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The Cost to Carry: New York State's Regulation on Firearm Registration

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THE COST TO CARRY: NEW YORK STATE'S REGULATION ON FIREARM REGISTRATION

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

Kwong v. Bloomberg[1]
(decided July 9, 2013)

I. INTRODUCTION

The Second Circuit Court of Appeals, in *Kwong v. Bloomberg*, held that New York City's residential handgun licensing fee, Administrative Code § 10-131(a)(2),[2] does not impose an unconstitutional burden on the plaintiffs' Second Amendment rights because the fees were regulated to defray the costs of administering the statute.[3] The court also highlighted that the revenues raised by the fees did not exceed these costs.[4] In addition, the court held that New York State Penal Law § 400.00(14),[5] authorizing the New York City licensing fee, did not violate the Equal Protection Clause of the Fourteenth Amendment.[6] In this case, the plaintiffs consisted of individuals who had been issued residential handgun licenses[7] in New York City and two organizations, the Second Amendment Foundation and the New York State Rifle and Pistol Association.[8] This action was

[1] 723 F.3d 160 (2d Cir. 2013).

[2] NEW YORK CITY, N.Y., CODE § 10-131(a)(2) (2012).

[3] *Kwong*, 723 F.3d at 168-69.

[4] *Id.* at 166.

[5] N.Y. PENAL LAW § 400.00(14) (McKinney 2013).

[6] *Kwong*, 723 F.3d at 172.

[7] A license holder is allowed to "have and posses [a handgun] in his dwelling." N.Y. PENAL LAW § 400.00(2)(a). These types of licenses are generally referred to as "premises-residence" handgun licenses. *See generally* Rombom v. Kelly, 901 N.Y.S.2d 29, 30 (App. Div. 1st Dep't 2010).

[8] Kwong v. Bloomberg, 876 F. Supp. 2d 246, 247 (S.D.N.Y. 2012). During the trial court proceedings, the New York Attorney General argued that the plaintiffs lacked standing to bring this action. *Id.* at 251. The court held that the individuals, who brought suit, had paid the $340, and obtained a residential handgun license, had standing to bring the actions. *Id.* at

brought under 42 U.S.C. § 1983, asserting that:

> (1) New York City Administration Code § 10-1313(a)(2) violates the Second Amendment by requiring New York City residents to pay $340[9] to obtain a residential handgun license[10]; and (2) New York Penal Law § 400.00(14) violates the Equal Protection Clause of the Fourteenth Amendment by allowing New York City and Nassau County to charge a higher handgun licensing fee than other jurisdictions in New York State.[11]

II. BACKGROUND

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[12] "[T]his right is deeply rooted in [our] Nation's history and tradition" with its origins based on the English Bill of Rights of 1689.[13] In the 1760s and 1770s, American colonists asserted the right to bear arms in response to King George III's attempt to disarm them.[14] During the Bill of Rights ratification debates in 1788, the paranoia that a central "government would disarm the population in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhet-

253. In this appellate action, the Second Circuit chose not to review whether the organizations had standing because they agreed with the trial court that the individual plaintiffs had standing. *Kwong*, 723 F.3d at 162 n.4. *See, e.g.*, Disability Advocates, Inc. v. New York Coal. for Quality Assisted Living, Inc., 675 F.3d 149, 156-57 (2d Cir. 2012) (discussing standing between individuals and associate organizations); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 263-64 (1977) (declining to address the issue as to whether an organization had standing after concluding that at least one individual plaintiff retained standing).

9 Not only was the $340 licensing fee contested at the trial court level, but the plaintiffs' highlighted that they were required to pay an additional $94.25 fee for "fingerprinting and background checks conducted by the New York State Division of Criminal Justice Service." *Kwong*, 723 F.3d at 162 n.5. It was noted that this fee is paid only for initial application and not for renewals; thus it was not contested on appeal. *Id.*

10 It should be noted that although the License Division of New York State issues licenses for many different types of firearms, the plaintiffs' appeal is concerned solely with the fee associated with obtaining a residential handgun license. *Id.* at 162 n.6.

11 *Id.* at 162.

12 U.S. CONST. amend II.

13 McDonald v. City of Chicago, 130 S. Ct. 3020, 3036 (2010).

14 *Id.* at 3037.

oric."[15] Federalists agreed with Antifederalists, not that the right was "important to warrant protection" from tyranny, "but by contending that the right was adequately protected by the Constitution's assignment of only limited powers to the Federal Government."[16]

This fear of tyranny, which prompted the addition of the Second Amendment to the constitution, lasted until the 1850s.[17] Around this time, self-defense became the focal point for the enforcement of the right to bear arms.[18] This need for self-defense became a priority in the southern states during the post-Civil War era.[19] In these southern states, former confederate troops would forcibly remove weapons from recently freed slaves.[20] Although Union Army commanders took action to prevent these armed parties from denying citizens their right to keep and bear arms, the 39th Congress determined that legislation to enforce the amendment was required.[21] The Freedmen's Bureau Act of 1866 provided:

> [T]he right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms*, shall be secured to and enjoyed by all citizens . . . without respect to race or color, or previous condition of slavery.[22]

In 2008, in *District of Columbia v. Heller*,[23] the Supreme Court reiterated this fundamental right for all citizens to possess a handgun in one's home for the purpose of self-defense. In *Heller*, the Supreme Court determined that "the Second Amendment conferred an individual right to keep and bear arms."[24] In *Heller*, the respondent applied for a firearm license in order to keep a firearm in his home.[25] Although the respondent was a Washington, D.C. police of-

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[15] *Id.*
[16] *Id.*
[17] *Id.* at 3038.
[18] *McDonald*, 130 S. Ct. at 3038.
[19] *Id.* at 3039.
[20] *Id.*
[21] *Id.* at 3039-40.
[22] *Id.* at 3040.
[23] 554 U.S. 570 (2008).
[24] *Id.* at 595.
[25] *Id.* at 575.

ficer, the application was subsequently denied by the District of Columbia.[26] At the time of this denial, the District of Columbia penalized the carrying of unregistered firearms, yet the law prohibited the registration of handguns.[27] The respondent challenged the denial of his handgun registration as an unconstitutional burden on his Second Amendment rights.[28] The Supreme Court held, "on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms."[29] However, the Court only answered the issue of whether the federal government was subject to the Second Amendment's freedoms; it did not provide guidance to the Second Amendment's applicability to the states.

Two years later, the Supreme Court addressed the state applicability issue in *McDonald v. City of Chicago*.[30] In *McDonald*, Chicago residents challenged the constitutionality of a city statute that prohibited an individual from possessing a handgun without valid registration.[31] Further, the city had also made it unlawful to register handguns, similar to the statute in *Heller*.[32] The respondents in *McDonald* contended that enforcement of the Chicago statute was a violation of their Second Amendment rights.[33] Although counsel for the City of Chicago argued that the ban "protect[ed] its residents from the loss of property and injury or death from firearms," the Chicago residents included police statistics that the city's handgun murder rate had increased since the enactment of the firearm ban.[34] The Supreme Court determined that although the Fourteenth Amendment traditionally protected individuals against state discrimination, it further "protect[ed] constitutionally enumerated rights, including the right to keep and bear arms."[35] Thus, *McDonald* held that Second Amendment rights were fully applicable to the states.[36]

In the State of New York, an individual may possess a firearm under certain circumstances; however, it is illegal to possess a hand-

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[26] *Id.*
[27] *Id.* at 574-75.
[28] *Heller*, 554 U.S. at 575-76.
[29] *Id.* at 595.
[30] 130 S. Ct. 3020 (2010).
[31] *Id.* at 3027.
[32] *Id.* at 3026.
[33] *Id.*
[34] *Id.*
[35] *McDonald*, 130 S. Ct. at 3025.
[36] *Id.* at 3050.

gun without a valid license.[37] Absent the fulfillment of these exemptions, New York State generally prohibits the carrying and possession of firearms without a license.[38] The State defines a firearm "to include pistols, revolvers, shotguns with barrels less than eighteen inches in length, rifles with barrels less than sixteen inches in length, and any weapon made from a shotgun or rifle with an overall length of less than twenty-six inches."[39] New York Penal Law § 400.00 "is the exclusive statutory mechanism for the licensing of firearms in New York State."[40]

Under New York Penal Law § 400.00(14), the general range of the state licensing is set from $3 to $10; however, the statute does allow an exception for both New York City and Nassau County to establish licensing fees that fall outside this range.[41] Pursuant to this exception, New York City Administrative Code § 10-131(a)(2) provides that every applicant for a license to "carry or possess a pistol or revolver in the city" shall pay a fee of $340 for each original or renewal application every three years.[42]

The New York State Legislature makes it illegal to possess a handgun within the home without a license.[43] New York Penal Law § 400 provides for several different types of licenses to carry or possess handguns in various places or circumstances, including the license at issue here, the premises-residence handgun license.[44] The premises-residence handgun license permits a licensee to "have and possess [a handgun] in his dwelling."[45] In order to obtain or renew a premises-residence handgun license, an individual must be twenty-one years of age or older.[46]

Further, New York Law restricts handgun licensing or renewal "except by the licensing officer, and then only after investigation and finding that all statements in a proper application for a license are

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[37] *See* N.Y. PENAL LAW § 265.01(1) (McKinney 2013) (making possession of any firearm a class A misdemeanor); *see also* N.Y. PENAL LAW § 265.20(a)(3) (providing an exception for persons to whom a license has been issued).

[38] Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 85 (2d Cir. 2012).

[39] *Id.*

[40] O'Conner v. Scarpino, 638 N.E.2d 950 (N.Y. 1994).

[41] *Kwong*, 723 U.S. at 162.

[42] NEW YORK CITY, N.Y., CODE § 10-131(a)(2) (2012).

[43] N.Y. PENAL LAW §§ 265.01(1), 265.20(a)(3).

[44] N.Y. PENAL LAW § 400.00(2).

[45] N.Y. PENAL LAW § 400.00(2)(a).

[46] N.Y. PENAL LAW § 400.00(1).

true."[47] The licensing officer may not approve the application if "good cause exists" to deny the license.[48] Licensing officers are "vested with considerable discretion" in determining whether to approve or deny a submitted firearm license application.[49] If denied, Article 78 of New York's Civil Practice law and Rules allows a firearm license applicant to request for judicial review of said denial.[50] However, in order to overturn the denial of a firearm license application, the licensing officer's determination must be found to be "arbitrary and capricious."[51]

In 2012, in *Kachalsky v. County of Westchester*,[52] the Second Circuit addressed whether the State requirement that an applicant demonstrate "proper cause" to obtain a concealed handgun license violates an individual's Second Amendment.[53] The Second Circuit held that New York State law preventing an individual from obtaining a full-carry, concealed handgun license to possess handguns in public, does not violate the Second Amendment.[54] The court in *Kachalsky* further held that proper cause or a demonstrated personal need for self-protection, which is distinguishable from that of the general community, is required to obtain a license; thus, any denial of a concealed carry handgun license without this showing did not violate the Second Amendment.[55] The court stated, "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.' "[56] The court in *Kachalsky* highlighted that the parties did not dispute that "New York has substantial, indeed compelling, governmental interests in public safety and crime prevention."[57]

The court in *Kachalsky* concluded that " '[p]roper respect for a coordinate branch of government' requires that [the court] strike

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[47] *Id.*; *see Kwong*, 876 F. Supp. 2d at 249 (highlighting other duties assigned to licensing officers, including determining whether the eligibility requirements set forth under New York law are met, inspecting medical hygiene record, and investigating the truthfulness of statements made in the application).

[48] N.Y. PENAL LAW § 400.00(1)(g).

[49] *Kachalsky*, 701 F.3d at 87.

[50] *Id.*

[51] *Id.*

[52] 701 F.3d 81 (2d Cir. 2012).

[53] *Id.* at 83.

[54] *Id.* at 101.

[55] *Id.* at 99-100.

[56] *Id.* at 86.

[57] *Kachalsky*, 701 F.3d at 97.

down legislation only if 'the lack of constitutional authority to pass the act in question is clearly demonstrated.' "[58] However, the court determined that the plaintiffs failed to meet their evidentiary burden to show that a special need for self-protection should not be a requisite for acquiring a firearm license.[59] The court stated that the plaintiffs did 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"; thus, the plaintiffs' claim was denied.[60]

Similar to the plaintiffs in *Kachalsky*, the plaintiffs in *Kwong* challenged two specific statutory provisions related to this licensing scheme.[61] First, they contended that Administrative Code § 10-131(a)(2) violated the Second Amendment because the fee it imposed was excessive and it impermissibly burdened their Second Amendment right to keep and bear arms.[62] The plaintiffs also challenged the New York State statute allowing the City of New York to set the licensing fee outside of the general $3 to $10 range.[63] The plaintiffs argued that the New York City exception violated the Equal Protection Clause because it drew a classification between New York City residents and other citizens of New York State, resulting in a disparate burden on the exercise of New York City residents' Second Amendment rights.[64]

New York Penal Law § 400.00(14) provides the New York City Council and the Nassau County Board of Supervisors with the option to fix the fee to be charged for a license to carry a pistol or revolver outside of the general $3 to $10 range.[65] The statute provides:

> In [New York City], the city council and in the county of Nassau the Board of Supervisors shall fix the fee to be charged for a license to carry or possess a pistol or revolver and provide for the disposition of such fees. Elsewhere in the state, the licensing officer shall collect and pay into the county treasury the following

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[58] *Id.* at 100-01 (quoting United States v. Harris, 106 U.S. 629, 635 (1883)).
[59] *Id.* at 101.
[60] *Id.*
[61] *Kwong*, 723 F.3d at 162.
[62] *Id.* at 165.
[63] *Id.* at 161.
[64] *Id.* at 169.
[65] N.Y. PENAL LAW § 400.00(14).

> fees: for each license to carry or possess a pistol or revolver, no less than three dollars nor more than ten dollars as may be determined by the legislative body of the county.[66]

The ability to set the fee outside of the general range has been authorized in New York City since 1947.[67] Between 1962 and 2004, the licensing fee in New York City was increased six separate times, the most recent being an amendment to Administrative Code § 10-131(a)(2) from a two-year permit set at $170 to a three-year permit currently set at $340.[68] The amendment to New York Administrative Code § 10-131(a)(2) also allowed New York City to recover some of the costs of processing license applications.[69]

Accompanying the amendment, the New York City Office of Management and Budget prepared a "User Cost Analysis" report showing an average administrative cost of $343.49 per application for a handgun license processed by the Licensing Department.[70] Moreover, the New York City Council's Committee on Finance offered a supplemental account showing the expenses incurred and revenues collected by the City's handgun licensing system.[71] This report detailed that costs associated with the licensing scheme amounted to over $6 million; however, the fees collected merely totaled $3.35 million, equaling a loss of over $2.6 million.[72] Yet, the report concluded with an estimate that the increase of the licensing fee to $340 would result in an estimated increase of $1.1 million in revenue.[73]

III. THE SECOND CIRCUIT'S ANALYSIS OF THE $340 FEE

In resolving whether the $340 handgun licensing fee imposed by Administrative Code § 10-131(a)(2) violated the Second Amendment, the Second Circuit first decided whether the fee was permissi-

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66 *Id.*

67 *Kwong*, 723 F.3d at 163.

68 *Id.*; *see also* NEW YORK CITY, N.Y., LOCAL LAW 37 (2004) (amending NY Administrative Code 10-131(a)(2), allowing the change from two years till renewal to three; on average increasing the cost of the license by $28.33 per year).

69 *Kwong*, 723 F.3d at 163.

70 *Id.*

71 *Id.* (stating that the pre-2004 licensing fee system "did not reflect the actual costs of licensing[.]").

72 *Id.*

73 *Id.*

ble under the Supreme Court's fee jurisprudence doctrine, namely used in First Amendment analyses.[74] Judge Cabranes's opinion states, "[T]he Supreme Court's First Amendment fee jurisprudence provides the appropriate foundation for addressing plaintiffs' fee claims under the Second Amendment."[75] The fee jurisprudence doctrine has historically been used during analysis of constitutional challenges to governmental fees on "expressive activities protected under the First Amendment[,]" for example, fees charged for holding a protest, parade, or rally.[76]

A. The Supreme Court's Fee Jurisprudence Doctrine

In the First Amendment context, the Supreme Court has held that governmental entities may impose licensing fees relating to the exercise of constitutional rights when the fees are designed "to meet the expense incident to the administration of the [licensing statute] and to the maintenance of public order in the matter licensed."[77] In other words, fees that serve as a method to defray the costs particularly incurred in the enforcement of municipal or state regulations, and not solely as revenue taxes, are constitutionally permissible.[78]

In *Cox v. New Hampshire*,[79] sixty-eight Jehovah's Witnesses were convicted in a New Hampshire municipal court for violating a regulation that disallowed public demonstrations conducted without being issued a special license or permit.[80] The Supreme Court found

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[74] *Kwong*, 723 F.3d at 165.

[75] *Id.*

[76] *Id.*; *see Heller*, 554 U.S. at 595 (noting similarities between the analyses of the First Amendment and the Second Amendment); *see also* Justice v. Town of Cicero, 827 F. Supp. 2d 835 (N.D. Ill. 2011) (finding that a firearms-regulation requirement, though not automatically valid, is not invalid simply because it regulates the exercise of an individual's Second Amendment constitutional right).

[77] Cox v. New Hampshire, 312 U.S. 569, 577 (1941); *compare id.* (allowing a parade licensing fee as constitutionally permissible because fees were set to defray administrative costs), *with* Murdock v. Pennsylvania, 319 U.S. 105, 113-14 (1943) (striking down a license tax that was "not a nominal fee [designed] as a regulatory measure to defray the expenses of policing the activities in question.").

[78] *See* Seleven v. New York Thruway Auth., 711 F.3d 253, 259-61 (2d Cir. 2013) (holding a toll bridge fee as constitutionally permissible); *see also* Nat'l Awareness Found. v. Abrams, 50 F.3d 1159, 1165 (2d Cir. 1995) (stating that fees that serve as revenue taxes-not as means to meet costs of administration to the public order-are not constitutionally permissible).

[79] 312 U.S. 569 (1941).

[80] *Id.* at 570-571.

that the New Hampshire municipality retained sufficient police power to administer regulations in furtherance of the control of its streets and "cannot be denied authority to give consideration, without unfair discrimination, to [the] time, place, and manner in relation to the other proper uses of the streets."[81] The municipality's license fee for processions was set at a permissible range up to $300.[82] This fee, the Court noted, would differ depending on the size and manner required of the proposed parade or procession.[83] The Supreme Court concluded that the proposed fee was "not a revenue tax, but . . . [a cost related] to the administration of the act and to the maintenance of public order."[84]

The Circuit Courts have generally extended this First Amendment analysis to determine whether fees concerning Second Amendment licensing rights are constitutional.[85] In *United States v. Decastro*,[86] the defendant was convicted of transporting a Florida-licensed firearm into New York without obtaining a proper New York license.[87] The defendant contended that the federal firearm transportation statute substantially burdened his right to keep and bear arms.[88] The Second Circuit stated, "In deciding whether a law substantially burdens Second Amendment rights, it is therefore appropriate to consult principles from other areas of constitutional law, including the First Amendment."[89]

The court in *Decastro* subsequently found that the defendant lacked standing because he had never applied for a license in New York.[90] Further, the Second Circuit held that although the challenged transportation statute prohibited the movement of a firearm between states without a sufficient license, the statute did "nothing to keep someone from purchasing a firearm in [his or] her home state, which is presumptively the most convenient place to buy anything."[91]

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[81] *Id.* at 576.

[82] *Id.*

[83] *Id.* at 576-77.

[84] *Cox*, 312 U.S. at 577.

[85] *Kwong*, 723 F.3d at 165.

[86] 682 F.3d 160 (2d Cir. 2012).

[87] *Id.* at 161.

[88] *Id.* at 163.

[89] *Id.* at 167.

[90] *Id.* at 164 ("As a general matter, to establish standing to challenge an allegedly unconstitutional policy, a plaintiff must submit to the challenged policy.") (quoting Jackson-Bey v. Hanslmaier, 115 F.3d 1091, 1096 (2d Cir. 1997)).

[91] *Decastro*, 682 F.3d at 168.

In *Kwong*, the Second Circuit used the same approach in determining whether Administrative Code § 10-131(a)(2) substantially burdened an individual's right to bear arms.[92] The court held that the New York Office of Management and Budget's user cost analysis report clearly showed that the $340 licensing fee was designed to assist in reducing the administrative expenses related with conducting the City's firearm licensing system.[93] Although the court noted that $340 licensing fee is well over the $10 maximum set in other New York Counties, it highlighted that "this is simply not the test for assessing the validity of a licensing fee."[94] Even though the plaintiffs contended that the fees must be "nominal" to be permissible, pursuant to *Murdock v. Pennsylvania*,[95] their argument was quickly rejected.[96]

In *Murdock*, the Supreme Court invalidated a city ordinance that required religious groups to pay a license fee of $1.50 a day before distributing literature.[97] The Court found the law to be "a flat tax imposed on the exercise of a privilege granted by the Bill of Rights" because the license fee was not a "nominal fee imposed as a regulatory measure to defray the expense of policing the activities in question."[98] The plaintiffs argued that this statement meant that the fee was not permissible unless it was both nominal and designed to defray administrative expenses.[99] The District Court rejected this argument stating, "this argument was explicitly rejected by the Supreme Court in *Forsyth County, Georgia v. Nationalist Movement*,[100] where the Court concluded that the courts below had erred in interpreting *Murdock* in this manner."[101]

While conceiving the possibility of fees to become so "exorbitant" as to deter the exercise of the licensed activity, the court in *Kwong* found that the plaintiffs merely asserted that the fee is exces-

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[92] *Kwong*, 723 U.S. at 167.

[93] *Id.* at 166.

[94] *Id.*

[95] 319 U.S. 105 (1943).

[96] *Kwong*, 876 F. Supp. 2d at 255; *see* Forsyth Cnty., Ga. v. Nationalist Movement, 505 U.S. 123, 137 (1992) ("Th[e] sentence [in *Murdock*] does not mean . . . only nominal charges are constitutionally permissible. It reflects merely one distinction between the facts in *Murdock* and those in *Cox*. The tax at issue in *Murdock* was invalid because it was unrelated to any legitimate state interest, not because it was of a particular size.").

[97] *Murdock*, 319 U.S. at 106-07.

[98] *Id.* at 113-14.

[99] *Kwong*, 876 F. Supp. 2d at 255.

[100] 505 U.S. 123 (1992).

[101] *Kwong*, 876 F. Supp. 2d at 255 (citation omitted).

sive.[102] Further, the court found that the plaintiffs provided no evidence to suggest that the $340 fee prohibited an individual from obtaining a residential handgun license.[103] Moreover, the fact that the individual plaintiffs were able to obtain the licenses they were seeking demonstrated that the "fee was not prohibitive or exclusionary as applied to these individual[s]."[104] Because of this determination, the Second Circuit held that New York Administrative Code § 10-131(a)(2) was constitutional as a permissible fee.[105]

B. Constitutional Burden Analysis of the $340 Fee

The court in *Kwong* next considered whether Administrative Code § 10-131(a)(2) imposed an unconstitutional burden on an individual's Second Amendment rights.[106] In *United States v. Decastro*, the Second Circuit held that the appropriate level of scrutiny for review of a statute dealing with the Second Amendment is determined by how "substantially" that statute burdens the exercise of Second Amendment rights.[107] The court explained that if the alleged burden imposed by a regulation of firearms was a "marginal, incremental or even appreciable restraint on the right to keep and bear arms," it would not be analyzed under heightened scrutiny.[108] The court continued, stating that "heightened scrutiny is appropriate only as to those regulations that substantially burden [] Second Amendment [rights]," not merely by placing a restraint on them.[109]

The court in *Kwong* held that Administrative Code § 10-131(a)(2) did not substantially burden an individual's Second Amendment right solely because the licensing requirement made it more expensive.[110] The court did not actually decide whether Administration Code § 10-131(a)(2) warranted a heightened scrutiny review.[111] Instead, it held that the statute would endure an intermediate

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[102] *Id.* at 256.
[103] *Id.*
[104] *Kwong*, 723 F.3d at 166-67.
[105] *Id.* at 167.
[106] *Id.*
[107] *Decastro*, 682 F.3d at 167-68.
[108] *Id.* at 166.
[109] *Id.* at 164.
[110] *Kwong*, 723 F.3d at 167.
[111] *Id.* at 168.

form of heightened scrutiny.[112] Under an intermediate form of heightened scrutiny standard, a regulation that burdens Second Amendment rights "passes constitutional muster if it is substantially related to the achievement of an important governmental interest."[113]

Observing that New York has a compelling interest in public safety and crime prevention, the court held that "the licensing fee is designed to allow the City of New York to recover the costs incurred through operating its licensing scheme, which is designed to promote public safety and prevent gun violence."[114] For these reasons, the Second Circuit affirmed the order of the District Court concluding that the $340 licensing fee was constitutional.[115]

IV. THE SECOND CIRCUIT'S EQUAL PROTECTION ANALYSIS OF PENAL LAW SECTION 400.00(14)

The second issue addressed in *Kwong* was whether New York State Penal Law § 400.00(14), allowing New York City and Nassau County to alter the licensing fee to $340, violated the Equal Protection Clause.[116] Again, the analysis began with a determination of the level of scrutiny that should be used during analysis of the alleged constitutional violation.[117] The plaintiffs asserted that because Penal Law § 400.000(14) imposed additional and unequal requirements on New York City residents, as opposed to other citizens who reside in the rest of the state, the statute violated the Equal Protection Clause.[118] Further, the plaintiffs contended that the statute "should be reviewed under strict scrutiny, and should be found unconstitutional to the extent it authorizes [only] the City [and Nassau County] to impose a fee greater than $10," which according to the plaintiffs, places a burden on the exercise of a constitutional right.[119]

The Equal Protection Clause prohibits the states from "deny[ing] to any person within its jurisdiction the equal protection of the laws."[120] The Supreme Court has made it clear that:

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112 *Id.*
113 *Id.*
114 *Id.* at 168-69.
115 *Kwong*, 723 F.3d at 169.
116 *Id.*
117 *Id.*
118 *Kwong*, 876 F. Supp. 2d at 259.
119 *Kwong*, 723 F.3d at 169.
120 U.S. CONST. amend. XIV.

> The guarantee of equal protection . . . is not a source of substantive rights or liberties, but rather a right to be free from invidious discrimination in statutory classifications and other governmental activity. It is well settled that where a statutory classification does not itself impinge on a right or liberty protected by the Constitution, the validity of classification must be sustained unless "the classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective."[121]

The presumption of validity of classification will disappear, however, if the reason for classification is based on "suspect" elements, such as gender-based or race-based classifications.[122] In *Romer v. Evans*,[123] the Supreme Court established that "if a law neither burdens a fundamental right nor targets a suspect class," the statute would be upheld "so long as it bears a rational relation to some legitimate end."[124] Otherwise stated, the Court determined that, without classification of a suspect class, legislation would be upheld as long as the enactment in question was rationally related to a legitimate governmental agenda.[125]

A. Penal Law Section 400.00(14) is Subject to Rational Basis Review

In *City of Cleburne v. Cleburne Living Center, Inc.*,[126] the Supreme Court noted that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike," not requiring "that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purposes

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[121] Harris v. McRae, 448 U.S. 297, 322 (1980) (quoting McGowan v. Maryland, 366 U.S. 420, 425 (1961)).

[122] *Id.*

[123] 517 U.S. 620 (1996).

[124] *Id.* at 631.

[125] *See* Heller v. Doe, 509 U.S. 312, 320 (1993) (holding that a classification will survive rational basis scrutiny "if there is a rational relationship between the disparity of treatment and some legitimate government purpose."); *see also* Nordlinger v. Hahn, 505 U.S. 1, 15 (1992) (highlighting that a legislature that creates these categories need not "actually articulate at any time the purpose or rationale supporting its classification.").

[126] 473 U.S. 432 (1985).

for which the classification is made."[127] In other words, the Fourteenth Amendment does not require equal treatment for all, but it does, however, require a reason relating to public state interest for why different classes would statutorily be treated differently.[128]

Cleburne established that this general rule gives way when any classification is sorted by "race, alienage, or national origin."[129] The court reasoned that "[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such consideration are deemed to reflect prejudice and antipathy-a view that those in the burdened class are not as worthy or deserving as others."[130] Any alleged discrimination of these suspect statutory classifications will be subjected to strict scrutiny and will be allowed only if they are "suitably tailored to serve a compelling state interest."[131]

The court in *Kwong*, however, agreed with the plaintiffs that Penal Law § 400.00(14) differentiated between New York City residents and other New York State citizens by instituting a $10 maximum fee "applicable only to the latter group; this indicate[d] only that the law draws a classification, not that this classification burdens a constitutional right."[132] The court reasoned that Penal Law § 400.00(14) neither burdened a fundamental right nor targeted a suspect class.[133] The court subsequently determined that rational basis was the appropriate standard of review.[134]

The Second Circuit has reasoned that Penal Law § 400.00(14) "simply allows" New York City and Nassau County to set the fee above the $3 to $10 range, albeit the statute does require that a licensing fee for firearm possession be set in all other parts of New York State.[135] The court in *Kwong* emphasized three examples of what Penal Law § 400.00(14) does "not do."[136] The statute does not mandate the City Council to implement a firearm license fee greater than other license fees set in other counties of the state, it merely allows the

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127 *Id.* at 439; *see also Kwong*, 723 F.3d at 169.
128 *Cleburne*, 473 U.S. at 439-40.
129 *Id.* at 440.
130 *Id.*
131 *Id.*
132 *Kwong*, 876 F. Supp. 2d at 260.
133 *Kwong*, 723 F.3d at 170.
134 *Id.*
135 *Id.* at 169.
136 *Id.* at 169-70.

ability to do so.[137] Secondly, it does not restrict all the other parts of New York State to apply for a legislative exemption to Penal Law § 400.00(14), like New York City and Nassau County have done.[138] Lastly, the Second Circuit found that the Penal Law does not allow a government to charge any fee amount, only an amount reasonably necessary to cover the costs of the "issuance, inspection, and enforcement."[139] The court concluded that, beyond setting the licensing fee range from $3 to $10 to most of New York State, "Penal Law § 400.00(14) itself does *nothing* to burden anyone's Second Amendment rights."[140]

B. Penal Law Section 400.00(14)'s Survival of "Rational Basis" Review

Rational basis review requires "only that there be a rational relationship between the disparity of treatment and some legitimate governmental purpose" for the statute to survive analysis.[141] The determination given by *Kwong* included many of the same reasons that allowed Administrative Code § 10-131(a)(2) to survive constitutional scrutiny, namely the fact that the fee set by the New York City Council was to defray the administrative costs attendant to the firearm licensing scheme.[142]

The plaintiffs in *Kwong* stipulated that "the state had a legitimate interest in allowing New York City to recoup the costs incurred by its regulatory schemes."[143] Further, the court in *Kwong* reasoned that the flexibility afforded to New York City and Nassau County, to reduce expenses in its licensing scheme, would help guarantee that the scheme remained satisfactorily funded, "thereby allowing it to function properly."[144] Lastly, the Second Circuit noted that every

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[137] *Id.*

[138] *Kwong*, 723 F.3d at 170.

[139] *Id.*; *see* ATM One L.L.C. v. Inc. Vill. Of Freeport, 714 N.Y.S.2d 721 (App. Div. 2d Dep't 2000) (settling that where a license or permit fee is imposed under the power to regulate "the amount charged cannot be greater than a sum reasonably necessary to cover the costs of issuance, inspection and enforcement . . . [t]o the extent that fees charged are exacted for revenue purposes or to offset the cost of general governmental functions they are invalid as an unauthorized tax.").

[140] *Kwong*, 723 F.3d at 170.

[141] *Id.* at 171.

[142] *Id.*

[143] *Id.*

[144] *Id.*

firearm application would trigger a background check, a check into an "applicant's mental health, criminal history and moral character, thus helping to ensure" that the system "promotes public safety."[145] For these reasons, *Kwong* held that the state statute allowing certain municipalities an exemption to its required $3 to $10 range established a rational relationship to a legitimate governmental purpose.[146]

Therefore, after determining that Penal Code § 400.00(14) survived rational basis review and highlighting the legitimate government purposes for allowing the exemptions that the Penal Law provides, the Second Circuit concluded that Penal Law § 400.00(14) "survive[d] rational basis review and [in turn, did] not violate the Equal Protection Clause."[147]

V. CONCLUSION

In Judge Walker's concurring opinion, he stated, "[t]he full import of the Second Amendment right and the government's burden to justify the infringement of this right in different contexts remain opaque."[148] Departing from the majority and adding to this confusion, Judge Walker considered this licensing fee to be a substantial burden on one's right to possess a firearm in her home for self defense, a fundamental tenant of the Second Amendment.[149] Thus, a substantial burden would call for intermediate scrutiny, which Judge Walker then believed the statute would have survived.[150]

Judge Walker's concurring opinion disagreed with the majority's observation that the court "need not address the questions of whether the fee is a substantial burden and what level of scrutiny is required."[151] The concurring opinion determined that intermediate scrutiny is sufficient because Administrative Code § 10-131(a)(2) imposed a burden, not a ban, on an individual's Second Amendment fundamental right.[152] Even though Judge Walker utilized a different level of review than the majority, they arrived at the same conclusion—Administrative Code § 10-131(a)(2) survived intermediate

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145 *Kwong*, 723 F.3d at 170.
146 *Id.* at 172.
147 *Id.* (Walker, J., concurring).
148 *Kwong*, 723 F.3d at 172 (Walker, J., concurring).
149 *Id.*
150 *Id.*
151 *Id.* at 173.
152 *Id.* at 174.

scrutiny because of its substantial relationship to a legitimate government interest, namely public safety from the threats of firearms.[153]

As per the Fee Jurisprudence doctrine, precedence has allowed the courts to use First Amendment doctrine in analyzing Second Amendment issues. The decision in *Kwong*, allowing these fees, is not shocking, yet there is something unsettling about rationalizing a fundamental right of possessing a firearm in one's home with a doctrine based on parade registrations or protests. In essence, the *Kwong* decision charges a fee to effectively prevent gun violence.

But does charging a fee that would keep weapons out of the hands of financially underprivileged citizens truly promote the government's agenda that warrants the fundamental burden? Does this lead to the conclusion that those with enough wealth to acquire a home and a firearm license are in the best position to promote the public safety concern that warrant the licensing fee in the first place? Further, does this program truly cost this much? If answered affirmatively, then why is it so much higher in New York City than anywhere else in the state?

Although the Second Circuit tailored its opinion narrowly in its decision of *Kwong v. Bloomberg*, the result has yet to put an end to future Second Amendment infringement claims where restraints further test the boundaries of a substantial burden on this fundamental right, especially in light of recent tragedies such as the Newtown, Connecticut disaster and the more recent D.C. Naval Yard incident.[154]

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[153] *Kwong*, 723 F.3d at 175-76 (Walker, J., concurring).

[154] *See* James Barron, *Nation Reels After Gunman Massacres 20 Children at School in Connecticut*, THE NEW YORK TIMES, (Dec. 14, 2012), http://www.nytimes.com/2012/12/15/nyregion/shooting-reported-at-connecticut-elementary-school.html?pagewanted=all ("A 20-year-old man wearing combat gear and armed with semiautomatic pistols and a semiautomatic rifle killed 26 people - 20 of them children."); *see also* Michael D. Shear, *Gunman and 12 Victims Killed in Shooting at D.C. Navy Yard*, THE NEW YORK TIMES, (Sept. 16, 2013), http://www.nytimes.com/2013/09/17/us/shooting-reported-at-washington-navy-yard.html?pagewanted%3Dall ("A former Navy reservist killed at least 12 people . . . in a mass shooting at a secure military facility.").

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