IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

David D. BACH,

Plaintiff,

v. Civil Action No. 02-CV-1500 (NAM/DRH)

George E. PATAKI, in his official capacity as Governor of New York; Eliot SPITZER, in his official capacity as Attorney General of New York; James W. MCMAHON, in his official capacity as Superintendent, New York State Police; J. Richard BOCKELMANN, in his official capacity as Ulster County Sheriff,

Defendants.

Plaintiff's Response in Opposition to State Defendants' Memorandum of Law in Support of its Cross-Motion to Dismiss the Complaint; and Reply to the State Defendants' Opposition to Plaintiff's Application for a Preliminary and Permanent Injunction, and Declaratory Relief

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Statement of the Case

On November 29, 2002, Bach commenced this action in the United States District Court for the Northern District of New York. The suit challenges certain provisions of New York Penal Law that bar ordinary, law-abiding, nonresident citizens of sister states from obtaining the required license to possess, carry or transport a firearm in or through New York State solely because they live out of State. Bach seeks declaratory and injunctive relief so as to permit him to participate in New York State's firearm licensing system, and to vindicate his constitutionally protected rights under the Second and Fourteenth Amendments, and Article IV of the United States Constitution.

The case was originally set by the Clerk of the Court for a hearing before District Judge Norman A. Mordue in Syracuse on January 8, 2003. The state defendants however, requested an adjournment of the hearing to February 5, 2003, and for additional time to answer or otherwise move in response to the case until January 22, 2003. On December 17, 2002, the Court granted the State's request.

On December 10, 2002, Bach served Plaintiff's Motion to Advance and Consolidate the Trial on the Merits with the Hearing on the Preliminary Injunction, and supporting Brief thereof. On or about December 18, 2002, Bach and defendant Sheriff Bockelmann through his attorney, stipulated in writing that the time for Sheriff Bockelmann to file and serve an answer or other responsive papers would be extended without date.

On January 24, 2003, Bach received a Memorandum of Law in Support of State Defendants' Cross-Motion to Dismiss the Complaint and State Defendants' Cross-Motion to Dismiss the Complaint and in Opposition to Plaintiff's Motions for a Preliminary Injunction and to Consolidate the Trial on the Merits With the Hearing on the Application for a Preliminary Injunction.

On January 29, 2003, the Court granted Bach's 27 January request for an adjournment of the 5 February return date to March 19, 2003, with additional time to respond and reply to the state defendants' cross–motion to dismiss, and response in opposition until March 5, 2003.

Argument and Authorities

The threshold legal issue before the Court is whether the contested provisions of New York law implicate a fundamental constitutional right. If the Court answers this question in the affirmative, then the appropriate standard of constitutional review would be strict scrutiny under the compelling state interest test. If the Court finds otherwise, then a lesser standard of constitutional review likely would apply. For this reason, it must be determined initially whether the Second Amendment guarantees an individual right of the people to keep and bear arms or a collective right of state governments to maintain organized military forces. Once this determination is made, an analysis of the contested provisions under the Fourteenth Amendment and Article IV can proceed while applying the appropriate standard of constitutional review.

In addition, a principal factual argument now being advanced to justify the State's invidious classification of nonresidents is that these citizens fail to meet a kind of "substantial contacts test."[1] But as more fully explained herein, this diversion is without merit.

1. The Second and Fourteenth Amendments to the United States Constitution safeguard the personal rights, privileges and immunities of individual Americans to keep and bear arms against federal and state infringement.

In Point III of the State's legal memorandum, the state defendants seek a dismissal on the grounds that the Second Amendment "does not provide for the individual right to bear arms," and in any event the Amendment "binds only the actions of the federal government."[2] In particular, the state defendants argue that "the Second Amendment grants a collective right of the States to preserve a well–regulated militia."[3] But as indicated below, these arguments dissipate upon closer examination.

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[1] *Def.'s Br. in Support of Mot. Dismiss and Opp'n.* at 4. *See also* pp. 1, 3, 14, 16, 19, 20, 21 and 22.
[2] *See Id.* at 7–12. Although the State appears to take issue only with respect to the right of individuals to "bear" arms, it is assumed that the State also disputes the right of individuals to "keep" arms as well.
[3] *See Id.* at 11 (quoting *Dew v. United States,* No. 97–Civ.6409, 1998 U.S. Dist. Lexis 4176 at 18–19 (S.D.N.Y. 1998). New York's select militia forces operate under the auspices of the New York State Division of Military and Naval Affairs (DMNA). The DMNA is a state agency that serves as the headquarters for New York's militia forces, which are comprised of the Army National Guard, the Air National Guard, the New York Guard and the New York Naval Militia.

A. The Second Amendment protects individual Americans in their rights to privately possess and bear their own firearms regardless of whether they are a member of a select militia or performing active military service or training.

Perhaps the most compelling and straightforward evidence that the Second Amendment secures an individual right rather than a collective right is found in the original textual meaning of the Amendment's terms: "[a] well–regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." When these twenty–seven words are properly considered in the context of the Amendment's original textual meaning and its explicit historical references, there is little doubt that the Second Amendment was meant to accomplish two distinct goals.

First, the Second Amendment guaranteed to ordinary, law–abiding Americans the right to have and carry their private arms for self–preservation and self–defense of their families, homes and private property. This lawful purpose was considered to be an ancestral right of English heritage by a citizenry who recognized with absolute certainty the importance of personal security, personal liberty and private property in their daily lives and concepts of liberty.[4] Thus, the people of whom the Bill of Rights was intended to protect neither delegated to their government such prized individual liberties nor conceived that such a grant of power was necessary to establish the new Republic. Secondly, it assured the continued security and freedom of the newly–formed States by proclaiming the necessity of an armed, well–trained militia *comprised of all male citizens* physically capable of acting in concert, ordinary civilians primarily—soldiers on occasion, who could be called out to exercise or into service bearing arms maintained and supplied by themselves, and who were intimately acquainted with their usage and operational capabilities. This second and related objective assuaged concerns, particularly by Anti–Federalists over a standing army of select military forces, which the States were forbidden to keep without consent of Congress, that would be kept in check by the citizens of whom the Second Amendment expressly refers and ultimately safeguards.

[4] *See* BLACKSTONE, COMMENTARIES, 140–41 (St. Geo. Tucker Ed. 1803).

As previously cited in Plaintiff's Brief in Support of his Application for Preliminary and Permanent Injunction, and Declaratory Relief, the foregoing interpretation is consistent with prior decisions of the United States Supreme Court, the Fifth Circuit Court of Appeals opinion in *United States v. Emerson*,[5] and the overwhelming legal commentary by approved constitutional scholars.[6] Although this substantial authority persuasively demonstrates that the Second Amendment secures an individual right to Americans, the Ninth Circuit's recent opinion in *Silveira v. Lockyer*,[7] relied upon heavily by the state defendants, concludes that the Second Amendment secures no substantive guarantee for individual citizens, but merely a right of States to arm their select militias.[8] The Court should be aware however, that the Ninth Circuit recently criticized *Silveira,* in *Nordyke v. King.*[9]

In *United States v. Emerson*, the court of appeals held that consistent with the Supreme Court's holding in *United States v. Miller*,[10] the Second Amendment:

> *protects the right of individuals*, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms, such as the pistol involved here, that are suitable as personal, individual weapons and are not of the general kind or type excluded by *Miller*.[11]

Thus, while recognizing that the Second Amendment secures an individual right, the court of appeals acknowledged that in certain instances this right may "be made subject to limited, narrowly tailored specific exceptions or restrictions" provided they are "reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this

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[5] 270 F.3d 203 (2001), *cert. denied,* 122 S.Ct. 2362 (2002).
[6] *See Pl's. Br. in Support of his Appl'n for Prelim. and Perm. Injunc., and Decl. Relief*, at 12–16, and Table of Authorities for a comprehensive listing.
[7] 312 F.3d 1052 (9th Cir. 2002).
[8] The state defendants cite *Silveira* in support of their contention that Harvard Law Professor, Lawrence Tribe has retreated from his opinion expressed in the third edition of his treatise that the Second Amendment secures an individual right. *See Def.'s Br.* at 11–12. The NY Times letter referenced in *Silveira* at note 22 is attached as Exhibit 1. An earlier article that appeared in USA Today on August 8, 1999 is attached as Exhibit 2. Neither the letter nor the article indicate any change in Professor Tribe's opinion that the right is an individual rather than a collective right.
[9] *Nordyke v. King,* –F.3d–, 2003 WL 347009 (9th Cir. Feb. 18, 2003) (copy appended hereto) (criticizing *Silveira's* collective rights explication and strongly endorsing the individual rights view held by *Emerson*. The *Nordyke* court recognized however, that it was bound by the Ninth Circuit's ruling in *Hickman v. Block,* 81 F.3d 98 (9th Cir.1996).
[10] 307 U.S. 174 (1939).
[11] *See Emerson,* 270 F.3d at 260 (emphasis added).

country."[12] The court of appeals thus observed that the right is not absolute, but rather is on a par with all the great fundamental civil rights embraced by the Bill of Rights and entitled to no less protection than the Constitution demands.

A different outcome however, was achieved by the Ninth Circuit in *Silveira v. Lockyer.*[13] *Silveira* involved a challenge to a so–called "assault weapons ban" that made it a felony offense to manufacture in California any of the semi-automatic weapons specified in the statute, or to possess, sell, transfer, or import into the State such weapons without a permit. Plaintiff gun owners, filed suit against the Attorney General and Governor challenging the constitutionality of certain amendments to the statute enacted in 1999, which substantially broadened the list of prohibited weapons. The court of appeals held "that the Second Amendment imposes no limitation on California's ability to enact legislation regulating or prohibiting the possession or use of firearms, including dangerous weapons such as assault weapons."[14] Thus under *Silveira*, the State has the unfettered authority to disarm the population at large.

Although there are similarities between the *Emerson* and *Silveira* opinions with regard to the manner in which they meticulously analyzed the Second Amendment's text and history, the conclusions drawn could not have been further apart. This striking difference may be attributed to *Silveira's* narrow construction of the constitutional right involved and selective analysis of the historical record, which naturally led the court of appeals to conclude that the substantive guarantee applies strictly to the State.

For example, the first significant flaw in *Silveira's* textual analysis is found in the court's construction of the term "the people" contained in the operative clause of the Amendment. To accept the textual meaning ascribed by the *Silveira* court, one must substitute the term "the people" with "the State" to support the collective rights theory, or "members of the select militia" to support the

[12] *Id.* at 261.
[13] 312 F.3d 1052 (9th Cir. 2002).
[14] *See Silveira,* 312 F.3d at 1087.

sophisticated collective rights theory. Of course the Second Amendment does not say that "the right of the State" or "the right of members of the select militia" to keep and bear arms shall not be infringed. Rather, the operative clause of the Amendment gives the same meaning to the term "the people" as used throughout the Bill of Rights and Constitution as a whole, which the Supreme Court has plainly suggested means:

> "[T]he people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth, … First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community….[15]

Although acknowledging the Supreme Court's view, the *Silveira* court's construction is not only far removed from the actual wording of the Second Amendment, but also creates substantial tension with Article 1, § 8, Cl. 16 of the Constitution, which grants Congress the power "to provide for … arming … the militia …").[16] Moreover, as used throughout the Constitution, "the people" have "rights" and "powers," but the federal and state governments only have "powers" or "authority"—never "rights."

As correctly observed by the *Emerson* court, "the Constitution's text recognizes not only the difference between the "militia" and "the people" but also between the "militia" which has not been "call[ed] forth" and "the militia, when in actual service."[17] Further, it is plain that the First Congress knew how to distinguish between "the people" and "the States" as evidenced by the Tenth Amendment to the Constitution. The term "the people" thus should be interpreted in accord with its plain meaning informed by the Supreme Court, and in other contemporaneous provisions of the Bill of Rights and

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[15] *United States v. Verdugo-Urquidez,* 494 U.S. 259, 265 (1990) (citations omitted); *see also Planned Parenthood v. Casey,* 505 U.S. 833, 848–49 (1992) (indicating that the right secured by the Second Amendment to "the people" is an individual or personal right in accord with First and Fourth Amendments, not a collective or quasi–collective right).
[16] *See Emerson,* 270 F.3d at 227.
[17] *Id*. at 227–28 (citing U.S. CONST. Art. 1, § 8, Cl. 15).

Constitution as a whole. Such an interpretation would be consistent with the individual rights model, which is in harmony with the Supreme Court's finding in *United States v. Verdugo–Urquidez* and, which does not require any special or unique meaning to be attributed to the term "the people."[18]

Next, to reconcile its collective construction of the term "the people," the *Silveira* court construes the term "militia" as meaning a select military force of the State, which by today's standards is the National Guard.[19] The difficulty with this construction however, is that it conflicts with the central purpose of the Second Amendment—ensuring an armed citizenry, and the contemporaneous historical references plainly establishing that the militia was comprised of virtually all able–bodied male citizens. Thus, as discussed below, the "militia" was not a select group of military forces chosen by state officials, which the States could disarm at will.[20]

In section 1(a) of the opinion, the *Silveira* court takes the Fifth Circuit to task for its interpretation of the term "militia," which *Emerson* properly found was "understood to be composed of the people generally possessed of arms which they knew how to use, rather than to refer to some formal military group separate and distinct from the people at large."[21] Although somehow overlooked by the *Silveira* court, the conclusion drawn by *Emerson* that the militia referred to in the Second Amendment included virtually all able–bodied male citizens is based in part on the Supreme Court's opinion in *Miller:*

> The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia–civilians primarily, soldiers on occasion.
>
> The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. *These show plainly enough that the Militia comprised of all males physically capable of acting in concert for the common defense.* 'A body of citizens enrolled for military discipline.' And further, that

[18] *Id.* at 228.
[19] Concern over the militia's new domestic role also led the States to reexamine their need for a well-equipped and trained militia, and between 1881 and 1892, every state revised the military code to provide for an organized force. Most changed the name of their militias to the National Guard, following New York's example.
[20] *See Emerson,* 270 F.3d at 234–35 (referring to *United States v. Miller,* 307 U.S. at 178–82); *see also Presser v. Illinois,* 116 U.S. 252, 264–66 (1886) ("[T]he states cannot … prohibit the people from keeping and bearing arms….").
[21] *Id.*

> ordinarily when called for service these men were expected to appear *bearing arms supplied by themselves* and of the kind in common use at the time.[22]

The *Miller* Court further observed that "'[i]n all the colonies … the militia systems … implied the general obligation of all adult male inhabitants to possess arms.'"[23] The historical evidence thus indicates that the Second Amendment contemplated a general militia composed of ordinary citizens bearing their own arms, rather than a select military force of regulars chosen by the State.[24]

Despite the foregoing authority, the Ninth Circuit chose to construe the "militia" in terms of its hierarchy while disregarding the relevancy of its composition. But *Silveira's* silence with regard to the composition of the militia is particularly troublesome since correctly defining those who comprised the militia is important in determining for whom the substantive right to keep and bear arms applies. Further, *Silveira's* limiting construction that seemingly is based on a selective analysis of the militia's historical underpinnings, contravenes the plain meaning of the text of the guarantee, its placement within the Bill of Rights, and the wording of other articles in the Constitution.[25] Thus, as carefully explained in *Emerson*, the proper relationship between the Second Amendment's preamble and the substantive guarantee requires an understanding of why the Framers believed that the "right of the people to keep and bear arms" was essential to the existence, continuation and effectiveness of "[a] well–regulated militia."[26]

In addition, the *Silveira* court applies an unduly narrow construction to the terms "keep" and "bear" arms. For example, *Silveira* construes the term "keep" as a unitary phrase subordinate to the

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[22] *See Miller,* 307 U.S. at 178–79 (citing additional historical references in support of its finding that the militia was composed of virtually the entire armed citizenry) (emphasis added) (citations omitted); *see also Presser v. Illinois*, 116 U.S. 252, 265 (1886) (recognizing that "It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the states….").

[23] *Id.* at 818.

[24] *Id. see also* Joyce Lee Malcolm, 10 Hastings Const. L.Q. 285-314 (1983) ("If one applies English rights and practice to the construction of the Second Amendment to the United States Constitution, it is clear that the Amendment's first clause is an amplifying rather than a qualifying clause, and that a general rather than a select militia was intended. In fact, every American colony formed a militia that, like its English model, comprised all able-bodied male citizens. This continued to be the practice when the young republic passed its first uniform militia act under its new constitution in 1792. Such a militia implied a people armed and trained to arms.").

[25] It is noteworthy that this is the position currently being advanced by the state defendants in this case. *See Def.'s Br. in Support of Mot. Dismiss and Opp'n.* at 9–12.

term "bear," that relates solely to the maintenance of arms to be borne in military service. But as observed by *Emerson*, "[t]he plain meaning of the right of the people to keep arms is that it is an individual, rather than a collective right, and is not limited to keeping arms while engaged in active military service or as a member of a select militia such as the National Guard."[27] Thus, to "keep" arms simply means keeping one's own arms for self-defense or militia use. Further, as noted by the *Silveira* court in its criticism of an approved legal commentator, "the well-established canon of interpretation [ ] requires a court, wherever possible, to give force to each word in every statutory (or constitutional) provision."[28] Finally, in construing the term "bear arms," *Silveira* contracts its meaning to a singular military purpose while failing to give credence to its broader meaning and contemporaneous usage in other contexts.[29]

Silveira's oblique construction of the Second Amendment's text and selective analysis of the historical record thus led the court to conclude that the Amendment protects only the right of states to arm their militias. But the problem with such a conclusion is that the operative clause of the Second Amendment refers to "the right of the people to keep and bear arms," not "the right of the States to arm their militias," which was expressly rejected by the Senate in its deliberations. Further, the Supreme Court has defined "the people" of the Second Amendment as being the same as those referred to in the First and Fourth Amendments, and of whom the militia is comprised. The preamble thus cannot be read to eliminate the substantive right of "the people to keep and bear arms…." Finally, the collective rights' theory expressed in *Silveira* fails to recognize the significance of historical facts raised by *Emerson* such as the Militia Act of 1792,[30] which further defined who are the militia. The individual

[26] *See Emerson,* 270 F.3d at 234–60 (providing a meticulous account of the historical context in which the Second Amendment was enacted and ratified by the States).
[27] *Id.* at 232 (citing *Amyette v. State of Tennessee,* 21 Tenn. (2 Humph.) 154 (1840).
[28] *See Silveira*, 312 F.3d, n.24 at 1069 (criticizing Professor Eugene Volokh, *The Commonplace Second Amendment,* 73 N.Y.U. L. REV. 793 (1998) (citations omitted).
[29] *See Emerson,* 270 F.3d at 229–32 (providing a comprehensive analysis of the textual meaning of "bear arms"); *see also Muscarello v. United States,* 524 U.S. 125, 143 (1998) (cited in *Emerson* recognizing the broader meaning of *bear arms*).
[30] *See Emerson,* 270 F.3d at 236, n.33 (quoting the Militia Act of 1792, 1 Stat. 271 (1792)); *see also Ex. 1, Pl.'s Br. in Support of his Application* at 5 (citing the current Militia Law of 1956, 10 U.S.C. § 311).

rights view thus "is most consistent with the Second Amendment's language, structure, and purposes, as well as colonial experience and pre-adoption history."[31]

Plaintiff respectfully submits that the Fifth Circuit's opinion in *Emerson* provides the correct interpretation of the Second Amendment's original textual meaning and historical underpinnings, and asks that the Court adopt *Emerson's* legal reasoning, and textual and historical analysis in construing the substantive rights safeguarded by the Second Amendment.

B. The fundamental rights of individuals to privately possess and bear their own firearms are among the privileges and immunities of United States citizens protected by § 1 of the Fourteenth Amendment against state or local action.

Assuming that individual citizens have a right to keep and bear arms, the Court then must decide whether the requirements of the Second Amendment are incorporated into the Due Process, or Privileges or Immunities Clauses of the Fourteenth Amendment. In addition, because the State's class discrimination against nonresidents implicates the fundamental rights of these citizens to keep and bear arms, and travel interstate, the Court may choose to further analyze the State's classification under the Equal Protection Clause of the Fourteenth Amendment. Because the Second Amendment safeguards a fundamental right of individual Americans, plaintiff respectfully submits that it would be inconceivable not to provide this right constitutional protection similar to that afforded to other fundamental rights against state and local action, particularly given the prominent role this right has played in our Nation's history, traditions and concepts of liberty.

(1) The fundamental rights of Americans to privately possess and bear their own firearms are protected by the Due Process Clause of the Fourteenth Amendment against state or local action.

The state defendants urge the Court to dismiss the complaint in Point III of their legal memorandum because "the Second Amendment has never been specifically incorporated through the

[31] *See Nordyke, supra,* 2003 WL 347009 at 8.

Fourteenth Amendment to restrict the power of the states."[32] In support of their argument, the state defendants principally rely on *United States v. Cruikshank* and *Presser v. Illinois*.[33]

As previously explained in plaintiff's brief in support of his Application, *Cruikshank* and *Presser* were decided before the existence of the doctrine of due process incorporation. And although the Supreme Court has never formally overruled either case, the rationale upon which these opinions are based has been superceded by twentieth century precedent holding that certain portions of the Bill of Rights, including the right to assembly at issue in *Cruikshank*, are binding on the States. Thus, although at least one appellate court has held that *Presser* forecloses any consideration of the Second Amendment's applicability to the States,[34] such wooden reliance ignores nearly 120 years of Fourteenth Amendment jurisprudence and is inconsistent with the fundamental principles laid down by the Supreme Court in subsequent civil rights cases. The courts in *Silveira* and *Emerson* both appear to agree on this point:

> Following the now-rejected *Barron v. Baltimore,* 32 U.S. (7 Pet.) 243, 8 L.Ed. 672 (1833) (holding that the Bill of Rights did not apply to the states), *Cruikshank* and *Presser* found that the Second Amendment restricted the activities of the federal government, but not those of the states. One point about which we are in agreement with the Fifth Circuit is that *Cruikshank* and *Presser* rest on a principle that is now thoroughly discredited.[35]

Notwithstanding the limited applicability of *Cruikshank* and *Presser*, it is significant that when referring to "all citizens capable of bearing arms" as the "reserve militia," the *Presser* Court observed that "the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for

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[32] *Def.'s Br. in Support of Mot. Dismiss and Opp'n.* at 9.
[33] 92 U.S. 542, 553 (1876); 116 U.S. 252, 265 (1886), respectively. The state defendants also cite *Malloy v. Hogan,* 378 U.S. 1, 5 (1964) "for the proposition that the guarantees of the Second Amendment [do] not bind the states." But the reference to *Presser* is included in a list of Supreme Court cases a number of which were subsequently overruled. The Court thus is simply noting that the Second Amendment is among one of the rights not yet incorporated into the Fourteenth Amendment but leaves open the possibility. *Id.* at 5..
[34] *Quilici v. Village of Morton Grove*, 695 F.2d 261 (1982).
[35] *Silveira*, 312 F.3d at 1067 (citing *Emerson,* 270 F.3d at 221 n.13); *compare Nordyke,*2003 WL 347009 at 7 (Gould, J., concurring opinion) (advocating that the court should revisit the whether the Second Amendment is incorporated into the Due Process Clause of the Fourteenth Amendment.).

maintaining the public security ...."[36] *Presser* thus recognized that "the vitality of the Second Amendment's protection for national defense and for preservation of freedom depends on the premise that the States cannot disarm the citizenry."[37]

Given the significant changes in our society and laws respecting civil rights over the past 120 years, and the more expanded views of incorporation that have become embedded in our jurisprudence, the Court may reasonably conclude that the preincorporation rationale relied on by *Cruikshank* and its confined progeny, is no longer controlling for purposes of deciding whether a fundamental right is incorporated into the Due Process Clause of the Fourteenth Amendment.

Further support for incorporating the guarantees of the Second Amendment is found in the Second Circuit's opinion, *Engblom v. Carey*.[38] *Engblom* involved a statewide strike of correction officers who were evicted from their facility-residences without their consent during the strike to make room for members of the National Guard. The officers claimed *inter alia,* a deprivation of their rights under the Third Amendment. In reversing and remanding the summary dismissal of the district court, the court of appeals held that the Third Amendment secures a fundamental right to individuals that is made applicable to the States through the Fourteenth Amendment.[39]

The *Engblom* case is significant for two reasons. First, it is the only judicial explication of the substantive rights safeguarded by the Third Amendment to the Constitution. Second, the court of appeals unanimously upheld the district court's finding that the Third Amendment is incorporated into the Fourteenth Amendment "since it is one of the 'fundamental' rights 'rooted in the tradition and conscience of our people' and thus 'implicit in the concept of ordered liberty.'"[40] In holding that the constitutional protections afforded by the Third Amendment are applicable to the States, the Second

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[36] *Id.*
[37] *See Nordyke,*2003 WL 347009 at 13 (citing *Presser,* 116 U.S. at 264–66); *see also, Pl.'s Br. in Supp. of his Appl'n* at 19–22 (for a more complete discussion of the *Presser* opinion).
[38] *Engblom v. Carey,* 677 F.2d 957 (1982), *on remand,* 572 F. Supp. 44 (S.D.N.Y.), *aff'd. per curiam,* 724 F.2d 28 (2d Cir. 1983). The state defendants apparently reviewed only the lower court opinion.
[39] *Id.* at 964.
[40] *Id.* at 961 (citing *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) *[and] Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

Circuit Court of Appeals cleared a path in this Circuit for the requirements of the Second Amendment to be incorporated into the Due Process Clause of the Fourteenth Amendment provided they are fundamental and implicit in the concept of ordered liberty. The fundamental right of individual American citizens to privately possess and carry their own firearms thus plainly meets the criteria further recognized in *Engblom* for incorporation into the Due Process Clause of the Fourteenth Amendment.

Finally, although somewhat redundant, the state defendants seek dismissal of the substantive due process claim in Point VI of their legal memorandum. While the state defendants' recitation of the law would appear to be accurate, it is noted that the State's justification for its actions has no relevance to the legal question of whether the rights of American citizens to privately possess and bear their own firearms is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment. As observed by the Supreme Court, "all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States."[41] Thus, the State's rationale for refusing to recognize a fundamental liberty interest is relevant only to determining whether the State's interests are sufficiently compelling and narrowly tailored—not whether the right itself is protected by the Clause.[42]

Unlike various unenumerated rights that have been incorporated into the Fourteenth Amendment, the rights of individual Americans to keep and bear arms finds explicit textual reference in the Second Amendment to the Constitution. As discussed *supra*, this right is so deeply rooted in our Nation's history and tradition, and the conscience of our people as to be ranked as fundamental, and thus implicit in the concept of ordered liberty.[43] The "right of the people to keep and bear arms" is perhaps the most fundamental of all individual rights since without this right it is doubtful that our Nation, and

[41] *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 847 (1992) (citation omitted).
[42] *Washington v. Glucksberg,* 521 U.S. 702, 766 (1997) (providing a compendium of substantive due process cases).
[43] *See Poe v. Ullman,* 367 U.S. 497, 541 (1961) ("This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; *the right to keep and bear arms*; the freedom from unreasonable searches and seizures; and so on.") (emphasis added).

the individual rights and freedoms we value in other portions of the Constitution would have survived.

In this case, New York's licensing restrictions are a substantial arbitrary imposition and purposeless restraint on the fundamental rights of ordinary, law–abiding nonresident citizens. They deliberately exclude ordinary nonresidents as a class from participating in New York State's licensing system solely because they live out of State. Significantly, the State's licensing scheme does not seek to regulate the conduct of nonresidents or otherwise impose a reasonable burden on their ability to qualify for a license such as requiring higher fees or additional information during the application process. Rather, it serves as a complete bar prohibiting ordinary citizens of sister States from obtaining the required license to lawfully possess and carry their own firearms so that they may have a rational and effective means to repel violent criminal predators while traveling within or through the State. Because the State has established that a firearms license is a prerequisite for possessing and carrying a firearm, the State cannot then erect a barrier that deprives an entire class of law–abiding citizens of this fundamental liberty interest absent a compelling state interest of equal or greater weight that is narrowly tailored to achieve that interest. None of the reasons proffered by the State rise to this level nor has the State attempted to argue this point.

(2) The fundamental rights to keep and bear arms, and travel interstate are privileges and immunities guaranteed to all American citizens by virtue of their national citizenship.

Another avenue for incorporation of the Second Amendment is through the Privileges or Immunities Clause of the Fourteenth Amendment. As more fully explained in plaintiff's brief in support of the pending Application, the Supreme Court's recent landmark opinion in *Saenz v. Roe*[44] reawakened the previously dormant Privileges or Immunities Clause of the Fourteenth Amendment. The Supreme Court applied the Clause in a right–to–travel context to hold that travelers deciding to become permanent residents of a different State enjoy the right to be treated like other citizens of that State. Although *Saenz* is premised on what has been described as the third component of the right to

[44] 526 U.S. 489 (1999).

travel—the right of interstate migration, the Court's recognition of that right as a privilege and immunity of national citizenship within the meaning of the Fourteenth Amendment is significant.

Before *Saenz*, courts and legal commentators had interpreted the *Slaughter–House Cases* as rendering the Clause essentially nugatory.[45] But now that the Supreme Court has revitalized the Clause, its applicability to other fundamental rights, such as the right of United States citizens to privately possess and bear their own personal firearm while traveling interstate—is no longer foreclosed.[46] Thus, a State law that permanently requires United Citizens to surrender their fundamental rights to life, liberty and private property in order to enter or to pass through the State runs contrary to the Clause's proscriptions.

In addition, specifically included among the privileges and immunities protected by the Fourteenth Amendment was the fundamental right of United States citizens to keep and bear arms. Significantly, the *same two–thirds* of Congress who adopted the Fourteenth Amendment also voted to enact the Freedmen's Bureau Act, which protected the "full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and … estate …, *including the constitutional right to bear arms*…."[47] Given the explicit intention of the Framers to include the right of individual Americans to keep and bear their own arms as a privilege and immunity of national citizenship upon which no State could infringe, a constitutional basis exists to apply this right within the framework of the Privileges or Immunities Clause of the Fourteenth Amendment.

(3) Because the State cannot demonstrate a compelling state interest that is narrowly tailored, its invidious classification violates the Equal Protection Clause of the Fourteenth Amendment.

In Point V of the State's legal memorandum, the state defendants urge the Court to dismiss the equal protection claim because the contested provisions of New York law pass the rational basis test and therefore are not constitutionally infirm. Citing *United States v. Toner* as primary authority, the

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[45] 83 U.S. 36 (1872); *see also,* Robert H. Bork, *The Tempting of America* 180 (1990).
[46] *See Pl's. Br. in Support of his Appl'n for Prelim. and Perm. Injunc., and Decl. Relief*, at 17–18.
[47] Freedman's Bureau Act of July 16, 1866, 14 Stat. 173, 176–77 (1866) (emphasis added); *see also,* Stephen P. Halbrook, *Personal Security, Personal Liberty, and "The Constitutional Right to Bear Arms": Visions of the Framers of the Fourteenth Amendment,* 5 Seton Hall Const. L.J. 341–434 (1995).

state defendants allege that because the questioned provisions do not implicate a fundamental right, they need only demonstrate a legitimate state interest to succeed on their motion.[48] Because the State does not allege however, that its discrimination is justified by a compelling state interest that is narrowly tailored, the State's motion to dismiss the equal protection claim appears to hinge on the Court's acceptance of their argument that no fundamental right is implicated.

The Court however, need not decide whether any of the alleged reasons proffered by the State meet this deferential standard because the contested provisions of New York law implicate three very important constitutional rights—keeping and bearing arms, and interstate travel. Under the purported regulatory scheme, travel by nonresidents in New York is permitted, but only at a price; the right to travel is indirectly penalized, while the rights of nonresidents to keep and to bear arms are absolutely denied.[49] Where a classification is found to implicate the right to travel, it will be upheld only if it is found to "be necessary to promote a compelling governmental interest."[50] Therefore, the appropriate standard of constitutional review of the State's classification is strict scrutiny under the compelling state interest test—a standard the State cannot meet in this case.

Alternatively, even if the rational basis test were the appropriate standard of review—which it is not, the State's discriminatory classification, which targets ordinary, law–abiding nonresident citizens appears to lack a rational basis is not reasonable in light of its stated purpose. Significantly, the State's classification does not seek to regulate the conduct of nonresidents or otherwise impose a reasonable burden on their ability to qualify for a firearms license such as requiring higher fees or additional background information during the application process. Such measures conceivably could serve a legitimate governmental purpose. Rather, as previously indicated, the classification serves as a complete bar prohibiting ordinary citizens of sister States from obtaining the required license to lawfully possess and carry their own firearms so that they may have a rational and effective means to

[48] *Def.'s Br. in Support of Mot. Dismiss and Opp'n.* at 19.
[49] *See Pl's. Br. in Support of his Appl'n for Prelim. and Perm. Injunc., and Decl. Relief*, at 18–19 (discussing *Dunn v. Blumstein*, 405 U.S. 330 (1972) *[and] Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

repel violent criminal predators while traveling in or through the State. This substantial privilege and benefit is reserved only for residents and those special nonresidents who are either merchants or bank messengers of financial institutions. It is not afforded to the plaintiff or other ordinary nonresident citizens who temporarily reside or travel within the State. Thus, there is no set of circumstances under which the offending provisions can be applied without violating a constitutional guarantee.

2. The State's discrimination does not bear a close relation to the achievement of substantial State objectives because these nonresidents as a class are not the peculiar source of the evil the State seeks to remedy.

In Point IV, the state defendants seek a dismissal of the Article IV claim in the Fifth Cause of Action alleging that New York's restrictions on permit applications foster a legitimate state interest and do not unduly burden the right to travel. Further, the State urges the Court to consider the validity of its "substantial contacts test."

The Privileges and Immunities Clause was designed "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned."[51] Thus, "a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the 'Privileges and Immunities of Citizens in the several States' that he visits" by virtue of his State citizenship.[52]

With this purpose in mind, the Supreme Court has held that it is "[o]nly with respect to those privileges and immunities bearing on the vitality of the Nation as a single entity that a State must accord residents and nonresidents equal treatment."[53] Thus, the Supreme Court has permitted a State to discriminate against nonresidents only where the presence or activity of nonresidents is the peculiar source of the evil or cause of the problem that the State seeks to remedy, and the discrimination bears a

[50] *See Shapiro,* 394 U.S. at 634 (emphasis in original).
[51] *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988) (citing *Paul v. Virginia*, 8 Wall. 168, 180 (1869)).
[52] *See Saenz, supra* at 501.
[53] *New Hampshire v. Piper*, 470 U.S. 274, 279 (1985) (quoting *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 383 (1978).

close relation to the achievement of substantial state objectives.[54] In deciding whether the degree of discrimination bears a sufficiently close relation to the reasons proffered by the State, the Court has considered whether, within the full panoply of legislative choices otherwise available to the State, there exist alternative means of furthering the State's purpose without implicating constitutional concerns.[55]

In this case, New York's discrimination against nonresidents bears no reasonable relationship to the State's substantial interest in reducing violent crime and protecting the health, safety and welfare of all classes of citizens within its borders. Significantly, ordinary, law–abiding citizens of other States are neither less capable than New York residents of safely and responsibly handling firearms nor more prone to committing violent criminal acts—nor do they pose a danger to the community or otherwise constitute the peculiar source of the evil at which the restrictions are aimed.

Apparently realizing this, the State advances a new theory that it claims substantially justifies the State's discrimination by requiring applicants to have significant New York contacts before a license shall issue. According to the state defendants, New York Penal Law § 400.00(3)(a) was designed to ensure that only those individuals with a substantial connection to New York would be eligible to receive a firearms license. The state defendants appear to infer from this language that the purpose of the provisions relating to where a person is principally employed or has his principal place of business as a merchant or storekeeper is to establish a substantial contacts test for applicants. Based on this reading, the state defendants contend that principal employment in the State is all that is required to establish a sufficient connection to the State to confer eligibility for a license by nonresidents since the statute's purpose is to encourage "those who wish to *work* or operate a business in New York to apply for a permit they may believe is necessary to protect their economic interest in the state."[56] The state defendants cite various statutes from other States in support of their substantial contacts argument,

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[54] *See Hicklin v. Orbeck,* 437 U.S. 518 (1978); c*ompare, Baldwin,* 436 U.S. 371 (holding that access by nonresidents to recreational big-game hunting in Montana does not fall within the category of rights protected by the Privileges and Immunities Clause).
[55] *See Friedman, supra* at 67 (citing *Piper, supra* at 284).
[56] *See Def.'s Br. in Support of Mot. Dismiss and Opp'n.* at 14 (emphasis added).

including Connecticut, which unlike New York, appears to require only that an applicant have a "bona fide residence or place of business within the jurisdiction."[57]

While the state defendants are free to offer whatever reasons they deem legitimate, it is noted that its purported substantial contacts test does not appear to have been recognized by any court that has construed this provision. Rather, New York courts have consistently construed § 400.00 as requiring primary residency in the State as a prerequisite for issuance of a firearms license apart from any substantial contacts based on economic interests.[58] More important, the State's rationale directly conflicts with § 400.00(2)(c), which limits this special employment provision to "messenger[s] employed by a banking institution or express company; …."[59] This specific type of license applies only to a fraction of the population who fit this narrow designation.

Finally, if having substantial contacts were the main purpose behind the State's discrimination, then scores of nonresidents who have a substantial connection to New York, but who are currently barred from receiving a license, would be eligible. This would apply for example to nonresident homeowners who reside and work in the State for extended periods each year, who are active members of their churches, and other state and local civic organizations, and who pay a considerable amount in state and local taxes. But unlike Connecticut's statute, New York's statute makes no such provision for nonresident homeowners despite the quantity of contacts they have with the State. Thus, the Court need not waste time considering whether this confusing argument runs counter to the purpose of the Privileges and Immunities Clause.

Turning to the State's arguments concerning concealed carry laws in other states, they are largely irrelevant to the central issue before the Court—whether New York's discriminatory classification violates the constitutionally protected rights of nonresident citizens to keep and bear arms, and travel

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[57] *See Def.'s Br. in Support of Mot. Dismiss and Opp'n.* at 15.
[58] *See Mahoney v. Lewis*, 605 N.Y.S.2d 168 N.Y.A.D. 3 Dept.,1993 (construing the residency requirement as synonymous with domicile); *People v. Perez*, 1971, 67 Misc.2d 911, 913, 325 N.Y.S.2d 183, 186 (stating that a license "can only be issued to a New York State resident").
[59] *See* Exhibit 3, Op.Atty.Gen. (Inf.) 94–6 (listing the categories of licenses that can be issued under § 400.00).

interstate. Because whether plaintiff has a right to carry a *concealed* firearm is not at issue, an examination of concealed carry laws of other States is of dubious value.[60] Relevant however, is that: (1) New York is the only State in the Union that prohibits ordinary, law–abiding nonresidents (those who meet none of the narrowly prescribed exemptions in § 265.20, and are neither merchants nor bank messengers) from transporting a firearm in or through the State; and (2) most States provide a means for residents and nonresidents to possess and carry a handgun including, but not limited to issuing a permit if required or simply giving recognition to concealed carry permits of other States.[61] Thus, if anything, a review of state laws from other jurisdictions serves to further highlight the severity of the discrimination being practiced on nonresidents who travel to New York.

As for the state defendants' remaining allegations, to the extent that any of the purposes claimed by the State are legitimate, they do not bear a close relationship to the distinction drawn between residents and nonresidents as a class, and thus do not achieve a substantial state interest. For example, the State's argument that the Legislature was justified in acting to stem the unrestricted flow of dangerous weapons into and through the State is not achieved by denying nonresidents an opportunity to participate in New York State's licensing system. Rather, licensing provides an additional degree of control over weapons that are carried into the State since only those who have met State requirements may legally do so. Because handguns can have legitimate uses such as self–defense, target shooting and hunting, the State's interest is not in banning these weapons, but rather to reasonably ensure that those who are issued a license will not be a hazard to others.

Drawing a distinction between law–abiding nonresidents and residents that completely bars a class of citizens from participating in the State's licensing system because they live out of State is not closely related to the State's interest in regulating who may possess and carry a firearm for lawful purposes. As previously discussed, nonresidents as a class are law–abiding and clearly not the peculiar

[60] States in close proximity to New York that provide for issuance of *concealed* carry permits to nonresidents are Maryland, New Jersey, Rhode Island, Pennsylvania, Connecticut, Vermont, New Hampshire, Massachusetts and Maine.

source of the evil the State seeks to remedy—keeping firearms out of the hands of criminals, mental incompetents and minors. Because criminals by definition disobey the law whether they are residents or nonresidents, there is no rational relationship between the discrimination being practiced on nonresidents and the State achieving its substantial objective of keeping guns out of the hands of criminals, mental incompetents and minors. Thus, if regulating the flow of handguns into the State is a compelling interest as alleged, then it does not follow that restricting an entire class of law–abiding citizens simply based on residency is closely related to the achievement of that interest.

Similarly, the State's interests regarding the strain it would place on investigatory resources, lack of uniformity in the licensing system and undue risk of forum shopping are not closely related to the distinction drawn between residents and nonresidents, nor are they sufficiently substantial. Although such interests can be framed as legitimate, it does not follow that discriminating against nonresidents is necessary to achieve these interests, particularly given the current technology in use by the State and cooperation between state and federal law enforcement agencies throughout the country. For example, the National Instant Check System can provide local law enforcement an expeditious means of checking and verifying the criminal background records of applicants. In addition, the burden can be placed on nonresident applicants to submit additional information that can be verified through disclosure forms similar to what is used by States for investigating the backgrounds of bar applicants. The State also may charge nonresidents a higher fee to defray any additional costs that might be incurred as is done in other States. The State also may require nonresidents to regularly verify their information, renew their licenses, or notify New York officials of any disqualifying information. In short, the State has an interest in tailoring the application process to meet investigatory needs without causing undue strain on investigatory resources or impinging on any constitutional rights.

An equally effective tool available to local authorities is the New York State Pistol Permit Bureau.

[61] For example Delaware allows residents and nonresidents to possess and carry a handgun in the open without a license subject to certain restrictions that apply to residents and nonresidents alike. No permit is required to possess a handgun in Minnesota.

The Bureau maintains all records of transaction and pistol permits in a master database. Documents are filed by county and type of transaction to establish an efficient means of tracking each handgun lawfully possessed in the State. Thus, current ownership and the legality of a person's possession of a weapon can be quickly determined. Further, Bureau personnel can provide police investigators from agencies across the country with information pertaining to handguns that may have been involved in the commission of a crime. Such a cooperative system provides an effective means of ensuring uniformity in the State's licensing system and in minimizing the risk of fraud or abuse in the permitting process. Further, it reduces the likelihood of forum shopping since the Bureau maintains a record of all permits, amendments, cancellations and revocations issued. So thus, even if any of these purposes, when framed so as to be legitimate, could be considered "compelling," the distinction drawn by the statute, which is not closely related to the purpose of ensuring that those who are issued a permit will not be a hazard to others, can hardly be deemed necessary to its achievement.

3. The State's remaining allegations in Points I, II, VII and VIII are without merit and should be denied.

A. Plaintiff has standing to maintain his "as applied" challenge because submission of an application for a firearms license would have been futile.

In Point I of their legal memorandum, the state defendants seek a dismissal of the complaint on the grounds that plaintiff lacks standing to maintain an "as applied" challenge. The State contends that plaintiff's failure to submit an application for a firearms license absent proof that submission would have been futile precludes him from having standing to maintain his as applied challenge.

The Second Circuit in *Prayze FM v. Federal Communications Comm'n,* found that as a general rule, "to establish standing to challenge an allegedly unconstitutional policy, a plaintiff must submit to the challenged policy."[62] The court of appeals further stated that "[t]his threshold requirement for standing may be excused only where a plaintiff makes a substantial showing that application for the

[62] 214 F.3d 245, 251 (2d Cir.2000) (quoting *Jackson–Bey v. Hanslmaier,* 115 F.2d 1091, 1096 (2d Cir.1997).

benefit . . . would have been futile."[63] *Prayze,* which is controlling, thus recognizes that the requirement of standing may be excused where a substantial showing is made that application for the benefit would have been futile.

In this case, there is substantial evidence that submission of an application for a firearms license would have been futile. First, it unquestionably would have been rejected in accordance with current law as consistently applied by state courts.[64] Second, Bach mailed written inquiries to the appropriate state and county officials seeking to confirm his understanding that submission of an application for a firearms license would be a futile act.[65] By letter of November 27, 2001, Peter A. Drago, from the Office of the Attorney General referred Bach to the New York State Police in Albany as the "appropriate authority to contact with [his] request."[66] By letter of December 5, 2001, Sergeant James Sherman of the New York State Police, Pistol Permit Bureau confirmed that "no exemption exists which would enable you to possess a handgun in New York."[67] A similar letter was received by Bach from Ulster County Undersheriff George A. Wood.[68] The evidence thus shows that there is no question that submission of an application would have been futile. New York law, on its face and as applied, leaves no doubt that ordinary nonresidents like Bach are ineligible to obtain a firearms license. And that is the State's position in this litigation.

B. The Attorney General and Superintendent of the New York State Police are proper parties.

In Point II of their legal memorandum, the state defendants move to dismiss the action as against the Attorney General Spitzer and Superintendent of the New York State Police McMahon because they have no role in the licensing process or enforcement of the contested statutes.

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[63] *Id.*
[64] *See Mahoney v. Lewis*, 605 N.Y.S.2d 168 N.Y.A.D. 3 Dept.,1993 (finding that domicile is a prerequisite for issuance of a firearms license); *People v. Perez*, 1971, 67 Misc.2d 911, 913, 325 N.Y.S.2d 183, 186 (stating that a license "can only be issued to a New York State resident").
[65] *See Pl.'s Application* at ¶¶ 42–46.
[66] *See Id.* at ¶ 43.
[67] *See Id.* at ¶ 44.
[68] *See Id.* at ¶ 45.

In *Ass'n of American Medical Colleges v. Carey,*[69] the District Court for the Northern District of New York held that the Attorney General was a proper party in an action seeking preliminary injunctive relief challenging the constitutionality of disclosure provisions of the New York Standardized Testing Act. Referring to *Ex Parte Young*,[70] the district court found that the duties of the Attorney General, which are set forth in Executive Law § 63, established a sufficient connection to the enforcement of the Education Law at issue. For example, paragraph (1) requires the Attorney General to "[p]rosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state…." In addition, paragraph (12) specifies that the Attorney General may apply on behalf of the State for an order enjoining any continuing illegal or fraudulent activity.

Attorney General Spitzer's duties establish a sufficient connection to the enforcement of the contested provisions and other gun control laws affecting the constitutional rights of citizens. As the Chief Legal Officer, he has an active role in instituting, authorizing, tolerating, ratifying, permitting, and acquiescing in policies, practices, usage and customs of denying required firearms licenses to otherwise competent nonresidents because of their residency status. His jurisdiction is statewide and he routinely issues opinions that although do not carry force of law, they are adhered to very closely by state and local officials. In addition to enforcing the statute, the Attorney General has been instrumental in drafting gun control legislation. Further, the law does not require that the Attorney General be personally involved in the action before the Court—only that he have a sufficient connection. By virtue of his duties and responsibilities as regards his involvement in policies and practices, and enforcement of the contested firearms laws, he is a proper party to this action.

With respect to Superintendent McMahon, he is the head of the only law enforcement agency in the State with statewide jurisdiction. Under the Superintendent's leadership, the State Police are responsible for enforcing the contested provisions throughout the State and have routinely done so.

[69] 482 F.Supp. 1358, 1363–64 (1980).

Additionally, the Superintendent is responsible for allocating resources within the department to enforce the State's firearms' laws. McMahon is further responsible for the State's Pistol Permit Bureau, which is sufficiently connected to the licensing process and enforcement of the firearms laws throughout the State to meet the requirements of *Ex Parte Young* and *Carey* above. Finally, McMahon is statutorily required to approve the contents and form of the license application. His involvement thus is considerably more than simply ministerial as alleged by the state defendants.

C. Plaintiff has met the legal standard required for issuance of a preliminary injunction.

In Point VII of their memorandum of law, the state defendants' move to dismiss the claim for preliminary injunctive relief alleging that plaintiff cannot establish a clear likelihood of success on the merits. Plaintiff however, has met the required burden under *Jackson Dairy Inc. v. H.P. Hood & Sons*[71] and its progeny. The State's allegation, which subsumes most, if not all of the issues before the Court should be denied.[72]

Conclusion

The motion to dismiss supported by Points I through VIII should be denied.

Respectfully submitted,

Dated: March 5, 2003 By: _____

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[70] 209 U.S. 123, 157 (1908)
[71] 596 F.2d 70, 72 (2d Cir. 1979) (*per curium*).
[72] While not abandoning the motion to consolidate, plaintiff acknowledges that it is completely within the Court's discretion whether consolidation is appropriate and therefore, plaintiff will not address it here.