UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JOHN W. JACKSON and 2ND 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' RESPONSE IN OPPOSITION TO MOTION FOR PRELIMINARY INJUCTION

COMES NOW the Defendants, GARY KING and BILL HUBBARD, by and through their counsel P. Cholla Khoury, Assistant Attorney General, and oppose Plaintiffs' Motion for Preliminary Injunction.

I. STATEMENT OF THE CASE

On April 21, 2012, Plaintiffs John Jackson and 2nd 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.

II. ARGUMENT

The New Mexico Concealed Handgun Carry Act, NMSA 1978, § 29-19-1 *et seq*. (the Act), and specifically Section 4 of the Act is an exception to New Mexico's prohibition, consistent with the United States and New Mexico Constitution, on the concealed carrying of a handgun in New Mexico. There is no Second Amendment right to carry a concealed handgun. Additionally, the requirements of Section 4 of the Act, when viewed within the entirety of the statutory scheme, pass constitutional muster. As there are no Constitutional rights being denied to Plaintiffs, there is no irreparable harm being inflicted on Plaintiffs. Because the Act at issue is not a violation of Plaintiffs Constitutional rights, Plaintiffs are unlikely to succeed on the merits. There is no threat to public safety by continued enforcement of the Act. In fact, Plaintiff Jackson and members of Plaintiff 2nd Amendment Foundation (SAF) are free to carry firearms openly, in public, for self defense[1]. Additionally, the statutory scheme prohibiting unlawful carrying of a firearm allows for concealed carry of a handgun in one's own home, for transportation in a vehicle, and while on one's own private property. NMSA 1978, § 30-7-2. Between the ability to openly carry a firearm and the ability to carry concealed when on one's own property or in one's vehicle, Plaintiffs and their alleged class are not denied the ability to protect themselves. Because there is no violation of any Constitutional right and because Plaintiffs are unlikely to succeed on the merits of this litigation, a preliminary injunction is inappropriate.

A. Standard of Review

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

a. As a "Disfavored" Type of Preliminary Injunction Plaintiffs' Motion Should be Denied because it Fails to Satisfy the Requirements for Such an Injunction

The injunction sought by Plaintiffs should be denied because Plaintiffs do not meet the heightened burden associated with seeking a disfavored injunction. While Plaintiffs admit their motion is a disfavored one, they fail to discuss why. The requested injunction is a disfavored injunction because it would both alter the status quo and grant the Plaintiffs all the relief they could recover at the conclusion of a full trial. *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1224(10th Cir. 2009). The party seeking such an injunction must meet a heightened burden – the party must make a strong showing of both the likelihood of success and the balance of harms weigh in their favor. *Awad v. Ziriax*, 670 F.3d 1111, 11125 (10th Cir. 2012) (emphasis added) (citing *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1048-49 (10th Cir. 2007), *rev'd on other grounds, 555 U.S. 460, 129 S. Ct 1125, 172 L. Ed. 2d 853 (2009)*). Plaintiffs fail to show a strong likelihood of success on the merits of their claims and they fail to make a strong showing that the balance of harms weighs in their favor.

Plaintiffs claim that they do not need to show a strong likelihood of success on the merits because the other three factors weigh so heavily in their favor. Plaintiffs are incorrect. To be clear, *Kansas Judicial Watch v. Stout*, 653 F.3d 1230, 1234 (10th Cir. 2011), does hold that if the three other factors weigh heavily in favor of the injunction then the success on the merits factor will be relaxed. However, *Stout*'s relaxed standard is not in the context of the heightened scrutiny of a disfavored injunction. Disfavored injunctions are still reviewed under heightened scrutiny, meaning that Plaintiffs must show a strong likelihood that they will prevail on the merits.

B. Plaintiffs Fail to Establish a Strong Showing that They Will Prevail on the Merits

Plaintiffs not only fail to establish a strong showing that they will prevail on the merits, they fail to even establish a likely showing that they will prevail at all. Furthermore, it is likely that Plaintiffs will fail on the merits of their claim and therefore a preliminary injunction is not appropriate.

There are at least two issues raised by Plaintiffs' motion, each which deserves its own analysis and each which deserves a different level of scrutiny. Plaintiffs' allegation of a Fourteenth Amendment violation should be analyzed under something less than strict scrutiny. Plaintiffs' allegations of a Second Amendment violation would ordinarily be analyzed under strict scrutiny, but as will be discussed, it is not necessary to reach that issue.

a. Plaintiffs Lose on the Merits of Their Complaint of Fourteenth Amendment Violation.

Plaintiffs fail to establish a strong likelihood of prevailing on the merits of their Count I. In their petition for a preliminary injunction Plaintiffs argue that Plaintiff Jackson and members of Plaintiff SAF, as permanent resident aliens, are entitled to Second Amendment rights under the equal protection clause of the Fourteenth Amendment. There is no argument from the Defendants that permanent resident aliens are entitled to Second Amendment rights. However, it is not a Second Amendment right at stake here. As discussed below, the concealed carry of a firearm is not a constitutional right. Plaintiffs attempt to create a right that even citizens do not have-- the *right* to concealed carry of a firearm. Plaintiffs contend that they cannot be denied their Second Amendment rights under the Fourteenth Amendment based on their alienage. However,

the New Mexico Statute does not deny any Second Amendment right based on alienage since the concealed carry of a firearm is not a right protected by the Second Amendment. There is no constitutional right at issue here and thus Plaintiffs arguments in their motion for preliminary injunction fail.

This challenge to the Fourteenth Amendment is not subject to strict scrutiny. "...[O]ur scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogative." *Sugarman v. Dougall*, 413 U.S. 634, 648, 93 S. Ct. 2842, 2850 (1973)(internal citations omitted). *See also Cabell v. Chavez-Salido*, 454 U.S. 432, 102 S. Ct. 735 (1982). As discussed below, there is no fundamental right to concealed carry. Also, cases which delineate based upon alienage have been analyzed under strict scrutiny only when the statute denies aliens an economic benefit. (*See generally Graham v. Richardson* 403 U.S. 365, 91 S. Ct. 1848 (1971); *Truax v. Raich*, 239 U.S. 33, 36 S. Ct. 7, (1915); *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 68 S. Ct. 1138 (1948); *Sugarman*, 413 U.S. 634.) The cases which Plaintiffs cite all deal with the economic rights of the aliens. In *Truax* the Court says that aliens "cannot live were they cannot work." 239 U.S at 42. It would be absurd to claim that "one cannot live where one cannot conceal a weapon" and yet, that is exactly what Plaintiffs claim. Plaintiffs liken this statute to economic statutes that delineate against resident aliens. However, the distinguishing characteristic with the statute at issue is that while other statutes appear to be focused on limiting the rights of aliens, this statute is not focused on aliens at all, but on regulating concealed carry.

Under *Sugarman*, the Court seems to carve out an exception when the issue is one that falls within the historical state prerogative. 413 U.S. at 648. As will be discussed

further, the state has the prerogative to completely ban concealed carry of firearms. It thus follows that, if the state has the prerogative to completely ban concealed carry, it is fundamentally within the state's power to regulate the exceptions to that ban. State bans on concealed carry of firearms are long standing and clearly an issue that is firmly within the state's prerogative and therefore should be given a lesser scrutiny. (*See State v. McAdams,* 714 P.2d 1236 (Wy. 1986); *State ex. Rel. N.M Voices for Children, Inc. V. Denko*, 90 P.3d 458 (N.M 2004), *State v. Chandler*, 5 La. Ann. 489 (1850)).

Since there is no fundamental right at issue here and because there is no delineation of economic rights, the law should be evaluated under a less stringent standard than strict scrutiny. When evaluated under this standard, not only have the Plaintiffs failed to make a strong showing that they will prevail on the merits, but they likely lose on the merits because the regulation of concealed carry is firmly within the state's constitutional prerogative.

In a motion for a preliminary injunction, it is not enough to simply cry foul and have the burden shift to the non-moving. Rather, as the movants, the Plaintiffs bear the burden of making a strong showing that they are likely to prevail on the merits. Plaintiffs have not only failed to make a strong showing that they are likely to prevail on their equal protection claim, they have failed to make a showing at all. There is no clear claim for preliminary injunction based on their Fourteenth Amendment claim. All references to any claimed violations of the Fourteenth Amendment are couched in terms of Second Amendment rights. Plaintiffs claim that Defendants cannot cite a compelling state interest without explaining why a compelling state interest is necessary. A compelling state interest is necessary only when the statute is evaluated under strict scrutiny.

i. **Even Under Strict Scrutiny Plaintiffs Still Fail to Make a Strong Showing That They Succeed on the Merits of Their Fourteenth Amendment Claim.**

Even if the statute is analyzed under strict scrutiny, Plaintiffs still fail to make a strong showing of prevailing on the merits. 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 regulating the concealed carry of a firearm because it falls clearly within the State's ability to regulate its political community and its police power. The statute is also narrowly tailored when viewed as part of a statutory scheme.

Police powers are reserved to the State by the Tenth Amendment of the U.S. Constitution. Necessarily at the core of that police power is the ability to protect the public from concealed carry of firearms because of the inherent danger that unregulated concealed weapons pose to the public. *Chandler*, 5 La. Ann. at 490. The statute at question does no more than grant an exception to that constitutional ban. Thus, the state has a compelling interest in protecting the public by regulating the concealed carry of a firearm.

Taken as a whole, the statutory scheme is narrowly tailored because though it bans concealed carry of a firearm, it is not without exceptions. NMSA 1978, § 30-7-2 is clear that it is completely legal for a person to carry a concealed weapon in their home, on their own real property and in a vehicle. Plaintiffs may even carry a firearm openly in public. They simply cannot carry a concealed firearm in public.

If strict scrutiny is required, Plaintiffs still fail to make a strong showing that they will prevail because the state has a narrowly tailored statutory scheme for achieving its compelling state interest.

b. Plaintiffs Lose on Their Allegation of a Violation of the Second Amendment.

Plaintiffs' next argument goes to an alleged deprivation of Plaintiffs' Second Amendment rights. Plaintiffs fail to cite any law or other authority that supports the proposition that concealed carry of a firearm is protected by the Second Amendment. In fact, in *District of Columbia v. Heller*, the Court expressly notes that the right protected by the Second Amendment is not an unqualified right, that it is not "a right to keep and carry any weapon whatsoever in any manner whatsoever...". 128 S. Ct. 2783, 2816-17, 554 U.S. 570, 626-27 (2008). The Court recognizes the long-standing traditions of prohibition on concealed carrying of a firearm. *Id.* Because there is no deprivation of Second Amendment rights, the Court does not even need to reach the question of which level of scrutiny applies.

Plaintiffs rely heavily on *U.S. v. Huitron-Guizar*, 678 F.3d 1164 (10th Cir. 2012). However, even the language Plaintiffs choose to quote is contrary to their claim. Plaintiffs cite language that supports the ability of permanent resident aliens to possess a firearm. There is no such restriction in New Mexico law. Aliens may possess and even openly carry a firearm in New Mexico. The ability to possess a firearm and the ability to conceal one in public are two different issues. This case is only dealing with the ability of permanent resident aliens to conceal a firearm in public. Plaintiffs may openly carry a firearm in public if they so choose—that is the extent of their Second Amendment rights.

There is no violation of the Second Amendment here, as Plaintiffs claim, because Plaintiff Jackson and members of Plaintiff SAF may openly carry a firearm for self defense in public. The Act does not place limitations on the ownership of firearms. It does not prevent Plaintiff Jackson or members of Plaintiff SAF from defending one's self or home. The statute simply provides limited exceptions to the otherwise constitutional ban on concealed carry of a firearm.

Because concealed carry of a firearm is not protected under the Second Amendment, Plaintiffs will lose on the merits of Count II of their complaint.

c. Plaintiffs Fail to Make any Showing Regarding Count III of Their Complaint

Plaintiffs make no mention in their motion for preliminary injunction of their third count alleging federal preemption. Defendants therefore assume that Plaintiffs are not asserting their third count as a basis for preliminary injunction.[2]

C. Plaintiffs Fail to Establish that They will Suffer Irreparable Harm if the New Mexico Continues to Enforce its Statutes.

Plaintiffs fail to establish that they will suffer irreparable harm if New Mexico continues to enforce its statutes. Plaintiffs are by no means impeded from defending themselves with a firearm. In fact, in New Mexico, Plaintiffs can carry a firearm openly, as well as conceal one on their own property, in a vehicle and in their home. There are sufficient means for Plaintiffs to exercise their rights under the Second Amendment. In fact, the statute in question does not limit those rights at all.

Plaintiffs claim that without injunctive relief they and those similarly situated will be "unconstitutionally frustrated in their ability to exercise their fundamental Second

[2] If Plaintiffs' reply includes a clear assertion of preemption as grounds for the sought preliminary injunction, Defendants would reserve the right to file a sur-reply addressing only the issues raised for the first time in the reply.

Amendment rights." (*Memorandum of Point and Authorities in Support of Plaintiffs'' Motion for Preliminary Injunction*, at 10.). That is simply not the case. As discussed above, the statute in question does not infringe on anyone's ability to exercise their fundamental right, as the ability to carry a concealed firearm is not protected by the Second Amendment. Plaintiffs also claim, though they make no showing, that the inability to carry a concealed firearm subjects them to criminal attack. However, Plaintiffs fail to mention that they are free to defend themselves with a firearm, which they may carry openly.

The concealed carry of a firearm is not protected by the Second Amendment. There is no deprivation of Second Amendment rights as presented in this case. Because there is no deprivation of Second Amendment rights, the Court does not even need to determine which level of scrutiny applies. As such, Plaintiffs have failed to make a showing that they will suffer irreparable harm in the absence of preliminary injunctive relief.

D. Plaintiffs Fail to Make a Strong Showing that Their Threatened Injury Outweighs the Injury the Defendants will Suffer Under the Injunction

Plaintiffs mention their potential injury: deprivation of their Second Amendment rights, and their inability to defend themselves from criminal attack. As discussed above, the injury of deprivation of a constitutional right is not at issue here, because there is no constitutional right. Also, the threatened injury of not being able to defend one's self against criminal attack is also not applicable because Plaintiffs have many options for carrying a weapon to defend themselves, most notably carrying that weapon openly in public and concealed to defend one's home. NMSA 1978, § 30-7-2.

However, should a preliminary injunction be issued, Defendants would run the risk of being forced to grant concealed weapons permits to applicants that, at the conclusion of this case, may not be legally permitted to maintain that permit. Granting permits that later have to be revoked creates an injury to the Defendants in the form of time and expense of administrative proceedings. Additionally, the rationale cited for the state prerogative in banning concealed carry creates the risk of another harm; that the public welfare and safety be put at risk.

If a preliminary injunction issues, Plaintiffs do not gain access to any Constitutional right. Weighing against that is the fact that Defendants would be forced to issue permits that may later be invalid and the heightened risk to public safety.

E. The Injunction Would be Adverse to the Public Interest

Plaintiffs completely fail to address the fourth prong of the test for preliminary injunction, namely why a preliminary injunction would not be adverse to the public interest. Their failure to make a showing at all is enough for Plaintiffs to lose their motion. However, even if Plaintiffs did address the public interest, they could not show that an injunction would not be adverse to it.

The ban on concealed carry of firearms falls firmly within the state's police power of protecting the public. States have retained the ability to completely ban concealed carry. As such, it is firmly within the prerogative of the state to grant exceptions to that ban. So is the case here. New Mexico has had a long history of banning concealed carry. *See State ex. Rel. N.M Voices for Children, Inc.* 90 P.3d at 461. But in the statute at issue New Mexico granted a limited exception to an otherwise complete ban. The ban of concealed carry and exceptions to that ban are actions the legislature clearly invoked in

the public interest. An injunction preventing the enforcement of the statute would be adverse to the public interest.

III. CONCLUSION

Plaintiffs bear the burden in this motion for preliminary injunction. And Plaintiffs fail to carry that burden.

Plaintiffs fail to make the requisite showings that a disfavored preliminary injunction is necessary in this case. They fail to make a strong showing that they are likely to succeed on the merits. They fail to make a showing that they will suffer irreparable injury if an injunction is not granted. They fail to make a strong showing that the harm they will suffer outweighs the harm Defendants will suffer if an injunction is granted. And Plaintiffs fail to make a showing that an injunction is not adverse to the public interest. Because Plaintiffs fail to meet their burden injunctive relief should be denied.

WHEREFORE, Defendants respectfully request the motion for preliminary 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 August 12, 2012.

/s/ P. Cholla Khoury
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