

**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.)

BILL HUBBARD,)
in his Official Capacity of as Director)
of the Special Investigations Division)
of the New Mexico Department of)
Public Safety,)

Defendants.

**DEFENDANTS' RESPONSE IN OPPOSITION TO MOTION
FOR PERMANENT INJUNCTION**

COMES NOW the Secretary Gorden E. Eden, Jr., stepping in for former Defendant Bill Hubbard, by and through his counsel P. Cholla Khoury, Assistant Attorney General, and opposes Plaintiffs' Motion for Permanent Injunction.

I. STATEMENT OF THE CASE

On April 21, 2012, Plaintiffs John Jackson and Second Amendment foundation filed suit against Defendants Attorney General Gary King and Director of Special Investigations Division of the New Mexico Department of Public Safety, Bill Hubbard. In their complaint Plaintiffs allege New Mexico Statutes 1978, Section 29-19-4 violates the Second and Fourteenth Amendments of the U.S. Constitution. They also allege that the statute is preempted by federal law. On August 9, 2012, Plaintiffs filed a Motion for Preliminary Injunction, which was granted on March 30, 2013. On March 30, 2013 this Court granted Defendant King's motion to dismiss. Upon motion for summary judgment

from Defendant Hubbard, the Court granted in part and denied in part that motion; noting that strict scrutiny would apply to Plaintiffs' the Fourteenth Amendment claims. On August 26, 2013 Plaintiffs' filed their motion for permanent injunction. Mr. Gordon E. Eden, Jr, Cabinet Secretary has filed a motion to substitute defendant. Secretary Eden now responds to Plaintiffs' motion for permanent injunction.

II. ARGUMENT

There are four elements which Plaintiffs must prove in order for a permanent injunction to issue. They must prove "(1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1180 (10th Cir. 2003) (internal citations omitted). "This standard is remarkably similar to the standard for a preliminary injunction. The only measurable difference between the two is that a permanent injunction requires showing actual success on the merits, whereas a preliminary injunction requires showing a substantial likelihood of success on the merits." Prairie Band Potawatomi Nation v. Wagon, 476 F.3d 818, 822 (10th Cir. 2007) (Internal citations omitted).

This Court has already ruled regarding standards two, three and four in its order granting Plaintiffs' Motion for Preliminary Injunction (Doc. 42). Defendant hereby incorporates and restates all arguments advanced in his briefing regarding Plaintiffs' motion for preliminary injunction in regards to the second, third and fourth standards set out above. (Doc. 20) Therefore, the only remaining issue for the Court to consider is Plaintiffs' demonstration of success on the merits. Plaintiffs' motion should be denied.

The Motion should be denied because Plaintiffs have not actually prevailed on the merits. In the Court's order denying summary judgment as to Plaintiffs' Fourteenth Amendment claim, the Court ruled simply that Defendant's motion for summary judgment as to Plaintiffs' equal protection claim is denied. There has been no affirmative ruling in favor of Plaintiffs. Plaintiffs cannot demonstrate actual success on the merits of this case. Additionally, there has been no dispositive ruling upon which Plaintiffs can base their claim for permanent injunction.

Secondly, Plaintiffs' Motion should be denied because the requirements of the New Mexico Concealed Handgun Carry Act, NMSA 1978, § 29-19-1 *et seq.* (the Act), and specifically Section 4 of the Act, pass strict scrutiny and therefore survive challenge. The statute meets strict scrutiny because it is narrowly tailored to achieve the compelling government interest of preventing unqualified persons from obtaining concealed weapons.

A. Plaintiffs Fail to Establish Success on the Merits

Plaintiffs cannot prove actual success on the merits because there has been no dispositive ruling regarding the merits of their Fourteenth Amendment claim. “[T]he injunction standard of probable success on the merits is not equivalent to actual success on the merits.’ Consequently, a party's claim to have succeeded at the preliminary injunction stage does not necessarily transform a party into a prevailing party.” Lorillard Tobacco Co. v. Engida, 611 F.3d 1209, 1217 (10th Cir. Colo. 2010) (quoting N. Arapahoe Tribe v. Hodel, 808 F.2d 741, 753 (10th Cir. 1987).)

The Court did not dispose of Plaintiffs' Fourteenth Amendment claim when it denied Defendant's motion for summary judgment. Certainly, the Court's ruling denying Defendant's motion for summary judgment as to the Fourteenth Amendment claim means that Plaintiffs' challenge survives. But it does not automatically follow that because the challenge survived a motion for summary judgment Plaintiffs have achieved success on the merits.

Because Plaintiffs have failed to demonstrate success on the merits, either in the form of summary judgment in their favor or in a resolution based on the facts, their motion for permanent injunction should be denied.

a. **Plaintiffs Cannot Prevail on the Merits of Their Complaint of Fourteenth Amendment Violation.**

Plaintiffs will not prevail on the merits of this case because the challenged statute survives strict scrutiny analysis. To survive strict scrutiny a law must be narrowly tailored to meet a compelling state interest. Abrams v. Johnson, 521 U.S. 74, 82, 117 S. Ct. 1925, 1931 (1997). This statute survives this test. The State has a compelling interest in protecting the public safety by ensuring that only qualified individuals receive permits to possess a concealed firearm. The statute is also narrowly tailored because it ensures that only persons who have undergone a complete and thorough background check receive a permit.

Assuming an applicant is otherwise qualified to obtain a permit under NMSA 1978, §29-19-4(A), he or she might still be disqualified from possessing a permit by NMSA 1978, §29-19-4(B). An otherwise qualified applicant must be denied a permit if he or she has a record of any misdemeanor offense involving a crime of violence or the possession or abuse of controlled substances within the last ten years. (NMSA 1978,

§§29-19-4(B)(1), (3)). Additionally, an applicant must be denied a permit if he or she has a record of *ever* having a misdemeanor offense involving assault, battery or assault against a household member. (NMSA 1978, §29-19-4(B)(4)). These requirements for permit eligibility are part of the regulatory scheme designed by New Mexico to ensure only qualified persons receive a permit to conceal firearms and therefore further the compelling interest of public safety.

The Act requires the Division of Special Investigations of the Department of Public Safety (DPS) to run background checks on applicants seeking a concealed carry permit. When running background checks, DPS seeks information regarding the applicant's criminal background, if any. If in the process of the background check DPS discovers the applicant has committed certain types of offenses, as listed above, a permit cannot issue. The determination of qualified persons is based upon DPS being able to run full and thorough background checks.

If the applicant is a permanent resident alien, however, DPS cannot complete a thorough background check. There is no international database with which to check criminal history. A permanent resident alien who has been in the United States for eight years would only be subject to an eight year check on his criminal history. The fact that the process of immigration includes a background check does not absolve the State from confirming on its own the background of applicants. There are certainly crimes that would not prevent immigration but would prevent the individual from possessing a permit under New Mexico Law.

The State could not provide a less restrictive means for ensuring the recipients of permits are qualified.

III. CONCLUSION

Plaintiffs fail to carry the burden of showing actual success on the merits. They have not prevailed on any final disposition of the merits of this case. Plaintiffs will not be able to prevail on the merits of this case.

Because Plaintiffs fail to carry their burden, injunctive relief should be denied.

WHEREFORE, Defendants respectfully request the motion for permanent injunctive relief be denied.

Respectfully Submitted,

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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 October 23, 2012.

/s/ P. Cholla Khoury
P. Cholla Khoury