

# Exit, Pursued by a “Bear”? New York City’s Handgun Laws in the Wake of *Heller* and *McDonald*

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*In its landmark 2008 decision in District of Columbia v. Heller, the Supreme Court held for the first time that the Second Amendment protects an individual’s right to keep and bear arms in the home for the purpose of self-defense. Then, in 2010, the Court held that this right is fully incorporated against state and local governments in McDonald v. Chicago. Both decisions declared that outright bans on handgun possession in the home were unconstitutional. However, the Court’s holdings have left many questions unanswered regarding which state and local gun regulations are constitutional under the new framework. This Note discusses the current handgun laws of New York City and New York State and seeks to determine which regulations will pass constitutional muster, and which may be invalidated.*

## I. INTRODUCTION

On December 22, 2011, Meredith Graves, a thirty-nine-year-old medical student from Tennessee, was arrested in Manhattan after asking security at the 9/11 Memorial where she could check the .32 caliber pistol she was carrying in her purse.<sup>1</sup> Graves, who possessed a Tennessee-issued concealed-carry permit, was visiting New York to attend a job interview at Brookhaven Memorial

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1. Jamie Schram et al., *Tennessee Tourist Arrested for Bringing Pistol into 9/11 Memorial*, N.Y. POST (Dec. 29, 2011, 1:43 AM), [http://www.nypost.com/p/news/local/manhattan/pistol\\_whipped\\_at\\_wtc\\_1x32hgT52UNhxpP36ZYAgJ](http://www.nypost.com/p/news/local/manhattan/pistol_whipped_at_wtc_1x32hgT52UNhxpP36ZYAgJ).

Hospital on Long Island.<sup>2</sup> She spent several days in jail before posting bond, and faced a minimum sentence of three and a half years in prison for criminal possession of a weapon in the second degree, a class C violent felony that carries a maximum sentence of fifteen years.<sup>3</sup> Graves ultimately avoided a prison sentence by pleading guilty to a misdemeanor count of criminal possession of a weapon in the fourth degree and paying a \$200 fine.<sup>4</sup>

Graves's arrest was just the latest in a string of unwitting out-of-state tourists who have recently run afoul of New York's strict gun laws. In 2011 and 2012, Jonathan Ryan,<sup>5</sup> Ryan Jerome,<sup>6</sup> Mark Meckler,<sup>7</sup> and Stephen Grant<sup>8</sup> all faced the same three-and-a-half-year minimum sentence for bringing handguns into New York City that they were permitted to carry in other states. These recent arrests of gun-toting tourists highlight the disparity between the laws of New York and those of most other states.

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2. *Id.*

3. *Id.*; see also N.Y. PENAL LAW §§ 265.03, 70.02(1)(b), 70.02(3)(b) (McKinney 2012).

4. Melissa Grace, *Gun-Toting Tourist Gets Plea Deal*, N.Y. DAILY NEWS (Mar. 19, 2012), [http://articles.nydailynews.com/2012-03-19/news/31212014\\_1\\_gun-toting-tourist-gun-license-tourist-meredith-graves](http://articles.nydailynews.com/2012-03-19/news/31212014_1_gun-toting-tourist-gun-license-tourist-meredith-graves).

5. In February 2011, a Manhattan jury acquitted Jonathan Ryan, a Florida resident who was charged with the same felony as Graves. Police had found a loaded nine-millimeter pistol in the glove compartment of Ryan's vehicle after pulling him over for making an illegal right-hand turn at a red light on the Upper East Side. Vinita Singla et al., *Lucky Son of a Gun*, N.Y. POST (Feb. 25, 2011, 1:16 PM), [http://www.nypost.com/p/news/local/manhattan/fla\\_driver\\_cleared\\_of\\_manhattan\\_EQj7QtfKSKPDCnlkX3fu8M](http://www.nypost.com/p/news/local/manhattan/fla_driver_cleared_of_manhattan_EQj7QtfKSKPDCnlkX3fu8M).

6. On September 27, 2011, Ryan Jerome, an ex-Marine from Indiana who was visiting New York City on business, was arrested when he tried to check his Indiana-licensed .45 caliber Ruger with security at the Empire State Building. Jerome spent two days in jail before posting bail and faced the same three-and-a-half-year minimum sentence before pleading guilty to a misdemeanor charge, resulting in a \$1000 fine and ten days' community service. Brad Hamilton, *2nd Dubious Gun-Carry Bust*, N.Y. POST (Jan. 1, 2012, 1:10 PM), [http://www.nypost.com/p/news/local/manhattan/nd\\_dubious\\_gun\\_carry\\_bust\\_LCJSSwtktOIQDhlsOmrUM](http://www.nypost.com/p/news/local/manhattan/nd_dubious_gun_carry_bust_LCJSSwtktOIQDhlsOmrUM); see also Russ Buettner, *Ex-Marine from Indiana Takes Deal on Gun Charge*, N.Y. TIMES, Mar. 20, 2012, at A18.

7. On December 15, 2011, Tea Party Patriots co-founder Mark Meckler was arrested at LaGuardia airport when he attempted to check a locked box containing a nine-millimeter Glock and nineteen rounds of ammunition prior to boarding a flight. The holder of a California concealed-carry permit, Meckler was not allowed to bring his weapon to New York City, and so, like the others, was charged with a Class C felony before eventually pleading guilty to disorderly conduct. Thomas Zambito, *Tea Party Big Mark Meckler Pinched on Gun Rap*, N.Y. DAILY NEWS (Dec. 15, 2011) [http://articles.nydailynews.com/2011-12-15/news/30522382\\_1\\_gun-rap-tea-party-patriots-gun-box](http://articles.nydailynews.com/2011-12-15/news/30522382_1_gun-rap-tea-party-patriots-gun-box); see also Buettner, *supra* note 6.

8. On January 4, 2012, Maryland resident Stephen Grant accepted a no-jail misdemeanor plea offer after having left a .380 caliber Walther PK in the safe of a midtown hotel in April 2011. Grace, *supra* note 4.

Each of the above-mentioned defendants could lawfully either possess or carry a handgun in his or her home state<sup>9</sup> (and, indeed, in many other states as well).<sup>10</sup> In New York, however, their actions constitute serious crimes. Under the New York Penal Law, possession of a loaded handgun outside one’s home or place of business is a class C felony<sup>11</sup> — in other words, it is treated as seriously as second-degree burglary,<sup>12</sup> second-degree robbery,<sup>13</sup> or second-degree aggravated sexual abuse.<sup>14</sup> Statewide, the possession of a handgun under any circumstances is presumptively illegal and constitutes a class A misdemeanor.<sup>15</sup> While section 265.20 of the New York Penal Law lists exemptions from the general prohibition on handgun possession, the only exemption that applies to individuals who are neither active-duty military personnel nor police officers is possession with a license issued under section 400.00.<sup>16</sup> Members of the general population can therefore only legally possess a handgun after obtaining a license.<sup>17</sup> In New York City, the process for obtaining a license to possess a hand-

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9. See Schram, *supra* note 1; Singla, *supra* note 5; Grace, *supra* note 4; Hamilton, *supra* note 6.

10. Tennessee, for instance, has formal reciprocity agreements with twenty states, while another seventeen states recognize Tennessee Handgun Carry Permits. Tennessee Handgun Carry Permit holders can thus legally carry a concealed handgun in public in all but twelve states. See *Handgun Carry Permit Reciprocity*, DEP’T OF SAFETY & HOMELAND SEC., <http://www.tn.gov/safety/handgun/reciprocity.shtml> (last visited Oct. 10, 2012). Similarly, Florida residents with carry permits can also carry in thirty-five other states. See *Concealed Carry Reciprocity*, FLA. DEP’T OF AGRIC. & CONSUMER SERVS., DIV. OF LICENSING, [http://licgweb.doacs.state.fl.us/news/concealed\\_carry.html](http://licgweb.doacs.state.fl.us/news/concealed_carry.html) (last visited Oct. 10, 2012). Indiana residents can carry in twenty-eight other states, California residents in eighteen other states, and Maryland residents in seventeen other states. See *Concealed Permit Reciprocity Maps*, USA CARRY, [http://www.usacarry.com/concealed\\_carry\\_permit\\_reciprocity\\_maps.html](http://www.usacarry.com/concealed_carry_permit_reciprocity_maps.html) (last visited Oct. 10, 2012).

11. N.Y. PENAL LAW § 70.02(1)(b) (McKinney 2012).

12. N.Y. PENAL LAW § 140.25 (McKinney 2012).

13. N.Y. PENAL LAW § 160.10 (McKinney 2012).

14. N.Y. PENAL LAW § 130.67 (McKinney 2012).

15. According to the Penal Law, “A person is guilty of criminal possession of a weapon in the fourth degree when: (1) He possesses any firearm . . . .” N.Y. PENAL LAW § 265.01(1) (McKinney 2012). All pistols and revolvers are included within the definition of “firearm.” N.Y. PENAL LAW § 265.00(2) (McKinney 2012).

16. N.Y. PENAL LAW §§ 265.20(3), 400.00 (McKinney 2012). Section 265.20(3) provides an exception to the rest of § 265 for “[p]ossession 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 . . . .” § 265.20(3). Section 400.00 lays out the guidelines for licenses to carry, possess, repair and dispose of firearms for the general populace, while § 400.01 pertains to retired sworn members of the division of state police. N.Y. PENAL LAW §§ 400.00–400.01 (McKinney 2012).

17. §§ 265.20(3), 400.00.

gun in one's home or place of business is time-consuming, expensive, and requires extensive documentation, while obtaining a permit to carry a loaded firearm in public is next to impossible for ordinary citizens.<sup>18</sup> Indeed, as Professor Adam Winkler has written of New York City's gun licensing regulations, "[i]t's not a total gun ban, but it's awfully close."<sup>19</sup>

The gun laws of New York City and New York State seem to be on a collision course with recent Supreme Court decisions. In its landmark 2008 decision *D.C. v. Heller*, the Supreme Court held that the Second Amendment protects an individual's right to keep and bear arms in the home for self-defense, overturning two Washington, D.C. statutes<sup>20</sup> that banned handgun possession in the home and prohibited lawfully possessed firearms from being loaded in all circumstances (including for the purpose of immediate self-defense).<sup>21</sup> In its 2010 decision *McDonald v. Chicago*, the Supreme Court held that the Second Amendment right recognized in *Heller* is fully applicable to the states, striking down the handgun bans of Chicago and Oak Park, Illinois.<sup>22</sup> As articulated in *Heller*, at its core, the Second Amendment protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home."<sup>23</sup> The Court was also clear that this protected class of arms includes handguns.<sup>24</sup> While neither New York City nor New York State have outright bans on handgun possession

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18. ADAM WINKLER, GUN FIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 40–41 (2011); see also *infra* Parts II.A, II.D-II.F (discussing the process for obtaining a license to possess a handgun in New York City and the restrictions placed on license holders), and III.B (discussing the issuance of licenses to carry handguns in public in New York City).

19. WINKLER, *supra* note 18, at 41.

20. D.C. CODE §§ 7-2502.02, 7-2507.02 (2009).

21. *District of Columbia v. Heller*, 554 U.S. 570, 629, 630, 635, 636 (2008).

22. *McDonald v. City of Chi., Ill.*, 130 S. Ct. 3020, 3050 (2010). The Chicago Municipal Code made it illegal to possess a firearm without a registration certificate, and prohibited registration of most handguns. CHI., ILL., MUN. CODE §§ 8-20-040(a), 8-20-050(c) (2009). Similarly, the Oak Park Municipal code made it illegal to possess a handgun. OAK PARK, ILL., MUN. CODE §§ 27-2-1 (2007), 27-1-1 (2009).

23. *Heller*, 554 U.S. at 635.

24. *Id.* at 628–29 (citations omitted) ("The [Washington, D.C.] handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose [of self-defense]. The prohibition extends moreover to the home where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to 'keep' and use for protection of one's home and family' would fail constitutional muster.").

like those annulled in *Heller* and *McDonald*, lawsuits have already been filed in the wake of those decisions challenging the city’s and the state’s firearms statutes and regulatory schemes.<sup>25</sup>

However, both *Heller* and *McDonald* left many unanswered questions regarding what exactly the Second Amendment right entails. *Heller*, for instance, makes it clear that the Second Amendment protects the right of law-abiding citizens to possess a handgun in the home for self-defense,<sup>26</sup> while *McDonald* holds that this right is fully incorporated against states and municipalities.<sup>27</sup> The majority in *Heller* nonetheless stated that “[l]ike most rights, the right secured by the Second Amendment is not unlimited,” and added that “longstanding 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, [and] laws imposing conditions and qualifications on the commercial sale of arms” remain constitutional.<sup>28</sup> But the Court has said nothing about other restrictions on the possession of handguns in the home; likewise, the Court has provided little guidance on restrictions regarding the possession of handguns outside the home, or on the types of firearms (other than handguns) that are constitutionally protected.

This Note will discuss the constitutionality of the handgun laws of New York City and New York State following *Heller* and *McDonald*. Part II begins with a general overview of the state and local laws concerning handgun ownership in New York City.

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25. See, e.g., *Kwong v. Bloomberg*, No. 11 Civ. 2356(JGK), 2012 WL 995290 (S.D.N.Y. Mar. 26, 2012); *Kachalsky v. Cacace*, 817 F. Supp. 2d 235 (S.D.N.Y. 2011); see also *infra* Parts II.E and III.D.

26. *Heller*, 554 U.S. at 635–36 (“And 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. . . . In sum, we 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.”).

27. *McDonald*, 130 S. Ct. at 3050 (“In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense. Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.”).

28. *Heller*, 554 U.S. at 626. The quoted statements are dicta, and had no bearing on the holding of *Heller*.

Building off of the Second Amendment's declaration that "the right of the people to keep and bear Arms, shall not be infringed,"<sup>29</sup> Part III then focuses on the right to keep handguns in the home, while Part IV considers the right to bear arms in public. Part III will discuss the complicated process for obtaining a license to possess a handgun in New York City, such as the vague "good moral character" requirement and the daunting \$340 application and renewal fee, and will also examine the various restrictions the city places on licensed handgun owners. Part III argues that, while the overall licensing scheme will likely pass constitutional muster, specific requirements risk being struck down by the Supreme Court. Part IV then turns to New York City's de facto ban on the concealed carrying of handguns by ordinary citizens and discusses lawsuits challenging restrictions on the right to bear arms in New York and other states. Part IV argues that New York's concealed-carry laws are especially vulnerable to invalidation at the Supreme Court level. Part V then discusses the effect future rulings will have on New York City, and proposes several steps that the city could take should the Supreme Court eventually rule against its current handgun policies. Ultimately, while *Heller* and *McDonald* have yet to bring about major changes in New York's handgun laws, in the near future the constitutional right of law-abiding New Yorkers to keep and bear arms will likely expand considerably.

## II. CURRENT NEW YORK HANDGUN LAWS

This Part offers an overview of New York's handgun laws. Part II.A begins with a history and presentation of the current laws, and Part II.B moves into a discussion of individuals who are categorically excluded from possessing a handgun under federal, state, or local law. Part II.C provides an examination of the difficult process of obtaining a handgun license in New York City.

### A. NEW YORK STATE AND CITY LAWS

The current handgun laws of New York State and New York City trace their origin to the state Sullivan Dangerous Weapons

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29. U.S. CONST. amend. II.

Act of 1911.<sup>30</sup> Proposed by Democratic State Senator and Tammany Hall leader Timothy D. “Big Tim” Sullivan, who represented the slums of lower Manhattan, the Act made it a misdemeanor to possess a handgun without a permit and a felony to carry a concealed weapon in public.<sup>31</sup> Whereas the Act designated judges as the licensing officers in much of the state, it gave the New York City police commissioner sole authority to grant or deny licenses in New York City, an arrangement that persists to this day.<sup>32</sup> At least part of the motivation behind the Sullivan Act was a desire to keep firearms out of the hands of recent immigrants from Italy and Southern Europe — perceived to be prone to violence — by giving the New York Police Department (NYPD) the power to grant or deny permits.<sup>33</sup> The NYPD’s Licensing Division still handles all handgun license applications in the city.<sup>34</sup>

Today, it remains illegal to possess a handgun anywhere in New York State without a license.<sup>35</sup> Section 265.01(1) of the New York Penal Law makes possession of a handgun an automatic class A misdemeanor,<sup>36</sup> unless a person can qualify for one of the

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30. Joyce Lee Malcolm, *The Supreme Court and the Uses of History*: District of Columbia v. Heller, 56 UCLA L. REV. 1377, 1398 n.16 (2009).

31. See 1911 N.Y. Laws ch. 195, sec. 1, § 1897 (codified as amended at N.Y. PENAL LAW §§ 265.01(1), 265.20(a)(3) (McKinney 2012)); WINKLER, *supra* note 18, at 205; Michael A. Bellesiles, *Firearms Regulation: A Historical Overview*, 28 CRIME & JUST. 137, 167–68 (2001); Robert J. Cottrol & Raymond T. Diamond, “Never Intended to be Applied to the White Population”: *Firearms Regulation and Racial Disparity — The Redeemed South’s Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307, 1334 (1995).

32. N.Y. PENAL LAW § 265.00(10) (McKinney 2012); N.Y.C. ADMIN. CODE § 10-131(a)(1) (2010). Elsewhere in the state, the licensing officer is “a judge or justice of a court of record having his residence in the county of issuance,” except in Nassau and Suffolk counties. § 265.00(10). In Nassau County, the licensing officer is the Commissioner of Police, while the Suffolk County Sheriff serves as the licensing officer in Suffolk County, except for the towns of Babylon, Brookhaven, Huntington, Islip, and Smithtown, where the licensing officer is the Commissioner of Police. *Id.*

33. See Cottrol & Diamond, *supra* note 31, at 1333–34 (“Of statewide dimension, the Sullivan Law was aimed at New York City, where the large foreign born population was deemed peculiarly susceptible and perhaps inclined to vice and crime.”); see also Bellesiles, *supra* note 31, at 167; Malcolm, *supra* note 30, at 1398 n.16; WINKLER, *supra* note 18, at 205–06.

34. See *Permits, Handgun Licensing Information*, NYC.GOV, [http://www.nyc.gov/html/nypd/html/permits/handgun\\_licensing\\_information.shtml](http://www.nyc.gov/html/nypd/html/permits/handgun_licensing_information.shtml) (last visited Oct. 10, 2012) [hereinafter *Permits*].

35. N.Y. PENAL LAW §§ 265.01(1), 265.20(a)(3) (McKinney 2012).

36. § 265.01(1) (“A person is guilty of criminal possession of a weapon in the fourth degree when: (1) He possesses any firearm . . . . Criminal possession of a weapon in the fourth degree is a class A misdemeanor.”). As defined in section 265.00, the term “firearm” in Article 265 includes “any pistol or revolver,” as well as so-called “assault weapons”

exceptions listed in section 265.20.<sup>37</sup> For ordinary citizens, the only exemption that applies is possession with a license issued under section 400.00.<sup>38</sup> Notably, New York State does not make a general exception for possession of a handgun in the home or at a target range, as does neighboring New Jersey.<sup>39</sup> Individuals must therefore have a license to possess a handgun in the home or to shoot a handgun at a target range.<sup>40</sup> Since 2006, possession of a loaded handgun outside the home — the crime with which Meredith Graves and other tourists were charged — has been classified as a class C violent felony offense that carries a minimum sentence of three and a half years' and a maximum of fifteen years' imprisonment.<sup>41</sup>

As has been the case since the passage of the Sullivan Act, obtaining a license under Penal Law section 400.00 is the only lawful way for civilians in New York State to possess a handgun in their home, place of business, or even at a target range.<sup>42</sup> Section 400.00(2) states that “[a] license for a pistol or revolver . . . shall be issued to (a) have and possess in his dwelling by a household-

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and shotguns or rifles with barrels under a certain length (eighteen and sixteen inches, respectively) or an overall length of less than twenty-six inches. N.Y. PENAL LAW § 265.00(3) (McKinney 2012).

37. N.Y. PENAL LAW § 265.20 (McKinney 2012). N.Y. Penal Law section 265.20(a)(3) provides an exception to the rest of section 265 for “[p]ossession 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 . . .” § 265.20(a)(3).

38. N.Y. PENAL LAW § 400.00 (McKinney 2012). Section 400.00 lays out the guidelines for licenses to carry, possess, repair, and dispose of firearms for the general populace, while section 400.01 pertains to retired sworn members of the division of state police.

39. N.J. STAT. ANN. §§ 2C:39-5(b), 2C:39-6(e), 2C:39-6(f)(1), 2C:39-6(f)(3)(b)-(c) (West 2012).

40. §§ 265.01, 265.20(3), 400.00.

41. N.Y. PENAL LAW § 70.02(1)(b) (listing “criminal possession of a weapon in the second degree as defined in section 265.03” as a “Class C violent felony offense”); N.Y. PENAL LAW § 70.02(3)(b) (McKinney 2012) (“For a class C felony, the term must be at least three and one-half years and must not exceed fifteen years . . .”); N.Y. PENAL LAW § 265.03 (McKinney 2012) (defining “criminal possession of a weapon in the second degree” as possession of “any loaded firearm” outside “such person’s home or place of business”). The gun does not actually have to be loaded to fit within the statute. “Loaded” can also mean “possessed by one who, at the same time, possesses a quantity of ammunition which may be used to discharge such firearm.” N.Y. PENAL LAW § 265.00(15) (McKinney 2012). If “such possession takes place in such person’s home or place of business,” then it is still only a misdemeanor. N.Y. PENAL LAW § 265.03(3) (McKinney 2012).

42. Section 265.20 lists exemptions from the general prohibition on handgun possession. The only exemption that applies to individuals who are neither active-duty military personnel nor police officers is possession with a license issued under section 400.00. See §§ 265.20(3), 400.00.



er; (b) have and possess in his place of business by a merchant or storekeeper; . . . (f) have and carry concealed, without regard to employment or place of possession, by any person when proper cause exists for the issuance thereof . . .”<sup>43</sup> Licenses are valid throughout New York State, except in New York City, which requires a separate license.<sup>44</sup>

According to the Rules of the City of New York,<sup>45</sup> the license mentioned in section 400.00(2)(a) is called a “Premises-Residence License” and that mentioned in section 400.00(2)(b) a “Premises-Business License,”<sup>46</sup> while the license referred to in section 400.00(2)(f), allowing for concealed carry unconnected to employment or place of possession, is called either a “Carry Business License” or a “Special License.”<sup>47</sup> Although both Business and Residence Premises Licenses are restricted to a particular address and do not allow licensees to carry a handgun in public,<sup>48</sup> holders of either Premises License who are caught with a loaded handgun outside the home can only be charged with a class A misdemeanor, rather than the class C violent felony that applies to out-of-state residents and New Yorkers without licenses.<sup>49</sup> From 2004 to 2006, an average of 858 new applications were submitted annually for Premises-Residence Licenses, with an average of 620 licenses issued per year; for Premises-Business Licenses, an average of fifty-nine new applications were submitted and fifty new licenses issued per year.<sup>50</sup> For all licenses combined, there are currently fewer than 40,000 handgun licensees

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43. N.Y. PENAL LAW § 400.00(2)(a), (b), (f) (McKinney 2012). Other categories listed under “types of licenses” include licenses to “have and carry concealed” for bank messengers, § 400.00(2)(c), judges, § 400.00(2)(d), and corrections officers, § 400.00(2)(e).

44. N.Y. PENAL LAW § 400.00(6) (McKinney 2012).

45. The Rules of the City of New York are a compilation of the administrative rules of various New York City agencies. See *About NYC Rules*, NYC.GOV, <http://www.nyc.gov/html/nycrules/html/about/about.shtml> (last visited Nov. 4, 2012). Title 38 of the Rules governs the NYPD. See R. OF CITY OF N.Y. tit. 38 (2012).

46. R. OF CITY OF N.Y. tit. 38, § 5-01 (2012). Since *Heller* and *McDonald* focused on the right to possess a handgun in the home, much of the discussion below will concentrate on the Premises-Residence License. However, the regulations involving a Premises-Business License are essentially the same. See R. OF CITY OF N.Y. tit. 38, § 5-23(a) (2012).

47. R. OF CITY OF N.Y. tit. 38, §§ 5-01, 5-03 (2012); see also *Permits*, *supra* note 34.

48. Tit. 38, §§ 5-01(a), 5-23(a).

49. N.Y. PENAL LAW § 400.00(17) (McKinney 2012).

50. *United States v. Decastro*, 682 F.3d 160, 162 (2d Cir. 2012).

in the city, comprising less than one-half of one percent of the population.<sup>51</sup>

#### B. INDIVIDUALS CATEGORICALLY DISQUALIFIED FROM GUN POSSESSION

Federal, state, and city law automatically disqualify certain individuals from possessing a handgun. For instance, New York state law explicitly declares that “[n]o license shall be issued or renewed except for an applicant . . . who has not been convicted anywhere of a felony or a serious offense . . . .”<sup>52</sup> Federal law also prohibits the possession of firearms by convicted felons.<sup>53</sup> In addition, federal statutes and New York City regulations prohibit handgun possession by drug users,<sup>54</sup> domestic violence misdemeanants,<sup>55</sup> and persons subject to restraining orders.<sup>56</sup> Using somewhat nebulous terminology, New York state law also requires applicants to be “of good moral character” in order to obtain a license.<sup>57</sup>

Both federal and New York state law also contain restrictions on handgun possession by the mentally ill. However, New York City has a much broader definition of disqualifying mental illnesses than either state or federal law. The federal statute, 18 U.S.C. § 922(g)(4), requires an adjudication of mental defectiveness or commitment to a mental institution in order for handgun possession to be unlawful.<sup>58</sup> Similarly, New York State requires a license applicant to declare “whether he or she has ever suffered from any mental illness or been confined to any hospital or institution, public or private, for mental illness.”<sup>59</sup> New York City also explicitly lists mental illness as grounds for denial of a license,<sup>60</sup>

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51. WINKLER, *supra* note 18, at 41.

52. N.Y. PENAL LAW § 400.00(1)(c) (McKinney 2012).

53. 18 U.S.C. § 922(g)(1) (2006).

54. 18 U.S.C. § 922(g)(3) (2006); R. OF CITY OF N.Y. tit. 38, § 5-10(d) (2012).

55. 18 U.S.C. § 922(g)(9) (2006); R. OF CITY OF N.Y. tit. 38, § 5-10(g) (2012).

56. 18 U.S.C. § 922(g)(8) (2006); R. OF CITY OF N.Y. tit. 38, § 5-10(f) (2012).

57. N.Y. PENAL LAW § 400.00(1)(b) (McKinney 2012). The applicant must also be someone “concerning whom no good cause exists for the denial of the license.” N.Y. PENAL LAW § 400.00(1)(g) (McKinney 2012). For a discussion of the constitutionality of the good-moral-character requirement, see *infra* Part II.

58. 18 U.S.C. § 922(g)(4) (2012).

59. N.Y. PENAL LAW § 400.00(1)(d) (McKinney 2012).

60. R. OF CITY OF N.Y. tit. 38, § 5-10(c) (2012).

but handgun license applicants in New York City must also state whether they have ever “[s]uffered from mental illness, or due to mental illness received treatment, been admitted to a hospital or institution, or taken medication.”<sup>61</sup> An answer of “yes” to this question requires the applicant to submit an explanation on a separate form,<sup>62</sup> and provides grounds for rejection.<sup>63</sup> Thus, under the current rules, the License Division can deny an individual’s application simply because he or she has taken antidepressants (which are covered under “medication”) or has seen a psychiatrist (which is covered under “treatment”).<sup>64</sup> Current New York City handgun license holders must also notify the License Division’s Incident Section if they receive psychiatric treatment or treatment for alcoholism or drug abuse, or if they suffer from “any disability or condition that may affect the handling of a handgun, including but not limited to epilepsy, diabetes, fainting spells, blackouts, temporary loss of memory, or nervous disorder.”<sup>65</sup> Any of these conditions may result in suspension or revocation of the license, following review and evaluation by License Division investigators.<sup>66</sup>

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61. *Instructions to All Handgun License Applicants*, POLICE DEP’T, CITY OF N.Y. 3 (May 2012), <http://www.nyc.gov/html/nypd/downloads/pdf/permits/HandGunLicenseApplicationFormsComplete.pdf> [hereinafter *Instructions*]; see also R. OF CITY OF N.Y. tit. 38, § 5-02(e) (2012).

62. See *id.* (“If you have answered YES to question(s) 10 through 28 you MUST use the HANDGUN LICENSE APPLICATION ADDENDUM to explain such answer(s) in complete detail.”).

63. See tit. 38, § 5-10(c) (listing as grounds for denial having “a disability or condition that may affect the ability to safely possess or use a handgun, including but not limited to alcoholism, drug use or mental illness”).

64. Application question 21 asks if the applicant has “due to mental illness received treatment . . . or taken medication.” See *Instructions, supra* note 61, at 3. The author knows of one individual whose application was denied solely because he answered “yes” to question 21 and explained that he once saw a psychiatrist when he was a teenager, but was never diagnosed with any illness or prescribed any medication. The individual in question appealed the denial, and eventually obtained his license when he submitted a letter from another psychiatrist (who charged him several hundred dollars for the service) certifying that he was mentally competent to possess a handgun.

65. R. OF CITY OF N.Y. tit. 38, §§ 5-22(c)(7), 5-30(c)(2)-(4) (2012).

66. R. OF CITY OF N.Y. tit. 38, § 5-30(e) (2012). Licensees have a right to appeal the decision. R. OF CITY OF N.Y. tit. 38, § 5-30(h) (2012).

## C. NEW YORK CITY LICENSING PROCESS

Even for eligible individuals, applying for a New York City Premises License is a lengthy and complicated process. The application itself is only four pages long, but it contains several rather tricky questions.<sup>67</sup> For instance, applicants must provide an explanation on a separate page if they have ever been discharged from any employment for any reason.<sup>68</sup> Applicants must also explain whether they have ever applied for any type of license or permit issued by any city, state, or federal agency.<sup>69</sup> Although the application does not specifically mention it, this latter category includes a driver's license, as a driver's license is issued by a state agency.<sup>70</sup> In addition, applicants must submit a notarized affidavit of familiarity with all relevant rules and laws, a notarized affidavit from any cohabitants (such as roommates or a significant other) stating that they have no objection to the applicant receiving a license and storing firearms at home, and an acknowledgment signed by another New York State resident who agrees to safeguard any firearms in the event of a licensee's death or incapacitation.<sup>71</sup> Since applicants must list their employment information, it is unclear whether students and other unemployed individuals are eligible to obtain a license.<sup>72</sup>

Along with the application and affidavits, applicants must submit two recent, one-and-a-half-inch square color photographs; an original birth certificate; an original social security card; and at least one document certifying proof of residence, such as a lease, a New York State Income Tax Return, or a current utility bill with the applicant's name on it.<sup>73</sup> The application also re-

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67. See *Instructions*, *supra* note 61, at 2–5.

68. *Id.* at 7.

69. *Id.*

70. The author and other New York City Handgun License holders whom he knows were thus required to submit a copy of a driver's license and an accompanying affidavit explaining the driver's license and attesting to its authenticity.

71. *Instructions*, *supra* note 61, at 14–16.

72. Having spoken with several New York City Premises-Residence License holders, the author suspects that a student might be able to submit an affidavit of financial support from someone supporting him or her financially. However, neither the Rules of the City of New York nor the NYPD License Division website provide any information as to whether or not an unemployed individual can obtain a license, and there is no case law dealing with this issue.

73. *Instructions*, *supra* note 61, at 1.

quires a non-refundable fee of \$340, along with a one-time fingerprinting fee of \$91.50.<sup>74</sup> Applications must be typed, and must be submitted personally by the applicant to the License Division’s office at One Police Plaza, along with all required documents and fees.<sup>75</sup> An in-person interview with an investigating officer is also required.<sup>76</sup> In total, successful applicants can expect to wait at least eleven weeks before obtaining their licenses.<sup>77</sup>

The application process outlined above covers merely the necessary steps to obtain the license required to lawfully possess a handgun in New York State. In New York City, successful applicants must undergo additional procedures prior to actually obtaining a handgun. Along with their new license, individuals receive a “Handgun Purchase Authorization,” required to purchase a handgun in New York City.<sup>78</sup> However, even after obtaining a license and a Handgun Purchase Authorization, a licensee who purchases a handgun from a federally licensed firearms dealer (“Federal Firearms Licensee” or “FFL”) must also undergo an instant background check through the National Instant Criminal Background Check System (“NICS”) prior to leaving the dealership, as required by federal law.<sup>79</sup> Once a licensee purchases a handgun, he or she has seventy-two hours to return to the License Division at One Police Plaza (between the hours of twelve noon and two o’clock p.m., Monday through Friday) to have the handgun and the mandatory accompanying safety-locking device

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74. *Permits*, *supra* note 34.

75. *Permits*, *supra* note 34.

76. *Permits*, *supra* note 34 (“After you file your application you will be contacted for an interview and may be required to submit additional documentation.”); *see also Instructions*, *supra* note 61, at 6.

77. CITY COUNCIL, CITY OF N.Y., TRANSCRIPT OF THE MINUTES OF THE COMMITTEE ON PUBLIC SAFETY 12 (Sept. 15, 2010), *available at* <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=718919&GUID=9F292395-2685-4A52-A827-1D89EA8869A4&Options=ID> (follow “Hearing Transcript 9/15/10” hyperlink) [hereinafter MINUTES].

78. R. OF CITY OF N.Y. tit. 38, § 5-25(a)-(b) (2012). Handguns can only be purchased from a licensed New York State Firearms Dealer; the holder of a current, valid, New York State or New York City Handgun License; a New York State or New York City Police Officer or Peace Officer; or the estate of a deceased New York City or New York State handgun licensee. R. OF CITY OF N.Y. tit. 38, § 5-25(a)(8)(i)-(iv) (2012). Anyone who purchases a handgun must also obtain an approved safety-locking device, such as a trigger lock. R. OF CITY OF N.Y. tit. 38, § 5-25(a)(2), (4) (2012).

79. 18 U.S.C. § 922(t) (2006).

inspected.<sup>80</sup> The handgun may not be utilized until after it has been inspected and entered on the license.<sup>81</sup>

A licensee may only own the handguns listed on his or her license,<sup>82</sup> and a Premises License allows for the ownership of one handgun.<sup>83</sup> If a licensee wishes to obtain an additional handgun, he or she must submit a written request to the License Division, which includes the make, model, and caliber of the handgun the licensee wishes to purchase.<sup>84</sup> If the request is approved, the licensee will receive a “Notice of Handgun Purchase Authorization Approval” by mail, and must go to One Police Plaza (between the hours of nine o’clock a.m. and twelve noon, Monday through Thursday) in order to pick up the Purchase Authorization required to purchase a handgun.<sup>85</sup> Each Purchase Authorization Request Form states that “only one purchase authorization request will be accepted every three months,” and that licensees should allow six weeks for the processing of their request.<sup>86</sup> Realistically, this means that New York City handgun license holders are limited to the purchase of two handguns per calendar year.<sup>87</sup>

In New York City, whenever a gun is out of the license holder’s “immediate possession or control,” it must be “rendered . . . inoperable by employing a safety-locking device.”<sup>88</sup> Failure to do so constitutes a violation in the first instance and a misdemeanor each subsequent time thereafter.<sup>89</sup> In addition, once the total number of handguns possessed by a licensee or li-

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80. R. OF CITY OF N.Y. tit. 38, § 5-25(a)(6)–(7) (2012).

81. Tit. 38 § 5-25(a)(6).

82. R. OF CITY OF N.Y. tit. 38, § 5-22(a)(8) (2012).

83. R. OF CITY OF N.Y. tit. 38, § 5-25(d)(4)(v)–(vi) (2012).

84. R. OF CITY OF N.Y. tit. 38, § 5-25(c)(1)–(2) (2012).

85. R. OF CITY OF N.Y. tit. 38, § 5-25(c)(3)–(4) (2012).

86. N.Y.C. POLICE DEP’T, MISC. 3323, PURCHASE AUTHORIZATION REQUEST FORM (2004) (on file with the *Columbia Journal of Law and Social Problems*).

87. With careful planning and fast processing times, three purchases may be possible during a single year. A licensee who purchases a handgun in early January will have to wait until early April before even submitting an additional Purchase Authorization Request, given the mandatory three-month waiting period. *Id.* It has been the author’s personal experience that requests take longer than six weeks to process — usually at least two to three months. Assuming the licensee obtains a second Purchase Authorization in June or July and immediately purchases a second handgun, he or she will not be able to submit another request until September or October as a result of the three-month waiting period. *See id.* If this second request is processed in two to three months, then it might be possible for the licensee to purchase a third handgun before the end of the year.

88. N.Y.C. ADMIN. CODE § 10-312(a) (2010).

89. § 10-312(a)-(b).

censees residing in or located in the same household or business exceeds four, the licensee or licensees must utilize a safe for handgun storage, and must provide proof of ownership of the safe in order to obtain permission to apply for any handguns in excess of four.<sup>90</sup> Notably, however, New York City does not require that lawfully possessed firearms remain unloaded at all times, as did the District of Columbia statute that the Supreme Court invalidated in *Heller*.<sup>91</sup>

New York City residents who wish to exercise their constitutional right to possess a handgun in the home for self-defense must therefore navigate their way through a three-month application process that requires extensive documentation, several weekday trips to One Police Plaza, and over \$430 in non-refundable fees. After receiving a license, successful applicants must follow additional procedures prior to purchasing their first handgun. Further documentation and another lengthy waiting period is also required prior to each additional handgun purchase. The following sections will address the constitutionality of several main features of New York City’s licensing regime for handgun possession, such as the procedure for appealing the denial of a handgun license, the good-moral-character requirement for obtaining a license, the \$340 application and renewal fee, and restrictions on transporting a licensed handgun.

### III. “TO KEEP”: HANDGUN POSSESSION IN THE HOME IN NEW YORK

Part III discusses New York’s laws and regulations governing handgun possession in the home. Part III.A begins with an overview of the Second Amendment right described in *Heller* and *McDonald*. Part III.B then looks at specific aspects of New York’s laws, including the question of whether handgun possession is a right or a privilege (Part III.B.1), the state’s “good moral charac-

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90. R. OF CITY OF N.Y. tit. 38, § 5-25(d)(1)-(2) (2012). The head of the License Division also has the right to reject the type of safe proposed for safeguarding the handguns. R. OF CITY OF N.Y. tit. 38, § 5-25(d)(3) (2012). In addition, the License Division has an unstated policy requiring individuals wishing to purchase a fifth handgun to sign a waiver permitting the police to inspect their residence to assure that the handguns are being properly stored.

91. 554 U.S. 570, 575 (2008).

ter” requirement for obtaining a handgun license (Part III.B.2), New York City’s handgun license application and renewal fee scheme (Part III.B.3), and a New York City Licensee’s ability to transport his or her handguns outside the city (Part III.B.4). Part III.C then examines the future of the right to possess handguns in New York in the wake of *Heller* and *McDonald*.

A. LEGAL FRAMEWORK: THE RIGHT DESCRIBED IN *HELLER* AND *MCDONALD*

This subsection discusses the scope of the Second Amendment right that the Supreme Court defined in *Heller* and *McDonald*. While the Court clearly held that the Second Amendment protects an individual right to keep a handgun in the home for self-defense, it said very little about the type of restrictions that may be placed on that right, or about the type of scrutiny that courts should apply in assessing the constitutionality of such restrictions.

The Second Amendment to the United States Constitution reads as follows: “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.”<sup>92</sup> In *Heller*, the Supreme Court declared 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.”<sup>93</sup> The Court stated explicitly that the Second Amendment “elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>94</sup> The Court also held that the class of constitutionally protected arms includes handguns,<sup>95</sup> and explicitly rejected rational basis as a standard for reviewing restrictions on

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92. U.S. CONST. amend. II.

93. *Heller*, 554 U.S. at 595.

94. *Id.* at 635.

95. *Id.* at 628–29 (citations omitted) (“Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home ‘the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family’ would fail constitutional muster . . . . Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.”).



Second Amendment rights.<sup>96</sup> In *McDonald*, the Court summarized its holding in *Heller* as follows: “In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense.”<sup>97</sup>

The *McDonald* Court then went on to hold “that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.”<sup>98</sup> However, this right is not unlimited; the Court stressed in *Heller* that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . .”<sup>99</sup> Nonetheless, where licenses are required to possess a handgun, a license should be issued “if [the applicant] is not a felon and is not insane.”<sup>100</sup> Since the plaintiff *Heller* conceded that he did not “have a problem with . . . licensing,” the Court did not address the District of Columbia’s licensing requirement.<sup>101</sup>

Thus far, the Supreme Court has yet to declare which standard is appropriate for reviewing firearm laws,<sup>102</sup> other than explicitly rejecting rational basis as a standard of review.<sup>103</sup> Recently, the Third Circuit concluded that different restrictions would trigger different levels of scrutiny,<sup>104</sup> and the Fourth Circuit has

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96. Citing the famous “footnote 4” from *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n.4 (1938), the Court stated that the rational-basis test “could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.” *Id.* at 628 n.27; see also Stephen Kiehl, Comment, *In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1155 (2011) (citations omitted) (“Rational basis review is too deferential a standard to apply to regulations that infringe on what the Court has recognized as ‘a specific, enumerated right,’ namely, the right to possess arms in the home for self-defense.”).

97. *McDonald v. City of Chi., Ill.*, 130 S. Ct. 3020, 3050 (2010).

98. *Id.*

99. *Heller*, 554 U.S. at 626.

100. *Id.* at 631.

101. *Id.*

102. *Id.* at 634 (“Justice Breyer moves on to make a broad jurisprudential point: He criticizes us for declining to establish a level of scrutiny for evaluating Second Amendment restrictions.”).

103. *Id.* at 628 n.27 (“If 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.”).

104. *United States v. Marzzarella*, 614 F.3d 85, 96–97 (3d Cir. 2010) (citations omitted) (“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.”) Specifically, the Third Circuit held that the restrictions of 18 U.S.C. § 922(k)

expressed a similar view.<sup>105</sup> Courts have been reluctant to impose strict scrutiny unless the law in question “would burden the ‘fundamental,’ core right of self-defense in the home by a law-abiding citizen.”<sup>106</sup> Thus, until the Supreme Court provides further guidance, lower courts will likely apply intermediate scrutiny to all regulations short of the total ban on handgun possession in the home that the Court invalidated in *Heller* and *McDonald*.<sup>107</sup> Indeed, since neither New York City nor New York State feature such absolute bans, after *Heller* and *McDonald* New York state and federal courts have applied an intermediate scrutiny standard toward firearm regulations.<sup>108</sup>

As the Supreme Court has held, intermediate scrutiny requires that a statute “be substantially related to an important governmental objective.”<sup>109</sup> It is also well established that the government has a “compelling interest” in public safety.<sup>110</sup> However, as Professor Eugene Volokh notes, one of the problems with intermediate scrutiny is that “[t]he government often tries to justify substantial burdens on constitutional rights by arguing that such burdens significantly reduce some grave danger.”<sup>111</sup> Nonetheless, for the time being, lower courts appear likely to apply intermediate scrutiny to all restrictions on the Second Amendment that fall short of the absolute bans invalidated in *Heller* and *McDonald*.<sup>112</sup>

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— prohibiting the transportation, shipment, or receipt of any firearm not bearing its original serial number — merited intermediate scrutiny. *Id.*

105. *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 756 (2011) (“[W]e might expect that courts will employ different types of scrutiny in assessing burdens on Second Amendment rights, depending on the character of the Second Amendment question presented.”).

106. *Id.* at 470 (refusing to apply strict scrutiny to Second Amendment challenge to a federal regulation prohibiting possession of a loaded handgun within a national park area); *see also Kachalsky v. Cacace*, 817 F. Supp. 2d 235, 268 (S.D.N.Y. 2011) (refusing to apply strict scrutiny regarding law that only applies to possession outside the home).

107. *See Kiehl, supra* note 96, at 1145, 1169–70.

108. *Kachalsky*, 817 F. Supp. 2d at 268; *People v. Nivar*, 915 N.Y.S.2d 801, 809 (N.Y. Sup. Ct. 2011).

109. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

110. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

111. 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, 1461 (2009).

112. *See, e.g., United States v. Masciandaro*, 638 F.3d 458, 460 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 756 (2011); *Kwong v. Bloomberg*, No. 11 Civ. 2356(JGK), 2012 WL 995290, at \*11 (S.D.N.Y. Mar. 26, 2012); *Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 834 (D.N.J. 2012); *Kachalsky*, 817 F. Supp. 2d at 268.

## B. CONSTITUTIONALITY OF NEW YORK LAW

The following subsections in Part III.B assess the constitutionality of several key provisions of the handgun laws of New York State and New York City. Part III.B.1 will look at whether New York state courts consider handgun possession to be a constitutionally protected right, or a mere privilege that can be denied for all but arbitrary and capricious reasons. Part III.B.2 discusses the “good moral character” requirement for obtaining a handgun license in New York State, while Part III.B.3 discusses New York City’s \$340 handgun license application and renewal fee. Finally, Part III.B.4 addresses the question of whether New York City Premises License holders are allowed to transport their handguns out of New York State.

### 1. *The Second Amendment in New York States Courts: A Right or a Privilege?*

This subsection examines how New York state courts have reviewed NYPD License Division rejections of handgun license applications. Under Article 78 of the New York State Civil Practice Law and Rules, rejected applicants can institute a proceeding challenging the Police Commissioner’s decision in state court.<sup>113</sup> Article 78 challenges to licensing decisions are limited to the question of “whether a determination . . . was arbitrary and capricious or an abuse of discretion.”<sup>114</sup>

Licensing officers thus have great discretion in determining an applicant’s eligibility for a handgun license under Penal Law section 400.00. As the New York Appellate Division, First Department stated in *Papaioannou v. Kelly*, “It is well settled that the possession of a handgun license is a privilege, not a right, which is subject to the broad discretion of the New York City Police Commissioner.”<sup>115</sup> New York courts also apply a deferential rational-basis test when reviewing licensing decisions — in other

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113. See, e.g., *Kaplan v. Bratton*, 673 N.Y.S.2d 66, 68 (N.Y. App. Div. 1998) (affirming lower court’s dismissal of petitioner’s Article 78 challenge to Commissioner William J. Bratton’s denial of her license application).

114. N.Y. C.P.L.R. § 7803(3) (McKinney 2012).

115. 788 N.Y.S.2d 378, 378–79 (N.Y. App. Div. 2005) (citing *Kaplan*, 673 N.Y.S.2d 66; *Fondacaro v. Kelly*, 652 N.Y.S.2d 604 (N.Y. App. Div. 1996)).

words, unless the licensing agency's determination was arbitrary and capricious, "[t]he agency's determination must be upheld if the record shows a rational basis for it, even where the court might have reached a contrary result."<sup>116</sup>

Following *McDonald's* incorporation of the right described in *Heller*,<sup>117</sup> however, one would expect that residents of New York State no longer have a mere privilege, but a constitutionally guaranteed right to possess a handgun in the home. As discussed above, New York residents can only exercise their Second Amendment right to possess a handgun in the home after obtaining a license.<sup>118</sup> Since it is now clear that possession of a handgun is a constitutional right,<sup>119</sup> it seems logical that obtaining the handgun license required to possess a handgun would likewise be a right, and not a privilege. In addition, since the Supreme Court in *Heller* explicitly rejected rational basis as a standard for reviewing restrictions on Second Amendment rights,<sup>120</sup> it would also appear that New York courts would now have to apply a less deferential standard than the rational-basis test that they have applied to the review of handgun license decisions in the past.

Nonetheless, as recently as June of 2011 — one year after *McDonald* was decided — the First Department of the New York State Supreme Court, Appellate Division repeated the mantra that the possession of a handgun license is a privilege, and not a right, and that the Police Commissioner has broad discretion in issuing or denying licenses, subject only to a rational-basis test upon review by the courts.<sup>121</sup> Similarly, the New York County Supreme Court continues to adhere to the "privilege, not a right" doctrine.<sup>122</sup> Remarkably, in one instance where petitioner's counsel explicitly argued that the United States Supreme Court's interpretation of the Second Amendment in *Heller* and *McDonald* "changes an individual's possession of a gun from a 'privilege' to a 'right,'" the New York County Supreme Court pronounced that it

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116. *Kaplan v. Bratton*, 673 N.Y.S.2d 66, 68 (N.Y. App. Div. 1998) (quoting *Sullivan Cnty. Harness Racing Assn. v. Glasser*, 30 N.Y.2d 269, 278–79 (N.Y. 1972)).

117. *McDonald v. City of Chi., Ill.*, 130 S. Ct. 3020, 3050 (2010).

118. *See supra* Part II.A.

119. *McDonald*, 130 S. Ct. at 3050.

120. *Heller*, 554 U.S. at 628 n.27.

121. *Campbell v. Kelly*, 924 N.Y.S.2d 269, 270 (N.Y. App. Div. 2011).

122. *See, e.g., Alsaede v. Kelly*, No. 116470/2009, 2011 WL 621904, at \*4 (N.Y. Sup. Ct. Feb. 22, 2011), *aff'd as modified* by 946 N.Y.S.2d 158 (N.Y. App. Div. 2012).

was “not prepared at this time to accept this interpretation,” without providing any rationale for its conclusion.<sup>123</sup>

Thus, despite the clear language in both *Heller*<sup>124</sup> and *McDonald*<sup>125</sup> that the Second Amendment protects an individual’s *right* to possess a handgun in the home for self-defense, in New York possessing the license that is required to possess a handgun is not a right, but a privilege. Similarly, despite *Heller*’s rejection of rational-basis review,<sup>126</sup> New York state courts will apparently only overturn the NYPD License Division’s decision to deny a handgun license application if it is arbitrary and capricious. However, if an applicant were to challenge the denial of a license in federal court on Second Amendment grounds, then New York’s “privilege not a right” doctrine and arbitrary-and-capricious standard of review would likely be declared unconstitutional, since they clearly contradict the explicit holdings of *Heller* and *McDonald*.

## 2. The “Good Moral Character” Requirement

New York State requires applicants to be “of good moral character” in order to obtain a license.<sup>127</sup> If any aspect of New York’s handgun licensing scheme seems unconstitutional, it is this “good moral character” standard, which is highly discretionary and is not defined anywhere in the Penal Law.<sup>128</sup> The Rules of the City of New York give some content to the requirement, defining grounds for denying a license based on lack of good moral character to include “a poor driving history,” “multiple driver license suspensions or [having] been declared a scofflaw by the New York State Department of Motor Vehicles,” and “terminat[ion] from employment under circumstances that demonstrate lack of good

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123. *Caputo v. Kelly*, No. 113232/10, 2011 WL 567978 (N.Y. Sup. Ct. Feb. 8, 2011). The court nonetheless declared the NYPD’s denial of petitioner’s handgun license application to be arbitrary and capricious on other grounds.

124. *Heller*, 554 U.S. at 595, 629–30, 635.

125. *McDonald v. City of Chi., Ill.*, 130 S. Ct. 3020, 3050 (2010).

126. *Heller*, 554 U.S. at 628 n.27.

127. N.Y. PENAL LAW § 400.00(1)(b) (McKinney 2008). The applicant must also be someone “concerning whom no good cause exists for the denial of the license.” N.Y. PENAL LAW § 400.00(1)(g) (McKinney 2012).

128. Penal Law section 400 provides no definition of “good moral character.”

judgment or lack of good moral character.”<sup>129</sup> Meanwhile, courts have upheld the revocation of handgun licenses for violation of the good-moral-character requirement as a result of a conviction for fifth-degree possession of stolen property,<sup>130</sup> failure to notify the License Division of revocation of another license,<sup>131</sup> a driving-while-intoxicated (“DWI”) conviction,<sup>132</sup> a DWI arrest coupled with possession of a loaded firearm and a refusal to take a breathalyzer test at the time of arrest,<sup>133</sup> conspiring to deceive the License Division about one’s business address,<sup>134</sup> and the commission of multiple traffic violations, including third-degree aggravated unlicensed operation of a motor vehicle.<sup>135</sup>

In order to obtain a license in the first place, applicants must make an affirmative showing that they possess good moral character, which requires providing character reference letters, the number and nature of which varies depending upon the locality.<sup>136</sup> New York City does not provide any information regarding its

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129. R. OF CITY OF N.Y. tit. 38, §§ 5-10(h), (j) (2012). Precisely what sort of employment termination circumstances would disqualify an applicant remains unclear: does the provision merely cover being fired for unlawful activities such as theft or drug use, or would insulting one’s boss, or repeatedly showing up late to work, also indicate a lack of good moral character?

130. *Davi v. Cosgrove*, 621 N.Y.S.2d 386, 387 (N.Y. App. Div. 1995).

131. *Romanoff v. Kelly*, 806 N.Y.S.2d 6, 7 (N.Y. App. Div. 2005).

132. *Olivera v. Kelly*, 805 N.Y.S.2d 6, 7 (N.Y. App. Div. 2005).

133. *Broadus v. City of N.Y. Police Dep’t (License Div.)*, 878 N.Y.S.2d 738, 739 (N.Y. App. Div. 2009).

134. *Rombom v. Kelly*, 901 N.Y.S.2d 29, 30 (N.Y. App. Div. 2010).

135. *Georgakis v. Kelly*, No. 0111962/2007, 2008 WL 1844279, at \*6 (N.Y. Sup. Ct. Apr. 16, 2008).

136. Nassau County requires four character references from Nassau County residents who have known the applicant for a minimum of one year. *Pistol License Application Instructions*, NASSAU CNTY. POLICE DEP’T 1, 3 (Jan. 2008), [http://www.police.co.nassau.ny.us/pdf/InstructionsGeneral\\_2\\_.pdf](http://www.police.co.nassau.ny.us/pdf/InstructionsGeneral_2_.pdf) [hereinafter *Nassau County Application Instructions*]. The referees should be U.S. citizens, but cannot be relatives by blood or marriage, active law enforcement officers, husband and wife combinations, or two or more members of the same family or household. *Id.* at 1. In Rockland County, referees must be county residents who have known the applicant for at least two years, with only one referee permitted from any married couple. *Pistol License Information*, ROCKLAND CNTY., [http://www.rocklandcountyclerk.com/pistol\\_license.html](http://www.rocklandcountyclerk.com/pistol_license.html) (last visited Oct. 10, 2012). According to an Orange County firearm-enthusiast website, that county requires four references from county residents, unrelated to the applicant and unrelated to each other. *Instructions for Pistol Permit Applicant*, ORANGE CNTY. N.Y. SHOOTERS, <http://ocshooters.com/Hand/application-instructions.htm> (last visited Oct. 10, 2012). While Orange County does not indicate a minimum period of time that the referee must know the applicant, the reference questionnaire does ask how long the referee has known the applicant. *Id.*

character reference requirement.<sup>137</sup> The fact that New York City’s character-reference requirement is not documented anywhere underscores the problematic nature of the good-moral character-requirement, which gives licensing officials wide latitude to deny applicants for failing to meet the undefined standard. Moreover, it is one thing to deny an individual his or her constitutional right to possess a handgun in the home because he or she has been convicted of driving while intoxicated; it is quite another to deny that right because an individual does not have enough friends who are pro-gun U.S. citizens willing to provide reference letters.

If the good-moral-character requirement is challenged in federal court, the city and the state could argue that ensuring handgun license holders are of good moral character is related to the important government interest in preserving public safety.<sup>138</sup> For instance, the government would have a strong argument that public safety would be jeopardized if individuals who have already endangered the public by driving while intoxicated were allowed to possess handguns. Similarly, restrictions on handgun possession by individuals who have demonstrated a propensity to violate the law may likewise survive intermediate scrutiny.<sup>139</sup>

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137. The License Division’s website says only that applicants who have resided in the U.S. for less than seven years must submit two character reference letters along with their application. *Permits*, *supra* note 34. However, the author (who has resided in the U.S. for most of his life) had to provide three notarized character reference letters at the time of his interview in order to obtain his license, while the author’s wife (who was not a U.S. citizen at the time) was required to provide two letters. While these referees did not have to be New York residents, they did have to be U.S. citizens who had known the applicant for at least five years in the author’s case, or three years in the author’s wife’s case. Other individuals have reported needing three reference letters from people who have known them for at least seven years. See willus, Comment to # *MuevoloNYC’s NYC Gun FAQ (Laws and Procedures)*, [www.HKPRO.COM](http://www.hkpro.com) (Jan. 25, 2010, 5:43 AM), <http://www.hkpro.com/forum/new-york/78835-muevelonycs-nyc-gun-faq-laws-procedures-57.html>.

138. See, e.g., *Kwong v. Bloomberg*, No. 11 Civ. 2356(JGK), 2012 WL 995290, at \*11 (S.D.N.Y. Mar. 26, 2012) (citing *Bach v. Pataki*, 408 F.3d 75, 91 (2d Cir. 2005); *Kachalsky v. Cacace*, 817 F. Supp. 2d 235, 269–70 (S.D.N.Y. 2011); *Osterweil v. Bartlett*, 819 F. Supp. 2d 72, 84 (S.D.N.Y. 2011)) (“The parties do not dispute that the governmental objectives promoted by New York’s handgun licensing scheme are to promote public safety and prevent gun violence and that these objectives are important and substantial ones.”).

139. Cf. *United States v. Williams*, 616 F.3d 685, 692–93 (citations omitted) (7th Cir. 2010) (stating, in the course of upholding federal statute criminalizing firearm possession by convicted felons, “To pass constitutional muster under intermediate scrutiny, the government has the burden of demonstrating that its objective is an important one and that its objective is advanced by means substantially related to that objective. We find that the government satisfies its burden. In this case, the government’s stated objective is to keep firearms out of the hands of violent felons, who the government believes are often those

At the same time, the categories under which applications can be denied in New York are qualitatively different from the narrow categories articulated by the Supreme Court. In *Heller*, the Court suggested in dicta that being a felon or being insane could constitute grounds for denying a license to possess a handgun in the home.<sup>140</sup> Even if the list of acceptable reasons for prohibition were expanded to include DWI convictions and multiple traffic infractions, it would nonetheless be surprising if local governments could restrict the fundamental constitutional right to possess a handgun in the home for self-defense<sup>141</sup> solely because an individual lacked the required character references.

Courts may also declare that the statutory good-moral-character requirement is void for vagueness. As the Supreme Court has stated, “The void for vagueness doctrine addresses at least two connected but discrete due process concerns: Regulated parties should know what is required of them so that they may act accordingly; and precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.”<sup>142</sup> The good-moral-character requirement appears to violate both of these concerns. First, by failing to define good moral character, the Penal Law does not let license applicants know what is required of them.<sup>143</sup> This is particularly true in places like New York City and Orange County, where the local governments give no indication whatsoever that character reference letters will be required at all.<sup>144</sup> Second, the statute fails to provide

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most likely to misuse firearms. We cannot say that this objective is not an important one.”); *State v. Craig*, 807 N.W.2d 453, 462–64 (Minn. Ct. App. 2011) (upholding under intermediate scrutiny state statute prohibiting individual who had been convicted of crime of violence from possessing firearm); *State v. Pocian*, 814 N.W.2d 894, 897 (Wis. Ct. App. 2012) (citing *State v. Thomas*, 683 N.W.2d 497 (Wis. Ct. App. 2004) (“[T]he restriction placed upon felons prohibiting them from possessing firearms is a reasonable exercise of the State’s inherent police power.”)).

140. *District of Columbia v. Heller*, 554 U.S. 570, 626, 631 (2009).

141. *McDonald* refers to the Second Amendment’s protection of “the right to possess a handgun in the home for the purpose of self-defense” as “a provision of the Bill of Rights that protects a right that is fundamental from an American perspective.” 130 S. Ct. 3020, 3050 (2010).

142. *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).

143. *Cf. City of Chi. v. Morales*, 527 U.S. 41, 56 (1999) (stating, in the course of striking down vague Chicago’s gang loitering ordinance, that vagueness “may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits . . .”).

144. *See supra* notes 136–37 and accompanying text.



licensing authorities with specific guidelines on how to determine good moral character,<sup>145</sup> such that procedures for implementing the good-moral-character requirement vary among localities and even between licensing investigators within a particular locality.<sup>146</sup> One would be hard-pressed to find a rational basis for the differences between the requirements in suburban Nassau, Rockland, and Orange counties regarding the number of references, their county of residence, and how long they have known the applicant.<sup>147</sup> New York City’s practice of requiring a different number of references for each application, with different requirements as to how long the referee has known the applicant in each case,<sup>148</sup> seems especially arbitrary.

Even if courts uphold the general requirement that applicants be of good moral character, the reference letter requirement itself may be unconstitutional. Requiring an applicant to provide letters from individuals who meet the citizenship, residency, and other requirements places a significant burden on the exercise of a fundamental constitutional right. A right that can be denied on such arbitrary grounds as the failure to obtain letters from two or three longtime friends who are pro-gun U.S. citizens does not seem to be much of a right at all. Thus, even if courts find that the statutory good-moral-character requirement passes constitutional muster, New York City and other localities may have to abandon their reliance on character reference letters as a means of assessing character.

### 3. *License Application and Renewal Fee*

Among the most significant restraints that New York City places on the possession of a handgun in the home are the application and renewal fees for handgun licenses. Neither *Heller* nor *McDonald* says anything about license application fees, but under intermediate scrutiny, the current fees would likely be found unconstitutional.

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145. *Cf. Morales*, 527 U.S. at 56, 60 (1999) (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (“[Vagueness] may authorize and even encourage arbitrary and discriminatory enforcement. . . . The broad sweep of the ordinance also violates ‘the requirement that a legislature establish minimal guidelines to govern law enforcement.’”).

146. *See supra* notes 136 and 137.

147. *See supra* note 136 and accompanying text.

148. *See supra* note 137 and accompanying text.

In much of New York State, the fee for a handgun license is required by statute to be “not less than three dollars nor more than ten dollars,” as determined by the legislative body of the county.<sup>149</sup> In New York City and Nassau County, however, the Penal Law gives the New York City Council and the Nassau County Board of Supervisors the authority to charge whatever fee they choose.<sup>150</sup> Currently, the fee is \$340 in New York City and \$200 in Nassau County for application and renewal, plus an additional one-time fingerprinting fee of \$91.50 and \$94.25, respectively.<sup>151</sup> Licenses to carry or possess a pistol or revolver are valid for three years in New York City and for five years in Nassau, Suffolk, and Westchester counties; in the rest of the state, licenses are valid until otherwise revoked.<sup>152</sup> New York City handgun license holders are thus required to pay \$340 every three years in order to maintain their license. Fees are non-refundable should an applicant’s initial application or renewal be denied.<sup>153</sup>

Since the enactment of the Sullivan Law, New York City has deliberately imposed high fees for handgun licenses and registration in order to discourage poorer residents from obtaining weapons.<sup>154</sup> The current statutory language, which allows the City Council to “fix the fee to be charged for a license to carry or possess a pistol or a revolver and provide for the disposition of such fees,”<sup>155</sup> dates to 1947.<sup>156</sup> As indicated in the Sponsor’s Memorandum

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149. N.Y. PENAL LAW § 400.00(14) (McKinney 2008).

150. *Id.*

151. N.Y.C. ADMIN. CODE § 10-131(a)(2) (2010); *Nassau County Application Instructions*, *supra* note 136, at 3; *Permits*, *supra* note 34.

152. N.Y. PENAL LAW § 400.00(10) (McKinney 2012); N.Y.C. ADMIN. CODE § 10-131(a)(2) (2010); Conviction for a felony or serious offense, issuance of a temporary order of protection or an order of protection, and finding of a willful failure to obey an order of protection are all grounds for revocation of a license. N.Y. PENAL LAW § 400.00(11) (McKinney 2012). The Rules of the City of New York stress that a handgun license “is revocable at any time,” but list no other grounds for revocation other than conviction of a serious offense or evidence of any other disqualification mentioned in the grounds for approving or rejecting a license application. R. OF CITY OF N.Y. tit. 38, §§ 5-22(a)(1), 5-11 (2012).

153. N.Y.C. ADMIN. CODE § 10-131(a)(4) (2010).

154. Malcolm, *supra* note 30, at 1398 n.16 (“The act granted local law enforcement authorities discretion to decide who could be armed. When first passed, it required an initial fee of \$3.00 per gun, making it difficult for poorer people to license a weapon even if they were permitted to do so.”).

155. N.Y. PENAL LAW § 400.00(14) (McKinney 2008).

156. Memorandum of Law in Support of Plaintiff’s Motion for Summary Judgment at 7, *Kwong v. Bloomberg*, No. 11 Civ. 2356(JGK) (S.D.N.Y. 2012) (citing 1947 N.Y. Laws ch.

dum for the 1947 bill, part of the motivation for allowing the city to set fees without any limitations was that “a higher fee . . . will tend to discourage a great number of possible applicants who are better off, both as concerns themselves and the welfare of this City as a whole, without the possession of firearms.”<sup>157</sup> The goal was for the high fee to “eliminate a certain percentage of applicants, principally in that class where the possession of fire-arms is desired for reasons of bravado and like dangerous reasons.”<sup>158</sup> The city adopted the current \$340 fee in 2004 at the request of Mayor Michael Bloomberg.<sup>159</sup>

Shortly before the Supreme Court issued the *McDonald* decision in 2010, however, Mayor Bloomberg requested that the City Council substantially reduce handgun license application and renewal fees.<sup>160</sup> The Mayor’s Office wanted to lower the fees so that they would “more accurately reflect the amount of work the city has to do when it comes to these gun licenses and renewal licenses.”<sup>161</sup> As the Mayor told the press, “We want to be in compliance with the law . . . so that we don’t . . . lose the ability to have reasonable controls. If we have controls that the courts have ruled too onerous or too unfair, we could lose the whole thing.”<sup>162</sup> In July 2010, City Councilman and Chairman of the Committee on Public Safety Peter Vallone introduced a bill that would reduce the initial application fee for a Premises-Residence License to \$70, and to \$25 for each renewal.<sup>163</sup> The rationale behind the proposed changes was to structure the fees to more accurately reflect the investigative requirements for each license

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147, sec. 1), available at <http://www.saf.org/legal.action/nyc.fees.lawsuit/motionsummaryjudgment.pdf>.

157. *Id.* at 7–8.

158. *Id.*

159. New York, N.Y., Int. No. 385 (Jul. 12, 2004), available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=442318&GUID=98EB3804-8991-4A1A-AB80-02C471118C4E&Options=&Search=> (follow “Local Law” hyperlink).

160. MINUTES, *supra* note 77, at 25.

161. MINUTES, *supra* note 77, at 4–5.

162. *Huh? Bloomberg Proposes Slashing Gun Permit Fees*, CBS N.Y. (Oct. 26, 2010, 5:16 PM), <http://newyork.cbslocal.com/2010/10/26/mayor-bloomberg-proposes-slashing-gun-permit-fees/> [hereinafter *Slashing Gun Permit Fees*].

163. Int. No. 313, 2010 City Council (N.Y.C. 2010), available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=718919&GUID=9F292395-2685-4A52-A827-1D89EA8869A4&Options=ID|Text|&Search=313> (follow “Legislation Text” hyperlink).

type.<sup>164</sup> For instance, the fee for a concealed-carry license application would be higher than that for a Premises License since the concealed-carry license application requires the NYPD to spend more hours investigating an applicant.<sup>165</sup>

The proposal never passed, however, and in April 2011, Hui Kwong and a group of fellow handgun licensees filed a lawsuit in the Southern District of New York challenging the city's handgun license application and renewal fees.<sup>166</sup> In *Kwong v. Bloomberg*, the court granted summary judgment for the city and declared that the license fee and the implementing statutes were constitutional.<sup>167</sup> The court upheld the fee under intermediate scrutiny, finding that the \$340 fee was substantially related to the important governmental interests of promoting public safety and preventing gun violence, since it was designed to recover the costs attendant to the licensing scheme.<sup>168</sup> According to the court, “[t]he parties [did] not dispute that the governmental objectives promoted by New York’s handgun licensing scheme are to promote public safety and prevent gun violence and that these objectives are important and substantial ones.”<sup>169</sup> The court also denied the plaintiffs’ equal-protection claim under rational-basis review.<sup>170</sup> The plaintiffs subsequently submitted their appeal to the Second Circuit.<sup>171</sup>

Two aspects of the *Kwong* decision appear particularly vulnerable on appeal. First, the district court dismissed the notion that charging a recurring fee of \$340 might deter many individuals from exercising their fundamental constitutional right to possess a handgun in the home, finding “no evidence that the fee has de-

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164. MINUTES, *supra* note 77, at 35–36.

165. MINUTES, *supra* note 77, at 35–36; *see also* Int. No. 313, 2010 City Council (N.Y.C. 2010). The proposed legislation would have reduced the fee for a concealed-carry license application to \$110.

166. *Kwong v. Bloomberg*, No. 11 Civ. 2356(JGK), 2012 WL 995290, at \*1 (S.D.N.Y. Mar. 26, 2012). The lawsuit is sponsored by the Second Amendment Foundation, the same organization that financed *McDonald v. Chicago*. *See Gun Rights Legal Action*, SECOND AMENDMENT FOUND., <http://www.saf.org/default.asp?p=legalaction#nyc-fees-lawsuit> and <http://www.saf.org/default.asp?p=legalaction#chicago-gun-ban> (last visited Oct. 10, 2012).

167. *Kwong*, 2012 WL 995290, at \*1.

168. *Id.* at \*11.

169. *Id.*

170. *Id.* at \*12–14.

171. *See Kwong v. Bloomberg*, JUSTIA.COM, <http://dockets.justia.com/docket/circuit-courts/ca2/12-1578/> (last visited Nov. 4, 2012).

tered or is likely to deter any individual from exercising his or her Second Amendment rights; indeed, all of the plaintiffs have paid the fee and have not pointed to any particular hardship they faced in doing so.”<sup>172</sup> In fact, the \$340 fee is probably a large part of the reason that New York City’s handgun licensing regulations are, in the words of Professor Winkler, “awfully close” to a total gun ban.<sup>173</sup>

Indeed, the neighborhoods with the highest density of handgun-license holders, such as Howard Beach, Queens and Totenville, Staten Island,<sup>174</sup> are also among the wealthiest in the city, with median household incomes well in excess of \$100,000.<sup>175</sup> Meanwhile, licensed handgun ownership in some of the city’s poorest neighborhoods, such as Hunts Point and Longwood in the Bronx and the Brownsville section of Brooklyn, is virtually nonexistent.<sup>176</sup> This link between income and licensed handgun ownership is not surprising — for many New Yorkers, paying \$340 every three years just for the permission to exercise the core right of the Second Amendment would likely constitute a significant hardship indeed.<sup>177</sup> Thus, the Second Circuit may very well dis-

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172. *Kwong*, 2012 WL 995290, at \* 8.

173. WINKLER, *supra* note 18, at 41.

174. Jo Craven McGinty, *The Rich, the Famous, the Armed*, N.Y. TIMES, Feb. 20, 2011, at MB1.

175. Arun Venugopal, *Census Pinpoints City’s Wealthiest, Poorest Neighborhoods*, WNYC (Dec. 8, 2011, 12:01 AM), <http://www.wnyc.org/blogs/wnyc-news-blog/2011/dec/08/census-locates-citys-wealthiest-and-poorest-neighborhoods/>.

176. *Id.*; McGinty, *supra* note 174.

177. With the \$340 application fee and \$91.50 fingerprinting fee, applicants must pay \$431.50 just for the opportunity to obtain a license to possess a handgun. *See Permits*, *supra* note 34. When considered alongside market-based costs, these government-imposed fees make the lawful and responsible exercise of the right to keep and bear arms in New York City an expensive endeavor. A high-quality and relatively inexpensive handgun such as the Beretta 92fs costs at least \$650. *See Beretta 92 FS (Made in USA)*, BERETTA, <http://www.berettausa.com/products/beretta-92-fs-made-in-usa/> (last visited Oct. 10, 2012). The cheapest membership at the West Side Rifle and Pistol Range in Manhattan costs \$450 for two years. *See Membership*, WESTSIDE PISTOL & RIFLE RANGE, <http://www.westsidepistolrange.com/membership.php> (last visited Oct. 10, 2012) [hereinafter *Membership*]. The range sells nine-millimeter ammunition at roughly \$25 per box of fifty rounds. An individual would thus have to pay at least \$990 up front just to possess a handgun in the home, plus another \$750 to join a range and get minimal practice shooting fifty rounds per month over the course of a single year. At the end of two years, such an individual will have paid a total of \$2,040 for the gun, license, range membership, and ammunition, at which time range renewal dues (at the slightly lower rate of \$425 for two years) would be due. At the end of three years, the handgun license would need to be renewed at a cost of \$340.

agree with the district court and determine that the fee is in fact a deterrent and imposes financial hardship on license applicants.

Second, the district court readily accepted the city's calculations in declaring the fee to be reasonable.<sup>178</sup> Relying upon a 2010 User Cost Analysis prepared by the New York City Office of Budget Management, the court stated that "there is no genuine dispute that the \$340 fee is less than the administrative costs of the licensing scheme," and was thus "a permissible fee imposed on the exercise of constitutionally protected activities and does not violate the Second Amendment."<sup>179</sup> The 2010 User Cost Analysis indicated that the cost to the city for each Premises Residence handgun license application was \$977.16 for each initial application and \$346.92 for each renewal application.<sup>180</sup> However, the accuracy of these calculated costs seems suspect, given the public comments by both Mayor Bloomberg and First Deputy Criminal Justice Coordinator Arkadi Gerney suggesting that the fees should be lowered in order to "more accurately reflect the amount of work the city has to do" in its license investigations.<sup>181</sup> Nonetheless, the court denied the plaintiffs' request for additional discovery regarding the city's underlying calculations, on the grounds that their Rule 56(d) affidavit "[did] not make a specific proffer regarding what discovery the plaintiffs seek, why that discovery would be reasonably expected to create a genuine issue of material fact, or what effort they have made to obtain discovery."<sup>182</sup> If the Second Circuit agrees that plaintiffs' Rule 56(d) affidavit was too vague, then the basis for the city's calculations may remain a mystery until a new group of plaintiffs brings another challenge to the license application and renewal fee.

Given the application fee's deterrent value and the financial hardship it imposes, New York City's \$340 handgun license application and renewal fee faces a strong chance of being declared unconstitutional under intermediate scrutiny on appeal. The city may also be required to provide a full and detailed account of how

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178. *Kwong v. Bloomberg*, No. 11 Civ. 2356(JGK), 2012 WL 995290, at \*10 (S.D.N.Y. Mar. 26, 2012) (relying exclusively on numbers provided by New York City's Office of Management and Budget in assessing costs to the city of Premises Residence handgun applications).

179. *Id.*

180. *Id.*

181. MINUTES, *supra* note 77, at 4–5.

182. *Kwong*, 2012 WL 995290, at \*10.

the fee relates to the actual costs of the licensing process. However, even if New York City’s cost figures are correct, the fee still risks invalidation on the grounds that it is excessive and deters individuals from exercising the fundamental right to possess a handgun in the home for self-defense.<sup>183</sup> Patently exclusionary fees are not reasonable,<sup>184</sup> and requiring a non-refundable, recurring \$340 fee just to apply to exercise a core constitutional right places the Second Amendment out of the reach of many New Yorkers.

#### 4. *Transporting Handguns with a Premises License*

This Note began with a discussion of out-of-state tourists who were arrested for bringing their handguns to New York City. But what about New York City Premises License holders who wish to take their handguns outside of the city? Interestingly, as will be discussed below, the only obstacle that may potentially prohibit such behavior comes not from the laws of other states, but from the NYPD.

The Premises License is “a restricted handgun license, issued for a specific business or residence location.”<sup>185</sup> Although this restricted license does not allow possession of the handguns outside the specific address listed on the license, it does permit “the

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183. As the Supreme Court held in *Murdock v. Pennsylvania*, “A state may not impose a charge for the enjoyment of a right granted by the federal constitution.” 319 U.S. 105, 113 (1943). Instead, states can only charge “a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question.” *Id.* at 113–14. While the relationship between the fees imposed and expenses incurred by the government is an important factor, the Supreme Court has been careful to point out that *Murdock* does not stand for the proposition “that an invalid fee can be saved if it is nominal, or that only nominal charges are constitutionally permissible.” *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 136–37 (1992).

184. Thus, the Court has invalidated political candidate-filing fees in Texas, *Bullock v. Carter*, 405 U.S. 134, 149 (1972), and California, *Lubin v. Panish*, 415 U.S. 709, 722 (1974), under the Equal Protection Clause. In holding that the fees in *Bullock* were unconstitutional, the Court noted that “[u]nlike a filing-fee requirement that most candidates could be expected to fulfill from their own resources or at least through modest contributions, the very size of the fees imposed under the Texas system gives it a patently exclusionary character.” 405 U.S. at 143. As the Court observed in *Lubin*, “the Court has scrutinized wealth discrimination in a wide variety of areas,” and has frequently held that deterring individuals from exercising a fundamental constitutional right based on their wealth was unconstitutional. 415 U.S. at 720–21. *But see Cox v. New Hampshire*, 312 U.S. 569, 576–77 (1941) (upholding parade permit fees that ranged from nominal amount to \$300).

185. R. OF CITY OF N.Y. tit. 38, §§ 5-01(a), 5-23(a) (2012).

transporting of an unloaded handgun directly to and from an authorized small arms range/shooting club, secured unloaded in a locked container,” provided that any ammunition is carried separately.<sup>186</sup> In fact, the Rules of the City of New York state that “[t]he licensee should endeavor to engage in periodic handgun practice at an authorized small arms range/shooting club.”<sup>187</sup> However, the Rules of the City of New York are unclear as to what constitutes an “authorized small arms range/shooting club” and do not state whether such a range has to be located within the city.<sup>188</sup>

It remains unclear, however, whether or not New York City Premises Handgun License holders are currently permitted to transport their handguns outside New York State for target shooting. Nearby Pennsylvania, for instance, does not require a permit for the ownership or possession of handguns.<sup>189</sup> Non-Pennsylvania residents are thus free to bring their handguns into the state for lawful purposes.<sup>190</sup> On its “Frequently Asked Ques-

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186. Tit. 38, §§ 5-01(a), 5-23(a)(1)-(3). For Premises Licenses, the Rules of the City of New York state that “[t]he handguns listed on this license may not be removed from the address specified on the license except as otherwise provided in this chapter,” and then go on to list “transport . . . directly to and from an authorized small arms range/shooting club, unloaded, in a locked container, the ammunition to be carried separately.” Tit. 38, § 5-23(a)(1)-(3). While there are several private shooting clubs in New York City, with varying levels of restrictions placed on membership, the only public range in Manhattan is the West Side Pistol and Rifle Range, located at 20 West 20th Street, in the Flatiron District. See *Membership*, *supra* note 177.

187. R. OF CITY OF N.Y. tit. 38, § 5-22(a)(14) (2012).

188. *Id.* New York City regulations permit “transport . . . directly to and from an authorized small arms range/shooting club, unloaded, in a locked container, the ammunition to be carried separately,” without stating whether or not the range must be in New York City. Tit. 38, § 5-23(a)(3).

189. Pennsylvania law only requires licenses for carry of a firearm within a vehicle or concealed on or about one’s person (outside one’s residence or place of business). 18 PA. CONS. STAT. ANN. § 6106(a) (West 2011). Exceptions are granted for people going target shooting (provided the firearm is not loaded when they carry it), for people going hunting, and for people with licenses from other states who are carrying a firearm in a vehicle. 18 PA. CONS. STAT. §§ 6106(b)(4), (9), (11) (West 2011). “Open carry” of a loaded firearm on one’s person is not prohibited by law anywhere other than in Philadelphia. 18 PA. CONS. STAT. ANN. § 6108 (West 2011). There is nothing in Pennsylvania law stating that these provisions apply only to state residents, or that non-residents are subject to additional restrictions. Federal law, however, prohibits the direct transfer of firearms (other than rifles or shotguns) to out-of-state residents (so that New York residents cannot, for instance, legally purchase handguns from dealers in Pennsylvania). See 18 U.S.C. § 922(a)(5), (b)(3) (2006) (Section 922(b)(3) contains the exception for rifles and shotguns).

190. 18 PA. CONS. STAT. ANN. § 6106(a) (West 2011). Aside from its concealed-carry provisions, Pennsylvania law provides no other limitations on the transportation or possession of handguns by non-residents.



tions” (FAQ) page, the NYPD License Division website states (in answer to the question “Can I go target shooting outside NYC?”), “A NYC carry business license is valid throughout NYS. Premise residence and premise business licenses are only valid in NYC except as indicated in the next section” (which discusses how to obtain permission to go hunting with a handgun elsewhere in New York State).<sup>191</sup> It thus seems that a New York City Premises License holder cannot transport his or her handguns elsewhere in New York State to go target shooting. On its surface, the FAQ answer suggests that the Police Commissioner has limited Premises License holders’ permission to transport their handguns exclusively to New York City target ranges.<sup>192</sup> On the other hand, the first part of the Division’s answer<sup>193</sup> seems to interpret the question as asking about target shooting outside New York City but within New York State, leaving a certain degree of ambiguity regarding out-of-state ranges — especially since Pennsylvania, unlike New York, does not require a permit for handgun possession or open carry, making the issue of validity inconsequential.

In addition, federal law protects the interstate transportation of firearms.<sup>194</sup> According to the language of 18 U.S.C. § 926A, a

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191. *Permits, Gun Licensing FAQ*, NYC.GOV, [http://www.nyc.gov/html/nypd/html/permits/gun\\_licensing\\_faq.shtml#CanITargetShootOutsideNYC](http://www.nyc.gov/html/nypd/html/permits/gun_licensing_faq.shtml#CanITargetShootOutsideNYC) (last visited Oct. 10, 2012) [hereinafter *Gun Licensing FAQ*]. A licensee may transport his or her handguns elsewhere in New York State in order to go hunting, provided the handguns are transported “directly to and from an authorized area designated by the New York State Fish and Wildlife Law and in compliance with all pertinent hunting regulations, unloaded, in a locked container, the ammunition to be carried separately . . . .” R. OF CITY OF N.Y. tit. 38, § 5-23(a)(4) (2012). The licensee must first request and receive a “Police Department — City of New York Hunting Authorization” Amendment to his or her license in order to bring his or her handguns elsewhere in the state for hunting. *Id.*

192. While the Rules of the City of New York do not explicitly state that the target range must be within New York City, *see supra* note 188, they do allow the Police Commissioner to establish additional conditions and limitations “regarding, but not necessarily limited to the permissible number, type, transportation and safeguarding of handguns R. OF CITY OF N.Y. tit. 38, § 5-08 (2012).

193. *See Gun Licensing FAQ, supra* note 191 (“A[n] NYC carry business license is valid throughout NYS.”).

194. 18 U.S.C. § 926A (2006) (“Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person who is not otherwise prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle.”).

New York City Premises Handgun License holder should be able to transport his or her handgun from New York City to Pennsylvania, provided the handgun is unloaded and not readily accessible during transit.<sup>195</sup> Under this scenario, the New York City licensee would be transporting a firearm from a “place where he may lawfully possess and carry such firearm” (his or her New York City residence or business) to another “place where he may lawfully possess and carry such firearm” (a Pennsylvania target shooting range) for a “lawful purpose” (target shooting). The federal statute would thus protect the New York City licensee during the course of the journey, including through New York counties outside the city and through the state of New Jersey, where the New York City license is not valid.

However, two New York state court opinions present conflicting views on the transportation of licensed handguns outside New York State. In *Beach v. Kelly*, the First Department upheld the revocation of petitioner Beach’s Premises-Residence License after he brought his handgun by plane to Nevada to attend a gun convention.<sup>196</sup> Beach had a full-carry pistol license in Nevada.<sup>197</sup> Thus, his ability to “lawfully possess and carry” his firearm in Nevada satisfied the “destination” portion of § 926A. On the other hand, New York City argued that Beach’s Premises-Residence License did not authorize him to “carry” a handgun in New York City, so the federal statute did not apply.<sup>198</sup> The New York County Supreme Court ruled in favor of Beach, finding that the definition of “carry” in § 926A includes the transportation to and from small arms ranges, shooting clubs, and hunting locations that is permitted for Premises License holders in New York City.<sup>199</sup> The First Department reversed, however, holding that Beach violated the terms of his Premises-Residence License when he transported his handgun to and from the airport for his trip to Nevada, since his license only allowed him to transport his handgun to a target range or hunting area.<sup>200</sup> Since he could not lawfully bring his

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195. *Id.*

196. *Beach v. Kelly*, 860 N.Y.S.2d 112, 113 (N.Y. App. Div. 2008).

197. *Beach v. Kelly*, 837 N.Y.S.2d 534, 536 (N.Y. Sup. Ct. 2007), *rev'd*, 860 N.Y.S.2d 112 (N.Y. App. Div. 2008).

198. *Id.* at 537.

199. *Id.* at 537–38.

200. *Beach*, 860 N.Y.S.2d at 113.

handgun to the airport or to a gun convention, the protection of § 926A did not apply.<sup>201</sup>

The First Department’s decision in *Beach* left many questions unanswered. On the one hand, it now seems clear that a Premises License holder cannot transport his or her handgun to an airport to attend a gun convention. But would transport to an airport en route to a target range be permitted under the terms of the Premises License? If the First Department’s decision is read to hold that transport to an airport is *always* a violation of the New York City license and therefore unlawful within the language of § 926A, then what about transport via automobile directly from one’s residence to a shooting range outside the city — for instance, in Pennsylvania, where possession of the handgun would be legal?

In fact, in *Lipton v. Ward*, the First Department stated that Penal Law section 400.00(6), which provides guidelines pertaining to the validity of New York State handgun licenses, does not impose any limitation on carrying firearms outside New York State.<sup>202</sup> In that case, the NYPD License Division declined to renew dentist Saul Lipton’s carry license based upon his failure to notify the License Division that his Nassau County pistol license was suspended, his storage of guns in “an unauthorized location” (New Jersey), and his violation of a six-month probation period imposed on his license following an earlier arrest for menacing with a pistol and misuse of a firearm.<sup>203</sup> While the First Department upheld the revocation of Lipton’s license as a result of his numerous violations,<sup>204</sup> the court also stated that storage of firearms in New Jersey itself was not grounds for revocation, since Penal Law section 400.00(6), which lays out conditions for the validity of handgun licenses, does not “provide a limitation on carrying a firearm outside the state.”<sup>205</sup> The court also noted the absence of “any statute or regulation prohibiting such conduct.”<sup>206</sup>

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201. *Id.*

202. *Lipton v. Ward*, 496 N.Y.S.2d 744, 747 (N.Y. App. Div. 1986).

203. *Id.* at 744–45. Lipton also maintained a firing range in the basement of his home, abused his wife on numerous occasions, shot himself in the foot in his house, and shot holes in the pipes. *Id.* at 746.

204. *See id.*

205. *Id.* at 747.

206. *Id.*

Based on the First Department's holding in *Lipton*, it seems that New York City Premises Handgun license holders can transport their handguns outside the state to go target shooting. Although the court's subsequent holding in *Beach* declared that licensees cannot transport their handguns to and from an airport in order to attend a conference, the court did not declare a general prohibition on out-of-state transportation.<sup>207</sup> The fact that Lipton had a carry license while Beach had the more restricted Premises-Residence License might suggest that the *Lipton* holding does not apply to Premises Licenses. At the same time, however, Beach's conduct was clearly outside the language of the Rules of the City of New York,<sup>208</sup> since he did not transport his handgun to an authorized range. And, as the *Lipton* court noted, nothing in the New York Penal Law entails any limitation on carrying or possessing firearms outside the State of New York. For the time being, it remains unclear whether the NYPD Commissioner views such transport to an out-of-state range as a violation of the Premises License. While a test case would certainly help to clarify the New York courts' stand on the issue, unfortunately neither *Heller* nor *McDonald* provide any guidance from a constitutional perspective, since both merely address the right to keep and bear a handgun within the home.<sup>209</sup>

Nonetheless, a blanket prohibition on the transport of handguns out-of-state for target shooting would likely fail under intermediate scrutiny. From a practical standpoint, it should be of no concern to New York City law enforcement if a New York City licensee transports an unloaded and locked handgun to a Pennsylvania range, since he or she is already allowed to transport the firearm to a New York City range.<sup>210</sup> Perhaps the city could argue that it has a legitimate interest in ensuring that license holders do not use their firearms to commit crimes in other states, but this argument would likely fail since the city has a greater inter-

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207. See *Beach v. Kelly*, 860 N.Y.S.2d 112, 113 (N.Y. App. Div. 2008).

208. R. OF CITY OF N.Y. tit. 38, § 5-23(a)(1)-(3) (2012) ("The handguns listed on this license may not be removed from the address specified on the license except as otherwise provided in this chapter," except for purposes of "transport . . . directly to and from an authorized small arms range/shooting club, unloaded, in a locked container, the ammunition to be carried separately.").

209. See *McDonald v. City of Chi., Ill.*, 130 S. Ct. 3020, 3050 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 629, 630, 635, 636 (2008).

210. R. OF CITY OF N.Y. tit. 38, §§ 5-01(a), 5-23(a)(1)-(3) (2012).

est in ensuring that license holders do not commit crimes within New York City, but nonetheless permits license holders to transport their handguns to New York City ranges for target practice.<sup>211</sup> Moreover, if the limitation concerning transportation is read in its narrowest sense, then it would create the somewhat absurd situation of a Premises License holder being within the lawful terms of his or her license until the moment that he or she left the city limits and NYPD jurisdiction — perhaps just as the licensee drove past the Richmond Boro Gun Club in Staten Island and onto the Outerbridge Crossing heading toward to New Jersey, where § 926A provides protection. Indeed, a general prohibition on transporting handguns out of state seems too arbitrary to satisfy intermediate scrutiny, and may very well be preempted by federal law regarding the interstate transport of firearms.<sup>212</sup>

### C. THE FUTURE OF THE RIGHT TO KEEP ARMS IN NEW YORK

As the previous discussion has shown, obtaining a license to possess a handgun in the home in New York City involves a great deal of money, effort, and time. Before even submitting an application, applicants must pay over \$430 in fees just for the opportunity to obtain a license.<sup>213</sup> In addition, the application process requires at least three separate weekday trips to One Police Plaza (one for fingerprinting, one for the interview, and one for handgun inspection),<sup>214</sup> which for many means missing three days of work. Applicants will also have to collect documents such as their birth certificate, social security card, identifying photographs, and proof of residence,<sup>215</sup> and will also have to pester their friends and acquaintances for reference letters.<sup>216</sup> A successful applicant will likely have had to wait for three months before finally exercising his or her constitutional right to possess a hand-

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211. R. OF CITY OF N.Y. tit. 38, § 5-22(a)(14) (2012).

212. On preemption, see, for example, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 550 (2001), which held that Massachusetts restrictions on cigarette sales and advertising were preempted by federal law.

213. See MINUTES, *supra* note 77, at 12.

214. See *supra* notes 75–76, 80. Applicants must also appear in person to pick up their new license and Purchase Authorization, and must appear in person to pick up each subsequent Purchase Authorization as well. See *supra* notes 85–86.

215. See *Permits*, *supra* note 34; *Instructions*, *supra* note 61.

216. See *supra* notes 136–37 and accompanying text.

gun in the home.<sup>217</sup> As if the administrative hurdles and expenses were not enough to deter New Yorkers from exercising their Second Amendment right, applicants may also be rejected, subject to review only under an arbitrary-or-capricious standard.<sup>218</sup> Indeed, the fact that it is unclear whether the Police Commissioner will allow New York City residents to bring their handguns to Pennsylvania for target shooting, even though both Pennsylvania and federal law permit them to do so,<sup>219</sup> highlights the uncertainty surrounding gun rights in the city.

Nonetheless, since New York City does not feature the sort of absolute bans that were struck down in *Heller* and *McDonald*, lower courts will likely resist any argument that the United States Supreme Court's recent rulings have affected New York's laws in any way.<sup>220</sup> Since New York state courts appear unlikely to change their view that handgun possession is a privilege and not a right,<sup>221</sup> in the future one can expect to see license application denials challenged in federal court on Second Amendment grounds rather than in state court under Article 78. Given the anti-gun stances of many state and local politicians,<sup>222</sup> New York City and New York State will likely continue to do as much as possible to restrict New Yorkers' Second Amendment rights, so long as they remain short of an absolute ban on handguns. It will therefore likely be up to the Supreme Court to further define the meaning of the Second Amendment by issuing specific holdings to

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217. See R. OF CITY OF N.Y. tit. 38, § 5-25(a)(6)-(7) (2012).

218. See *District of Columbia v. Heller*, 554 U.S. 570, 629, 630, 635-36 (2008); *McDonald v. City of Chi., Ill.*, 130 S. Ct. 3020, 3050 (2010).

219. See *supra* Part III.B.4.

220. See, e.g., *Kwong v. Bloomberg*, No. 11 Civ. 2356(JGK), 2012 WL 995290, at \*11 (S.D.N.Y. Mar. 26, 2012).

221. See *Caputo v. Kelly*, No. 113232/10, 2011 WL 567978 (N.Y. Sup. Ct. Feb. 8, 2011) (citations omitted) (“[C]ounsel first argues that the United States Supreme Court’s recent interpretation of the Second Amendment to the United States Constitution in two cases, *District of Columbia et al. v. Heller*, and *McDonald v. Chicago* changes an individual’s possession of a gun from a ‘privilege’ to a ‘right’ . . . I am not prepared at this time to accept this interpretation . . .”).

222. New York City Mayor Michael Bloomberg has gained notoriety for his role as founder of Mayors Against Illegal Guns, a group that calls for tightening restrictions around the nation regarding access to firearms. See *About the Coalition*, MAYORS AGAINST ILLEGAL GUNS, <http://www.mayorsagainstillegalguns.org/html/about/about.shtml> (last visited Oct. 10, 2012). New York State Governor Andrew Cuomo also supports stringent firearm restrictions. See Erik Kriss & Carl Campanile, *Cuomo Now Gunning for Stricter Laws*, N.Y. POST (Aug. 8, 2012, 1:08 AM), [http://www.nypost.com/p/news/local/cuomo\\_now\\_gunning\\_for\\_Wmg86bg52AISuUmErHji8O](http://www.nypost.com/p/news/local/cuomo_now_gunning_for_Wmg86bg52AISuUmErHji8O).

explain what constitutes a permissible fee or acceptable grounds on which to deny an individual’s ability to exercise his or her Second Amendment right to possess a handgun in the home for self-defense.

#### IV. “TO BEAR”: CARRYING A HANDGUN IN PUBLIC IN NEW YORK

Although the scope of the right to possess a handgun in the home requires further clarification from the Supreme Court, the most important Second Amendment decisions in future years will likely involve the extent to which the right to bear arms applies outside the home.<sup>223</sup> As articulated in *Heller* and *McDonald*, the Second Amendment’s “right of the people to keep and bear arms” seems to apply only to the possession and carrying of firearms in the home.<sup>224</sup> Since *Heller* and *McDonald* have left the question unresolved, the Supreme Court will need to issue a definitive ruling to answer whether the Second Amendment merely protects the right to carry a handgun in the home, or whether the right extends to bearing arms in public as well.

This section will discuss the right to bear arms in public in New York. Part IV.A looks at the current state of the law in New York, where the state’s proper-cause requirement ensures that very few individuals can legally carry handguns in public in New York City. Part IV.B examines *Heller*’s language regarding the applicability of the Second Amendment outside the home, while Part IV.C analyzes the current challenge to New York State’s proper-cause requirement pending before the Second Circuit. Part IV.D then briefly considers concealed-carry litigation pending in other circuits, while Part IV.E assesses the future of New York’s proper-cause requirement.

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223. See Volokh, *supra* note 111, at 1515–24 (discussing laws banning possession of a firearm in certain places); James Bishop, Note, *Hidden or on the Hip: The Right(s) to Carry After Heller*, 97 CORNELL L. REV. 907, 921, 928 (2012) (“[T]he Roberts Court is likely to consider laws that burden the right to carry in the next few years . . . . Not now, but soon, California, Hawaii, Illinois, Maryland, New Jersey, New York, Rhode Island, and the District of Columbia must allow their citizens to carry loaded firearms for self-defense — whether hidden or on the hip.”).

224. See *McDonald v. City of Chi., Ill.*, 130 S. Ct. 3020, 3050 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 629, 630, 635, 636 (2008).

A. CURRENT STATE OF THE LAW: NEW YORK'S "PROPER CAUSE"  
REQUIREMENT

In New York State, applicants who wish to obtain a license to carry a firearm in public face even more stringent requirements than those who apply for a Premises License. For anyone who is not an armed guard, judge, or corrections officer, Penal Law section 400.00(2)(f) requires "proper cause" to support the issuance of a concealed-carry license, in addition to fulfillment of all the requirements for a Premises License.<sup>225</sup> Since New York law does not contain a provision for a license to carry an unconcealed weapon, satisfying this "proper cause" requirement is the only way for average citizens to lawfully carry a firearm in public.<sup>226</sup> Although the Penal Law does not define "proper cause,"<sup>227</sup> New York state courts have interpreted the term to mean "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession."<sup>228</sup>

In New York City, the Rules of the City of New York lay out some of the factors that the Police Commissioner should consider to determine whether an applicant has demonstrated proper cause. Persons seeking to obtain a carry license in connection to their employment or business must show that there is "[e]xposure of the applicant by reason of employment or business necessity to extraordinary personal danger requiring authorization to carry a handgun."<sup>229</sup> Applicants seeking a concealed-carry license for reasons unrelated to their employment face even tougher standards: the applicant must show "[e]xposure . . . to extraordinary personal danger, documented by proof of recurrent threats to life or safety requiring authorization to carry a handgun."<sup>230</sup> The Rules further state that "extraordinary personal danger" requires "[i]nstances

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225. N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2012).

226. *Kachalsky v. Cacace*, 817 F. Supp. 2d 235, 240 (S.D.N.Y. 2011).

227. *Id.*; see also Suzanne Novak, *Why the New York State System for Obtaining a License to Carry a Concealed Weapon is Unconstitutional*, 26 FORDHAM URB. L.J. 121, 123 (1998) ("This statute [section 400.00(2)(f)], however, does not clarify what constitutes proper cause, and no legislative intent on the matter exists.").

228. *Bando v. Sullivan*, 735 N.Y.S.2d 660, 662 (N.Y. App. Div. 2002) (quoting *Klenosky v. N.Y.C. Police Dep't*, 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980)).

229. R. OF CITY OF N.Y. tit. 38, § 5-03(a) (2012). As an example, the Rules list "[e]mployment in a position in which the applicant routinely engages in transactions involving substantial amounts of cash, jewelry or other valuables or negotiable items." *Id.*

230. R. OF CITY OF N.Y. tit. 38, § 5-03(b) (2012).



in which Police Department records demonstrate that the life and well-being of an individual is endangered, and that s/he should, therefore, be authorized to carry a handgun.”<sup>231</sup> The Rules specifically note that “the mere fact that an applicant has been the victim of a crime or resides in or is employed in a ‘high crime area,’ does not establish ‘proper cause’ for the issuance of a carry or special handgun license.”<sup>232</sup>

As a result of the proper-cause requirement and its interpretation by lawmakers and the courts, concealed-carry licenses are a rarity in New York City.<sup>233</sup> Excluding retired police officers, there are approximate four thousand concealed-carry license holders in New York City.<sup>234</sup> This figure includes armed guards and other individuals who carry a weapon related to their employment, politicians such as Queens District Attorney Richard Brown, City Council members Inez Dickens and Peter Koo, and Nassau County Republican Committee Chairman Joseph Mondello, actors Robert De Niro and Harvey Keitel, radio hosts Don Imus and Howard Stern, and real estate mogul Donald Trump.<sup>235</sup> Even gun-control advocates such as former *New York Times* publisher Arthur Ochs Sulzberger Sr. and former *National Review* publisher William F. Buckley Jr. have held New York City concealed-carry licenses.<sup>236</sup> Perhaps most remarkably, the NYPD has issued concealed-carry licenses to Aerosmith singer Steven Tyler and guitarist Joe Perry,<sup>237</sup> despite the pair’s legendary addictions to cocaine and other controlled substances<sup>238</sup> that would presumably

231. *Id.*

232. *Id.*

233. McGinty, *supra* note 174; *see also* WINKLER, *supra* note 18, at 40–41.

234. McGinty, *supra* note 174.

235. Jo Craven McGinty & Alain Delaqu erie, *Boldface Names with Guns*, N.Y. TIMES (Feb. 18, 2011), <http://www.nytimes.com/interactive/2011/02/20/nyregion/20-Owners.html?ref=nyregion>; *see also* WINKLER, *supra* note 18, at 40–41. The names and addresses of handgun license owners is public information. N.Y. PENAL LAW § 400.00(5) (McKinney 2012).

236. Clayton E. Cramer & David B. Kopel, “*Shall Issue*”: *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 684 (1995) (listing “[g]un prohibition advocate and New York Times publisher Arthur Ochs ‘Punch’ Sulzberger” and “Brady Bill advocate William F. Buckley” among individuals who have been awarded New York City concealed-carry permits).

237. Philip Messing & Murray Weiss, *NYPD Big Under Fire in Aerosmith ‘Got a Gun’ Scandal*, N.Y. POST (Nov. 24, 2002, 12:00 AM), [http://www.nypost.com/p/news/item\\_CnOc0GJC1FB18llmgCQIUJ](http://www.nypost.com/p/news/item_CnOc0GJC1FB18llmgCQIUJ).

238. *See* STEVEN TYLER, DOES THE NOISE IN MY HEAD BOTHER YOU?: A ROCK ‘N’ ROLL MEMOIR 226–27, 374, 555 (2012) (discussing the band’s past drug use, Tyler and Perry’s

disqualify them under the Rules of the City of New York and federal law.<sup>239</sup> These rich, famous, and well-connected individuals have apparently been able to demonstrate the exposure to “extraordinary personal danger” required to establish proper cause.

But courts have repeatedly upheld denials of ordinary citizens’ concealed-carry license applications, despite the fact that, as Professor Winkler notes, “[t]hey are the ones, not the rich and famous, who are most often victimized by crime.”<sup>240</sup> Thus, the First Department used a rational-basis test to affirm the License Division’s denial of a carry permit for a female urologist working late hours at a hospital, agreeing that “petitioner’s general allegations about her work hours and location were insufficient” to establish an “extraordinary personal danger.”<sup>241</sup> More recently, the New York County Supreme Court affirmed the denial of a carry permit for a criminal-defense attorney licensed to carry a concealed weapon in Connecticut, Florida, and elsewhere in New York State, on the similar grounds that he failed to show an extraordinary threat to his safety.<sup>242</sup> Although the attorney argued that he routinely traveled to dangerous areas to conduct criminal investigations, the court determined that the Licensing Division’s rationale for denying the application — mainly, that he failed to provide specific proof of any alleged threats made toward him — satisfied rational-basis scrutiny.<sup>243</sup>

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nickname as “the Toxic Twins” and Tyler’s cocaine use in 2006); *Steven Tyler: Joe Perry and I Did Drugs in 2008*, HUFFINGTON POST (Apr. 27, 2011, 8:59 AM), [http://www.huffingtonpost.com/2011/04/27/steven-tyler-joe-perry-drugs-2008\\_n\\_854220.html](http://www.huffingtonpost.com/2011/04/27/steven-tyler-joe-perry-drugs-2008_n_854220.html).

239. 18 U.S.C. § 922(g)(3) (2006) (“It shall be unlawful for any person who is an unlawful user of or addicted to any controlled substance . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”); R. OF CITY OF N.Y. tit. 38, § 5-10(d) (2012) (listing as grounds for denial of a handgun license that “[t]he applicant has been an unlawful user of, or addicted to, a controlled substance or marijuana”).

240. WINKLER, *supra* note 18, at 41.

241. *Kaplan v. Bratton*, 673 N.Y.S.2d 66, 68 (N.Y. App. Div. 1998).

242. *Lederman v. N.Y.C. City Police Dep’t Licensing Div.*, No.112434-10, 2011 WL 1343558, at \*4 (N.Y. Sup. Ct. Mar. 31, 2011).

243. *Id.* at \*3–4.

## B. *HELLER*'S APPARENT AMBIGUITY

The Supreme Court's opinion in *Heller* seems to offer conflicting views on the constitutional status of carrying firearms in public. In discussing the text of the Second Amendment, the majority observed, “At the time of the founding, as now, to ‘bear’ meant to ‘carry.’ When used with ‘arms,’ however, the term has a meaning that refers to carrying for a particular purpose — confrontation.”<sup>244</sup> The Court then went on to accept the meaning of “bear arms” that Justice Ginsburg provided in her dissent in *Muscarello v. United States*: “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.”<sup>245</sup> Indeed, following its textual analysis of the Second Amendment's operative clause, the Court concluded that its terms “guarantee the individual right to possess and carry weapons in case of confrontation.”<sup>246</sup> Since confrontation with another person is more likely to occur outside the home than within,<sup>247</sup> this language suggests that the protected right “to bear arms” includes the right to carry a weapon for purposes of confrontation outside the home as well as within.<sup>248</sup>

*Heller*'s holding, however, applied solely to the possession of handguns in the home.<sup>249</sup> Moreover, elsewhere in its opinion the Court specifically noted that “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,” as part of its illustration of the historical conception “that the right was not a right to keep and carry any

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244. *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008).

245. *Id.* (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

246. *Id.* at 592.

247. As Justice Stevens pointed out in his dissent to *Heller*, “the need to defend oneself may suddenly arise in a host of locations outside the home . . . .” *Id.* at 679–80 (Stevens, J., dissenting).

248. The defendants in *Muscarello* were convicted under 18 U.S.C. § 924(c)(1) of carrying a firearm during and in relation to a drug trafficking crime. 524 U.S. at 126 (1998). While the majority held that the statute's phrase “carries a firearm” applies to a person who “knowingly possesses and conveys” firearms in the locked glove compartment or trunk of a car, *id.* at 126–27, Justice Ginsburg's definition in her dissent was also based upon the premise that the “carrying” in question was taking place outside the home. *Id.* at 146–48.

249. *Heller*, 544 U.S. at 635.

weapon whatsoever in any manner whatsoever.”<sup>250</sup> On the other hand, the two nineteenth-century cases that the Court cited both permitted the open carrying of weapons in public.<sup>251</sup> Ultimately, the Court withheld final judgment on the issue of carrying firearms in public, stating that “we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment,” and provided assurance that “nothing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.”<sup>252</sup> In addition, the Court stated in an accompanying footnote that “[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive,” suggesting through this dicta that other restrictions not specifically mentioned might still be constitutional.<sup>253</sup>

C. CONCEALED-CARRY LITIGATION IN THE SECOND CIRCUIT:  
*KACHALSKY V. CACACE*

Less than a month after the Supreme Court issued its decision in *McDonald*, a group of plaintiffs who were denied Westchester County concealed-carry permits for failure to meet the proper-cause requirement filed suit in the Southern District of New York.<sup>254</sup> They claimed that New York State’s proper-cause requirement violated their Second Amendment rights under *Heller* and *McDonald*.<sup>255</sup> The court granted summary judgment for Westchester County, prompting the plaintiffs to appeal their case to the Second Circuit.<sup>256</sup>

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250. *Id.* at 626.

251. Kiehl, *supra* note 96, at 1167 (referencing *Nunn v. State*, 1 Ga. 243, 251 (1846) and *State v. Chandler*, 5 La. Ann. 489, 490 (1850)). In discussing *Chandler*, *Heller* notes that “the Louisiana Supreme Court held that citizens had a right to carry arms openly.” 554 U.S. at 613.

252. *Id.* at 626–27.

253. *Id.* at 627 n.26.

254. *Kachalsky v. Cacace*, 817 F. Supp. 2d 235, 239–42 (S.D.N.Y. 2011). The plaintiffs’ attorney is Alan Gura (who successfully argued both *Heller* and *McDonald* before the Supreme Court), and the suit is funded by the Second Amendment Foundation. *Id.* at 239; see also *Current Litigation Index*, SECOND AMENDMENT FOUND., <http://www.saf.org/default.asp?p=legalaction> (last visited Nov. 11, 2012) (listing *Kachalsky* as Second Amendment Foundation litigation matter).

255. *Kachalsky*, 817 F. Supp. 2d at 239.

256. *Id.* at 273; Notice of Appeal, *Kachalsky v. Cacace*, 817 F. Supp. 2d 235 (S.D.N.Y. 2011) (No. 10-CV-05413).

Throughout its opinion, the Southern District emphasized *Heller*'s narrow holding, which applies only to the “right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>257</sup> Unwilling to go beyond the Supreme Court's limited holding, the court noted that “[v]arious other courts have seized upon this language in *Heller* in concluding that concealed weapons bans and regulations are constitutional under the Second Amendment.”<sup>258</sup> Open carrying of firearms, the court added, “is likewise outside the core Second Amendment concern articulated in *Heller*: self-defense in the home.”<sup>259</sup> Thus, the court ultimately concluded that the proper-cause requirement in “[s]ection 400.00(2)(f) does not burden recognized protected rights under the Second Amendment.”<sup>260</sup>

Accordingly, the court resolutely resisted the plaintiffs' attempts to read into *Heller* a more expansive right to carry handguns outside the home.<sup>261</sup> With respect to the seemingly open-ended text of the *Heller* opinion, the court dismissed the applicability of the Supreme Court's definition of “to bear arms,” stating that “[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.”<sup>262</sup> Instead, the court focused on “the opinion's pervasive limiting language” regarding historical bans on the concealed carry of firearms.<sup>263</sup> In the

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257. *Kachalsky*, 817 F. Supp. 2d at 260 (quoting *Heller*, 554 U.S. at 635).

258. *Id.* at 261 (citing *United States v. Hart*, 726 F. Supp. 2d 56, 60 (D. Mass. 2010), *Swait v. Univ. of Neb. at Omaha*, No. 8:08 CV 404, 2008 WL 5083245, at \*3 (D. Neb. Nov. 25, 2008), *United States v. Hall*, Criminal Action No. 2:08-00006, 2008 WL 3097558, at \*1 (S.D. W.Va. Aug. 4, 2008), *State v. Knight*, 218 P.3d 1177, 1190 (Kan. Ct. App. 2009)).

259. *Id.* at 264. The court also emphasized that “according Second Amendment protection to the carrying of an unconcealed weapon outside the home would certainly go further than *Heller* did.” *Id.*

260. *Id.* at 272.

261. *Id.* at 260–63.

262. *Id.* at 262.

263. *Id.* Responding to the plaintiffs' argument that various nineteenth-century state cases (including those cited in *Heller*) involved jurisdictions that, unlike New York, permitted the open carrying of firearms, the court noted,

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.

court's view, since the New York statute does not constitute a complete ban on the carrying of firearms, those earlier cases that upheld bans on concealed carry only when open carry was lawful were inapposite.<sup>264</sup> In reality, of course, New York's proper-cause requirement effectively bans concealed carry for the overwhelming majority of the law-abiding adult population,<sup>265</sup> a point that the court neglected to consider.

The court went on to conclude that, "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" under an intermediate-scrutiny standard.<sup>266</sup> The court held that the proper-cause requirement is substantially related to the important governmental interest of promoting public safety and preventing crime.<sup>267</sup> New York's policy of limiting concealed-carry licenses to the few individuals who can show "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession" would therefore remain constitutional under intermediate scrutiny even if the Supreme Court determines that the Second Amendment protects a right to bear arms in public.<sup>268</sup>

On August 22, 2012, a Second Circuit panel consisting of Judges Robert Katzmann, Gerald Lynch, and Richard Wesley<sup>269</sup> heard oral arguments in *Kachalsky*.<sup>270</sup> Alan Gura (who also argued *Heller* and *McDonald* before the Supreme Court) argued on behalf of the plaintiffs, while Assistant Solicitor General Simon

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*Id.*

264. *Id.* Further, according to the court, the plaintiffs' argument 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" is likewise "unavailing, as hunting does not involve handguns and therefore falls outside the ambit of the challenged statute." *Id.* at 263. Hunting can, however, involve handguns, which is why the NYPD allows Premises License holders to transport their handguns elsewhere in New York State to go hunting. See *supra* note 191 and accompanying text.

265. McGinty, *supra* note 174; see also WINKLER, *supra* note 18, at 40–41.

266. *Kachalsky*, 817 F. Supp. 2d at 267.

267. *Id.* at 271

268. *Id.* at 253 (quoting *Kaplan v. Bratton*, 673 N.Y.S.2d 66, 68 (N.Y. App. Div. 1998)).

269. *Panel Information*, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, <http://www.ca2.uscourts.gov/docs/calendar/aug/aug20pnl.pdf> (last visited Nov. 12, 2012).

270. *Approved Calendar for the Week of August 20 Through August 24, 2012*, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, <http://www.ca2.uscourts.gov/Docs/Calendar/aug/aug20b.pdf> (last visited Nov. 12, 2012).

Heller of the New York State Attorney General’s Office argued on behalf of New York State.<sup>271</sup>

While the parties discussed a wide range of issues during the nearly eighty-minute session,<sup>272</sup> several major themes emerged during the course of the arguments. For instance, it became increasingly likely as the arguments progressed that the court might very well hold that the Second Amendment protects a right to carry firearms in public. Judge Wesley twice acknowledged that Alan Gura had “a pretty good argument” that the right outlined in *Heller* and *McDonald* extends beyond the home.<sup>273</sup> Judge Lynch addressed how the text of the Second Amendment seems to suggest a right to bear arms in public.<sup>274</sup> Indeed, even Assistant Solicitor General Simon Heller seemed to concede that the Second Amendment right extends outside the home.<sup>275</sup>

With two judges and even the State’s attorney apparently in agreement that the Second Amendment protects a right to bear arms in public, at various points in the argument the discussion focused on whether or not New York’s proper-cause requirement represented an unconstitutional infringement of that right. The State repeatedly argued that the proper-cause requirement was constitutional with regards to concealed handguns because New York allows the carrying of long guns (i.e., rifles and shotguns) in public.<sup>276</sup> The State suggested that allowing people to carry a long

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271. Oral Argument at 0:00 and 46:25, *Kachalsky v. Cacace*, Nos. 11-3642-cv & 11-3962-cv (2d Cir. 2012), available at <http://www.marylandshallissue.org/share/2ndoral.mp3> [hereinafter Oral Argument].

272. *Id.* at 1:19:12.

273. *Id.* at 11:45 (addressing Alan Gura) (“*Heller*’s a very strong statement for your view, and you say that Heller has implications beyond the home, because of a number of things . . . .”); *id.* at 56:48 (addressing Simon Heller) (“What this case requires us to do is . . . understand the parameters of the right as delineated by *Heller* and *McDonald*. . . . You say it doesn’t go beyond what it says, and your opponent says there are some really good indications that it extends beyond that. . . . He does have a pretty good argument on that regard.”).

274. *Id.* at 47:51 (addressing Simon Heller) (“How can you justify a limitation to the home of a constitutional text that provides a right to keep and bear arms? *Heller* and *McDonald* may have dealt with keeping, but, it’s different, it’s a right to keep arms in the home that is pretty near absolute, but a right to bear arms that actually becomes not much of a right at all [under New York’s proper-cause requirement].”).

275. *Id.* at 48:51 (“While there may be some right to carry some firearm for self-defense purposes outside the home, that right may extend outside the home . . . .”); *id.* at 1:10:55 (“To the extent that the Second Amendment right does exist outside the home, and I think that it does to some extent . . . .”).

276. *Id.* at 53:35 (“New York does allow carrying of long guns.”).

gun “on their shoulder or on the back of their SUV when they go hunting” adequately protects the right to bear arms.<sup>277</sup> Judge Lynch later pointed out that proper cause “by definition” means that “even after you exclude felons and the like, fewer than half of the non-categorically bannable citizens have a right to bear arms,” and then asked the State “[w]hat kind of right is it if fifty percent of the people or more don’t have that right?”<sup>278</sup> The State replied that “[t]he other fifty percent, under New York law, can carry long guns, if they want to, for self-defense.”<sup>279</sup> But the law does not actually permit New Yorkers to carry rifles or shotguns around with them in public for the purpose of self-defense.

Indeed, the court asked each attorney what would happen if an individual carried a long gun in New York City,<sup>280</sup> but neither was able to provide a complete answer to the question.<sup>281</sup> In fact, in New York City, where a permit is required to possess a rifle or shotgun,<sup>282</sup> it is illegal to carry a loaded rifle or shotgun in public, other than at an authorized range.<sup>283</sup> Further, permit-holders may only transport their long guns “to and from a licensed range or hunting area,” and the guns must be “carried unloaded in a locked, non-transparent case,” with the ammunition carried separately.<sup>284</sup> Thus, in New York City, at least, there is no right to carry long guns in public for the purpose of self-defense, but only locked and unloaded en route to a range or hunting grounds.

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277. *Id.* at 50:00 (“There’s a difference between easy access to a handgun when a burglar comes into one’s home, as opposed to the obvious access that a person has to a long gun that’s perhaps, I suppose, carried on their shoulder or on the back of their SUV when they go hunting.”).

278. *Id.* at 59:38.

279. *Id.* at 1:00:19.

280. *See id.* at 6:13 (question of Judge Lynch to Alan Gura) (“Could you, under New York law [walk around the streets of New York carrying a long gun]?); *id.* at 50:21 (question of Judge Katzmann to Simon Heller) (“Could I carry a long gun outside 40 Foley Square? What would happen to me if I carried a long gun?”).

281. *See id.* at 6:04 (statement of Alan Gura) (“Nobody would use a long arm to walk around the streets of New York and defend themselves from a mugger or rapist. . . . I suppose that walking around the streets here in front of the courthouse with a shotgun would constitute probably disturbing the peace or some modern form of affray because that’s not normal behavior. . . .”); *id.* at 50:28 (statement of Simon Heller) (“I think there would be intense police scrutiny of a person carrying a long gun outside [the courthouse] . . . carrying a dangerous weapon in a manner that frightens the public was prohibitable even in England several hundred years ago as well as in the colonial period.”).

282. *See* N.Y.C. ADMIN. CODE § 10-303 (2010); R. OF CITY OF N.Y. tit. 38, § 3-02 (2012).

283. R. OF CITY OF N.Y. tit. 38, § 3-14(a) (2012).

284. R. OF CITY OF N.Y. tit. 38, § 3-14(b) (2012).



However, since *Kachalsky* only challenges New York State’s proper-cause requirement, and not the rules and regulations of New York City, it remains to be seen whether the ability to carry long guns in public for self-defense under state law sufficiently protects the right to bear arms.

#### D. CONCEALED-CARRY LITIGATION IN OTHER CIRCUITS

Since the Court’s decision in *McDonald*, groups of plaintiffs have filed lawsuits in federal district courts challenging similar proper-cause requirements in California, New Jersey, and Maryland. While the Eastern and Southern Districts of California and the District of New Jersey have upheld their state’s restrictions on concealed carry,<sup>285</sup> the District of Maryland has reached the opposite conclusion, striking down Maryland’s “good and substantial reason” requirement.<sup>286</sup>

In *Richards v. Yolo County*, the Eastern District of California upheld the constitutionality of Yolo County’s “valid reason” or “good cause” requirement for obtaining a concealed-carry permit.<sup>287</sup> As in New York, self-defense “without credible threats of violence” is an invalid reason for obtaining a permit in California.<sup>288</sup> Interestingly, part of the court’s rationale for upholding Yolo County’s good-cause requirement for concealed-carry permits was that California law at the time permitted the open carrying of unloaded firearms in public.<sup>289</sup> Similarly, in *Peruta v.*

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285. See *Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 837 (D.N.J. 2012); *Richards v. Yolo Cnty.*, 821 F. Supp. 2d 1169 (E.D. Cal. 2011); *Peruta v. Cnty. of San Diego*, 758 F. Supp. 2d 1106, 1115 (S.D. Cal. 2010).

286. *Woollard v. Sheridan*, 863 F. Supp. 2d 462, 476 (D. Md. 2012).

287. *Richards*, 821 F. Supp. 2d at 1178.

288. *Id.* at 1172.

289. *Id.* at 1175. As it stood in May 2011, California Penal Code section 12025(a) prohibited the concealed carrying of firearms, but section 12025(f) specified that firearms “carried openly in belt holsters” were not covered by the statute. Meanwhile, section 12031(a)(1) prohibited the carrying of a loaded firearm in public. CAL. PENAL CODE §§ 12025(a), (f), 12031(a)(1) (West 2011) (repealed 2012). That is why California gun-rights activists were not breaking the law when they started openly carrying unloaded handguns in Starbucks cafes around the state in 2010. See Alison Stateman, *Should People Have Guns at Starbucks?*, TIME MAGAZINE (Mar. 22, 2010), <http://www.time.com/time/magazine/article/0,9171,1971411,00.html>. As the *Richards* court observed, California Penal Code section 12031(j)(1) did provide for one key exception to the general prohibition on the open carrying of loaded firearms: allowing the carrying of a loaded firearm “where someone . . . believes they are in ‘immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or proper-

*County of San Diego*, the Southern District of California upheld the constitutionality of San Diego County's good-cause requirement based in part on the availability of unloaded open carry.<sup>290</sup> However, in late 2011, approximately ten months after *Peruta* was decided, California Governor Jerry Brown signed into law Assembly Bill 144, banning the open carrying of firearms.<sup>291</sup> The new statute makes it a misdemeanor to openly carry an unloaded handgun in public.<sup>292</sup> Since both the Eastern and Southern Districts based their rationale for upholding California's concealed-carry-permit issuing policy in part on the availability of open carry, the disappearance of that option may result in a reversal by the Ninth Circuit.<sup>293</sup>

Like *Kachalsky*, *Richards*, and *Peruta*, another lawsuit in the District of New Jersey, *Piszczatoski v. Filko*, challenged that State's "justifiable need" requirement for a concealed-carry permit.<sup>294</sup> As in New York and California, "[n]either 'generalized fears for personal safety' nor the 'need to protect property alone' satisfy the standard" for obtaining a concealed-carry permit in New Jersey.<sup>295</sup> In granting the State's motion for summary judg-

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ty." 821 F. Supp. 2d at 1175 (quoting CAL. PENAL CODE § 12031(j)(i) (West 2011) (repealed 2012)). The statute defines "immediate" as "the brief interval before and after the local law enforcement agency, when reasonably possible, has been notified of the danger and before the arrival of its assistance." *Id.* at 1175 n.6. Theoretically, at least, a person carrying an unloaded firearm could lawfully load the firearm as soon as he or she reasonably believed that there was an immediate, grave danger that required the presence of a loaded firearm. (Of course, in reality, by the time an individual recognized a threat, loaded his or her firearm, and pointed it on target, it might very well be too late from a self-defense standpoint.) Thus, the court in *Richards* reasoned that, "[u]nder the statutory scheme, even if Plaintiffs are denied a concealed weapon license for self-defense purposes from Yolo County, they are still more than free to keep an unloaded weapon nearby their person, load it, and use it for self-defense in circumstances that may occur in a public setting." *Id.* at 1175.

290. 758 F. Supp. 2d at 1115. Specifically, California's statutes permitting "loaded open carry for immediate self-defense" led the court to conclude that it did "not need to decide whether the Second Amendment encompasses Plaintiffs' asserted right to carry a loaded handgun in public." *Id.*

291. Patrick McGreevy & Anthony York, *Gov. Brown Caps a Month of Bill Signings, Vetoes*, L.A. TIMES (Oct. 10, 2011), <http://articles.latimes.com/2011/oct/10/local/la-mew-adv-brown-bills-20111010>.

292. CAL. PENAL CODE § 26350 (West 2012).

293. *Richards*, 821 F. Supp. 2d at 1175 (E.D. Cal. 2011), *appeal docketed*, No. 11-16255 (9th Cir. May 16, 2011); *Peruta*, 758 F. Supp. 2d 1106, 1115 (S.D. Cal. 2010), *appeal docketed*, No. 10-56971 (9th Cir. Dec. 14, 2010).

294. *Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 815 (D.N.J. 2012).

295. *Id.* at 817 (quoting *In re Preis*, 573 A.2d 148, 151-52 (N.J. 1990)).

ment, the court held that “[t]he Second Amendment does not protect an absolute right to carry a handgun for self-defense outside the home.”<sup>296</sup> The court further held that the “right to keep and bear arms under the Second Amendment . . . should be narrowly construed against recognizing an absolute right to carry in public,” particularly given “[t]he inherent risks associated with the public exercise of [the Second Amendment] right,”<sup>297</sup> which the court provocatively compared to the public possession of obscenity.<sup>298</sup>

The District of Maryland, however, has reached the opposite conclusion. In *Woollard v. Sheridan*, the court held that Maryland’s “good and substantial reason” requirement for obtaining a concealed-carry permit<sup>299</sup> was not reasonably adapted to a substantial government interest under intermediate scrutiny, and was therefore an unconstitutional violation of the Second Amendment.<sup>300</sup> Drawing upon Fourth Circuit Judge Paul Niemeyer’s concurring opinion in *United States v. Masciandaro*,<sup>301</sup>

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296. *Id.* at 820.

297. *Id.* at 829; *see also id.* at 831 (“The Supreme Court has not recognized any absolute Second Amendment right to carry firearms in public for self-defense and the historical record does not persuade this Court that the holding of *Heller* should be extended to establish such.”).

298. *Id.* at 829 (citing *Stanley v. Georgia*, 394 U.S. 557, 565–68 (1969)) (“The Supreme Court has found limitations on the scope of a constitutional right outside the home in the First Amendment context, recognizing a right to privately possess obscene materials in the home but allowing the states broad power to regulate obscenity outside the home.”) As Professor Eugene Volokh has pointed out, the problem with this analogy between handguns and obscenity is that “it analogizes a core category of private arms to one of the *least* protected and marginal categories of speech (obscenity).” Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 98 (2009).

299. Maryland prohibits the carrying of a handgun outside the home, openly or concealed, without a permit. MD. CODE ANN., CRIM LAW § 4-203 (West 2012); MD. CODE ANN., PUB. SAFETY § 5-303 (West 2012). In addition to satisfying other criteria, permit applicants must have “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.” MD. CODE ANN. PUB. SAFETY § 5-306(a)(5)(ii) (West 2012). Of the four categories of “good and substantial reason” to carry a handgun in public, only one, “personal protection,” is unrelated to employment. *See Woollard v. Sheridan*, 863 F. Supp. 2d 462, 472 (D. Md. 2012). Maryland courts have defined “personal protection” as “some sort of objectively heightened threat, above and beyond the ‘personal anxiety’ or ‘apprehension of an average person.’ Simply living in a dangerous or high-crime area, for example, is not enough.” *Id.* at 473.

300. *Id.* at 464.

301. *United States v. Masciandaro*, 638 F.3d 458, 468 (4th Cir. 2011) (Niemeyer, J., concurring), *cert. denied*, 132 S. Ct. 756 (2011). *Masciandaro* held that, even if the Second Amendment protects the right to carry a loaded handgun for self-defense in public, a federal regulation prohibiting the carrying or possession of a loaded weapon in a motor ve-

the court interpreted *Heller's* holding of the need for self-defense being "most acute" in the home as suggesting "that the right also applies in some form 'where that need is not 'most acute,'" especially since, according to *Heller*, the Second Amendment was historically understood to allow for militia membership and hunting, neither of which is a household activity.<sup>302</sup> The court also looked toward *Heller's* definition of "to bear"<sup>303</sup> and discussion of "presumptively lawful" restrictions on the Second Amendment to conclude that the right to bear arms is not confined to the home,<sup>304</sup> and ultimately struck down the "good and substantial reason" requirement as an overly broad "rationing system"<sup>305</sup> that is not tailored to the preservation of public safety.<sup>306</sup> In conclusion, the court held that "[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."<sup>307</sup>

The district courts to consider the issue have thus reached different conclusions regarding the scope of the right to bear arms in public, suggesting that future guidance from the Supreme Court is necessary to arrive at a uniform conception of the Second Amendment.

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hicle within a national park withstood intermediate scrutiny. *Id.* at 460. After Masciandaro's arrest, the Department of the Interior subsequently changed the regulation to allow concealed carry of a loaded handgun in a national park area, so long as it is allowed under the laws of the state in which the portion of the park is located. *Id.* at 461.

302. *Woollard*, 863 F. Supp. 2d at 469 (quoting *Masciandaro*, 638 F.3d at 468 (Niemeyer, J., concurring)).

303. *Id.* at 470.

304. *Id.* ("The Supreme Court's choice of phrasing connotes that the restrictions it termed 'presumptively lawful' pass muster under a heightened standard of review. It would likely not have used the modifier 'presumptively' if those restrictions were subject, not to any form of elevated scrutiny, but only to the rational basis review that all laws are presumed to satisfy. If this is correct, and laws limiting the carrying of firearms in sensitive places are indeed implicated by the Second Amendment's protections, then those protections necessarily extend outside the home, at least to some degree.")

305. *Id.* at 474 ("It aims, as Defendants concede, simply to reduce the total number of firearms carried outside the home by limiting the privilege to those who can demonstrate 'good reason' beyond a general desire for self-defense.")

306. *Id.* at 475 ("A law that burdens the exercise of an enumerated constitutional right by simply making that right more difficult to exercise cannot be considered 'reasonably adapted' to a government interest, no matter how substantial that interest may be.")

307. *Id.*

## E. PROPER CAUSE AND THE RIGHT TO BEAR ARMS

Thus far, federal district courts in New York<sup>308</sup> and New Jersey<sup>309</sup> have upheld those states’ proper-cause and justifiable-need requirements for obtaining a concealed-carry permit. However, the District of Maryland has declared that state’s good-and-substantial-reason requirement to be unconstitutional,<sup>310</sup> while district courts in California have upheld good-cause requirements based in part on California statutes allowing the open carry of unloaded firearms, which have since been repealed.<sup>311</sup> In the near future, the Second,<sup>312</sup> Third,<sup>313</sup> Fourth,<sup>314</sup> and Ninth Circuits<sup>315</sup> will decide if the Second Amendment applies outside the home, and, if so, whether proper-cause and similar requirements that severely restrict the ability of ordinary citizens to obtain concealed-carry permits are constitutional. Ultimately, the United States Supreme Court will likely have to provide a definitive answer to these questions by further defining the scope of the Second Amendment.

Given the volume of litigation concerning the right to keep and bear arms, it would not be surprising for the Supreme Court to rule on the issue in the near future. Indeed, the language of *Heller* seems to suggest that the Court would welcome a future opportunity to provide further clarification on the scope of the Second Amendment. For instance, in *Heller*, the Court acknowledged Justice Breyer’s criticisms of the majority for “declining to establish a level of scrutiny for evaluating Second Amendment restrictions,”<sup>316</sup> “for leaving so many applications of the right to keep and bear arms in doubt, and for not providing extensive his-

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308. *Kachalsky v. Cacace*, 817 F. Supp. 2d 235, 273 (S.D.N.Y. 2011).

309. *Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 816 (D.N.J. 2012).

310. *Woollard v. Sheridan*, 863 F. Supp. 2d 462, 464 (D. Md. 2012).

311. *Richards v. Yolo Cnty.*, 821 F. Supp. 2d 1169 (E.D. Cal. 2011); *Peruta v. Cnty. of San Diego*, 758 F. Supp. 2d 1106, 1115 (S.D. Cal. 2010).

312. *Kachalsky*, 817 F. Supp. 2d 235, *appeal docketed*, No. 11-3642 (2d Cir. Sept. 16, 2011).

313. *Piszczatoski*, 840 F. Supp. 2d 813, *appeal docketed*, No. 12-1150 (3d Cir. Jan. 16, 2012).

314. *Woollard*, 863 F. Supp. 2d 462, *appeal docketed*, No. 12-1437 (4th Cir. Mar. 7, 2012).

315. *Richards*, 821 F. Supp. 2d 1169, *appeal docketed*, No. 11-16255 (9th Cir. May 16, 2011); *Peruta*, 758 F. Supp. 2d 1106, *appeal docketed*, No. 10-56971 (9th Cir. Dec. 14, 2010).

316. *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008).

torical justification for those regulations of the right that we describe as permissible.”<sup>317</sup> With an eye toward future cases, the Court then responded, suggestively, that, “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 . . . . And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.”<sup>318</sup> Further, in his *Heller* dissent, Justice Stevens suggested that the Court might take up prohibitions on the public carrying of firearms in the future, especially given “the reality that the need to defend oneself may suddenly arise in a host of locations outside the home . . . .”<sup>319</sup>

In late 2011, however, the Supreme Court denied certiorari to two Fourth Circuit cases, *Williams v. Maryland*<sup>320</sup> and *Masciandaro v. United States*,<sup>321</sup> which would have permitted the Court to clarify the issue.<sup>322</sup> Unlike the federal civil suits discussed above, both cases involved criminal defendants appealing their convictions for breaking laws prohibiting the concealed carry of loaded handguns in public.<sup>323</sup> The Supreme Court’s refusal to hear these cases should not be interpreted as an outright refusal to rule on the applicability of the Second Amendment outside the home, however, since the Court has shown a reluctance to consider the scope of the Second Amendment in cases involving a criminal defendant.<sup>324</sup> In addition, the specific facts of the cases make them

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317. *Id.* at 635.

318. *Id.* Elsewhere, the Court states that it is not “undertak[ing] an exhaustive historical analysis *today* of the full scope of the Second Amendment . . . .”, which suggests that tomorrow may bring a more exhaustive historical analysis. *Id.* at 626 (emphasis added).

319. *Id.* at 679–80 (Stevens, J., dissenting).

320. 132 S. Ct. 93 (2011).

321. 132 S. Ct. 756 (2011).

322. *Cf.* James Vicini, *Supreme Court Won’t Review Gun Rights Outside of Home*, REUTERS, Oct. 3, 2011, available at <http://www.reuters.com/article/2011/10/03/us-usa-guns-court-idUSTRE7923OX20111003> (“The Supreme Court refused Monday to consider whether an individual’s right to own guns includes carrying a firearm outside the home, staying out one of the nation’s most divisive social, political, and legal issues.”).

323. *Williams* involved a Maryland man who was convicted of transporting a handgun outside the home without a permit after a police officer saw him try to hide a loaded Glock pistol in the bushes. *See* 10 A.3d 1167, 1170-71 (Md. 2011). *Masciandaro* involved a Virginia man who was convicted of carrying a loaded weapon in a motor vehicle within a national park, in violation of 36 C.F.R. § 2.4(b). *See* 638 F.3d 458, 460 (4th Cir. 2011).

324. *See* WINKLER, *supra* note 18, at 49 (“Perhaps one of the reasons the Court had long refused to hear a Second Amendment case was that the type of people who challenged gun-control laws were usually criminals or dangerous people whose gun possession merely

particularly problematic from the point of view of establishing constitutional-law precedent: Williams never even applied for a carry permit<sup>325</sup> and thus lacked standing to challenge Maryland’s permit regulations,<sup>326</sup> while the federal regulation under which Masciandaro was convicted<sup>327</sup> was changed shortly after Masciandaro’s arrest to allow concealed carry in national parks.<sup>328</sup> *Kachalsky* and similar suits in other circuits present far more ideal test cases for a definitive ruling, since they involve law-abiding, civil plaintiffs who are appealing the denial of their license applications. The main question is which lawsuit will make it through the appellate level and to the Supreme Court first.

If the Second Amendment is to make any sense from a textual standpoint, then “the right of the people to keep and bear arms” must protect both the right to possess firearms in the home and to carry firearms outside the home. A limitation of the Second Amendment to the narrow holding of *Heller*, protecting only the right to keep and bear arms in the home, would create some troublesome textual difficulties regarding the term “to bear.” Under such an interpretation, the Second Amendment’s “to bear” would no longer mean “to carry” in a general sense, but only to carry within the home, and the “right of the people to keep and bear arms” would only protect the right to keep and carry arms within the home. Yet throughout *Heller*, the Court uses the verb “to carry” with the understanding that it means to carry in public,<sup>329</sup> as distinguished from mere possession.<sup>330</sup> If “to carry” and

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raised the chances of someone’s getting hurt. The Court might be more inclined to hear a case involving a law-abiding person who wanted to own a gun for self defense.”)

325. *Williams*, 10 A.3d at 1173, 1177.

326. *Id.* at 1173 n.7; see also WINKLER, *supra* note 18, at 89–92, for a discussion of how a lack of standing similarly derailed early attempts to challenge Washington D.C.’s handgun ban.

327. 36 C.F.R. § 2.4(b) (2011).

328. *Masciandaro*, 638 F.3d at 461.

329. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008) (citations omitted) (“At the time of the founding, as now, to ‘bear’ meant to ‘carry.’ When used with ‘arms,’ however, the term has a meaning that refers to carrying for a particular purpose — confrontation. In *Muscarello v. United States*, in the course of analyzing the meaning of ‘carries a firearm’ in a federal criminal statute, Justice Ginsburg wrote that ‘[s]urely a most familiar meaning is, as the Constitution’s Second Amendment . . . indicate[s]: ‘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.’ We think that Justice Ginsburg accurately captured the natural meaning of ‘bear arms.’”); *id.* at 613 (citing state court decisions that upheld “a right to carry arms openly”); *id.* at 626 (“From Blackstone through the 19th-century cases, commentators and courts

“to possess” collapse into a single meaning of possession in the home, then the Court’s statement that the terms of the Second Amendment’s operative clause “guarantee the individual right to possess and carry weapons in case of confrontation”<sup>331</sup> becomes redundant. Even Penal Law section 400.00(2) distinguishes between possession and carrying, providing separate licenses to “have and possess in [one’s] dwelling” and to “have and carry concealed.”<sup>332</sup> Indeed, the Supreme Court has historically referred to the Second Amendment as protecting the right of citizens “to keep and carry arms wherever they went.”<sup>333</sup>

Since it seems very likely that the Second Amendment protects a right to bear arms in public, the question then becomes whether New York’s proper-cause requirement passes constitutional muster. Although on the surface New York’s “statute does not function as an outright ban on concealed carry,”<sup>334</sup> the fact remains that the high standard of the proper-cause requirement constitutes a de facto ban on concealed carry for most law-abiding individuals, particularly in New York City and other downstate counties, where concealed-carry licenses are rarely issued to ordinary civilians.<sup>335</sup> Since only applicants who can document exposure to “extraordinary personal danger” can lawfully carry a handgun in public, the statute effectively bans public carrying of firearms by almost all private citizens, as did the Chicago ban overturned in *McDonald* with respect to handgun possession in the home.<sup>336</sup> If the Supreme Court holds that the Second Amendment protects the right to bear arms outside the home, then New York’s combination of the restrictive proper-cause requirement for concealed carry with a complete ban on open carry seems to constitute precisely the sort of complete ban that is im-

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routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”).

330. For example, the Court ultimately holds “that the District’s ban on handgun possession in the home violates the Second Amendment . . .” *Heller*, 554 U.S. at 635 (2008) (emphasis added).

331. *Id.* at 591.

332. N.Y. PENAL LAW § 400.00(2) (McKinney 2012).

333. *Dred Scott v. Sanford*, 60 U.S. 393, 416 (1856) (considering the right of citizens “to keep and carry arms wherever they went” as one of “the privileges and immunities of citizens”).

334. *Kachalsky v. Cacace*, 817 F. Supp. 2d 235, 271 (S.D.N.Y. 2011).

335. *McGinty*, *supra* note 174; see also WINKLER, *supra* note 18, at 40–41.

336. *McDonald v. City of Chi., Ill.*, 130 S. Ct. 3020, 3026 (2010).



permissible under any standard of review.<sup>337</sup> New York may be able to restrict one manner of bearing arms in public, but not both.

## V. APPLYING THE SECOND AMENDMENT TO NEW YORK CITY: PRACTICAL CONSIDERATIONS

This Part will discuss the practical ramifications for New York City if courts strike down key provisions of state and city restrictions on handguns. Part V.A looks at what might happen if restrictions on the right to keep a handgun in the home, such as the state’s good-moral-character requirement and the city’s \$340 application and renewal fee, are declared unconstitutional. Part V.B focuses on how eliminating the state’s proper-cause requirement for concealed-carry licenses would impact New York City.

### A. THE RIGHT TO KEEP ARMS IN NEW YORK CITY

Even if courts declare several key provisions of New York City’s system for issuing Premises Licenses to be unconstitutional, the overall effect on the city will likely be minimal. The elimination of New York State’s good-moral-character requirement may result in handgun licenses being issued to individuals who have been fired from their jobs, individuals who have neglected to pay parking tickets, or even individuals who have been convicted of certain violations and misdemeanors. But felons,<sup>338</sup> drug users,<sup>339</sup> domestic violence misdemeanants,<sup>340</sup> persons subject to restraining orders,<sup>341</sup> and the mentally ill<sup>342</sup> will continue to be prohibited from possessing handguns. The NYPD’s extensive investigations into applicants will continue to ensure that such potentially dangerous individuals are not issued handgun licenses.

Eliminating the character reference requirement will make the license application process much easier, and may encourage more people to apply for licenses. Similarly, reducing the \$340

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337. *See* District of Columbia v. Heller, 544 U.S. 570, 628–29 (2008).

338. *See* 18 U.S.C. § 922(g)(1) (2006); N.Y. PENAL LAW § 400.00(1)(c) (McKinney 2012).

339. *See* 18 U.S.C. § 922(g)(3) (2006); R. OF CITY OF N.Y. tit. 38, § 5-10(d) (2012).

340. *See* 18 U.S.C. § 922(d)(9) (2006).

341. *See* 18 U.S.C. § 922(g)(8) (2006); R. OF CITY OF N.Y. tit. 38, § 5-10(f) (2012).

342. *See* 18 U.S.C. § 922(g)(4) (2006); N.Y. PENAL LAW § 400.00(1)(d) (McKinney 2012).

application and renewal fee will likewise encourage more people to apply for licenses, and may force the city to absorb a greater portion of the costs associated with its licensing scheme, if the city's calculations regarding the costs of processing each application are indeed accurate. Since state courts seem unwilling to follow *Heller* and *McDonald*,<sup>343</sup> rejected applicants may eschew Article 78 administrative appeals and instead file § 1983 claims in federal court challenging the city's refusal to grant them a license on constitutional grounds,<sup>344</sup> which will cause the city to absorb additional financial costs as well. But allowing licensed New Yorkers to transport their handguns out-of-state will have no impact on New York City whatsoever. In short, even if the courts rule against New York City in each of these areas, Mayor Bloomberg's fears that the city will lose its entire regulatory scheme<sup>345</sup> are unlikely to be realized.

#### B. BEARING ARMS IN NEW YORK CITY?

If courts declare New York's proper-cause requirement to be unconstitutional, New York City would have still have several options to regulate the carrying of handguns in public. The first and simplest solution would be for New York City to do absolutely nothing. If the proper-cause requirement is declared unconstitutional, then the standards for obtaining a concealed-carry license in New York City will be essentially the same as they currently are for obtaining a Premises-Residence License. For all licenses combined, there are currently fewer than 40,000 handgun licensees in the city, compromising less than one-half of one

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343. See *Campbell v. Kelly*, 924 N.Y.S.2d 269, 270 (N.Y. App. Div. 2011); *Alsaede v. Kelly*, No. 116470/2009, 2011 WL 621904, at \*4 (N.Y. Sup. Ct. Feb. 22, 2011), *aff'd as modified* by 946 N.Y.S.2d 158 (2012); *Caputo v. Kelly*, No. 113232/10, 2011 WL 567978, at \* 7–8 (N.Y. Sup. Ct. Feb. 8, 2011).

344. Both *Kachalsky* and *Kwong* were filed under § 1983. See *Kwong v. Bloomberg*, No. 11 Civ. 2356(JGK), 2012 WL 995290, at \*1 (S.D.N.Y. Mar. 26, 2012); *Kachalsky v. Cacace*, 817 F. Supp. 2d 235, 250 (S.D.N.Y. 2011). As the court stated in *Kachalsky*, "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.] This rule reflects 'the paramount role Congress has assigned to the federal courts to protect constitutional rights.'" *Kachalsky*, 817 F. Supp. 2d at 350 (quoting *Steffel v. Thompson*, 415 U.S. 452, 472–73, (1974)).

345. *Slashing Gun Permit Fees*, *supra* note 162.

percent of the population.<sup>346</sup> Even if the \$340 licensing application and renewal fee and the good-moral-character requirement are ultimately declared unconstitutional, navigating the lengthy (and often tricky) application process should continue to deter many residents from applying for licenses in the first place. Since compiling the necessary documents and making the requisite trips to One Police Plaza involves considerable time, effort, and diligence, only the most motivated individuals will be likely to apply for concealed-carry license, as is currently the case for Premises Licenses. Moreover, the requirements for obtaining a Premises License — such as those pertaining to mental health and criminal history — will ensure that concealed-carry licenses are issued only to law-abiding, healthy individuals.

Perhaps most importantly, however, the New York City Charter makes it a crime to possess a firearm within a “gun-free school safety zone,” which extends one thousand feet from the real property boundary line of any school or day care center.<sup>347</sup> This provision would continue to place a significant restraint on the carrying of handguns in public even if the proper-cause requirement is invalidated. Indeed, under the law, concealed-carry license holders are only entitled to an affirmative defense to the crime of possession in a school zone if they are carrying their firearm between their business, home, or bank in a school zone.<sup>348</sup> Carrying a handgun on all other occasions would therefore be a crime. The Second Circuit addressed such “gun-free school-zone” laws during oral arguments in *Kachalsky*,<sup>349</sup> but both counsel for plaintiff and the court stressed that the case only dealt with New York State’s proper-cause requirement.<sup>350</sup>

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346. WINKLER, *supra* note 18, at 41.

347. N.Y.C. CHARTER §§ 459, 460 (2011). The law does not apply for licensed possession of a firearm in one’s home or business. § 460(b)(i) and (ii). It is also an affirmative defense if a licensed individual transports a firearm back home on the day it was purchased, to and from the police department for inspection, or to and from an authorized target practice facility or a gunsmith. § 460(c)(ii)-(v).

348. § 460(c)(i).

349. Oral Argument, *supra* note 271, at 37:42 (question of Judge Lynch to Alan Gura) (“How about not within a hundred feet of a school? That would take care of New York City pretty well, I suppose. . . . But that wouldn’t be constitutional because, then you wouldn’t have a place to defend yourself?”).

350. Oral Argument, *supra* note 271, at 40:50 (statement of Alan Gura) (“Those cases [regarding school zone and similar ordinances] will come up. . . . We don’t believe that this is the case that is supposed to resolve every single permutation of how the state might regulate the carrying of guns, and there’s nothing wrong with perhaps other cases coming

Alternately, if even the gun-free school safety-zone law is declared unconstitutional, then New York may opt for a system similar to that in California prior to the adoption of Assembly Bill 144,<sup>351</sup> in which license holders would be allowed to openly carry firearms in public. Given the history of concealed-carry bans throughout the United States,<sup>352</sup> courts might be unlikely to hold that the Second Amendment specifically protects a right to carry concealed handguns. Instead, courts may hold that the Second Amendment requires states and localities to allow law-abiding, healthy individuals to bear some type of firearms, whether handguns or long guns, and whether openly or concealed. Unless courts specifically state that individuals have the right to carry loaded handguns, New York City could also require that they remain unloaded except for in case of immediate grave danger, as was the case in California prior to 2012.<sup>353</sup> For the city, open carry would present several advantages over concealed carry:<sup>354</sup> social stigma against visible firearms would likely deter many license holders from exercising their Second Amendment right to bear arms in public.<sup>355</sup> Private parties, such as employers, stores, and restaurants, might also try banning firearms from their pre-

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forward in the future”); Oral Argument, *supra* note 271, at 1:02:50 (statement of Judge Lynch) (“What Mr. Gura is saying is, I’m asking you for the narrowest piece of this right. Now, I’m sure he’s got a few more things he’s going to ask for after this one, but for now what he’s saying is, that’s exactly the narrowest thing I’m asking for.”).

351. Stats. 2011, c. 725 (A.B. 144), § 14 (codified at CAL. PENAL CODE § 26350 (West 2012)).

352. See *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (“[T]he 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”).

353. CAL. PENAL CODE §§ 1205(a), (f), 12031(a)(1) (West 2011) (repealed 2012).

354. See Bishop, *supra* note 223, at 926 (“[A]n open-carry regime in conjunction with rigorous police enforcement of permit requirements and behavior by permit holders might be an effective — if counterintuitive — policy for large cities and largely urban states forced to offer some outlet for the right to carry following an extension of the Second Amendment outside the home”).

355. See Volokh, *supra* note 111, at 1521–24 (“To be sure, any discussion of open carry rights has a certain air of unreality. In many places, carrying openly is likely to frighten many people, and to lead to social ostracism as well as confrontations with the police. . . . This is likely to deter many people from carrying a gun”); Bishop, *supra* note 223, at 925 (“Citizens who wear deadly weapons openly in urban centers attract negative attention from the police, fellow citizens, and the media. Requiring carriers to wear guns on the hip sets up a powerful social barrier to actually carrying a firearm for self-defense and decreases the number of people willing to do so.”).

mises, effectively limiting the lawful carrying of handguns in public to city sidewalks and parks.<sup>356</sup>

A third option is for the City to create a new licensing scheme for concealed-carry permits. Should New York City choose this option, the San Francisco Sheriff’s Department’s concealed-carry license policy could serve as a model. San Francisco requires applicants to pass a rigorous, live-fire qualification test for proficiency in handgun marksmanship and safe-handling.<sup>357</sup> Such tests would do far more to protect public safety than the current New York licensing regime, which does not feature any requirements in firearm marksmanship or safety. In addition to the standard California good-moral-character requirement,<sup>358</sup> applicants must also pass a psychological test.<sup>359</sup> Successful applicants can only carry the handgun with which they qualify, and the handgun must be among those on a limited list.<sup>360</sup> Mainly because of the proficiency test (which costs \$1722) and psychological exam (\$150), the total fee for a San Francisco concealed-carry permit is \$2067, with another \$1,079.96 required for re-qualification and renewal.<sup>361</sup> If New York City’s current \$340 fee deters many residents from applying for a license, the significantly higher fees and more rigorous application process required under the San Francisco regime could be expected to drastically limit the number of applicants. Even if such fees are ultimately struck down as unconstitutional, the marksmanship and psychological tests should ensure that only competent individuals are permitted to carry handguns in public.

Thus, whether it relies on the bureaucratic hassles of the application process, the gun-free school safety zone law, or the social stigma associated with open carry, New York City will still

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356. See Volokh, *supra* note 111, at 1527.

357. See S.F. SHERIFF’S DEP’T, POLICY NO. SFSD 01-15, CARRY CONCEALED WEAPON (2011) [hereinafter CARRY CONCEALED WEAPON], available at <http://www.calgunsfoundation.org/downloads/documents/SanFrancisco.pdf>.

358. CAL. PENAL CODE § 26150(a)(1). Of course, California currently maintains a “good cause” requirement under § 26150, but this hypothetical discussion presumes that such requirements would be declared unconstitutional by the Supreme Court.

359. CARRY CONCEALED WEAPON, *supra* note 357.

360. CARRY CONCEALED WEAPON, *supra* note 357. Semiautomatic pistols must be chambered for 9mm, .40 S&W, or .45 ACP, while revolvers must be chambered for .38 special. Only handguns from selected, high-quality manufacturers are allowed, and single action semiautomatics (such as 1911 variants or the Browning Hi-Power) are forbidden.

361. *Id.*

have a number of options available for regulating concealed carry if the state's proper-cause statute is invalidated.

## VI. CONCLUSION

The Supreme Court's rulings in *Heller* and *McDonald* alone are unlikely to bring about major changes in New York City's handgun licensing regime, one of the most restrictive in the nation. Ultimately, the fate of restrictions such as New York City's \$340 handgun license application and renewal fee and New York State's proper-cause requirement for concealed-carry licenses hinges on how the Supreme Court defines the scope of the right to keep and bear arms. While it may be impossible to predict the outcome of current and future Second Amendment litigation, one thing, at least, seems certain: firearm-related lawsuits against New York City and New York State will become an increasingly common occurrence in the wake of *Heller* and *McDonald*.