

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

JOHN W. JACKSON and SECOND)
AMENDMENT FOUNDATION, INC.,)
)
Plaintiffs,)

Case No. 1:12-CV-421-WDS-RHS

v.)

GARY KING, in his Official Capacity)
as Attorney General of the State of)
New Mexico; and BILL HUBBARD,)
in his Official Capacity of as Director)
of the Special Investigations Division)
of the New Mexico Department of)
Public Safety,)

Defendants.

**DEFENDANTS HUBBARD AND KING’S REPLY IN SUPPORT OF
THEIR MOTION FOR SUMMARY JUDGMENT**

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*Attorney for Defendants
Bill Hubbard and Gary King*

JUDGE: MCA
DATED: January 8, 2013

I. STATEMENT OF THE CASE

Plaintiffs John Jackson and Second Amendment Foundation¹ wrongly assert that New Mexico Statutes 1978, Section 29-19-4(A)(1) (the Act) violates the Second and Fourteenth Amendments of the U.S. Constitution. They also allege that the statute is preempted by federal law. Plaintiffs have failed to show dispute as to any material fact and those facts indicate that the Act is a reasonably restrictive means of regulating the concealed carry of a firearm in New Mexico.

Plaintiffs do not have a Second Amendment right to the concealed carry of a firearm. The Act is within the traditional and historical state prerogative of limiting the concealed carry of firearms and thus is constitutional under a fourteenth amendment challenge. The statute is a narrowly tailored means of achieving the compelling state interest of ensuring concealed carry permit holders receive a thorough background check (even though the statute is not subject to strict scrutiny). There are no material issues of fact for the Court to decide and the undisputed facts show that Defendants Hubbard and King are entitled to summary judgment on all counts of Plaintiffs' complaint. Fed. R. Civ. P. 56(a).

II. ARGUMENT

A. Plaintiffs have Failed to Show a Genuine Issue of Material Fact.

Plaintiffs attempt to rebut Defendants' undisputed facts numbers ten, eleven and twelve by referring the court to a website. The content of that website is an overview of

¹ For purposes of clarity, Plaintiff Jackson and members of Plaintiff SAF will here-forward be referred to collectively as "Plaintiffs".

the type of files accessible through the National Crime Information Center database. Defendant Hubbard stated in his affidavit that the databases for background checks on applicants for concealed carry licenses do not list foreign convictions. (*See Affidavit of Bill Hubbard* attached to *Defendants' Motion for Summary Judgment* as Exhibit 1). The Website to which Plaintiffs refer the Court does not contain information regarding specific files within the NCIC database. Plaintiffs refer particularly to two separate types of files which the website says are contained in the database. First, Plaintiffs point out that the database contains Foreign Fugitive Files which, according to the website contain records of persons wanted by another country only for violations that would constitute a felony here. Second, Plaintiffs refer to the Immigration Violator File, which according to the website contains records of persons who have been deported or issued warrants of removal. Neither of these limited descriptions from the website are enough to refute the facts established by Defendant Hubbard's affidavit, that there are no databases available to Defendant Hubbard which contain information involving disqualifying convictions in foreign jurisdictions. (*See Affidavit of Bill Hubbard* ¶ 6)

B. Defendants Prevail on the Second Amendment Issue Because There is No Second Amendment Right to the Concealed Carry of a Firearm.

The Second Amendment of the US Constitution does not protect the ability to carry a concealed firearm. The US Supreme Court in *District of Columbia v. Heller*, emphasized that the Second Amendment did not apply to all forms of weapons and every means of carry. 554 U.S. 570, 626-627, 128 S. Ct. 2783, 2816-17 (2008). It also stressed that the opinion in *Heller* does not cast doubt on longstanding prohibitions. *Id.* In the very recent decision *Peterson v. Martinez*, the 10th Circuit held that the concealed carry of a firearm is

not protected by the Second Amendment. 2013 U.S. App. LEXIS 3776 (Feb. 22, 2013). Regulations and prohibitions on concealed carry are long standing in New Mexico and around the country. Carrying a concealed weapon is not a fundamental right.

Plaintiffs try to confuse the issue in this case by making arguments about the right to carry a firearm generally. They cite a plethora of case law which shows there is a right to carry weapons in case of self defense. In fact, they try to drag a legal argument by Attorney General King made in another venue, based on another set of facts. The facts of that case are about severe restrictions on the right to carry a firearm in public *at all*. Plaintiffs miss the point. Plaintiffs are free to carry firearms in New Mexico. That is not what this case is about; the issue in this case is whether there is a Second Amendment right to carry a *concealed* firearm. There is not.

Because there is no Second Amendment right, Defendants are entitled, as a matter of law, to summary judgment.

C. Defendants Prevail on the Fourteenth Amendment Challenge because there is No Fundamental Right at Issue and the Regulation of Concealed Carry is Historically Within the State Prerogative.

There is no fundamental right to the concealed carry of a firearm. Because there is no fundamental right upon which Plaintiffs can rest their claim of discrimination, Defendants necessarily prevail. Strict scrutiny review is only appropriate when reviewing a question related to fundamental rights or where there is an impermissible delineation based upon alienage. The issue here is not one of fundamental rights. The delineation based upon alienage is not preventing aliens from exercising a fundamental right and it is an area that is traditionally and fundamentally within the constitutional prerogative of the State. The State is therefore free to base delineation upon alienage.

Defendants prevail on their Motion for Summary Judgment because there are no material facts which support Plaintiffs' claim.

Plaintiffs seem to miss the point of Defendants' argument. Defendants are not arguing the Plaintiffs pose a greater threat to the public than any other group of people. Rather Defendants assertions can be broken down into 3 specific points: 1) Regulating concealed carry is historically and traditionally done to protect the public from the dangers of unregulated concealed weapons. *See State v. Chandler*, 5. La. Ann. 489, 490 (1850); 2) in its exercise of police power of regulating concealed carry, the State has required that a background check be completed; 3) the State lacks the ability to perform an adequate background check on non-citizens.

Because the regulation is historically and traditionally within the state prerogative the regulation should be reviewed under the rational basis standard. *See Sugarman v. Dougall*, 413 U.S. 634, 93 S. Ct. 2842 (1973) (finding that scrutiny will be lessened for matters falling within a State's constitutional prerogative).² The State, having the ability to regulate concealed carry has determined that a background check must be conducted for each applicant. The requirement the holders of a concealed carry permit be citizens is not, as Plaintiffs would have this Court believe, because the State believes permanent resident aliens are a danger to society as a class, but because the practical application of the required background check necessitates that permit holders be citizens. A permanent resident alien does not increase the risk to society by carrying a concealed weapon. But a person who has not had a thorough background check may. This is not a statute about aliens (like the statutes in the cases Plaintiffs cite). This is about regulating concealed

² For a discussion of the history regulations on concealed carry, see *Peterson* 2013 U.S. App. LEXIS 3776.

carry. Specifically it is a statute about ensuring fitness to carry a concealed weapon. The statute is narrowly tailored to address the very important requirement that permit holders pass a thorough background check.

Plaintiffs would have this Court believe that traveling citizens would have the same problem as non-citizens. However, when an American citizen gets arrested or convicted in a foreign jurisdiction the U.S., by treaty, is likely to be informed of that arrest or conviction. *See Vienna Convention on Consular Relations*, Art. 36 (April 24, 1963).

Defendants are entitled to summary judgment as to the Fourteenth Amendment challenge because there is no fundamental right at stake and the delineation based upon alienage is in an area that is firmly within the State's prerogative. The statute stands up under a strict scrutiny review, even though it is not required to meet that burden. The state has a compelling interest in public safety. One way the state protects public safety is by ensuring those who are permitted to conceal a firearm are submitted to a thorough background check. Defendant Hubbard, for the State, cannot check for non-domestic criminal backgrounds. As such, the requirement that permit holders be citizens is narrowly tailored to achieve a compelling state interest and Defendants are entitled to summary judgment under any standard the court applies.

D. Defendants Are Entitled to Summary Judgment On Plaintiffs' Preemption Claim Because Regulating Concealed Carry Is Not Federally Preempted in Any Way and No Fundamental Rights are Being Denied to Plaintiffs.

The Act in no way infringes on any fundamental right of a permanent resident alien. Carrying a concealed weapon is not protected conduct. Plaintiffs would still have

this Court believe that a person cannot live where he or she cannot conceal a weapon. That simply is not true. Plaintiffs are welcome to defend themselves. The Act does not impermissibly infringe on that ability. This is not a case about regulating immigration or preventing immigrants from obtaining jobs or government services. Since there is no fundamental right being denied and the Act has not been in any other way preempted by federal law, Defendants are entitled to summary judgment as to the preemption claim.

CONCLUSION

Because there is no genuine issue of material fact, and because the undisputed facts indicate the citizenship requirement is constitutional, Defendants are entitled to summary judgment on all counts of Plaintiffs' complaint. For the foregoing reasons Defendants request the Court: 1) grant summary judgment to the Defendants on all counts of Plaintiffs complaint, 2) order all parties to pay their own costs and 3) provide Defendants any additional relief to which they may entitled.

DATED: February 28, 2013

Respectfully Submitted,
GARY K. KING
NEW MEXICO ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing on Plaintiffs' counsel of record via email on February 28, 2013.

/s/ P. Cholla Khoury
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