UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LIBERTARIAN PARTY OF ERIE COUNTY, MICHAEL KUZMA, RICHARD COOPER, GINNY ROBER, PHILIP M. MAYOR, MICHAEL REBMANN, EDWARD L. GARRETT, DAVID MONGIELO, JOHN MURTARI, and WILLIAM A. CUTHBERT,

Plaintiffs,

- against -

ANDREW M. CUOMO, individually and as Governor of the State of New York; ERIC T. SCHNEIDERMAN, individually and as Attorney General of the State of New York; JOSEPH A. D'AMICO, individually and as Superintendent of the New York State Police; MATTHEW J. MURPHY, III, individually and as Niagara County pistol permit licensing officer; DENNIS M. KEHOE, individually and as Wayne County pistol permit licensing officer; and M. WILLIAM BOLLER, individually and as Erie County pistol permit licensing officer,

Defendants.

15-cv-00654-FPG

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DISMISSAL

INTRODUCTION

The plaintiffs filed suit to challenge the current version of the Sullivan Act of 1911, which required a license to possess a handgun in New York State.

Sullivan was a corrupt Tammany Hall politician who allegedly passed the bill for nefarious reasons. See, *Kachalsky v. Cacace*, 10-cv-5413 (S. D. N. Y.), Doc. 68-1. We cannot find any solid research that was done to support the law's enactment. Rather, assuming for the sake of argument that was bill was well-intentioned, it was simply the product of the prevailing

ideology of that time, progressivism, which held and holds, without any evidence, that legislation can magically improve human life.[1] What is significant for present purposes is this. The famous Progressive Oliver Wendell Holmes once wrote: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." However, it is also the case that the Second Amendment does not enact the platform of the Coalition to Stop Gun Violence or its underlying ideology, progressivism, that was developed well over a hundred years later. However, all too often and even after *Heller* and *McDonald*, many courts smuggle into their Second Amendment rulings various elements of the progressive ideology that are neither rooted in constitutional law nor based on any evidence or logic.

There is one primary issue in this case. *Heller* and *McDonald* announced that the right to bear arms is an individual fundamental constitutional *right*. The Sullivan Act and its interpretation in the state courts treat it as a *privilege* to be bestowed at the whim of licensing officials. One of these views must give way to the other and the Supremacy Clause states that federal law is supreme.

The defendants' brief gives the impression that the constitutionality of this statute is settled law. That is not the case at all. Until *McDonald v. City of Chicago* in 2010, there was no firm legal ground to challenge the Act. Thus, all the legal history in between, including numerous New York State court decisions, is obsolete. Even after *McDonald*, New York State courts have refused to take these cases seriously and have in several cases merely rubber-stamped the law as valid. New York State cases are not of course binding on this Court but neither should this Court consider them as persuasive given the paucity of legal analysis they contain.

[1] See, James Ostrowski, *Progressivism: A Primer on the Idea Destroying America* (2014).

As for federal cases dealing with the Sullivan Act, they are few. The only binding case is *Kachalsky v County of Westchester*, 701 F3d 81, 93-101, cert denied ___ US ___, 133 S Ct 1806. *Kachalsky* is only binding on one of the twelve or so issues raised in the complaint, the proper cause requirement for a carry permit. The only other federal cases that dealt with the Sullivan Act are trial level cases not binding on this Court. Those cases are analyzed below.

Kachalsky only involves one of the issues raised in this case, the proper cause requirement and itself is at odds with a Ninth Circuit case, *Peruta v. County of San Diego*, 742 F.3d 1144 (2014). Most recently, a trial judge in the District of Columbia sided with *Peruta* and against *Kachalsky* and granted a preliminary injunction against a statute that required citizens to comply with a "good reason" requirement when applying for a concealed carry permit. *Grace v. District of Columbia*, 15-cv-2234 (May 17, 2016).

The point is, for the vast majority of the issues raised in the complaint, this is the equivalent of a case of first impression. The age of the challenged law is beside the point. The defendants concede that at least one plaintiff has standing to challenge the pistol permit law. Given the lack of precedent on all but one issue, this Court may rule on these issues as its best wisdom dictates.

I. THE PLAINTIFFS KUZMA, COOPER, ROBER, REBMANN, AND GARRETT HAVE STANDING EVEN THOUGH THEY HAVE NOT APPLIED FOR A PISTOL PERMIT LICENSE.

The complaint clearly challenges the right of the State to require a license to exercise a fundamental constitutional right. Thus, it would be absurd to force the plaintiffs to ask for a license when it is *the asking* that they object to. Thus, the "futility" exception stated by *United States v. Decastro*, 682 F.3d 160, 164 (2d Cir. 2012) applies here. The plaintiffs complain not

about being unable to obtain a permit but about the need to do so and about the *time, energy and expense* of doing so. Actually applying for a permit accomplishes nothing concrete in furtherance of the goal of challenging the statute, so imposing this requirement here becomes merely a nasty legalism of the type that makes people cynical about the law. "Woe to you lawyers as well! For you weigh men down with burdens hard to bear, while you yourselves will not even touch the burdens with one of your fingers." Luke 11:46. Surely, as Javert would argue, had they applied for a permit and been approved, then sued, their action would be dismissed as moot.

II. THE PLAINTIFF MAYOR HAS STANDING.

For the reasons stated in the complaint, the plaintiff Phil Mayor has standing.

> "The plaintiffs PHILIP M. MAYOR and WILLIAM A. CUTHBERT have obtained a pistol permits but remain under constant threat of having their licenses revoked based on application of the arbitrary and subjective criteria set forth in the statute. Further, they are unlawfully restricted in the firearms they can purchase and carry and are forced by the risk of immediate arrest to carry their permits on them at all times. Permit holders also face a cumbersome process for adding firearms onto their permits, often involving several trips to the licensing office and gun store and delays of several weeks before being allowed to carry newly purchased firearms." Amended Complaint, pars. 77-79.

Further, like the plaintiff Mongielo, Mayor is under constant threat of having his permit revoked without notice based on frivolous hearsay allegations secretly conveyed to the Court. *Id.* at 80, et seq. Thus, it is not a "highly speculative fear" but one borne out by allegations concerning a co-plaintiff in the same complaint. We believe pretrial discovery will uncover evidence of a multitude of similar improper suspensions. Finally, Mayor has standing because, like the other plaintiffs, he wishes to assert his right to be free of the state's unconstitutional licensing scheme altogether.

III. PLAINTIFF MONGIELO'S CLAIMS ARE NOT MOOT.

Plaintiff Mongielo's claims in this action are not moot merely because his improper suspension has been lifted. The plaintiffs in this case are complaining about an illegal permit regime which routinely and repeatedly violates the plaintiffs' rights. These are not isolated incidents but part of a pattern of illegal behavior caused by New York State's refusal to accept the fact that the law of the land has changed because of *Heller* and *McDonald*. Because Mongielo remains under constant threat of further improper suspensions without cause or proper notice, his claims for injunctive and declaratory relief are not moot.

IV. PLAINTIFF CUTHBERT HAS STANDING TO CHALLENGE THE STATE'S AT-HOME LICENSING REQUIREMENT.

The plaintiff Cuthbert has standing to challenge the at-home licensing requirement for the same reason the other plaintiffs do, see Point I, and for the same reason plaintiff Mayor does. See Point II. Since he was denied a carrier permit, he also has standing to challenge that statute in the appeals courts.

V. THE PLAINTFFS ARE CHALLENGING THE CRIMINAL PROHIBITIONS ON UNLICENSED FIREARM POSSESSION.

Contrary to the defendants' contention, the plaintiffs are challenging statutes that criminalize the lack of a license granted under the Pistol Permit laws. See, Amended Complaint, pars. 55-59, request for relief.

VI. THE GOVERNOR, THE ATTORNEY GENERAL, AND THE SUPERINTENDENT ARE PROPER PARTIES TO THIS ACTION.

The Governor, Attorney General and Superintendent were sued because of their specific statutory law enforcement powers and their personal commitment and enthusiasm for enforcing gun control laws. The complaint contains very detailed and specific allegations with respect to the Superintendent's involvement in enforcement and the defendants fail to cite any case where he has been held to be an improper party. Plaintiffs complain about a statewide illegal regime that each of these men supports and helps to enforce on a daily basis. Officials should not escape legal responsibility merely because they order subordinates to do the actual dirty work. The plaintiffs would consider dismissing the action against them if they provided affidavits to the Court stating that they have no involvement whatsoever in enforcing the pistol permit law. We expect to wait a very long time for such affidavits to be provided.

VII. NEITHER OF THE TWO DISTRICT COURT CASES CITED BY THE DEFENDANTS IS PERSUASIVE.

The defendants cite only two federal trial court cases that dealt with the New York Statute. Neither opinion is persuasive.

The Plaintiffs disagree with the defendants' characterization of *Moreno v. New York City Police Department*, 2011 U.S. Dist. LEXIS 76129 (S.D.N.Y. 2011). In that case, the plaintiff filed a pro se complaint that apparently did not even mention the Second Amendment! It was up to the court to conjure up a possible Second Amendment claim by the plaintiff. There is no indication that any of the statutory defects alleged in the present complaint were considered. Rather, the court appeared to base its decision on the peculiar facts of that case including the

plaintiff's *extensive history of domestic violence complaints* and a false statement concerning such. Report, p. 4. Also significant was that the plaintiff sought a permit to work as a guard, not for personal protection in the home. *Id*. at 6. Thus, it falls under *Kachalsky*. Any reference in *Moreno* to the validity of the statute is dictum as the plaintiff made no challenge to the statute. *Moreno* should be disregarded by this Court.

The only other federal case cited by the defendants that discusses the statute is *Aron v. Becker*, 48 FSupp3d 347 (N. D. N. Y. 2014). That case also involved a complaint drafted by a pro se plaintiff. The court described it as "convoluted," and "hardly a model of clarity. . ."

The same can be said of the opinion of the court. It holds that the pistol permit law does not require heightened scrutiny because it does not impose a substantial burden but at the same time described the licensing process as "rigorous." Of course, this conclusion begs the question. The complaint in the present case does in fact describe a process that is substantially burdensome, time-consuming and expensive. None of those allegations was before the court in *Aron.* The court completely misses the point of the present suit by asserting that the statute only burdens those denied a permit. False. The statute burdens everyone! It burdens those who endure the onerous, embarrassing and expensive process but who end up with a permit. It burdens those, *like the author of this brief*, who once looked at the application and said, it's not worth it. And it burdens those who are denied a permit based on the whim of a licensing officer whose decisions are rarely overturned on the deferential standard used by the Appellate Division.

In short, this is one of those decisions referred to in the Introduction that smuggles in the ideology of progressivism, which presumes, without a scintilla of evidence or logic that legislation can magically solve problems and at zero cost. The court in *Aron* simply made all the

costs of the permit process disappear into the ether by a sheer act of will. Again, the Second Amendment does not enact progressivism. It bans it when it comes to arms!

For these reasons and because the court did not have before it as many as ten discrete objections to the statute, *Aron* is irrelevant to this motion.

VIII. NONE OF THE STATE CASES CITED BY THE DEFENDANTS IS PERSUASIVE OR RELEVANT.

None of the New York state cases cited by the defendants merits much discussion. The casual attitude of the New York state courts toward the Second Amendment is exemplified by a case cited by the defendants, *Chomyn v. Boller*, 2016 NY Slip Op 02231 (4th Dept. 2016). There, the Fourth Department summarily rejected petitioner's Second Amendment contentions without any discussion, citing cases which themselves did not address the issues raised in this case, *Matter of Cuda v Dwyer*, 107 AD3d 1409 (4th Dept. 2013); or that give them only a cursory review. *Matter of Kelly v Klein*, 96 AD3d 846 (2nd Dept. 2012). Incredibly, *Cuda* cites a 1985 case decided before *Heller* and *McDonald.* This perfectly exemplifies the state's casual attitude toward a fundament right. See, *Matter of Demyan v Monroe*, 108 AD2d 1004, 1005 [1985]).

None of the other New York state cases is persuasive or relevant as they do not address the detailed objections to the statute at issue here and their analysis is brief and conclusory. For example, *Mongielo v. Cuomo*, 40 Misc 3d 362 (Sup. Ct. Albany Co. 2013) was yet another pro se complaint that did not lend itself to careful judicial consideration.

That being the case, the defendants' half-hearted argument by footnote for claim preclusion against the plaintiff Mongielo should be ignored by the Court. Claim preclusion is a flexible common law doctrine that should be rejected here due to the lack of a serious argument

in favor of it, the lack of proof that the issues raised in that case are similar to those raised herein, and because the complaint was pro se.

IX. INTERMEDIATE SCRUTINY IS NOT THE APPROPRIATE STANDARD FOR CHALLENGES TO THE LICENSING SCHEME PERTAINING TO FIREARMS IN THE HOME.

Plaintiffs disagree with the defendants on the appropriate level of scrutiny to be applied in this case. They cite *NYSRPA v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015). However, the present case concerns a core value of the Second Amendment, possession of a firearm in the home for self-defense. *Heller* calls this a fundamental right. Thus, as with other fundamental rights, strict scrutiny should apply. In that event, for the reasons previously stated, the law fails as it goes far beyond the parameters marked out by *Heller* as to when a state can deny the right to possess a gun in the home. See, the Introduction, above.

Even under intermediate scrutiny, the statute fails but for similar reasons. Assuming for the sake of argument that Heller would permit a licensing process wherein a citizen could *quickly and cheaply* secure a weapon for possession in the home unless he or she was a felon or mentally ill, New York's regime goes far beyond that by expanding the grounds for denial and by making the process extremely time-consuming and expensive.

No amount of discussion of standards of review can obscure the basic fact of this case. The pistol permit law violates the principles enunciated by *Heller* and *McDonald*.

X. NEW YORK'S LICENSING REQUIREMENTS FOR HOME FIREARM POSSESSION SUBSTANTIALLY BURDEN THE PLAINTIFFS' SECOND AMENDMENT RIGHTS.

Contrary to the assertions of the defendants, which, at this stage, carry zero evidentiary value, the pistol permit law does substantially burden the right to bear arms. The Amended Complaint is very specific and detailed on this point. For example:

> "In most counties in the state, it can take a year or more to obtain a permit. If the permit is denied, judicial intervention can take an additional year and a half including one appeal as of right to the Appellate Division and cost as much as $5000 for legal fees and costs. The permit process involves a massive invasion of privacy, forcing the applicant to identify his or her closest friends who are then subjected to a criminal record check themselves. The permit process can be expensive, thus preventing many low-income persons from applying for a permit. The permit process can also be time-consuming, constituting a burden not imposed for the exercise of numerous other fundamental constitutional rights. In the case of an application for a carrier permit, the applicant must prove "proper cause" in order to exercise a fundamental right. While this requirement has been ruled constitutional by the United States Court of Appeal's for the Second Circuit, it is complained of here so as to preserve the issue for reconsideration by the Second Circuit or review by the Supreme Court. See, *Kachalsky v. County of Westchester*, 701 F.3d 81. (2d Cir. 2012); but see *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014). A right that can only be exercised by seeking prior permission of the government, which permission can be withheld at the government's subjective discretion, is a right that has ceased to exist. The plaintiffs seek injunctive and declaratory relief to remedy the defendants' violation of their right to bear firearms in their homes and elsewhere. The plaintiffs PHILIP M. MAYOR and WILLIAM A. CUTHBERT have obtained pistol permits but remain under constant threat of having their licenses revoked based on application of the arbitrary and subjective criteria set forth in the statute. Further, they are unlawfully restricted in the firearms they can purchase and carry and are forced by the risk of immediate arrest to carry their permits on them at all times. Permit holders also face a cumbersome process for adding firearms onto their permits, often involving several trips to the licensing office and gun store and delays of several weeks before being allowed the carry newly purchased firearms." Amended Complaint, pars. 68, et seq.

Further, because there is no reason to believe that any of the cases cited by the defendants dealt with similar allegations, none of them is binding on this Court.

See also, Point VII, above.

XI. THE STUDIES CITED BY THE DEFENDANTS ARE FLAWED, INCOMPLETE AND IRRELEVANT.

The defendants cite several studies that purport to find advantages in various gun control laws. This kind of statistical evidence would be more appropriate for summary judgment after it has been tested in pretrial discovery and each side has been given a chance to present and cross-examine experts.

None of the studies purports to show what the effects would be if New York were *Hellerized*, made to comply with *Heller* and *McDonald*. Thus, they are irrelevant. Under *Heller*, states may still restrict possession by felons and the mentally ill. None of the studies measures the effects of denying handguns to law-abiding citizens by the sheer difficulty of navigating through the torturous pistol permit process. None apparently measures the defensive use of guns.

The Connecticut study has been criticized for cherry picking data.[2] The same is true of the Missouri study.[3] There is a massive amount of "data" on both sides of the debate and each side accuses the other of "cooking" the data to advance a political or ideological agenda. Data showing the Sullivan Act failed to prevent a crime wave in the years that followed its enactment was presented to the district court in *Kachalsky* but did not carry the day. *Kachalsky v. Cacace*, 10-cv-5413 (S. D. N. Y.), Doc. 68-1.

The truth is, it is very difficult to prove anything in the social sciences by statistics. Defining and enforcing constitutional rights is the job of judges, not PhDs in statistics. Those who framed

[2] http://crimeresearch.org/2015/06/daniel-websters-cherry-picked-claim-that-firearm-homicides-in-connecticut-fell-40-because-of-a-gun-licensing-law/
[3] http://crimeresearch.org/2014/02/cprc-at-fox-news-media-cherry-picks-missouri-gun-data-to-make-misleading-case-for-more-control/

the Second Amendment did not do so on the basis of statistics but the inherent right of each human being to possess the means of staying alive in an uncertain world. The next person who is murdered in New York State for want of a handgun for self-defense will be a mere statistic to the defendants but their unconstitutional law took "away all he's got and all he's ever gonna have."[4]

XII. THE PISTOL PERMIT LAW IS UNCONSTITUTIONALLY VAGUE.

The issue of vagueness is inextricably linked with the issue of whether the statute violates the right to bear arms. The Supreme Court has set forth very limited grounds for denying that right including mental illness and felonious criminality. Obviously, the New York statute goes far beyond those tests and into murky concepts such as "good moral character" and "proper cause" and the absence of "good cause" to deny a license. Yet, to try to construe these broad terms as meaning only a consideration of the factors allowed by *Heller* is to simply rewrite the statute to mean what it does not in fact mean. Perhaps the statute could be saved if this Court were to hold that these vague concepts refer only to the commission of felonies or an adjudication of mental disability. However, such a ruling would constitute a significant partial victory for the plaintiffs herein. For example, such a ruling would mean that the requirement of seeking out character references would be enjoined. What would be manifestly unfair, however, is if the Court were to dismiss plaintiffs' complaint on the ground that the statute means less than it actually says but deprive the plaintiffs of appropriate injunctive and declaratory relief.

[4] *Unforgiven* (1992).

The main case relied on by the defendants, *Aron*, 48 F. Supp. 3d at 372-74, basically dismissed a claim while apparently narrowing the meaning of the statute just as described above. Additionally, its attempt to save the statute from a vagueness attack is not persuasive. Basically, the court argued that the term "good moral character" is to be defined by reference to other criteria in the statute related to criminal records and mental illness. It is not even clear what that means but it is clear that such an approach violates the maxim that all the words in a statute are to be given a meaning. These terms mean something above and beyond commission of a felony or confirmed mental illness, factors recognized as valid by Heller. The problem is, *we don't know what they mean* nor does the defendants' brief even attempt to tell us. For that reason, these terms are both vague and violative of the Second Amendment.

XIII. THE LICENSING OFFICERS WHO HAPPEN TO BE JUDGES ARE NOT IMMUNE FROM SUIT.

Obviously judges are immune from suit for money damages for judicial acts. The mere fact that a statute confers upon a judge a licensing function does not convert that function into a judicial act. That argument obviously begs the question. Licensing is an administrative function generally performed by non-judges. The respondent has failed to demonstrate that licensing is a judicial function. If it was, the courts would also have to immunize from suit hundreds of other officials who issue licenses and permits.

The fact that judges in Upstate New York act as licensing officials is an accident of legislation. Non-judges handle the job Downstate. All these officials at times investigate, prosecute and enforce penal laws. They commonly receive ex parte communications which are never shared with the applicant or permit holder.

If licensing officials are acting in a judicial capacity, then why do they appear to be massively ignoring or violating the Code of Judicial Conduct?

> "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. . . Rules of the Administrative Judge, section 100.3(E)(1)
>
> "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding, except:
>
> "Ex parte communications that are made for scheduling or administrative purposes and that do not affect a substantial right of any party are authorized, provided the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and the judge, insofar as practical and appropriate, makes provision for prompt notification of other parties or their lawyers of the substance of the ex parte communication and allows an opportunity to respond." Rules of the Administrative Judge, section 100.3(B)(6).

The references to ex parte communications speak for themselves. The rule on impartiality pertains to the difficulty of a judge acting as investigator, cop, prosecutor and judge all in one case.

The main case relied upon by the defendants here is poorly argued. In *Aron v. Becker,* 48 F.Supp. 3d 347 (N. D. N. Y. 2014), the court basically said that the defendant was immune from suit because he was called a "judge" by statute. That contradicted the very case cited by the court which stated that immunity is determined by a functional analysis. *Butz v. Economou,* 438 U.S. 478 (1978). That is a bad argument since judges are not immune from suit for administrative activities even though those who perform them are *called* judges and even though those functions are statutorily prescribed or bestowed ex officio. It also implies any number of reductio ad absurdum scenarios such as a small town that appoints the town judge as the animal

control officer. If the judge then shoots a dog for no reason, the court in *Aron v. Becker* would confer immunity. Absurd.

None of the cases cited by the defendants involved the detailed factual allegations in the amended complaint which clearly show that these judges are not acting in a judicial capacity:

> "Licensing officers in New York State, in addition to determining applications for pistol permits, on information and belief, also engage in investigations of applicants and work closely with various police agencies in monitoring the behavior of permit holders, applicants and those whose permits have been suspended. Licensing officers also act as prosecutors of permit applicants and those whose permits have been suspended. Thus, licensing officers do not act in a judicial capacity but rather their duties include investigatory, prosecutorial and law enforcement functions fundamentally inconsistent with the judicial function. On information and belief, licensing officers routinely receive information and evidence about permit applicants or suspended holders of permits on an informal basis and on occasion without the knowledge of the applicant or holder of a permit." Amended complaint, pars. 23-26.

The defendants basically ignore these allegations. However, they must be deemed true by the Court in this motion.

As surprising or shocking as it may be, judges acting as licensing officers are not immune from suit.

XIV. QUALIFIED IMMUNITY DOES NOT BAR PLAINTIFFS' DAMAGES CLAIMS.

For the reasons stated throughout this brief, the defendants are not entitled to qualified immunity. The fact is that those involved in enforcing New York gun laws have never come to terms with the legal revolution created by *Heller* and *McDonald*. They have simply ignored those cases. Those cases declare the right to bear arms to be a fundamental right which can only be regulated under limited conditions such as commission of a felony or

mental illness. New York's pistol permit regime, which was enacted and ratified many times by the courts in an era when the predominant view was that the Second Amendment *did not* protect an individual right to bear arms, is in clear conflict with that right as spelled out in great detail in the Amended Complaint. Willful ignorance of two of the most widely read and discussed Supreme Court decisions in decades, does not entitle one to qualified immunity from suit.

XV. THE COMPLAINT ALLEGES SUFFICIENT PERSONAL INVOLVEMENT BY THE GOVERNOR, THE ATTORNEY GENERAL, AND THE SUPERINTENDENT.

See Point VI, above.

XVI. MURTARI'S ARTICLE 78 CLAIM SHOULD NOT BE DISMISSED.

Contrary to the defendants' assertions, there is nothing special, mystical or magical about an Article 78 proceeding that would lead to an unnecessary duplication of court actions. Almost all such cases are decided on the papers after the defendants produce the complete administrative record. Not only are the federal and state issues intertwined but this Court would no doubt benefit from having at least one complete state court record before it in determining whether Article 78 proceedings generally provide adequate protection of Second Amendment rights. See, Amended Complaint, pars. 69, 138(k). If anything, the adjudication of the Article 78 proceeding in this Court would likely be faster than in state court where it can take many, many months. That is because, in pistol permit cases, the proceeding is filed in the Appellate Division where, in addition to the regular exchange of pleadings, the court orders briefs and oral argument.

The Court should deny the defendant's motion to dismiss the Article 78 claim because, contrary to their argument, there is no "record" before the Court. Article 78 requires that the defendant produce a complete record for the Court's consideration and the plaintiff's further response. See CPLR 7804(e).

CONCLUSION

The motions of the defendant should be denied with the following exception.

The plaintiff concedes that the Court must dismiss the plaintiff's challenge to the "proper cause" requirement for a carrier permit.

Dated: Buffalo, New York
June 3, 2016

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Proof of Service

James Ostrowski; an attorney at law admitted to practice in this Court, affirms under penalties of perjury that on June 3, 2016, he served a copy of the attached document on the party below by electronic filing with the clerk of the court:

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