

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

CARLOS NINO DE RIVERA LAJOUS,	)	Case No. 4:13CV3070
	)	
Plaintiffs,	)	
	)	
v.	)	<b>BRIEF IN SUPPORT OF</b>
	)	<b>DEFENDANTS' MOTION TO DISMISS</b>
JON BRUNING, et al,	)	
	)	
Defendant.	)	

**INTRODUCTION**

Plaintiffs Carlos Nino De Rivera Lajous (“Lajous”), the Second Amendment Foundation Inc., (“SAF”), and the Nebraska Firearms Owners Association (“NFOA”)<sup>1</sup> challenge Nebraska’s concealed carry permitting process because only United States citizens are qualified to obtain a permit. Plaintiffs claim this is a violation of the Equal Protection Clause of the 14<sup>th</sup> Amendment, the 2nd Amendment of the United States Constitution, and the federal pre-emption of immigration law. (Filing No. 1, ¶¶ 25-31) Defendants have filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and offer the instant brief in support of said Motion.

**SUMMARY OF LAW AT ISSUE**

In their Complaint, Plaintiffs challenge Nebraska’s Concealed Handgun Permit Act, Neb. Rev. Stat. §§69-2427 through 69-2449, which was adopted in 2010. To aid the Court in understanding the arguments put forth by Plaintiffs and the State, a brief summary of the Act is provided below.

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<sup>1</sup> For purposes of clarity, Plaintiff LaJous and the members of the Plaintiffs NOAF and SAF will here-forward be referred to collectively as “Plaintiffs.”

Individuals may obtain permits to carry a concealed carry handgun in accordance with the Concealed Handgun Permit Act ("the Act"). Neb. Rev. Stat. § 69-2428. Applicants are required to apply in person at any Nebraska State Patrol Headquarters and present a current proof Nebraska or military identification and a set of fingerprints for a criminal history record check. Neb. Rev. Stat. § 69-2430. The applications are made on forms prescribed by the Superintendent of Law Enforcement and Public Safety. *Id.* Applicants shall: (1) be at least 21 years of age; (2) not be prohibited from purchasing a handgun by 18 U.S.C. § 922; (3) possess the same powers of eyesight as required for a Class O operator's license; (4) not have been convicted of a felony; (5) not have been convicted of a misdemeanor; (6) not have been found to be a mentally ill and dangerous person within the previous 10 years; (7) have been a resident of the state for at least 180 days; (8) not have any conviction relating to firearms, unlawful use of a weapon, or controlled substances; (9) not be on parole; (10) be a citizen of the United States; and (11) provide proof of training. Neb. Rev. Stat. § 69-2443. The Nebraska State Patrol adopts and promulgates rules and regulations to carry out the Act. Neb. Rev. Stat. § 69-2446.

### **STANDARD OF REVIEW**

"Dismissal under Rule 12(b)(6) is appropriate if it is clear that no relief can be granted under any set of facts that could be proven consistent with the allegations." *O'Neal v. State Farm Fire & Cas. Co.*, 630 F.3d 1075, 1077 (8th Cir. 2011). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *U.S. ex rel. Raynor v. Nat'l Rural Utilities Co-op. Fin., Corp.*, 690 F.3d 951, 955 (8th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937 (2009)). "A claim has facial plausibility when the plaintiff pleads

factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* In applying these standards, the court must "accept as true the factual allegations contained in the complaint and draw all reasonable inferences in favor of the nonmoving party." *Mathers v. Wright*, 636 F.3d 396, 397 (8th Cir. 2011).

## **ARGUMENT**

### **I. ATTORNEY GENERAL JON BRUNING SHOULD BE DISMISSED.**

Plaintiffs seek relief from a party, the Attorney General, who cannot provide the requested relief and against whom they do not have standing. Plaintiffs assert broadly that as the Attorney General, Defendant Bruning is "responsible for executing and administering the state of Nebraska's laws, customs, practices, and policies, including NRS § 69-2433(10)."<sup>2</sup> (Filing No. 1, ¶ 17) However, reviewing the entirety of the Nebraska Concealed Handgun Permit Act (Neb. Rev. Stat. §§ 69-2427 through 69-2449) ("Act") reveals no indication that the Attorney General has the responsibility to execute and administer it, as Plaintiffs assert. There is no statutory provision supporting Plaintiffs' assertion either. For example, nowhere in Neb. Rev. Stat. § 84-203, the provision describing the Attorney General's duties, is the Attorney General given authority over or responsibility for the Department of Law Enforcement and Public Safety or the Nebraska State Patrol, the agencies assigned authority to administer the Act. Nor does the Nebraska Constitution afford the Attorney General the broad responsibilities which Plaintiffs attribute

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<sup>2</sup> This is not an allegation of fact, but law. Thus the Court need not treat it as "true" for purposes of this matter.

to him. The Attorney General only has such authority as is afforded by the Nebraska Constitution or Statute. Neb. Rev. Stat. § 84-203 et seq. Plaintiffs have failed to allege action by or on behalf of the Attorney General which is traceable to the alleged injury. As Defendant Bruning has no hand in the issuance or denial of concealed handgun permits, Defendant Bruning should be dismissed.

Plaintiffs' complaint against Defendant Bruning also fails as a matter of law for the independent reason that there is no relief available to Plaintiffs from Defendant Bruning. Because the Attorney General is in no way responsible for administering Nebraska's concealed carry scheme, the Attorney General cannot redress the alleged injuries suffered by Plaintiffs. Without available relief from the Attorney General, not only do Plaintiffs lack standing as to the Attorney General, they also fail to state a claim upon which relief can be granted. See *Minor v. Yanero*, 2008 WL 822102 (N.D.W. Va. Mar. 26, 2008) (motion to dismiss granted where named party is powerless to provide the relief requested); *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Murphy*, 448 F. Supp. 2d 166, 170 (D.D.C. 2006) (motion to dismiss granted where defendant did not assume responsibility and cannot provide the requested relief). Taking, as the Court must for the purposes of this motion, all the allegations in the Complaint as true, Plaintiffs fail to state a claim against Defendant Bruning upon which the Court can grant relief.

The Attorney General neither approves nor denies applications for the concealed carry of a handgun. Neb. Rev. Stat. § 69-2430. The Attorney General does not direct the Nebraska State Patrol. The Attorney General has no input into the issuance of concealed handgun permits. An injunction against the Attorney General would have no effect on securing Plaintiffs' alleged rights, nor would a declaratory judgment to the effect that Neb.

Rev. Stat. § 69-2433 is unconstitutional alter, in any way, the role of the Attorney General. Since there is no action of the Attorney General to be compelled or halted and the Attorney General cannot grant the remedy sought—the ability of non-citizens to carry a concealed handgun- the Court should grant Defendants' Motion to Dismiss.

## **II. STATES CAN REGULATE CONCEALED HANDGUNS UNDER THE SECOND AMENDMENT.**

Under Nebraska law, with limited exceptions, gun owners must obtain a concealed handgun permit in order to lawfully carry a concealed handgun. Neb. Rev. Stat. § 69-2433. The requirements and procedures for obtaining a concealed handgun permit in Nebraska are set forth in Neb. Rev. Stat. § 69-2433. Among the numerous requirements and qualifications, the State of Nebraska requires that an applicant must be a United States citizen in order to obtain a concealed handgun permit.<sup>3</sup> Neb. Rev. Stat. § 69-2433(10). Plaintiffs challenge only this aspect of the statute.

In their Complaint, Plaintiffs allege that the citizenship requirement contained in Neb. Rev. Stat. § 69-2433, which restricts lawfully admitted citizens from carrying concealed handguns based on citizenship, violates their individual right to keep and bear arms as secured by the Second Amendment. (Filing No. 1, ¶ 28) They also allege the citizenship requirement of Section 69-2433 is a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution. (Id., ¶ 26). However, since the protections afforded under the Second Amendment are limited to citizens and the Second Amendment does not create a right to carry concealed weapons, the Court should grant Defendants'

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<sup>3</sup> As it relates to this suit, Neb. Rev. Stat. § 69-2433(10) provides in pertinent part:  
An Applicant shall:  
(10) Be a citizen of the United States;

Motion to Dismiss.

First, United States Supreme Court jurisprudence limits the protections afforded under the Second Amendment to citizens. The Second Amendment protects “the right of law-abiding, responsible **citizens** to use arms in defense of hearth and home.” *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (emphasis added). The Supreme Court has held that therefore a total “ban on handgun possession in the home violates the Second Amendment, as does [a] prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.” *Id.* The Court reiterated throughout *Heller*, however, that the Second Amendment protects a “not unlimited” right belonging to “citizens.” *Id.* at 584-85 & n.8; 595, 602-3, 607-8, 611-14, 616, 618-19, 625-26, 629-30, 635. As LaJous is not a citizen of the United States, the Second Amendment protections are not afforded to him.

Second, the Second Amendment does not create a right to carry concealed weapons. As the Eastern District of Missouri has concluded in facing a challenge to Missouri’s Conceal Carry law, “this case does not involve a limitation on a Second Amendment right.” *Plastino v. Koster*, 2013 U.S. Dist. LEXIS 58544 (E.D. Mo. Apr. 24, 2013).

From Blackstone through the 19<sup>th</sup>-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Heller*, 554 U.S. 570, 626, (2008). The Supreme Court noted that “the majority of 19<sup>th</sup>-century courts to consider the question held that the prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.” *Id.* Indeed, the nineteenth century Supreme Court agreed, noting in dicta that “the right of the people to keep and bear arms. . . is not infringed by laws prohibiting the carrying of concealed weapons.” *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897).

Modern federal courts that have been specifically called upon to address the

constitutionality of concealed carry restrictions have found the restrictions did not violate the Second Amendment. See *Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013) (holding Second Amendment does not provide the right to carry a concealed firearm); *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012) (holding New York legislation limiting concealed firearms in public does not violate the Second Amendment); *Hightower v. City of Boston*, 693 F.3d 61, 73 (1st Cir. 2012) (holding revocation of license to carry concealed firearm did not violate Second Amendment); *United States v. Rene E.*, 583 F.3d 8, 12 (1st Cir. 2009) ("laws prohibiting the carrying of concealed weapons" are an "example[ ] of 'longstanding' restrictions that [are] 'presumptively lawful' under the Second Amendment") (quoting *Heller*, 554 U.S. at 626); *Richards v. County of Yolo*, 821 F.Supp. 2d 1169, 1174 (E.D. Cal. 2011) ("[T]he Second Amendment does not create a fundamental right to carry a concealed weapon in public"); *Martinkovich v. Oregon Legislative Body*, 2011 U.S. Dist. LEXIS 154726, 2011 WL 7693036, at \*2 (D. Or. Aug. 24, 2011) ("The Second Amendment does not prohibit regulations on carrying a concealed weapon."); *Dorr v. Weber*, 741 F.Supp.2d 993, 1005 (N.D. Ia. 2010) ("a right to carry a concealed weapon under the Second Amendment has not been recognized to date")

*Plastino v. Koster*, 2013 U.S. Dist. LEXIS 58544, pg. 10-11 (E.D. Mo. Apr. 24, 2013).

As the Second Amendment does not create a right to carry concealed weapons, denial of a permit for a concealed weapon cannot violate the Second Amendment. Since the protections afforded under the Second Amendment are limited to citizens and the Second Amendment does not create a right to carry concealed weapons, Plaintiffs have failed to state a claim against Defendants Bruning and Sankey.

### **III. Neb. Rev. Stat. § 69-2433(10) Does Not Violate the Fourteenth Amendment.**

As argued above, the concealed carry of a handgun does not implicate any Second Amendment right. Plaintiffs contend they cannot be denied their Second Amendment rights under the Fourteenth Amendment based on their alienage. Plaintiffs' claim fails because (1) the prohibition of non-citizens from carrying concealed weapons has a rational means to promote the legitimate end of public safety; and (2) even if subjected to strict scrutiny, the law would still pass constitutional muster because it achieves the

compelling government interest of protecting the public from those individuals carrying concealed handguns whose criminal backgrounds cannot be determined by the licensing agency, by the least restrictive means available.

**A. The law is subject to, and passes, rational basis review because it neither implicates a fundamental right nor targets a suspect class.**

“If a legislative classification neither burdens a fundamental right nor targets a suspect class,” it is not subject to strict scrutiny and must be upheld so long as the classification rationally relates to a legitimate government end. *Romer v. Evans*, 517 U.S. 620, 631 (1996) citing *Heller v. Doe*, 509 U.S. 312, 319-20 (1993). As argued above, regulation of the concealed carry of a handgun does not implicate a Second Amendment right, and no other fundamental rights are implicated. Further, State laws that discriminate on the basis of alienage are not under strict scrutiny when the State law falls within its traditional constitutional prerogative, public safety. As the First Circuit has noted, the right protected by the Second Amendment has long been understood to be “a civic right” that applies only to “members of the polity” who are “deemed capable of exercising it in a virtuous manner.” *United States v. Rene E.*, 583 F.3d 8, 15 (1st Cir. 2009). Because the Nebraska law is a public safety measure, Nebraska has acted within its traditional constitutional prerogative and thus the Act must be subjected only to rational basis review. Nebraska’s Concealed Handgun Permit Act easily meets this threshold.

**1. Regulation of concealed handguns does not implicate a fundamental right.**

Plaintiff LaJous concedes he can possess and carry firearms in his home and openly in public, but wishes to conceal them on his person outside of his home. (Filing No.

1, ¶¶ 9, 10). However, as argued above, regulation of concealed handguns does not implicate a fundamental right. *District of Columbia v. Heller*, 554 U.S. 570 (2008). Instead, as applied to the states, the Second Amendment guarantees LaJous a “not unlimited” right to keep and bear firearms for his own defense. *Id.* at 626. Because regulation of concealed handguns does not violate the Second Amendment, and no other rights have been asserted by LaJous, the law does not implicate a fundamental right. Because the law also does not target a suspect class, it should be evaluated under rational basis review. *Romer*, 517 U.S. at 631.

**2. Regulation of Concealed Handguns Is Firmly within the State’s Constitutional Prerogative of Public Safety.**

Not all laws that concern alienage are constitutionally suspect under the Equal Protection Clause of the Fourteenth Amendment. *Foley v. Connelie*, 435 U.S. 291, 294 (1978) (“we [have never] held that all limitations on alienage are suspect.”). “State laws discriminating on the basis of alienage are reasonable, and not suspect, when they deal with subject matter ‘firmly within the state’s constitutional prerogatives.’” *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973). In *Sugarman*, the Supreme Court upheld a state law excluding non-citizens from civil service on that basis, and the *Sugarman* line of cases has extended the rational basis shelter for laws discriminating on the basis of alienage beyond its original context. *Perkins v. Smith*, 370 F. Supp. 134 (D. Md. 1974) aff’d, 426 U.S. 913 (1976) (states may exclude aliens from jury service); *Foley*, 435 U.S. 291 (states may exclude aliens from serving as state troopers); *Cabell v. Chavez-Salido*, 454 U.S. 432 (1985) (states may exclude aliens from service as probation officers); *Ambach v. Norwick*, 441 U.S. 68 (1979) (states may exclude aliens from teaching in public schools). See also

*de Paz Lisk v. Aponte Roque*, 1989 WL 607276 (P.R. June 30, 1989) (collecting cases).

Thus, there is precedential authority supporting the proposition that a state law prohibiting non-citizens from carrying concealed weapons in public is constitutional so long as it is a rational means of achieving a legitimate government interest. Although courts have split on the level of scrutiny to be applied to laws denying non-citizens concealed-carry permits, neither the Eighth Circuit<sup>4</sup> nor the Supreme Court have yet spoken on the issue, and this case presents a reasonable opportunity for the extension of *Sugarman*'s rational basis review to such laws.

In *Sugarman*, the Supreme Court found that a state law refusing to hire non-citizens is valid where the refusal "rests on legitimate state interests that relate to" the position being sought. 413 U.S. 634 at 647. Such laws are subject to rational basis review because they implicate matters "firmly within the state's constitutional prerogatives" and reflect the state's historical "responsibility for the establishment and operation of its own government". *Id.* at 648.

The rationale articulated in *Sugarman* has been extended to include more and more State functions and responsibilities because the Supreme Court held that *Sugarman* and its progeny "*did not describe the outer limits of permissible citizenship requirements*", and that other such laws could be scrutinized "under limited judicial review." *Cabell*, 454 U.S. at 444-45 (emphasis added). In expanding the *Sugarman* framework, courts have focused on the role the non-citizen subject to the law would play in the functioning of society. See e.g. *Ambach*, 441 U.S. 68 (applying *Sugarman* to public school teachers

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<sup>4</sup> The Eighth Circuit has indicated approval of rational basis review where State laws regulate under *Sugarman*'s paradigm. *Midwest Foster Care and Adoption Ass'n v. Kincaid*, 712 F.3d 1190 (8th Cir. 2013).

because of the importance of youth education and the crucial role the teacher plays in shaping society).

Nebraska's concealed-carry licensure law is similar in function to laws upheld in *Ambach*, *Foley*, and *Cabell*. In *Foley*, the Supreme Court upheld a New York law requiring its State Troopers to be United States citizens because they are vested with the police power of the State and could rationally be limited to those who "can be presumed to share in the values of its political community as, for example, those who possess citizenship status." 435 U.S. at 302 (Blackmun, J. concurring). In *Ambach*, the Supreme Court under *Sugarman* upheld a New York law forbidding non-citizens from teaching in public schools unless they had declared an intention to become United States citizens. 441 U.S. at 71. The Court reasoned that because public school teachers, like the police in *Foley*, "fulfilled a fundamental obligation of the State to its constituency", laws prohibiting non-citizens from taking those positions satisfied rational basis review. *Id.* at 76. Finally, in *Cabell*, the Supreme Court upheld a California law requiring that peace officers be United States citizens because officers exercise "the sovereign's coercive police powers over the members of the community . . ." 454 U.S. at 444. The law was upheld despite some of the officers' connection to the State's power being "tenuous", significantly because those officers had in common the ability to carry firearms. *Id.* at 443-4.

Defendants concede that to date, *Sugarman's* rational-basis equal protection safe harbor for state laws concerning non-citizens has been confined to regulating the delegation of state authority. However, *Foley*, *Ambach*, and *Cabell*, read together, articulate an equal protection basis for reviewing laws prohibiting non-citizens from carrying concealed weapons under rational basis review. Like in *Foley* and *Ambach*, the challenged

law here impacts a “fundamental obligation of the State to its constituency” – the State’s obligation to keep its citizens safe. *Ambach*, 441 U.S. at 76; *Hill v. Colorado*, 530 U.S. 703 (2000) (maintaining the public’s health and safety is within the State’s traditional police power). Like in *Cabell*, the challenged law here, while having only a tenuous connection to the delegation of the State’s authority, affects the public’s use of concealed handguns.

Like in *Foley*, the challenged law here favors those individuals who “can be presumed to share in the values of its political community” – citizens, in the exercise of a privilege which is regulated by the police. 435 U.S. at 302 (Blackmun, J. concurring). Here, the State’s sovereignty has been exercised by the legislature to carry out the State’s fundamental obligation to its constituency by regulating handguns and protecting the public from those individuals carrying concealed handguns whose criminal backgrounds cannot be determined by the licensing agency. Note also the crucial social significance in allowing some members of the public limited self-policing powers by granting the privilege of concealing handguns while in public, much like the crucial role played by teachers in *Ambach*. In sum, the Act is a valid exercise of police power by those who are ultimately obligated to oversee public safety – the legislature – in denying non-citizens the ability (not the right) to conceal handguns in public.

Because the law fulfills a “fundamental obligation of the State to its constituency” and falls “firmly within the State’s constitutional prerogatives”, and because *Sugarman* and its progeny do not “describe[ ] the outer limits” of permissible state restrictions on alienage, the law is subject to a rational basis review under *Sugarman*’s equal protection analysis. *Ambach*, 441 U.S. at 71; *Sugarman*, 413 U.S. at 648; *Cabell*, 454 U.S. at 444-5.

3. **The law withstands rational basis review because prohibiting non-citizens from concealing handguns in public is a rational means of ensuring the legitimate end of public safety.**

Public safety is a legitimate, indeed compelling, government interest. See e.g. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Laws regulating the concealed carry of handguns in public are legitimate measures aimed at protecting members of the public from harm. *Heller*, 554 U.S. 570. The Nebraska law was enacted to further the compelling government interest in public safety by having State agencies regulate those individuals privileged to conceal handguns on their person outside their homes. Floor Deb. on LB 454, 99th Neb. Leg., 1st Sess. 5205 (May 6, 2005) (Comments of Sen. Flood). Subsection (10) of the law contributes to the achievement of this end by excluding from consideration for concealed carry privileges those individuals whose criminal backgrounds cannot be determined by the licensing agency. The law therefore removed from Nebraska municipalities the ability to self-regulate with respect to concealed weapons except where those municipal laws conformed to the statewide standard set forth in the law, imposed uniform standards and penalties, and declared that non-citizens were ineligible for concealed carry. Neb. Rev. Stat. § 69-2427 et. seq. In addition to preventing criminals from concealing handguns in public, the law was later amended to prevent the mentally ill from doing the same. FIREARMS, 2011 Nebraska Laws L.B. 512; Neb. Rev. Stat. §§ 69-2402, 69-2409.01. Information on the applicant's mental health and criminal history is furnished through the Nebraska State Patrol and the Federal Bureau of Investigation's National Crime Information Center ("NCIC"). Neb. Rev. Stat. §§ 69-2431. NCIC helps criminal justice professionals apprehend fugitives, locate

missing persons, recover stolen property, and identify terrorists.<sup>5</sup> It also assists law enforcement officers in performing their official duties more safely and provides them with information necessary to aid in protecting the general public. However, the NCIC does not reveal criminal histories from outside of the United States.<sup>6</sup> Here, by restricting concealed carry handgun permits to citizens, the State of Nebraska recognized the importance of obtaining a complete criminal history and the difficulty in obtaining complete criminal history from foreign jurisdictions. Indeed, the Nebraska State Patrol would have no reasonable way to evaluate the requisite factors for jurisdictions outside of the United States, many of which do not provide such information in a readily accessible manner. Although some non-citizens who would have otherwise qualified for concealed carry permits undoubtedly cannot because of the citizenship requirement, the investigating authorities cannot know that for certain.

Further, “the fact that legislation may be overinclusive or underinclusive with regard to its goal does not signify that a rational relationship is lacking.” *Baker v. Concord*, 916 F.2d 744, 755 (1st Cir. 1990).

Because Neb. Rev. Stat. § 69-2433 is a public safety law, it serves a legitimate government interest. Denying permits to non-citizens who cannot easily be confirmed to meet the other qualifications required for a concealed carry permit under the Act, is a rational means of protecting the public from those individuals carrying concealed handguns whose criminal backgrounds cannot be determined by the licensing agency, and is therefore facially valid.

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<sup>5</sup> <http://www.fbi.gov/about-us/cjis/ncic> (accessed May 22, 2013)

<sup>6</sup> For a list of the 21 files maintained by the NCIC, see [http://www.fbi.gov/about-us/cjis/ncic/ncic\\_files](http://www.fbi.gov/about-us/cjis/ncic/ncic_files) (accessed May 22, 2013)

**B. Even under strict scrutiny Section 69-2433 is still constitutionally sound because prohibiting non-citizens from concealing handguns in public is the least restrictive means of achieving a compelling government interest.**

Laws subjected to strict scrutiny will survive judicial review if they are narrowly tailored to meet a compelling government interest. *Bowman v. White*, 444 F.3d 967, 980 (8th Cir. 2006) citing *Thorburn v. Austin*, 231 F.3d 1114, 1120 (8th Cir. 2000) (“A regulation is narrowly tailored when it furthers a significant government interest that would be achieved less effectively without the regulation”). Even under strict scrutiny, Neb. Rev. Stat. § 69-2433 validly disqualifies non-citizens because it is narrowly tailored to meet the compelling state interest of protecting the public.

**1. Public safety is a compelling government interest.**

Police powers have been reserved to the States by the Tenth Amendment. *U.S. v. Bailey*, 115 F.3d 1222 (5th Cir. 1997). Among those powers is the preservation of public safety, which is a compelling government interest. *Heller*, 554 U.S. 570. The regulation of concealed handguns is a valid exercise in furtherance of that compelling interest. *Id.* Because the Act is a legislative measure to protect the public from those individuals carrying concealed handguns whose criminal backgrounds cannot be determined by the licensing agency, it is a law in furtherance of a compelling government interest.

States have a compelling governmental interest in protecting the safety of the public. The federal government has recognized the compelling governmental interest in preventing certain individuals from obtaining or possessing firearms. Under 18 U.S.C. § 922(g), it is unlawful for any person “who has been convicted in any court of, a crime

punishable by imprisonment for a term exceeding one year” (i.e., convicted of a felony) to possess or transport any firearm or ammunition in interstate or foreign commerce. Additional factors include dishonorable military discharge, renunciation of citizenship, crimes involving intoxicating substances, judgments of mental incompetence, and other factors. The stated purpose is to “make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency, and to assist law enforcement authorities in the States and their subdivisions in combating the increasing prevalence of crime.” S.Rep. No. 90-1097, at 22 (1968), 1968 U.S.C.C.A.N. 2112, 2113-14.

Nebraska’s law reflects similar safety concerns. Accordingly, because the Act is a legislative measure to protect the public from those individuals carrying concealed handguns whose criminal backgrounds cannot be determined by the licensing agency, it is a law in furtherance of a compelling government interest.

**2. Section 69-2433 is narrowly tailored to safeguard the public from unregulated concealed handguns.**

Laws are narrowly tailored to achieve their ends when a compelling interest would be achieved less effectively without the regulation. *Bowman*, 444 F.3d at 980. The Act is properly conceived of as a measure to standardize the process for and increase confidence in the means of qualifying individuals to carry concealed handguns in public. Floor Deb. on LB 454, 99th Neb. Leg., 1st Sess. 5200-5201 (May 6, 2005) (Comments of Sens. Flood and Beutler). As such, it is important to note that the Nebraska law prohibits more than non-citizens as a class from licensure under its terms. In addition to barring non-citizens from concealed carry, the law also prohibits: those under the age of 21; those

prohibited from possessing firearms under 18 U.S.C § 922<sup>7</sup>; those with eyesight too poor to qualify for a driver's license; those convicted of a felony in any State; those convicted of a misdemeanor crime of violence in any State in the preceding ten years; those who have been found to be mentally incompetent; those who have not resided in Nebraska for 180 days prior to applying; those who have any firearms or drug convictions in the preceding ten years; those on parole, probation, house arrest, and work release; and those who have not completed firearm training from carrying concealed weapons in public. Neb. Rev. Stat. §§ 69-2433(1)-(9), (11). As is evident, a large number of individuals, of which non-citizens are but a subset, are excluded from the privilege of carrying concealed handguns by the law.

Even more importantly, and as LaJous concedes, non-citizens are still permitted to possess and bear firearms in their homes, vehicles, and openly in public. (Filing No. 1, ¶¶ 9, 10). As argued above, regulation of concealed carry permits by the Act does not violate the Second Amendment. The law is therefore an attempt to allow the State's constituents to carry concealed weapons in the safest way possible.

The exclusion of non-citizens as a class is permissible even if some of the class may meet the requirements, so long as it is applied equally to all non-citizens. *State v. Garza*, 241 Neb. 934 (1992) citing *Commonwealth v. Acen*, 396 Mass. 472, 482 (1986) (permitting the exclusion of aliens from jury service in Nebraska as a means of ensuring that all jurors are able to speak English). Under Neb. Rev. Stat. § 69-2433, the applicant's

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<sup>7</sup> 18 U.S.C. § 922(g) makes it unlawful for anyone who: (1) is indicted for or convicted of a crime punishable by imprisonment for more than one year; (2) is a fugitive; (3) is addicted to any controlled substance; (4) is mentally incompetent; (5) is an illegal alien or an alien admitted on a nonimmigrant visa; (6) has been dishonorably discharged from the Armed Forces; (7) has renounced his United States citizenship; (8) is the subject of certain restraining orders; or (9) has been convicted of misdemeanor domestic violence. § 922(d) prohibits the sale or transfer of firearms to those same individuals.

tradeoff for the privilege of carrying a concealed handgun is opening his background to the scrutiny of the State to determine his fitness for that responsibility. Non-citizens will be unable to do so within the confines of the databases to which the Nebraska State Patrol has access, and the State Patrol is not in a position to know when it has all the information it needs and when it does not. Here, as in *Garza*, although some non-citizens undoubtedly otherwise meet the licensure requirements under the law, because not all will, their exclusion as a class is properly tailored. Thus, the exclusion of all non-citizens as a class is necessarily the narrowest group sufficient to ensure that no one unfit to carry concealed is permitted to do so.

Moreover, because the law doesn't simply aim at non-citizens, but instead aims at ensuring that only the safest possible group of people are carrying concealed handguns, regulation of concealed handgun permits does not infringe upon the Second Amendment., Additionally, since all non-citizens are excluded because licensing agencies are unable to compile a complete background knowledge of non-citizens, the law is as narrowly-tailored as possible in furtherance of the compelling interest of public safety.

### **CONCLUSION**

WHEREFORE Defendants request that this Court dismiss this Complaint for failure to state a claim, and for such other and further relief as this Court deems just and proper.

JON BRUNING AND DAVID SANKEY,  
Defendants.

BY: JON BRUNING, #20351  
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**CERTIFICATE OF SERVICE**

It is hereby certified that on May 28, 2013, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which will send notice to the Plaintiffs' attorney of record.

s/Stephanie Caldwell  
Stephanie Caldwell, #22994  
Assistant Attorney General