

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
WHITE PLAINS DIVISION

ALAN KACHALSKY, et al.,	:	Case No. 10-CV-05413-CS
	:	
Plaintiffs,	:	SEPARATE STATEMENT OF
	:	DISPUTED MATERIAL FACTS
v.	:	IN OPPOSITION TO INDIVIDUAL
	:	DEFENDANTS' MOTION FOR
SUSAN CACACE,	:	SUMMARY JUDGMENT [L.R. 56.1]
	:	
Defendants.	:	
	:	
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SEPARATE STATEMENT OF DISPUTED MATERIAL FACTS IN OPPOSITION TO
INDIVIDUAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COME NOW the Plaintiffs, Alan Kachalsky, Christina Nikolov, Eric Detmer, Johnnie Nance, Anna Marcucci-Nance, and Second Amendment Foundation, Inc., by and through undersigned counsel, and submit their Separate Statement of Disputed Material Facts in Opposition to Individual Defendants' Motion for Summary Judgment.

Dated: February 9, 2011

Respectfully submitted,

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Alleged Fact	Response
1. Plaintiff Alan Kachalsky is a natural person; and a citizen of the United States, State of New York, County of Westchester. First Amended Complaint ("FAC") ¶ 1; Tomari Decl. Exhibit "A".	1. Undisputed.
2. Plaintiff Christina Nikolov is a natural person; and a citizen of the United States, State of New York, County of Westchester. FAC ¶ 2; Tomari Decl. Exhibit "A".	2. Undisputed.
3. Plaintiff Eric Detmer is a natural person; and a citizen of the United States, State of New York, County of Westchester. FAC ¶ 3; Tomari Decl. Exhibit "A".	3. Undisputed.
4. Plaintiff Johnnie Nance is a natural person; and a citizen of the United States, State of New York, County of Westchester. FAC ¶ 4; Tomari Decl. Exhibit "A".	4. Undisputed.
5. Plaintiff Anna Marcucci-Nance is a natural person; and a citizen of the United States, State of New York, County of Westchester. FAC ¶ 5; Tomari Decl. Exhibit "A".	5. Undisputed.
6. Plaintiff Second Amendment Foundation, Inc. ("SAF") is a non-profit membership organization incorporated under the laws of the State of Washington, with its principal place of business in Bellevue, Washington. FAC ¶ 6; Tomari Decl. Exhibit "A".	6. Undisputed.

Alleged Fact

Response

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| 7. | The Hon. Susan Cacace is now, and was at all times relevant herein, a County Court judge for Westchester County ("Westchester"). She has been on the bench for five (5) years. Pursuant to New York State Penal Law §265.00 (10) as a county judge she is also a handgun licensing officer for Westchester. Declaration of Hon. Susan Cacace. ("Cacace Decl.") ¶ 2. | 7. | Undisputed. |
| 8. | The Hon. Jeffrey A. Cohen currently sits as a Justice on the bench of the Appellate Division, Second Department. Prior to his appointment thereto on December 9, 2010, he served as a County Court judge for Westchester for three (3) years. He has been on the bench for four (4) years. Pursuant to New York State Penal Law §265.00 (10) as a county judge he was also a handgun licensing officer for Westchester. Declaration of the Hon. Jeffrey A. Cohen ("Cohen Decl.") ¶ 2. | 8. | Undisputed. |
| 9. | The Hon. Albert Lorenzo is now, and was at all times relevant herein, an Acting Justice for the Supreme Court, of the State of New York, Westchester County. He has been on the bench for eight (8) years. Pursuant to New York State Penal Law §265.00 (10) as an acting justice he serves as a handgun licensing officer for Westchester. Declaration of Hon. Albert Lorenzo ("Lorenzo Decl.") ¶ 2. | 9. | Undisputed. |

Alleged Fact

Response

10. The Hon. Robert K. Holdman currently sits as a Justice of the Supreme Court of the State of New York, Bronx County. Prior to serving as a Supreme Court Justice for the Bronx, and at all times relevant herein, he served as a Justice for the Supreme Court, of the State of New York, Westchester County. He has been on the bench since June of 2005. Pursuant to New York State Penal Law §265.00 (10), as a Supreme Court Justice in Westchester, he was also a handgun licensing officer for Westchester County. Declaration of Hon. Robert K. Holdman ("Holdman Decl.") ¶ 2.

10. Undisputed.

11. New York State does not ban handguns, but requires them to be licensed. FAC ¶ 21, Tomari Decl. Exhibit "A"; N.Y. Penal Law § 265.00; § 400.00 *et seq.*; Declaration of Bruce Bellom, sworn to January 25, 2011 ("Bellom Decl."), ¶ 3.

11. Disputed. As described more fully in the Amended Complaint and Plaintiffs' Motion for Summary Judgment, New York law permits Defendants to generally ban the carrying of handguns.

12. PL § 400.00 (2) sets forth the type of handgun permits available in this State. PL § 400.00 (2) (a) expressly provides for handgun possession in the home; PL § 400.00 (2) (b) - (e) provides for various job related licenses; and PL § 400.00 (2)(f) governs the issuance of permits to carry concealed handguns in public. N.Y. Penal Law § 265.00; § 400.00 *et seq.*

12. Undisputed.

Alleged Fact

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| 13. PL § 400.00 sets forth that an individual seeking a carried concealed permit must (a) be over 21; (b) be of good moral character; (c) never have been convicted of a felony or other serious crime (d) never have been mentally ill or confined to any institution; (e) never had a license revoked or been the subject of a family court order; (f) have undergone a firearms safety training if the permit is sought in Westchester; and as set forward in § 400.00 (2)(f): must show "proper cause" exists for such a permit. N.Y. Penal Law § 400.00 <i>et seq.</i> ; FAC ¶¶ 22, 24, Tomari Decl. Exhibit "A". | 13. Undisputed. |
| 14. "Proper cause" as used in the context of issuing handgun permits means a showing a need for "self-protection distinguishable from that of the general public". FAC ¶¶ 25-26, 30, 35; 36; 37, Tomari Decl. Exhibit "A"; Cacace Decl. ¶ 5; Cohn Decl. ¶ 5; Holdman Decl. ¶¶ 6-8; <i>Bach v. Pataki</i> , 408 F.3d 75, 80 (2d Cir. 2003). | 14. Undisputed. |

Alleged Fact

Response

15. The Pistol Licensing Unit of the Westchester County Department of Public Safety maintains a copy of each application for a carry concealed, or "fully carry" permit; and conducts an investigation of each such application. In so doing, it compiles a file containing the results of the investigation and summarizes the investigation for the licensing officer who determines whether such permit will issue. Declaration of Bruce Bellom, sworn to January 24, 2011 ("Bellom Decl.") ¶¶ 1, 3; PL § 400.00 (4).

15. Undisputed.

16. The application form requires the applicant to provide four (4) character references "who by their signature attest to [the applicant's] good moral character" and to disclose whether he/she has "ever been arrested, summoned, charged or indicted anywhere for any offense, including DWI, (except traffic infractions)" and if so, to disclose the date, police agency, charge and disposition, including the court and date of disposition. Bellom Decl. ¶ 5; Tomari Decl. Exhibit B.

16. Undisputed.

Alleged Fact**Response**

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| 17. | <p>In addition, the applicant must disclose whether he/she has ever: a) been discharged from any employment or the armed forces for cause; b) undergone treatment for alcoholism or drug use; c) suffered from any mental illness; d) had a pistol license; dealer's license; gunsmith license; or any application for such a license disapproved or had such a license revoked or cancelled; e) any physical condition which could interfere with the safe and proper use of a handgun; and f) been charged, petitioned against, a respondent, or otherwise been a subject of a proceeding in family court. If the "YES" box to any of these questions is checked, the applicant must provide a written explanation. Bellom Decl. ¶ 7; Tomari Decl. Exhibit B; PL § 400.00 <i>et seq.</i></p> | 17. | Undisputed. |
| 18. | <p>Upon receipt of a completed initial application, a police member of the Pistol Permit Unit conducts the investigation required under Penal Law §400.00(4). For an initial application, this investigation includes a fingerprint based criminal background check with the New York State Department of Criminal Justice Services, the Federal Bureau of Investigation and the National Instant Criminal Background system. When the applicant is filing for a restriction change, the criminal background check is updated by a search of the National Instant Criminal Background system. Bellom Decl. ¶ 12; PL§400.00 <i>et seq.</i></p> | 18. | Undisputed. |

Alleged Fact

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| 19. As part of the investigation, the applicant's identifying information is forwarded to the New York State Department of Mental Hygiene to determine if the applicant had any hospitalizations for mental illness. Bellom Decl. ¶ 13. | 19. Undisputed. |
| 20. In addition to the background and mental health check, the investigation includes a review of the application form, Character Reference Letters submitted with the application form, and the application attachment completed by the applicant. Bellom Decl. ¶ 14. | 20. Undisputed. |
| 21. Upon review of all the materials, once the investigation is deemed complete, an investigation summary is compiled for the licensing officer, whom, in Westchester, pursuant to statute, is a Judge. Prior to submission to the licensing officer however, the investigation summary, and all application materials, are submitted to a County Police lieutenant; the Chief Inspector of Administrative Services; and the Commissioner or a Deputy Commissioner, who all, also review the materials. Bellom Decl. ¶¶ 2, 14; PL § 265.00(10). | 21. Undisputed, except to note that the “investigation summary” referenced by Defendants include recommendations. <i>See, e.g.</i> , Plaintiffs’ Exhibits C, E, G. |

Alleged Fact**Response**

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| 22. | Once all the reviews by the Department of Public Safety are complete, the entire investigation file is submitted to the Judge for review and decision on the application. The role of the Pistol Permit Unit is limited to the investigation described herein. The County has no ability to grant or deny license applications or amendments. Bellom Decl. ¶ 15. | 22. | Disputed. The County, by and through its officers, make recommendations as to whether the applications should be granted or denied. <i>See, e.g.</i> , Plaintiffs' Exhibits C, E, G. |
| 23. | In calendar year 2010, in Westchester County, 130 "carry concealed" pistol permits; an additional 41 pistol permits restricted to carrying for purposes of employment; and 471 pistol permits issued for the purpose of target shooting were issued. Bellom Decl. ¶ 17. | 23. | Plaintiffs are not in a position to admit or deny the truth of this statement, which is, in any event, wholly irrelevant. It is beyond dispute that Plaintiffs' applications for carry permits were denied. |
| 24. | This process, as just described above was used to compile the investigative files for Plaintiffs Alan Kachalsky (Tomari Decl. Exhibit F), Christina Nikolov (Tomari Decl. Exhibit G), Eric Detmer (Tomari Decl. Exhibit H), Johnnie Nance (Tomari Decl. Exhibit I) and Anna Marcucci-Nance (Tomari Decl. Exhibit J). Bellom Decl. ¶ 16. | 24. | On information and belief, undisputed, except to the extent that the County made recommendations regarding Plaintiffs' applications. |
| 25. | In May, 2008, Kachalsky applied for a "full carry" permit to carry concealed handguns with him while in public. FAC ¶ 26; Tomari Decl. Exhibit F. | 25. | Undisputed. |

Alleged Fact

Response

26. As part of his application, Kachalsky listed as factors he believed established "proper cause" for a full carry permit:

26. Undisputed.

The factors which establish proper cause for the issuance to myself of a Full Carry pistol permit are: 1) the Second Amendment of the Constitution grants citizens the right to bear arms. As a citizen, I am therefore entitled to exercise my Constitutional right to bear arms. I believe the Constitutional right entitles me to the permit without further the need to establish "proper cause".

If the issuing agency for some reason requires more than this, then I will cite the fact that we live in a world sporadic random violence might at any moment place one in a position where one needs to defend oneself or possibly others, e.g. random shootings in universities (Virginia Tech), post offices, airline check-in counters, malls, road rage, as well as the run-of-the-mill street muggings and robberies. While the odds of finding oneself in a Virginia Tech type situation are remote, one must reflect that had there been even one armed person, the death toll might have been considerably less than 31 dead. While one never knows what one might do in such situations, it is my belief that it is better to have the option to defend oneself (and others) than not to have the option. As a pilot and skydiver, I have been trained to handle emergencies, and I

Alleged Fact

Response

have actually handled several emergencies, so it is unlikely that I will respond in a dangerous manner.

Additionally, as an attorney (who has practiced criminal law in this State and in this County for over 25 years), I know when the use of deadly force is justified. I also know when the use of deadly force is neither justified (nor required). I am capable of, and have previously defended myself (on rare occasions) and others from non-deadly force. Two of these incidents resulted in police intervention. On one such occasion, I was compelled to intervene when my client was being choked by her estranged husband. On another such occasion, I was assaulted with a 12" butcher's knife by an irate employee. I have been threatened once by the spouse of my (divorce) client, and once by my own (unhappy) client.

However, as we see every day, sometimes, non-deadly force is simply not enough for self-defense. In those situations, I am entitled to, and, by applying for a full carry pistol permit, it is my intention to carry a licensed concealed pistol to defend myself and others in the event circumstances require it.

Finally, I am a law-abiding citizen. I have never been convicted of a crime, nor have I ever assaulted or threatened to assault another person.

Tomari Decl. Exhibit F.

Alleged Fact	Response
<p>27. Upon completion of its investigation, the Department of Public Safety recommended denial of Kachalsky's application as he failed to 'demonstrate a need for self protection distinguishable from that of the general public. Tomari Decl. Exhibit F.</p>	<p>27. Undisputed.</p>
<p>28. The application, investigation file and recommendations of the Department of Public Safety were forwarded to the Hon. Susan Cacace, who acted as the licensing officer for Kachalsky application. Cacace Decl. ¶ 2.</p>	<p>28. Undisputed.</p>
<p>29. After reviewing the materials related to Mr. Kachalsky's application, Judge Cacace issued a decision and order denying Mr. Kachalsky's application, dated October 8, 2008, noting "the State has a substantial and legitimate interest and grave responsibility for ensuring the safety of the general public" and that licensing officers "are vested with broad discretion in determining applications for an unrestricted pistol license and are required to exercise their judgment on the basis of a total evaluation of relevant factors". Cacace Decl. ¶ 4; Tomari Decl. Exhibit K.</p>	<p>29. Undisputed.</p>

Alleged Fact

Response

30. Judge Cacace denied Kachalsky's application for an unrestricted, full carry pistol permit, as he failed to state "any facts which would demonstrate a need for self protection distinguishable from that of the general public", and because "based upon all the facts and circumstances of this application, it is my opinion that proper cause does not exist for the issuance of an unrestricted 'full carry' pistol license" to Mr. Kachalsky. FAC ¶ 26; Cacace Decl. ¶ 5, Tomari Decl. Exhibit K.

30. Undisputed.

Alleged Fact

31. Kachalsky appealed the denial of his application to the New York State Appellate Division, Second Department through a Special Proceeding commenced pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR"). In his Verified Petition, Kachalsky asserted a Second Amendment challenge. Tomari Decl. Exhibits L and M. By Order dated September 8, 2009, the Appellate Division held that Kachalsky "failed to demonstrate 'proper cause' for the issuance of a 'full carry permit' [and] accordingly, [Judge Cacace's] determination was not arbitrary and capricious and should not be disturbed". *Kachalsky v. Cacace*, 65 A.D.3d 1045 (2d Dep't 2009); FAC ¶ 27, Tomari Decl. Exhibit A.

Response

31. Undisputed, except for the allegation that Kachalsky "asserted a Second Amendment challenge." Kachalsky asserted that the Second Amendment secured his right to carry a gun in public, however, under New York law, Article 78 proceedings are not considered vehicles by which to lodge constitutional challenges to state law. It is well-established that "article 78 does not lie to challenge a legislative act . . . a petitioner who is challenging the validity of legislation may not use an article 78 proceeding for that purpose; a lawsuit to challenge the validity of legislation should take the form of an action for a declaratory judgment." *Matter of Council of City of N.Y. v. Bloomberg*, 6 N.Y.3d 380, 388 (2006) (citation omitted). "New York law permits a party in an Article 78 proceeding to 'raise a claim that the administrative application of a rule to her is unconstitutional,' but does not allow the party to raise a general constitutional challenge to a law or regulation." *Karamoko v. N.Y. City Hous. Auth.*, 170 F. Supp. 2d 372, 378 (S.D.N.Y. 2001) (quoting *Hachamovitch v. Debuono*, 159 F.3d 687, 695 (2d Cir. 1998)). In any event, this factual allegation is irrelevant to any issue in the case.

Alleged Fact**Response**

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| 32. | Kachalsky then sought leave to appeal the denial of his Article 78 petition to the New York Court of Appeals, again, arguing that the denial of a "full carry" permit infringed his Second Amendment right. Tomari Decl. Exhibit N. The Court of Appeals, <i>sua sponte</i> , dismissed his appeal, upon the grounds that "no substantial constitutional question is directly involved". <i>Kachalsky v. Cacace</i> , 14 N.Y.3d 743 (2010); FAC ¶ 28, Tomari Decl. Exhibit A. | 32. | Undisputed, subject to the response to item number 31. In any event, this factual allegation is irrelevant to any issue in the case. |
| 33. | The Court of Appeals dismissal of Kachalsky's petition for leave to appeal was issued prior to the Supreme Court's decision in <i>McDonald v. City of Chicago</i> , which held that the Second Amendment applied to the states. FAC ¶ 28, Tomari Decl. Exhibit A. | 33. | Undisputed, but in any event, these factual allegations are irrelevant to any issue in the case. |
| 34. | Kachalsky has taken no further action on his application and has not re-applied for a license. FAC ¶ 29, Tomari Decl. Exhibit A. | 34. | Undisputed, but in any event, these factual allegations are irrelevant to any issue in the case. |
| 35. | In March, 2009, Nikolov applied for a "full carry" permit to carry concealed handguns with her while in public. FAC ¶ 30, Tomari Decl. Exhibits A and G. | 35. | Undisputed. |

Alleged Fact

36. As part of her application, Nikolov listed as factors she believed established "proper cause" for a full carry permit:

First of all, I have been a law-abiding citizen my entire life, as evidenced by my non-existent criminal record. And I meet all the other minimum requirements stated within the Pistol License Information Handbook.

In addition, I currently possess a concealed weapon permit (with full-carry privileges) in the State of Florida and have never once brandished or discharged my firearms anywhere other than in a safe manner at a law-enforcement utilized shooting range. As someone with considerable experience carrying a firearm legally, I am well aware of the responsibility involved when carrying a concealed firearm and the restraint required.

If ever confronted with a potentially dangerous situation, common sense dictates that the course of action is to extract myself from the situation and contact the authorities immediately. And if I am unable to escape, the only time I would ever take out my firearm would be if my life were in imminent danger and I have exhausted all other non-lethal options. But even then, depending on the circumstances (closed quarters, innocent people nearby, etc.), I would still need to determine whether using a firearm would be prudent.

Response

36. Undisputed.

Alleged Fact

Response

I have completed three firearms safety courses with NRA certified Instructors over the past three years and continually seek opportunities to further educate myself in the area of safety, even when not required by law.

For the past 20 years I have been a licensed commercial pilot and for more than two years, a certified flight instructor and instrument flight instructor. As a pilot and more importantly, someone who teaches people to fly, it is absolutely critical for me to always remain calm regardless of how stressful a situation becomes. I mention this because a calm demeanor is essential when either involved in or a witness to a potentially dangerous situation.

Also relevant to my application and establishing proper cause for issuing me a New York State full carry firearm license is my status as a [sic] transgender female, [sic] the National Coalition of Anti-Violence programs reports that I am far more likely to be a victim of violent crime than a genetic female. And these hate crimes are increasingly locally, as well as nationwide. I have included a list of hundreds of crimes against people in similar circumstances as myself, some of which are high profile, like the Brandon Teena murder.

Tomari Decl. Exhibit G.

Alleged Fact	Response
37. Upon completion of its investigation, the Department of Public Safety recommended denial of Nikolov's application as she failed to demonstrate a need for self protection distinguishable from that of the general public. Tomari Decl. Exhibit G.	37. Undisputed.
38. The application, investigation file and recommendations of the Department of Public Safety were forwarded to the Hon. Jeffrey A. Cohen, who acted as the licensing officer for Nikolov's application. Cohen Decl. ¶ 2.	38. Undisputed.
39. After reviewing the materials related to Ms. Nikolov's application, Judge Cohen issued a decision and order denying Mr. Kachalsky's application, dated October 2 2008, because she failed to demonstrate "that she has a special need for self-protection distinguishable from that of the general public". FAC ¶ 30; Cohen Decl. ¶ 5; Tomari Decl. Exhibit O. Ms. Nikolov did not appeal her decision of re-apply for a license.	39. Undisputed.
40. Detmer is licensed to have a handgun for the purpose of target shooting only. FAC ¶ 32, Tomari Decl. Exhibits A and H.	40. Undisputed.
41. In July, 2010 Detmer sought to amend his current pistol permit from target shooting only, to a "full carry" permit to carry concealed handguns while in public. FAC ¶ 32, Tomari Decl. Exhibits A and H.	41. Undisputed.

Alleged Fact

42. As part of his application, Detmer listed as factors he believed established "proper cause" for a full carry permit:

I am a Federal Law Enforcement Officer with the United States Coast Guard (USGC). Specifically, I have been a qualified Boarding Team Member (BTM) since September, 2004. When on-duty with the USCG I carry a .40 caliber pistol as a personal defense weapon. As a BTM my duties include boarding pleasure and commercial boats, inspecting shore side facilities and interacting with the public, all while performing the public service of enforcing laws. To maintain my BTM qualification, I complete semi-annual training consisting of a non-firing judgmental pistol course, a firing tactical pistol course, and use-of-force training. This training ensures I use the pistol safely and properly while on-duty. With a full carry permit, I would safely provide the same public service of enforcing laws while off-duty, if needed. My training and experience with the USGC shows I am qualified to have a full carry permit.

Attached is my enlistment contract with the USCG, showing I will be working for the USCG until at least December, 2014. Also attached is my BTM qualification letter, dated September, 2004.

FAC ¶ 31, Tomari Decl. Exhibit H.

Response

42. Undisputed.

Alleged Fact	Response
43. Detmer's application represented that while he carries a .40 caliber handgun when on duty with the Coast Guard, he has no authority to make arrests, and must surrender the handgun each time he leaves duty. FAC ¶ 31, Tomari Decl. Exhibits A and H.	43. Undisputed.
44. Upon completion of its investigation, the Department of Public Safety recommended denial of Detmer's application as he failed to 'demonstrate a need for self protection distinguishable from that of the general public. FAC ¶ 32, Tomari Decl. Exhibit H.	44. Undisputed.
45. After reviewing the materials related to Mr. Detmer's application, Judge Lorenzo denied Detmer's application to change his permit from "target shooting", to "full carry", and so informed him through correspondence dated September 27, 2010, finding there was "no justification" warranting a "full carry" permit. FAC ¶ 33; Lorenzo Decl. ¶ 5; Tomari Decl. Exhibit P.	45. Undisputed.
46. Nance is licensed to have a handgun for the purpose of target shooting only. FAC ¶ 34, Tomari Decl. Exhibits A and I.	46. Undisputed.
47. In June, 2010 Nance sought to amend his pistol permit from target shooting only, to a "full carry" permit to carry concealed handguns while in public. FAC ¶ 34, Tomari Decl. Exhibit I.	47. Undisputed.

Alleged Fact

Response

48. As part of his application, Nance listed as factors he believed established "proper cause" for a full carry permit:

48. Undisputed.

I am a citizen in good standing in the community with many family and social ties. I am steadily employed and stable. I am of good moral character.

My intent to change restriction is due to my desire to become involved in competitive shooting at various range locations. Also, the NRA has offered to partner with my wife to provide all female classes to women. It is my intention to co-instruct these classes. I would like to use my NRA Instructor Safety certifications to promote safe gun handling at various locations. Having a full carry permit would facilitate these endeavors.

FAC ¶ 31, Tomari Decl. Exhibit I.

49. Upon completion of its investigation, the Department of Public Safety recommended denial of Nance's application as he failed to 'demonstrate a need for self protection distinguishable from that of the general public. FAC ¶ 34, Tomari Decl. Exhibit I.

49. Undisputed.

Alleged Fact	Response
50. After reviewing the materials related to Mr. Nance's application, Judge Holdman issued a Decision dated September 9, 2010 denying Nance's application to change his permit from "target shooting", to "full carry". FAC ¶ 35, Tomari Decl. Exhibit Q; Holdman Decl. ¶ 4.	50. Undisputed.
51. Judge Holdman's September 9, 2010 Decision, observed that "those charged with the duty to oversee handgun licensing ... must ... recognize and honor the right while at the same time recognizing the limits to the right to bear arms under the Second Amendment". Holdman Decl. ¶ 5; Tomari Decl. Exhibit Q.	51. Undisputed.
52. Judge Holdman's September 9, 2010 Decision further found that "[t]he burden of establishing 'proper cause' for the issuance of a full-carry permit is upon the applicant to establish a 'special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession' ". Holdman Decl. ¶ 6; Tomari Decl. Exhibit Q.	52. Undisputed.

Alleged Fact

Response

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| 53. Upon reviewing Mr. Nance's application materials, Judge Holdman concluded that Nance had "not provided the court with any information that he faces any danger of any kind that would necessitate the issuance of a full carry firearm license; or [had] demonstrated a need for self-protection distinguishable from that of the general public or of other persons similarly situated", and thus denied his application to amend his license from target shooting to "full carry". FAC ¶ 35; Holdman Decl. ¶ 5; Tomari Decl. Exhibit Q. | 53. Undisputed. |
| 54. Marcucci-Nance is licensed to have a handgun for the purpose of target shooting only. FAC ¶ 36, Tomari Decl. Exhibits A and J. | 54. Undisputed. |
| 55. In June, 2010 Marcucci-Nance sought to amend her pistol permit from target shooting only, to a "full carry" permit to carry concealed handguns while in public. FAC ¶ 36, Tomari Decl. Exhibits A and J. | 55. Undisputed. |

Alleged Fact

Response

56. As part of her application, Marcucci-Nance listed as factors she believed established "proper cause" for a full carry permit:

56. Undisputed.

I am a citizen in good standing in the community with many familial and social ties. I am steadily employed and stable. I am of good moral character. My intent to change restriction is due to my desire to become involved in competitive target shooting at various range locations. Also, the NRA has offered to partner with me to provide all female classes to women.

I would like to use my NRA Instructor Safety certifications to promote safe gun handling at various locations. Having a full carry permit would facilitate these endeavors.

FAC ¶ 36, Tomari Decl. Exhibit J.

57. Upon completion of its investigation, the Department of Public Safety recommended denial of Marcucci-Nance's application as she failed to 'demonstrate a need for self protection distinguishable from that of the general public. FAC ¶ 37, Tomari Decl. Exhibit J.

57. Undisputed.

58. Judge Holdman's September 9, 2010 Decision, observed that "those charged with the duty to oversee handgun licensing ... must ... recognize and honor the right while the right to bear arms under the Second Amendment". Holdman Decl. ¶ 8; Tomari Decl. Exhibit R.

58. Undisputed.

Alleged Fact

Response

59. Judge Holdman September 9, 2010 Decision further found that "[t]he burden of establishing 'proper cause' for the issuance of a full-carry permit is upon the applicant to establish a 'special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession' ". Holdman Decl. ¶ 8; Tomari Decl. Exhibit R.

59. Undisputed.

60. Upon reviewing Marcucci- Nance's application materials, Judge Holdman concluded that Marcucci-Nance had "not provided the court with any information that he faces any danger of any kind that would necessitate the issuance of a full carry firearm license; or [had] demonstrated a need for self-protection distinguishable from that of the general public or of other persons similarly situated", and thus denied his application to amend his license from target shooting to "full carry". FAC ¶ 37; Holdman Decl. ¶¶ 8-9; Tomari Decl. Exhibit R.

60. Undisputed.

Alleged Fact

61. The current version of New York's Penal Law § 400.00(2)(f) was enacted in 1911 as "the Sullivan Law". It was enacted to combat handgun violence and provided in its original format:

Any person over the age of sixteen years, who shall have in his possession in any city, village or town of this state, any pistol, revolver or other firearm of a size which may be concealed upon the person, without a written license therefore, issued to him by a police magistrate of such city or village, or by a justice of the peace of such town, or in such manner as may be prescribed by ordinance in such city, village or town, shall be guilty of a misdemeanor.

Any person over the age of sixteen year, who shall have or carry concealed upon his person in any city, village, or town of this state, any pistol, revolver, or other firearm without a written license therefore issued to him by a police magistrate of such city or village, or by a justice of the peace of such town, or in such a manner as may be prescribed by ordinance of such city, village or town, shall be guilty of a felony.

N.Y. Penal Law § 1897 (1911)
(current version at N.Y. Penal Law § 400.00 (2)(f) (McKinney 2010));
Tomari Decl. Exhibit S (1).

Response

61. The former version of the law is irrelevant.

Alleged Fact

Response

62. A January 30th, 1911 New York Times article states:

A marked increase in the number of homicides and suicides in this city by shooting has led officials of the Coroner's office to start a movement which they hope will lead to new legislation restricting the sale of firearms...one of the Coroner's clerks has just completed a list of recommendations to the Legislature, which he and his fellow officials believe will result in materially decreasing acts of violence in which revolvers figure.

62. Plaintiffs are not in a position to admit or deny the truth of this statement, which is, in any event, wholly irrelevant.

Tomari Decl. Exhibit S (2).

63. The Law was intended to eradicate "the concealed weapon evil" (Tomari Exhibit S (2)), limit gang violence (Tomari Decl., Exhibit S (3)), and to "decrease appreciably the number of homicides, accidental and impulsive, while some restraint will be imposed even upon the criminals." (Tomari Decl., Exhibit S (4)).

63. The text of the various referenced documents is not disputed, but the legislative history of the Act as referenced by Defendants is entirely irrelevant to any issue in the case.

64. Testimony before the Senate Codes Committee hearing stated that the Sullivan law would prevent fifty murders in New York City annually, remove firearms from the hands of criminals. (Tomari Decl., Exhibit S (5)).

64. The text of the various referenced documents is not disputed, but the legislative history of the Act as referenced by Defendants is entirely irrelevant to any issue in the case.

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65. Senator Henry W. Pollock, a member of the Senate Codes Committee that approved the text of the Sullivan law, stated in a September 1, 1911 letter to New York Times that the bill was intended "to punish for the unlawful possession of dangerous weapons" and to "aid the authorities in the identification of the owner of a firearm used in the commission of a crime." Senator Pollock stated that "the only opposition to any of the provisions of this bill urged before either of the committees of the Legislature was that of representatives of manufacturers and dealers in firearms." (Tomari Decl., Exhibit S (6)).

65. The text of the various referenced documents is not disputed, but the legislative history of the Act as referenced by Defendants is entirely irrelevant to any issue in the case.

66. Two years after the Sullivan Law's initial enactment, a 1913 amendment created the "proper cause" requirement by the addition of a new paragraph stating:

66. The text of the various referenced documents is not disputed, but the legislative history of the Act as referenced by Defendants is entirely irrelevant to any issue in the case.

In addition, it shall be lawful for any magistrate, upon proof before him that the person applying therefore is of good moral character, and that *proper cause* exists for the issuance thereof, to issue such person a license to have and carry concealed a pistol or revolver without regard to employment or place of possessing such weapon...

N.Y. Penal Law § 1897 (1913)
(current version at N.Y. Penal Law § 400.00 (2)(f) (McKinney 2010));
Tomari Decl. Exhibit S (7).

Alleged Fact

Response

67. A 1921 amendment divided the law into sections and changed the licensing language to provide:
- In addition, it shall be lawful for *the police commissioner in the city of New York or elsewhere in this state, for a judge or justice of a court of record*, upon proof before him of the person applying therefore is of good moral character, and that proper cause exists for the issuance thereof, to issue such person a license to have and carry concealed a pistol or revolver without regard to employment or place of possessing such weapon...
- N.Y. Penal Law § 1897(9)(1921) (current version at N.Y. Penal Law § 400.00 (2)(f) (McKinney 2010)) (emphasis added); Tomari Decl. Exhibit S (8).
68. The text of the Sullivan Law remained largely unchanged until the early 1960s. On January 3rd, 1962, Senator Albert Berkowitz, at the request of the New York State Joint Legislative Committee on Firearms and Ammunitions, introduced an act to amend and reorganize provisions of the Penal Law. The 1962 Report of the New York State Joint Legislative Committee on Firearms and Ammunition states that "more than a quarter of a million serious crimes are committed with weapons annually in the United States, and the number is on the increase." Rep. of N.Y.J. Legis. Comm., No. 29 at 11 (1962); Tomari Decl. Exhibit S (9).

67. The text of the various referenced documents is not disputed, but the legislative history of the Act as referenced by Defendants is entirely irrelevant to any issue in the case.
68. The text of the various referenced documents is not disputed, but the legislative history of the Act as referenced by Defendants is entirely irrelevant to any issue in the case.

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| <p>69. Additionally, the report states:</p> <p>The legislative problem posed for the fifty-one American jurisdictions (fifty states and the District of Columbia), charged with the major responsibility of criminal law enforcement in the United States, suggests itself: to enact statutes adapted to prevent these crimes and occurrences before they happen, and, at the same time, preserve the legitimate interests of individual liberty, training for national defense, hunting, target shooting and trophy collecting.</p> | <p>69. The text of the various referenced documents is not disputed, but the legislative history of the Act as referenced by Defendants is entirely irrelevant to any issue in the case.</p> |
| <p>70. On July 1, 1963, a modified version of the original bill became effective. Rep. of N.Y. J. Legis. Comm., No. 35 at 5 (1963); Tomari Decl. Exhibit S (10).</p> | <p>70. The text of the various referenced documents is not disputed, but the legislative history of the Act as referenced by Defendants is entirely irrelevant to any issue in the case.</p> |
| <p>71. The purpose of the amendment was stated to be for "clarification and rearrangement of present laws affecting firearms and ammunition, and contains no substantive change in the present laws." N.Y. Legis. Ann. at 65 (1963), (emphasis in original), Tomari Decl. Exhibit S (11).</p> | <p>71. The text of the various referenced documents is not disputed, but the legislative history of the Act as referenced by Defendants is entirely irrelevant to any issue in the case.</p> |
| <p>72. Thus, the licensing provisions formerly found in § 1897 were placed in § 1903(2) of the Penal Laws of New York. N.Y. Penal Law § 1903 (1963) (current version at N.Y. Penal Law § 400.00(2)(f) (McKinney 2010)); Tomari Decl. Exhibit S (12).</p> | <p>72. The text of the various referenced documents is not disputed, but the legislative history of the Act as referenced by Defendants is entirely irrelevant to any issue in the case.</p> |

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73. The 1963 New York State Legislative Annual states:

It is noteworthy that the New York State Conservation Council, which represents hundreds of thousands of sportsmen and to which belong substantially all the responsible conservationist groups in the state, at the State Convention in Lake Placid last October, unanimously adopted a resolution not to oppose this bill, provided that any newly discovered substantive changes would be deleted.

N.Y. Legis. Ann. 1963 at 66; Tomari Decl. Exhibit S (13).

74. In its 1965 report, the New York State Joint Legislative Committee on Firearms and Munitions again recognized the role of the penal law in crime and violence prevention. Specifically, the Committee stated that "the primary value to law enforcement of adequate statutes dealing with dangerous weapons is prevention of crimes of violence before their consummation." Rep. of N.Y. J. Legis. Comm., No.6 at 12 (1965); Tomari Decl. Exhibit S (13).

73. The text of the various referenced documents is not disputed, but the legislative history of the Act as referenced by Defendants is entirely irrelevant to any issue in the case.

74. The text of the various referenced documents is not disputed, but the legislative history of the Act as referenced by Defendants is entirely irrelevant to any issue in the case.

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75. Additionally, the committee states:

...in the absence of adequate weapons legislation, under the traditional law of criminal attempt, lawful action by the police must await the last act necessary to consummate the crime...adequate statutes governing firearms and weapons would make lawful intervention by police and prevention of these fatal consequences, before any could occur."

Rep. of N.Y. J. Legis. Comm., No. 6 at 13 (1965); Tomari Decl. Exhibit S (13).

75. The text of the various referenced documents is not disputed, but the legislative history of the Act as referenced by Defendants is entirely irrelevant to any issue in the case.

76. No significant revisions occurred to the text of §1903 until the Revised Penal Law of 1965 came into effect in 1967 which renumbered many penal provisions thereby creating today's modern New York Penal Law § 400.00.

76. The text of the various referenced documents is not disputed, but the legislative history of the Act as referenced by Defendants is entirely irrelevant to any issue in the case.

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77. In the past 30 years, the legislature has repeatedly chosen not to remove the "proper cause" requirement for concealed carry permits. Notably, Senator Franz Leichter enumerated many of the reasons why the "proper cause" requirement of New York Penal Law § 400.00(2)(f) should remain intact during the 1982 Senate debate over Bill Number 3409, an act to amend the Penal Law, in relation to issuance of licenses to have and carry pistols:

And certainly one of the concerns...that any licensing authority ought to have and which will be lost under your bill is some assessment of the maturity, the responsibility and the ability of the person is licensed to safely possess and use a handgun.

So we are not only talking about crime, which obviously is important, but we're also talking about public safety...Now, in this instance, it's not only protecting a person from himself but it's protecting innocent people who get shot every day because handguns are lying around, and that is something that should be of concern to all of us...I'm afraid in your bill that some of the restrictions and some of the safeguards that we have are going to be eliminated.

...by making handguns more readily and easily accessible and available in our society, it means inevitably that more handguns are going to come into the hands of criminals, and by

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77. The text of the various referenced documents is not disputed, but the legislative history of the Act as referenced by Defendants is entirely irrelevant to any issue in the case.

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loosening your standards for licensing, it means that people are going to have handguns who either aren't going to safeguard them properly or just there's going to be more handguns available that are going to be stolen or are going to be used in the commission of a crime.

N.Y. Senate Debate on Senate Bill 3409, Jun. 2, 1987, at 2470-2474 (Statement of Senator Leichter); Tomari Decl. Exhibit S (14).

Response

Alleged Fact

78. New York has a compelling and well recognized interest in limiting the number of guns on its street; especially handguns, which are easily concealed and closely linked to use in crime. These interests are described in part in the declarations submitted in support of the State Defendants' Motion for Summary Judgment, and described in the studies, articles, history and reports referenced in the State Defendants' Memorandum of Law in Support of Motion for Summary Judgment. These include: Declaration of Philip J. Cook, ("Cook Decl."); Declaration of Franklin E. Zimring, ("Zimring Decl."); Declaration of Thomas L. Fazio ("Fazio Decl."); Declaration of Andrew Lunetta, ("Lunetta Decl."); Declaration of Stephanie Miner ("Miner Decl."); and Declaration of the Hon. David R. Roefaro ("Roefaro Decl.>").

Response

78. Disputed. This is not a statement of fact, but a statement of opinion. New York has an interest in limiting gun violence, but it has no interest in limiting the exercise of Second Amendment rights by law-abiding people. In any event, the reduction in gun carrying is an effect of the law, not an interest used to justify it. *See Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120 (1991).

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| 79. | Many Americans die by gunfire. The gun deaths from homicide, accident and suicide have totaled close to one million during the last three decades. In 2007, the most recent year for which the National Center for Health Statistics provides data on deaths, there were 18,361 criminal homicides, of which 69% were committed with guns. Cook Decl. ¶ 3. | 79. | Irrelevant. |
| 80. | In 2007, homicide victimization rates were 15 times as high for black men aged 15-34, as for white non-Hispanic men in this age group. Homicide is the leading cause of death for black males age 15-34, and the second-leading cause of death for Hispanic males in this age group. Cook Decl. ¶ 4. | 80. | Irrelevant. |
| 81. | Handguns are especially a law enforcement and public health concern because they are much more likely to be used in criminal violence than long guns. While handguns are approximately one third of all guns owned by civilians in the United States, they are used in more than 75% of all gun killings. Cook Decl. ¶ 9; Zimring Decl. ¶ 5. | 81. | Irrelevant. “It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon.” <i>District of Columbia v. Heller</i> , 128 S. Ct. 2783, 2818 (2008). |
| 82. | Handguns pose a particular public safety challenge because they are smaller, more conveniently carried, and easily concealed from law enforcement, potential victims, and the public at large. Cook Decl. ¶ 17. | 82. | Irrelevant. Plaintiffs do not dispute that the government has a legitimate interest in regulating handguns and other firearms in the interest of public safety. |

Alleged Fact

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| <p>83. It takes little skill to operate a modern semi-automatic pistol and a person with just a few pockets can easily carry dozen of rounds of ammunition without ready detection. Declaration of Thomas L. Fazio, sworn to January 21, 2011 ("Fazio Decl.") ¶ 4.</p> | <p>83. Irrelevant.</p> |
| <p>84. Of the 536 law enforcement officers who were feloniously killed in the United States between 2000 and 2009, 490 (91%) were assaulted with a firearm and 73 % of those were with a handgun. Cook Decl. ¶ 5; Fazio Decl. ¶ 7.</p> | <p>84. Plaintiffs are not positioned to admit or deny these factual assertions which are, in any event, irrelevant. Plaintiffs do not dispute that the government has a legitimate interest in regulating handguns and other firearms in the interest of public safety.</p> |
| <p>85. Ninety-four percent of all law enforcement officers feloniously killed in the line of duty in 2009 were killed by a gun, of which 58% were killed by handguns. Declaration of Andrew Lunetta, sworn to January 25, 2011 ("Lunetta Decl.") ¶ 11.</p> | <p>85. Plaintiffs are not positioned to admit or deny these factual assertions which are, in any event, irrelevant. Plaintiffs do not dispute that the government has a legitimate interest in regulating handguns and other firearms in the interest of public safety.</p> |
| <p>86. Every New York City Police Department ("NYPD") officer killed since 2005, has been killed with a handgun. Lunetta Decl. ¶ 10.</p> | <p>86. Plaintiffs are not positioned to admit or deny these factual assertions which are, in any event, irrelevant. Plaintiffs do not dispute that the government has a legitimate interest in regulating handguns and other firearms in the interest of public safety.</p> |

Alleged Fact

87. The likelihood that a gun will be used in crime is closely linked to the general availability of guns, and especially handguns. Cook Decl. ¶¶ 12, 14; Roefaro Decl. ¶ 5; Lunetta Decl. ¶ 12.

Response

87. Disputed. This is not a “fact,” but a matter of opinion, and the subject of much legitimate debate as a matter of criminology. *See, e.g.* Florenz Plassman & John Whitley, *Comment: Confirming “More Guns, Less Crime,”* 55 *STANFORD L. REV.* 1313 (2003); Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide: A Review of International Evidence*, 30 *HARVARD JOURNAL OF LAW & PUB. POL’Y* 651 (2007); “[N]o statistically significant relationship between guns and murder rates.” Jeffrey Miron, *Violence, Guns, and Drugs: A Cross-Country Analysis*, 44 *JOURNAL OF LAW & ECONOMICS*, 615. “[N]o significant correlations (of gunstock levels) with total suicide or homicide rates were found.” Abstract to Martin Killias, et al., *Guns, Violent Crime, and Suicide in 21 Countries*, 43 *CANADIAN J. OF CRIMINOLOGY* 429 (2001); Lawrence Southwick, *Do Guns Cause Crime? Does Crime Cause Guns? A Granger Test*, 25 *ATLANTIC ECON. J.* 256 (1997); Gary Kleck & Britt Patterson, *The Impact of Gun Control and Gun Ownership Levels on City Violence Rates*, 9 *J. QUANT. CRIMINOLOGY* 249-87 (1993); “The estimated net effect of guns on crime... is generally very small and insignificantly different from zero.” Carlisle Moody & Thomas Marvell, *Guns and Crime*, 71 *SO. ECON. J.* 720, 735 (2005); *see also* John Lott, *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS* (3d edition, Univ. of

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Chicago Press 2010). From 1946 to 2004, gun ownership in the United States increased from 34,400 to 85,000 civilian firearms per 100,000 people, while the murder rate dropped from 6.9 to 5.5 per 100,000 individuals. Between 1973 and 2003, the civilian gun stock rose from 627 to 858 per 1000 people, while the murder rate declined 41%. *See* Murder rate from FBI, Uniform Crime Reports; Guns per capita from Gary Kleck, Targeting Guns: Firearms and Their Control 96-97 (1997), and BATF Annual Firearms Manufacture and Export Reports, available at <http://www.atf.gov/statistics/afmer/>

Alleged Fact

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| 88. Allowing more individuals to carry concealed handguns will endanger officers stopping individuals on the street or making car stops, and complicate interactions between uniformed officers and those working in plain clothes or off-duty. Lunetta Decl. ¶¶ 13- 16. | 88. Disputed. This is plainly a matter of opinion, not a “fact.” Considering that 43 states issue licenses to carry concealed handguns on a shall-issue basis, or require no such licenses at all, this opinion is obviously widely disputed. |
| 89. From 1981 to 2009, 26 police officers around the country were shot and killed by fellow officers who had mistaken them for criminals. Fazio Decl. ¶ 6. | 89. Plaintiffs are not in a position to dispute this figure, which is, in any event, irrelevant. |
| 90. The ability to stop and frisk individuals who appear to be carrying handguns in public is one of the NYPD's greatest tactics in curbing violence. Increasing the prevalence of concealed handguns will undermine that tactic. Lunetta Decl. ¶ 16. | 90. Disputed. What qualifies as a “greatest tactic” is a matter of debate. Plaintiffs submit that stopping law-abiding people for exercising a constitutional right is not a great tactic. Numerous police tactics that would undoubtedly be effective in reducing crime would also be unconstitutional, <i>e.g.</i> , dispensing with the Fourth, Fifth, Sixth, and Eighth Amendments. |

Alleged Fact

91. The majority of criminal homicides and other serious crimes are committed by individuals who have not been convicted of a felony and would receive permits to carry concealed weapons without the "proper cause" requirement. Cook Decl. ¶¶ 27-35; Roefaro Decl. ¶¶ 4, 6.

Response

91. Irrelevant, but in any event, disputed. “The vast majority of persons involved in life threatening violence have a long criminal record with many prior contacts with the justice system.” Delbert Elliott, *Life Threatening Violence is Primarily a Crime Problem*, 69 COLO. L. REV. 1081, 1093 (1998)(summarizing studies); *see also* Jo McGinty, *New York Killers, and those Killed, by the Numbers*, NEW YORK TIMES, Apr. 28, 2006 (for murders committed in 2003-05, “More than 90 percent of the killers had criminal records”); Richard Berke, *Capital Offers a Ripe Market to Drug Dealers*, NEW YORK TIMES, Mar. 28, 1989, at 1, 6 (almost all murderers and victims in Washington, D.C. “involved in the drug trade”); Anthony Braga et al., *Understanding and Preventing Gang Violence: Problem Analysis and Response Development in Lowell, Massachusetts*, 9 POLICE Q. 20, 29-31 (2006) (in Lowell, Mass., “Some 95% of homicide offenders” had been “arraigned at least once in Massachusetts courts” before they killed. “On average ... homicide offenders had been arraigned for 9 prior offenses....”); Gus Sentementes, *Patterns persist in city killings: Victims, suspects usually black men with long criminal histories*, BALTIMORE SUN, Jan. 1, 2007 (92% of Baltimore murder suspects in 2006 had criminal records); “Homicide offenders are likely to commit their murders in the course of long criminal careers consisting primarily of nonviolent crimes but

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including larger than normal proportions of violent crimes.” David Kennedy & Anthony Braga, *Homicide in Minneapolis: Research for Problem Solving*, 2 HOMICIDE STUD. 263, 276 (1998) (analyzing national data for 1988, 74% of criminals for whom data was available had prior criminal record).