11-1149

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Gray Peterson,

Appellant,

v.

Alex Martinez, et al.,

Appellees.

On Appeal from the United States District Court
For the District of Colorado

The Honorable Walker D. Miller
Senior District Judge

D.C. No. 10-cv-00059-WDM-MEH

RESPONSE OF APPELLEES JOHN W. SUTHERS AND JAMES DAVIS TO PETITION FOR REHEARING AND REHEARING *EN BANC*

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The Court should deny the petition for rehearing and rehearing *en banc*. The panel decision of February 22, 2013 was mandated not only by long-standing Supreme Court *dicta* – which binds the court "almost as firmly as by the Court's outright holdings," *United States v. Serawop,* 505 F.3d 1112, 1122 (10th Cir. 2007) – but also is far narrower than, and thus distinguishable from, recent opinions issued by the Second, Fourth and Seventh Circuits. While the scope of the Second Amendment is undoubtedly a question of great public importance, the Plaintiff's strategic decisions have ensured that this case is a poor vehicle for resolving it. In short, as the Attorney General has repeatedly argued to this Court, Peterson contested the wrong law and identified the wrong defendant when he bypassed Denver's open carry limitation in favor of a narrow challenge to Colorado's regulatory structure for non-resident concealed carry permitting. The Supreme Court alone is in a position to reconsider its prior statements on concealed carry; this Court should not give credence to Plaintiff's belated attempt to expand his arguments to encompass claims that he explicitly abandoned, even assuming that those claims were properly asserted in the first place.

ARGUMENT

I. Plaintiff's complaint asserted only the existence of a Second Amendment right to carry a concealed firearm; his decision not to challenge Denver's open carry limitation was strategic and is not subject to further review.

In his petition for rehearing Peterson maintains that he always intended to force a decision on whether he had a right to carry a firearm in public, irrespective of method. Perhaps that was his goal. But if so, it was incumbent upon Peterson to frame his complaint in a manner that would permit this Court to address it. By limiting the scope of its review solely to the state statute that Peterson challenged, the panel complied with the well-settled proposition that a court must narrowly construe constitutional challenges and decide no more than is necessary. *See, e.g., Pearson v. Callahan,* 555 U.S. 223, 241-244 (2009) (outlining doctrine of constitutional avoidance); *United States v. Masciandaro,* 638 F.3d 458, 475 (4th Cir. 2010) (the scope of Second Amendment "strikes us as a vast *terra incognita* that courts should enter only upon necessity and then by small degree").

There is little doubt that the panel correctly evaluated the nature and scope of the claim that Peterson presented. The amended

complaint, for example, did no more than identify Denver ordinances that limit open carry; it did not expressly challenge them. Applt. Appx. at 7-17. Plaintiff's first four claims for relief referenced only concealed handgun permitting and reciprocity. *Id.* at 14-15. The remaining two claims were somewhat more broadly worded, but still focused entirely on the alleged existence of "a licensing scheme that precludes Plaintiff from obtaining a necessary license to bear arms." *Id.* at 15-16. Similarly, Peterson's prayer for relief did not mention open carry or the Denver ordinances limiting it at all, instead challenging only the state statutes that cover the issuance of concealed carry permits. *Id.* at 16-17.

This theme persisted as the litigation continued. Peterson explicitly denied in his summary judgment briefing that he was challenging the constitutionality of the Denver ordinance, in fact arguing "that it is Colorado's refusal to allow Plaintiff to obtain a CHL that is unconstitutional." *Slip op.* at 17 (internal quotation omitted). And at the first set of oral arguments, the following exchange occurred:

> JUDGE HARTZ: You have not specifically challenged the Denver ordinance, have you?

> MR. MONROE: No we have not, *we accept the ordinance as it is*, and the fact that a license is required, and are playing by the game and saying "OK, we want a license."

(Oral Argument, November 17, 2011, (recording at 3:35-3:48) (emphasis added)).

Peterson now faults the panel for confining its ruling solely to the statute that he challenged, rather than addressing a far broader question: Whether the Second Amendment guarantees him the right to carry a firearm wherever he wishes. But he cannot have it both ways. Peterson made the strategic decision to limit the scope of his challenge in the apparent hope that the court would declare that he had a right to concealed carry. Irrespective of that argument's outcome, he cannot now legitimately complain about the fact that the panel's opinion was correspondingly narrow.

II. The panel decision does not merit *en banc* review because it is consistent with *Robertson v. Baldwin* and is not contradicted by the decisions of any other circuits.

As the panel recognized, this Court is virtually bound by *obiter dicta* of the United States Supreme Court, particularly where it "is recent and not enfeebled by later statements." *Slip op.* at 22, *quoting Serawop*, 505 F.3d at 1122. While *Robertson v. Baldwin,* 165 U.S. 275

(1897), is not a contemporary decision, the panel correctly noted that subsequent rulings by the Supreme Court have never cast doubt on its statement that "the right of the people to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons." 165 U.S. at 281-82. If anything, modern Second Amendment jurisprudence buttresses this statement. The *Heller* majority not only cited *Robertson* with approval, but also uncritically observed that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." 554 U.S. at 599, 626.

Nor does adherence to *Robertson* create a split with recent opinions issued by the Second, Fourth, and Seventh Circuits. *See Woollard v. Gallagher,* __F.3d__ (No. 12-1437, 4th Cir. March 21, 2013); *Kachalsky v. County of Westchester,* 701 F.3d 81 (2nd Cir. 2012); and *Moore v. Madigan,* 702 F.3d 933 (7th Cir. 2012). Not only do *Woollard* and *Kachalsky* lend substantial support to the panel opinion, but all three decisions are distinguishable from the instant case in both breadth and substance. In brief, whereas other circuit cases have been legitimately postured as broad "carry" cases applicable to the entire

firearm-eligible populations of Maryland, New York, and Illinois, Peterson elected to challenge only one aspect of the limitations that apply to him personally while he is visiting Colorado: the scope of the state's statutory scheme for issuing and recognizing concealed carry permits.

Woollard and *Kachalsky* were both focused on a much more expansive question – whether a state that generally prohibits open carry may condition the issuance of concealed carry permits on an applicant's showing of particular need for self-defense while in public. Applying the doctrine of constitutional avoidance (*Kachalsky* did so implicitly, *Woollard* explicitly), both circuit courts assumed without deciding that the Second Amendment did extend outside the home.[1] They then proceeded to apply intermediate scrutiny, concluding that there was a reasonable fit between the discretionary issue of concealed

[1]Peterson's petition for rehearing asserts that *Kachalsky* "focused on whether there is a constitutional right to carry arms at all outside the home, and concluded that there is not." *Pet.* at 11. This is incorrect. In *Kachalsky,* the Second Circuit concluded, based on an analysis of applicable precedent, "that the [Second] Amendment must have *some* application in the…context of the public possession of firearms. Our analysis proceeds on this assumption." 701 F.3d at 89 (emphasis in original).

carry permits and the substantial governmental interest of promoting public safety. *Kachalsky*, 701 F.3d at 100-101; *Woollard*, slip op. at 32.

By challenging the *entire* regulatory scheme that prevented them from carrying a pistol outside the home – and not just the law that prohibited them from carrying a concealed firearm – the plaintiffs in *Kachalsky* and *Woollard* launched precisely the type of broad-based attack that Peterson strategically avoided in this case. Peterson's decision to limit the scope of his challenge throughout this litigation renders his newly asserted and far more expansive arguments unreviewable now.

Nonetheless, the fact that even these broad challenges failed suggests that Peterson would have been unsuccessful even if he *had* properly raised the constitutionality of Denver's ordinance. As *Kachalsky* held and *Woollard* echoed, "[i]t is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments." *Woollard,* slip op. at 30, *quoting Kachalsky,* 701 F.3d at 99. Accordingly, the Fourth Circuit deferred to "the considered judgment of the General Assembly that the good-and-substantial-reason requirement strikes an appropriate balance between granting handgun

permits to those persons known to be in need of self-protection and precluding a dangerous proliferation of handguns on the streets of Maryland." *Woollard,* slip op. at 30. Similarly, the Second Circuit "decline[d] Plaintiffs' invitation to strike down New York's one-hundred-year-old law and call into question the state's traditional authority to extensively regulate handgun possession in public." *Kachalsky,* 701 F.3d at 101.

Because it dealt with an across-the-board ban on carrying a firearm in public in any fashion, the Seventh Circuit's holding in *Moore* was understandably somewhat broader than the approach adopted in *Woollard* and *Kachalsky*. But it is precisely the breadth of the holding in *Moore* that renders it almost entirely inapplicable to the panel opinion here. The *Moore* majority certainly held that the right to carry a firearm extends outside the home, and that Illinois's blanket prohibition on the practice did not withstand scrutiny. Here, however, bound by *Robertson* and by Peterson's strategic decision to frame his complaint narrowly, the panel did not address that question at all.

In any event, in *Moore* the majority's primary concerns were: 1) the breadth of the Illinois ban on carry, and 2) what the majority

perceived as the state's failure to justify it. 702 F.3d at 941-42. Far from declaring that a state is prohibited from placing any limitations on who can carry outside the home, the *Moore* majority commented favorably on the holding in *Kachalsky* despite its characterization of New York's "proper cause" requirement as "one of the nation's most restrictive such laws." *Moore,* 702 F.3d at 941. As a state that generally permits open carry and has a "shall issue" system for concealed carry permitting, Colorado comes nowhere near maintaining restrictions on the order of those that were stricken in *Moore*. And just as important, as both the district court and the panel here recognized, Colorado offered substantial and uncontroverted evidence in support of its argument that there was a reasonable fit between the protection of public safety and the legislature's policy decisions regarding who is eligible for a concealed carry permit.

Peterson argues that "[i]t is more logical to conclude that carrying arms is constitutionally protected, but the constitution does not guarantee a particular method of carry." *Pet.* at 9. In support, Peterson claims – without any citation whatsoever – that "at the time of *Robertson,* banning of carrying arms openly was practically non-

existent," that in the nineteenth century, "it was unheard of to ban open carry," and that open carry at the time of *Robertson* "was ubiquitous." *Pet.* at 6, 9, 9. But these claims are simply wrong. As the Second Circuit noted in *Kachalsky*, "[a]t least four states once banned the carrying of pistols and similar weapons in public, both in a concealed or an open manner." 701 F.3d at 90 (citing late nineteenth century laws from Arkansas (1881), Wyoming Territory (1876), Tennessee (1870), and Texas (1871). In other words, even if Peterson had raised a broad "carry" claim that forced a decision on the scope of the Second Amendment outside the home, there would have been strong historical support for the panel's adherence to the *dicta* of *Robertson*, at least with respect to the concealed carry component of such an argument. Moreover, while *Robertson* would have had no bearing on the constitutionality of Denver's open carry limitation, *en banc* review of the city ordinance has been foreclosed by Peterson's strategic narrowing of the case.

III. The panel opinion correctly applied the Eleventh Amendment to uphold the district court's dismissal of the Executive Director of Public Safety.

The panel opinion's application of Eleventh Amendment immunity to the Executive Director of Public Safety was neither groundbreaking nor erroneous. As the panel recognized, a court need not accept as true a legal conclusion couched as a factual allegation. *Slip op.* at 13, *citing Papasan v. Allain,* 478 U.S. 265, 286 (1986) (citation omitted). And it certainly follows that a "factual allegation" that is directly contradicted by a statutory provision does not qualify as "well-pled." *See GFF Corp. v. Associated Wholesale Grocers, Inc.,* 130 F.3d 1381, 1385 (10th Cir. 1997). Moreover, the statutory devolution of permitting authority to county sheriffs could hardly be clearer. Section 18-12-201(3), C.R.S. (2012), "instructs each sheriff to implement and administer the provisions of this part 2." The statute does not assign the Executive Director this or any other duty with respect to concealed carry permitting or reciprocity. Accordingly, the Executive Director is without "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.3 818, 828 (10th Cir. 2007).

That Denver may be confused about its own responsibilities under the statute is no reason to conclude otherwise. Nor is Peterson's new suggestion that he "has evidence to support" his claim that the Executive Director "administers" the state's reciprocity scheme. *Pet.* at 15. If such evidence exists, it was incumbent upon Peterson to introduce it in response to the Executive Director's assertion of Eleventh Amendment immunity. He could have (and should have) done so in the trial court because an assertion of sovereign immunity challenges the subject matter jurisdiction of the court, *see, e.g. Robinson v. Kansas,* 295 F.3d 1183, 1188 (10th Cir. 2002), and the district court's review of that question would not have been limited to the four corners of the complaint. *See, e.g., Merrill Lynch Bus. Fin. Servs., Inc. v Nudell*, 363 F.3d 1072, 1074 (10th Cir. 2004). In short, if Peterson withheld evidence that he had with respect to the Director's alleged administration of the reciprocity scheme, he cannot now complain of either the district court's or the panel's failure to consider it. Because the panel appropriately affirmed the district court's application of Eleventh Amendment immunity principles, *en banc* review is not warranted.

CONCLUSION

Based on the foregoing reasoning and authorities, the Attorney General respectfully requests that this Court deny Appellant's petition for rehearing and *en banc* rehearing.

Respectfully submitted this 22nd day of March, 2013.

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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **RESPONSE TO PETITION FOR REHEARING AND REHEARING EN BANC**, as been submitted in digital form via the Court's ECF system, is an exact copy of the written document filed with the clerk and has been scanned for viruses with Symantec Endpoint Protection Version 11.0.7101.1056, and according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **RESPONSE TO PETITION FOR REHEARING AND REHEARING EN BANC** was furnished through (ECF) electronic service to the following on this 22nd day of March, 2013:

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