CASE NO. 11-1149
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GRAY PETERSON,

Appellant,

v.

CHARLES F. GARCIA, et al.,

Appellees.

On Appeal from the United States District Court
For the District of Colorado
The Honorable Senior District Judge Walker D. Miller
D.C. No. 10-cv-00059-WDM-MEH

ANSWER BRIEF OF APPELLEES JOHN W. SUTHERS AND JAMES DAVIS

Respectfully submitted,

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Colorado Attorney General John Suthers (hereinafter "the Attorney General"), and Executive Director of the Department of Public Safety James Davis (hereinafter "the Executive Director"), hereby submit their Answer Brief in response to the Opening Brief submitted by Plaintiff-Appellant Gray Peterson.

RELATED CASES

There are no prior or related appeals pending in the Tenth Circuit.

STATEMENT OF THE ISSUES

1) Whether the district court correctly applied principles of Eleventh Amendment immunity and properly dismissed the Executive Director for want of subject matter jurisdiction.

2) Whether the district court correctly determined that the challenged statute does not violate the right to travel as protected by the Privileges and Immunities Clause of Article IV, § 2.

3) Whether, because he cannot trace any alleged injury to his asserted Second Amendment rights to the challenged statute, the Plaintiff has Article III standing to challenge, on Second Amendment

grounds, Colorado's residency requirement for the issuance of concealed handgun permits.

4) Whether the district court appropriately applied intermediate scrutiny to the Plaintiff's Second Amendment claim.

STATEMENT OF THE CASE

After his application for a concealed handgun permit was denied, Plaintiff Gray Peterson, a resident of the State of Washington, filed suit against the *ex officio* sheriff of Denver and the Executive Director of the Department of Public Safety, challenging: 1) Colorado's statutory reciprocity requirements for the recognition of concealed handgun permits issued to certain non-residents of Colorado, and 2) Colorado's residency requirement for the issuance of concealed handgun permits by Colorado authorities. Upon motion, the district court dismissed the Executive Director, finding that he had Eleventh Amendment immunity. Appellant App. 126-27. In the same order, the district court denied a motion for summary judgment filed by the Denver *ex officio* sheriff and permitted the Attorney General of the State of Colorado to intervene in order to defend the constitutionality of the state statute.

Id. at 127-29. The district court delayed ruling on the Plaintiff's pending motion for summary judgment until the Attorney General had an opportunity to respond. *Id.* at 127.

The Attorney General responded to the Plaintiff's motion for summary judgment and filed a cross-motion for summary judgment on all claims. *Id.* at 131-51; 152-72. The district court denied the Plaintiff's motion for summary judgment and granted the Attorney General's cross-motion. *Id.* at 211-28. These proceedings followed.

STATEMENT OF THE FACTS

This case is one of many filed by various plaintiffs in courts throughout the country that attempt to expand upon the Second Amendment right established by *District of Columbia v. Heller,* 554 U.S. 570 (2008), and incorporated into the Bill of Rights by *McDonald v. City of Chicago,* 130 S.Ct. 3020 (2010). Plaintiff Gray Peterson's particular complaint arises from the confluence of Denver ordinance, which places certain restrictions on the open carry of firearms within city limits, and Colorado statute, which, to ensure the initial and ongoing qualifications of its concealed handgun permit ("CHP") holders,

limits the issuance of Colorado CHPs to residents of the state. Because Peterson does not live in Colorado, he is ineligible for a CHP. C.R.S. § 18-12-203(1)(a). Likewise, because he is not a resident of a state that has permit reciprocity with Colorado, the concealed carry permits that he does possess are not recognized here. C.R.S. § 18-12-203(3). As described in more detail below, the combined effect of Denver ordinance and Colorado statute therefore places some limits on the places and situations in which Peterson may carry a pistol while he is within Denver city limits.

Peterson submitted a CHP application to the Manager of Safety of the City and County of Denver (hereinafter, "the Sheriff"), who by statute is charged with sole authority to accept, evaluate, and issue or deny CHPs in accordance with a detailed set of statutory criteria. Appellant App. 124-25. One of these criteria is residency; Colorado statute requires any individual to whom a county sheriff issues a CHP to be a resident of Colorado at the time of issuance and for as long as the permit is held. C.R.S. § 18-12-203(1)(a). Here, in accordance with

state law, the Sheriff declined to issue a CHP to Peterson because Peterson is not a Colorado resident. Appellant App. 125.

Peterson subsequently filed suit against: 1) the Sheriff, challenging his refusal to issue him a CHP due to his non-residency, and 2) the Executive Director, claiming that various constitutional provisions compel Colorado to provide reciprocal recognition to his non-resident Florida CHP. *Id*. at 7-17. With respect to the claims asserted against the Sheriff, Peterson challenged *only* the state statute that prohibits the issuance of CHPs to non-residents; he did not challenge Denver's limitation on open carry. His specific constitutional claims were rooted in the Privileges and Immunities Clause of the United States Constitution (Article IV, § 2), the Equal Protection, Due Process, and Privileges or Immunities Clauses of the Fourteenth Amendment, and the Second Amendment. *Id.* Peterson does not raise an independent equal protection claim on appeal.

Because it is important to the outcome of this case, the actual impact of the combined effect of Denver ordinance and state statute, as well as the state's reasons for requiring residency of its CHP holders,

are recounted here. Peterson has argued throughout this litigation that the combined effect of Denver's open carry limitation and Colorado's residency requirement for CHPs is to "completely disarm" him when in Denver. The district court rejected this claim, and rightly so. *Id.* at 226. A review of the applicable Denver ordinances and Colorado statutes demonstrates that Peterson, despite his non-residency, may still possess a loaded and operable firearm while in Denver as follows: in a dwelling, place of business, or on property controlled or owned by the person at the time of carrying, Denver Revised Municipal Code (D.R.M.C.) 38-117(a); while in a private automobile or other private means of conveyance, D.R.M.C. 38-117(f)(2); and in defense of home, person or property, when there is a direct and immediate threat thereto. D.R.M.C. 38-118(b)(1).

Colorado's reasons for requiring residency of its CHP holders are compelling. As the district court found, the state's ability to accurately ensure that the individuals to whom it issues CHP permits qualify under the statutory requirements, and will not pose a danger to themselves or others, depend largely on the availability of background

information. Appellant App. 212-15. Colorado law enforcement authorities undertake extensive background investigations of permit applicants in order to ensure eligibility. Supp. App. 2-6; 10-12. However, the undisputed evidence below demonstrated that full and thorough background checks are virtually impossible to conduct on non-residents. *Id.* at 2-6; 10-12; 41 (Transcript, 64:4-25, 65:1); 17 (Transcript, 11:2-22). Federally administered databases can be incomplete and inaccurate, and data sharing between states is limited; as a result local sheriffs have far more access to accurate background information on local residents than they do on residents of other states. Suppl. Appdx., pp. 2-6; pp. 10-12.

Ongoing monitoring is also important. Law enforcement contacts and other issues (such as drug abuse) can result in revocation of a previously issued permit. C.R.S. § 18-12-204(3)(a) and (3)(b). While information about in-state law enforcement contacts is available through state-administered databases, the same information is not available from other states. Supp. App. 11-12 (¶¶ 12-13). As the district court found, the evidence below demonstrated that "it is much

more difficult and expensive to obtain information pertinent to an applicant's eligibility for a concealed handgun permit from out-of-state sources." Appellant App. 221. Whether it is available at the time of the application or during the period that the permit is active, "[i]nformation about a person's contacts with law enforcement, mental health status, alcohol and drug use, and domestic violence history is simply more likely to be found in the jurisdiction where that person resides." *Id.*

SUMMARY OF THE ARGUMENT

Authority to administer Colorado's statutory scheme for the issuance of concealed handgun permits is expressly delegated to the state's local sheriffs. Colorado's statutes operate on their own to define the states with which Colorado shares reciprocity. The Executive Director of Public Safety has no role in applying these statutes or in determining how reciprocity will apply. Because he has no connection to the operation of the statute and no authority to enforce it, the district court correctly determined that the Executive Director had Eleventh Amendment immunity from suit.

Colorado statutes limit the issuance of concealed handgun permits to state residents. This scheme does not implicate the Privileges and Immunities Clause of Article IV, § 2, because Second Amendment rights, irrespective of their extent, are not considered "fundamental" for the purposes of that clause. Even if such rights are "fundamental," however, the state has a substantial reason for discriminating between residents and non-residents.

Plaintiff's purported Second Amendment rights are ostensibly abridged not only by Colorado statute, which he did challenge, but also by Denver ordinance, which he did not. However, whether or not the Second Amendment extends outside the home, it does not protect any right to carry a concealed weapon. Thus, Plaintiff's claimed injury – the asserted right to carry a firearm outside the home – would be traceable only to Denver's open carry limitation, and not to Colorado's residency requirement for CHPs. Accordingly, Plaintiff lacks Article III standing to challenge the CHP residency requirement.

Nonetheless, even if Plaintiff does have standing, the combined effect of Colorado statute and Denver ordinance – because they

encompass the right announced in *Heller* and more – do not infringe upon any rights that the Second Amendment protects. And even if they do, the burden is not severe, so intermediate scrutiny would apply to Plaintiff's Second Amendment claim. The challenged statute passes constitutional muster under that standard.

STANDARD OF REVIEW

The Plaintiff's reciprocity claims were dismissed based upon a finding of Eleventh Amendment immunity. With no subject matter jurisdiction, the district court's dismissal must have been pursuant to Fed. R. Civ. P. 12(b)(1). Plaintiff contends that the district court's Eleventh Amendment ruling amounted to a dismissal under Fed. R. Civ. P. 12(b)(6). For reasons explained below, this assertion is incorrect. However, the standard of review under either rule is *de novo*. *Steadfast Ins. Co. v. Agric. Ins. Co.*, 507 F.3d 1250, 1253 (10th Cir. 2007).

Rulings on motions for summary judgment are reviewed *de novo*. *Allen v. Sybase, Inc.,* 468 F.3d 642, 649 (10th Cir. 2006). The district court's findings of fact will only be reversed if they are clearly

erroneous. *Crawford v. Ne. Okla. State Univ.*, 713 F.2d 586, 588 (10th Cir. 1983).

I. The district court correctly applied principles of Eleventh Amendment Immunity to dismiss the Executive Director for lack of subject matter jurisdiction.

As noted above, Peterson's Amended Complaint named two defendants and asserted distinct claims against each of them. Peterson's allegations against the Executive Director of the Department of Public Safety related only to the constitutionality of C.R.S. § 18-12-213(1), which establishes Colorado's requirements for reciprocal recognition of CHPs from other states. Peterson's Amended Complaint alleged that the Executive Director "is primarily responsible for administering the recognition and reciprocity of CHLs issued by other states." Appellant App. 13 (¶ 54). By "giv[ing]" reciprocity to Florida's resident CHP holders, while simultaneously "refusing" reciprocity for non-resident Florida CHP holders, Peterson alleged, the Executive Director violates the Privileges and Immunities Clause of Art. IV, § 2, the Second Amendment, and various provisions of the Fourteenth Amendment. *Id.* at 14 (¶ 56), 15 (¶ 58).

Because, by statute, he has no responsibility or authority for administration or enforcement of Colorado's statutory reciprocity requirements, the Executive Director asserted Eleventh Amendment immunity and moved to dismiss for lack of subject matter jurisdiction. Taking judicial notice of the statute that devolves "implement[ation] and administr[ation]" of Colorado's entire concealed handgun permitting, issuance, and monitoring scheme to the state's county sheriffs, the district court agreed that the Executive Director was shielded from suit by the Eleventh Amendment, and accordingly dismissed the claims asserted against him because it lacked subject matter jurisdiction. Appellant App. 126-27.

Peterson takes issue with two aspects of the ruling below. First, he complains that, for the purposes of the Executive Director's motion to dismiss, the district court was required to credit his "well-pleaded allegation" that the Executive Director "is primarily responsible for administering the recognition and reciprocity of concealed handgun licenses by other states," despite the fact that, as the district court found, this claim is directly contradicted by Colorado statute. Open. Br.

at 15. Second, he argues that the district court misapplied the holding of *Ex Parte Young*, 209 U.S. 123 (1908), to conclude that Eleventh Amendment immunity applied. *Id.* at 21-22.

A. Standard of review

The district court dismissed the Executive Director as a defendant on Eleventh Amendment grounds, finding that, per Colorado statute, he has "no authority or ability to provide the relief sought by Plaintiff[.]" Appellant App. 127. On appeal, Peterson argues that this amounted to a dismissal for failure to state a claim upon which relief may be granted, pursuant to Fed. R. Civ. P. 12(b)(6). Open. Br. at 17. Eleventh Amendment immunity, however, implicates the subject matter jurisdiction of federal courts, and is properly considered under Fed. R. Civ. P. 12(b)(1). *See, e.g., Robinson v. Kansas*, 295 F.3d 1183, 1188 (10th Cir. 2002). A district court's dismissal of a claim or party pursuant to the Eleventh Amendment and Rule 12(b)(1) is reviewed *de novo*. *See Elephant Butte Irrigation Dist. of N.M. v. Dep't of Interior*, 160 F.3d 602, 607 (10th Cir. 1998).

B. The district court properly took judicial notice of a Colorado statute that directly contradicts certain factual allegations contained in the Amended Complaint.

Peterson's Amended Complaint made a single allegation regarding the Executive Director's role in Colorado's reciprocity scheme: "As Executive Director of Public Safety, Defendant Weir [now Davis] is primarily responsible for administering the recognition and reciprocity of CHLs issued by other states." Appellant App. 13 (¶ 54). The district court declined to credit this claim, holding that it "need not accept this allegation as true if it is contradicted by state statute setting forth the scope of an official's authority, of which I may take judicial notice." Appellant App. 126.

On appeal, Peterson complains that the district court erred, for the purposes of evaluating the motion to dismiss, by failing to accept this allegation as true and construing it in a light most favorable to his complaint. But ample authority supports the approach that the district court took. First, it is doubtful that Peterson's claim about the Executive Director's responsibilities should be considered a factual

allegation at all. To the contrary, because the duties and responsibilities of Colorado law enforcement officials as they pertain to the state's permitting scheme are specifically defined by statute, Peterson's claim that the Executive Director has any enforcement authority can only be based on his interpretation of Colorado law. However, as the Supreme Court has held, for the purposes of a motion to dismiss, a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papason v. Allain*, 478 U.S. 265, 286 (1986); *see also Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir.1993) ("conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss").

Second, even if Peterson's claims regarding the Executive Director's responsibilities represent a factual assertion rather than a legal conclusion, the district court correctly pointed out that it may take judicial notice of state statutes. *See United States v. Coffman,* 638 F.2d 192, 194 (10th Cir. 2001). Just as important is that fact that a "court need not . . . accept as true allegations that contradict matters subject

to judicial notice." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Here, the court properly took judicial notice of the applicable Colorado statute and, based on its plain language, properly determined that it contradicted Peterson's claim.

C. The district court correctly interpreted the applicable statute to determine that the Executive Director had Eleventh Amendment immunity from suit.

The Eleventh Amendment bars citizen lawsuits brought in federal court against a state or one of its agencies. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). Eleventh Amendment immunity applies "whether the relief sought is legal or equitable." *Papason*, 478 U.S. at 276. However, the "legal fiction" of *Ex Parte Young,* 209 U.S. 123 (1908), establishes a narrow exception to the Eleventh Amendment's general limitation on federal court jurisdiction. *Harris v. Owens*, 264 F.3d 1282, 1290 (10th Cir. 2001). Under the *Ex Parte Young* exception, an action brought against a state official who has the authority to enforce a particular law, and which seeks only prospective or injunctive relief barring enforcement of that law, "is not

an action against the state and, as a result, is not subject to the doctrine of sovereign immunity." *Crowe & Dunleavy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011).

The *Ex Parte Young* exception is narrow, and requires the state official who is sued to "have a particular duty to 'enforce' the statute in question and a demonstrated willingness to exercise that duty." *Prairie Band Potawatomi Nation v. Wagnon,* 476 F.3d 818, 828 (10th Cir. 2007). The necessary connection "must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *Los Angeles Cnty. Bar Ass'n v. Eu,* 979 F.2d 697, 704 (9th Cir. 1992). The "connection *must be determined under state law* depending on whether and under what circumstances a particular defendant has a connection with the challenged state law." *Oklapobi v. Foster,* 244 F.3d 405, 416 (5th Cir. 2001), *quoting Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998) (emphasis added).

Here, the Amended Complaint alleged that the Executive Director is "primarily responsible for administering the recognition and

reciprocity of CHLs issued by other states." Appellant App. 13 (¶ 54). As the district court found, however, this claim is directly contradicted by statute. C.R.S. § 18-12-202(3) "instructs each sheriff to implement and administer the provisions of this part 2." Part 2 comprises the entirety of Colorado's concealed handgun permitting scheme. This authority is exclusive and leaves the Executive Director with no power to either enforce or supervise the issuance of CHPs. The same goes for reciprocity. The reciprocity statute, C.R.S. § 18-12-213, is one of the "provisions of this part 2," and thus falls within the sheriffs' general implementation and administration authority.

Peterson's arguments on appeal only serve to underscore why the district court's conclusion was correct. He argues that Eleventh Amendment immunity does not apply because he is challenging the Executive Director's "refusal to give recognition to Peterson's CHLs issued by other states." Open Br. at 21. But the statutes discussed above demonstrate that the Executive Director has not "refused" to do anything. Indeed, by statute he has no role in granting or denying

reciprocity under state law. The legislature has instead delegated that responsibility to the state's county sheriffs.

Perhaps the best way to assess whether Eleventh Amendment immunity should apply would be to consider whether enjoining the Executive Director from "enforcing" Colorado's reciprocity statute would have any practical effect. Because, by statute, the Executive Director has no role administering or implementing the statute, the answer is an obvious "no." The district court acknowledged as much when, upon dismissing the Executive Director, it invited Peterson to "substitut[e] or nam[e] an alternative defendant to represent the State of Colorado[.]" Appellant App. 127. It would have been simple enough for Peterson to substitute the Sheriff, but Peterson elected not to do so despite the fact that, per Colorado statute, the Sheriff has precisely the type of enforcement authority that would qualify for the *Ex Parte Young* exception.

In sum, in evaluating the Executive Director's assertion of Eleventh Amendment immunity, the district court 1) properly took judicial notice of Colorado law, and 2) correctly interpreted it to

conclude that there was no nexus between the Executive Director's statutorily-defined job duties and enforcement of the state's reciprocity scheme. This Court should accordingly affirm the district court's order ruling that the Executive Director was entitled to Eleventh Amendment immunity and dismissing him for lack of subject matter jurisdiction.

II. The district court correctly found that the challenged statute does not violate the right to travel as protected by the Privileges and Immunities Clause of Article IV, § 2.

Peterson argues that his Amended Complaint relies on a "right to travel" that is apparently derived from the Constitution, but that is nonetheless separate and apart from the Privileges and Immunities Clause. He fails to clearly identify a textual source for the asserted right, but nonetheless argues that the district court erred when it concluded that "the right to travel at issue here is derived from the Privileges and Immunities Clause and so only one analysis is required." Appellant App. 218. The constitutional source of Peterson's right to travel claim is potentially important because – assuming that Peterson has asserted a cognizable right to travel claim – it dictates the level of scrutiny that this Court must apply. However, applying any type of

scrutiny to Peterson's right to travel claim is premature unless and until Peterson is able to demonstrate that the challenged statute implicates his right to travel as guaranteed by the Privileges and Immunities clause. Only if Peterson is able to make this showing will there be any need to consider whether the district court correctly determined that intermediate scrutiny, and not strict scrutiny, applies to the specific type of right to travel claim asserted in this case.

A. The challenged statute does not implicate the right to travel because carrying a concealed pistol is not a privilege or immunity of citizenship.

Before considering which level of scrutiny is appropriate, it is necessary to assess whether Peterson even presents a cognizable claim that his right to travel has been abridged. The source of the right to travel that Peterson asserts in this case is discussed in more detail below, but for now it is sufficient to point out that, as the district court found, the component he asserts is violated by Colorado law finds its roots in the Privileges and Immunities Clause of Article IV, § 2. *See Saenz v. Roe,* 526 U.S. 489, 501 (1999). That is, the right that Peterson claims is violated by Colorado statute – the right to be treated as a

welcome visitor rather than an unfriendly alien when visiting another state – "is merely a restatement of rights arising under Article IV." *Bach v. Pataki,* 408 F.3d 75, 87 (2d Cir. 2005). Accordingly, because Peterson's right to travel and Privileges and Immunities claims have the same constitutional underpinnings, the district court correctly applied the same analysis to both.

The Privileges and Immunities Clause does not enumerate "the particular subjects as to which [non-residents] are guaranteed equality of treatment," *Austin v. New Hampshire,* 420 U.S. 656, 660 (1975), and Supreme Court precedent demonstrates that the "privileges" protected by the Clause are not as numerous as Peterson might hope. To the contrary, the Privileges and Immunities Clause applies only to rights that "bear upon the vitality of the Nation *as a single entity*, and are thus "sufficiently basic to the livelihood of the Nation so as to fall within its purview." *Supreme Court v. Friedman,* 487 U.S. 59, 64-65 (1988) (emphasis added); *see also Baldwin v. Mont. Fish & Game Comm'n,* 436 U.S. 371, 383, 388 (1978). In other words, the component of the right to travel protected by the Privileges and Immunities Clause prohibits

classification based on residency only where the privilege at issue is "basic to the maintenance or well-being of the Union." *Id.* at 388. It does not prohibit "distinctions between residents and nonresidents [that] merely reflect the fact that this is a Nation composed of individual States." *Id.* at 383.

Peterson asserts that that the incorporation of the Second Amendment in *McDonald* is enough to establish that whatever rights it protects qualify as "privileges" under Article IV, § 2. While it is true that one early case described the Privileges and Immunities Clause as protecting rights "which are, in their nature, fundamental," *Corfield v. Coryell,* 6 F.Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, Circuit Justice), those "fundamental" rights as originally enumerated focused primarily on the "right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade . . . or otherwise," and "an exemption from higher taxes or impositions than are paid by the other citizens of the state." *Id.* at 551-52. To be sure, *Corfield* also mentioned the right to "pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe

for the general good of the whole." *Id.* at 551. But firearms go unmentioned, and subsequent interpretations of Article IV establish that the Privileges and Immunities Clause protects fundamental *economic* rights, and nothing more.[1] *See, e.g., Supreme Court v. Piper,* 470 U.S. 274, 279-80 (1985) ("the Privileges and Immunities Clause was intended to create a national economic union"); *Lunding v. N.Y. Tax Appeals Tribunal,* 522 U.S. 287 (1998) (striking down tax law that varied availability of deductions based on residency); *see also* 112 Harv. L. Rev. 132, 141 *Constitutional Law* (1998) ("the Privileges and Immunities Clause may have been intended specifically to protect all the privileges of trade and commerce") (internal quotation omitted). Thus, the Supreme Court has applied the Clause primarily to "burdens on the pursuit of common callings, the ownership and disposition of

[1] *Amicus* National Rifle Association relies on Chief Justice Taney's infamous *Dred Scott* opinion for the proposition that the Privileges and Immunities of citizenship include the right to possess and carry firearms. NRA Brief at 25, *citing Dred Scott v. Sanford,* 60 U.S. 393, 417 (1856). Their efforts to have the Court rely on *Dred Scott*, an historical embarrassment, illustrates the lengths to which Peterson and *amici* must go to justify their position. Moreover, at best, the cited reference to the Privileges and Immunities Clause is dicta which, given the fact that the underlying case has been completely discredited, carries no weight whatsoever.

privately held property and access to the courts." *Conservation Force, Inc. v. Manning,* 301 F.3d 985, 993 (9th Cir. 2002), *citing Baldwin,* 436 U.S. at 388.

Heller held that the Second Amendment creates a personal right to keep and bear arms within the home.[2] *McDonald* held that this right was "fundamental in the sense relevant here" – that is, to incorporation, not Privileges and Immunities – and therefore held that Second Amendment protections applied against the states. But the foregoing analysis demonstrates that, just because a right is declared "fundamental" in one narrow instance does not lead to the conclusion that it is "fundamental" for all purposes. Indeed, the Second Amendment has no conceivable connection to the economic rights,

[2] Peterson and *amici*, of course, contend that the fundamental Second Amendment right extends much further, and permits individuals such as Peterson to carry a pistol in any place not reasonably considered "sensitive." For the purposes of the Privileges and Immunities Clause, however, the breadth of the Second Amendment's protection is irrelevant. However "fundamental" the Second Amendment may be for the purposes of the Bill of Rights, it has nothing to do with the privileges of trade and commerce, or the creation of "a national economic union." *Piper,* 470 U.S. at 280. Second Amendment protections therefore fall outside the scope of Article IV, § 2.

involving primarily commerce, economics, and taxation, that the Clause was originally designed to guarantee.

While the Second Amendment is "fundamental" in the sense that it is incorporated against the states into the Fourteenth Amendment, it is not "fundamental" in the sense contemplated by Article IV. Accordingly, because Peterson's right to travel claim, assuming it is cognizable at all, extends no further than the right protected by the Privileges and Immunities Clause, there is no need to address his arguments concerning the appropriate standard of review in order to affirm the district court's ruling.

B. The right to travel as asserted by Peterson is based in the Privileges and Immunities Clause and is subject to intermediate scrutiny.

The right to travel has a long history, but its constitutional moorings have, for just as long, been a subject of debate. This Circuit has previously acknowledged the uncertainty surrounding the source and meaning of the right to travel. *See Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 498 (10th Cir. 1998). Indeed, one commentator has noted that state and federal courts have cited no fewer than ten

different constitutional provisions as the source of the right. *See* Christopher S. Maynard, *Nine-Headed Caesar: The Supreme Court's Thumbs-Up Approach to the Right to Travel*, 51 Case W. Res. L. Rev. 297, 297 (2000). Some opinions have even "implied that the search for a textual source is superfluous." *Id., citing Zobel v. Williams,* 457 U.S. 55, 66 (1982) (Brennan, J. concurring) ("the frequent attempts to assign the right to travel to some textual source in the Constitution seem . . . to have proved both inconclusive and unnecessary").

Perhaps recognizing the need to more clearly define the right to travel, in recent years various Justices have attempted to better define its scope and constitutional source. The most definitive of these discussions (and the only one to muster a majority of the Supreme Court) appears in *Saenz v. Roe,* 526 U.S. 489 (1999). *Saenz* acknowledged that the right to travel is comprised of at least three separate components, each arising from a different source:

a) The right of a citizen of one State to enter and to leave another State. The *Saenz* majority freely acknowledges that the Constitution contains no clear textual source for this aspect of the right, noting

instead that in *Shapiro v. Thompson,* 394 U.S. 618 (1969), the Court had relied on the nation's unified federalist structure and language contained in the Articles of Confederation to conclude that the right existed.

The level of scrutiny that applies to a law that implicates this aspect of the right varies along with the nature and severity of a challenged statute's interference with its exercise. Thus, while prohibiting individuals from crossing state lines will certainly trigger strict scrutiny, *see Edwards v. California,* 314 U.S. 160 (1941), the Court applied rational basis review to an Iowa law requiring new residents to undergo a waiting period before filing for divorce. *See Sosna v. Iowa,* 419 U.S. 393 (1975).

b) *For those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.* This aspect of the right to travel is often referred to as the "right to migrate." *See, e.g. Hooper v. Bernalillo Cnty. Assessor,* 472 U.S. 612, 615 (1985). It is protected by the Privileges *or* Immunities Clause of the Fourteenth Amendment, *Saenz,* 562 U.S. at 502-03, although the line between it

and the Equal Protection is not always entirely clear. *See Zobel v. Williams,* 457 U.S. 55, 60, n.6 (1982). Irrespective of its source, however, Supreme Court case law clarifies that strict scrutiny applies to state laws that place burdens on the right to migrate. *See, e.g., Att'y Gen. of N.Y. v. Soto-Lopez,* 476 U.S. 898, 903 (1986).[3]

c) *The right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State.* The instant case implicates only this facet of the right to travel. *Saenz* definitively identifies its source: "The second component of the right to travel is . . . expressly protected by the text of the Constitution. The first sentence of Article IV, § 2, provides: 'The Citizens of each State

[3] In *Soto-Lopez,* a three-Justice plurality wrote that "[a] state law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right." 476 U.S. at 904. Peterson contends that this articulation of the right to travel applies to his situation (in addition to the right protected by the Privileges and Immunities Clause). Read in context, however, and along with the Supreme Court's clear articulation of the source and nature of the various components of the right to travel in *Saenz,* the discussion in *Soto-Lopez* can only be read as describing the various aspects of the "right to migrate" protected by the Fourteenth Amendment, and not as establishing new aspects of the right to travel.

shall be entitled to all Privileges and Immunities of Citizens in the several States.'" *Saenz,* 526 U.S. at 501. Even *Selevan v. N.Y. Thruway Auth.,* 584 F.3d 82 (2d Cir. 2009), which Peterson touts as distinguishing between right to travel and Privileges and Immunities claims, acknowledges that "[i]n *Saenz*, a right-to-travel case, the Court identified the article's Privileges and Immunities Clause as the source of the right of 'a citizen of one State who travels in other States, intending to return home at the end of his journey . . . to enjoy the Privileges and Immunities of Citizens in the several States that he visits.'" *Selevan,* 584 F.3d at 103, *quoting Saenz,* 526 U.S. at 501.

Peterson argues that strict scrutiny applies to his right to travel claim, but in contrast to the first and third components of the right to travel, laws implicating the right to be treated as a welcome visitor rather than an unfriendly alien are examined under the "substantial reason" test, which in practice approximates an intermediate scrutiny standard. *See, e.g., Lutz v. City of York, Pa.,* 899 F.2d 255, 269-70 (3d Cir. 1990) (pre-*Saenz* case applying intermediate scrutiny to right-to-travel challenge to cruising ordinance); *see also Peruta v. Cnty. of San*

Diego, 758 F.Supp.2d 1106, 1119-20 (S.D. Cal. 2010) (applying intermediate scrutiny to right-to-travel challenge to county concealed handgun law).

As *Saenz* holds, the right to travel as protected by the Privileges and Immunities Clause bars discrimination against residents of other states only "where there is no substantial reason for the discrimination beyond the fact that they are citizens of other states." *Id.* at 502, *quoting Toomer v. Witsell,* 334 U.S. 385, 386 (1948). This is not the language of strict scrutiny, which typically requires the government to prove that the challenged restriction is narrowly tailored to further a compelling interest. *See, e.g., Citizens United v. Fed. Elections Comm'n,* 130 S.Ct. 876, 898 (2010). In *Buchwald*, a panel of this Court recognized as much, noting that the Supreme Court has avoided determining whether a state-created classification penalizes the right to travel "either by determining the purpose advanced by the government are illegitimate or, if legitimate, that the created distinction does not even rationally further the state goal. 159 F.3d at 497-98. *Buchwald* thus suggested that right to travel claims be reviewed under a "purpose

scrutiny" standard. *Id.* Although this approach is more stringent than rational basis review, *Buchwald* also confirms that strict scrutiny does not apply to Peterson's right to travel claim.

> d) *Even assuming that carrying a concealed pistol implicates a right protected by the Privileges and Immunities Clause, the district court correctly applied intermediate scrutiny to determine that there was a substantial reason to affirm the challenged statute's constitutionality.*

It is necessary to apply the "substantial reason" test only upon a determination that the challenged statute implicates the right to travel. *Lunding,* 522 U.S. 287 (1998) (applying substantial reason test after determining that challenged tax law implicated a fundamental right under Article IV). Assuming that Peterson is able to make such a showing, his right to travel claim can only succeed if he is able to establish that Colorado has no substantial reason for refusing to issue CHPs to non-residents beyond the fact of their lack of residency.

As the district court found, however, the "competent and uncontroverted evidence" presented below established exactly the type of justification that passes muster under the substantial reason test. Appellant App. 221. Colorado does not refuse to issue CHPs to non-

residents arbitrarily or due to some sort of xenophobia. To the contrary, Colorado requires its CHP holders to be residents of the state precisely because the issuing sheriff must be able to accurately assess whether issuing a permit will endanger either the public or the permit holder himself. In order to determine, per statutory requirements, whether an applicant or permit holder "will present a danger to self or others," C.R.S. § 18-12-203(2), (3)(b), the issuing sheriff must conduct extensive background research. *See* C.R.S. § 18-12-203 (factors including criminal history, chronic and habitual use of alcoholic beverages, drug use or addiction, among others). Informed and accurate decisions about who qualifies and who does not cannot be based on an applicant's say-so. As the record demonstrates, the issuing sheriff must evaluate not only objective factors (such as an applicant's criminal history), but also subjective ones (such as drug or alcohol addiction issues). Supp. App. 2-4; 10-13. Much more, and much more accurate, information about all of these factors is available for Colorado residents than it is for residents of other states.[4] *Id.*

[4] In one of many impermissible attempts to inject new (and dubious)

Despite the fact that Colorado has a relatively permissive regime regulating weapons possession and is often referred to as a "shall-issue" jurisdiction for concealed handgun permits, the state's statutory permitting scheme imposes substantial investigatory and monitoring obligations on the sheriffs charged with evaluating CHP applications. As the evidence below established and the district court concluded, these obligations accrue whether a sheriff is issuing a permit for the first time or is monitoring a permit holder's ongoing qualifications. Supp. App. 11-12 ¶ 12; Appellant App. 214-15. For example, while statewide databases inform issuing sheriffs when permit holders from their county have in-state law enforcement contacts, no such information would be available for a non-resident who was arrested in his home state. Appellant App. 215. The same goes for other issues that permit holder may have. A sheriff is far more likely to learn of a local

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information into the record on appeal, the NRA's *amicus* brief expresses "doubts" concerning the State's assertion that national databases are imperfect. NRA *Amicus* at 30, n.6. The evidence on this point is uncontroverted, and clearly demonstrates that Colorado permitting authorities have found statewide databases – which, for example, include information about municipal convictions that are not consistently reported to NCIC – to be far more reliable than the national databases maintained by the FBI. Supp. App. 10-11 (¶¶ 9-12).

resident's alcohol or substance abuse problems, or perhaps domestic issues that stop short of arrest, than he is to find out the same information about a permit holder who lives a thousand miles away. Supp. App. 4-6 (¶ 11).

There is thus an obvious and substantial reason underlying Colorado's decision to issue CHPs to residents while denying the same to non-residents. There is, moreover, a strong relationship between this decision and the state's objective of ensuring public safety. This conclusion is entirely consistent with the few court decisions that have addressed the question. *See Bach,* 408 F.3d at 87 ("New York's interest in monitoring gun licensees is substantial and that New York's restriction of licenses to residents and persons working primarily within the State is sufficiently related to this interest."); *Peruta,* 758 F. Supp. 2d at 1119-20 (adopting analysis in *Bach* to hold that residency requirement for concealed weapons permit does not violate Privileges and Immunities Clause). Requiring Colorado to issue CHPs to non-residents would compromise the safety of the state's citizens by undermining the reliability of the extensive background check that is a

required component of every application. Accordingly, even if Peterson is correct in his assertion that the challenged regulatory scheme burdens an Article IV, § 2 "privilege," he is unable to demonstrate that Colorado's regulations violate his constitutional right to travel as protected by the Privileges and Immunities Clause.

III. The district court correctly found that the challenged statute does not violate the Second Amendment.

Peterson next argues that the district court erred in holding that the challenged statute is consistent with the Second Amendment. More specifically, he contends that strict scrutiny, and not intermediate scrutiny, applies to his claim. *Amicus* Second Amendment Foundation (SAF) additionally argues that the district court erroneously applied rational basis review under the guise of intermediate scrutiny. While both of these arguments are ultimately unavailing, it is necessary to consider several threshold issues before addressing them directly.

A. Because the Amended Complaint challenges the wrong law, Peterson cannot trace any purported injury of his Second Amendment rights to the challenged statute. He therefore does

not have standing to pursue a claim under the Second Amendment.

Peterson filed suit to vindicate his ostensible Second Amendment right to carry a pistol anywhere he wishes when visiting Denver. In essence, he argues that *Heller* and *McDonald* require application of a strict scrutiny standard to any law that prevents him from carrying a handgun in public. Because, he argues, the challenged statute is not narrowly tailored to achieve a compelling governmental interest, it cannot satisfy strict scrutiny and accordingly violates the Second Amendment.

Although Peterson vastly overstates the effect of the law on his ability to carry a pistol while in the city, it is true that the combined effect of Denver ordinance, which limits open carry for everyone, and Colorado statute, which prohibits the issuance of CHPs to non-residents, places some limits on the locations in Denver where Peterson may carry a firearm. Any injury to Peterson's asserted Second Amendment rights, however, cannot be traced to the Colorado statute. This becomes all the more clear when one considers that whatever the scope of the Second Amendment may be, it does not establish a right to

carry a concealed pistol. *See, e.g., Robertson v. Baldwin,* 165 U.S. 275, 281-82 (1897) ("the right of the people to keep and bear arms…is not infringed by laws prohibiting the carrying of concealed weapons"); *Thomas v. Members of City Council of Portland,* 730 F.2d 41, 42 (1st Cir. 1984) ("[e]stablished case law makes clear that the federal Constitution grants appellant no right to carry a concealed handgun"); *cf.* Colo. Const., art. II, § 13 ("The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; *but nothing herein contained shall be construed to justify the practice of carrying concealed weapons.*") (emphasis added).

"Standing under Article III is . . . a threshold issue in every case before a federal court[.]" *Hutchinson v. Pfeil,* 211 F.3d 515, 523 (10th Cir. 2000). It may be raised at any time, *Powder River Basin Resource Council v. Babbitt,* 54 F.3d 1477, 1484 (10th Cir.1995), and the plaintiff "must have standing to seek each form of relief in each claim." *Bronson v. Swensen,* 500 F.3d 1099, 1106 (10th Cir.2007). To establish constitutional standing under Article III, a plaintiff "must demonstrate

three elements: injury in fact, traceability, and redressability." *S. Utah Wilderness Alliance v. Office of Surface Mining Reclamation and Enforcement,* 620 F.3d 1227, 1233 (2010). Peterson's decision not to challenge the Denver's limitation on open carry causes him problems under all of these elements, but his standing to challenge the Colorado statute alone is perhaps best analyzed by looking at traceability.

"A plaintiff's injury is fairly traceable to the challenged action of a defendant where there is a 'causal connection between the injury and the conduct complained of.'" *City of Colo. Springs v. Climax Molybdenum Co.,* 587 F.3d 1071, 1080 (10th Cir. 2009), *quoting Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (internal alterations omitted). A showing of proximate cause is not required, but Article III does "require proof of a substantial likelihood that the defendant's conduct caused plaintiff's injury in fact." *Habecker v. Town of Estes Park,* 518 F.3d 1217, 1225 (10th Cir. 2008), *quoting Nova Health Sys. v. Gandy,* 416 F.3d 1149, 1156 (10th Cir. 2005).

Peterson's claimed injury-in-fact is the deprivation of the asserted Second Amendment right to carry a handgun in public. Accordingly,

because he has challenged *only* the applicable state statute, and not Denver's open carry ordinance, his only claimed injury stems from Colorado's residency requirement for CHP issuance. If *Heller* and *McDonald* cast doubt on anything, however, it is neither the validity of regulations limiting concealed carry, nor residency requirements for acquiring a concealed carry permit. *Cf. Heller,* 554 U.S. at 626 (Second Amendment does not create "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose"). Those cases only reinforce the longstanding rule that concealed carry falls outside whatever protections the Second Amendment establishes. *See id.* at 626; *Robertson,* 165 U.S. at 281-82 ("the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons"); *Dorr v. Weber,* 741 F. Supp.2d 993, 1004-05 (N.D. Iowa 2011). Instead, assuming *arguendo* that the Second Amendment right extends outside the home at all, it protects only *open* carry.

Peterson may well respond that the Second Amendment requires an outlet, an opportunity to carry a pistol in public for the purpose of

self-defense. He has already advanced, for instance, the *non sequitur* that if functioning firearms cannot be banned "in the home, it stands to reason that Denver may not ban possession of functioning firearms in all places but dwellings, private automobiles, and places of business." Open. Br. at 39. This goes far beyond *Heller*'s articulation of the Second Amendment's core – "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller,* 554 U.S. at 635. But even if he is right about *Heller*, Peterson cannot simply pick and choose which law to challenge based on his own preferences. To allow him to do so here would permit him to bootstrap a complaint about Colorado's concealed handgun permitting laws – which, under *Robertson* (which is not called into question by *Heller*), are outside the Second Amendment's scope – into a full-blown constitutional claim. If Peterson wished to assert that his Second Amendment rights are violated, it was incumbent upon him to challenge a law that actually implicated those rights. Because Denver's open carry limitation represents the only conceivable infringement on Peterson's Second Amendment rights in

this case, he is unable to show that his alleged injury is traceable to the Colorado statute at issue.

B. Assuming that Peterson has standing to raise a Second Amendment challenge, the district court's application of intermediate scrutiny and its eventual holding should be affirmed.

In the wake of *Heller* and *McDonald,* state and federal courts around the country have addressed challenges to firearms regulations promulgated and enforced by all levels of government. It is well-known that *Heller* and *McDonald* left much about the scope and application of the Second Amendment undecided. The federal district and circuit courts, however, have begun to fill those gaps, and have done so with remarkable consistency, at least on issues relevant to this case. Despite the fact that firearms regulations have a dizzying array of applications – *e.g.* rights inside and outside the home, felon dispossession, and the rights of law-abiding citizens are just a few examples – the circuit courts have spoken with a single voice on two critical subjects: 1) the analytical approach to Second Amendment challenges; and 2) the level of scrutiny that the Second Amendment requires. The district court

followed this approach and correctly concluded that Peterson's Second Amendment rights are not violated by the combined effect of Denver ordinance and Colorado statute.

1. The combined effect of the challenged laws does not fall within the Second Amendment's protections.

In *United States v. Reese,* 627 F.3d 792, 800-01 (10th Cir. 2010), a panel of this Court joined a growing number of circuits that have adopted a two-step approach to analyzing Second Amendment claims. Under *Reese*, "a reviewing court first asks whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. If it does not, the court's inquiry is complete. If it does, the court must evaluate the law under some form of means-end scrutiny." *Id.* (internal quotations, citations, and alterations omitted). The district court acknowledged this approach, but "assum[ed] without deciding that the statute at issue falls within the scope of the Second Amendment in that it places restrictions on Plaintiff's right to carry a weapon for the purposes of self-defense." Appellant App. 225. The opinion went on to consider Peterson's

arguments on the merits, eventually concluding that the challenged statute survives immediate scrutiny.

The district court's assumption that the challenged statute "falls within the scope of the Second Amendment" is worth reconsidering here. As already noted, Peterson substantially overstates the combined effect of Denver ordinance and Colorado law on his ability to possess and carry a pistol in the city. Because he cannot acquire a CHP, when and where Peterson can carry a pistol is controlled primarily by Denver ordinance. Peterson claims that as a result, the challenged law causes him to be "completely disarmed in Denver." Open. Br. at 33. This is not so. When Peterson visits Denver, he may carry a pistol in his dwelling, his place of business, on any property he owns or controls, in private automobiles or other private means of conveyance, or for defense of an immediate threat to "home, person, or property." He may do so openly or concealed. D.R.M.C. § 38-117, -118.

Accurately assessing the scope of permissible and prohibited conduct is important, because Peterson cannot prevail unless he is able to show that "the challenged law imposes a burden falling within the

scope of the Second Amendment's guarantee." *United States v. Marzzarella,* 614 F.3d 85, 89 (3d Cir. 2010). This is doubly true in the context of this case because, despite Peterson's and *amici*'s claims to the contrary, *Heller*'s holding is explicitly limited. To be sure, *Heller* took "off the table . . . the absolute prohibition of handguns held and used for self-defense in the home." 554 U.S. at 636. But *Heller* also declared that only a narrow range of core conduct is protected by the Second Amendment: "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635. But the Supreme Court went no further. Together, the right enumerated by *Heller* and *McDonald* guarantees only that no government – whether federal, state, or local – may prohibit qualified individuals from possession a functional handgun within the home for the purpose of self-defense. Governments may still enact licensing requirements and may still restrict those who are "disqualified from the exercise of Second Amendment rights" from possessing a firearm at all. *See Heller,* 554 U.S. at 635-36.

In effect, Peterson asks this Court to expand the reach of *Heller* by declaring that, under the Second Amendment, one need not be a resident of a state to possess a gun there. In this case, however, there is no need to reach that question because the combined effect of Denver ordinance and Colorado statute allows Peterson to carry a gun in a manner consistent with the core right – indeed, in a manner that far exceeds the core right – articulated in *Heller*. For example, it cannot be disputed that, under both Colorado law and Denver ordinance, Peterson may keep and bear a pistol for self-defense in his dwelling while he is visiting Denver. While Peterson insists that he has no "dwelling" in Denver because he lives elsewhere, Colorado's criminal code generally defines the term as "a building which is used, intended to be used, or usually used by a person for habitation." C.R.S. § 18-1-901(3)(g). This is not the same thing as a "residence," which Peterson apparently does not possess in Colorado. In any event, the broad definition of "dwelling" would surely encompass a hotel room or acquaintance's residence, thus ensuring compliance with the Second Amendment right should it extend that far.

Peterson's right to carry a handgun in Colorado in general are extensive. In short aside from a few minor exceptions such as schools, C.R.S. § 18-12-105.5, no provisions of state law prohibit him from carrying openly (without a permit). Home-rule cities that restrict open carry are the exception, not the rule. Moreover, even though Peterson's ability to carry a pistol in Denver is limited by the city's limitations on open carry, Denver's laws are still far more permissive than *Heller*'s minimum requirements. Transportation by private conveyance is permitted, as is carrying on any property which Peterson owns or controls. Most importantly, however, Denver ordinances establish an affirmative defense for carrying a firearm "[i]n defense of home, person or property, when there is a direct and immediate threat thereto." D.R.M.C. § 38-118(b)(1). Although the fit may be less than perfect, this allowance is consistent with *Heller*'s concern over confrontation. In other words, assuming *arguendo* that the right declared in *Heller* does extend does outside the home, Denver's emergency exception would likely be consistent with it.

The bottom line is that this Court need not consider the precise scope of *Heller*'s core right in order to determine that the combined effect of Denver ordinance and Colorado statute do not infringe upon it. The record plainly demonstrates that Peterson's right to carry a firearm for self-defense while in Denver is far more extensive than he suggests. Therefore, because Peterson is unable to show that the combined effect of Denver law and Colorado ordinance impose a burden on conduct falling within the scope of the Second Amendment's guarantee, it is unnecessary to consider the standard of review or the district court's ultimate conclusion in this case.

2. Assuming *arguendo* that the challenged law does burden Peterson's Second Amendment rights, intermediate scrutiny applies.

In *Reese*, this Court applied intermediate scrutiny to a Second Amendment challenge to a federal law prohibiting possession of a firearm by a person subject to a domestic protection order. 627 F.3d at 802. Because no *en banc* rehearing occurred and no superseding opinions have been issued by the Supreme Court, the panel's

application of intermediate scrutiny set the precedent for the level of scrutiny to be applied to Second Amendment challenges in this circuit. *See United States v. Edward J.*, 224 F.3d 1216, 1220 (10th Cir. 2000).

Reese's application of intermediate scrutiny to Second Amendment challenges is consistent with every other circuit to have considered the issue. *See, e.g. Marzzarella,* 614 F.3d at 98; *United States v. Skoien,* 614 F.3d 638 (7th Cir. 2010) (*en banc*); *United States v. Chester,* 628 F.3d 673 (4th Cir. 2010). Peterson does not contend that *Reese* was wrongly decided – indeed, he does not even acknowledge that it addressed the scrutiny question – but instead argues that his case is distinguishable from *Reese* because he is a law-abiding citizen. Open Br. at 34. Peterson cites to the Fourth Circuit's opinion in *Chester*, a criminal case, for this proposition. *Amicus* SAF expands on it, arguing that the court "selected intermediate scrutiny" a criminal case, because it "viewed the Second Amendment's core as reaching 'law-abiding, responsible citizen[s].'" *SAF Amicus* at 17, *quoting Chester,* 628 F.3d at 683. SAF interprets this statement as "indicat[ing] that strict scrutiny

must apply in Second Amendment cases involving ordinary individuals." *Id.*

This reading of *Chester* was always questionable, and the Fourth Circuit settled any remaining confusion several months ago when it decided *United States v. Masciandaro,* 638 F.3d 458 (4th Cir. 2011). *Masciandaro* is instructive here because, despite the fact it was a criminal case, it considered the level of scrutiny to apply to an otherwise law-abiding citizen who happened to be caught with a loaded gun in a national park. *Id.* at 470 ("In the case before us, Masciandaro was a law-abiding citizen at the time of his arrest, without any criminal record, whereas in *Chester*, the defendant was a domestic violence misdemeanant."). *Masciandaro* acknowledged the core right of *Heller,* and "assume[d] that any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny." *Id.* However, as the court also acknowledged: "as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense." *Id.*

Peterson offers no compelling reasons to believe that limitations on *where* a pistol may be carried should be treated any differently than restrictions on *who*, for safety reasons, may carry them. The mere fact that a right is "fundamental" does not always trigger strict scrutiny. Instead, strict scrutiny is most commonly applied where the challenged regulation has an invidious motive, *see e.g. Johnson v. California*, 543 U.S. 499, 505 (2005), or where the government attempts to curtail certain First Amendment rights central to the democratic process. *See, e.g. Denver Area Educ. Telecomm. Consortium Inc. v. FCC*, 518 U.S. 727, 741 (1996); *see also* Adam Winkler, *Scrutinizing the Second Amendment,* 105 Mich. L. Rev. 683, 703-04 (2007). ("Most provisions in the Bill of Rights do not trigger strict scrutiny, and the oft-repeated linkage between fundamental rights and strict scrutiny is more rhetoric than doctrinal reality."). There is no reason to believe that the individual rights protected by the Second Amendment – even if they do extend outside the home – fall into either of these categories. As *Masciandaro* acknowledges, firearms regulations are rooted in concerns

about public safety. 638 F.3d at 470. They are not motivated by an invidious objective of discriminating against gun owners.

It is for these reasons that courts analyzing the individual right to bear arms guaranteed by state constitutions "have universally rejected using a 'strict scrutiny' test." Jeffrey Monks, Comment, *The End of Gun Control or Protection Against Tyranny?: The Impact of the New Wisconsin Constitutional Right to Bear Arms on State Gun Control Laws*, 2001 Wis. L. Rev. 249, 290. In *State v. Cole,* 665 N.W.2d 328 (Wis. 2003), for example, the court acknowledged that the Wisconsin constitution established a "fundamental individual right" to bear arms, yet still refused to "agree with Cole's position that strict scrutiny or intermediate scrutiny is required in this case." *Id.* at 337. This result is consistent with every other court of last resort that has considered the issue under state law. *See e.g.*, *Bleiler v. Chief, Dover Police Dep't,* 927 A.2d 1216, 1222 (N.H. 2007) (rejecting strict scrutiny); *Students for Concealed Carry on Campus, LLC v. Regents of the University of Colorado,* __P.3d__, 2010 WL 1492308 (Colo. App. April 15, 2010), (*cert. granted*) ("we conclude that the reasonable exercise test . . . not the

rational basis test, is the appropriate test for evaluating" claim brought under Colorado Constitution).

Masciandaro makes the additional point that "were we to require strict scrutiny in circumstances such as those presented here, we would likely foreclose an extraordinary number of regulatory measures, thus handcuffing lawmakers' ability to prevent armed mayhem in public places, and depriving them of a variety of tools for combating that problem." 638 F.3d at 471 (internal quotations omitted). This is an important consideration. Strict scrutiny is powerful medicine, and its application would certainly limit the regulatory options available to state and local governments.

Also useful is *Chester*'s analogy to First Amendment jurisprudence that requires content-neutral time, place and manner restrictions to be reviewed under an intermediate level of scrutiny. 628 F.3d at 682, *citing Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989). *Masciandaro* clarifies the standard: a challenged statute will survive intermediate scrutiny if the government can demonstrate that it is reasonably adapted to a substantial governmental interest. 638 F.3d at

471. In keeping with this approach, and so long as they do not attempt to eliminate the core rights announced in *Heller,* state and local governments retain the authority to determine for themselves where and when weapons may be carried in public. So long as those regulations are related to an important objective, and so long as the means used are substantially related to achieving that objective, the government's approach will pass constitutional muster. *See Reese,* 627 F.3d at 802.

The Seventh Circuit's very recent decision in *Ezell v. City of Chicago,* __F.3d__, 2011 WL 2623511 (7th Cir. July 6, 2011), sheds additional light on the still-evolving application of this standard. *Ezell* involves an ongoing challenge (the opinion addressed preliminary injunction issues) to one part of a broad gun control ordinance adopted four days after Chicago's gun ban was stricken by the *McDonald* opinion. *Id.* at *2. Described by the concurring judge as a "too clever by half . . . thumbing of the municipal nose at the Supreme Court," the particular facet of the new ordinance challenged in *Ezell* was particularly invidious in that it required prospective gun owners to

engage in annual firing range practice, while simultaneously banning commercial firing ranges inside city limits. *Id.* at *20 (Rovner, J. concurring in the judgment). Taken as a whole, the ordinance had "the effect of another complete ban on gun ownership within City limits." *Id.*

The *Ezell* majority applied the two-part approach described by this Court in *Reese*, eventually deeming the challenged ordinance likely to violate the Second Amendment. First, the majority held that the challenged ordinance implicated the Second Amendment because the range ban represented a "serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense." *Id.* at *17. The concurring judge took a somewhat different approach: in her view, the ordinance implicated *Heller*'s core right because "the City may not condition gun ownership for self-defense in the home on a prerequisite that the City renders impossible to fulfill within the City limits. *Id.* at *20 (Rovner, J. concurring in the judgment).

After finding that the ordinance impinged upon the right announced in *Heller*, the majority engaged in the type of means-end

scrutiny followed by this Court in *Reese*, which is patterned after the Supreme Court's analysis of First Amendment cases. The majority noted that the challenged ordinance was designed to interfere with the core Second Amendment right of "law-abiding, responsible citizens," *id.* at *17. Its intent, in other words, was to limit the exercise of *Heller*'s core right. Despite this conclusion about the motivation underlying the ordinance, the majority *declined* to apply strict scrutiny. To be sure, it-applied a heightened standard, stating that it would require "a more rigorous showing than that applied in *Skoien* . . . if not quite 'strict scrutiny.'" *Id.* But the important point is that even when analyzing an ordinance that was obviously designed to impinge upon *Heller*'s core right, the court still applied means-end scrutiny that balanced the harm to the right with the city's reasons for enacting the ordinance. While the concurrence more narrowly construed *Heller*'s core right, the *Ezell* majority's analysis still provides substantial support for the level of scrutiny that the district court applied in this case. *Ezell*'s "not-quite-strict scrutiny" approach was appropriate for a law that is designed to impede, and has the effect of impeding, the core right announced in

Heller. Given the doubtful justifications proffered by the city for enacting the range ban – which included an expression of concern about exposure to lead dust caused by poor handwashing technique – it is unsurprising that the court reached the opinion that it did.

The challenged law at issue here contrasts sharply with the ordinance that was challenged in *Ezell* both in its purpose and in its effect. As the evidence presented to the district court demonstrated, neither Colorado nor Denver has any interest in impinging upon *Heller*'s core right. Indeed, that right is expressly protected by both Colorado statute and Denver ordinance.

What a case such as *Ezell* does do is serve to highlight the need for an accurate understanding of the impact that a challenged law actually has on the asserted Second Amendment right. Applying a sliding scale is difficult enough even when the court is provided with accurate information; the task becomes hopeless, however, when the analysis is based on information that is incorrect or incomplete. It is for this reason that Peterson's continued misunderstanding of the effect of the challenged law on him is important. Although Peterson's argument

would certainly be enhanced by a showing that he is "completely disarmed" while in Denver, his claim to be totally deprived of the right to self-defense is directly contradicted by both Denver ordinance and Colorado statute. To the extent that the combined effect of Colorado law and Denver ordinance implicate Peterson's Second Amendment right at all, the impact on Peterson is not severe. Standard intermediate scrutiny therefore applies, and the district court's analytical approach should be affirmed.

3. The district court appropriately applied the intermediate scrutiny standard to the evidence presented.

Amicus SAF contends that the district court gave lip service to the intermediate scrutiny standard, but then in reality applied only rational basis review. SAF *Amicus* at 18-21. The Defendant disagrees, but since *de novo* review applies in any event, simply points out why Colorado's residency restriction is in fact reasonably related to a substantial governmental interest.

As developed by post-*Heller* case law, intermediate scrutiny in the context of the Second Amendment requires (1) that the asserted

governmental interest be "important or substantial" or "significant," and (2) that "the fit between the challenged regulation and the proffered objective be reasonable, not perfect." *Marzzarella,* 614 F.3d at 98; *see also Skoien,* 614 F.3d at 641 (intermediate scrutiny requires the challenged law to be "substantially related to an important governmental objective"). Here, where the combined effect of two laws is being challenged, both governmental objectives must be considered.

Although Denver declined to respond substantively to Peterson's claims, the city has previously explained the rationale for enforcement of its open carry limitation. In *City and Cnty. of Denver v. State of Colo.,* Denver District Court Case No. 03CV3809, *aff'd by operation of law in State of Colorado v. City and County of Denver,* 139 P.3d 635 (Colo. 2006), the city sought a declaratory judgment that several of its gun control ordinances were not preempted by state law. In support of its argument that the limitation on open carry was a matter of a local concern (and was thus not preempted), Denver relied on public safety issues, including population density, organized crime rates, and the fact that "a bullet fired in Denver – whether maliciously by a criminal or

negligently by a law-abiding citizen is more likely to hit something or somebody than a bullet fired in rural Colorado." Supp. App. 53. Preemption issues notwithstanding, these are substantial public safety concerns and Denver's decision to address them by limiting open carry passes constitutional muster. Intermediate scrutiny only requires that "the fit between the challenged regulation and the proffered objective be reasonable, not perfect." *Marzzarella,* 614 F.3d at 98.

Colorado's residency requirement for the issuance of CHPs approaches the same public safety concern from a different, but equally legitimate, angle. The State has an abiding interest in ensuring that those who apply for permission to carry concealed pistols are qualified to do so. However, as the district court found, much of the information that is crucial to assessing the initial and ongoing eligibility of CHP holders is simply unavailable with respect to non-residents. Simply put, if non-residents were eligible for CHPs, Colorado law enforcement authorities would be put in the untenable situation of having to issue permits to individuals for whom insufficient background information was available. There is therefore surely a reasonable fit between

Colorado's goal of promoting public safety and its policy decision to restrict concealed carry permits to residents of the state. Hence, assuming that Peterson has asserted a cognizable claim under the Second Amendment, Colorado's residency requirement for the issuance of CHPs easily survives intermediate scrutiny.

CONCLUSION

Based on the foregoing reasoning and authorities, the Defendant respectfully requests that this Court affirm: 1) the district court's dismissal of the Executive Director based on a finding of Eleventh Amendment Immunity, and 2) the district court's grant of summary judgment to the Defendant on the remaining claims.

Statement on oral argument.

The Defendant requests oral argument. This case involves several questions of first impression in this Circuit, resolution of which will provide guidance for lower courts.

Respectfully submitted this 11th day of July, 2011.

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I hereby certify that a copy of the foregoing **ANSWER BRIEF** was furnished through (ECF) electronic service to the following on this 11th day of July, 2011:

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