20-1027-cv

United States Court of Appeals

for the

Second Circuit

LAMBERT HENRY,

Plaintiff-Appellant,

– v. –

COUNTY OF NASSAU, NASSAU COUNTY POLICE DEPARTMENT, THOMAS KRUMPTER, ACTING COMMISSIONER PATRICK J. RYDER, MARC TIMPANO, Lieutenant, ADAM FISCHER, Sergeant, STEPHEN TRIANO, Deputy Sheriff, JEFFERY KUCHEK, Deptuy Sheriff, MARK SIMON, Deputy Sheriff, JEFFREY TOSCANO, Deputy Sheriff,

Defendants-Appellees,

JOHN DOES 1-3, JANE DOES 1-3, said names being fictitious, but intended to designate certain unknown employees of the County of Nassau in the Pistol License Section of the Nassau County Police Department,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFF-APPELLANT

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. §1291 to adjudicate final orders of the United States District Court for the Eastern District of New York. The District Court had jurisdiction under 28 U.S.C. §1331, 1343(a)(3)-(4) and the Constitution of the United States. Plaintiff-Appellant Lambert Henry (hereinafter "Plaintiff") filed a timely Notice of Appeal on March 20, 2020 (A 323)[1] following the entry of the Clerk's Judgment on March 12, 2020 (SPA 24), which dismissed the case pursuant to Judge Denis R. Hurley's Memorandum and Order of March 12, 2020 (hereinafter "decision") granting Defendants-Appellees' (hereinafter "Defendants") motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). (SPA 1).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues before this Court for review are set forth below:

(1) Did the lower court err in granting the Defendants' motion to dismiss on the basis that *Kachalsky v. County of Westchester* did not mandate something higher than intermediate scrutiny where the plaintiff

[1] Citations to the Joint Appendix will be prefaced with an "A". Citations to the Special Appendix will be referenced "SPA". Citations to the Confidential Appendix will be referenced "CA".

undergoes a total deprivation of all Second Amendment rights upon a license revocation?

(2) Did the lower court err in granting the Defendants' motion to dismiss on the basis that the Defendants are not required under NYPL §400.00(2)(a) to issue a home premise license under the shall issue standard? and;

(3) Did the lower court err in granting the Defendants' motion to dismiss on the basis that NYPL §400.00(11)(a) grants broad discretion to the local licensing officer to determine the circumstances that may trigger a revocation and loss of all Second Amendment rights?

STATEMENT OF THE CASE

The present appeal arises from the decision of the Hon. Denis R. Hurley, U.S.D.J. to dismiss the Complaint against the Defendants, under Index No. 17-cv-06545 (DRH) (AKT). The action arose after the Defendants, including Nassau County Police Department, made the determination to revoke the Plaintiff's pistol carry license,[2] despite having no authority to do so under NYPL §400.00(11)(a).

[2] The Plaintiff possessed a pistol license classified as a retired police officer license, issued pursuant to NYPL §400.00(2)(f).

The Notice of Pistol License Revocation, dated October 12, 2016, included the warning that the Plaintiff was also prohibited from owning or possessing any rifle or shotgun.[3] (A 119). Thus, Plaintiff was subject to a total ban on all of his rights under the Second Amendment upon the revocation of a Nassau County pistol license as if he were a convicted felon.

The Third Amended Complaint was filed with the consent of the Defendants after partial document discovery. (A 103) In addition, a proffer of proof to support the policy was filed at the direction of Magistrate Judge A. Kathleen Tomlinson. (See Order dated November 16, 2018, ¶ 8, A 65.1-65.2) A high-ranking police official provided a whistleblower affidavit detailing the official, unconstitutional policy to deter handgun ownership and reduce the overall number of pistol licenses within Nassau County. (CA 1-8) As a result of this proffer, the Defendants temporarily abandoned their policy to ban all firearm ownership upon the loss of a pistol license. The change in policy was accompanied, allegedly, by six new letters that were being issued to Nassau County licensees. (A 235-243). Part of the proposed settlement would have included the Defendants' issuance of a new letter

[3] Under New York law, and in Nassau County, there is no requirement generally to license longarms, which include rifles and shotguns.

specifically to the Plaintiff, informing him that he could possess longarms immediately upon withdrawing the lawsuit. (A 242-243).

Despite the Defendants' prior insistence that Plaintiff could not own or possess longarms, he in fact did purchase a new longarm, passing all state and federal requirements, as the state did not recognize the County debarring of Plaintiff from all firearms rights. (A132)

A. Framework of Defendants' Policy

The overall purpose of the Defendants' policy as described in the Third Amended Complaint (hereafter "TAC") and as confirmed by the whistleblower affidavit is to reduce the overall amount of pistol licenses issued in Nassau County (A 93-94)(CA 1-8). This is effectuated by several different actions.

First, the Defendants refuse to issue a home premise license, which is mandated under NYPL §400.00(2)(a) and controlling Supreme Court caselaw. (A 93) By eliminating this entire category of licenses, the Defendants only allow licenses for which the applicant carries the burden of demonstrating proper cause.[4]

[4] Even New York City differentiates the individual right to a "shall issue" home premises under *District of Columbia v. Heller*, 554 U.S. 570 (2008) and McDonald v. Chicago, 561 U.S. 742 (2010) compared to a "proper cause" Penal Law § 400.00(2)(f) concealed carry license. (A161-170, where only the NYC applicants for a carry license are required to provide justification under a letter of necessity).

Additionally, there is no possible "downgrade" from a carry license to a home premise license under Penal Law §400.00(2)(a)(downgrade is still discussed as an option according to the revocation letter in the 2016 Pistol License Manual). (A 119[5]). This eliminates the lighter-burdened license. It is noteworthy that County did not make this argument. (SPA 14) The lower court ignored the different burdens of a carry license compared to a home premise in its decision and accepted the 2019 online manual holding, "A review of the Nassau County Police Department's Pistol License Section Handbook ("Handbook") however reveals that a licensee granted the "Target/Hunting" category includes a license for use "'within [a licensee's] home for the purposes of home protection.'" The lower court simply ignores the different legal standards for carry compared to home premises.

Second, the Defendants create a constructive ban of all Second Amendment rights upon the revocation of a pistol license. By banning all firearm ownership and possession upon a revocation, the County creates a "chilling effect" to depress the number of pistol license applicants. A potential applicant is deterred from applying, when upon a revocation, he will lose all Second Amendment rights, but

[5] The Court instead relied upon the 2019 Pistol License Handbook. (SPA14)

if he did not possess a license, the same circumstances may not trigger loss of all Second Amendment rights.

Third, the Defendants override judicial determinations *not* to seize firearms, doing so upon their own accord. Upon serving Family Court Orders of Protection, it is the policy to seize all firearms, even if not directed to do so by a positive check in "Box 12." This deters handgun licensees because the Defendants are only aware (unless the individual making the complaint informs them so) of firearms in a household because of the handgun license.[6]

Fourth, the Defendants fail to undertake a prompt administrative review of pistol license revocations. Instead, the Defendants suspend a license, wait several years, and then finally revoke the license. (A 113)(A 119)(A 135-148) This extends the five-year debarment period to apply for a new license, delaying the total term for almost a decade in some cases.

Fifth, the Defendants have refused to enact a *Krimstock*-style hearing for the return of longarms, despite several court cases mandating such action. This supports the policy because, in the event of revocation, a licensee has no guarantee

[6] Rifles and shotguns are unregistered, so the Defendants are unaware of their presence in a household.

that he will promptly be returned property that he legally owns. This further chills the exercise of the Second Amendment in Nassau County. (A 94)

Sixth, the Defendants disproportionately issue pistol licenses to Nassau County citizens of a minority race or ethnic background. (A 191-219) This further diminishes handgun ownership by denying a large percentage of Nassau County's residents' access to a pistol license, subject to the more liberal "shall-issue" standard.

Thus, there are ample facts to support the TAC, demonstrating that the Defendants had in place a policy which violated the Second Amendment rights of Nassau County citizens, including the Plaintiff. (A 93-94)

PROCEDURAL HISTORY

On or about December 22, 2016, Plaintiff filed its Notice of Claim. (A 30) On November 9, 2017, Plaintiff filed its Complaint with five (5) Exhibits. (A 11-56) On January 17, 2018, the Proposed Scheduling Order was jointly filed by Plaintiff and Defendants. On January 22, 2018, the County Answered the Complaint. (See Dkt. 16, A 4) The Initial Conference was held on January 23, 2018 under Justice Wexler's rules. Stipulations regarding Confidentially and Preservation of Electronically Stored Material were filed with the court on March 22, 2018 and discovery was commenced. (A 4-5) On June 7, 2018, the discovery

report indicated the County had not yet responded to discovery demands. (A 5) On July 25, 2018 Plaintiff filed its motion to compel the Defendants to produce documents and witnesses for examination. Plaintiff was directed to refile his motion to compel to comply with Local Rule 37.1. (See Dkt. 27, A 5, Order dated July 26, 2018). On October 24, 2018, the County informed the Court it was working to produce document responses. Upon the production of said documents, party names which were previously listed as "John Does 1-3 and Janes Does 1-3", were Amended to the Summons and Complaint on consent**.**

At the conference on November 16, 2018 (A 65.1-65.2) the Court granted in part the Plaintiff's motion to compel and ordered that a proffer of evidence be made by the Plaintiff of the policy to reduce firearms licenses before ordering the County to produce additional records. The Court Ordered:

> 8. The Court pointed out that it is not going to direct the production of massive amounts of records on the basis of an unnamed, unsworn informant whose statements are essentially hearsay. If Plaintiff's counsel believes he is entitled to further production, he will need to provide the court with something more than hearsay from an unnamed source. The Court will permit Plaintiff's counsel to provide an affidavit from the individual he is referencing and will permit counsel to make an application to have the affidavit from the individual he is referencing filed under seal for the present time. However, any such affidavit must be accompanied by a cover letter filed on ECF, explaining why the information presented provides an adequate basis to warrant production of the information Plaintiff seeks. (A 65.1-65.2)

On November 29, 2018, the Affidavit re: Proffer of Evidence by the County by the Nassau County Police Official on behalf of the Plaintiff (the "whistleblower affidavit") was filed with the Court as Ordered. (Dkt 35 and CA 1-8). The details, facts and contents of the County policy to reduce Penal Law §400.00(2)(f) licenses were set forth in detail such that the County was then ordered to produce additional document discovery related to ethnicity. The matter was reassigned to Justice Hurley and the Motion to Dismiss was filed on August 12, 2019. On March 12, 2020, the Court granted the Motion to Dismiss. This appeal followed.

A. The Order on the Motion to Dismiss

The Defendants' motion to dismiss contained many inaccuracies. The Defendants argued for example, "as the case law within this circuit indicates that the right to bear arms is not a not right to hold some particular gun... because there is no constitutional right to possess and retain some particular gun, such as a pistol, plaintiff is unable to show that he has a specific license." (A 271). This was inapplicable to the facts, where Plaintiff was barred by Nassau County to own or possess *any* firearm at all.

In reviewing the Motion to Dismiss, the lower court began by reviewing on its own the "Legal Framework for Firearms Licensing in New York" (SA 10-14).

Rather than basing this analysis upon the County's motion papers and opposition thereto, the lower court relied upon its own experience and review of the 2019 version of the Nassau County Police Department Pistol License Section Handbook (the "Handbook"). This version of the handbook was inapplicable, as it had been updated since the revocation of the Plaintiff's carry license in 2016.[7]

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[7] In *Nicosia v. Amazon*, the Court consider a 12(b)(6) motion distinction where the Court relies upon an extrinsic document mentioned in the Complaint compared to a document which the complaint "relies upon its terms and effect". 834 F.3d 220 at 229 (2nd Cir. 2016).
A "necessary prerequisite" for taking into account materials extraneous to the complaint "is that the 'plaintiff rely on the terms and effect of the document in drafting the complaint; mere notice or possession is not enough.'" *Global Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 156 (2d Cir. 2006). This generally occurs when the material considered is a "contract or other legal document containing obligations upon which the plaintiff's complaint stands or falls, but which for some reason—usually because the document, read in its entirety, would undermine the legitimacy of the plaintiff's claim—was not attached to the complaint." *Id*. at 157.
If the document is not relied upon by the Complaint, or the document is questionable such as both of the documented referenced buy the Court, then the documents may not be considered.
"Even where a document is considered " 'integral' to the complaint, it must be clear on the record that no dispute exists regarding the authenticity or accuracy of the document." *DiFolco*, 622 F.3d at 111 (quoting *Faulkner v. Beer*, 463 F.3d 130, 134 (2d Cir. 2006)). "It must also be clear that there exist no material disputed issues of fact regarding the relevance of the document." Faulkner, 463 F.3d at 134. This principle is driven by a concern that a plaintiff may lack notice that the material will be considered to resolve factual matters. See *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991). Thus, if material is not integral to or otherwise incorporated in the complaint, it may not be considered unless the motion to dismiss is converted to a motion for summary judgment and all parties

The lower court made a vital error in reviewing the 2019 Handbook. The lower court determined that a carry license with a "Target/Hunting" restriction was the equivalent of a home premise license, because the restricted carry license allowed carry of a firearm "within [a licensees'] home for the purposes of home protection." (SPA 14) As a default, obviously a license to carry outside the home

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are "given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d). In sum, when it is apparent—on the face of the complaint and documents properly incorporated therein—that claims are subject to arbitration, a district court may dismiss in favor of arbitration without the delay of discovery. See *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764, 774–76 (3d Cir. 2013). If, however, there is a dispute as to the relevance, authenticity, or accuracy of the documents relied upon, the district court may not dismiss the complaint with those materials in mind. Cf. Chambers, 282 F.3d at 154. If the lower court is going to rely on the extrinsic materials, the proper course is to convert the motion to a motion for summary judgment dismissing the case in favor of arbitration, after providing notice to the parties and an opportunity to be heard."

Nicosia 234-235

Here, neither the 2019 Handbook nor the State Police website were "integral to the complaint".

where the lower court had We review de novo the dismissal of a complaint pursuant to Rule 12(b)(6), construing the complaint liberally, accepting all factual allegations as true, and drawing all reasonable inferences in the plaintiff's favor. *Chen v. Major League Baseball Props., Inc.*, 798 F.3d 72, 76 (2d Cir. 2015). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

allows a licensee to carry within his own home. The carry license is necessary only to possess a handgun *outside* the home. This is set forth clearly in NYPL §400.00(2).

The lower Court simply errors in its application of *Kachalsky* to a case where all Second Amendment Rights are lost and does no analysis of Penal Law §400.00(11) under the heightened level of security required by *Kachalsky*. (SPA 16-19)

The lower court settled to apply intermediate scrutiny to the entire policy, despite the burdens it placed upon the core of the Second Amendment protections. The lower court stated that:

> Plaintiff cites repeatedly to *Kachalsky*, including for the inexplicable proposition that this Court should apply some level of scrutiny "higher than heightened scrutiny." (Pl.s' Mem. in Opp. at 11.) In *Kachalsky*, the Second Circuit applied intermediate scrutiny and affirmed New York's "proper cause" requirement for the issuance of a concealed carry license, even though the requirement "places substantial limits on the ability of law-abiding citizens to possess firearms for self-defense in public." 701 F.3d at 93, 96 (SA-16)

The lower court continued to obscure the fundamental allegations of the TAC. In no way does the TAC allege that the total ban of firearm ownership applied to *all* Nassau County residents. (SPA 16-17) Rather, it only applies to those Nassau

County residents who own longarms ***and*** receive a pistol license revocation. (¶¶77, 86, 96, (A 77-78, 80, 81-82) The lower court obfuscated this when it wrote that:

> While Plaintiff asserts that his "Complaint alleges the total ban on all [firearm] ownership," (Pl.'s Mem. in Opp. at 14), a review of Plaintiff's complaint indicates that the substance of his grievance is that Nassau County revoked his license following the Order of Protection against him, which has resulted in a total ban on firearm ownership for him. Therefore, Plaintiff is not actually alleging in his complaint that Nassau County has implemented a policy banning all firearm ownership for all people. Thus, the restrictions Plaintiff complains of do not come close to the core of the Second Amendment right and are not as severe a burden on the right as Plaintiff makes them out to be…. (SA 16-17).

Still, the lower court has no basis to claim that the core protections of the Second Amendment are not violated, when the Defendants refuse to issue a license to possess a handgun in the home.

Regarding the issue of the breadth of police officer discretion in revoking license and the enumerated provisions of NYPL §400.00(11)(a), the lower court rejected the plain meaning argument of the "any time language," holding instead that "at any time" should be read broadly to mean "for any reason." The Court held:

> I do not read the statute that narrowly. The plain language of the statute, and New York's longstanding interpretation of §400.00(11), provides that a pistol license can be revoked for reasons other than the situations listed in subsection (11)(a) that the plaintiff highlights." 2019 WL 4752303, * 7 n.17. …"

The Court holds:

> Nassau County's interpretation of NYPL § 400.00(11), as in, that it can seize firearms, including longarms, at any time, is substantially related to the important government interest of preventing domestic violence.

The "broad discretion" of the Home Rule has a prevalent exception, where such local rule is preempted by State statute. In *Chwick v. Mulvey*, Nassau County adopted a rule banning pink-colored and other "deceptively colored" firearms. This rule was overturned on the basis of the preemption doctrine: "Broadly speaking, State preemption occurs in one of two ways—first, when a local government adopts a law that directly conflicts with a State statute and second, when a local government legislates in a field for which the State Legislature has assumed full regulatory responsibility." *Chwick,* 81 A.D.3d 161, 167, 915 N.Y.S.2d 578 (2d Dep't 2010).

The lower court's conclusion ignores all of the factual allegations of the TAC, including the Defendants' willingness to settle the case, offering return of the Plaintiff's longarms, ignoring the intent and clear meaning of the Penal Law, and ignoring contrary, persuasive and controlling caselaw. As such, Plaintiff's Second Amendment claim, his *Monell* claim, and claim under §1983, should be reinstated.

PRIOR CASELAW

A. Creation of the *Panzella* Doctrine Requiring a Prompt Post-Deprivation Hearing

On March 20, 2007, two Nassau County police officers from the Pistol License Division entered the home of Gabriel Razzano. The previous day, there was an incident at the office of Congresswoman Carolyn McCarthy's office, in which Razzano, an active McCarthy supporter and fundraiser, was told to leave the premises as he was no longer one of McCarthy's constituents. Informed otherwise by the Board of Elections, Razzano refused and was escorted out of the building by Police.

Although no arrest was ever made, or charges brought, the officers confiscated all firearms, rifles and shotguns belonging to Razzano over his objection that, "revocation of his pistol license only legally required that he surrender his handguns." *Razzano v. County of Nassau*, 765 F.Supp.2d 176.

Over a month later, on April 24, 2007, Nassau County informed Razzano that his pistol license was revoked. This sparked litigation, which ultimately resulted in a negative outcome for the County. Hon. Arthur D. Spatt held that:

> [T]he right to bear arms is enshrined in the Second Amendment of the United States Constitution, and although this right is by no means unlimited, ownership of guns by individuals legally entitled to those guns is a basic

> right. A prompt due process hearing is likely to limit the unfair curtailment of this right.
>
> *Razzano*, 765 F.Supp.2d at 190.

Judge Spatt went on, outlining the specific process by which Nassau County can seize guns upon revocation of a pistol license without violating the Due Process rights of Nassau County residents. While preferring a pre-derivation hearing when available, Judge Spatt stated that a post-deprivation hearing must include:

> • First, the post-deprivation hearing must be held before a neutral decision-maker.
>
> • Second, consistent with the Second Circuit's rulings in the *McClendon* trio, the right to a prompt post-deprivation hearing only applies to seized longarms that are not (1) the fruit of a crime, (2) an instrument of crime, (3) evidence of a crime, (4) contraband, or (5) barred by court order from being possessed by the person from whom they were confiscated.
>
> • Third, at the hearing, Nassau County shall have the burden of showing that it is likely to succeed in court on a cause of action—presumably forfeiture or a cause of action seeking an order of protection, although the Court does not limit Nassau County to these theories—to maintain possession of the seized longarms.
>
> • Fourth, if the person deprived of longarms prevails at the hearing, the longarms must be returned, barring an order to the contrary from a court to whom that finding is appealed. If, by contrast, Nassau County prevails at the hearing, Nassau County must timely commence a proceeding by which it seeks to maintain possession of the longarms in question.
>
> *Razzano*, 765 F.Supp.2d at 191.

Razzano never challenged the pistol license revocation. His longarms were returned, but his confiscated handguns were later destroyed "accidentally" by Nassau County for which he was awarded the cost of the destroyed property in a separate action. *See Razzano v. County of Nassau*, 2012 WL 1004900 (E.D.N.Y. 2012). *See Razzano v. Nassau County, et al*, Index No. CV-011446-15 (Nassau Co. Dist. Ct., 1st Dist.).

Instead, as a person who had his pistol license revoked by the County, for no reason, Mr. Razzano sued related to the automatic disqualification for ownership of longarms under the Safe Act. 2012 WL 1004900 (E.D.N.Y. 2012). During the course of the *Razzano* Safe Act litigation, whether or not NYPL § 400.00(11)(a) could on its own justify a total revocation of longarms was the focus. Plaintiff argued that given the differences in pistol license standards county by county at the time, one could not have a uniform policy if the debarment was automatic upon revocation. *See Chwick*, generally.

Susan M. Connolly, Esq., the attorney for the State of New York made it clear that Penal Law §400.00(11) did not create a separate independent discretionary standard of revocation for the Nassau County Police Department. She clearly stated on this very issue:

> Your Honor, he [Plaintiff Razzano] is revoked [*i.e.*, barred from owning a handgun], not ineligible [to own an unlicensed shotgun or rifle]. He admits that none of the disqualifying factors in State or federal law apply to him; no mental health conditions, he doesn't have an Order or Protection against him, he hasn't been convicted of a serious offense or felony. If any of those things were true about **Mr. Razzano, he would be ineligible and he wouldn't be able to own any weapon in any case regardless of the SAFE Act because of the federal and State law. But he admitted none of those factors apply to him, therefore, he is not ineligible.**
>
> He would like his interpretation of ineligibility to be accepted by the Court. **Revocation doesn't equal ineligible.** You can be revoked from having a permit to carry a weapon because of your business. Let's say you are a jeweler, you stop being a jeweler, your permit for carrying a weapon gets revoked.
>
> (See Dkt. 45-4, TAC Ex. 4, Transcript of *Razzano v. State of New York* April 14, 2014, p. 6, lines 7-23)(A 77-79)

The County also agreed that Penal Law §400.00(11) did not give rise to a separate, independent grounds for revocation. David A. Tauster, Esq. of the Nassau County Attorney's office stated:

> I have to apologize to the Court, to my adversaries. I misspoke in the County papers. I think I clarified it later. But in any event, the issue is not so much whether an individual is not entitled to possess a license pursuant to the SAFE Act by the local licensing officials, it's whether you are ineligible pursuant to the statutory factors set forth in the penal law and federal law. The idea is not so much that Nassau County can revoke somebody's pistol license and forever prohibit [that individual] from possessing longarms. If one of the mandatory factors occur under the federal law in the first instance, further under State law, the individual would not have been entitled to possess a weapon. **The County is not saying that the statute operates under Nassau County**

> **standards but pursuant to the State standards. It's a misstatement of the law in our papers and I apologize to the Court.**
>
> (A 78)

In fact, NYPL §400.00(11)(a) mirrors the Lautenberg Amendment to the letter, which prohibits possession of a firearm by an individual convicted of a misdemeanor domestic violence, or for the duration that they are under a restraining order. *See* 18 U.S. 922(g)(9). However, the ban due to a restraining order requires that: (1) the subject of the order had an opportunity to be heard at a hearing, (2) the subject and the petitioner were intimate partners, (3) the order restrains from future harassing, stalking, or threatening behavior, and (4) it was determined that the subject was a credible threat to the petitioner. *See Id.* In the absence of any one of these requirements, the Lautenberg Amendment does not apply.

The lower court's decision to grant broad discretion to revoke a license "at any time" would create uneven results, not only in each county, but in the same county, from one officer to another. This does not satisfy due process or controlling legal authority. (See *Chwick* . Rather, as Judge Spatt warned, prompt administrative hearing is required to prevent abuses. *See Razzano*, 765 F.Supp.2d at 191.

Nassau County never implemented the prompt post-deprivation hearing for the return of firearms. This led to *Panzella v. Sposato*, in which this Circuit held that, "We therefore hold, consistent with the district court's decision in the instant case, and the decision in *Razzano*, that persons in Panzella's situation are entitled to a prompt post-deprivation hearing under the four conditions set forth by the district court in this case and in *Razzano*." *Panzella*, 863 F.3d 210, 219 (2d Cir. 2017).

Still, Nassau County has wholly ignored the *Razzano* and *Panzella* doctrine, and the lawsuits have continued. *See Panzella v. Sposato*, 863 F.3d 210 (2d Cir. 2017), *Dudek v. Nassau County* 991 F.Supp.2d 402 (E.D.N.Y. 2013), *Schojan v. Nassau County*, 2:16-cv-4790, *Heredia v. Nassau County* 2:16-cv-04, *Hartenstein v. Nassau County*, 2:16-cv-06139, *Stahura v. Nassau County*, 2:17-cv-04677, all as described on the TAC. (A 83-86)

B. Defining the Scope of the Second Amendment and Right to Carry

During the *Razzano* litigation, the Supreme Court issued the *Heller* and *McDonald* decisions, changing the landscape of Second Amendment litigation. Ultimately, the Supreme Court held that the Second Amendment, at the very least, protected the core right to use a firearm in the home for purposes of self-defense, as well as the "individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 554, 592 U.S. 570, 128 S.Ct. 2783

(2008). Furthermore, in regard to the right, the Supreme Court held that the core right of the Second Amendment was *not* subject to an interest-balancing test. The Supreme Court stated that:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an "interest-balancing" approach to the prohibition of a peaceful neo-Nazi march through Skokie. See *National Socialist Party of America v. Skokie*, 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977) *(per curiam)*. The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrongheaded views. The Second Amendment is no different. Like the First, it is the very *product* of an interest balancing by the people—which Justice Breyer would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.
>
> *Heller*, 554 U.S. at 634-35.

McDonald later incorporated the right to keep and bear arms into the state legislatures via the Fourteenth Amendment. *See McDonald v. City of Chicago*, 561 U.S. 742, 130 S.Ct. 3020 (2010).

In New York, this Circuit took up the issue of what protections should be afforded to Second Amendment rights that fall outside of the "core" protection in *Kachalsky v. County of Westchester*. Regarding NYPL §400.00(2)(f) mandate of burdening an applicant for a carry license with demonstrating proper cause,[8] the Second Circuit found that, "we believe that applying less than strict scrutiny when the regulation does not burden the "core" protection of self-defense in the home makes eminent sense in this context and is in line with the approach taken by our sister circuits." *Kachalsky*, 701 F.3d 81, 93 (2012).

Justice Kavanaugh has recently weighed in on the issue, setting forth his belief that some federal courts are misapplying the principles set forth in *Heller*. He wrote that:

> And I share Justice Alito's concern that some federal and state courts may not be properly applying *Heller* and *McDonald*. The Court should address that issue soon, perhaps in one of the several Second Amendment cases with petitions for certiorari now pending before the Court. *NYSRP v. City of New York*, 2020 WL 1978708, (L. Kavanaugh, concurring).

The current status of *Heller* remains murky in respect to the scope of the Second Amendment protections outside the home. Inside the home however, there

[8] *See Klenosky v. New York City Police Dept.*, 428 N.Y.S.2d 256, 75 A.D.2d 293 (1st Dep't 1980).

is no uncertainty, "where the need for defense of self, family, and property is most acute." *Heller,* 554 U.S. at 628.

C. Dealing with the Language of NYPL §400.00(11)(a)

Since *Kachalsky,* the District Courts have since struggled with the issue raised by the language of NYPL §400.00(11)(a), which deals with the power to revoke an issued pistol license.

In *Weinstein v. Krumpter,* the Plaintiff challenged the constitutionality of granting broad discretionary authority to police officers to revoke pistol licenses *outside* of the enumerated reasons for revocation listed in NYPL §400.00(11)(a). The Eastern District applied intermediate scrutiny, and ultimately upheld the constitutionality of granting authority to police officers to revoke licenses, despite no textual authority for such discretion. The *Weinstein* court held that, "[t]he challenged law substantially relates to the pertinent government objective of limiting the possession of handguns to law abiding, responsible individuals and there is a reasonable fit between the objective and the law." *Weinstein,* 386 F.Supp.3d 220, 232 (E.D.N.Y. 2019).

In *Juzumas v. Nassau County*, the Eastern District revisited the issue. Under similar facts, the *Juzumas* Court reaffirmed that, "the statute grants police officers

extremely broad discretion to issue or revoke a firearm license." *Juzumas,* 417 F.Supp.3d 178, 187 (E.D.N.Y. 2019), citing *Weinstein*, 386 F. Supp. 3d at 231.

However, the Eastern District also clarified their previous position. While the licensing officers had broad discretion, they were still limited to the enumerated reasons for revocation under NYPL §400.00(11)(a). The *Juzumas* Court held that, "[t]he plaintiff lost his pistol license and was instructed to get rid of his longarms because he 'became ineligible to obtain a license' for enumerated reasons under New York Penal Law §§ 400.00(1) and 400.00(11) – not merely for 'any reason.'" *Juzumas*, 417 F.Supp.3d at 187.

Now, the Second Circuit is tasked with deciding the case before it. Under *Juzumas*, it would appear that Plaintiff Lambert Henry's pistol license was improperly revoked. Under *Weinstein*, the older case, there appears to be no limit to the discretion of the police officers in revoking a pistol license.

STANDARD OF REVIEW

This Court applies a *de novo* standard of review to a District Court's grant of a motion to dismiss in favor of the County Defendants. *Ruston v. Town Board for the Town of Skaneateles*, 610 F.3d 55, 58 (2d Cir. 2010).

> '[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for

> relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.' ... 'While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.'" *Ruston* at 58-59 (citing *Ashcroft v. Iqbal,* 556 U.S. 662, 679 (2009), and *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 565-66 (2007)). On a motion to dismiss, "the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. *Todd v. Exxon Corp.,* 275 F.3d 191,198 (2d Cir.2001).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft,* 556 U.S. at 678. While the plausibility test "asks for more than a sheer possibility that a defendant has acted unlawfully," *Id. at 679,* it "does not impose a probability requirement." *Twombly,* 550 U.S. at 556. A court should not dismiss a complaint for failure to state a claim if the factual allegations sufficiently "raise a right to relief above the speculative level." *Twombly* at 555.

ARGUMENT

POINT I

THE PLEADING WAS WELL-PLED UNDER FEDERAL RULES

A. The Lower Court Did Not Afford the Plaintiff Every Favorable Assumption

Rule 8 of the Federal Rules of Civil Procedure requires, *inter alia*, that a pleading seeking relief "must contain ... a short and plain statement of the claim

showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint that "contain[s] sufficient factual matter, accepted as true," will survive a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) ("*Iqbal*") (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) ("*Twombly*")). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937.

> [O]nly a complaint that states a plausible claim for relief survives a motion to dismiss. [*Twombly*, 550 U.S.] at 556 [127 S.Ct. 1955]. Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. ... But where the well-pleaded facts do not permit the court to infer more than *the mere possibility of misconduct*, the complaint has alleged--but it has not "show[n]"--"that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).
>
> *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937 (emphasis added).

Any "pleading [that] contain[s] something more ... [than] a statement of facts that merely creates a suspicion [of] a legally cognizable right of action," is facially plausible and will survive a motion to dismiss. *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955 (internal quotation marks omitted).

In considering a motion to dismiss for failure to state a claim, a court must limit itself to the facts stated in the complaint, documents attached to the complaint as exhibits and documents incorporated by reference in the complaint. *See Kramer v. Time Warner Inc*., 937 F.2d 767, 773 (2d Cir.1991).

The lower court erred in failing to assume the truthfulness of the allegations in the TAC. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Instead, the lower Court actively sought out to contradict the TAC, where the Defendants themselves did not even oppose the allegations. This occurs several times throughout the lower Court decision.

The Court argued (while the Defendant did not), that the Plaintiff's allegations were merely "misstatements." The Court stated, "In order to address Plaintiff's arguments, many of which are predicated on misstatements of the legal framework surrounding gun ownership in New York state and Nassau County, the Court finds it useful to provide a brief overview of NYPL §400.00." Order, page 10-11.

The alleged "misstatement" is the Plaintiff's allegation that Nassau County does not issue a "shall issue" home premises licenses pursuant to NYPL §400.00(2)(a). **This allegation is entirely true and is not argued by the County.** (A 154) Rather than accept the allegation of the TAC as true, as it must, the lower

Court, on its own accord, went onto Nassau County's website, and interpreted the language of the 2019 version of the Pistol License Section Handbook. The Court reasoned that:

> First, Plaintiff argues that Nassau County does not allow a license for possession of a firearm in the home pursuant to §400.00(2)(a)… A review of the Nassau County Police Department's Pistol License Section Handbook ("Handbook"), however, reveals that a license granted under the "Target/Hunting" category includes a license for use "within [a licensee's] home for the purpose of home protection."… Thus, Plaintiff's allegation that the County "[ignore[s] Penal Law §[]400.00(2)(a) entirely" is factually inaccurate and his claim of a Second Amendment violation on that basis is dismissed.
>
> (SPA 14)

The lower Court was mistaken in its improper conclusion that a Target/Hunting license, which is a form of restricted "carry" license pursuant to NYPL §400.00(2)(f), issued upon a proper cause standard being shown by the applicant is the same as a home premise license, where the burden is on the police to find a reason not to issue the license. The Target/Hunting license allows the licensee to carry the firearm on their person and outside of the home, while the premise license does not.[9]

[9] Outside of Nassau County, the Target/Hunting restriction ceases to exist, unless the jurisdiction also acknowledges such a restriction, transforming the license to a full, unrestricted carry license.

Justice Alito, joined by Justices Gorsuch and Thomas, have succinctly set forth the basic structure of New York's pistol license regime. Justice Alito recently states that:

> New York State law contemplates two primary forms of handgun license—a premises license, which allows the licensee to keep the registered handgun at a home or business, and a carry license, which permits the licensee to carry a concealed handgun outside the home. N.Y. Penal Law Ann. §§ 400.00(2)(a), (b), (f).

See NYSRPA v. City of New York, 2020 WL 1978708 (J. Alito, dissenting). As made clear, the premise license in the home is distinct and apart from the carry license. The range of the carry license is much greater, allowing a licensee to carry a firearm outside of a specified location. However, this is coupled with the burden to prove the need for the carry license under rules set forth by the licensing officer.

It was highly improper for the lower court to take it upon itself to disprove the allegations of the TAC which were not relied upon, using documents not in existence at the time of the occurrence, in areas of the law the Defendants themselves chose not to address, and to ignore the plain language of the licensing scheme found within NYPL §400.00.

B. Dismissal was Improper at this Stage of Litigation

This action was dismissed on a pre-answer motion to the TAC, even after an Answer had already been filed and a proffer of evidence was made to satisfy the Magistrate of the legitimacy of the complaint for purposes of discovery. Still, the action was dismissed without any reference to the "whistleblower affidavit" in the decision. This is improper, given that adequate facts were pled in the TAC and confirmed. Moreover, the lower court relied upon two other decisions, *Juzumas* and *Weinstein* as legal authority for the dismissal. Both of those cases, however, were decided on a motion for summary judgment, after discovery had taken place. Here, however, there was limited discovery which was supporting the allegations in the TAC.

That discovery included the production of a sealed "whistleblower affidavit" and the County's partial production of records regarding the disposition of pistol licenses. These supported the allegation that the Defendants' had a secret policy to reduce the overall number of pistol licenses issued in Nassau County, and were having an effect in the minority communities. Not only did there exist a policy to deter pistol licenses, but the Defendants used the license to gain favor with friends, fast-tracking certain applications while delaying others up until nine months in

some instances. This is precisely why the grant of "broad discretion" to the licensing officers is inconsistent with NYPL §400.00.

Rather than allow the discovery to continue, however, the lower court took it upon itself to dismiss the action before an Answer to the TAC was served.

POINT II

THE COUNTY'S POLICY VIOLATES THE SECOND AMENDMENT

A. The Policy Violates Strict Scrutiny or any Similarly Rigorous Test

The Supreme Court has held that, "the right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered liberty." *McDonald,* 561 U.S. at 778. This Court has reiterated the fundamental nature of the right to keep and bear arms, classifying "that right as fundamental to our scheme of ordered liberty." *U.S. v. Decastro*, 682 F.3d. 160, 166 (2d. Cir. 2012).

Further, it has been well-established that, "[w]here the right infringed is fundamental, strict scrutiny is applied to the challenged governmental regulation." *Leebaert v. Harrington,* 332 F.3d 134, 140 (2d Cir. 2003); *see also Washington v. Glucksberg,* 521 U.S. 702, 719-20 (1997). This has been embraced by this Court in the recent decision of *Kachalsky v. County of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012). This applies to the "core" protections of the Second Amendment, which as of now, includes self-protection within the home. *See id.*

The lower court failed to apply strict scrutiny to those aspects of the policy that infringe upon the core protections of the Second Amendment, deciding that, "Given the similarity of the alleged restrictions at issue here to the one in *Kachalsky*, the Court will apply intermediate scrutiny." This is a false dichotomy. The Court in *Kachalsky* set forth the single issue as such: "Does New York's handgun licensing scheme violate the Second Amendment by requiring an applicant to demonstrate "proper cause" to obtain a license to carry a concealed handgun in public?" *Kachalsky*, at 83. This is outside the "core" protection of self-defense in the home.

Two of the restrictions here are demonstrably different from the "restriction" at issue in *Kachalsky*. First, Nassau County refuses to issue a "home premise" license. Even New York City issues the home premises license under the proper cause standard, where no justification is required. (A164). "There are two primary types of handgun licenses in New York: a 'carry' license, which allows an individual to carry a concealed handgun in public, and a 'premises' license, which allows an individual to have a pistol or revolver in her home." *Toussaint v. City of New York*, 2018 WL 4288637, *4 (E.D.N.Y. Sept. 7, 2018) (internal citations omitted). Under NYPL §400.00(2)(a), the "premises" license is issued under the "shall issue" standard. This standard places the burden upon the licensing officer to

demonstrate why an applicant should not receive the license. Upon failure to demonstrate reason for a denial, the license "shall" be issued. This is different from the "proper cause" standard, which governs the issuance of a "carry" license under NYPL §400.00(2)(f) and places the burden upon the applicant to demonstrate "proper cause" for the issuance of the license. It is the latter type of license that was at issue in *Kachalsky*.

Second, Nassau County restricts all firearm and longarm ownership upon the revocation of a pistol license.

This infringes upon the licensee's ability to defend himself in his own home entirely, but also has consequences for self-defense outside the home as well.

Additionally, the other policy actions of the County, including a five-year debarment period for reapplying, have a cumulative effect upon lawful self-defense within the home. The cumulative effect is demonstrated as follows. A Nassau County homeowner wishes to exercise her Second Amendment right to defend herself in her own home. She chooses to purchase a handgun, one of the "entire class of 'arms' that is overwhelmingly chosen by American society for [the] lawful purpose" of self-defense. *Heller* 554 U.S. at 628, 128 S.Ct. 2783. She cannot receive a home premise license, because Nassau County does not issue one, and

therefore she must apply for a fully carry license under the "proper cause" standard.[10] She must prove herself worthy and demonstrate proper cause. She must disclose her application to others and obtain at least four references who must also be willing to submit forms to the police. If she fails to meet her burden, then she cannot reapply for at least five years under Nassau County policy. If she does meet her burden, she will receive a license to carry which may or may not have a Target/Hunting restriction locally but be a full carry license upstate. However, if she fails to meet all the requirements of the Nassau County Pistol License Handbook, such as updating the County with her address, then she will have her license revoked and will be barred from all firearm and longarm ownership, until she reapplies in five years where she may or may not be successful.

Nassau County's policy, specifically refusal to issue a home premise license and the prohibition on all firearm and longarm ownership, must be subject to strict scrutiny under *Heller* and *Kachalsky*. The policy generally, creates a cumulative effect which is also subject to strict scrutiny, based upon the reversed burden to

[10] The "proper cause" standard is a rigorous challenge to meet, which few applicants actually overcome. *See Klenosky v. New York City Police Dept.,* 75 A.D.2d. 793, 428 N.Y.S.2d 256 (1st Dep't 1980) (Where the applicant "did not sufficiently demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.")

obtain a pistol license in Nassau Count such as four-character references, each of whom must submit a signed form of reference. (A 150). The burden is on the County to find a reason why the applicant is not qualified for a home premises license under the "shall issue" standard. Such burdens effectively ignore the "shall issue" standard, home premise mandate, and place restrictions upon Nassau County residents to defend themselves within their homes.

B. The Policy Cannot Meet Intermediate Scrutiny, Properly Applied

Plaintiff Lambert Henry, a retired law enforcement officer and veteran does seek the return of his carry license, which was improperly revoked pursuant to Nassau County's policy. This Court has reiterated its belief that "applying less than strict scrutiny when the regulation does not burden the 'core' protection of self-defense in the home makes eminent sense…." *Kachalsky* 701 F.3d at 93. As far as the policy concerns the Second Amendment's existence outside of its core protections, intermediate scrutiny must be properly applied.

In properly applying the intermediate scrutiny test upon a restriction, "the key question is whether the statute at issue is substantially related to the achievement of an important governmental interest." *NYSRP v. City*, 883 F.3d 45, 62 (2d Cir. 2018) (quoting *NYSRP v. Cuomo*, 804 F.3d at 261) (alterations adopted). The *NYSRP* court set forth the County's interest as follows: "New York

State has a legitimate interest in ensuring public safety, preventing crime, and confirming that only law-abiding, responsible individuals possess handguns to defend their person and property." citing *Weinstein*, 386 F. Supp. 3d at 231.

However, the lower court cannot simply introduce a government interest, when the municipal party has failed to meet its own burden. The County was willing to return Plaintiff his right to possess longarms in return for dropping the case, ignoring the temporal violation of his rights upon withdrawing the case. Rather, Nassau County must demonstrate a substantial evidentiary showing of the governmental interest: it must provide "meaningful evidence, not mere assertions ... to show a substantial relationship between" the regulation and the purported government interest. *Heller II*, 670 F.3d at 1259. Rather, "[w]hen the Government defends a regulation... as a means to... prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994). The lower court made no such analysis.

Furthermore, there must be a "tight fit" between the important governmental interest, and the regulations imposed by the County in attempting to accomplish that interest. This "fit" is demonstrably loose, given that the State legislature built in safeguards to NYPL §400.00 to "ensur[e] public safety, prevent[] crime, and

confirm[] that only law-abiding, responsible individuals possess handguns to defend their person and property." Specifically, the State legislature enacted NYPL §400.00(11) to accomplish the stated governmental interest.

NYPL §400.00(11) reads as follows:

> 11. License: revocation and suspension. (a) The conviction of a licensee anywhere of a felony or serious offense or a licensee at any time becoming ineligible to obtain a license under this section shall operate as a revocation of the license. A license may be revoked or suspended as provided for in section 530.14 of the criminal procedure law or section eight hundred forty-two-a of the family court act. Except for a license issued pursuant to section 400.01 of this article, a license may be revoked and cancelled at any time in the city of New York, and in the counties of Nassau and Suffolk, by the licensing officer, and elsewhere than in the city of New York by any judge or justice of a court of record; a license issued pursuant to section 400.01 of this article may be revoked and cancelled at any time by the licensing officer or any judge or justice of a court of record. The official revoking a license shall give written notice thereof without unnecessary delay to the executive department, division of state police, Albany, and shall also notify immediately the duly constituted police authorities of the locality.

There are enumerated, specific events which may trigger a revocation or suspension of a license. The first of these is a criminal conviction of a "felony or serious offense." Alternatively, a license may be revoked according to §530.14 of

the Criminal Procedure law, or §842-a of the Family Court Act. This is consistent with the Lautenberg Amendment.

C. The Defendants Have Not Proven the Existence of a Valid Governmental Interest

Under either heightened or intermediate level of scrutiny, the municipal defendants must prove that the policy is related to a government interest.

The Appellees have offered the following as the interest:

> [I]t is the duty of the Nassau County Police Department to preserve the public peace, prevent crime, protect the rights of persons and property, and guard the public health…. [w]hen a police officer determines that a threat to the public safety exists out of the possession of firearms, he is authorized to remove those firearms, including both handguns and longarms (rifles and shotguns)." A 292-294.

The lower court accepted this argument, stating that, "New York State had a legitimate interest in ensuring public safety, preventing crime, and confirming that only law-abiding, responsible individuals possess handguns to defend their person and property." SPA 17, quoting *Weinstein*, 386 F.Supp.3d at 231. The Court concluded that the policy "is substantially related to the important government interest of preventing domestic violence." SPA 19.

This conclusion is flawed. The lower Court ignored other language in the *Weinstein* decision that lessened the value of the important government interest. Specifically, the *Weinstein* held that the governmental interest in public safety (*i.e.*, preventing domestic violence) is greatly diminished where the licensee can still possess other types of firearms. The *Weinstein* court said:

> As the Court previously explained in *Razzano*, a person's ability to purchase additional longarms to replace the weapons seized substantially limits the Defendants' public safety interest in retaining confiscated longarms."
>
> *Weinstein v. Krumpter*, 386 F.Supp.3d 220. 237 (E.D.N.Y. 2019).

Now, it is clear that the *Weinstein* holding is limited to the possession of longarms. However, that same logic can be extended to any firearm in the home (not carried abroad). Under NYPL §400.00(2)(a), an applicant can apply for a home premises license, to keep a handgun within his or her home. This handgun *cannot* be carried on the licensee's person outside the home. Likewise, without a license, a New York citizen can possess a longarm (rifle or shotgun) within the home but cannot carry it outside on his or her person.

In essence, there is no substantial difference between the right to a handgun or rifle or shotgun in the home, at least in respect to the purported government

interest. As a factual matter, none of the identified firearms can be loaded with more than ten rounds in New York State. Handguns are typically less powerful than rifles and shotguns and thus safer for defense. The handguns main benefit, its concealability, is reduced when there is no requirement that it be carried concealed in the home. *See* NYPL §400.00(2)(f). Still, it remains that a handgun is the most selected firearm by American citizens to keep in the home. *See Heller,* 554 U.S. at 628-29 ("[a handgun is] the most preferred firearm in the nation to 'keep' and use for protection of one's home and family.")

As stated above, the government has a greatly diminished interest in preventing domestic violence where the individual in question can still lawfully possess a longarm as in this case. This also applies to handguns, where permitted to be kept in one's home. The Defendants can offer no reason for why the Plaintiff can go out and purchase a rifle or shotgun (which he has) and keep that in his home lawfully but cannot purchase a handgun to keep in the home. The Defendants cannot argue that allowing the possession of longarms does not impact public safety, while prohibiting the possession of handguns does.

Accordingly, the stated interest of public safety and preventing domestic violence is greatly reduced where a longarm can lawfully be purchased under New York State regulations and is not further increased simply because the applicant

chooses to defend himself and home with a handgun. As stated above, the government has a greatly diminished interest in preventing domestic violence where the individual in question can still lawfully possess a longarm.

D. NYPL §400.00(11)(a) is Properly Tailored to the Governmental Interest, As Written

In addition to setting forth a government interest, the Defendants' must set forth that the interest properly tailored to the government interest. Under strict scrutiny, the regulation must be "narrowly tailored" to the government interest. Under intermediate scrutiny, the regulation must be "substantially related" or have a "reasonable fit" to the "important governmental interest." *NYSRP v. City*, 883 F.3d at 62; *Weinstein v. Krumpter*, 386 F.Supp.3d 220, 231 (E.D.N.Y. 2019).

Regardless of which level of scrutiny is applied (and different levels should be applied to different regulations that make up the County's policy), the regulation is not properly fitted to the diminished interest of public safety. Specifically, any additional grounds that are not enumerated in NYPL §400.00(11)(a) are not related to the government policy. Moreover, the policy in this case, to reduce the number of carry licenses, is not a valid interest.

The lower Court found that the policy, which includes interpreting the language "at any time" as meaning "for any reason" within NYPL §400.00(11)(a),

is "substantially related to the important government interest of preventing domestic violence. Order, page 19. The lower Court cites to a footnote in *Juzumas v. County of Nassau* in support. It reads:

> The plaintiff maintains that the "this section" language of Section 400.00(11)(a) refers only to the reasons spelled out in Section 400.00(11)(a)—specifically, conviction of a felony or serious offense, issuance of an order of protection, or notice under New York mental hygiene law. I do not read the statute that narrowly. The plain language of the statute, and New York's longstanding interpretation of Section 400.00(11), provides that a pistol license can be revoked for reasons other than the situations listed in subsection (11)(a) that the plaintiff highlights. *See, e.g., Nash v. Nassau Cty.*, 150 A.D.3dd 1120, 52 N.Y.S.3d 670 (2d Dep't. 2017)
>
> *Juzumas*, 417 F.Supp.3d 178, n.17.

Upon closer inspection, it is clear that there is no support for a loose interpretation of NYPL §400.00(11)(a) in either the plain language of the statute, or any longstanding legal interpretation.

The statute clearly sets forth the instances under which a pistol license can be revoked: a conviction of a felony or serious offense, an order of protection under the criminal court act or family court act, or under the mental hygiene law.

The caselaw cited to in *Juzumas* does not set forth any additional reason for revocation. In *Nash,* the petitioner sought reinstatement of his pistol license in an Article 78 proceeding. The background of the action is as follows:

> The petitioner's pistol permit was suspended and subsequently revoked after a domestic incident involving the petitioner and his wife. After petitioner was acquitted of criminal charges arising from the incident, he sought reinstatement of his permit and the return of his firearms.
>
> *Nash*, 150 A.D.3d at 1121.

First off, the *Nash* decision was purely limited to a finding of whether the revocation was "supported by a rational basis in the record," as it was an Article 78 proceeding. *Id*. Secondly, being that there was a domestic incident which lead to criminal charges being brought, this revocation fits squarely within the circumstances enumerated in NYPL §400.00(11)(a). In other words, *Nash* does stand for the proposition that revocation can occur for instances other than those enumerated. The Police did not utilize any special "at any time" authority to reach their result and did not overturn a Family Court determination.

Likewise, the revocation in *Juzumas* also fits squarely within the enumerated framework of NYPL §400.00(11)(a). In *Juzumas*, the plaintiff was "arrested for conspiracy to import controlled substances," and later plead guilty to a misdemeanor. *Juzumas*, 417 F.Supp.3d at 183. His pistol license was later revoked for "[a]rrest history, [c]onviction under 18 U.S.C. § 371, and [l]ack of good moral character." *Id.* This fits squarely within the "conviction of a felony or serious offense" circumstance proscribed by NYPL §400.00(11)(a).

In this case, the facts fall inside of the NYPL §400.00(11)(a) framework, do not support revocation. There was no conviction of the Plaintiff, or a criminal order of protection. There was an order of protection pursuant to the Family Court Act. However, the issuing judge specifically found that there was no imminent possibility of violence, and therefore declined to check off "Box 12" on the order of protection. Instead, the sheriff's department substituted their own determination, and revoked the license. This is inapposite to the particular circumstances enumerated.

This *identical* mischaracterization of the Order form was made by Mr. Reissman in *Panzella v. County of Nassau*, 2015 WL 5607750, Aug. 8, 2015. Hon. Joan M. Azrack held that:

> The Family Court did not expressly order plaintiff to surrender (or defendants to confiscate) her longarms pursuant to §842-a or pursuant to federal law, Notably, the Family Court's orders did not include the explicit surrender provision found in the Temporary Order of Protection Form or otherwise invoke §842-a. The federal warning language found in the Order was a mere admonition, warning plaintiff that it would be a violation of federal law for her to possess firearms or longarms while the Order remained in effect. For these reasons, the Order did not direct plaintiff to surrender her longarms—let alone bar their return once the Extension Order expired. Given that the Family Court did not order plaintiff to surrender her longarms pursuant to §842-a, the legislative glitch" in §842-a is not relevant here.
>
> *Panzella v. County of Nassau*, 2015 WL 5607750, at *7.

Family Court Act §842-a is *one* of the four enumerated instances of revocation. Where the Family Court does not expressly order the surrender of the firearms, the County has no authority to confiscate.

The references to the enumerated circumstances in the NYPL §400.00(11)(a) framework is important, because those circumstances are reasonably fitted to prevent domestic violence. If the issuing judge believed that the Plaintiff was a possible threat, NYPL §400.00(11)(a) provides a route for the judge to revoke the license and order the surrender of all firearms, thus accomplishing the purported government interest. A policy to reduce carry licenses as described herein has no relation to the interest. If the interest is expanded, or better served by providing additional routes to revocation, than it is the place of the Legislature to add those new routes, not of the local police departments to enforce their own determinations.

E. A Whistleblower Has Set Forth a Different Government Interest for the Policy

While the Defendants have set forth the governmental interest of public safety, and the lower Court has adopted it, there remains other, unstated reasons for the implementation of the policy clearly provided in a sworn statement. (CA 1-8)

In a sealed affidavit, a former Nassau County Pistol License officer stated that there existed an internal policy to work to reduce the overall number of pistol licenses within Nassau County. Specifically, it read that, "Thomas Krumpter also wished to reduce the number of pistol license holders in Nassau County." (CA 7). Krumpter, as former NCPD commissioner, is also a named defendant in this case. This was referenced in the motion papers below. (A 292).

Rather than refer to the important sealed affidavit, a document ordered to be produced by the Court prior to ordering document production by the County, the lower Court decided to look online at the 2019 County's Pistol License Handbook and infer its own view of the Defendants' governmental interest from 2016 and earlier. While the two theories of the true government interest are conflicting, the pleadings require that ever favorable instance be afforded them, and that they be deemed true for purposes of a motion to dismiss. If it is true that the government interest is to reduce the number of pistol licensees in Nassau County, then that governmental interest is a violation of the Second Amendment and dismissal is improper.

POINT III

THE *MONELL* CLAIM WAS IMPROPERLY DISMISSED

The dismissal of the *Monell* Claim arises solely from the holding that there has been not constitutional violation. (SA 19). The Court is ignoring the facts of the TAC and the specific assertions made by the "whistleblower" without even considering the credibility of the witness.

The *Monell* claim is plead against the individual Defendants as well as the County and confirmed by a proffer of proof. The parties were literally in the middle of producing records on the racial categories of licensees and revocation information when this motion arose. There is clearly far more here than mere allegations.

"A defendant may be personally involved in a constitutional deprivation within the meaning of §1983 if he directly participated in the infraction, or if he is a supervisory official, and he (1) failed to remedy the wrong after learning of the violation through a report or appeal; (2) created or continued a custom or policy under which unconstitutional practices occurred; or (3) was grossly negligent in managing subordinates who caused the unlawful condition or event."

Jones v. Nassau County Sheriff Dept., 285 F. Supp.2d 322, 325 (E.D.N.Y. 2003)(citing *Wright v. Smith,* 21 F.3d 496, 501 (2d Cir. 1994)(internal quotations omitted). Further,

> A supervisor or high official's "personal involvement" in a constitutional violation can take any of the following five forms: (1) direct participation in the alleged violation, (2) failure to remedy the violation after being informed of it, (3) creation or tolerance of a policy or custom under which the violation occurred, (4) gross negligence in supervising subordinates who committed the violation, or (5) failure to act on information indicating that the violation was occurring.
>
> *Davis v. County of Nassau*, 355 F. Supp. 2d 668, 676 (E.D.N.Y. 2005); *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir.1995).

Here, Defendants Krumpter and Ryder meet the supervisor or high official standard. At a minimum, their personal involvement extends to their creation, continuation and toleration of a custom or policy under which unconstitutional practices and constitutional violations occurred.

A municipality can be held liable for its action when there is an official policy or custom that causes the plaintiff to be subjected to a denial of a constitutional right. *See Monell v. Department of Social Services*, 436 U.S. 658 (1978); *see also Zahra v. Town of Southold*, 48 F.3d 674, 685 (2d Cir. 1995). "The policy or custom need not be memorialized in a specific rule or regulation." *Kern v. City of Rochester*, 93 F.3d 38, 44 (2d Cir. 1996)(*citing Sorlucco v. New York City Police Dep't*, 971 F.2d 864, 870 (2d Cir. 1992)).

"Municipal liability may attach under § 1983 when a [municipal] policymaker takes action that violates an individual's constitutional rights." *Gronowski v.*

Spencer, 424 F.3d 285, 296 (2d Cir. 2005); *see also Davis v. Lynbrook Police Dep't*, 224 F. Supp. 2d 463, 478 (E.D.N.Y. 2002) ("A plaintiff can show a municipal custom, policy or practice by establishing that an official who is a final policymaker directly committed or commanded the constitutional violation"). A policymaker is an individual whose "decisions, at the time they are made, for practical or legal reasons constitute the municipality's final decisions." *Anthony v. City of N.Y.*, 339 F.3d 129, 139 (2d Cir. 2003); *see Gronowski*, 424 F.3d at 296 (*quoting Rookard v. Health & Hosps. Corp*, 710 F.2d 41, 45 (2d Cir. 1983))(Where a municipal official "`has final authority over significant matters involving the exercise of discretion, his choices represent government policy.") As the pleadings sufficiently allege a *Monell* claims, and the County only argues the law, discovery should be permitted to continue and the case be reinstated.

POINT IV

THE §1981 CLAIM WAS IMPROPERLY DISMISSED

The lower court's treatment of the §1981 claim is set forth on page SA 21 and states:

"Putting aside Defendants' concern about whether §1981 properly covers pistol licenses, Plaintiff's claim fails because he is unable to show an intent to discriminate. Plaintiff has not alleged that his firearms were removed from his

home or that his license was revoked because of his race. There is no indication in the Revocation Appeal that the decision to remove Plaintiff's firearms or to revoke his license had anything to do with his race, but rather with his volatile domestic situation. The Revocation Appeal explains in detail the "fourteen (14) incidents where law enforcement officers reported to [Plaintiff's] residence to assist with domestic incidents." (TAC Ex. 6 at 3.) Under these circumstances, there is no reason to conclude that either decision had anything to do with Plaintiff's race."

In the TAC ¶ 155 (j) it states:

> 155. The County and the Police Department have an unconstitutional policy (the "Policy") to:
>
> * * *
>
> (j) Disregard the discriminatory effect of the impact of the Policy in the non-white community,
>
> (A 93-94)

Also, the first paragraph of the Complaint states: "This is a civil rights action ……based upon Defendants' policy or practice to deter ownership of all firearms and with the intention and effect of reducing pistol license ownership, most especially in the non-white communities of Nassau County. (A 66-67) It also notes that "Henry is an African American, a 21-year veteran of the New York City Corrections Department, and has extensive training in firearms." and "Nassau County citizens such as Plaintiff are and continue to be provided with fewer rights

than others in other New York counties under Penal Law §400.00, especially in the African American community, Hispanic community and other non-white communities." (A 66-67) TAC ¶ 97 (A 82), and that such conduct is intentional, in TAC ¶177. (A 97) Therefore, the pleadings-based argument of the County must fail.

Thus, the Court is not accepting the well pled facts, or the facts of the "whistleblower complaint".

There three elements of a well-pled §1981 claim: "(1) the plaintiff is a member of a racial minority; (2) an intent to discriminate on the basis of race by the defendant; and (3) the discrimination concerned one or more of the activities enumerated in the statute (i.e., make and enforce contracts, sue and be sued, give evidence, etc.)" (County's MOL, page 11 (A277)).

The first element, that Henry is a member of a racial minority, is clearly pled. In ¶ 94 of the TAC, it states:

> 94. Henry is an African American, a 21-year veteran of the New York City Corrections Department and has extensive training in firearms. Yet under the County's Policy described above, Henry is treated in the same manner as a convicted felon, fugitive from justice, or controlled substance user by being deemed by the County as unfit to possess any firearms in his home county, Nassau County.
>
> (A81)

The pleading of this element is not disputed by the County. The second element, that the County intended to discriminate on the basis of race, is also well-pled in the TAC, despite the County's allegations otherwise.

In the very first paragraph of the TAC, Plaintiff pleads that the County's policy to deter firearm ownership, especially in the Black and Hispanic communities of Nassau County, is intentional.

The lower court's holding that Plaintiff fails to allege that the Defendants intentionally discriminated against him is fundamentally untrue. Further, the lower court ignores the 42 U.S.C. §1981(a) regarding provision regarding licenses which provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, **licenses**, and exactions of every kind, and to no other.

42 U.S.C. §1981(a) (emphasis added).

Further, in *Mahone v. Waddle*, in which the plaintiffs brought a claim alleging that police officers "motivated by racial bias, verbally and physically abused them, falsely arrested them, and gave false testimony against them," the court concluded that "the facts alleged [fell] within the broad language of both the equal benefits and

like punishment clauses of §1981." 562 F.2d 1018 (3d Cir. 1977), *cert denied,* 438 U.S. 904 (1978).

The language of §1981(a) clearly embodies discrimination other than the mere interference with contractual rights. As applied here, it Henry's deprivation of his Second Amendment rights, namely, his pistol license, fits into both the "full and equal benefit" clause, as well as the "license" clause of §1981(a). A *fortiori,* the 42 U.S.C. §1981 Cause of Action was one added to the TAC based upon the records being produced by the County in this case and compared to the racial profile of the County.

The policy requires direct and intentional action, and thus satisfies the purposeful discrimination of *Juarez v. Nw. Mut. Life Ins. Co.*, 69 F. Supp. 3d 364, 367 (S.D.N.Y. 2014), *amended*, 2014 WL 12772237 (S.D.N.Y. Dec. 30, 2014) (quoting *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 291 (1982)). Plaintiff is an African American male, and despite 14 prior domestic incidents, only the new policy caused a minor family court issue to escalate into Federal litigation. The causal link between race and the policy lies in the lack of a lower tier home premises downgrade, and a second example which occurred only a few months later to another retired law enforcement official who is also an African American male.

A. The Lower Court Failed to Provide the 1981 Claim with Every Favorable Instance

Unlike the Second Amendment Claim or the *Monell* Claim, the lower court dismisses the §1981 Claim because it found that "there is no reason to conclude that either decision had anything to do with Plaintiff's race." This ignores the other allegations of the Complaint. It was alleged that Nassau County discriminates against its minority populations in the issuance of pistol licenses. Additionally, the application form requires applicants to set forth their race. (*See* A 154, line 8) The Defendants have set forth no other reason for asking race on an application, and thus it can be assumed that such a requirement is included to easily discriminate against minorities.

Regardless, there is no requirement for the lower court to "conclude" anything regarding the validity of the claim. The lower court merely must accept the allegations of true, instead of creating alternate theories for why the Defendants took a certain course of action. *See Ashcroft,* 556 U.S. at 678.

CONCLUSION

The lower court's decision must be vacated. The Second Amendment claim was dismissed improperly. The lower court utterly failed to assume the truthfulness of the allegations, endeavoring instead to disprove the allegations. Not even the

Defendants themselves attacked the facts asserted in the TAC or claim a Target/Hunting license; a type of carry license to be equivalent to a home premises license.

The lower court assumed, rather, that the facts alleged by the Defendants upon motion were true. Specifically, the lower court adopted the purported government interest of "public safety," while a whistleblower affidavit alleged that the true government interest was the reduction of pistol licenses in Nassau County and the County wished to return the longarms. Even then, the lower court failed to make an analysis of the fitment of the purported government interest to the challenged regulations.

Further, the lower court, in attempting to discover the "truth," made crucial factual errors, the foremost being the obfuscation of a carry license standard and a premise license standard. This resulted in the incorrect application of intermediate scrutiny to the Defendant's policy of refusing issuance of premises licenses in Nassau County. *Heller* makes clear that the core protection of the Second Amendment is not subject to any balancing interest test, and *Kachalsky* purports that intermediate scrutiny is only proper for protections other than the core Second Amendment right to keep firearms within the home.

The *Monell* claim was improperly dismissed following the dismissal of the Second Amendment claim upon which it was based. Additionally, the § 1983 claim should have survived the motion to dismiss, where evidence already discovered demonstrates a disproportionate ratio of minority licensees, and the license application requires the applicant to set forth his or her race and obtain four affidavits stating the applicant to be safe to the police. At the very least, dismissal was improper at this stage of litigation, and should have been delayed until summary judgment.

Accordingly, the order of the lower court should be vacated and the Defendants' Motion to Dismiss be denied.

Dated: Garden City, New York
May 12, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,018 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface using Microsoft Word in Times New Roman, 14 point font.

Dated: Garden City, NY
May 12, 2020

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