

1 12-1578-cv
2 Kwong v. Bloomberg

3
4 JOHN M. WALKER, JR., Circuit Judge, concurring:

5 This case presents complicated questions in an area of law in
6 which the Supreme Court has provided limited guidance. The full
7 import of the Second Amendment right and the government's burden to
8 justify the infringement of this right in different contexts remain
9 opaque. Thus, it is not entirely surprising that, while I agree
10 with the majority that the two laws at issue here are
11 constitutional, I reach that conclusion by a different route.

12 I would hold that Administrative Code §10-131(a)(2), which
13 imposes a non-negligible, indeed significant, initial handgun
14 licensing fee of \$340, does not violate the Second Amendment.
15 Although the fee constitutes a substantial burden on the
16 fundamental Second Amendment right to possess a handgun in the home
17 for self-defense, see McDonald v. City of Chicago, 130 S. Ct. 3020,
18 3036 (2010), and thereby necessitates intermediate scrutiny, the
19 statute survives such heightened review.¹ The government interest at
20 stake—protecting the public safety—is an important one, and the fee
21 is collected solely to recoup the costs of the licensing regime

¹ Because it does not state that the fee definitively constitutes a substantial burden on the Second Amendment right, the majority implies that rational basis review may be sufficient. Since I find that charging a non-nominal fee for the exercise of a right protected by the core of the Second Amendment imposes a substantial burden on a fundamental right, I believe heightened scrutiny of the fee statute is necessary.

1 that is designed to further that interest. Indeed, because of the
2 heightened public safety concern in the Second Amendment context, I
3 find it unlikely that handgun licensing fees tied to cost recovery
4 would ever fail to meet this heightened standard.

5 Second, I would hold that Penal Law § 400.00(14) does not
6 violate the Equal Protection Clause, despite the fact that it, in
7 combination with local law, permits the City of New York and Nassau
8 County to impose significantly higher residential handgun licensing
9 fees than other New York counties. The fee disparity burdens the
10 exercise of a fundamental right differently for different New York
11 State residents and therefore demands a heightened level of review.
12 However, the governmental interest at issue here—permitting local
13 discretion in deciding whether and how to recoup costs related to
14 protecting the public safety—justifies this disparity.

15 **A. Administrative Code § 10-131(a) (2) Does Not Violate the Second**
16 **Amendment**

17 The majority begins its analysis of the constitutionality of
18 Administrative Code § 10-131(a) (2) under the Second Amendment with
19 a discussion of the Supreme Court's First Amendment "fee
20 jurisprudence." It concludes—and I agree—that the \$340 licensing
21 charge is not an unconstitutional tax, but rather a
22 constitutionally permissible fee.

23 The majority then addresses the question of whether the fee is
24 an unconstitutional burden on the Second Amendment. In other words,

1 does § 10-131(a)(2) impose a substantial burden on the fundamental
2 right to keep a handgun in the home?

3 As the majority notes, the Second Circuit does not read
4 Supreme Court jurisprudence as "mandat[ing] that any marginal,
5 incremental or even appreciable restraint on the right to keep and
6 bear arms be subject to heightened scrutiny." United States v.
7 Decastro, 682 F.3d 160, 166 (2d Cir. 2012) (determining that a
8 statute that barred the transportation of firearms across state
9 lines required only rational basis review because individuals could
10 apply for licenses to own guns in all states). Instead, we have
11 determined that "heightened scrutiny is triggered only by those
12 restrictions that . . . operate as a substantial burden on the
13 ability of law-abiding citizens to possess and use a firearm for
14 self-defense (or for other lawful purposes)." Id. (emphasis added).
15 The majority relies on Decastro's "appreciable restraint" language
16 to suggest we need not apply heightened scrutiny to a licensing fee
17 that "amounts to just over \$100 per year." Ante at 10. However,
18 because it ultimately finds that the statute would survive
19 intermediate scrutiny, the majority observes that it need not
20 address the questions of whether the fee is a substantial burden
21 and what level of review is required.

22 While I agree with the majority that § 10-131(a)(2) survives
23 intermediate scrutiny, I believe that such review is required. The
24 Supreme Court has clarified that a law-abiding citizen's right to

1 possess a handgun in the home for self-defense is fundamental. See
2 McDonald, 130 S. Ct. at 3036. Any non-nominal licensing fee
3 necessarily constitutes a substantial burden on this right.² And,
4 unlike the statute at issue in Decastro, which barred transporting
5 a firearm across state lines, “there are no alternative options for
6 obtaining a license to [have] a handgun.” Kachalsky v. Cnty. of
7 Westchester, 701 F.3d 81, 93 (2d Cir. 2012).

8 Intermediate scrutiny is sufficient, however, because a
9 licensing fee imposes only a burden—not a ban—on this fundamental
10 right. Id. at 93-97. Accordingly, and for substantially the same
11 reasons advanced by the majority, I believe that § 10-131(a)(2)
12 easily survives intermediate scrutiny. Indeed, I would go a step
13 further. As we recently noted, “[t]he regulation of firearms is a
14 paramount issue of public safety, and recent events in [Newtown,
15 Connecticut] are a sad reminder that firearms are dangerous in the

² Portions of the majority’s opinion might be read as stating that a fee of \$100 per year is not a substantial burden. See ante at 12 (“On the facts of this case, we find it difficult to say that the licensing fee, which amounts to just over \$100 per year, is anything more than a marginal, incremental or even appreciable restraint on one’s Second Amendment rights—especially considering that plaintiffs have put forth *no evidence* to support their position that the fee is prohibitively expensive.” (quotation marks omitted)). I do not believe that whether a fee is prohibitive is the appropriate test for evaluating whether it imposes a substantial burden. Although some fees may be so marginal as to be immaterial, a \$340 licensing fee is not nominal and therefore constitutes a substantial burden. Certainly, it may be negligible for some individuals, while for others it would present a prohibitively costly barrier to exercising a fundamental right.

1 wrong hands." Osterweil v. Bartlett, 706 F.3d 139, 143 (2d Cir.
2 2013). Because of the heightened safety concerns in the Second
3 Amendment context, I would find that handgun licensing fees tied to
4 and limited by cost recovery are generally constitutional under the
5 Second Amendment.

6 **B. Penal Law § 400.00(14), Separately or In Combination with Local**
7 **Law, Does Not Violate the Equal Protection Clause**

8 The majority reasons that, because Penal Law § 400.00(14)
9 "simply allows the New York City Council to fix the fee to be
10 charged for a license to carry or possess a pistol or revolver in
11 New York City," ante at 15 (quotation marks and alteration
12 omitted), it "itself does *nothing* to burden anyone's Second
13 Amendment [fundamental] rights," ante at 16. Furthermore, the
14 majority notes, § 400.00(14) does not permit New York City and
15 Nassau County to charge any amount they wish; no licensing fee can
16 exceed "a sum reasonably necessary to cover the costs of the
17 issuance, inspection and enforcement." ATM One LLC v. Inc. Vill. of
18 Freeport, 714 N.Y.S.2d 721, 722 (2d Dep't 2000) (quotation marks
19 omitted). Based on its determination that the contested law does
20 not burden any fundamental rights and the fact that the statute's
21 geographic classification is not suspect, the majority concludes
22 that only rational basis review is warranted under the Equal
23 Protection Clause.

1 This analysis both blinks reality and condones a loophole that
2 permits disparate burdens on a fundamental right for different
3 individuals. Penal Law § 400.00(14) does not operate in a vacuum;
4 it is applied through local legislation that has the result of a
5 gun owner paying a \$340 handgun licensing fee in one New York State
6 jurisdiction and a \$10 fee in another. This disparate burden of a
7 fundamental right necessitates more exacting scrutiny than rational
8 basis review.³

³ The majority observes that, if a law is found constitutional under Second Amendment jurisprudence, courts generally apply only rational basis review to associated Equal Protection Clause claims. See ante at 16 n.19 (citing First, Fourth, Fifth, and Ninth Circuit decisions applying rational basis review to an Equal Protection Clause claim after finding that the contested law survived the review required under the Second Amendment). Those cases, which dealt with regulation of conceal-and-carry licenses, handgun ownership by young adults, and firearms possession on public property, did not consider the impact of a law on the core Second Amendment right of gun ownership for defense of the home. Moreover, they provide little, if any, explanation for their decision to short-circuit the usual Equal Protection Clause analysis.

Although the Supreme Court has found that laws which survive review under the Free Exercise jurisprudence receive only rational basis review under an associated Equal Protection Clause claim, see Locke v. Davey, 540 U.S. 712, 720 n.3 (2004); Johnson v. Robinson, 415 U.S. 361, 375 n.14 (1974), these cases are distinguishable. In Locke and Johnson, the plaintiffs argued that they were denied a governmental benefit (scholarship money and educational benefits, respectively) due to their religious-oriented activity (pursuit of a theology degree and conscientious objection, respectively). The Supreme Court upheld both laws after conducting a Free Exercise analysis, noting that the laws posed only "incidental" or "minor" burdens on the plaintiff's Free Exercise rights—if any burden at all. Locke, 540 U.S. at 725; Johnson, 415 U.S. at 385. The Supreme Court then found, in cursory footnotes, that the associated Equal Protection Clause claims required only rational basis review.

Here, in contrast, the contested law creates a disparate

1 Courts apply heightened scrutiny when a legislative
2 classification burdens a fundamental right. Romer v. Evans, 517
3 U.S. 620, 631 (1996) (“[I]f a law neither burdens a fundamental
4 right nor targets a suspect class, we will uphold the legislative
5 classification so long as it bears a rational relation to some
6 legitimate end.”). However, strict scrutiny does not appear
7 warranted when, as here, an Equal Protection Claim is based on a
8 burdening of a fundamental right that demands only intermediate
9 scrutiny under that right’s jurisprudence. See Ramos v. Town of
10 Vernon, 353 F.3d 171, 178-80 (2d Cir. 2003) (applying intermediate
11 scrutiny based on the lack of a suspect class, despite the
12 legislative burdening of a fundamental right, and noting that “the
13 equal protection framework allows for a more discerning inquiry to
14 accommodate competing [governmental and individual] interests”).
15 Accordingly, I believe that this is a situation where intermediate
16 scrutiny is sufficient.

17 Even if strict scrutiny were applicable, this would be one of
18 those rare situations where strict scrutiny would not be fatal in
19 fact. See Adam Winkler, 59 Vand. L. Rev. 793, 815, 862-63 (2006)

burden—and a potentially prohibitive burden—on exercising a
fundamental right. This requires heightened review under the Equal
Protection Clause. I am not suggesting, as the majority implies,
that the claim under the Equal Protection Clause should necessarily
receive more exacting scrutiny than that under the Second
Amendment. See ante at 16 n.19. I read the majority opinion to
imply that both claims can be reviewed for rational basis, and I am
applying the same standard of review—intermediate scrutiny—to both
claims.

1 (finding that approximately 30 percent of all applications of
2 strict scrutiny result in the challenged law being upheld); United
3 States v. Miles, 238 F. Supp. 2d 297, 301 (D. Me. 2002) (upholding
4 a gun control law under strict scrutiny).

5 First, there is an important and compelling governmental
6 interest in allowing local governments to be flexible in setting
7 fees to recoup costs related to protecting the public safety if
8 they so choose, even if this results in different localities
9 charging different fees for a constitutionally-protected activity.
10 See Cox v. New Hampshire, 312 U.S. 569, 577 ("The suggestion that a
11 flat fee should have been charged [for a parade license] fails to
12 take account of the difficulty of framing a fair schedule to meet
13 all circumstances, and we perceive no constitutional ground for
14 denying to local governments that flexibility of adjustment of fees
15 which in the light of varying conditions would tend to conserve
16 rather than impair the liberty sought." (emphasis added)).

17 Second, a cost recovery licensing fee is a substantially
18 related and narrowly tailored means of protecting this governmental
19 interest, provided (1) that all localities are free to request and,
20 if they do so, are granted the statutory fee cap exception; and (2)
21 that, as is currently required under § 400.00(14), all localities
22 that set their own fees are subject to the cost recovery ceiling.⁴

⁴ The plaintiffs do not challenge the state's calculation of the costs of its licensing regime.

1 The right to keep and bear arms may be fundamental, but its
2 exercise necessitates costly regulatory actions to protect the
3 public safety. The state and its localities are not obligated to
4 subsidize these costs.

5 For the above reasons, I believe that Administrative Code
6 § 10-131(a)(2) and Penal Law § 400.00(14)—separately, or in
7 combination with local implementing law—are constitutional, and I
8 concur in the majority's conclusion that the district court's
9 judgment should be affirmed.