights. *See generally* L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation,* 38 Wm. & Mary L. Rev. 1311 (1997) (discussing problems with efforts to associate firearms with the First Amendment's prohibition on prior restraints).

But even if we decided to apply prior-restraint doctrine to Second Amendment claims, this case

would be a poor vehicle for its maiden voyage. To make out a prior-restraint argument, Plaintiffs would have to show that the proper cause requirement lacks "narrow, objective, and definite standards," thereby granting officials unbridled discretion in making licensing determinations. *Forsyth Cnty. v. Nationalist Movement,* 505 U.S. 123, 131 (1992) (quoting *Shuttlesworth v. Birmingham,* 394 U.S. 147, 150-51 (1969)). But Plaintiffs' contention that the proper cause requirement grants licensing officials unbridled discretion is something of a red herring. Plaintiffs admit that there is an established standard for determining whether an applicant has demonstrated proper cause. The proper cause requirement has existed in New York since 1913 and is defined by binding judicial precedent as "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." *Klenosky,* 75 A.D.2d at 793; *see e.g., Brando v. Sullivan,* 290 A.D.2d 691, 693 (3d Dep't 2002); *Bernstein,* 85 A.D.2d at 574.

Plaintiffs' complaint is not that the proper cause requirement is ***standardless***; rather, they simply do not like the ***standard*** – that licenses are limited to those with a special need for self-protection. This is not an argument that licensing officials have unbridled discretion in granting full-carry permits. In fact, the State Defendants' determinations that Plaintiffs do not have a special need for self-protection are unchallenged. Rather, Plaintiffs question New York's ability to limit handgun possession to those demonstrating a

threat to their safety. This is precisely the type of argument that should be addressed by examining the purpose and impact of the law in light of the Plaintiffs' Second Amendment right.

Plaintiffs' attempts to equate this case with *Heller* or to draw analogies to First Amendment concerns come up short.

B

Thus, given our assumption that the Second Amendment applies to this context, the question becomes how closely to scrutinize New York's statute to determine its constitutional mettle. *Heller,* as noted above, expressly avoided deciding the standard of review for a law burdening the right to bear arms because it concluded that D.C.'s handgun ban was unconstitutional "[u]nder any of the standards of scrutiny [traditionally] applied to enumerated constitutional rights." *Heller,* 554 U.S. at 628. The Court did, however, rule out a rational basis review because it "would be redundant with the separate constitutional prohibitions on irrational laws." *Id.* at 629 n.27.

We have held that "heightened scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes)." *United States v. Decastro,* 682 F.3d 160, 166 (2d Cir. 2012). *Decastro*

rejected a Second Amendment challenge to 18 U.S.C. § 922(a)(3), which makes it unlawful for an individual to transport into his state of residence a firearm acquired in another state. Because we concluded that § 922(a)(3) did not impose a substantial burden on the defendant's Second Amendment right, we left unanswered "the level of scrutiny applicable to laws that do impose such a burden." *Id.* at 165. Here, some form of heightened scrutiny would be appropriate. New York's proper cause requirement places substantial limits on the ability of law-abiding citizens to possess firearms for self-defense in public. And unlike *Decastro,* there are no alternative options for obtaining a license to carry a handgun.

We do not believe, however, that heightened scrutiny must always be akin to strict scrutiny when a law burdens the Second Amendment. *Heller* explains that the "core" protection of the Second Amendment is the "right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller,* 554 U.S. at 634-35. Although we have no occasion to decide what level of scrutiny should apply to laws that burden the "core" Second Amendment protection identified in *Heller,* we believe that applying less than strict scrutiny when the regulation does not burden the "core" protection of self-defense in the home makes eminent sense in this context and is in line with the approach taken by our sister circuits.[17]

[17] *Heller v. District of Columbia,* 670 F.3d 1244, 1261-64 (D.C. Cir. 2011) (applying intermediate scrutiny to prohibition

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It is also consistent with jurisprudential experience analyzing other enumerated rights. For instance, when analyzing First Amendment claims, content-based restrictions on noncommercial speech are subject to strict scrutiny, *see United States v. Playboy Entm't Grp., Inc.,* 529 U.S. 803, 813 (2000), while laws regulating commercial speech are subject to intermediate scrutiny, *see Florida Bar v. Went For It, Inc.,* 515 U.S. 618, 624-25 (1995).

The proper cause requirement falls outside the core Second Amendment protections identified in *Heller.* New York's licensing scheme affects the ability

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on possession of magazines with a capacity of more than ten rounds of ammunition); *United States v. Booker,* 644 F.3d 12, 25 (1st Cir. 2011) (applying intermediate scrutiny to 18 U.S.C. § 922(g)(9), which prohibits the possession of firearms by a person convicted of a misdemeanor crime of domestic violence), *cert. denied,* 132 S. Ct. 1538 (2012); *United States v. Masciandaro,* 638 F.3d 458, 470 (4th Cir. 2011) (applying intermediate scrutiny to 36 C.F.R. § 2.4(b), which prohibits "carrying or possessing a loaded weapon in a motor vehicle" within national park areas), *cert. denied,* 132 S. Ct. 756 (2011); *United States v. Chester,* 628 F.3d 673, 683 (4th Cir. 2010) (applying intermediate scrutiny to 18 U.S.C. § 922(g)(9)); *United States v. Marzzarella,* 614 F.3d 85, 97 (3d Cir. 2010) (applying intermediate scrutiny to 18 U.S.C. § 922(k), which prohibits the possession of firearms with obliterated serial numbers), *cert. denied* 131 S. Ct. 958 (2011); *United States v. Reese,* 627 F.3d 792, 802 (10th Cir. 2010) (applying intermediate scrutiny to 18 U.S.C. § 922(g)(8), which prohibits the possession of firearms while subject to a domestic protection order), *cert. denied,* 131 S. Ct. 2476 (2011); *United States v. Skoien,* 614 F.3d 638, 641-42 (7th Cir. 2010) (en banc) (applying form of intermediate scrutiny to 18 U.S.C. § 922(g)(9)), *cert. denied,* 131 S. Ct. 1674 (2011).

to carry handguns only ***in public***, while the District of Columbia ban applied ***in the home*** "where the need for defense of self, family, and property is most acute." *Heller,* 554 U.S. at 628. This is a critical difference. The state's ability to regulate firearms and, for that matter, conduct, is qualitatively different in public than in the home. *Heller* reinforces this view. In striking D.C.'s handgun ban, the Court stressed that banning usable handguns in the home is a "policy choice[ ]" that is "off the table," *id.* at 636, but that a variety of other regulatory options remain available, including categorical bans on firearm possession in certain public locations, *id.* at 626-27 & n.26.

Treating the home as special and subject to limited state regulation is not unique to firearm regulation; it permeates individual rights jurisprudence. For instance, in *Stanley v. Georgia,* the Court held that in-home possession of obscene materials could not be criminalized, even as it assumed that public display of obscenity was unprotected. 394 U.S. 557, 568 (1969). While "the States retain broad power to regulate obscenity [ ] that power simply does not extend to mere possession by the individual in the privacy of his own home." *Id.* Similarly, in *Lawrence v. Texas,* the Court emphasized that the state's efforts to regulate private sexual conduct between consenting adults is especially suspect when it intrudes into the home: "Liberty protects the person from unwarranted government intrusions into a dwelling or other

private places. In our tradition the State is not omnipresent in the home." 539 U.S. 558, 562 (2003); *see also Kyllo v. United States,* 533 U.S. 27, 37 (2001) ("In the home, our [Fourth Amendment] cases show [that] the entire area is held safe from prying government eyes."); *Griswold v. Connecticut,* 381 U.S. 479, 484 (1965) (discussing general right to privacy that was closely connected to "the sanctity of a man's home and the privacies of life" (internal quotation marks omitted)).[18]

But while the state's ability to regulate firearms is circumscribed in the home, "outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense." *Masciandaro,* 638 F.3d at 470. There is a longstanding tradition of states regulating firearm possession and use in public because of the dangers posed to public safety. *See* Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control,* 73 Fordham L. Rev. 487, 502-16 (2004). During the Founding Era, for instance, many states prohibited the use of firearms on certain occasions and in certain locations. *See, e.g.,* Act of April 22, 1785, ch. 81, 1785 Laws of N.Y. 152; Act of Nov. 16, 1821, ch. LXLIII, 1821 Tenn. Pub. Acts

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[18] That the home deserves special protection from government intrusion is also reflected in the Third Amendment, which provides: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. Const. amend. III.

78; Act of Jan. 30, 1847, 1846-1847 Va. Acts ch. 79, at 67; Act of Dec. 24, 1774, ch. DCCIII, 1774 Pa. Stat. 410.[19] Other states went even further. North Carolina prohibited going armed at night or day "in fairs, markets, nor in the presence of the King's Justices, or other ministers, nor in no part elsewhere." *See* Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review,* 60 Clev. St. L. Rev. 1, 31-32 (2012) (citation and internal quotation marks omitted). Massachusetts and Virginia enacted similar laws. *Id.*[20]

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[19] Regulations concerning the militia and the storage of gun powder were also common. *See* Act of May 8, 1792, 1792 Conn. Pub. Acts 440 (forming the state militia); Act of July 19, 1776, ch. I, 1775-1776 Mass. Acts 15 (regulating the militia of Massachusetts); Act of Apr. 3, 1778, ch. 33, 1778 Laws of N.Y. 62 (regulating the militia of New York State); Act of Mar. 20, 1780, ch. CLXVII, 1780 Pa. Laws 347 (regulating the militia of Pennsylvania); Act of Mar. 26, 1784, 1784 S.C. Acts 68 (regulating militia); *see also* Act of June 26, 1792, ch. X, 1792 Mass. Acts 208 (regulating storage of gun powder in Boston); Act of Apr. 13, 1784, ch. 28, 1784 Laws of N.Y. 627 (regulating storage of gun powder in New York); Act of Dec. 6, 1783, ch. CIV, 1783 Pa. Laws 161, ch. MLIX, 11 Pa. Stat. 209 (protecting the city of Philadelphia from the danger of gunpowder).

[20] Curiously, North Carolina referred to the "King's Justices" after the colonies had won their independence. The laws in North Carolina, Massachusetts, and Virginia track language from the 1328 Statute of Northampton, which provided that no person shall "go nor ride armed by Night nor by Day in Fairs, Markets, nor in the Presence of the Justices or other Ministers nor in no Part elsewhere." 2 Edw. 3, c. 3 (1328) (Eng.). There is debate in the historical literature concerning whether the

(Continued on following page)

In the nineteenth century, laws directly regulating concealable weapons for public safety became commonplace and far more expansive in scope than regulations during the Founding Era. Most states enacted laws banning the carrying of concealed weapons.[21] And as *Heller* noted, "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *Heller,* 554 U.S. at 626. Indeed, the nineteenth century Supreme Court agreed, noting that "the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of

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Statute of Northampton, and laws adopting similar language, prohibited the carrying of weapons in public generally or only when it would "terrorize" the public. *See* Charles, *The Faces of the Second Amendment Outside the Home,* 60 Clev. St. L. Rev. at 31-32.

[21] *See* Act of Feb. 1, 1839, ch. 77, 1839 Ala. Acts at 67-68; Act of Apr. 1, 1881, ch. 96, § 1, 1881 Ark. Acts at 191; Act of Feb. 1, 1881, 1881 Colo. Sess. Laws at 74; Act of Feb. 12, 1885, ch. 3620, 1885 Fla. Laws at 61; Act of Apr. 16, 1881, 1881 Ill. Laws at 73-74; Act of Jan. 14, 1820, ch. 23, 1820 Ind. Acts at 39; 29 Ky. Gen. Stat. art. 29, § 1 (as amended through 1880); Act of Mar. 25, 1813, 1813 La. Acts at 172; 1866 Md. Laws, ch. 375, § 1; Neb. Gen. Stat., ch. 58, ch. 5, § 25 (1873); Act of Mar. 5, 1879, ch. 127, 1879 N.C. Sess. Laws at 231; N.D. Pen. Code § 457 (1895); Act of Mar. 18, 1859, 1859 Ohio Laws at 56; Act of Feb. 18, 1885, 1885 Or. Laws at 33; Act of Dec. 24, 1880, no. 362, 1881 S.C. Acts at 447; S.D. Terr. Pen. Code § 457 (1883); Act of Apr. 12, 1871, ch. 34, 1871 Tex. Gen. Laws at 25-27; Act of Oct. 20, 1870, ch. 349, 1870 Va. Acts at 510; Wash. Code § 929 (1881); W. Va. Code, ch. 148, § 7 (1891); *see also* Cornell & DeDino, *A Well Regulated Right,* 73 Fordham L. Rev. at 502-16.

concealed weapons." *Robertson v. Baldwin,* 165 U.S. 275, 281-82 (1897).

In some ways, these concealed-carry bans were similar to New York's law because while a few states with concealed-carry bans considered self-defense concerns, the exceptions were extremely limited. For instance, in Ohio there was an exception if "the accused was, at the time of carrying [the concealed weapon] engaged in a pursuit of any lawful business, calling or employment, and that the circumstances . . . justif[ied] a prudent man in carrying the weapon . . . for the defense of his person." Act of Mar. 18, 1859, 1859 Ohio Laws at 56-57. Similarly, in Tennessee, a person was exempted from the concealed carry ban who was "on a journey to any place out of his county or state." Act of Oct. 19, 1821, ch. XIII, 1821 Tenn. Pub. Acts at 15-16. By contrast, Virginia's concealed-carry ban was even stricter than New York's statute because it explicitly rejected a self-defense exception. A defendant was guilty under Virginia's concealed-carry ban even if he was acting in self-defense when using the weapon. 1838 Va. Acts ch. 101 at 76.

Some states went even further than prohibiting the carrying of concealed weapons. As discussed above, several states banned concealable weapons (subject to certain exceptions) altogether whether carried openly or concealed. *See* Part II.A. Other states banned the sale of concealable weapons. For instance, Georgia criminalized the sale of concealable weapons, effectively moving toward their complete

prohibition. Act of Dec. 25, 1837, 1837 Ga. Laws at 90 (protecting citizens of Georgia against the use of deadly weapons). Tennessee enacted a similar law, which withstood constitutional challenge. Act of Jan. 27, 1838, ch. CXXXVII, 1837-1838 Tenn. Pub. Acts 200. In upholding the law, the Supreme Court of Tennessee reasoned that "[t]he Legislature thought the evil great, and, to effectually remove it, made the remedy strong." *Day v. State,* 37 Tenn. (5 Sneed) 496, 500 (1857).

The historical prevalence of the regulation of firearms in public demonstrates that while the Second Amendment's core concerns are strongest inside hearth and home, states have long recognized a countervailing and competing set of concerns with regard to handgun ownership and use in public. Understanding the scope of the constitutional right is the first step in determining the yard stick by which we measure the state regulation. *See, e.g., Bd. Of Trustees of Univ. of Alabama v. Garrett,* 531 U.S. 356, 365 (2001) ("The first step in [analyzing legislation intersecting with enumerated rights] is to identify with some precision the scope of the constitutional right at issue.").

We believe state regulation of the use of firearms in public was "enshrined with[in] the scope" of the Second Amendment when it was adopted. *Heller,* 554. U.S. at 634. As Plaintiffs admitted at oral argument, "the state enjoys a fair degree of latitude" to regulate the use and possession of firearms in public. The Second Amendment does not foreclose regulatory

measures to a degree that would result in "handcuffing lawmakers' ability to prevent armed mayhem in public places." *Masciandaro,* 638 F.3d at 471 (internal quotation marks omitted).

Because our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public, we conclude that intermediate scrutiny is appropriate in this case. The proper cause requirement passes constitutional muster if it is substantially related to the achievement of an important governmental interest. *See, e.g., Masciandaro,* 638 F.3d at 471; *Skoien,* 614 F.3d at 641-42; *see also Ernst J. v. Stone,* 452 F.3d 186, 200 n.10 (2d Cir. 2006) ("[T]he label 'intermediate scrutiny' carries different connotations depending on the area of law in which it is used.").

As the parties agree, New York has substantial, indeed compelling, governmental interests in public safety and crime prevention. *See, e.g., Schenck v. Pro-Choice Network,* 519 U.S. 357, 376 (1997); *Schall v. Martin,* 467 U.S. 253, 264 (1984); *Hodel v. Va. Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 300 (1981); *Kuck v. Danaher,* 600 F.3d 159, 166 (2d Cir. 2010). The only question then is whether the proper cause requirement is substantially related to these interests. We conclude that it is.

In making this determination, "substantial deference to the predictive judgments of [the legislature]" is warranted. *Turner Broad. Sys., Inc. v. FCC,* 520 U.S. 180, 195 (1997). The Supreme Court has

long granted deference to legislative findings regarding matters that are beyond the competence of courts. *See Holder v. Humanitarian Law Project,* 130 S. Ct. 2705, 2727 (2010); *Turner Broad. Sys., Inc.,* 520 U.S. at 195-196; *see also Walters v. National Ass'n of Radiation Survivors,* 473 U.S. 305, 330-31 n.12 (1985). In the context of firearm regulation, the legislature is "far better equipped than the judiciary" to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks. *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 665 (1994). Thus, our role is only "to assure that, in formulating its judgments, [New York] has drawn reasonable inferences based on substantial evidence." *Id.* at 666. Unlike strict scrutiny review, we are not required to ensure that the legislature's chosen means is "narrowly tailored" or the least restrictive available means to serve the stated governmental interest. To survive intermediate scrutiny, the fit between the challenged regulation need only be substantial, "not perfect." *Marzzarella,* 614 F.3d at 97.

New York's legislative judgment concerning handgun possession in public was made one-hundred years ago. In 1911, with the enactment of the Sullivan Law, New York identified the dangers inherent in the carrying of handguns in public. N.Y. Legislative Service, *Dangerous Weapons – "Sullivan Bill,"* 1911 Ch. 195 (1911). And since 1913, New York's elected officials determined that a reasonable method for

combating these dangers was to limit handgun possession in public to those showing proper cause for the issuance of a license. 1913 Laws of N.Y., ch. 608, at 1627-30. The proper cause requirement has remained a hallmark of New York's handgun regulation since then.[22]

The decision to regulate handgun possession was premised on the belief that it would have an appreciable impact on public safety and crime prevention. As explained in the legislative record:

> The primary value to law enforcement of adequate statutes dealing with dangerous weapons is prevention of crimes of violence before their consummation.
>
> . . . .
>
> . . . In the absence of adequate weapons legislation, under the traditional law of criminal attempt, lawful action by the police must await the last act necessary to consummate the crime. . . . Adequate statutes governing

[22] New York's statutory scheme was the result of a "careful balancing of the interests involved" and not a general animus towards guns. Report of the N.Y. State Joint Legislative Comm. On Firearms & Ammunition, Doc. No. 6, at 12 (1965). The legislature explained that "[s]tatutes governing firearms . . . are not desirable as ends in themselves." *Id.* Rather, the purpose was "to prevent crimes of violence before they can happen, and at the same time preserve legitimate interests such as training for the national defense, the right of self defense, and recreational pursuits of hunting, target shooting and trophy collecting." *Id.*

> firearms and weapons would make lawful intervention by police and prevention of these fatal consequences, before any could occur.

Report of the N.Y. State Joint Legislative Comm. On Firearms & Ammunition, Doc. No. 6, at 12-13 (1965). Similar concerns were voiced in 1987, during a floor debate concerning possible changes to the proper cause requirement. *See* N.Y. Senate Debate on Senate Bill 3409, at 2471 (June 2, 1987).

The connection between promoting public safety and regulating handgun possession in public is not just a conclusion reached by New York. It has served as the basis for other states' handgun regulations, as recognized by various lower courts. *Piszczatoski,* 840 F. Supp. 2d 813 at 835-36; *Richards v. Cty. of Yolo,* 821 F. Supp. 2d 1169, 1172 (E.D. Cal. 2011); *Peruta v. Cty. of San Diego,* 758 F. Supp. 2d 1106, 1110 (S.D. Cal. 2010).

Given New York's interest in regulating handgun possession for public safety and crime prevention, it decided not to ban handgun possession, but to limit it to those individuals who have an actual reason ("proper cause") to carry the weapon. In this vein, licensing is oriented to the Second Amendment's protections. Thus, proper cause is met and a license "shall be issued" when a person wants to use a handgun for target practice or hunting. N.Y. Penal Law § 400.00(2)(f); *see, e.g., Clyne,* 58 A.D.2d at 947. And proper cause is met and a license "shall be issued" when a person has an actual and articulable – rather

than merely speculative or specious – need for self-defense. N.Y. Penal Law § 400.00(2)(f); *see, e.g., Klenosky,* 75 A.D.2d at 793. Moreover, the other provisions of section 400.00(2) create alternative means by which applicants engaged in certain employment may secure a carry license for self-defense. As explained earlier, a license "shall be issued" to merchants and storekeepers for them to keep handguns in their place of business; to messengers for banking institutions and express companies; to state judges and justices; and to employees at correctional facilities. N.Y. Penal Law § 400.00(2)(b)-(e).

Restricting handgun possession in public to those who have a reason to possess the weapon for a lawful purpose is substantially related to New York's interests in public safety and crime prevention. It is not, as Plaintiffs contend, an arbitrary licensing regime no different from limiting handgun possession to every tenth citizen. This argument asks us to conduct a review bordering on strict scrutiny to ensure that New York's regulatory choice will protect public safety more than the least restrictive alternative. But, as explained above, New York's law need only be ***substantially related*** to the state's important public safety interest. A perfect fit between the means and the governmental objective is not required. Here, instead of forbidding anyone from carrying a handgun in public, New York took a more moderate approach to fulfilling its important objective and reasonably concluded that only individuals having a bona fide reason to possess handguns should be allowed to

introduce them into the public sphere. That New York has attempted to accommodate certain particularized interests in self defense does not somehow render its concealed carry restrictions unrelated to the furtherance of public safety.

To be sure, we recognize the existence of studies and data challenging the relationship between handgun ownership by lawful citizens and violent crime. Plaintiffs' Reply Br. at 37-38. We also recognize that many violent crimes occur without any warning to the victims. But New York also submitted studies and data demonstrating that widespread access to handguns in public increases the likelihood that felonies will result in death and fundamentally alters the safety and character of public spaces. J.A. 453, 486-90. It is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments. Indeed, assessing the risks and benefits of handgun possession and shaping a licensing scheme to maximize the competing public-policy objectives, as New York did, is precisely the type of discretionary judgment that officials in the legislative and executive branches of state government regularly make.

According to Plaintiffs, however, New York's conclusions as to the risks posed by handgun possession in public are "totally irrelevant." Plaintiffs' Reply Br. at 38. Because the constitutional right to bear arms is specifically for self-defense, they reason that the state may not limit the right on the basis that it is too dangerous to exercise, nor may it limit the right to those showing a special need to exercise it. In

Plaintiffs' view, the "'enshrinement'" of the right to bear arms "'necessarily takes [these] policy choices off the table.'" *Id.* at 39 (quoting *Heller,* 554 U.S. at 636).[23] We disagree.

Plaintiffs misconstrue the character and scope of the Second Amendment. States have long chosen to regulate the right to bear arms because of the risks posed by its exercise. As Plaintiffs admit and *Heller* strongly suggests, the state may ban firearm possession in sensitive places, presumably on the ground that it is too dangerous to permit the possession of firearms in those locations. 554 U.S. at 626-27. In fact, New York chose to prohibit the possession of firearms on school grounds, in a school building, or on a school bus precisely for this reason. N.Y. Penal Law § 265.01(3); *see also* N.Y. Legislative Service, Governor's Bill Jacket, 1974 Ch. 1041, at 2-4 (1974). Thus, as the Supreme Court has implicitly recognized, regulating firearms because of the dangers posed by

[23] Plaintiffs are quick to embrace the majority's view in *Heller* that handguns are the "quintessential self-defense weapon" for law abiding Americans today and extrapolate that right to public possession of a handgun. Thus, for Plaintiffs, handgun possession in public has the ring of an absolute constitutional right. This of course overlooks *Heller's* careful restriction of its reach to the home and is in sharp contrast with New York's view of concealed handguns one-hundred years ago as "the handy, the usual and the favorite weapon of the turbulent criminal class." *Darling,* 154 A.D. at 423-24. It seems quite obvious to us that possession of a weapon in the home has far different implications than carrying a concealed weapon in public.

exercising the right is entirely consistent with the Second Amendment.

We are also not convinced that the state may not limit the right to bear arms to those showing a "special need for self-protection." Plaintiffs contend that their "desire for self-defense . . . is all the 'proper cause' required . . . by the Second Amendment to carry a firearm." Plaintiffs' Br. at 45. They reason that the exercise of the right to bear arms cannot be made dependent on a ***need*** for self-protection, just as the exercise of other enumerated rights cannot be made dependent on a ***need*** to exercise those rights. This is a crude comparison and highlights Plaintiffs' misunderstanding of the Second Amendment.

State regulation under the Second Amendment has always been more robust than of other enumerated rights. For example, no law could prohibit felons or the mentally ill from speaking on a particular topic or exercising their religious freedom. *Cf. Simon & Schuster, Inc. v. New York State Crime Victims Bd.,* 502 U.S. 105 (1991) (invalidating a state law requiring profits from books authored by criminals to be distributed to crime victims). And states cannot prohibit speech in public schools. *Tinker v. Des Moines Indep. Comty. Sch. Dist.,* 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."). Not so with regard to the Second Amendment. Laws prohibiting the exercise of the right to bear arms by felons and the mentally ill, as well as by law-abiding

citizens in certain locations including public schools, are, according to *Heller,* "presumptively lawful." 554 U.S. at 627 n.26.

Moreover, as discussed above, extensive state regulation of handguns has never been considered incompatible with the Second Amendment or, for that matter, the common-law right to self-defense. This includes significant restrictions on how handguns are carried, complete prohibitions on carrying the weapon in public, and even in some instances, prohibitions on purchasing handguns. In this vein, handguns have been subject to a level of state regulation that is stricter than any other enumerated right.

In light of the state's considerable authority – enshrined within the Second Amendment – to regulate firearm possession in public, requiring a showing that there is an objective threat to a person's safety – a "special need for self-protection" – before granting a carry license is entirely consistent with the right to bear arms. Indeed, there is no right to engage in self-defense with a firearm until the objective circumstances justify the use of deadly force.[24] *See, e.g., People v. Aiken,* 4 N.Y.3d 324, 327-29 (2005) (discussing duty to retreat in New York).

Plaintiffs counter that the need for self-defense may arise at any moment without prior warning.

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[24] There is no question that using a handgun for self-defense constitutes deadly physical force. *See, e.g., People v. Magliato,* 68 N.Y.2d 24, 29-30 (1986).

True enough. But New York determined that limiting handgun possession to persons who have an articulable basis for believing they will need the weapon for self-defense is in the best interest of public safety and outweighs the need to have a handgun for an unexpected confrontation. New York did not run afoul of the Second Amendment by doing so.

To be sure, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller,* 554 U.S. at 636. But there is also a "general reticence to invalidate the acts of [our] elected leaders." *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S. Ct. 2566, 2579 (2012). "'Proper respect for a coordinate branch of government' requires that we strike down [legislation] only if 'the lack of constitutional authority to pass [the] act in question is clearly demonstrated.'" *Id.* (quoting *United States v. Harris,* 106 U.S. 629, 635 (1883)). Our review of the history and tradition of firearm regulation does not "clearly demonstrate[ ]" that limiting handgun possession in public to those who show a special need for self-protection is inconsistent with the Second Amendment. *Id.* Accordingly, we decline Plaintiffs' invitation to strike down New York's one-hundred-year-old law and call into question the state's traditional authority to extensively regulate handgun possession in public.

III

In view of our determination that New York's proper cause requirement is constitutional under the

Second Amendment as applied to Plaintiffs, we also reject their facial overbreadth challenge.[25] Overbreadth challenges are generally limited to the First Amendment context. *United States v. Salerno,* 481 U.S. 739, 745 (1987). But even if we assume that overbreadth analysis may apply to Second Amendment cases, it is well settled "that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick v. Oklahoma,* 413 U.S. 601, 610 (1973). This principle "reflect[s] the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Id.* at 610-11; *see also Gonzales v. Carhart,* 550 U.S. 124, 167-68 (2007). Accordingly, we reject Plaintiffs' facial challenge.

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[25] We also decline to consider Plaintiffs' claim under the Equal Protection Clause. "It is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Tolbert v. Queens Coll.,* 242 F.3d 58, 75 (2d Cir. 2001). Plaintiffs made only passing references to the Equal Protection Clause in their brief, noting that "[t]o the extent that [New York's proper cause requirement] implicates the Equal Protection Clause . . . the case might well be decided under some level of means-end scrutiny." Plaintiffs' Br. at 15-16; 54. Thus, this claim is forfeited.

IV

For the foregoing reasons, the judgment of the district court is hereby **AFFIRMED.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ALAN KACHALSKY, CHRISTINA NIKOLOV, ERIC DETMER, JOHNNIE NANCE, ANNA MARCUCCI-NANCE, and SECOND AMENDMENT FOUNDATION, INC.,

Plaintiffs,

– against –

SUSAN CACACE, JEFFREY A. COHEN, ALBERT LORENZO, ROBERT K. HOLDMAN, and COUNTY OF WESTCHESTER,

Defendants.

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OPINION AND ORDER

No. 10-CV-5413 (CS)

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Seibel, J.

Before the Court are the Motion to Dismiss of Defendants Susan Cacace, Jeffrey A. Cohen, Albert Lorenzo, and Robert K. Holdman (the "State Defendants"), (Doc. 30);[1] the Motion to Dismiss of Defendant County of Westchester (the "County"), (Doc. 33); the Motion for Summary Judgment of Plaintiffs Alan Kachalsky, Christina Nikolov, Eric Detmer, Johnnie Nance, Anna Marcucci-Nance, (together, the "Individual Plaintiffs"), and Second Amendment Foundation, Inc. ("SAF"), (Doc. 39); and the State Defendants' Cross-Motion for Summary Judgment, (Doc. 42).

[1] The original Complaint, filed on July 15, 2010 by Alan Kachalsky, Christina Nikolov, and Second Amendment Foundation, Inc., named only Cacace, Cohen, and the County of Westchester as defendants. (Doc. 1.) Cacace and Cohen served a motion to dismiss on November 9, 2010, (Docs. 30-32), and, after the remaining parties were added pursuant in the First Amended Complaint ("FAC"), (Doc. 18), joined Lorenzo and Holdman in submitting supplemental materials moving to dismiss the First Amended Complaint, (Docs. 17, 34-35). The Court therefore treats the State Defendants' motion as a motion to dismiss the First Amended Complaint.

I. BACKGROUND

For purposes of deciding the Motions to Dismiss, I assume the facts (but not the conclusions) as alleged in the First Amended Complaint to be true, and for purposes of deciding the Motion and Cross-Motion for Summary Judgment, the following facts are undisputed, except where noted.

The instant case presents a facial and as-applied constitutional challenge to New York Penal Law ("NYPL") Section 400.00(2)(f), which provides that licenses to "have and carry concealed" handguns "shall be issued" to "any person when proper cause exists for the issuance thereof." Plaintiffs claim that the statute violates their rights under the Second Amendment to the U.S. Constitution as recognized in the Supreme Court case *District of Columbia v. Heller,* 554 U.S. 570 (2008), and made applicable to the states in *McDonald v. City of Chicago,* 130 S. Ct. 3020 (2010). To give proper context to Plaintiffs' claims, a brief description of New York's handgun licensing scheme is warranted.

A. New York's Handgun Licensing Scheme

The NYPL provides for the licensed possession of handguns in New York State. Article 265 of the NYPL imposes a general ban on the possession of firearms, *see* N.Y. Penal Law § 265.01(1), which includes handguns, *id.* § 265.00(3)(a), but creates various specific exemptions from that ban, *see id.* § 265.20, including "[p]ossession of a pistol or revolver by a person to

whom a license therefor has been issued as provided under [NYPL] section 400.00,"[2] *id.* § 265.20(3); *see Matter of O'Connor v. Scarpino,* 83 N.Y.2d 919, 920 (1994) (§ 400.00 "is the exclusive statutory mechanism for the licensing of firearms in New York State"). Section 400.00(1) sets out the eligibility requirements for handgun permit applicants and provides, generally, that applicants must: be at least twenty-one years of age; be of good moral character; not have been convicted of a felony or a serious offense; not have suffered any mental illness or been confined to an institution for such illness; not have had a handgun license previously revoked or been the subject of a family court order; not exhibit "good cause . . . for the denial of the license"; and, for applicants in Westchester County, have "successfully completed a firearms safety course and test." N.Y. Penal Law § 400.00(1). Section 400.00(2) sets out the various types of licenses available, providing that "[a] license for a pistol or revolver . . . shall be issued" under various circumstances, including, for example, to "have and possess in his dwelling by a householder," to "have and possess in his place of business by a

[2] The licensing exemption under Section 400.00 does not, however, preclude a conviction for knowing possession of a handgun on school grounds, in a school building, or on a school bus. N.Y. Penal Law §§ 265.20(3), 265.01(3). Other exemptions under Section 265.20 include possession by military and law enforcement officers, as well as conditional possession of various firearms for hunting purposes and at shooting ranges. *See, e.g., id.* § 265.20(1)(a)-(d), (4), (7).

merchant or storekeeper," and to "have and carry concealed" by various city and state judges, bank or express messengers, and corrections officers. *Id.* § 400.00(2)(a)-(e).

The provision at issue in this case is Section 400.00(2)(f), which provides that a license "shall be issued to . . . have and carry concealed, without regard to employment or place of possession, by any person when proper cause exists for the issuance thereof." *Id.* § 400.00(2)(f). There is no provision for a license to carry an unconcealed weapon, so for applicants who want to carry a weapon and do not fit in one of the occupational categories, the only way to obtain a license to carry a handgun – whether openly or not – is to meet the requirements, including "proper cause," of the licensing provision for concealed weapons. Though not defined in the NYPL, the term "proper cause" as used in Section 400.00(2)(f) has been interpreted by New York state courts to mean "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." *Bando v. Sullivan,* 735 N.Y.S.2d 660, 662 (3d Dep't 2002) (internal quotation marks omitted); *Kaplan v. Bratton,* 673 N.Y.S.2d 66, 68 (1st Dep't 1998) (internal quotation marks omitted); *Williams v. Bratton,* 656 N.Y.S.2d 626, 627 (1st Dep't 1997) (internal quotation marks omitted); *Klenosky v. N.Y. City Police Dep't,* 428 N.Y.S.2d 256, 257 (1st Dep't 1980), *aff'd,* 53 N.Y.2d 685 (1981); *see Bach v. Pataki,* 408 F.3d 75, 80 (2d Cir. 2005).

The application process for licenses under Section 400.00(2)(f), often called "full-carry permits," is administered locally. *See* N.Y. Penal Law § 400.00(3)-(4). Applications for full-carry permits in Westchester County request information concerning, for example, discharge from employment or the armed forces for cause, criminal history, treatment for alcoholism or drug use, history of mental illness, previous firearm licenses, and physical conditions that could interfere with safe and proper use of a handgun. (State Defs.' 56.1 ¶¶ 16-17; Pls.' Resp. 56.1 ¶¶ 16-17.)[3] An applicant must also provide four references to attest to his or her good moral character. (State Defs.' 56.1 ¶ 16; Pls.' Resp. 56.1 ¶ 16.) Applications are submitted to the Pistol Licensing Unit of the Westchester County Department of Public Safety for investigation consistent with NYPL Section 400.00(4). (State Defs.' 56.1 ¶¶ 15, 18; Pls.' Resp. 56.1 ¶¶ 15, 18.) *See* N.Y. Penal Law § 400.00(4) (outlining investigatory procedures). As part of this investigation, the Pistol Licensing Unit reviews the information provided and conducts a series of background checks with the New York State Department of Criminal Justice Services, the Federal Bureau of Investigation, the National Instant Criminal Background system, and the New

[3] "State Defs.' 56.1" refers to State Defendants' Statement of Undisputed Material Facts in Support of State Defendants' Motion for Summary Judgment. (Doc. 44, at 16-36.) "Pls.' Resp. 56.1" refers to Plaintiffs' Separate Statement of Disputed Material Facts in Opposition to Individual Defendants' Motion for Summary Judgment. (Doc. 47-1.)

York State Department of Mental Hygiene. (State Defs.' 56.1 ¶¶ 18-20; Pls.' Resp. 56.1 ¶¶ 18-20.)

Once the investigation is complete, an investigation summary is compiled and, along with the application, submitted to a County Police lieutenant, the Chief Inspector of Administrative Services, and the Commissioner or a Deputy Commissioner for review. (State Defs.' 56.1 ¶ 21; Pls.' Resp. 56.1 ¶ 21.) Based upon that review, the Chief Inspector and Commissioner or Deputy Commissioner generate a recommendation as to whether the full-carry permit should be approved or disapproved, (*see, e.g.,* Pls.' MSJ Exs. C, E, G),[4] and the file is submitted to a state licensing officer[5] for a final determination, (State Defs.' 56.1 ¶ 22; Pls.' Resp. 56.1 ¶ 22). Licensing officers have considerable discretion in deciding whether to grant a license application, *see, e.g., Vale v. Eidens,* 735 N.Y.S.2d 650, 652 (3d Dep't 2002); *Kaplan,* 673 N.Y.S.2d at 68; *Fromson v. Nelson,* 577 N.Y.S.2d 417, 417 (2d Dep't 1991); *Marlow v. Buckley,* 482 N.Y.S.2d 183, 184 (4th Dep't 1984), particularly in determining whether an applicant has demonstrated "proper cause" under Section 400.00(2)(f), *see Bach,* 408 F.3d at 79-80 & n.8, and their decisions will not be disturbed

[4] "Pls.' MSJ" refers to Plaintiffs' Notice of Motion for Summary Judgment. (Doc. 39.)

[5] Except for New York City and Suffolk County, a "licensing officer" is defined as a "judge or justice of a court of record having his office in the county of issuance." N.Y. Penal Law § 265.00(10).

unless determined to be arbitrary and capricious, *O'Brien v. Keegan,* 87 N.Y.2d 436, 439-40 (1996).

B. The Parties

Individual Plaintiffs are all United States citizens who reside in Westchester County. (State Defs.' 56.1 ¶¶ 1-5; Pls.' Resp. 56.1 ¶¶ 1-5.) Plaintiff SAF is a non-profit membership organization incorporated under the laws of the State of Washington, with its principal place of business in Bellevue, Washington. (State Defs.' 56.1 ¶ 6; Pls.' Resp. 56.1 ¶ 6.) It claims to have over 650,000 members and supporters nationwide, including in Westchester County, to engage in education, research, publishing, and legal action focusing on the Second Amendment, and to expend resources encouraging the exercise of the right to bear arms, as well as advising and educating its members, supporters, and the general public about policies relating to the public carrying of handguns in New York. (Pls.' 56.1 ¶¶ 25-26.)[6] The State Defendants are judges on various courts within the New York State Unified Court System and, at the times of Individual

[6] "Pls.' 56.1" refers to Plaintiffs' Separate Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Summary Judgment. (Doc. 41.) The State Defendants state that they lack information sufficient to admit or deny these facts, as Plaintiffs moved for summary judgment prior to discovery. (State Defendants' Response to Plaintiffs' Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Summary Judgment ("State Defs.' Resp. 56.1") (Doc. 44, at 1-15), ¶¶ 25-26.)

Plaintiffs' full-carry permit applications, described below, served as handgun licensing officers under NYPL Section 265.00(10).[7] (State Defs.' 56.1 ¶¶ 7-10; Pls.' Resp. 56.1 ¶¶ 7-10.)

C. Plaintiffs' Permit Applications

In May 2008, Plaintiff Kachalsky applied for a full-carry permit to be able to carry a concealed handgun while in public. (State Defs.' 56.1 ¶ 25; Pls.' Resp. 56.1 ¶ 25.) In his application, Kachalsky asserted that he believed he satisfied Section 400.00(2)(f)'s "proper cause" requirement because he was a U.S. citizen and therefore entitled to "the right to bear arms" under the Second Amendment, "we live in a world where sporadic random violence might at any moment place one in a position where one needs to defend oneself or possibly others," and he was "a law-abiding citizen" who had neither "been convicted of a

[7] Cacace serves as a Judge on the County Court in Westchester County. (State Defs.' 56.1 ¶ 7; Pls.' Resp. 56.1 ¶ 7.) Cohen currently serves as a Justice on the New York State Supreme Court, Appellate Division, Second Department, and, at the time of the relevant licensing decision described herein, served as a Judge on the County Court in Westchester County. (State Defs.' 56.1 ¶ 8; Pls.' Resp. 56.1 ¶ 8.) Lorenzo serves as an Acting Justice for the New York State Supreme Court, Westchester County. (State Defs.' 56.1 ¶ 9; Pls.' Resp. 56.1 ¶ 9.) Holdman currently serves as Justice for the New York State Supreme Court, Bronx County, and, at the time of the relevant licensing decision described herein, served as Justice for the New York State Supreme Court, Westchester County. (State Defs.' 56.1 ¶ 10; Pls.' Resp. 56.1 ¶ 10.)

crime" nor "assaulted or threatened to assault another person." (State Defs.' 56.1 ¶ 26; Pls.' Resp. 56.1 ¶ 26.) Upon reviewing Kachalsky's application and completing a corresponding investigation, the Department of Public Safety recommended that the permit be denied. (State Defs.' 56.1 ¶ 27; Pls.' Resp. 56.1 ¶ 27.) The application, investigation file, and recommendation were forwarded to Defendant Cacace, who, acting as licensing officer, reviewed those materials and issued a decision and order, dated October 8, 2008, denying Kachalsky's application. (State Defs.' 56.1 ¶¶ 28-29; Pls.' Resp. 56.1 ¶¶ 28-29.) Cacace observed that Kachalsky failed to state "any facts which would demonstrate a need for self protection distinguishable from that of the general public," and that "based upon all the facts and circumstances of this application, it is my opinion that proper cause does not exist for the issuance of an unrestricted 'full carry' pistol license." (State Defs.' 56.1 ¶ 30; Pls.' Resp. 56.1 ¶ 30.)

On February 6, 2009, Kachalsky filed a petition under Article 78 of the New York Civil Practice Law and Rules with the New York State Supreme Court, Appellate Division, Second Department, appealing his permit denial. (State Defs.' 56.1 ¶ 31; Pls.' Resp. 56.1 ¶ 31; Tomari Decl. Ex. L.)[8] By Order dated September 8, 2009, the Appellate Division affirmed the denial, holding that Kachalsky "failed to demonstrate

[8] "Tomari Decl." refers to the Declaration of Anthony J. Tomari, submitted in support of State Defendants' Cross-Motion for Summary Judgment. (Docs. 49, 51, 65, 66.)

'proper cause' for the issuance of a 'full carry' permit. Accordingly, the respondent's determination was not arbitrary or capricious and should not be disturbed." *Kachalsky v. Cacace,* 884 N.Y.S.2d 877, 877 (2d Dep't 2009). Kachalsky thereafter sought leave to appeal to the New York State Court of Appeals, (State Defs.' 56.1 ¶ 32; Pls.' Resp. 56.1 ¶ 32), but on February 16, 2010, the court dismissed his appeal *sua sponte* "upon the ground that no substantial constitutional question [was] directly involved," *Kachalsky v. Cacace* ("*Kachalsky II*"), 14 N.Y.3d 743, 743 (2010).

In March 2009, Plaintiff Nikolov applied for a full-carry permit. (State Defs.' 56.1 ¶ 35; Pls.' Resp. 56.1 ¶ 35.) In her application, Nikolov asserted that she believed she satisfied Section 400.00(2)(f)'s "proper cause" requirement because she was a "law-abiding citizen," she possessed a concealed weapon permit in the State of Florida and had neither brandished nor discharged her weapon outside of shooting ranges there, she had completed three firearms safety courses with the National Rifle Association within the previous three years, her experience as a pilot and flight instructor gave her the "calm demeanor . . . essential when either involved in or a witness to a potentially dangerous situation," and she was a transgender female subject to a higher likelihood of being the victim of violence. (State Defs.' 56.1 ¶ 36; Pls.' Resp. 56.1 ¶ 36.) Upon reviewing Nikolov's application and completing a corresponding investigation, the Department of Public Safety recommended that the permit be denied. (State Defs.' 56.1 ¶ 37; Pls.'

Resp. 56.1 ¶ 37.) The application, investigation file, and recommendation were forwarded to Defendant Cohen, who, acting as licensing officer, reviewed those materials and issued a decision and order, dated October 2, 2008, denying Nikolov's application. (State Defs.' 56.1 ¶¶ 38-39; Pls.' Resp. 56.1 ¶¶ 38-39.) Cohen observed that "[c]onspicuously absent" from Nikolov's application "is the report of any type of threat to her own safety," and "notwithstanding her accomplishments and unblemished record, it cannot be said that the applicant has demonstrated that she has a special need for self-protection distinguishable from that of the general public." (State Defs.' 56.1 ¶ 39; Pls.' Resp. 56.1 ¶ 39; *see* Tomari Decl. Ex. O.)

In June 2010, Plaintiff Nance applied for a full-carry permit. (State Defs.' 56.1 ¶ 47; Pls.' Resp. 56.1 ¶ 47.) At that time, Nance was licensed to have a handgun for the purpose of target shooting only. (State Defs.' 56.1 ¶ 46; Pls.' Resp. 56.1 ¶ 46.) In his application, Nance asserted that he believed he satisfied Section 400.00(2)(f)'s "proper cause" requirement because he was a "citizen in good standing in the community," he was "steadily employed and stable," he was "of good moral character," and the permit would facilitate his efforts to become involved with competitive shooting and gun safety instruction. (State Defs.' 56.1 ¶ 48; Pls.' Resp. 56.1 ¶ 48.) Upon reviewing Nance's application and completing a corresponding investigation, the Department of Public Safety recommended that the permit be denied. (State Defs.' 56.1 ¶ 49; Pls.' Resp. 56.1 ¶ 49.) The

application, investigation file, and recommendation were forwarded to Defendant Holdman, who, acting as licensing officer, reviewed those materials and issued a decision, dated September 9, 2010, denying Nance's application. (State Defs.' 56.1 ¶ 50; Pls.' Resp. 56.1 ¶ 50.) Holdman observed that Nance had "not provided the court with any information that he faces any danger of any kind that would necessitate the issuance of a full carry firearm license; [and had not] demonstrated a need for self-protection distinguishable from that of the general public or of other persons similarly situated." (State Defs.' 56.1 ¶ 53; Pls.' Resp. 56.1 ¶ 53.)

As with Nance, in June 2010, Plaintiff Marcucci-Nance applied to amend her pistol permit from a target-shooting permit to a full-carry permit. (State Defs.' 56.1 ¶¶ 54-55; Pls.' Resp. 56.1 ¶¶ 54-55.) In her application, she cited the same reasons as Nance for why she believed she satisfied Section 400.00(2)(f)'s "proper cause" requirement, (State Defs.' 56.1 ¶ 56; Pls.' Resp. 56.1 ¶ 56), and her application was similarly addressed: after an investigation, the Department of Public Safety recommended denial, and Holdman, to whom the application materials were forwarded, denied the application on September 9, 2010, citing the same concerns as he did with respect to Nance. (State Defs.' 56.1 ¶¶ 57-60; Pls.' Resp. 56.1 ¶¶ 57-60.)

Finally, in July 2010, Plaintiff Detmer applied for a full-carry permit. (State Defs.' 56.1 ¶ 41; Pls.' Resp. 56.1 ¶ 41.) Like Nance and Marcucci-Nance, Detmer

was at that time licensed to have a handgun for the purpose of target shooting only. (State Defs.' 56.1 ¶ 40; Pls.' Resp. 56.1 ¶ 40.) In his application, Detmer asserted that he believed he satisfied Section 400.00(2)(f)'s "proper cause" requirement because he was a federal law enforcement officer with the U.S. Coast Guard who, while on duty, regularly carried a .40-caliber pistol, and, as part of his training, had completed various courses concerning the use of his pistol. (State Defs.' 56.1 ¶ 42; Pls.' Resp. 56.1 ¶ 42.) The Department of Public Safety reviewed Detmer's application, conducted its investigation, recommended denial, and subsequently forwarded the file to Defendant Lorenzo, who, acting as licensing officer, reviewed those materials and denied the application. (State Defs.' 56.1 ¶¶ 44-45; Pls.' Resp. 56.1 ¶¶ 44-45.) Lorenzo informed Detmer of this decision by letter dated September 27, 2010, in which he noted simply that there was "no justification" for issuing a full-carry permit. (State Defs.' 56.1 ¶ 45; Pls.' Resp. 56.1 ¶ 45.)

Individual Plaintiffs state that they have not reapplied for full-carry permits because they believe such acts would be futile, and that they would carry handguns in public but for their fear of arrest, prosecution, fine, and/or imprisonment. (Kachalsky Decl. ¶¶ 3-4; Nikolov Decl. ¶¶ 3-4; Nance Decl. ¶¶ 5-6; Marcucci-Nance Decl. ¶¶ 5-6; Detmer Decl. ¶¶ 6-7.)[9]

[9] "Kachalsky Decl." refers to the Declaration of Alan Kachalsky. (Doc. 39-9.) "Nikolov Decl." refers to the Declaration

(Continued on following page)

D. Plaintiffs' Claims

As late as 2005, the Second Circuit, in rejecting a constitutional challenge to New York's handgun licensing scheme, held that the "Second Amendment's 'right to keep and bear arms' imposes a limitation on only federal, not state, legislative efforts." *Bach,* 408 F.3d at 84. Three years after that, in 2008, the Supreme Court issued its watershed decision *District of Columbia v. Heller,*[10] in which it undertook an exhaustive review of the text and history of the Second Amendment and concluded for the first time that the Second Amendment conferred an individual, as opposed to collective, right to keep and bear arms. 554 U.S. at 595. The question before the Court in *Heller* was the constitutionality of several District of Columbia statutes that generally prohibited the possession of handguns and required any other lawful firearms in the home to be inoperable – *i.e.,* unloaded and disassembled or bound by a trigger lock or similar device. *Id.* at 574-75. The Court held that the "ban on handgun possession in the home violates the Second Amendment, as does [the] prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Id.* at 635.

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of Christina Nikolov. (Doc. 39-12.) "Nance Decl." refers to the Declaration of Johnnie Nance. (Doc. 39-13.) "Marcucci-Nance Decl." refers to the Declaration of Anna Marcucci-Nance. (Doc. 39-10.) "Detmer Decl." refers to the Declaration of Eric Detmer. (Doc. 39-11.)

[10] *Heller* is discussed in greater detail below; it is mentioned here only to place Plaintiffs' claims in jurisprudential context.

Two years later, in *McDonald v. City of Chicago,* the Supreme Court held that the Fourteenth Amendment's Due Process Clause incorporates the Second Amendment right recognized in *Heller,* thereby extending that right as against the states. 130 S. Ct. at 3050.

On July 15, 2010, less than a month after the Supreme Court issued its decision in *McDonald,* Kachalsky, Nikolov, and SAF filed the Complaint in the instant action. (Doc. 1.) On November 8, 2010, they joined Detmer, Nance, and Marcucci-Nance in filing a First Amended Complaint ("FAC"), (Doc. 18), the operative complaint for the purposes of the instant motions. In it, Plaintiffs assert claims under 42 U.S.C. § 1983 ("Section 1983") for violations of the Second Amendment and the Equal Protection Clause of the Fourteenth Amendment. Specifically, they claim that Section 400.00(2)(f)'s "proper cause" requirement violates the Second Amendment both facially and as applied to them, and that it classifies individuals on the basis of "irrelevant, arbitrary, and speculative criteria in the exercise of a fundamental right." (FAC ¶¶ 41, 43.) Plaintiffs seek to enjoin enforcement of Section 400.00(2)(f)'s "proper cause" requirement, as well as an order directing Defendants to issue Plaintiffs permits, declaratory relief consistent with the requested injunctive relief, costs, and fees. (*Id.* at 11.) Defendants filed Motions to Dismiss the First Amended Complaint, (Docs. 30, 33); Plaintiffs filed a Motion for Summary Judgment, (Doc. 39);

and the State Defendants filed a Cross-Motion for Summary Judgment, (Doc. 42).

II. DISCUSSION

A. Motions to Dismiss

Defendants' Motions to Dismiss largely concern threshold issues. As such, I consider these motions first. While Defendants briefly touch upon the question of Section 400.00(2)(f)'s constitutionality in these motions, they address that issue in far greater detail in briefing submitted in connection with the Motion and Cross-Motion for Summary Judgment. I therefore consider Defendants' constitutional arguments in conjunction with those motions.

1. Legal Standards

Defendants bring their Motions to Dismiss under Federal Rules of Civil Procedure 12(b)(1), for lack of subject matter jurisdiction, and 12(b)(6), for failure to state a claim.

a. Rule 12(b)(1)

"A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States,* 201 F.3d 110, 113 (2d Cir. 2000). "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Id.*

Defendants argue that the Court lacks subject matter jurisdiction because Plaintiffs lack standing and the case is not ripe for adjudication. I discuss the individual standards for those doctrines below.

b. Rule 12(b)(6)

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555 (alteration, citations, and internal quotation marks omitted). While Federal Rule of Civil Procedure 8 "marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, . . . it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal,* 129 S. Ct. at 1950.

In considering whether a complaint states a claim upon which relief can be granted, the court may "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth," and then determine whether the remaining well-pleaded factual allegations, accepted as true, "plausibly give rise to an entitlement to relief." *Id.* Deciding whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.'" *Id.* (second alteration in original) (quoting Fed. R. Civ. P. 8(a)(2)).

c. Documents the Court May Consider

When deciding a motion to dismiss, the Court is entitled to consider the following:

> (1) facts alleged in the complaint and documents attached to it or incorporated in it by reference, (2) documents "integral" to the complaint and relied upon in it, even if not attached or incorporated by reference, (3) documents or information contained in [a] defendant's motion papers if plaintiff has knowledge or possession of the material and relied on it in framing the complaint, (4) public disclosure documents required by law to be, and

> that have been, filed with the Securities and Exchange Commission, and (5) facts of which judicial notice may properly be taken under Rule 201 of the Federal Rules of Evidence.

Weiss v. Inc. Vill. of Sag Harbor, 762 F. Supp. 2d 560, 567 (E.D.N.Y. 2011) (internal quotation marks omitted); *accord Chambers v. Time Warner, Inc.,* 282 F.3d 147, 152-53 (2d Cir. 2002). A document is considered "integral" to the complaint where the plaintiff has "reli[ed] on the terms and effect of [the] document in drafting the complaint." *Chambers,* 282 F.3d at 153 (emphasis omitted). Such reliance "is a necessary prerequisite to the court's consideration of the document on a dismissal motion; mere notice or possession is not enough." *Id.* If a document outside of the complaint is to form the basis for dismissal, however, two requirements must be met in addition to the requirement that the document be "integral" to the complaint: (1) "it must be clear on the record that no dispute exists regarding the authenticity or accuracy of the document"; and (2) "[i]t must also be clear that there exist no material disputed issues of fact regarding the relevance of the document." *Faulkner v. Beer,* 463 F.3d 130, 134 (2d Cir. 2006).

2. Analysis

a. Standing and Ripeness

i. Standards

Article III, Section 2 of the U.S. Constitution restricts federal court jurisdiction to "Cases" and

"Controversies." U.S. Const. art. III, § 2; *Vt. Right to Life Comm., Inc. v. Sorrell,* 221 F.3d 376, 381 (2d Cir. 2000). "Constitutional standing is the threshold question in every federal case, determining the power of the court to entertain the suit." *Leibovitz v. N.Y. City Transit Auth.,* 252 F.3d 179, 184 (2d Cir. 2001) (internal quotation marks omitted). To establish standing within the meaning of Article III,

> first, the plaintiffs "must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Second, "there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Moreover, the "party invoking federal jurisdiction bears the burden of establishing these elements."

Field Day, LLC v. Cnty. of Suffolk, 463 F.3d 167, 175 (2d Cir. 2006) (alterations in original) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)).

The ripeness doctrine "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hospitality Ass'n v. Dep't of Interior,* 538 U.S. 803, 808 (2003) (internal quotation marks omitted).

Its purpose is to "ensure that a dispute has generated injury significant enough to satisfy the case or controversy requirement of Article III" and "prevent[ ] a federal court from entangling itself in abstract disagreements over matters that are premature for review because the injury is merely speculative and may never occur." *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals,* 282 F.3d 83, 90 (2d Cir. 2002). In determining whether a claim that challenges a law is ripe for review, the Court must consider whether the issue is fit for adjudication as well as the hardship to the plaintiff that would result from withholding review. *Abbott Labs. v. Gardner,* 387 U.S. 136, 149 (1967), *overruled on other grounds, Califano v. Sanders,* 430 U.S. 99 (1977); *Marchi v. Bd. of Coop. Educ. Servs.,* 173 F.3d 469, 478 (2d Cir. 1999). "Standing and ripeness are closely related doctrines that overlap 'most notably in the shared requirement that the [plaintiff's] injury be imminent rather than conjectural or hypothetical.'" *N.Y. Civil Liberties Union v. Grandeau,* 528 F.3d 122, 130 n.8 (2d Cir. 2008) (second alteration in original) (quoting *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.,* 462 F.3d 219, 225 (2d Cir. 2006)).

ii. Individual Plaintiffs

With respect to Individual Plaintiffs, Defendants' arguments as to standing and ripeness are essentially one and the same: they argue that because Kachalsky and Nikolov failed to apply for full-carry permits post – *McDonald,* and because Detmer, Nance, and

Marcucci-Nance's claims precede any state court ruling interpreting New York's "proper cause" requirement post-*McDonald,* their purported injuries are speculative. That is, they argue that Individual Plaintiffs' injuries have not yet manifested themselves in post-*McDonald* permit denials and/or adverse court rulings. I therefore consider the ripeness arguments together with and as a part of the standing inquiry. *See, e.g., Grandeau,* 528 F.3d at 130 n.8; *Brooklyn Legal Servs.,* 462 F.3d at 225-26. I find that Plaintiffs have standing and that their claims are ripe.

"As a general rule, 'to establish standing to challenge an allegedly unconstitutional policy, a plaintiff must submit to the challenged policy.'" *Prayze FM v. FCC,* 214 F.3d 245, 251 (2d Cir. 2000) (quoting *Jackson-Bey v. Hanslmaier,* 115 F.3d 1091, 1096 (2d Cir. 1997)); *see Bach v. Pataki,* 289 F. Supp. 2d 217, 223 (N.D.N.Y. 2003) ("In many cases, requiring litigants to actually apply for a license before challenging a licensing scheme prevent[s] courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also . . . protect[s] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.") (alterations in original) (internal quotation marks omitted), *aff'd,* 408 F.3d 75. Each of the Individual Plaintiffs have submitted to Section 400.00(2)(f), having applied for, and subsequently been denied, full-carry permits under the statute. (FAC ¶¶ 26, 30, 32-37.) Defendants'

characterization of Individual Plaintiffs' injuries as "speculative" ignores the plain fact that these very permit denials constitute actual, ongoing injuries not contingent upon any future event. Recent caselaw in the area of handgun regulation is instructive. Notably, in *Parker v. District of Columbia,* 478 F.3d 370 (D.C. Cir. 2007), *aff'd sub nom. Heller,* 554 U.S. 570, the D.C. Circuit observed that "a license or permit denial pursuant to a state or federal administrative scheme [constitutes] an Article III injury," *id.* at 376, and that by dint of the fact that Heller applied for and was denied a registration certificate to own a firearm, he had standing to challenge the D.C. firearm registration system:

> Heller has invoked his rights under the Second Amendment to challenge the statutory classifications used to bar his ownership of a handgun under D.C. law, and the formal process of application and denial, however routine, makes the injury to Heller's alleged constitutional interest concrete and particular. He is not asserting that his injury is only a threatened prosecution, nor is he claiming only a general right to handgun ownership; he is asserting a right to a registration certificate, the denial of which is his distinct injury.

Id.

The D.C. Circuit recently reaffirmed this view in *Dearth v. Holder,* 641 F.3d 499 (D.C. Cir. 2011). There, the plaintiff, an American citizen who lived in Canada, challenged a federal regulation prohibiting

people living outside the United States from lawfully purchasing firearms in the United States. *Id.* at 500-01. The plaintiff sought to purchase firearms to stow with his relatives in Ohio, and had twice attempted to purchase firearms but encountered difficulties with completing the required paperwork asking for his state of residence. *Id.* at 501. The court stated,

> We agree with [plaintiff] that the Government has denied him the ability to purchase a firearm and he thereby suffers an ongoing injury. [Plaintiff's] injury is indeed like that of the plaintiff in *Parker,* who had standing to challenge the District of Columbia's ban on handguns because he had been denied a registration certificate to own a handgun. As we there stated, a license or permit denial pursuant to a state or federal administrative scheme that can trench upon constitutionally protected interests gives rise to an Article III injury; the formal process of application and denial, however routine, suffices to show a cognizable injury.

Id. at 502 (citations and internal quotation marks omitted).[11] I find *Parker* and *Dearth* persuasive. The State Defendants' denial of the Individual Plaintiffs' permit applications constitutes an actual and ongoing

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[11] *Dearth* reversed *Hodgkins v. Holder* – on which Defendants rely in their papers – in which the district court held that "past refusals of merchants to sell firearms to [plaintiffs] are not enough, without more, to provide the basis for a[ ] [declaratory judgment] action." 677 F. Supp. 2d 202, 204 (2010).

injury because it forestalls the exercise of their alleged constitutional rights.[12]

Defendants' attempt to shift the focus of this inquiry to future, contingent events in an attempt to describe the purported injuries as "speculative" is unavailing. Defendants' reliance upon *Golden v. Zwickler,* 394 U.S. 103 (1969), demonstrates how their focus is misplaced. In that case, the Court determined that a plaintiff seeking to challenge a New York statute criminalizing the distribution of anonymous election campaign literature did not have standing where he sought only to distribute literature criticizing a particular congressman who, at the time the case was heard, had left the House of Representatives to begin a 14-year term on the New York State Supreme Court. *Id.* at 109-10 & n.4. The Court held that because "the prospect was neither real nor immediate of a campaign involving the Congressman, it was wholly conjectural that another occasion might arise when [the plaintiff] might be prosecuted for distributing the handbills referred to in the complaint," and his "assertion in his brief that the former Congressman *can be* 'a candidate for Congress again' is hardly a substitute for evidence that this is a prospect of 'immediacy and reality.'" *Id.* at 109 (emphasis added). In sharp contrast to *Golden,* there is no contingency here upon which Individual Plaintiffs' injuries are

[12] For purposes of the standing inquiry, the Court assumes the validity of Individual Plaintiffs' claims that their rights have been violated. *See Lujan,* 504 U.S. at 561.

conditioned; Defendants' permit denials have actually prevented – and indeed continue to prevent – Individual Plaintiffs from being able to exercise their alleged constitutional right. *See Dearth,* 641 F.3d at 503 (distinguishing *Golden* on similar grounds).

Further, Individual Plaintiffs' injuries may not be labeled as speculative, as Defendants argue, simply because they have failed to submit post-*McDonald* applications for full-carry permits. That state licensing officers might grant Individual Plaintiffs' second full-carry permit applications were they to submit such applications at some point in the future does not suggest that their current injuries are speculative – at most, it suggests that the *continuation* of their injuries *past that point* is speculative. But putting that aside, Defendants' argument is unavailing in light of the fact that the decisions denying Detmer, Nance, and Marcucci-Nance's applications were issued after the Court's decision in *McDonald.* (FAC ¶¶ 33, 35, 37.) Crucially, the decisions issued with respect to Nance and Marcucci-Nance reaffirm that in order to meet the "proper cause" requirement of Section 400.00(2)(f), applicants must demonstrate a "need for self protection distinguishable from that of the general public," and cite as support the Appellate Division's decision upholding the October 2008 denial of Kachalsky's full-carry permit application. (*Id.* ¶¶ 35, 37; Rotini Decl. Exs. D-E.)[13] *See Kachalsky,* 884

[13] "Rotini Decl." refers to the Declaration of Melissa-Jean Rotini in Support of Motion to Dismiss Amended Complaint.

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N.Y.S.2d 877. These decisions signal the continued vitality of the "proper cause" requirement as a basis on which New York handgun licensing officers deny full-carry permit applications, and demonstrate that were the Individual Plaintiffs to submit new applications post-*McDonald* (for Detmer, Nance, and Marcucci, their second post-*McDonald* applications; for Kachalsky and Nikolov, their first), they would be futile. Individual Plaintiffs cannot be required to engage in a "futile gesture as a prerequisite for adjudication in federal court." *Williams v. Lambert,* 46 F.3d 1275, 1280 (2d Cir. 1995); *cf. Bach,* 408 F.3d at 82-83 (plaintiff's failure to apply did not deprive him of standing to challenge concealed-firearm statute because he did not live or work in New York, as required by the statute, and thus "[i]mposing a filing requirement would force [him] to complete an application for which he is statutorily ineligible").[14]

(Doc. 33-1.) I may consider the decisions issued with respect to Nance and Marcucci-Nance, as they are quoted in the First Amended Complaint. *See McCarthy v. Dun & Bradstreet Corp.,* 482 F.3d 184, 191 (2d Cir. 2007).

[14] Defendants attempt to distinguish *Bach* on the basis that the in-state residency/work requirement there was written into the statute, whereas here the requirement that applicants demonstrate a "need for self protection distinguishable from that of the general public" does not appear in the statute and is instead derived from state courts' interpretation of the phrase "proper cause," (Reply Memorandum of Law in Further Support of the State Defendants' Motion to Dismiss the Complaint, (Doc. 37), at 10), but the distinction is unavailing. Plaintiffs' claims in essence target the "proper cause" requirement, not the interpretation

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Nor were Individual Plaintiffs required to bring their post-*McDonald* federal constitutional challenge in state court before resorting to this Court. It is well-settled that "[w]hen federal claims are premised on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) – as they are here – [a plaintiff is] not required [to] exhaust[ ] . . . state judicial or administrative remedies." *Steffel v. Thompson,* 415 U.S. 452, 472-73 (1974) (citing *McNeese v. Bd. of Educ.,* 373 U.S. 668 (1963); *see Monroe v. Pape,* 365 U.S. 167 (1961)). This rule reflects "the paramount role Congress has assigned to the federal courts to protect constitutional rights." *Id.* Defendants argue that *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442 (2008), compels a finding that the case is premature for adjudication, but that case does not speak to the situation here, where a plaintiff challenges existing state court interpretations of a state statute in federal court. Instead, in *Washington State Grange,* the petitioners sought to challenge a state ballot initiative that had never before been subject to state review: indeed, "[t]he State ha[d] had no opportunity to implement [the initiative], and its courts ha[d] had no

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thereof: they argue that the right to carry handguns in public is absolute and that individuals cannot be required to demonstrate proper cause to exercise that purported right – not that "proper cause" should somehow be interpreted differently. In any event, to the extent that the instant case does not comport with *Bach,* the standing analysis remains unaffected, as, unlike *Bach,* the Individual Plaintiffs here actually submitted applications under the relevant handgun statute.

occasion to construe the law in the context of actual disputes . . . , or to accord the law a limiting construction to avoid constitutional questions." *Id.* at 450. And while it is true that a plaintiff may be required to exhaust his or her state appellate remedies when he or she has already initiated a proceeding in state court, that is an issue properly raised not in the context of ripeness or standing, but rather abstention – which I address below.

iii. SAF

SAF asserts both organizational and representational standing. While it is true that organizations can have standing on their own behalf when they have suffered injuries, *see Warth v. Seldin,* 422 U.S. 490, 511 (1975), SAF has not sufficiently alleged an injury. It maintains that it "promot[es] the exercise of the right to keep and bear arms" and engages in "education, research, publishing and legal action focusing on the [c]onstitutional right to privately own and possess firearms," (FAC ¶ 6), but such activates [sic], standing alone, are plainly insufficient to give rise to standing. SAF also maintains that it has "over 650,000 members and supporters nationwide." (*Id.*) An organization may sue on behalf of its members, but only if "[(1)] its members would have standing to sue in their own right, [(2)] the interests at stake are germane to the organization's purpose, and [(3)] neither the claim asserted nor the relief requested requires individual members' participation in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*

(TOC), Inc., 528 U.S. 167, 181 (2000). SAF cannot meet the first requirement, as it fails to allege anywhere in the First Amended Complaint that it has any members who have applied for and been rejected full-carry permits under Section 400.00(2)(f). SAF alleges in conclusory fashion that the various Defendants have "enforced the challenged laws, customs and practices against . . . SAF's membership," (FAC ¶¶ 7-11), but it has neither identified particular members who have standing, nor specified how they would have standing to sue in their own right. It therefore fails to satisfy the first requirement identified above. *See, e.g., FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 235 (1990).

b. Abstention

Defendants argue that this Court should abstain from deciding this case under the doctrines laid down in *Younger v. Harris,* 401 U.S. 37 (1971), *Railroad Commission v. Pullman Co.,* 312 U.S. 496 (1941), and/or *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943). I find that none of these abstention doctrines apply.

i. *Younger* Abstention

In *Younger v. Harris,* the Supreme Court held that federal courts must abstain from exercising jurisdiction over federal constitutional claims that involve or call into question ongoing state proceedings. 401 U.S. at 43-44. "Although the *Younger* abstention doctrine was born in the context of state criminal

proceedings, it now applies with equal force to state administrative proceedings." *Diamond "D" Constr. Corp. v. McGowan,* 282 F.3d 191, 198 (2d Cir. 2002) (citing *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.,* 477 U.S. 619, 627 (1986)). "*Younger* abstention is required when three conditions are met: (1) there is an ongoing state proceeding; (2) an important state interest is implicated in that proceeding; and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of the federal constitutional claims." *Id.* (citing *Grieve v. Tamerin,* 269 F.3d 149, 152 (2d Cir. 2001)). "Despite the strong policy in favor of abstention, a federal court may nevertheless intervene in a state proceeding upon a showing of 'bad faith, harassment or any other unusual circumstance that would call for equitable relief.'" *Id.* (quoting *Younger,* 401 U.S. at 54).

Younger abstention does not apply here because there are no ongoing state proceedings. "The Supreme Court has clearly held that a would-be plaintiff who has been subjected to a state proceeding which he seeks to challenge in federal court must first exhaust all available state appellate remedies. . . ." *Kirschner v. Klemons,* 225 F.3d 227, 234 (2d Cir. 2000) (citing *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 608 (1975)). Here, Kachalsky initiated an Article 78 proceeding in state court to challenge the denial of his full-carry permit application, but he exhausted all available state court remedies, appealing the Appellate Division's decision to the New York Court of Appeals, where his appeal was summarily dismissed. *See*

Kachalsky II, 14 N.Y.3d at 743. Once the Court of Appeals dismissed Kachalsky's appeal, there ceased to be an ongoing state proceeding with which lower federal courts were capable of interfering. *See, e.g., Aretakis v. Comm. on Prof'l Standards,* No. 08-9712, 2009 WL 1905077, at *5 (S.D.N.Y. July 1, 2009) (where New York Court of Appeals denied plaintiff's application for leave to appeal Appellate Division's order suspending his license to practice law, court held that "no 'pending state proceeding' exists, and the *Younger* abstention doctrine cannot be applied"); *Ponterio v. Kaye,* No. 06-6289, 2007 WL 141053, at *6 (S.D.N.Y. Jan. 22, 2007) ("[Plaintiff] has litigated and lost his state claims up to the New York Court of Appeals. As *Younger* requires, he appears to have exhausted his state-court remedies.").

Nor are there any ongoing state proceedings with respect to the remaining Individual Plaintiffs, as none of them commenced state court proceedings to challenge the denial of their full carry permit applications. *See Coastal Distribution, LLC v. Town of Babylon,* 216 F. App'x 97, 102 (2d Cir. 2007) (where plaintiff did not challenge zoning board of appeals' decision via an Article 78 proceeding, *Younger* did not apply; caselaw "gives no support to the proposition that the availability of an Article 78 action *after* the completion of state administrative proceedings renders them ongoing perpetually").

ii. *Pullman* Abstention

Pullman abstention applies when "difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Haw. Hous. Auth. v. Midkiff,* 467 U.S. 229, 236 (1984). In the Second Circuit,

> [t]hree basic conditions must be present to trigger *Pullman* abstention: "First, the state statute must be unclear or the issue of state law uncertain; second, resolution of the federal issue must depend upon the interpretation given to the ambiguous state provision; and third, the state law must be susceptible of an interpretation that would avoid or modify the federal constitutional issue."

Williams v. Lambert, 46 F.3d 1275, 1281 (2d Cir. 1995) (internal quotation marks omitted). Abstention under this doctrine is limited to uncertain questions of state law because "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Colo. River Water Conservation Dist. v. United States,* 424 U.S. 800, 813 (1976). In fact, even when the three conditions specified above are fulfilled, the court is "not required to abstain, and, to the contrary, important federal rights can outweigh the interests underlying the *Pullman* doctrine." *Hartford Courant Co. v. Pellegrino,* 380 F.3d 83, 100 (2d Cir. 2004) (internal quotation marks omitted). Moreover, "abstention should not be ordered merely to await an attempt to vindicate the claim in a state court." *Wisconsin v. Constantineau,* 400 U.S. 433, 439 (1971).

As noted above, courts in New York have consistently interpreted Section 400.00(2)(f)'s "proper cause" requirement to mean "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." *See, e.g., Bando,* 735 N.Y.S.2d at 662; *Kaplan,* 673 N.Y.S.2d at 68; *Williams,* 656 N.Y.S.2d at 627; *Klenosky,* 428 N.Y.S.2d at 257. Where, as here, state courts have settled upon an interpretation of the statute at issue, *Pullman* abstention is not warranted. *See, e.g., Commack Self-Service Kosher Meats v. Rubin,* 986 F. Supp. 153, 157-58 (E.D.N.Y. 1997) (*Pullman* abstention not applicable "[b]ecause there exist[ed] a well established interpretation of the . . . [l]aws by the New York state courts, and because the constitutional challenges raised by plaintiffs [were] not entangled in a skein of state law that must be untangled before the federal case can proceed") (internal quotation marks omitted).

iii. *Burford* Abstention

The *Burford* abstention doctrine serves to "protect[ ] complex state administrative processes from undue federal interference." *New Orleans Pub. Serv., Inc. v. Council of New Orleans,* 491 U.S. 350, 362 (1989) (internal quotation marks omitted). It does not, however, "require abstention whenever there exists such a process, or even in all cases where there is a potential for conflict with state regulatory law or

policy." *Id.* (internal quotation marks omitted). A federal court should abstain under *Burford*

> (1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

Id. at 361 (internal quotation marks omitted); *accord Dittmer v. Cnty. of Suffolk,* 146 F.3d 113, 116 (2d Cir. 1998). In evaluating whether the exercise of federal review would be disruptive of state efforts to establish a coherent policy, district courts should consider "(1) the degree of specificity of the state regulatory scheme; (2) the need to give one or another debatable construction to a state statute; and (3) whether the subject matter of the litigation is traditionally one of state concern." *Hachamovitch v. DeBuono,* 159 F.3d 687, 697 (2d Cir. 1998).

Burford abstention does not apply here because Plaintiffs' claims do not present an "ambiguous state law issue," and do not seek to "involve federal courts in supervising, interrupting, or meddling in state policies by interfering in state regulatory matters"; instead, the claims present "a direct challenge to the constitutionality of a state statute, a controversy federal courts are particularly suited to adjudicate." *Alliance of Am. Insurers v. Cuomo,* 854 F.2d 591, 600-01

(2d Cir. 1988) (declining, on same grounds, to apply *Burford* abstention to constitutional challenge to provision of New York Medical and Dental Malpractice and Professional Conduct Act imposing moratorium on medical malpractice insolvencies and authorizing stabilization of rates for medical malpractice coverage). Though not binding on this Court, particularly instructive is a recent case from the District of Maryland, *Woollard v. Sheridan,* No. 10-2068, 2010 WL 5463109 (D. Md. Dec. 29, 2010), in which the court declined to abstain from passing on the constitutionality of a nearly identical statute – namely, a state law requiring that applicants for full-carry handgun licenses demonstrate "good and substantial reason to wear, carry, or transport a handgun, such as a finding that the permit is necessary as a reasonable precaution against apprehended danger." *Id.* at *1. The court held that neither of the two grounds for *Burford* abstention was applicable because

> Maryland appellate courts have repeatedly examined and interpreted the statute at issue in this case, and there is no reason to believe this case will present a new question of state law. . . . In addition, where, as here, a plaintiff "launches a *facial* attack on [a] state statute [ ] *as a whole*" abstention on the second ground is not appropriate because the potential relief – an injunction barring the enforcement of the statute – "could not possibly threaten [the statute's] *uniform* application."

Id. at *5 n.6 (quoting *Martin v. Stewart,* 499 F.3d 360, 367 (4th Cir. 2007)) (second, third, and fourth alterations,

and emphases in original) (citations omitted). That rationale applies with equal force here and compels rejection of Defendants' arguments as to *Pullman* abstention.

c. *Res Judicata*

Defendants argue that Kachalsky's Article 78 proceeding and the State Defendants' rejection of Individual Plaintiff's permit applications have claim preclusive effect on the Section 1983 claims currently before this Court. A federal court assessing the effect of a state court judgment looks to the law of the state in which the judgment was entered, *Marrese v. Am. Acad. of Orthopedic Surgeons,* 470 U.S. 373, 380 (1985), here, New York. Under New York's *res judicata* doctrine,

> a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation. . . . Additionally, . . . once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy.

In re Hunter, 4 N.Y.3d 260, 269 (2005) (citations and internal quotation marks omitted).

I find that Kachalsky's Article 78 proceeding does not bar him from bringing the instant as-applied and facial challenges to Section 400.00(2)(f). Whether a claim that was not raised in the previous action could have been raised therein "depends in part on . . . 'whether the facts essential to support the second were present in the first.'" *Marvel Characters, Inc. v. Simon,* 310 F.3d 280, 287 (2d Cir. 2002) (emphasis and internal quotation marks omitted). Consequently, *res judicata* "does not preclude litigation of events arising after the filing of the complaint that formed the basis of the first lawsuit." *Curtis v. Citibank, N.A.,* 226 F.3d 133, 139 (2d Cir. 2000). Similarly, "[m]odifications in controlling legal principles could render a previous determination inconsistent with prevailing doctrine, and changed circumstances may sufficiently alter the factual predicate such that new as-applied claims would not be barred by the original judgment" on *res judicata* grounds. *Monahan v. N.Y. City Dep't of Corr.,* 214 F.3d 275, 290 (2d Cir. 2000) (citations and internal quotation marks omitted). Kachalsky's constitutional challenges are based on *McDonald's* application of the Second Amendment, as discussed in *Heller,* to the states. At the time of Kachalsky's Article 78 proceeding, however, the prevailing law was that Second Amendment did not apply to the states. *See Bach,* 408 F.3d at 84 (New York's handgun licensing scheme did not infringe plaintiff's Second Amendment "right to keep and bear arms," which "imposes a limitation on only federal, not state, legislative efforts"). He therefore could not have based his prior proceeding on the Second

Amendment's applicability to the states, and, because of that, his constitutional challenges are not precluded. *See, e.g., Bronx Household of Faith v. Bd. of Educ.,* 226 F. Supp. 2d 401, 412 (S.D.N.Y. 2002) ("[T]he Supreme Court has cast doubt upon the Court of Appeals' majority opinion. . . . Because there has been a change in the law, another look at the situation is justified. Concomitantly, the change in the law is sufficiently serious to reject defendants' assertion that plaintiff's preliminary injunction motion should be denied on the grounds of res judicata or collateral estoppel."), *aff'd,* 331 F.3d 342 (2d Cir. 2003).

Nor are the claims brought by Nikolov, Detmer, Nance, and Marcucci-Nance precluded because their applications for full-carry permits were denied. *Res judicata* applies to "give conclusive effect to the quasi-judicial determinations of administrative agencies, when rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunals employing procedures substantially similar to those used in a court of law." *Ryan v. N.Y. Tel. Co.,* 62 N.Y.2d 494, 499 (1984) (citations omitted). A review of relevant authority and the materials submitted in connection with the Motions to Dismiss, however, does not support the conclusion that the procedures for applying for a full-carry permit in any way resemble those used in a court of law, *see Shapiro v. N.Y. City Police Dep't,* 595 N.Y.S.2d 864, 867 (Sup. Ct. N.Y. Cnty. 1993) (only reference to judicial hearing in New York gun licensing regulations is in connection with suspension and revocation

procedures), and, in any event, even were the State Defendants' actions to qualify as quasi-judicial, Individual Plaintiffs neither raised, nor had the opportunity to raise, arguments regarding the constitutionality of Section 400.00(2)(f) in submitting to the State Defendants their applications for full-carry permits. *See generally* Tomari Decl. Exs. G-J (Nikolov, Detmer, Nance, and Marcucci-Nance's permit applications).[15]

d. *Rooker-Feldman* Doctrine

Finally, Defendants argue that Kachalsky's claims are barred by the *Rooker-Feldman* doctrine. *Rooker-Feldman* is a limited doctrine aimed at "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review of those judgments." *McKithen v. Brown,* 626 F.3d 143, 154 (2d Cir. 2010) (internal quotation marks omitted).

> *Rooker-Feldman* directs federal courts to abstain from considering claims when four requirements are met: (1) the plaintiff lost in state court, (2) the plaintiff complains of

[15] The Court may consider the permit applications in deciding the Motions to Dismiss, as the applications are discussed in the First Amendment Complaint, (FAC ¶¶ 30, 32, 34, 36), and incorporated by reference therein. *See, e.g., Webster v. Wells Fargo Bank, N.A.,* No. 08-10145, 2009 WL 5178654, at *12 n.8 (S.D.N.Y. Dec. 23, 2009) (loan application discussed in complaint and thereby incorporated by reference).

> injuries caused by the state court judgment, (3) the plaintiff invites district court review of that judgment, and (4) the state court judgment was entered before the plaintiff's federal suit commenced.

Id. At a minimum, Defendants' argument fails because Kachalsky does not complain that he was injured by the state court judgment – *i.e.,* by the decision rendered in the Article 78 proceeding – but rather that he was injured by Section 400.00(2)(f) and by Cacace's interpretation of the statute and application of it to Kachalsky in denying his application for a full-carry permit. *See Skinner v. Switzer,* 131 S. Ct. 1289, 1298 (2011) ("[Petitioner] does not challenge the adverse [Texas Court of Criminal Appeals] decisions themselves; instead, he targets as unconstitutional the Texas statute they authoritatively construed. . . . [A] state-court decision is not reviewable by lower federal courts, but a statute or rule governing the decision may be challenged in a federal action. [Petitioner's] federal case falls within the latter category.") (footnote omitted). *Rooker-Feldman* therefore does not bar Kachalsky's claims.

e. County as a Proper Party

In its Motion to Dismiss, the County puts forth the separate argument that it is not a proper party to this lawsuit because it does not effectuate the grant or denial of full-carry permits and plays a limited role in the permitting process under applicable state law. The County notes that, although county

law enforcement conducts the investigations that grow out of full-carry permit applications, the state's licensing officers (here, the State Defendants) make independent and ultimate determinations regarding such applications. As such, they argue, Plaintiffs have failed to allege that they were denied any constitutional right by the County, as required by Section 1983. *See Dove v. Fordham Univ.,* 56 F. Supp. 2d 330, 336 (S.D.N.Y. 1999) ("In order to hold a municipality liable as a 'person' within the meaning of § 1983, [a plaintiff] must establish that the municipality itself was somehow at fault."). In response, Plaintiffs note that defendants sued under Section 1983 are "responsible for the natural consequences of [their] actions," and "may be held liable for those consequences attributable to reasonably foreseeable intervening forces, including the acts of third parties." *Kerman v. City of N.Y.,* 374 F.3d 93, 126 (2d Cir. 2004) (alteration in original) (internal quotation marks omitted). Here, Plaintiffs argue, it was reasonably foreseeable that the State Defendants would heed County law enforcement's recommendations to deny Plaintiffs' full-carry permit applications, and that this is sufficient to make the County a proper party.

In light of the disposition below, I need not decide whether the County is a proper party and assume for the sake of argument that it is. I now turn to the question of the as-applied and facial constitutionality of Section 400.00(2)(f), which I address in the context of Plaintiffs' Motion for Summary Judgment and

State Defendants' Cross-Motion for Summary Judgment.

B. Motion and Cross-Motion for Summary Judgment

1. Legal Standard

Summary judgment is appropriate when "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). "[T]he dispute about a material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A fact is "material" if it "might affect the outcome of the suit under the governing law. . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* On a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [her] favor." *Id.* at 255. The movant bears the initial burden of demonstrating the absence of a genuine issue of material fact, and, if satisfied, the burden then shifts to the non-movant to present evidence sufficient to satisfy every element of the claim. *Holcomb v. Iona Coll.,* 521 F.3d 130, 137 (2d Cir. 2008) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986)). "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]."

Anderson, 477 U.S. at 252. Moreover, the non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986), and she "may not rely on conclusory allegations or unsubstantiated speculation," *Fujitsu Ltd. v. Fed. Express Corp.,* 247 F.3d 423, 428 (2d Cir. 2001) (internal quotation marks omitted).

"A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials. . . ." Fed. R. Civ. P. 56(c)(1)(A). Where, as here, affidavits are used to support or oppose the motion, they "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant . . . is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4); *see Major League Baseball Props., Inc. v. Salvino, Inc.,* 542 F.3d 290, 310 (2d Cir. 2008).

2. Second Amendment Claim

Plaintiffs claim that Section 400.00(2)(f) violates the Second Amendment, which reads, "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. An evaluation of Plaintiffs' claim must necessarily start

with a discussion of the Second Amendment right as recognized in *Heller*.

a. *Heller* and the Scope of the Second Amendment

As noted above, *Heller* resolved the long-standing question as to whether the Second Amendment guarantees an individual right to keep and bear arms or merely a collective right to do so in connection with service in a militia, holding that "[t]here seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." 554 U.S. at 595. The Court observed that, like the First and Fourth Amendments, the Second Amendment "codified a pre-existing right," *id.* at 592 (emphasis omitted), and that the amendment's prefatory clause, while not restricting the scope of the right, did "announce[ ] the purpose for which the right was codified: to prevent elimination of the militia," *id.* at 599. The Court warned, however, that "[t]he prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting" – even going so far as to refer to individual self-defense as the "central component" of the right. *Id.* (emphasis omitted).

As so many courts considering statutory challenges post-*Heller* have observed, the *Heller* Court, while not setting the outer bounds of the Second

Amendment, explicitly stated that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Id.* at 626. Crucially, the Court observed, "From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* (citations omitted). For example, the Court stated, "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues," and

> nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. at 626-27 (emphasis added). And as a footnote to this statement, the Court specified that it was "identify[ing] these presumptively lawful regulatory measures only as examples," and that the "list does not purport to be exhaustive." *Id.* at 627 n.26.[16]

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[16] The Court reiterated this point in *McDonald*:

> It is important to keep in mind that *Heller,* while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not "a right to keep and carry

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What very clearly did not fall within the ambit of presumptively lawful gun regulations were the District of Columbia's statutes banning the possession of handguns in the home and requiring that other lawful firearms be inoperable. The Court observed that "[t]he Constitution leaves the District of Columbia a variety of tools for combating [the] problem [of handgun violence], including some measures regulating handguns," "[b]ut the enshrinement of constitutional rights necessarily takes certain policy choices off the table. . . . includ[ing] the absolute prohibition of handguns held and used *for self-defense in the home*." *Id.* at 636 (emphasis added).

This emphasis on the Second Amendment's protection of the right to keep and bear arms for the purpose of "self-defense in the home" permeates the

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> any weapon whatsoever in any manner whatsoever and for whatever purpose." We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as "prohibitions on the possession of firearms by felons and the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." We repeat those assurances here. Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms.

130 S. Ct. at 3047 (citations omitted). "[S]tate and local experimentation with reasonable firearms regulations," it observed, "will continue under the Second Amendment." *Id.* at 3046 (internal quotation marks omitted).

Court's decision and forms the basis for its holding – which, despite the Court's broad analysis of the Second Amendment's text and historical underpinnings, is actually quite narrow. For example, in considering the statutes at issue there, the Court noted that their prohibitions "extend[ ] . . . to the home, where the need for defense of self, family, and property is most acute." *Id.* at 628. It discussed the several reasons why citizens might prefer handguns for "home defense," concluding that "handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Id.* at 629. In considering the Second Amendment's scope, the Court stated, "whatever else it 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 635. The Court limited its holding as follows: "[W]e hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Id.* at 635.[17]

[17] It has since repeated: "In *Heller,* we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense." *McDonald,* 130 S. Ct. at 3050.

b. Relationship Between Section 400.00(2)(f) and the Second Amendment Right Recognized in *Heller*

The scope of the right guaranteed by the Second Amendment was not the only matter the Court left undefined in *Heller*; it also declined to articulate the level of scrutiny that applies to claims, such as Plaintiffs', challenging the constitutionality of statutes under the Second Amendment. Instead, the Court found that "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights," the District's regulations "would fail constitutional muster." *Id.* at 628-29. The Court did, however, rule out rational-basis review,[18] observing 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. It also rejected the "interest-balancing" approach for which Justice Breyer advocated in dissent.[19] *Id.* at 634-35 ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding

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[18] To pass rational-basis review, a law must be rationally related to a legitimate state interest. *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 440 (1985).

[19] Justice Breyer's test would have courts ask " 'whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.' " *Heller,* 554 U.S. at 634 (quoting *id.* at 689-90 (Breyer, J., dissenting)).

'interest-balancing' approach. The very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is *really worth* insisting upon."); *see, e.g., Osterweil v. Bartlett,* No. 09-825, 2011 WL 1983340, at *7 (N.D.N.Y. May 20, 2011) (noting *Heller* ruled out rational basis review and the interest-balancing approach); *Peruta v. Cnty. of San Diego,* 758 F. Supp. 2d 1106, 1115 (S.D. Cal. 2010) (same). Beyond that, however, *Heller* provided no explicit guidance regarding what test should be applied.

Unsurprisingly, the parties in this case advocate for the application of different tests (while arguing, alternatively, that their arguments succeed under *any* level of scrutiny). Defendants argue, first, that Section 400.00(2)(f) does not implicate a right protected under the Second Amendment and that the inquiry must end there; alternately, they argue that if means-ends scrutiny must be applied to the statute, the Court should employ either intermediate scrutiny or reasonableness review.[20] (State Defs.' Mem. at 12-32.)

[20] To pass intermediate scrutiny, a law must be substantially related to an important governmental interest. *Clark v. Jeter,* 486 U.S. 456, 461 (1988). As Defendants explain, to pass reasonableness review (a standard located somewhere between rational basis review and intermediate scrutiny) a court must "consider whether the challenged statute is a reasonable limitation of the right to bear arms." (Memorandum in Support of State Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment ("State

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Plaintiffs urge the Court to apply strict scrutiny.[21] (Pls.' Mem. at 19-24.)[22]

Given the lack of a clear directive from the Supreme Court, lower courts have devised a range of approaches to constitutional challenges under the Second Amendment post-*Heller*. *See Heller v. District of Columbia* ("*Heller II*"), 698 F. Supp. 2d 179, 185-86 (D.D.C. 2010) (surveying various approaches). There is much support for Defendants' implicit argument that before determining the level of scrutiny to be applied, the court must first determine whether the statute at issue implicates a Second Amendment right as articulated in *Heller*. As the Third Circuit has held,

> As we read *Heller,* it suggests a two-pronged approach to Second Amendment challenges. First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. If it does not, our inquiry is complete. If it does, we evaluate the law under some

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Defs.' Mem."), (Doc. 43), at 20 n.13.) *Amicus* Brady Center to Prevent Gun Violence (the "Brady Center") also advocates for reasonableness review. (Amended Brief of *Amicus Curiae* Brady Center to Prevent Gun Violence, (Doc. 24-1), at 15-23.)

[21] To pass strict scrutiny, a law must be narrowly tailored to serve a compelling governmental interest. *Abrams v. Johnson,* 521 U.S. 74, 91 (1997).

[22] "Pls.' Mem." refers to the Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment. (Doc. 40.)

> 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 (3rd Cir. 2010) (citation and footnote omitted); *accord, e.g., 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); *United States v. Skoien,* 614 F.3d 638, 639-43 (7th Cir. 2010); *Heller II,* 698 F. Supp. 2d at 188. Defendants argue that the scope of the Second Amendment right in *Heller* does not extend to invalidate regulations, such as Section 400.00(2)(f), on carrying handguns. I agree.

As explained above, the language of *Heller* makes clear that the Court recognized "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose," 554 U.S. at 626, but rather a much narrower right – namely the "right of law-abiding, responsible citizens to use arms in defense of hearth and home," *id.* at 635. Indeed, *Heller* "warns readers not to treat [it] as containing broader holdings than the Court set out to establish: that the Second Amendment creates individual rights, one of which is keeping operable handguns at home for self-defense." *Skoien,* 614 F.3d at 640. In identifying limitations on the right secured by the Second Amendment, the Court explicitly stated that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." 554 U.S. at 626. Various cases

read this limiting language as removing modern-day concealed carry regulations from the ambit of Second Amendment protection. The district court in *Dorr v. Weber,* 741 F. Supp. 2d 993 (N.D. Iowa 2010), for example, adopted this view in considering a qualified immunity defense presented by a sheriff who denied concealed weapons permits to plaintiff applicants. As the court there observed, *Heller's* limiting language makes clear that the Supreme Court did not disturb its prior ruling in *Robertson v. Baldwin,* 165 U.S. 275 (1897), where it "recognized that the Second Amendment right to keep and bear arms is not infringed by laws prohibiting the carrying of concealed weapons." *Dorr,* 741 F. Supp. 2d at 1005 (citing *Robertson,* 165 U.S. at 281-82).[23] The *Dorr* court observed that the plaintiffs in that case failed to "direct[ ] the court's attention to any contrary authority recognizing a right to carry a concealed weapon under the Second Amendment and the court's own research efforts . . . revealed none." *Id.* Accordingly, it concluded, "a right to carry a concealed weapon under the Second Amendment has not been recognized to date." *Id.*; *see also People v. Flores,* 86 Cal. Rptr. 3d 804, 808 (Ct. App. 2008) (citing *Robertson* and *Heller* in holding that "[g]iven this implicit approval [in *Heller*] of concealed firearm prohibitions, we cannot read *Heller* to have

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[23] *Heller* cited to *Robertson,* but only for the proposition that "the Second Amendment was not intended to lay down a 'novel principl[e]' but rather codified a right 'inherited from our English ancestors.' " 554 U.S. at 599 (alteration in original) (quoting *Robertson,* 165 U.S. at 281).

altered the courts' longstanding understanding that such prohibitions are constitutional"); *Mack v. United States,* 6 A.3d 1224, 1236 (D.C. 2010) (citing *Robertson* and *Heller* and noting "it simply is not obvious that the Second Amendment secures a right to carry a concealed weapon").

Various other courts have seized upon this language in *Heller* in concluding that concealed weapons bans and regulations are constitutional under the Second Amendment. *See, e.g., United States v. Hart,* 726 F. Supp. 2d 56, 60 (D. Mass. 2010) (rejecting defendant's motion to suppress firearm and ammunition recovered by police during *Terry* stop, and citing *Heller* language quoted above in holding that "*Heller* does not hold, nor even suggest, that concealed weapons laws are unconstitutional. . . . Therefore, it was not a violation of [defendant's] Second Amendment rights [sic] to stop him on the basis of the suspicion of a concealed weapon."); *Swait v. Univ. of Neb.,* No. 08-404, 2008 WL 5083245, at *3 (D. Neb. Nov. 25, 2008) (rejecting plaintiff's challenge to fine for concealed weapon possession and citing to *Heller* for principle that "[S]tates can prohibit the carrying of a concealed weapon without violating the Second Amendment"); *United States v. Hall,* No. 08-006, 2008 WL 3097558, at *1 (S.D.W.Va. Aug. 4, 2008) (denying motion to suppress and citing *Heller* in concluding "that the prohibition, as in West Virginia, on the carrying of a concealed weapon without a permit, continues to be a lawful exercise by the state of its regulatory authority notwithstanding the Second Amendment"); *State v.*

Knight, 218 P.3d 1177, 1190 (Kan. Ct. App. 2009) ("[T]he *Heller* Court specifically mentioned prohibitions on concealed firearms in the sentence before its list of presumptively lawful prohibitions. The *Heller* Court began the paragraph stating that 'the right secured by the Second Amendment is not unlimited' and, two sentences later, noted prohibitions on carrying concealed firearms as an example. This clearly shows that the *Heller* Court considered concealed firearms prohibitions to be presumptively constitutional under the Second Amendment.") (citations omitted).[24]

Plaintiffs' attempts to cast *Heller* as creating a broader Second Amendment right implicating Section 400.00(2)(f) are unavailing. Plaintiffs cite first to the Court's textual analysis of the phrase "keep and bear arms," (Pls.' Mem. at 8), wherein the Court stated that the phrase should be read as meaning "'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person,'" *Heller,* 554 U.S. at 584

[24] *See also* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self Defense: An Analytical Framework and a Research Agenda,* 56 UCLA L. Rev. 1443, 1523-24 (2009) ("For over 150 years, the right to bear arms has generally been seen as limited in its scope to exclude concealed carry. Constitutional provisions enacted after this consensus emerged were likely enacted in reliance on that understanding. If *Heller* is correct to read the Second Amendment in light of post-enactment tradition and not just Founding-era original meaning, this exclusion of concealed carry would be part of the Second Amendment's scope as well.") (citations omitted).

(alteration in original) (quoting *Muscarello v. United States,* 524 U.S. 125, 143 (1998)). This textual interpretation does not stand on its own, however, but rather appears within the context of, and is provided solely to support, the Court's holding that the Second Amendment gives rise to an individual right, rather than a collective right connected to service in a militia. Indeed, the Court concludes that same paragraph by observing that the phrase "keep and bear arms" "in no way connotes participation in a structured military organization." *Id.* Nor does this textual interpretation somehow expand the Court's holding, as such a reading overlooks the opinion's pervasive limiting language discussed above. *See, e.g., People v. Dawson,* 934 N.E.2d 598, 605 (Ill. App. Ct. 2010) ("The specific limitations in *Heller* and *McDonald* applying only to a ban on handgun possession in a home cannot be overcome by defendant's pointing to the *Heller* majority's discussion of the natural meaning of 'bear arms' including wearing or carrying upon the person or in clothing."), *cert. denied,* 131 S. Ct. 2880 (2011).

Plaintiffs also point to various nineteenth-century state court cases that they claim demonstrate that state concealed carry bans are constitutional only where the state provides for unconcealed, or open, carry as well. (Pls.' Mem. at 10-11.) Those cases' holdings, however, seem not to be premised on the existence of open carry provisions specifically, but rather on the existence of provisions for some other means of carry generally; in other words, they suggest that

such statutes would fail to pass muster only if functioning as complete bans to carrying weapons outside the home under any circumstances. *See, e.g., State v. Reid,* 1 Ala. 612, 1840 WL 229, at *3 (1840) (regulation that amounted to total ban, *i.e.,* "destruction of the right," would be "clearly unconstitutional"); *Nunn v. State,* 1 Ga. 243, 1846 WL 1167, at *5 (1846) (concealed weapons ban valid so long as it does not impair right to bear arms "altogether"); *Andrews v. State,* 50 Tenn. 165, 1871 WL 3579, at *11 (1871) (statute that forbade carrying "without regard to time or place, or circumstances," violated the state right to keep and bear arms); *see also Peruta,* 758 F. Supp. 2d at 1114 ("The *Heller* Court relied on 19th-century cases upholding concealed weapons bans, but in each case, the court upheld the ban because alternative forms of carrying arms were available.").[25] Neither the NYPL generally, nor Section 400.00(2)(f) specifically, completely bans the carrying of firearms. As discussed above, the statute provides for carry permits to be issued under several circumstances including, but not limited to, when an applicant can demonstrate proper

[25] *But see State v. Chandler,* 5 La. Ann. 489, 1850 WL 3838, at *1 (1850) (law making it a misdemeanor to be "found with a concealed weapon . . . that does not appear in full open view," while "necessary to counteract a vicious state of society, growing out of the habit of carrying concealed weapons," protected right to carry " 'in full open view,' which places men upon an equality" and "is the right guaranteed by the Constitution of the United States").

cause. As the statute does not operate as a complete ban, the cases are inapposite.

Moreover, other state court cases decided around that same time suggest that bans on carrying guns in both a concealed and open manner are constitutional. *See, e.g., Fife v. State,* 31 Ark. 455, 1876 WL 1562, at *4 (1876) (upholding statute prohibiting "the carrying, as a weapon, [of] 'any pistol of any kind whatever,'" as a lawful "exercise of the police power of the State without any infringement of the constitutional right" to bear arms); *Aymette v. State,* 21 Tenn. 154, 1840 WL 1554, at *4 (1840) ("The Legislature . . . [has] a right to prohibit the wearing or keeping [of] weapons dangerous to the peace and safety of the citizens, and which are not usual in civilized warfare, or would not contribute to the common defence. . . . [A]lthough [the right keep [sic] and bear arms for the common defence] must be inviolably preserved, . . . it does not follow that the Legislature is prohibited altogether from passing laws regulating the manner in which these arms may be employed.") (cited in *Heller,* 554 U.S. at 613); *State v. Workman,* 14 S.E. 9, 11 (W. Va. 1891) (upholding conviction for carrying concealed weapon, and observing, "The second amendment of our federal constitution should be constructed with reference to the provisions of the common law upon this subject as they then existed. . . . As early as the second year of Edward III, a statute was passed prohibiting all persons, whatever their condition, 'to go or ride armed by night or by day.' And so also at common law the 'going around with unusual and

dangerous weapons to the terror of the people' was a criminal offense."); *see also Hill v. State,* 53 Ga. 472, 1874 WL 3112, at *2 (1874) ("I have always been at a loss to follow the line of thought that extends the guarantee [of the right to keep and bear arms] to the right to carry pistols . . . and those other weapons of like character, which, as all admit, are the greatest nuisances of our day.").[26]

Finally, Plaintiffs argue that *Heller's* discussion of the lawful use of arms for hunting demonstrates that the Court's holding is not limited to possession in the home. (Pls.' Mem. at 12.) This argument too is unavailing, as hunting does not involve handguns and therefore falls outside the ambit of the challenged statute. In any event, the NYPL provides for licenses to possess firearms for hunting purposes. *See, e.g.,* N.Y. Penal Law § 265.20(4).

Unlike in this case, the bulk of cases that have applied the two-pronged approach to Second Amendment challenges have found, under the first prong, that the challenged law at issue imposed a burden on conduct falling within the amendment's scope because the restrictions in the challenged statute substantially overlapped with the core Second Amendment right articulated in *Heller* – namely the right to use arms

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[26] *See also* John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* 152-53 (1868) ("The right of the people to keep and bear arms. . . . is certainly not violated by laws forbidding persons to carry dangerous or concealed weapons. . . .") (source cited in *Heller,* 554 U.S. at 618).

for the purpose of self-defense in the home. The clearest, and most frequent, examples are challenges to various sections of the federal Gun Control Act that ban all gun possession by certain categories of individuals (*e.g.,* felons, domestic violence misdemeanants) irrespective of the location of or purpose for such possession. *See, e.g., United States v. Booker,* 644 F.3d 12 (1st Cir. 2011) (considering 18 U.S.C. § 922(g)(9), which bans possession of firearms by a person convicted of a misdemeanor crime of domestic violence); *Chester,* 628 F.3d 673 (same); *Reese,* 627 F.3d 792 (considering 18 U.S.C. § 922(g)(8), which bans possession of firearms while subject to a domestic protection order); *Skoien,* 614 F.3d 638 (18 U.S.C. § 922(g)(9)); *see also Marzzarella,* 614 F.3d 85 (considering 18 U.S.C. § 922(k), which bans possession of firearms with an obliterated serial number). As such statutes "permanently disarm[ ] . . . entire category[ies] of persons," *Chester,* 628 F.3d at 680, they *ipso facto* ban possession by such persons in their homes for the purpose of self-defense, and thus clearly raise red flags under *Heller.*[27] Section 400.00(2)(f), however, does not impose such a broad prohibition. For all these reasons, the Court rejects Plaintiffs'

[27] *See also Ezell v. City of Chicago,* No. 10-3525, 2011 WL 2623511, at *14-17 (7th Cir. July 6, 2011) (considering level of scrutiny applicable to city ordinance banning firing ranges, after concluding that "[t]he right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use").

claims under the first prong of the two-prong analysis described above.

To the extent that Plaintiffs are attacking New York's statutory scheme as precluding open carry – and it is by no means clear that they are, given their concessions that each applied "to carry concealed handguns," (Pls.' Resp. 56.1 ¶¶ 25, 35, 41, 47, 55), their focus on Section 400.00(2)(f) in particular, (*see, e.g.,* FAC ¶¶ 22, 41), and their seeming rejection of open carry as a reasonable alternative to concealed carry, (Pls.' Reply Mem. at 14)[28] – such carrying is likewise outside the core Second Amendment concern articulated in *Heller*: self-defense in the home. *See, e.g., Moreno v. N.Y. City Police Dep't,* No. 10-6269, 2011 WL 2748652, at *3 (S.D.N.Y. May 7, 2011) (noting "*Heller* has been narrowly construed, as protecting the individual right to bear arms for the specific purpose of self-defense within the home," and collecting cases), *report and recommendation adopted,* 2011 WL 2802934 (S.D.N.Y. July 14, 2011); *Osterweil,* 2011 WL 1983340, at *6 (*Heller* "appears to suggest that the core purpose of the right conferred by the Second Amendment was to allow 'law-abiding,

[28] "Pls.' Reply Mem." refers to the Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment and in Reply to Defendants' Opposition to Plaintiffs' Summary Judgment Motion. (Doc. 47.) Also instructive is Kachalsky's Article 78 petition in the state court, in which he exclusively contested his inability to carry a concealed weapon, and made no mention whatsoever of open carry. (*See* Tomari Decl. Ex. L ¶¶ 8, 14.)

responsible citizens to use arms in defense of hearth and home'"); *United States v. Tooley,* 717 F. Supp. 2d 580, 596 (S.D.W.Va. 2010) ("[P]ossession of a firearm outside of the home or for purposes other than self-defense in the home are not within the 'core' of the Second Amendment right as defined by *Heller.*"); *Gonzalez v. Vill. of W. Milwaukee,* No. 09-384, 2010 WL 1904977, at *4 (E.D. Wis. May 11, 2010) (citing *Heller* for the proposition that "[t]he Supreme Court has never held that the Second Amendment protects the carrying of guns outside the home"); *Heller II,* 698 F. Supp. 2d at 185 (the "core Second Amendment right" is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home") (internal quotation marks omitted); *United States v. Masciandaro,* 648 F. Supp. 2d 779, 788 (E.D. Va. 2009) ("[A]lthough *Heller* does not *preclude* Second Amendment challenges to laws regulating firearm possession outside the home, *Heller's dicta* makes pellucidly clear that the Supreme Court's holding should not be read by lower courts as an invitation to invalidate the existing universe of public weapons regulations.") (emphasis in original) (footnotes omitted), *aff'd,* 638 F.3d 458 (4th Cir. 2011) ("[A]s we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense."); *Beachum v. United States,* 19 A.3d 311, 319 n.11 (D.C. 2011) ("*Heller* does not address, and we have not decided, whether the Second Amendment protects the possession of handguns for other than defensive use in the home."); *Knight,* 218 P.3d at 1189 ("It is clear

that the Court [in *Heller*] was drawing a narrow line regarding the violations related solely to use of a handgun in the home for self-defense purposes.").

Although it is admittedly a closer question, given the existence of some nineteenth-century state court cases upholding the right to carry openly, *see, e.g., Chandler,* 1850 WL 3838, at *1, according Second Amendment protection to the carrying of an unconcealed weapon outside the home would certainly go further than *Heller* did, and Defendants have pointed to no case decided after *Heller* that has done so. To the contrary, *Williams v. State,* 10 A.3d 1167, 1169-70 (Md. 2011), considered a Maryland statute prohibiting any carrying outside the home without a permit, which could only be issued if the applicant, among other things, demonstrated a "good and substantial reason to wear, carry, or transport a handgun." *Williams* found that statute to be "outside of the scope of the Second Amendment," *id.* at 1169, because, like New York's statute, it "permitt[ed] home possession," *id.* at 1178; *see id.* at 1177 ("*Heller* and *McDonald* emphasize that the Second Amendment is applicable to statutory prohibitions against home possession, the dicta in *McDonald* that 'the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home,' notwithstanding. Although [petitioner] attempts to find succor in this dicta, it is clear that prohibition of firearms in the home was the gravamen of the certiorari questions in both *Heller* and *McDonald* and their answers. If the Supreme Court, in this dicta, meant its holding to extend

beyond home possession, it will need to say so more plainly.") (citation omitted).

Similarly, the court in *People v. Dawson* considered a challenge to Illinois's aggravated unlawful use of a weapon statute, which made it illegal for any person to carry "on or about his or her person or in any vehicle or concealed on or about his or her person *except when on his or her land or in his or her abode or fixed place of business* any pistol, revolver, . . . or other firearm." 934 N.E.2d at 604 (emphasis added). The court determined that the statute, under which the defendant challenging the law was convicted, was constitutional, as "*Heller* specifically limited its ruling to interpreting the [Second A]mendment's protection of the right to possess handguns in the home, not the right to possess handguns outside of the home in case of confrontation." *Id.* at 605-06; *see Little v. United States,* 989 A.2d 1096, 1100-01 (D.C. 2010) (rejecting defendant's Second Amendment challenge to his conviction under D.C. gun statute because "[i]n *Heller,* the issue was the constitutionality of the District of Columbia's ban on the possession of usable handguns in the home," and defendant conceded that he was outside of his home) (internal quotation marks and citation omitted).

In any event, even if the Second Amendment can plausibly be read to protect a right infringed upon or regulated by Section 400.00(2)(f), the statute passes constitutional muster for the reasons explained below.

c. Section 400.00(2)(f) Passes Constitutional Muster

As noted above, *Heller* left open the question of which form of means-ends scrutiny applies to evaluate statutes regulating conduct protected by the Second Amendment, ruling out only rational basis review and an "interest-balancing approach." Following closely on *Heller*'s heels, some lower courts adopted a uniform level of scrutiny applicable to all Second Amendment challenges. *See, e.g., Heller II,* 698 F. Supp. 2d at 186 (adopting intermediate scrutiny); *United States v. Engstrum,* 609 F. Supp. 2d 1227, 1231-32 (D. Utah 2009) (adopting strict scrutiny);[29] *United States v. Miller,* 604 F. Supp. 2d 1162,

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[29] *Engstrum* reasoned that strict scrutiny was warranted for the following two reasons:

> First, the *Heller* Court described the right to keep and bear arms as a fundamental right that the Second Amendment was intended to protect. The Tenth Circuit has declared that, where fundamental rights are at stake, strict scrutiny is to be applied. Second, the *Heller* Court categorized Second Amendment rights with other fundamental rights which are analyzed under strict scrutiny.

609 F. Supp. 2d at 1231-32. *Engstrum* appears to be the only case post-*Heller* to adopt a one-size-fits-all strict scrutiny approach; indeed, Plaintiffs do not cite to other cases endorsing such an approach, (Pls.' Mem. at 19-24), and the Court is unable to locate any. The dissenting opinion in *Heller,* and various lower courts to consider the issue post-*Heller,* reject this approach as inconsistent with the *Heller* majority's reference to "presumptively lawful" statutes prohibiting firearm possession by felons, by the mentally ill, or in sensitive places, or imposing conditions and qualifications on the commercial sale of firearms. *See, e.g.,*

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1171 (W.D. Tenn. 2009) (adopting intermediate scrutiny). Most circuit courts to have (more recently) considered this question, however, reject a one-size-fits-all framework in favor of a variable approach whereby the level of scrutiny to be applied is determined on a case-by-case basis depending on the proximity of the right burdened by the statute at issue to the core Second Amendment right recognized in *Heller*. *See, e.g., Ezell,* 2011 WL 2623511, at *13-17; *Booker,* 644 F.3d at 25; *United States v. Masciandaro,* 638 F.3d 458, 469-71 (4th Cir. 2011); *Reese,* 627 F.3d at 801-02; *Marzzarella,* 614 F.3d at 96-98;[30] *see also Osterweil,* 2011 WL 1983340, at *8-10. This approach is borrowed from First Amendment jurisprudence. As the court in *Marzzarella* explained,

> Whether or not strict scrutiny may apply to particular Second Amendment challenges, it

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Heller, 554 U.S. at 688 (Breyer, J., dissenting) ("the 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"); *Skoien,* 587 F.3d at 812 ("We do not see how the listed laws could be 'presumptively' constitutional if they were subject to strict scrutiny. . . ."); *Heller II,* 698 F. Supp. 2d at 187 ("[A] strict scrutiny standard of review would not square with the majority's references to 'presumptively lawful regulatory measures. . . .' "); *United States v. Marzzarella,* 595 F. Supp. 2d 596, 604 (W.D. Pa. 2009) ("[T]he Court's willingness to presume the validity of several types of gun regulations is arguably inconsistent with the adoption of a strict scrutiny standard of review."), *aff'd,* 614 F.3d 85.

[30] *But see Nordyke v. King,* 644 F.3d 776, 784-85 (9th Cir. 2011) (adopting a "substantial burden framework" similar to that used in abortion cases).

> is not the case that it must be applied to all Second Amendment challenges. Strict scrutiny does not apply automatically any time an enumerated right is involved. We do not treat First Amendment challenges that way. Strict scrutiny is triggered by content-based restrictions on speech in a public forum, but content-neutral time, place, and manner restrictions in a public forum trigger a form of intermediate scrutiny. Regulations on non-misleading commercial speech trigger another form of intermediate scrutiny,[31] whereas disclosure requirements for commercial speech trigger a rational basis test. In sum, the right to free speech, an undeniably enumerated fundamental right, is susceptible to several standards of scrutiny, depending upon the type of law challenged and the type of speech at issue. We see no reason why the Second Amendment would be any different.

Marzzarella, 614 F.3d at 96-97 (footnote and citations omitted); *see Ezell,* 2011 WL 2623511, at *16-17 (analogizing to the different First Amendment standards applied to restrictions on the content of speech, the "time, place, and manner" of the speech, political speech, adult bookstores, commercial speech, and the expressive association rights of voters, candidates, and parties in elections). I find this analogy persuasive

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[31] Such regulations must directly advance a substantial governmental interest and not be more burdensome than necessary to serve that interest. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n,* 447 U.S. 557, 566 (1980).

and apply it in determining the proper level of scrutiny for Section 400.00(2)(f).[32]

[32] Plaintiffs argue that because courts have looked to First Amendment jurisprudence as a guide in developing a standard of analysis for Second Amendment claims, the Court should import the First Amendment principle of prior restraint and apply it to strike down Section 400.00(2)(f), as the statute accords licensing officers "unbridled discretion" in granting full-carry permits. (Pls.' Mem. at 13-18.) I decline to do so. While these cases borrow an *analytical framework,* they do not apply *substantive* First Amendment rules in the Second Amendment context, and while state licensing officers do have discretion in deciding whether to grant full-carry permits, their discretion is not "unbridled," but is instead constrained by the well-established judicial construction of the term "proper cause" – which Plaintiffs themselves admit is a "strict policy," (FAC ¶ 25) – as well as "arbitrary and capricious" review.

Further to their "unbridled discretion" argument, Plaintiffs argue that licensing officers enforce Section 400.00(2)(f)'s "proper cause" requirement together with Section 400.00(1)(b)'s "good moral character" eligibility requirement. (Pls.' Mem. at 18-19; Pls.' Reply Mem. at 9.) The State Defendants' decisions denying Plaintiffs' applications, however, suggest the opposite, as they do not discuss or even refer to the "good moral character" requirement. (*See* Rotini Decl. Exs. A-E.) To the extent that Plaintiffs raise an independent objection to the "good moral character" requirement, I decline to consider that argument herein. Plaintiffs do not object to that requirement in their pleadings, and their claims target Section 400.00(2)(f) exclusively. (FAC ¶¶ 22, 41, 43.) *See, e.g., Chapman v. City of N.Y.,* No. 06-3153, 2011 WL 1240001, at *7 n.5 (E.D.N.Y. March 30, 2011) ("As this claim was not raised in [plaintiff's] complaint, it will not be considered by the Court [on summary judgment].") (citing *Lyman v. CSX Transp., Inc.,* 364 F. App'x 699, 701 (2d Cir. 2010)). In any event, were the "good moral character" requirement subject to intermediate scrutiny (the standard I find applicable for reasons stated below), it would likely pass muster, as

(Continued on following page)

The question, then, is which level of scrutiny applies here. Strict scrutiny is not warranted, as, under this approach, it is reserved for "any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen." *Masciandaro,* 638 F.3d at 470. Section 400.00(2)(f) clearly does not burden that right, as it speaks only to possession *outside* the home, and, in any event, the NYPL separately provides that gun permits "shall be issued to . . . have and possess in his dwelling by a householder." N.Y. Penal Law § 400.00(2)(a). And while strict scrutiny is too stringent a standard to apply in this instance, reasonableness review, which Defendants and *Amicus* Brady Center invite the Court to apply, is too lenient. Indeed, "[t]he reasonableness test subjects firearms laws to only a marginally more heightened form of review than rational-basis review." *Heller II,* 698 F. Supp. 2d. at 186 ("'[N]early all laws survive the reasonable regulation standard, thus giving wide latitude to legislatures. . . . Like rational basis, the reasonable regulation standard tends to be, more than anything else, shorthand for broad judicial deference.'" (quoting Adam Winkler, *Scrutinizing the Second Amendment,* 105 Mich. L. Rev. 683, 718-19 (2007))). In any event, reasonableness review is

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restricting handguns to those of good moral character would substantially relate to the government's strong interest in public safety and crime prevention in ways similar to those described below in connection with Section 400.00(2)(f).

virtually absent from post-*Heller* Second Amendment jurisprudence.

I therefore join the multitude of other cases applying intermediate scrutiny under this approach. *See, e.g., Booker,* 644 F.3d at 25; *Masciandaro,* 638 F.3d at 471; *Chester,* 628 F.3d at 683; *Reese,* 627 F.3d at 802; *Skoien,* 614 F.3d at 642; *Marzzarella,* 614 F.3d at 97; *Osterweil,* 2011 WL 1983340, at *10; *Peruta,* 758 F. Supp. 2d at 1117. As noted above, to the extent that Section 400.00(2)(f) overlaps at all with the core Second Amendment right as recognized in *Heller,* it decidedly does not overlap to the same extent as Gun Control Act provisions that ban certain categories of individuals from both in-home possession and public carry, and thus it may plausibly be argued that a more lenient standard of review is warranted here than in those cases. The application of intermediate scrutiny in two recent cases outside the Gun Control Act context, however, suggests that, if Section 400.00(2)(f) must be subject to constitutional review at all, intermediate scrutiny applies here as well. Specifically, intermediate scrutiny was applied in *United States v. Masciandaro,* where the federal regulation at issue banned possession of a loaded handgun in a motor vehicle within a national park area, 638 F.3d at 459-60, and in *Peruta v. County of San Diego,* where the state statute at issue, like Section 400.00(2)(f), required applicants for full-carry permits to demonstrate "a set of circumstances that distinguishes the applicant from other members of

the general public and causes him or her to be placed in harm's way," 758 F. Supp. 2d at 1110.[33]

As noted above intermediate scrutiny requires that the law be substantially related to an important governmental interest. To satisfy this standard, Defendants need to show a "reasonable" "fit between the legislature's ends and the means chosen to accomplish those ends." *Bd. of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 480 (1989) (internal quotation marks omitted). Defendants here claim that the law serves to promote public safety and prevent crime, (State Defs.' Mem. at 24), and this is supported by the history behind Section 400.00(2)(f), which the State Defendants have provided to the Court.

For example, the "proper cause" requirement, now located at Section 400.00(2)(f) was added in 1913 as N.Y. Penal Law § 1897, (*see* State Defs.' 56.1 ¶ 66), and the law thereafter underwent a series of modifications to the ordering of its statutory provisions. In a report produced in 1962 in connection with one of those modifications, the state Joint Legislative Committee on Firearms and Ammunitions stated,

> More than a quarter of a million serious crimes are committed with weapons annually in the United States, and the number is on the increase.

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[33] *Peruta,* which the Court finds persuasive, was decided before the Ninth Circuit adopted a "substantive burden framework" for Second Amendment claims in *Nordyke v. King*.

. . . .

> The legislative problem posed for the fifty-one American jurisdictions (fifty states and the District of Columbia), charged with the major responsibility of criminal law enforcement in the United States, suggests itself: to enact statutes adapted to prevent these crimes and occurrences before they happen, and, at the same time, preserve the legitimate interests of individual liberty, training for national defense, hunting, target shooting and trophy collecting.

Report of the N.Y. State Joint Legislative Comm. on Firearms & Ammunition, Doc. No. 29, at 11-12 (1962) (Tomari Decl. Ex. S(9)). In a 1965 supplement to that report, the committee added,

> The primary value to law enforcement of adequate statutes dealing with dangerous weapons is prevention of crimes of violence before their consummation.
>
> . . . .
>
> . . . In the absence of adequate weapons legislation, under the traditional law of criminal attempt, lawful action by the police must await the last act necessary to consummate the crime. . . . Adequate statutes governing firearms and weapons would make lawful intervention by police and prevention of these fatal consequences, before any could occur.

Report of the N.Y. State Joint Legislative Comm. on Firearms & Ammunition, Doc. No. 6, at 12-13 (1965) (Tomari Decl. Ex. S(13)). Finally, in 1982, during a floor debate regarding substantive changes to portions of the state handgun licensing scheme, Senator Franz Leichter, speaking regarding Section 400.00(2)(f)'s "proper cause" requirement, observed,

> [W]e are not only talking about crime, which obviously is important, but we're also talking about public safety. . . . [I]n this instance, it's not only protecting a person from himself but it's protecting innocent people who get shot every day because handguns are lying around, and that is something that should be of concern to all of us.

N.Y. Senate Debate on Senate Bill 3409, at 2471 (June 2, 1987) (Tomari Decl. Exs. S(14)). Despite proposals to change the licensing scheme, Section 400.00(2)(f)'s "proper cause" requirement has remained. (State Defs.' 56.1 ¶ 77.)[34]

The Supreme Court has repeatedly acknowledged that governments have an important, even compelling, interest in protecting public safety. *See, e.g., United States v. Salerno,* 481 U.S. 739, 745 (1987) (federal government has "compelling interests in public

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[34] Plaintiffs question the relevance of the legislative history, (Pls.' Reps. [sic] 56.1 ¶¶ 63-77), but courts have cited to such history to demonstrate the important government interest implicated by a challenged statute, *see, e.g., Heller II,* 698 F. Supp. 2d. at 190.

safety"); *Tennessee v. Garner,* 471 U.S. 1, 25-26 (1985) (O'Connor, J., dissenting) (commenting, in Fourth Amendment context, that there is an "important public interest in crime prevention and detection"); *Schall v. Martin,* 467 U.S. 253, 264 (1984) ("The 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted. We have stressed before that crime prevention is 'a weighty social objective'. . . .") (collecting cases) (citations omitted). And various lower courts have acknowledged the connection between promoting public safety and regulating the carrying of concealed handguns. This case finds an analogue in *Peruta,* where, as noted above, the concealed carry regulation at issue required that an applicant for a full-carry permit demonstrate "a set of circumstances that distinguishes the applicant from other members of the general public and causes him or her to be placed in harm's way." There, the court held that the state

> has an important and substantial interest in public safety and in reducing the rate of gun use in crime. In particular, the government has an important interest in reducing the number of concealed weapons in public in order to reduce the risks to other members of the public who use the streets and go to public accommodations. The government also has an important interest in reducing the number of concealed handguns in public because of their disproportionate involvement

> in life-threatening crimes of violence, particularly in streets and other public places.

Peruta, 758 F. Supp. 2d at 1117 (citations omitted); *see, e.g., Richards v. Cnty. of Yolo,* No. 09-1235, 2011 WL 1885641, at *4 (E.D. Cal. May 16, 2011) (agreeing with defendants' assertion that "regulating concealed firearms is an essential part of [the] County's efforts to maintain public safety and prevent both gun-related crime and, most importantly, the death of its citizens"); *People v. Yarbrough,* 86 Cal. Rptr. 3d 674, 682 (Ct. App. 2008) ("Unlike possession of a gun for protection within a residence, carrying a concealed firearm presents a recognized threat to public order, and is prohibited as a means of preventing physical harm to persons other than the offender. A person who carries a concealed firearm on his person or in a vehicle, which permits him immediate access to the firearm but impedes others from detecting its presence, poses an imminent threat to public safety.") (citations, footnote, and internal quotation marks omitted).[35]

Notwithstanding the emphasis placed on the interest in regulating concealed carry, the same rationales apply equally, or almost equally, to the regulation of open carry. *See, e.g., Osterweil,* 2011 WL 1983340,

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[35] The court in *Yarbrough* also observed that "carrying a firearm concealed on the person or in a vehicle in violation of [California state law] is not in the nature of a common use of a gun for lawful purposes which the court declared to be protected by the Second Amendment in *Heller*." 86 Cal. Rptr. 3d at 682.

at *10 ("[T]he harm caused by gun violence in this country has been well-documented, and government efforts to curtail this threat have a direct impact on domestic security. As such, the government objective promoted by these laws is not only 'legitimate,' but also 'important.'") (citations omitted); *Miller,* 604 F. Supp. 2d at 1171 (same); *City of N.Y. v. Bob Moates' Sport Shop, Inc.,* 253 F.R.D. 237, 240-41 (E.D.N.Y. 2008) ("By enacting strong gun control laws to protect its citizens from gun-related crimes, New York City and State have expressed a special public policy interest in the subject matter of this litigation."); *City of N.Y. v. A-1 Jewelry & Pawn, Inc.,* 501 F. Supp. 2d 369, 429 (E.D.N.Y. 2007) ("New York has a strong interest in the safety of its residents and territory from handgun violence. . . ."); *People v. Marin,* 795 N.E.2d 953, 958-959, 962 (Ill. Ct. App. 2003) ("The overall purpose of the . . . statute is to protect the public from gun violence. This purpose is accomplished not only by prohibiting the possession of weapons by gang members, but by prohibiting the accessibility to loaded weapons in public places by society at large. . . . [T]he underlying activity of possessing or transporting an accessible and loaded weapon is itself dangerous and undesirable, regardless of the intent of the bearer since it may lead to the endangerment of public safety. Access to a loaded weapon on a public street creates a volatile situation vulnerable to spontaneous lethal aggression in the event of road rage or any other disagreement or dispute.") (citations omitted). For all these reasons, I hold that the state has an important government

interest in promoting public safety and preventing crime.[36]

I also hold that Section 400.00(2)(f) is substantially related to that important government interest. The statute does not function as an outright ban on concealed carry, but rather calls for individualized, case-by-case determinations regarding whether full-carry permit applicants have an actual and articulable – rather than merely speculative, potential, or even specious – need for self-defense. As crafted, the statute seeks to limit the use of handguns to self-defensive purposes – a use which, although in this context existing outside the home, is nonetheless a hallmark of *Heller* – rather than for some other use

[36] In an effort to further demonstrate the state's interest in regulating handguns to promote public safety and prevent crime, the State Defendants have provided the Court various witness affidavits. Based on those affidavits, the State Defendants conclude that "[t]he likelihood that a gun will be used in crime is closely linked to the general availability of guns, and especially handguns," "[a]llowing more individuals to carry concealed handguns will endanger officers stopping individuals on the street or making car stops, and complicate interactions between uniformed officers and those working in plain clothes or off-duty," "[i]ncreasing the prevalence of concealed handguns will undermine" officers' "ability to stop and frisk individuals who appear to be carrying handguns in public," and "[t]he majority of criminal homicides and other serious crimes are committed by individuals who have not been convicted of a felony and would receive permits to carry concealed weapons without the 'proper cause' requirement." (State Defs.' 56.1 ¶¶ 87-88, 90-91.) Plaintiffs dispute these facts, (Pls.' Resp. 56.1 ¶¶ 87-88, 90-91), and, therefore, I do not rely on them in deciding the instant motions.

that has not been recognized as falling within the protections of the Second Amendment. This purpose is furthered by the statute's directive that full-carry permits "shall be" issued where there exists proper cause – rather than directing merely that permits "may" be issued in such instances.

The other provisions of Section 400.00(2) create alternative means by which applicants may secure permits and highlight the emphasis the statute places upon self-defense: as noted above, it compels the issuance of handgun permits to merchants and storekeepers for them to keep in their places of business – where they may be subject to robberies – as well as the issuance of full-carry permits to messengers for banking institutions and express companies, who often carry sensitive communications or valuable parcels that others may covet, to state judges and justices, who may be the targets of criminal defendants or disgruntled litigants (or their associates), and to employees at correctional facilities, for whom protection from those being housed at such facilities is necessary. Surely, the legislature cannot be expected to enumerate every profession or circumstance that might give rise to an articulable need for self-defense, and so Section 400.00(2)(f) vests the responsibility for discerning such need in the capable hands of the state's neutral and detached licensing officers.

In upholding California's version of Section 400.00(2)(f), the Court in *Peruta* observed that

> [r]equiring documentation enables Defendant to effectively differentiate between individuals who have a bona fide need to carry a concealed handgun for self-defense and individuals who do not.
>
> The Court acknowledges Plaintiffs' argument that many violent gun crimes, even a majority, are committed by people who cannot legally have guns, and the ongoing dispute over the effectiveness of concealed weapons laws. But under intermediate scrutiny, Defendant's policy need not be perfect, only reasonably related to a "significant," "substantial," or "important" governmental interest. Defendant's policy satisfies that standard.

Id. (citations omitted). Plaintiffs here make the same argument as in *Peruta,* and the Court recognizes not only that many violent crimes are committed by those carrying handguns illegally, but also that most gun owners across the country are responsible, law-abiding citizens. The Court also recognizes the existence of contrasting studies and statistics concerning the relationship between handgun ownership and violent crime. But it is the job of the legislature, not the Court, to weigh the conflicting evidence and make policy choices (within constitutional parameters). *See, e.g., Turner Broad. Sys., Inc. v. FCC,* 520 U.S. 180, 195 (1997) (legislature is "far better equipped than the judiciary to 'amass and evaluate the vast

amounts of data' bearing upon legislative questions") (internal quotation marks omitted); *City of Richmond v. JA. Croson Co.,* 488 U.S. 469, 544 (1989) ("Local officials, by virtue of their proximity to, and their expertise with, local affairs, are exceptionally well qualified to make determinations of public good within their respective spheres of authority.") (internal quotation marks omitted). As with the statute at issue in *Peruta,* Section 400.00(2)(f) may not be perfect, but it need not be to pass constitutional muster. Section 400.00(2)(f)'s limitations promote the government's strong interest in public safety and crime prevention, and are substantially related to it.

* * *

Section 400.00(2)(f) does not burden recognized protected rights under the Second Amendment. If Section 400.00(2)(f) could be read to implicate such rights, the statute, as applied to Plaintiffs, does not violate the Second Amendment under intermediate scrutiny. Accordingly, the Court *a priori* rejects Plaintiffs' facial constitutional challenge. "[A] plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' *i.e.,* that the law is unconstitutional in all of its applications." *Wash. State Grange,* 552 U.S. at 449 (quoting *Salerno,* 481 U.S. at 745); *see Skoien,* 614 F.3d at 645 ("[a] person to whom a statute properly applies [cannot] obtain relief based on arguments that a differently situated person might present"). As Section 400.00(2)(f) is constitutional as applied to Plaintiffs, it is therefore not

unconstitutional in all its applications. *See Heller II,* 698 F. Supp. 2d at 188 n.10.[37]

3. Equal Protection Claim

Finally, Plaintiffs challenge Section 400.00(2)(f) as violative of the Equal Protection Clause. The "Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 439 (1985). Equal protection claims are subject to a two-step analytical process. *See Phillips v. Girdich,* 408 F.3d 124, 129 (2d Cir. 2005). First, a plaintiff must "demonstrate that he was treated differently than others similarly situated as a result of

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[37] To the extent that Plaintiffs' facial claim is framed as an "overbreadth" challenge, it must fail on that ground as well:

> Without entertaining the novel notion that an overbreadth challenge could be recognized outside the limited context of the First Amendment, [the Court] conclude[s] that a person . . . to whom a statute was constitutionally applied, will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. This conclusion reflect[s] the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws.

Masciandaro, 638 F.3d at 474 (fourth alteration in original) (citations and internal quotation marks omitted).

intentional or purposeful discrimination." *Id.* Second, he must show that "the disparity in treatment cannot survive the appropriate level of scrutiny." *Id.* The claim fails, as Section 400.00(2)(f) does not treat similarly situated individuals differently, but rather applies uniformly. Further, all full-carry permit applicants are not similarly situated because some can demonstrate "proper cause" for the issuance of a permit, while others cannot. *See, e.g., Osterweil,* 2011 WL 1983340, at *11; *Richards,* 2011 WL 1885641, at *6; *Peruta,* 758 F. Supp. 2d at 1117-18; *see also Ruston v. Town Bd.,* 610 F.3d 55, 59 (2d Cir. 2009) (equal protection claim failed because plaintiffs did not allege "applications that were made by persons similarly situated").

III. CONCLUSION

For the reasons stated above, I hereby DENY the State Defendants' and the County's Motions to Dismiss, DENY Plaintiffs' Motion for Summary Judgment, and GRANT the State Defendants' Cross-Motion for Summary Judgment. Although the County has not cross-moved for summary judgment, I hereby GRANT it summary judgment *sua sponte.*[38] The Clerk of the

[38] As the Second Circuit recently stated,

> [D]istrict courts have the discretion to grant summary judgment *sua sponte,* even without notice in certain circumstances. In granting summary judgment *sua sponte,* however, a district court must determine that the party against whom summary judgment is rendered

(Continued on following page)

Court is respectfully directed to terminate the pending motions, (Docs. 30, 33, 39, 42), and close the case.

SO ORDERED.

Dated: ~~August~~ 9/2, 2011
White Plains, New York

/s/ Cathy Seibel
CATHY SEIBEL, U.S.D.J.

> has had a full and fair opportunity to meet the proposition that there is no genuine issue of material fact to be tried. . . . [T]he district court must assure itself that following the procedures set out in Rule 56 would not alter the outcome. Discovery must either have been completed, or it must be clear that further discovery would be of no benefit. The record must, therefore, reflect the losing party's inability to enhance the evidence supporting its position and the winning party's entitlement to judgment.

Priestley v. Headminder, Inc., No. 09-4931, 2011 WL 3190307, at *6 (2d Cir. July 28, 2011) (citation and internal quotation marks omitted). The Court is satisfied that those standards have been met here. Although the County did not cross-move for summary judgment, the State Defendants did, on claims identical to those advanced against the County, and Plaintiffs had a full and fair opportunity to submit materials in opposition to that cross-motion – and indeed did submit such materials. *See, e.g., Parks v. Town of Greenburgh,* 344 F. App'x 654, 655 (2d Cir. 2009) (*sua sponte* grant of summary judgment in favor of remaining defendants not error where "[plaintiff] had the opportunity to submit evidence in opposition to [officer's] summary judgment motion" and "[plaintiff's] claim of selective treatment was identical as it related to the [officer] and the remaining defendants").

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

ALAN KACHALSKY, CHRISTINA NIKOLOV, ERIC DETMER, JOHNNIE NANCE, ANNA MARCUCCI-NANCE, and SECOND AMENDMENT FOUNDATION, INC.,	**10 CV 05413 (CS)** **JUDGMENT**
Plaintiffs,	
-against-	
SUSAN CACACE, JEFFREY A COHEN, ALBERT LORENZO, ROBERT K. HOLDMAN, and COUNTY OF WESTCHESTER,	
Defendants.	

- X

Whereas the above entitled action having been assigned to the Honorable Cathy Seibel, U.S.D.J., and the Court thereafter on September 2, 2011, having handed down an Opinion and Order (Docket #80), denying the State Defendants' and the County's Motions to dismiss, denying Plaintiffs' Motion for Summary Judgment, and granting the State defendants' Cross-Motion for Summary Judgment, it is,

ORDERED, ADJUDGED AND DECREED: that the Court denies the State Defendants' and the County's Motions to Dismiss, denies Plaintiffs' Motion

for Summary [sic], and grants the defendants' Cross-Motion for Summary Judgment, and although the County has not moved for summary judgment, the Court also grants the County Summary Judgment sua sponte. Accordingly, Judgment is entered in favor of defendants, and the case is hereby closed.

Dated: White Plains, New York
September 7, 2011

/s/ Ruby J. Krajick
Ruby Krajick – Clerk

FILED
AND ENTERED
ON [10/8] 2008

WESTCHESTER
COUNTY CLERK

COUNTY COURT OF THE
STATE OF NEW YORK
COUNTY OF WESTCHESTER

X

In the Matter of the
Application of

Alan N. Kachalsky,

for a pistol permit
pursuant to Penal Law
Section 400.00

DECISION & ORDER
Index No.: 3/2008

X

CACACE, J.

This Court, in its capacity as handgun licensing officer for the County of Westchester (see Penal Law §265.00(10)) has been presented with the application of Alan N. Kachalsky, 47C Peck Avenue, Rye, New York, for an unrestricted full carry pistol permit. In accordance with the statutory mandate (see Penal Law §400.00(4)), the Westchester County Department of Public Safety has conducted an investigation of the applicant's background.

In order for the issuance of a license to "have and carry concealed [sic] without regard to employment or place of possession by any person," the Court must

find "proper cause exists for the issuance thereof." Penal Law §400.00(2)(f).

The Court, in exercising its broad discretion, finds "good cause" for denial of the subject application. *Matter of Charles I. Anderson v. Joseph A. Mogavero, Jr. as County Court Judge of Ostego County,* 116 AD2d 885.

In support of his request for an unrestricted permit, the applicant has stated that his belief is that the Second Amendment of the United States Constitution entitles him to an unrestricted permit without further establishing "proper cause." He goes on to cite the fact that we live in a world where "sporadic random violence might at any moment place one in a position where one needs to defend oneself or possibly others.

He has not stated any facts which would demonstrate a need for self protection distinguishable from that of the general public. The Westchester County Department of Public Safety has forwarded a recommendation that his application be denied.

The Court does not find that the applicant has submitted a persuasive argument justifying the issuance of a "full carry" license.

The State has a substantial and legitimate interest and a grave responsibility for ensuring the safety of the general public. Licensing officers are vested with broad discretion in determining applications for an unrestricted pistol license, and are required to

exercise their judgement on the basis of a total evaluation of relevant factors. See *Fulco v. McGuire*, 81 AD2d 509.

Based upon all the facts and circumstances of this application, it is my opinion that proper cause does not exist for the issuance of an unrestricted "full carry" pistol license to be issued to Alan N. Kachalsky. Accordingly, the application for an unrestricted, full carry pistol permit by Alan N. Kachalsky is denied.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
October [8], 2008

/s/ Susan Cacace
HON. SUSAN CACACE
County Court Judge

COUNTY COURT:
WESTCHESTER COUNTY
STATE OF NEW YORK

FILED
AND
ENTERED
ON [Oct. 2], 2008

---------- X

In the Matter of the
Application of

CHRISTINA M. NIKOLOV

for a Pistol Certification
Pursuant to Penal
Law § 400.00

**DECISION
& ORDER**

---------- X

JEFFREY A. COHEN, J.:

The applicant, Christina M. Nikolov, seeks a New York full carry pistol license. This court, in its capacity as handgun licensing officer for the County of Westchester, *see* Penal Law § 265.00(10), has been presented with the application, which includes, in accordance with Penal Law § 400.00(4), the results of the investigation that the Westchester County Department of Public Safety conducted concerning Ms. Nikolov's background.

The application and investigation reveal, in pertinent part, that the applicant currently possesses a concealed weapon permit with full carry privileges in the State of Florida and that she is a transgender female and that as such according to the National Coalition of Anti-Violence Programs she is far more

likely to be a victim of violent crime than a genetic female. In addition the applicant states that "[t]hese hate crimes are increasing locally as well as nationwide" and she appended a list of hundreds of crimes against people in similar circumstances from around the world. *See* attachment to Form WCPD-126H. Conspicuously absent, however, is the report of any type of threat to her own safety anywhere.

Under these circumstances, and notwithstanding her accomplishments and unblemished record, it cannot be said that the applicant has demonstrated that she has a special need for self-protection distinguishable from that of the general public; therefore, her application for a firearm license for a full carry permit must be denied. *See, e.g., In re Application of Ferrara v Safir,* 282 AD2d 383 (1st Dept 2001) (denial of license proper as petitioner failed to show that his position as the chief executive officer of a body-guard business for movie stars places him in extraordinary personal danger, or other special need for self-protection distinguishable from that of the general community); *In re Application of Kaplan v Bratton,* 249 AD2d 199 (1st Dept 1998) (denial of license upheld as petitioner's general allegations about her work hours and location were insufficient to show an extraordinary threat to her safety); *In the Matter of Bastiani,* 23 Misc3d 235 (Co. Ct Rockland Co. 2008) (applicant for a full carry pistol permit did not demonstrate a special need for self-protection distinguishable from that of the general community, even

though on two occasions she assertedly feared for her personal safety in public places.)

The foregoing opinion shall constitute the decision and order of the court.

Enter.

Dated: [Oct. 1, 2009]
White Plains, NY

/s/ [Illegible]
County Court Judge

HON. JEFFREY A. COHEN

TO: Christina M. Nikolov
10 Franklin Avenue
White Plains, NY 10601

SUPREME COURT OF THE STATE OF NEW YORK

RICHARD J. DARONCO
WESTCHESTER COUNTY COURTHOUSE
111 DR. MARTIN LUTHER KING, JR. BOULEVARD
WHITE PLAINS, NEW YORK 10601
(914) 824-5403
FAX: (914) 995-8551

[LOGO]
CHAMBERS OF
ALBERT LORENZO
JUSTICE

September 27, 2010

Mr. Eric R. Detmer
321 Fenimore Road
Mamaroneck, New York 10543

Dear Mr. Detmer:

Please be advised that I am in receipt of your application to amend your pistol permit from target shooting to full carry. At this time, I see no justification for a full carry permit. Accordingly, I have disapproved your application.

Very truly yours,

/s/ Albert Lorenzo
Albert Lorenzo
Acting Supreme Court Justice

AL:lg

05-266

FILED
AND
ENTERED
ON [9/10] 20[10]
WESTCHESTER
COUNTY CLERK

COUNTY COURT OF THE
STATE OF NEW YORK
COUNTY OF WESTCHESTER

---------- X

In the Matter of the Application of

Johnnie Nance,

Petitioner,

For an amendment to his New York State Pistol Permit.

DECISION

---------- X

Robert K. Holdman, J.

The following papers were read upon Petitioner's application in the above captioned proceeding:

Johnnie Nance's Application 1

Department of Public Safety Report and Attachments 2

The applicant, Johnnie Nance, has submitted an application to Westchester County to amend his New York State Pistol License (#104518) to delete target shooting and to add full carry. The applicant also seeks the addition of one firearm and the deletion of one firearm to his license. The petitioner currently has a restricted license to carry for sport target

shooting issued in the County of Westchester on April 30, 2009. The petitioner requested an amendment for a fully carry to this license because of his desire to use his NRA Instructor Safety Certifications to promote safe gun handling at various locations.

The issuance of a pistol permit for self protection has recently been held by the United States Supreme Court to be a right protected by the Second Amendment of the United States Constitution:

> There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. *District of Columbia v. Heller*, 554 U.S. ___ (2008); *Slip op* @ page 22.

However, in so holding the Supreme Court also recognized that the Second Amendment should not be "read . . . to protect the right of citizens to carry arms for any sort of confrontation." (*Id*). The individual right to bear arms is limited:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th Century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. [citations omitted]. For example, the majority of 19th Century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second

> Amendment or state analogues. *Slip. Op. Supra* at 54.

Putting aside the question of whether the Second Amendment "individual" right to bear arms is in fact extended to the states as a fundamental right, an issue not addressed by the Supreme Court, it is clear that even if that be the case, a regulatory scheme would not run afoul of the Courts' holding. *Id*, pages 53-56 and footnote 26 (where the court set forth several examples of reasonable restrictions on the right to keep and carry a weapon). In striking down the District of Columbia statute as "a ban on handgun possession in the home" and thereby violative of the Second Amendment, the Supreme Court went on to hold:

> The Constitution leaves the District of Columbia a variety of tools for combating [handgun violence], including some measures regulating handguns. *Id.* at page 64.

Therefore, those charged with the duty to oversee handgun licensing, such as this Court, must, in the opinion of this Court, recognize and honor the right while at the same time recognizing the limits to the right to bear arms under the Second Amendment to the United States Constitution.

The burden of establishing "proper cause" for the issuance of a full-carry permit is upon the applicant to establish "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." *Kaplan v.*

Bratton 249 A.D.2d 199 at 201, *op. cit*. *Matter of Klenosky v. New York City Police Department* 75 A.D.2d 793, *affd'*. 53 NY2d 685. However, Mr. Nance fails to demonstrate any concern for his safety and certainly did not distinguish himself from almost any other citizen. The Court received a report from the Westchester County Department of Public Safety, indicating that "the necessary proper cause for the issuance of a firearm license for the purpose of Full Carry *has not* been met by the applicant." The applicant has not provided the court with any information that he faces any danger of any kind that would necessitate the issuance of a full carry firearm license; or has not demonstrated a need for self-protection distinguishable from that of the general public or of other persons similarly situated. The Department recommends that the applicant's amendment to his New York State Pistol License be disapproved.

Penal Law section 400.00(2)(f) requires a showing of "proper cause" prior to the issuance of a carry-concealed permit as requested by the petitioner in this matter. However, the petitioner failed to demonstrate "proper cause." *Kachalsky* v. *Cacace*, 65 A.D.3d 1045 (2nd Dept. 2009); *Hecht v. Bivona,* 11 A.D.3d 614 (2nd Dept. 2004); *Milo v*. *Kelly,* 211 A.D.3d 488 (1st Dept. 1995).

In sum, the applicant has not shown sufficient circumstances to distinguish his need from those of countless others, nor has he demonstrated a specific need for self protection distinguishable from that of

the general community or of persons engaged in the same business or profession. Accordingly, the petitioner's application to amend his New York State Pistol License (#104519) is denied but the application to add one firearm and to delete one firearm to the license is approved.

This constitutes the decision and order of this Court.

Dated: September 9, 2010
White Plains, New York

/s/ [Illegible]
Hon. Robert K. Holdman, JSC

05-267

FILED
AND
ENTERED
ON [9/10] 20[10]
WESTCHESTER
COUNTY CLERK

COUNTY COURT OF THE
STATE OF NEW YORK
COUNTY OF WESTCHESTER

---------- X

In the Matter of the Application of

Anna L. Marcucci-Nance,

Petitioner,

For an amendment to her New York State Pistol Permit.

DECISION

---------- X

Robert K. Holdman, J.

The following papers were read upon Petitioner's application in the above captioned proceeding:

Anna Marcucci-Nance's Application 1

Department of Public Safety Report and Attachments 2

The applicant, Anna Marcucci-Nance, has submitted an application to Westchester County to amend her New York State Pistol License (#104519) to delete target shooting and to add full carry. The applicant also seeks the addition of one firearm and the deletion of one firearm to her license. The petitioner currently has a restricted license to carry for

sport target shooting issued in the County of Westchester on April 30, 2009. The petitioner requested an amendment for a fully carry to this license because of her desire to use her NRA Instructor Safety Certifications to promote safe gun handling at various locations.

The issuance of a pistol permit for self protection has recently been held by the United States Supreme Court to be a right protected by the Second Amendment of the United States Constitution:

> There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. *District of Columbia v. Heller,* 554 U.S. ___ (2008); *Slip op* @ page 22.

However, in so holding the Supreme Court also recognized that the Second Amendment should not be "read . . . to protect the right of citizens to carry arms for any sort of confrontation." (*Id*). The individual right to bear arms is limited:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th Century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. [citations omitted]. For example, the majority of 19th Century courts to consider the question held that prohibitions on carrying concealed

> weapons were lawful under the Second Amendment or state analogues. *Slip. Op. Supra* at 54.

Putting aside the question of whether the Second Amendment "individual" right to bear arms is in fact extended to the states as a fundamental right, an issue not addressed by the Supreme Court, it is clear that even if that be the case, a regulatory scheme would not run afoul of the Courts' holding. *Id*, pages 53-56 and footnote 26 (where the court set forth several examples of reasonable restrictions on the right to keep and carry a weapon). In striking down the District of Columbia statute as "a ban on handgun possession in the home" and thereby violative of the Second Amendment, the Supreme Court went on to hold:

> The Constitution leaves the District of Columbia a variety of tools for combating [handgun violence], including some measures regulating handguns. *Id*. at page 64.

Therefore, those charged with the duty to oversee handgun licensing, such as this Court, must, in the opinion of this Court, recognize and honor the right while at the same time recognizing the limits to the right to bear arms under the Second Amendment to the United States Constitution.

The burden of establishing "proper cause" for the issuance of a full-carry permit is upon the applicant to establish "a special need for self-protection distinguishable from that of the general community or of

persons engaged in the same profession." *Kaplan v. Brattan* 249 A.D.2d 199 at 201, *op. cit*. *Matter of Klenosky v. New York City Police Department* 75 A.D.2d 793, *affd'*. 53 NY2d 685. However, Ms. Marcucci-Nance fails to demonstrate any concern for her safety and certainly did not distinguish herself from almost any other citizen. The Court received a report from the Westchester County Department of Public Safety, indicating that "the necessary proper cause for the issuance of a firearm license for the purpose of Full Carry *has not* been met by the applicant." The applicant has not provided the court with any information that she faces any danger of any kind that would necessitate the issuance of a full carry firearm license; or has not demonstrated a need for self-protection distinguishable from that of the general public or of other persons similarly situated. The Department recommends that the applicant's amendment to his New York State Pistol License be disapproved.

Penal Law section 400.00(2)(f) requires a showing of "proper cause" prior to the issuance of a carry-concealed permit as requested by the petitioner in this matter. However, the petitioner failed to demonstrate "proper cause." *Kachalsky v. Cacace*, 65 A.D.3d 1045 (2nd Dept. 2009); *Hecht v. Bivona,* 11 A.D.3d 614 (2nd Dept. 2004); *Milo v. Kelly,* 211 A.D.3d 488 (1st Dept. 1995).

In sum, the applicant has not shown sufficient circumstances to distinguish her need from those of countless others, nor has she demonstrated a specific

need for self protection distinguishable from that of the general community or of persons engaged in the same business or profession. Accordingly, the petitioner's application to amend her New York State Pistol License (#104519) is denied but the application to add one firearm and to delete one firearm to the license is approved.

This constitutes the decision and order of this Court.

Dated: September 9, 2010
White Plains, New York

/s/ [Illegible]
Hon. Robert K. Holdman, JSC

N.Y. Penal Law § 265.00(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.

N.Y. Penal Law § 265.01(1):

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"; . . .

* * *

Criminal possession of a weapon in the fourth degree is a class A misdemeanor.

N.Y. Penal Law § 265.03:

Criminal possession of a weapon in the second degree

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

* * *

(3) such person possesses any loaded firearm. Such possession shall not, except as provided in subdivision one or seven of section 265.02 of this article, constitute a violation of this [fig 1] subdivision if such possession takes place in such person's home or place of business.

Criminal possession of a weapon in the second degree is a class C felony.

N.Y. Penal Law § 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.

* * *

N.Y. Penal Law § 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 1898, 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 pursuant 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 assembling 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, caliber 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.

N.Y. Penal Law § 400.01:

License to carry and possess firearms for retired sworn members of the division of state police.

1. A license to carry or possess a firearm for a retired sworn member of the division of state police shall be granted in the same manner and upon the same terms and conditions as licenses issued under section 400.00 of this article provided, however, that applications for such license shall be made to, and the licensing officer shall be, the superintendent of state police.

2. For purposes of this section, a "retired sworn member of the division of state police" shall mean a former sworn member of the division of state police,

who upon separation from the division of state police was immediately entitled to receive retirement benefits under the provisions of the retirement and social security law.

3. The provisions of this section shall only apply to license applications made or renewals which must be made on or after the effective date of this section. A license to carry or possess a pistol or revolver issued pursuant to the provisions of section 400.00 of this article to a person covered by the provisions of this section shall be valid until such license would have expired pursuant to the provisions of section 400.00 of this article; provided that, on or after the effective date of this section, an application or renewal of such license shall be made pursuant to the provisions of this section.

4. Except for the designation of the superintendent of state police as the licensing officer for retired sworn members of the division of state police, all of the provisions and requirements of section 400.00 of this article and any other provision of law shall be applicable to individuals licensed pursuant to this section. In addition all provisions of section 400.00 of this article, except for the designation of the superintendent of state police as licensing officer are hereby deemed applicable to individuals licensed pursuant to this section.