IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

FELICITY M. VEASEY and SECOND AMENDMENT FOUNDATION, INC.,	)	
Plaintiffs,	)	
v.	)	Case No. 5:14-CV-369-BO
BRINDELL B. WILKINS, JR., in his official Capacity as Sheriff of Granville County, North Carolina,	)	
Defendant.	)	

PLAINTIFFS' MOTION FOR LEAVE TO FILE REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION, *INSTANTER*

COMES NOW the Plaintiffs, FELICITY M. VEASEY and SECOND AMENDMENT FOUNDATION, INC., by and through undersigned counsel, and moves for leave to file their Reply to Defendant's Response to their Motion for Preliminary Injunction, *instanter*. In support thereof, Plaintiffs state as follows:

1. Plaintiff filed a pending Motion for Preliminary Injunction and supporting Memorandum (Dkt. ## 17, 21). Defendant filed a Response (Dkt. #26), and Plaintiffs' Reply was due on December 1, 2014.

2. Plaintiffs' counsel diligently worked towards completing their Reply, but unfortunately, due to caseload demands including preparations for settlement conferences in *Jucha v. City of North Chicago*, 13 CV 8629 (N.D.IL) and the drafting and filing the Complaint in *Townsel v. Randle*, 14 L 12219 (Cook County, IL)

required more time than anticipated. However, Plaintiffs seek leave to file the Reply, *instanter*.

3. Since this a Reply brief, no further biefing is due on the Motion and Defendant will not be prejudiced by its filing.

4. Plaintiffs contacted Defendant's counsel for their position as to this Motion, but did not receive an answer.

5. This Motion is brought in good faith and not for dilatory purposes or for delay, as Plaintiffs have worked diligently to complete and present all pleadings to the Court.

6. The proposed Reply and a proposed Order are attached to this Motion.

7. Plaintiffs' counsel's electronic signature below shall serve as an F.R.Civ.P. 11 verification of the contents of this Motion.

WHEREFORE, the Plaintiffs requests this Honorable Court:

1. Grant Plaintiffs leave to file their Reply to Defendant's Response to their Motion for Preliminary Injunction, *instanter*;

2. Grant Plaintiffs any and all further relief as this Court deems just and proper.

Dated: December 3, 2014

Respectfully submitted,

By: /s/ David G. Sigale
David G. Sigale

One of the Attorneys for Plaintiffs

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Attorneys for Plaintiffs

CERTIFICATE OF ATTORNEY AND NOTICE OF ELECTRONIC FILING

The undersigned certifies that:

1. On December 3, 2014, the foregoing document was electronically filed with the District Court Clerk *via* CM/ECF filing system;

2. Pursuant to F.R.Civ.P. 5, the undersigned certifies that, to his best information and belief, there are no non-CM/ECF participants in this matter.

/s/ David G. Sigale
One of the Attorneys for Plaintiffs

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PLAINTIFFS' REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

NOW COME the Plaintiffs, FELICITY M. VEASEY and SECOND AMENDMENT FOUNDATION, INC., by and through undersigned counsel, and for their Reply to Defendant's Response to their Motion for Preliminary Injunction, state as follows:

Dated: December 3, 2014

Respectfully submitted,

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PLAINTIFFS' REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

PRELIMINARY STATEMENT

Defendant's Response, which simply refers to his arguments in his meritless Motion to Dismiss, offers nothing to refute that Plaintiffs are entitled to a preliminary injunction. Indeed, Defendant does not even dispute that the challenged law is unconstitutional. Defendant simply asks everyone not to blame him for enforcing it.

Defendant further attempts to argue that the concealed carrying of firearms for self-defense is not a Second Amendment right, and that lawful resident aliens are less entitled to constitutional protection, when in fact the opposite is true; they are a protected class for equal protection purposes. Further, while concealed carry is the specific issue here; it is also the right of public carry that is denied to a protected class for no reason other than discrimination. Defendant is making a bureaucratic argument that does not serve as a justification for discrimination, and in no way salvages the statute.

Therefore, a preliminary injunction against the enforcement of N.C.G.S. § 14-415.12(a)(1) should be granted.

ARGUMENT

Defendant is only arguing against the element of "success on the merits."

Defendant's Response to this Motion (Dkt. #26) refers to and relies entirely on his pleadings for its Motion to Dismiss; namely, his Memorandum in Support (Dkt. #15) and his Reply (Dkt. #25).

These pleadings do not address or acknowledge the preliminary injunction elements of "irreparable harm," the "inadequacy of legal remedies," or the "balance of interests."[1] The Response only mentions the "success on the merits" element. Therefore, Defendant concedes the other three elements are met, and Plaintiffs will not belabor them in this Reply.

Plaintiffs are likely to succeed on the merits, because even though the State can regulate the manner of public carrying, the Defendant may not discriminate against lawful resident aliens in implementing the manner it has chosen.

Plaintiffs incorporate their arguments contained in their Response to Defendant's Motion to Dismiss (Dkt. #23). In addition, Plaintiffs argue the following:

Plaintiffs did not write the State's laws. If Plaintiff Veasey, or any other resident of Granville County, North Carolina, wishes a concealed carry permit, State law makes the Defendant the gatekeeper. If the Defendant feels the State has thrown him under the proverbial bus, case precedent mandates he ignore the indisputably unconstitutional law and issue Veasey a concealed carry permit, since she is otherwise-qualified to obtain one. But the Defendant's position, which is to absolve himself of blame, deny the Plaintiffs' request for an injunction, dismiss the lawsuit, and leave him free to violate the County residents' constitutional rights in peace, is unjust and untenable.

[1] Unless Defendant is arguing that his right to be left alone to deny Plaintiffs' constitutional rights is greater than Plaintiffs' right to the enforcement and enjoyment of those constitutional rights.

Defendant is not arguing Plaintiffs should be unsuccessful in their injunction request because the statute is allegedly constitutional. Defendant barely even mentions the challenged statute, and does not in any way argue the statute meets the required strict scrutiny.

"The Equal Protection Clause of the Fourteenth Amendment provides that 'no State shall . . . deny to any person within its jurisdiction the equal protection of the laws.' U.S. Const. amend. XIV, § 1. The Clause 'does not take from the States all power of classification,' *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979), but 'keeps governmental decision makers from treating differently persons who are in all relevant respects alike.'" *Morrison v. Garraghty*, 239 F.3d 648, 653-654 (4th Cir. 2001) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)).

Plaintiffs have shown that, as a protected class, their equal protection claims should be evaluated using strict scrutiny, and indeed this is well-settled law. *See Graham v. Richardson*, 403 U.S. 365, 372 (1971); *See also United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, n. 4 (1938)); *See also Nyquist v. Mauclet*, 432 U.S. 1 (1977) (discrimination against aliens in state financial assistance for higher education violated failed to meet strict scrutiny burden of Equal Protection Clause).

Further, because the Defendant's prohibition implicates the Second Amendment, at a minimum the Court must apply near strict scrutiny in evaluating the statute's constitutionality. In this case, since the Defendant's ban neither

furthers a compelling State interest nor is the least-restrictive means to reach any such claimed interest, the prohibition must be enjoined.

Courts have addressed this issue and repeatedly come down on the side of the lawful aliens and against fear-mongering discrimination, including the specific application of the Fourteenth Amendment's Equal Protection Clause to aliens in the context of firearms. As noted in *State v. Chumphol*, 97 Nev. 440 (Nev. 1981): "A person does not exhibit a tendency toward crime merely because he or she is a noncitizen. *See Raffaelli v. Committee of Bar Examiners*, 496 P.2d 1264 (Cal. 1972). As the California Supreme Court noted in that case, classification based upon alienage 'is the lingering vestige of a xenophobic attitude which . . . should now be allowed to join those [other] anachronistic classifications among the crumbled pedestals of history.'" *Id.* at 442.

Plaintiffs have shown the turning tide on this issue in their Memorandum, by citing to the cases in Massachusetts, New Mexico, Nebraska, Arkansas, Washington, South Dakota and Hawaii (Dkt. #21, pp.17-20). Courts have repeatedly been striking down exactly the statute at issue as unconstitutional.

Defendant concedes this by not arguing to the contrary. Applying strict or even near-strict scrutiny, Defendant has offered no evidence, or even any plausible excuses, why lawful resident aliens are subjected to disparate treatment. *See Graham*, 403 U.S. at 377. Further, Defendant does not even deny that is what he is doing. Defendant offers no reason why permanent resident aliens residing in Granville County, who are trustworthy enough to carry firearms in their home, on

their property, in their vehicle, and even openly in public, are a danger to society if allowed to carry concealed.

Rather, Defendant argues he should not he held to blame, even though he is the only person who holds the power to grant or deny Plaintiff Veasey her constitutional rights of equal protection and armed self-defense as enjoyed by citizens. Notably, Defendant has not pointed to anyone who should be added or substituted for him, because there is no such person.

Defendant can and must be held accountable for the denial of constitutional rights.

Defendant used his authority and power to deny Plaintiffs their constitutional rights. The Defendant had a policy of enforcing an unconstitutional and discriminatory law, despite case precedent that he should not have followed it. In the alternative, while Defendant spends much time arguing he is not enforcing a local policy, it can be also argued he is enforcing the State's policy, as the challenged statute specifically puts him in charge of concealed carry permits. Either way, regardless of whether the Defendant is wearing the hat of state-agent or county-agent, the result is the same, as he is liable under Section 1983 for violating the Plaintiffs' constitutional rights. If Defendant was wearing the state-agent hat, it is well-settled that claims for injunctive relief may be brought against state officials. *See*, *e.g.*, *Nanda v. Board of Trustees of the University of Illinois*, 303 F.3d 817, 821 (7th Cir. 2002) (citing *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989)); *See also O'Connell v. City of Greenville*, 2014 U.S. Dist. LEXIS 127264 at *3 (E.D.N.C., 2014).

Plaintiffs are not seeking money damages under Section 1983 from the Defendant, or from Granville County, or from the State. Defendant seeks to equate himself with municipal entities in cases involving damages claims. Defendant's reference to *Monell v. Department of Social Services*, 436 U.S. 658 (1978) is misplaced. All of Defendant's cited cases in his Reply to his Motion to Dismiss are likewise distinguishable as they do not address the instant situation, where the State statute places the Defendant in charge of denying Plaintiffs' constitutional rights, and the Plaintiff is seeking injunctive relief to correct the injustice.

For example, *Kentucky v. Graham*, 473 U.S. 159 (1985) reversed a Section 1988 fee award against the state because the violating officers had been sued in their individual and not official capacities, the opposite of this case.

In addition to the above, Plaintiffs incorporate those arguments and citations discussed regarding this issue in their Response to Defendant's Motion to Dismiss (Dkt. #23).

Further, it must be noted that Defendant's attempt to distinguish *Snider v. City of Cape Girardeau*, 752 F.3d 1149 (8th Cir. 2014) is incorrect. Defendant makes much of the case's treatment of the city, but ignores that the officer was found liable under Section 1983 and Section 1988 for "just following" an unconstitutional state law.

Dismissal would be improper and unjust.

The State's failure to participate cannot justify Defendant's main argument, that the matter should be dismissed in the name of "uniformity," as if that is a

greater interest than the preservation and enforcement of constitutional rights. Rather, Defendant makes the outrageous (and incorrect) leap that he is not responsible, and the State itself has Eleventh Amendment immunity (though this is not true when injunctive relief is sought, as discussed above), so rather than giving Plaintiffs injunctive relief, the matter must be dismissed. In arguing this, Defendant continues to ignore that he is the only authorized and responsible person under state law. The State enacted an unconstitutional law and tasked Defendant with enforcing it. This does not place Defendant in the most enviable position, but he is nonetheless responsible.

However, even assuming *arguendo* that the State should be made a party[2], and even if F.R.Civ.P. 19 applied, dismissal would still be inappropriate. This case is nothing like *Republic of the Philippines v. Pimentel*, 553 U.S. 851 (2008), which involved a class action, a two billion dollar judgment, and an interpleader action against a sovereign nation. The Rule states, in relevant part:

> (b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:
>
> > (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

[2] If this was the case, there would be an appropriate state official to name in this suit, but there is none, except to the extent Defendant himself is serving as the authorized state official/representative.

> (2) the extent to which any prejudice could be lessened or avoided by:
>
> (A) protective provisions in the judgment;
> (B) shaping the relief; or
> (C) other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

First, the State is not prejudiced by enjoining an unconstitutional law. An injunction and judgment in Plaintiffs' favor gets Plaintiff Veasey the vindication of her constitutional rights, which would be adequate relief. And so long as Veasey lives in North Carolina, she has no remedy at all if the action is dismissed.

Further, dismissal would be a grave injustice to Veasey and those similarly-situated. The only ones who would benefit are Defendant and those others who wish to enforce a blatantly discriminatory law.

Though Plaintiffs provided the required notice to the State, Plaintiffs will amend their Complaint to add a state official if the Court requires.

Plaintiffs have done what they must, and indeed all they can do. They notified the State of the instant constitutional challenge under F.R.Civ.P. 5.1, as acknowledged by Defendant. To date, for whatever reason, the State has implicitly declined to involve itself in this lawsuit. Plaintiffs cannot force the State to become involved in this litigation, because the concealed carry permit statute specifically charges Defendant with the responsibility to grant or deny permits. Plaintiffs have no idea if Defendant has attempted to contact the State on this issue.

However, should the Court require that a certain state official is required in order to grant Plaintiffs' injunction request, Plaintiffs then request leave to amend their Complaint in order to do so, though they also request this Motion for Preliminary Injunction remain pending.

The Second Amendment protects public carrying of firearms; therefore there is a Second Amendment right at stake.

Though the Plaintiffs can receive injunctive relief based on the Equal Protection Clause of the Fourteenth Amendment, and despite the Defendant's arguments, the rulings of other Courts show the Second Amendment also applies to this case, and, for this additional reason, near strict scrutiny applies to the State's actions.

Even though the Supreme Court has not weighed in on concealed carry, *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010), altered the legal landscape as to Second Amendment analysis, and in many instances the viability, of Second Amendment claims. That alteration is becoming evident throughout the Court system, including as to permanent resident aliens.

Since *McDonald*, multiple federal Courts have held that there is a constitutional right to the public carrying of firearms. The Seventh Circuit ruled in *Moore v. Madigan*¸ 702 F.3d 933 (7th Cir. 2012), that an Illinois ban on the public carrying of firearms is unconstitutional, as the Second Amendment right of bearing arms for self-defense extends outside of the home. The Ninth Circuit ruled the

same way in *Peruta v. County of San Diego*, 742 F.3d 1144, 1153 (9th Cir. 2014) ("the Second Amendment right could not rationally have been limited to the home").

Also, District Courts have specifically held that the Second Amendment confers rights that extend beyond the home. *See Bateman v. Perdue*, 2012 U.S. Dist. LEXIS 47336, at *10-*11 (E.D.N.C. March 29, 2012) ("Although considerable uncertainty exists regarding the scope of the Second Amendment right to keep and bear arms, it undoubtedly is not limited to the confines of the home." (striking down North Carolina's prohibition on the carrying of handguns during declared state emergencies)); *See also United States v. Weaver*, 2012 U.S. Dist. LEXIS 29613 (S.D.W.V., March 7, 2012).

The Supreme Court "read the [Second Amendment's] operative clause to 'guarantee the individual right to possess and carry weapons in case of confrontation.'" *United States v. Rene E.*, 583 F.3d 8, 11 (1st Cir. 2009) (quoting *District of Columbia v. Heller*, 554 U.S. at 592 (italics added)). *See also Weaver*, 2012 U.S. Dist. LEXIS 29613 at *13 (citing *United States v. Carter*, 669 F.3d 411, 415 (4th Cir. 2012) (recognizing *Heller's* notation that the right to keep and bear arms was understood by the founding generation to encompass "self defense and hunting" as well as militia service); also citing *Heller*, 554 U.S. at 594 (stating that, by the time of the founding, the right to have arms was "fundamental" and "understood to be an individual right protecting against both public and private violence.")). The *Heller* Court additionally mentioned militia membership and hunting as key purposes for the existence of the right to keep and bear arms. *See*

Heller, 554 U.S. at 598; *See also United States v. Masciandaro*, 638 F.3d 458, 467-68 (4th Cir. 2011), *cert. den.*, 132 S.Ct. 756 (U.S. Nov. 28, 2011) (Niemeyer, J., writing separately as to Part III.B.).

The *Weaver* Court found entirely persuasive Judge Niemeyer's dissent on *Masciandaro*, particularly for its analysis of the broader holdings of *Heller*, and agreed and adopted Judge Niemeyer's conclusion that "the general preexisting right to keep and bear arms for participation in militias, for self-defense, and for hunting is thus not strictly limited to the home environment but extends in some form to wherever those activities or needs occur . . ." *Weaver*, 2012 U.S. Dist. LEXIS 29613 at *13 (citing *Masciandaro*, 638 F.3d at 468 (Niemeyer, J., writing separately as to Part III.B.)).

Though Plaintiffs may carry firearms openly under Article I, § 30 of the State Constitution, it is obvious that there are situations where someone may wish to have a firearm for protection, yet not advertise that fact. Also, it is not always practical or feasible to carry openly. Further, Veasey testified she refrains from carrying concealed due to fear of criminal penalties. The Defendant's actions have categorically denied Plaintiffs this Second Amendment right that could save their lives. They have shown that are suffering discrimination under the law, and that there is no constitutional basis for doing so. The Defendant's pleadings do not change that conclusion.

CONCLUSION

Defendant cannot deny Second and Fourteenth Amendment rights to an entire class of his residents, especially a constitutionally-protected class. Plaintiffs have met the four required elements for a preliminary injunction, pursuant to *Winter v. NRDC, Inc.*, 555 U.S. 7 (2008) and *Pashby v. Delia*, 709 F.3d 307 (4th Cir. 2013). Therefore, Plaintiffs respectfully request that the motion for preliminary injunctive relief be granted.

Dated: December 3, 2014

Respectfully submitted,

By: /s/ David G. Sigale
David G. Sigale

One of the Attorneys for Plaintiffs

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The undersigned certifies that:

1. On December 3, 2014, the foregoing document was electronically filed with the District Court Clerk *via* CM/ECF filing system;

2. Pursuant to F.R.Civ.P. 5, the undersigned certifies that, to his best information and belief, there are no non-CM/ECF participants in this matter.

/s/ David G. Sigale
One of the Attorneys for Plaintiffs

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BRINDELL B. WILKINS, JR., in his official Capacity as Sheriff of Granville County, North Carolina,	)	
Defendant.	)	

[PROPOSED] ORDER GRANTING PLAINTIFFS LEAVE TO FILE REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This matter is before the Court upon Plaintiffs' Motion for Leave to File their Reply to Defendant's Response to Plaintiffs' Motion for Preliminary Injunction.

For good cause shown, IT IS ORDERED that the Plaintiffs are granted leave to file their Reply brief, *instanter*.

This ____ day of December, 2014.

_____
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF NORTH CAROLINA