DOCKET NO. 11-1149

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GRAY PETERSON,

Appellant

v.

CHARLES F. GARCIA, et al.,

Appellees

Appeal from the United States District Court
for the District of Colorado
(Civil Action No. 10-cv-00059- WDM-MEH)

BRIEF OF *AMICUS CURIAE* NRA CIVIL RIGHTS DEFENSE FUND IN SUPPORT OF APPELLANT SEEKING REVERSAL

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FRAP RULE 29 (c) (5) STATEMENT

No party's counsel authored the brief in whole or in part; no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief.

AMICUS CURIAE'S IDENTITY AND INTEREST

The NRA Civil Rights Defense Fund is organized exclusively for the following purposes:

1. Voluntarily to assist in the preservation and defense of the human, civil, and/or constitutional rights of the individual to keep and bear arms in a free society;

2. To give financial aid gratuitously and to supply legal counsel, which counsel may or may not be directly employed by the fund, to such persons who may appear worthy thereof, who are suffering or are threatened legal injustice or infringement in their said human, civil, and constitutional rights,

and who are unable to obtain such counsel or redress such injustice without assistance;

3. To conduct inquiry and research, acquire, collate, compile, and publish information, facts, statistics, and scholarly works on the origins, development and current status of said human, civil, and constitutional rights, and the extent and adequacy of the protection of such rights;

4. To encourage, sponsor, and facilitate the cultivation and understanding of the aforesaid human, civil, and constitutional rights which are protected by the constitution, statutes, and laws of the United States of America or the various states and territories thereof, or which are established by the common law, through the giving of lectures and the publication of addresses, essays, treatises, reports, and other literary and research works in the field of said human, civil, and constitutional rights;

5. To make donations to organizations which qualify as exempt organizations under Section 501 (c) (3) of the Internal Revenue Code of the United States or the corresponding provision of any future Internal Revenue Law of the United States.

The fund has an interest in protecting the right to keep and bear arms. The fund filed amicus briefs in several cases, including *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007). *Parker* was affirmed in the land mark case of *District of Columbia v. Heller*, 128 S.Ct. 2783, 171 L.Ed.2d 637, 554 U.S. 570 (2008).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

LAW REVIEW ARTICLES

MISCELLANEOUS

INTRODUCTION AND SUMMARY OF ARGUMENT

Introduction

Denver ordinances prohibit any nonresident of Colorado, including Peterson, from bearing any firearm on his person for self-defense in public, openly or concealed, in non-sensitive as well as sensitive places, except pursuant to a practically useless and constitutionally inadequate affirmative defense. The district court adequately summarized the contours of the Denver ordinances, Applt. Append. at 215, except that it failed to note an affirmative defense in cases when a gun is carried, "[i]n defense of home, person or property, when there is a direct and immediate threat thereto . . . " Denver Ord. §38-118(b). In short, except for the aforementioned affirmative defense, the ordinances totally prohibit the public carrying of any firearm in Denver, on his or her person, openly or concealed, by any private citizen who does not "hold[] a valid permit or a temporary emergency permit to carry a concealed handgun issued pursuant to state law," Denver Ord. §38-117(f)(1). It seems clear that "state law" means Colorado law; thus, all nonresidents of Colorado are subject to the general prohibition, because they are ineligible for Colorado concealed handgun licenses (CHLs[1]), Colo. Rev. Stat. Ann. §18-12-

[1] The amicus will adopt Peterson's practice of referring to all such licenses as

203(1)(a)(West 2004).

In the district court, Peterson challenged Colorado law as it relates to issuance of CHLs to nonresidents, and to recognition of CHLs issued by other states. Applt. Append. at 47, on constitutional grounds including the Second Amendment, and the Comity Clause of Article IV. The amicus will argue that the Denver ordinances violate both those provisions.[2]

Summary of Argument

Denver's prohibition against any nonresident of Colorado, including Peterson, carrying a firearm on his person for self-defense in public, openly or concealed, in non-sensitive as well as sensitive places, except pursuant to a practically useless and constitutionally inadequate affirmative defense, violates the Second Amendment and the Comity Clause.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that self-defense is "central" to the individual right guaranteed by

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CHLs, regardless of the terminology used by the issuing state.

[2] The court should not hesitate to reach the amicus' arguments, if it rejects Peterson's. The necessary parties are before it. All will have a fair opportunity to brief the issues, and the arguments are essentially the other side of the coin argued by Peterson. The amicus' arguments turn not on questions of fact, but rather on questions of law that this court is well-equipped to decide. It is within this court's discretion to decide the issues raised in this brief. *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976); *United States v. Mora*, 293 F.3d 1213, 1218 (10th Cir. 2002).

the Second Amendment, *id.* at 628, which encompasses a right to "wear, bear or carry [firearms] . . . upon the person or in the clothing or in a pocket, for the purposes . . . of being armed and ready for offensive or defensive action . . . " *Id.* at 584. *Heller* went on to say that "laws forbidding the carrying of firearms in sensitive places . . . " are presumptively permissible, *id.* at 626; however, this inescapably implies that the carrying of firearms cannot be forbidden in "non-sensitive" public places. Many of the cases that informed *Heller*'s understanding of the right to bear arms reached exactly that conclusion, striking down prohibitions on the carrying of firearms in public. Statistics concerning the locations where violent crimes occur support the proposition that the right to carry arms for self-defense must extend to public places.

The inescapable implication of the language of *Heller,* the cases upon which *Heller* relied, and the self-defense rationale that animated it, is that there is a robust Second Amendment right to carry firearms on one's person in public, non-sensitive places for self-defense. *McDonald v. Chicago*, 130 S.Ct. 3020, 3026 (2010), held that the Second Amendment right is fundamental, and incorporated it against the states. The Denver ordinances prohibit conduct that is squarely within the scope of the Second Amendment. And

they cannot satisfy any appropriate standard of scrutiny.

Heller declined to specify a standard of scrutiny in Second Amendment cases, but it clearly rejected rational basis scrutiny. *Id.* at 629. The approach adopted by this court in *United States v. Reese*, 627 F.3d 792, 800-801 (10th Cir. 2010), suggests strict scrutiny for some firearm regulations, and intermediate scrutiny for the rest. This court should hold that strict scrutiny applies here; however, the Denver ordinances cannot withstand even intermediate scrutiny. The fact that they contain an exception for carrying firearms in automobiles, and two narrow affirmative defenses, cannot save them. It is risible to say that they do not severely burden Peterson's Second Amendment rights. The ordinances irrebuttably presume that every nonresident of Colorado is a threat to public safety and, on that basis alone, deny them the right to bear arms. This cannot survive even intermediate scrutiny.

Finally, the Denver ordinances discriminate against nonresidents of Colorado in violation of the Comity Clause. U.S. Const., Art. IV, § 2, cl. 1.

Because they prohibit Peterson from carrying arms on his person in public, non-sensitive places for self-defense, openly or concealed, and arbitrarily discriminate against nonresidents of Colorado, this court should declare the Denver ordinances unconstitutional on Second Amendment and

Comity Clause grounds.

ARGUMENT

In any constitutional claim, the initial question is whether the conduct or policy being challenged touches upon activity that is within the scope of the right being asserted. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (fighting words are unprotected because they are outside the scope of the First Amendment), *Reese*, 627 F.3d at 800-801. If so, the next inquiry is whether the regulation can survive the applicable standard of scrutiny. *Id.* at 801. The Denver ordinances clearly prohibit conduct that is within the scope of the Second Amendment. Because they work a total prohibition on core Second Amendment activity as applied to Mr. Peterson, they should be subject to strict scrutiny. But they are unconstitutional even under intermediate scrutiny.

I. The Second Amendment guarantees an individual right to carry firearms on one's person in public, non-sensitive places for self-defense.

In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment guarantees an individual right to keep and bear arms. Concluding that "the inherent right of self-defense has been central to the Second Amendment right," *Heller* held that the District of Columbia ban on

possession and carrying of handguns in the home violated the Second Amendment because it, "ban[ned] from the home the most preferred firearm to 'keep' and use for protection of one's home and family." 554 U.S. at 628-29 (internal quotations omitted). *Heller* declined to adopt a standard of scrutiny for Second Amendment claims, but it rejected both rational basis and an interest-balancing test proposed by Justice Breyer. The Court saw no need to adopt a specific standard, concluding that the ban on handguns so offended the Second Amendment right of armed self-defense that it could not survive any appropriate level of scrutiny. *Id.* at 628-29, 629 n.27, 634-35.

The Second Amendment right to keep and bear arms was subsequently incorporated against the states in *McDonald v. Chicago*, 130 S.Ct. 3020, 3026 (2010), which struck down a similar, local handgun ban while reaffirming that "individual self-defense is 'the central component' of the Second Amendment right." *Id.* at 3036.

If the holdings of *Heller* and *McDonald* were formally limited to the possession and carrying of firearms in the home, it is because the plaintiffs sought no more than to do those things. See *Heller*, 540 U.S. at 574; *McDonald*, 130 S.Ct. 3026. But any fair reading of the rationale of *Heller* compels the conclusion that the Second Amendment protects a robust

individual right to carry arms on one's person, in public, non-sensitive places, ready for self-defense. The weight of authority of state right to arms cases, some of which informed *Heller*'s understanding of the Second Amendment, compels the same conclusion. Cases that have construed the Second Amendment to apply only to the home have ignored much of what *Heller* actually said, interpreting the Second Amendment "in a hostile . . . spirit . . . [that] does scant honor to the patriots who sponsored the Bill of Rights . . . " *Ullman v. United States*, 350 U.S. 422, 426-27 (1956).

A. *Heller* and *McDonald* compel the conclusion that the Second Amendment guarantees an individual right to carry arms for self-defense.

There can be no doubt that under *Heller* the Second Amendment protects a right not only to keep, but to carry arms for the purpose of self-defense. *Heller* explicitly held that the operative clause of the Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Id.* at 592 (emphasis added). This flowed from the Court's exegesis of the original meaning of the text, which concluded that, "[a]t the time of the founding, as now, to 'bear' meant to 'carry.' . . . When used with 'arms,' however, the term has a meaning that refers to carrying for a particular purpose – confrontation." 554 U.S., at 584. The Court went on to say that

"to bear" means to "wear, bear or carry . . . upon the person or in the clothing or in a pocket, for the purposes . . . of being armed and ready for offensive or defensive action . . . " *Id.* This, the Court said, was the meaning of the term "bear arms" as used in the Second Amendment by the founders. *Id.* at 584-86. Since Heller challenged the District's licensing requirement "insofar as it prohibits the carrying of a firearm . . . " *id.* at 575, the meaning of the term "bear arms" was properly before the Court. *Heller* squarely held that the Second Amendment protects an individual right to carry arms for self-defense.

B. The individual right to carry arms for self-defense extends to non-sensitive public places.

Nor is it the case that this right to carry arms is limited to the home, or some similarly narrow category of private, real property. *Heller* compels the conclusion that it extends to a wide variety of public places. So do the bulk of state cases interpreting parallel state rights, some of which informed *Heller*'s understanding of the Second Amendment. So, finally, do crime statistics that demonstrate Americans' clear need for armed self-defense outside the home.

1. Heller and the right to carry arms in public.

A claim that the right to carry arms does not extend to public places would fly in the face of *Heller*'s statement concerning the permissibility of "laws forbidding the carrying of firearms in sensitive places such as schools

and government buildings . . . " 554. U.S. at 626. It beggars belief to suggest that when the *Heller* Court identified two types of "sensitive" public places in which the carrying of arms could presumptively be forbidden, what it really meant to say was that the right to carry arms has no application outside the home. The only sensible reading of this dictum from *Heller* is that the carrying of arms generally cannot be prohibited in non-sensitive public places. This reading was adopted by the Puerto Rico Court of Appeals in *In re Nido Lanausse*, No. G PA2010-0002, 2011 WL 1563927 (P.R. Cir. Jan. 31, 2011) (concluding that after *Heller* the Second Amendment right to carry arms cabins the discretion of authorities to deny CHLs).[3]

Some courts have rushed to embrace *Heller*'s dictum that it should not be understood to cast doubt on certain pre-existing firearm regulations, 554 U.S. at 626-27. But if we are going to take *Heller*'s dicta seriously, we should take it all seriously. See *United States v. Bloom*, 149 F.3d 649, 653 (7th Cir. 1998) ("Appellate courts that dismiss . . . [considered Supreme Court dicta]

[3] The amicus has been unable to locate an official translation of the opinion, but an unofficial one is available on the Volokh Conspiracy legal weblog. Eugene Volokh, *The Puerto Rico Appellate Case Recognizing a Second Amendment Right to Carry Guns in Public*, The Volokh Conspiracy (May 18, 2011, 8:13 a.m.), http://volokh.com/2011/05/18/the-puerto-rico-appellate-case-recognizing-a-second-amendment-right-to-carry-guns-in-public/.

and strike off on their own increase the disparity among tribunals . . . and frustrate the evenhanded administration of justice . . ."). This requires us to acknowledge and respect *Heller*'s unmistakable implication that the right to carry arms extends to a wide variety of public places.

2. State cases also support the conclusion that the right to carry arms has always been understood to extend to public places.

State cases from the early-nineteenth century to recent years also hold that general bans on the carrying of firearms in public are impermissible.

> *Heller* states that bans on concealed carry of firearms are so traditionally recognized that they must have been seen as constitutionally permissible . . .
>
> The same cannot, however, be said about general bans on carrying firearms in public, which prohibit open as well as concealed carrying. *Heller* expressly concluded that the "right to . . . bear arms" referred to carrying arms. Ten state constitutions strongly imply this, by protecting "bear[ng] arms" but expressly excluding "carrying concealed weapons." Other constitutions don't mention carrying as such, but they do use the word "bear." And many courts applying state constitutional provisions have held or suggested that carrying in public is generally constitutionally protected . . .

Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 U.C.L.A. L. Rev. 1443, 1516-18 (2009)(internal citations omitted). *Heller* relied on some of those very cases in forming its understanding of the original meaning of the Second Amendment. *Compare* 554 U.S., at 585 n.9, 629, *with* Volokh, *supra*, at 1517

n. 312 (citing *State v. Reid*, 1 Ala. 612, 616-17 (1840), *Nunn v. State*, 1 Ga. 243 (1846), and *Andrews v. State*, 50 Tenn. 165 (1871)). *Nunn* upheld a prohibition on carrying arms concealed, but concluded – on Second Amendment grounds – that "so much of the [statute] as contains a prohibition against bearing arms openly, is in conflict with the Constitution, and void." 1 Ga., at 251. *Reid* upheld a prohibition on the carrying of concealed firearms, only because the law left open the alternative of open carry: "[a] statute which, under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be borne so as to render them wholly useless for the purpose of defence, would be clearly unconstitutional." 1 Ala., at 616-17. *Andrews* struck down a prohibition on the carrying of certain handguns, holding that a state constitutional provision permitting the legislature to regulate the wearing of arms could not support a total prohibition on carrying them. 50 Tenn., at 180-81. It did this despite the fact that the statute in question did not prohibit the carrying of long guns.

Many other state cases and attorney general opinions have held that there is, at minimum, a right to carry arms openly in public. *See* Volokh, *supra* at 1517 n.312. These include *City of Las Vegas v. Moberg*, 485 P.2d 737 (N.M. App. 1971)(invalidating an ordinance imposing a total ban on bearing arms

on one's person); *State v. Kerner*, 107 S.E. 222 (N.C. 1921)(invalidating a permit requirement to carry firearms openly off one's premises); *In re Brickey*, 70 P. 609 (Idaho 1902)(invalidating on both Second Amendment and state constitutional grounds a general prohibition on the carrying of arms in public, while opining that a prohibition on concealed carry would be lawful) ; *State v. Rosenthal*, 55 A. 610 (Vt. 1903)(invalidating a concealed carry ban), *State ex rel City of Princeton v. Buckner*, 377 S.E.2d 139 (W.Va. 1988) (invalidating an overbroad state statute requiring a license to carry dangerous or deadly weapons). In *State v. Blocker*, 631 P.2d 824 (Ore. 1981), the Oregon Supreme Court rejected an argument that the provision in the state constitution guaranteeing "[t]he people . . . the right to bear arms for the defence of themselves, and the state . . . " did not protect possession of a weapon outside the home. The *Blocker* court responded that, "[t]he text of the constitution is not so limited; the language is not qualified as to place except in the sense that it can have no effect beyond the geographical borders of this state." *Id.* at 825. Nor is the language of the Second Amendment qualified as to place – and neither is the right that it protects.

Some of the state constitutional provisions considered by the foregoing cases expressly protected a right to bear arms for self-defense. Prior to *Heller*,

one might have argued that those provisions were distinguishable from the Second Amendment. However, in light of the self-defense component of the Second Amendment that *Heller* identified, that argument is now untenable. As demonstrated in the preceding paragraphs, a considerable volume of American jurisprudence supports the proposition that the right to carry arms for self-defense has always been understood to include public places. Many of those cases struck down prohibitions less sweeping than the ones at issue here. There is no basis on which to conclude that the Second Amendment right, with its central self-defense component, is narrower in this respect than parallel state rights.

3. Crime statistics demonstrate the need for self-defense in public.

In light of the core self-defense component of the Second Amendment, it is noteworthy that a substantial majority of violent crimes occur outside the victim's home. Although *Heller* concluded that the home is the place where, "the need for defense of self, family, and property is most acute," 554 U.S., at 628, it never suggested that the need is exclusive to the home. And it isn't. According to Bureau of Justice Statistics data for 2008, only 18.4% of crimes of violence (not including homicides) occur at or in the respondent's home. Bureau of Justice Statistics, U.S. Dep't of Justice, Criminal Victimization in

the United States, 2008 Statistical Tables, tbl. 61, http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus0804.pdf. Data on the locations of homicides is hard to find, but one study covering all homicides in New York City during 1990-91 concluded that only 19.3% occurred in the victim's home, with another 5.8% occurring in automobiles. Kenneth Tardiff, et al., *A Profile of Homicides on the Streets and in the Homes of New York City*, Pub. Health Rep., Jan-Feb 1995, at 15 tbl. 2, available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1382068/pdf/pubhealthrep00056—015.pdf. In light of this, limiting the Second Amendment right to the home would guarantee that firearms are unavailable for defense against a significant majority of violent crimes. This would ill serve the right of armed self-defense that *Heller* sought to protect. *See* Volokh, *supra* at 1518. It is regrettable that Americans need to engage in armed self-defense in public places, but many do. This court should not turn a blind eye to that reality.

For all the foregoing reasons, this court should hold that the Second Amendment guarantees an individual right to carry arms on one's person for self-defense in non-sensitive public places.

II. The Denver ordinances violate Peterson's Second Amendment right to carry arms on his person in non-sensitive public places.

The Denver ordinances prohibit activity within the scope of the Second

Amendment. The next question is whether they meet the applicable standard of scrutiny. *Reese*, 627 F.3d at 800-801. As a threshold matter, this requires determining that standard. In its approach in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), adopted by this court in *Reese*, 627 F.3d at 800-801, the Third Circuit seemingly suggested that laws impacting Second Amendment rights should be evaluated under strict scrutiny when they "severely limit the possession of firearms," and intermediate scrutiny when they do not. 614 F.3d at 89 (internal citations omitted). The Denver ordinances severely limit the possession of firearms. What's more, they do not pass muster even under intermediate scrutiny.

A. Strict scrutiny is appropriate in this case.

The court should hold that strict scrutiny applies to the Denver ordinances. *Marzzarella's* command to determine the appropriate standard of scrutiny by examining whether a challenged regulation severely burdens possession of arms, *id.*, must be understood in light of *Heller*'s conclusion that the Second Amendment protects the possession of firearms for armed self-defense. 554 U.S. at 628. If a regulation severely restricts one's access to firearms when and where they are likely to be needed for that purpose, it severely burdens the possession of firearms. And the Denver ordinances do

exactly that. They prevent Mr. Peterson from possessing any firearm on his person for self-defense in any public place in Denver (at least outside his own automobile), openly or concealed, under nearly all circumstances. This is a massive abrogation of the right of armed self-defense. *Heller* struck D.C.'s requirement that guns in the home be kept inoperable, because it "ma[de] it impossible for citizens to use them for the core lawful purpose of self-defense." *Id.* at 630. The Denver ordinances similarly make it impossible for Peterson to use a firearm for the core lawful purpose of self-defense, in public, under nearly all circumstances. It also bears mentioning that the handgun ban struck down in *Heller* at least left open the possibility of self-defense with long guns, *id.* at 629; the ordinances do not.

In *Heller*, the severity of the burden resulted from the types of arms that were banned – "the most preferred firearm to 'keep' and use for protection of one's home and family," 554 U.S. at 628-29 – and the impact that this had on armed self-defense. But regulations such as the ordinances, which affect the geographic scope of the right to arms rather than banning a particular type of arms, can impose burdens at least as severe as those in *Heller*.

It is no answer to say that the ordinances allow possession of a concealed firearm in an automobile. §38-117(f)(2). If this means merely that

one may keep a firearm in one's vehicle, it is irrelevant to the right to "wear, bear or carry [firearms] . . . upon the person or in the clothing or in a pocket, for the purposes . . . of being armed and ready for offensive or defensive action . . . " 554 U.S. at 584. Even if it means that one may possess a firearm concealed on his person while riding in his automobile, the ordinance totally disarms pedestrians, bicyclists and those who use public transportation. And because apparently only a small proportion of violent crimes occur in vehicles, in either case the exception does little to further the right of self-defense in places where it is needed. Finally, query whether there is any rational basis for permitting the carrying of firearms in one's automobile, but prohibiting it in public places generally. It defies logic and common experience to believe that otherwise trustworthy citizens become violent criminals when they step out of their cars.

Neither will it save the ordinances to say that they allow affirmative defenses for weapons carried in certain narrow classes of private, real property, or "[i]n defense of home, person or property, when there is a direct and immediate threat . . . " §38-118. Since the former defense is limited to private property, it is irrelevant to the claim that the ordinances violate Peterson's right to carry arms in public. And the latter would do nothing to vindicate the

right of self-defense as a practical matter. It would require one to proceed unarmed until a "direct and immediate" threat arose – but no "direct and immediate" threat would allow the time to retrieve a firearm from one's home or car, so the benefit of this defense is chimerical. And both affirmative defenses convert the exercise of a fundamental, individual right into presumptively unlawful activity. Should one choose to exercise the right to bear arms, he can be arrested, charged with a crime, and forced to prove facts sufficient to establish innocence. That is impermissible, and this court should so hold.

> Where the Constitution – in this case, the Second Amendment – imposes substantive limits on what conduct may be defined as a crime, a legislature may not circumvent those limits by enacting a statute that presumes criminality from constitutionally-protected conduct and puts the burden of persuasion on the accused to prove facts necessary to establish innocence.

Herrington v. United States, 6 A.3dc 1237, 1244 (D.C. 2010), citing *Patterson v. New York*, 432 U.S. 197, 210 (1977).

Finally, it is no answer to say that the Denver ordinances make an exception for those who possess CHLs "issued pursuant to state law." Nonresidents like Peterson are prohibited from obtaining CHLs issued "pursuant to state law," Colo. Rev. StaAnn. §18-12-203(1)(a)(West 2004), so this exception is meaningless to him.

Denver prohibits Peterson from engaging in core Second Amendment conduct. The ordinances severely burden his right to possess arms in public for self-defense, and should be subject to strict scrutiny. However, they cannot withstand even intermediate scrutiny.

B. The ordinances cannot survive even intermediate scrutiny.

"To pass constitutional muster under intermediate scrutiny, the government has the burden of demonstrating that its objective is an important one and that its objective is advanced by means substantially related to that objective." *Reese*, 627 F.3d at 802. But intermediate scrutiny requires a little more than that. In the First Amendment context, upon which *Marzzarella* drew in adopting intermediate scrutiny for Second Amendment cases, 614 F.3d at 89 n.4, intermediate scrutiny requires that a regulation "leave open ample alternative" means of exercising the right asserted, or be "no more extensive than necessary to further the state's interests." *Id.* at 96 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), and *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 569-70 (1980)). In this case the ordinances are too extensive, and do not allow meaningful alternative means of exercising the right of carrying firearms in public for the purpose of self-defense.

Denver does not appear to assert that Peterson is not a responsible, law-abiding citizen, otherwise entitled to possess firearms. In fact, by all appearances Denver doesn't care, because it feels no obligation to make individualized determinations of untrustworthiness before withdrawing a fundamental, enumerated constitutional right. Instead, it has created an irrebuttable presumption that every nonresident of Colorado – and, for that matter, every resident of Colorado who lacks a Colorado CHL – is a threat to public safety. On that basis it prohibits the entire class, the vast majority of whom are no doubt entitled to possess firearms under all relevant state and federal laws, from carrying firearms in Denver.[4] This presumption is especially offensive with respect to Peterson, because Denver does not even dispute his claim that he has been issued CHLs by two of Colorado's sister states. Aplnt. Append. at 134, ¶ 5. (The amicus takes Peterson at his word that the number is now three. *See* Aplnt. Brf. at 11.) Thus, Peterson is presumptively a citizen in good standing. *Bellotte v. Edwards*, 629 F.3d 415, 420 (4th Cir. 2011). The Denver ordinances are crucially different from the federal statutes upheld in, *e.g.*, *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc)(upholding

[4] Query whether, if Denver really considers nonresidents threats to public safety, it is rational of Denver to permit them to possess firearms under any circumstances.

federal ban on firearm possession by domestic violence misdemeanants), and *United States v. Barton*, 633 F.3d 168 (3d Cir. 2011)(upholding federal ban on firearm possession by convicted felons), and by this court in *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009)(same), all of which prohibited the possession of arms by people convicted of certain crimes. Unlike those statutes, the Denver ordinances do not disarm on the basis of individualized findings of guilt of crimes that support a presumption of dangerousness. They instead make an irrebuttable presumption of dangerousness with respect to an entire class of people, the vast majority of whom almost certainly are not dangerous.

It is risible to say that the ordinances are no more extensive than necessary. They do not require that a firearm be carried for an unlawful purpose in order to merit criminal punishment. They permit no alternative means by which Peterson may exercise the right to carry arms for self-defense in public. They make no exception for one type of firearm or another, and no distinction between concealed and unconcealed carry. They make no attempt to determine the dangerousness of those they disarm.

In this vein it is also noteworthy that the State of Colorado permits essentially every American capable of lawfully possessing arms to carry them

openly in public throughout the state, apparently without jeopardizing public safety. Indeed, three states – Vermont, Alaska, and Arizona – now permit nearly any American age twenty-one or older, not otherwise disqualified from possessing firearms, *to carry concealed firearms in public as a matter of right*, no CHL required. *See*, Vt. Stat. Ann. tit. 13, §§4001-16 (West, Westlaw current with all laws effective upon passage through No. 7 of the 2011-2012 session (2011) of the Vermont General Assembly) and *State v. Rosenthal*, 55 A. 610 (Vt. 1903); Alaska Stat. §11.61.220 (West, Westlaw current through the 2010 Second Regular Session of the 26th Legislature 2010); Ariz. Rev. Stat. § 13-3102 (current through the First Special Session, and legislation effective April 28, 2011 of the First Regular Session of the Fiftieth Legislature (2011)). Wyoming will join them less than three weeks after this brief is filed. S.F. No. 47, 61st Leg., Gen. Sess. (Wyo. 2011), WY LEGIS 84 (2011) (Westlaw). If permitless concealed carry has turned any of these states into hotbeds of criminal violence, Denver should be able to point to some substantial evidence of it. The amicus has been unable to locate any such evidence. And if permitless concealed carry has *not* proven to pose a substantial threat to public safety, it would be difficult indeed to defend Denver's massive abrogation of nonresidents' Second Amendment right to bear arms as "no

more extensive than necessary" for public safety.

The Second Amendment right to carry arms in public is not immune from regulation. *Heller* suggests some likely permissible regulations, such as prohibitions on carrying firearms concealed, or in demonstrably "sensitive" public places. 554 U.S., at 626-27. There probably are other restrictions that would pass muster as well. But under any standard of scrutiny that takes seriously the command of the Second Amendment, the ordinances go too far.

> No doubt in time of peace, persons might be prohibited from wearing war arms to places of public worship, or elections, etc. But to prohibit the citizen from wearing or carrying a war arm, except upon his own premises or when on a journey traveling through the country . . . or when acting as or in aid of an officer, is an unwarranted restriction upon his constitutional right to keep and bear arms. If cowardly and dishonorable men sometimes shoot unarmed men with army pistols or guns, the evil must be prevented by the penitentiary and gallows, and not by a general deprivation of a constitutional privilege.

Wilson v. State, 33 Ark. 557, 560 (1878)(striking down a statute totally prohibiting the carrying of pistols in public, as applied to certain types of pistols).

Preventing criminal violence is an important governmental objective. However, public safety must not be allowed to become a magical incantation that neutralizes meaningful judicial scrutiny and nullifies the substantive guarantee of the Second Amendment. Courts should approach with

skepticism any claim that public safety demands curtailing liberty. And in this case the ordinances do not stand up to scrutiny.

For the foregoing reasons, this court should hold that the ordinances violate the Second Amendment. Apropos of the preceding discussion, they also discriminate against Peterson because he is a nonresident of Colorado. And that offends the Comity Clause of Article IV.

III. The Denver ordinances discriminate against Peterson in violation of the Comity Clause.

The ordinances require nonresidents of Colorado to check their constitutional liberties at the city limits when they travel to Denver. That is unconstitutional.

The Comity Clause provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const., Art. IV, § 2, cl. 1. Otherwise known as the Privileges and Immunities Clause, the Comity Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). According to Justice Washington's seminal discussion of the Comity Clause in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C. E.D. Pa. 1823), the privileges and immunities encompassed by the Clause include, "the enjoyment of life and liberty . . . with the right to pursue

and obtain happiness and safety." *Id.* at 551-52. Nothing could be more essential to the enjoyment of life, and to obtaining safety, than the right to defend oneself against violent criminal attack. Nelson Lund, *Have Gun, Can't Travel: The Right to Arms Under the Privileges and Immunities Clause of Article IV*, 73 U.M.K.C. L. Rev. 951, 961 (2005). Protecting life is a central purpose of the fundamental right to arms protected by the Second Amendment, and thus there should be no doubt that the enumerated individual right to bear arms merits protection under the Comity Clause. The Supreme Court agreed in *Scott v. Sandford*, 60 U.S. 393 (1856), when it opined that recognizing blacks as citizens would entitle them to the privileges and immunities of citizens, including "the full liberty . . . to keep and carry arms wherever they went." *Id.* at 417. While the *Scott* Court's racism was despicable, its reasoning on this point is unassailable: recognizing blacks as citizens *would* have entitled them to the liberty to keep and carry arms, because that is one of the privileges of citizens.

Modern cases sometimes have struggled to articulate a consistent framework for determining which rights are sufficiently fundamental to warrant Comity Clause protection. But the Court has struck down state laws inhibiting "the right to pursue a common calling, to engage in commercial

fishing, to practice law, [and] to purchase medical services." Lund, *supra* at 961, citing *Supreme Ct. of N.H. v. Piper*, 470 U.S. 274 (1985), *Toomer*, 334 U.S. 385, *Supreme Ct. of Va. v. Friedman*, 487 U.S. 59 (1988), and *Doe v. Bolton*, 410 U.S. 179 (1973). *Piper* struck down a state regulation limiting bar admission to state residents. 470 U.S. at 279-88. *Toomer* struck down discriminatory licensing fees against out-of-state commercial fishermen on the basis that the state had not shown how the high premium charged of nonresident licensees was related to some legitimate purpose. 334 U.S. at 403. *Friedman* struck down a Virginia rule permitting bar membership on motion for resident attorneys licensed in other states, but denying the same right to nonresident attorneys licensed elsewhere. 487 U.S. at 66-70. *Bolton* struck down a Georgia rule denying abortion services to nonresidents (not on the basis of the right to abortion, but rather based on the right of a nonresident to purchase medical services in a state). 410 U.S. at 751-52. Clearly, enumerated individual rights are at least as fundamental as any of these. Lund, *supra* at 961. That the Court has not had occasion to strike down discriminatory statutes affecting such rights surely says less about the types of rights protected by the Comity Clause than it does about the types of discrimination in which states tend to engage.

Even under the formulation extending Comity Clause protection only

to rights "basic to the maintenance or well-being of the Union," *Baldwin v. Fish and Game Commission of Mt.*, 436 U.S. 371, 388 (1978)(internal citations omitted), the "message of relative indifference to the lives and safety of . . . visitors" inherent in state laws that disarm nonresidents on the basis of nonresidency alone certainly invites "resentment and retaliation." Lund, *supra* at 962. Regardless of the test one chooses to apply, it cannot be that the rights to practice law and obtain a fishing license are more "basic to the Union" than enumerated constitutional rights. Were a state to enact "a statute forbidding its law enforcement officials to investigate and prosecute crimes against nonresidents, no one could argue with a straight face that the Privileges and Immunities Clause would not apply." *Id.*

Before the district court, the Attorney General argued that the rules limiting Colorado CHLs to Colorado residents, and recognizing sister state CHLs only insofar as they are issued to residents of those sister states, are justified by the difficulty of any state conducting an adequate background check on a nonresidents. Aplnt. Append. at 213-15. The amicus finds these arguments unpersuasive, at least as regards recognition of sister state CHLs issued to nonresidents of those states. That discussion is beyond the scope of

this brief.[5] But even if those arguments justify Colorado's discriminatory policies concerning issuance and recognition of CHLs, they cannot justify the Denver ordinances.

Bach v.Pataki, 408 F.3d 75 (2d Cir. 2005), seems to be the federal appellate case most closely on all fours with this case, and was raised by the Attorney General below, *e.g.*, Aplnt. Append. at 144; therefore, it bears discussion. *Bach* was wrongly decided for reasons discussed at length by Lund, *supra*, at 962-66. That aside, it is distinguishable from this case in crucial ways.

In *Bach,* New York had an elaborate and highly discretionary licensing scheme involving detailed background checks and allegedly continuous monitoring of licensees. *Id.* at 78-82; Lund, *supra*, at 962-63. New York argued that it could not adequately scrutinize and monitor nonresidents, and

[5] The amicus cannot resist making one observation. It is telling that Colorado's criteria for recognizing sister state CHLs are totally silent on the substance of the sister state's background check. All that is required is that the recipient be a resident of the issuing state, at least 21 years of age, and that the other state recognize Colorado CHLs. Colo. Rev. State. 18-12-213. It is impossible to say categorically that sister states can't adequately check the backgrounds of nonresident CHL applicants, because that depends entirely on the CHL criteria established by the issuing state – criteria to which Colorado law is indifferent. More to the point, because it declines to examine the licensing criteria of sister states, Colorado almost certainly recognizes foreign CHLs issues to nonresidents who would be ineligible for Colorado CHLs, were they residents. In light of all this, it is difficult to take seriously the State's asserted concern for the accuracy of sister state background checks.

therefore it was justified in discriminating against them in the issuance of firearm licenses. *Id*. at 91-94. *Bach* was decided before *Heller* and *McDonald*, so it summarily rejected Bach's claim that he had a constitutional right to arms enforceable against the state. *Id.* at 84-86. Peterson clearly has such a right. And here, Denver does not conduct background checks on anyone, resident or nonresident, before depriving them of the right to arms. Of course Denver can argue that by restricting carry in Denver to Colorado CHL holders, it takes advantage of the background checks conducted by the state in that context. But this argument assumes that Denver has the right to require that anyone who wishes to carry a firearm in Denver, even openly, meet the criteria for a Colorado CHL. In the wake of *Heller* and *McDonald*, that cannot be right.

In the trial court, the Attorney General's witness identified several types of information that he said were relevant to determining whether to issue a Colorado CHL, and were also unavailable in the various criminal background databases available to him. Aplnt. Append. at 213-15. But the types of information he identified generally are inadequate grounds on which to infringe the exercise of an enumerated constitutional right: "misdemeanor

crimes[6] . . . official contacts resulting from drug and alcohol abuse . . . mental health contacts, aggressive driving tendencies . . . 911 calls . . . violent contacts not resulting in arrest . . . " Colorado law permits denial of a CHL based on a "reasonable belief . . . that the applicant will present a danger to self or others." Colo. Rev. Stat. 18-12-203(2). Vague, unadjudicated hearsay concerning possibly problematic activity *may* be constitutionally sufficient to support a "reasonable belief" in this context, given that concealed carry has long been seen as less protected than the general right to bear arms. *Heller*, 554 U.S. at 626. But they cannot be sufficient to support the near-total abrogation of the right to carry arms. Enumerated individual liberties cannot be made to turn on unsubstantiated facts. *Cf. Henry v. United States*, 361 U.S. 98, 101 (1959)("common rumor or report, suspicions, or even 'strong reason to suspect' are inadequate to support an arrest warrant); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *United States v. Booker*, 543 U.S. 220 (2005). It is inappropriate to apply CHL criteria to people – whether or not they are Colorado citizens – who wish only to exercise the Second Amendment right to

[6] Federal courts have held that convictions of misdemeanor crimes of domestic violence support deprivation of the Second Amendment right, but the amicus doubts that those are the crimes the Attorney General's witness was referring to. The amicus has good reason to believe convictions of domestic violence misdemeanors are indeed captured by national databases.

openly bear arms in public, non-sensitive places. Denver cannot insist that even residents of Colorado meet those criteria, and so any possible need to require it of nonresidents vanishes. There is no adequate justification for the discriminatory provisions of the ordinances, and they violate the Comity Clause.

CONCLUSION

The Denver ordinances totally prohibit Peterson from bearing arms on his person for self-defense in non-sensitive, public places. Under any appropriate standard of review, this violates Peterson's rights under the Second Amendment and the Comity Clause. The ordinances should be declared unconstitutional as applied to Peterson.

Date: June 10, 2011

Respectfully Submitted
The NRA Civil Rights Defense Fund
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Appellate Case: 11-1149 Document: 01018650370 Date Filed: 06/15/2011 Page: 40

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system on June 10, 2011.

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