Docket No. 11-1149

The 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
The Hon. Walker D. Miller, Senior District Judge

Brief of Appellant

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Oral Argument Requested

[*]Charles F. Garcia has been substituted for Alvin LaCabe and James Davis has been substituted for Peter Weir

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Statutes

There are no prior or related appeals for this case.

Statement on Jurisdiction

The District Court had original jurisdiction of this case because the case involved federal questions under 28 U.S.C. § 1331, as the Plaintiff-Appellant sought redress for civil rights violations pursuant to 42 U.S.C. § 1983. Plaintiff-Appellant commenced the action below after he was denied a permit to carry a concealed handgun. He alleged that the denial violated his rights to travel, due process, privileges or immunities, and to keep and bear arms.

This Court has jurisdiction because Appellant is appealing a final order of a district court. 28 U.S.C. § 1291.

The District Court entered orders on October 20, 2010 and March 8, 2011, which orders are the subject of this appeal. A final judgment on those orders was entered on March 15, 2011. Such final judgment disposed of all parties' claims. Appellant filed a notice of appeal on April 8, 2011, so this appeal is timely. F.R.A.P. § 4(a)(1)(A).

Statement of the Issues

1. The District Court erred in dismissing Defendant-Appellee Peter Weir, where Plaintiff-Appellant alleged in his complaint that Weir is responsible for administering Colorado's concealed handgun reciprocity system and where the District Court did not cite contrary authority.

2. The District Court erred in granting Defendant-Appellee John W. Suthers' motion for summary judgment and in denying Plaintiff-Appellant's motion for summary judgment.

Statement of the Case

Nature of the Case

This is a civil rights case. Plaintiff-Appellant Gray Peterson ("Peterson") seeks declaratory and injunctive relief against Defendant-Appellee Charles F. Garcia ("Garcia"), the *ex officio* sheriff of Denver County, Colorado and Defendant-Appellee James Davis ("Davis"), the Executive Director of Public Safety for the State of Colorado.[1] Peterson seeks relief from Garcia on account of his denial of Peterson's application for a concealed handgun license ("CHL")[2] because of Peterson's non-residency within the State of Colorado.

Peterson seeks relief from Davis on account of Davis' administration of Colorado's CHL reciprocity with other states. Specifically, Colorado

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[1] Since the commencement of the case, James Davis ("Davis") has succeeded Peter Weir as Executive Director of Public Safety for the State of Colorado and Charles F. Garcia ("Garcia") has succeeded Alvin LaCabe as Denver Manager of Safety (and *ex officio* sheriff of Denver County). Because Davis and Garcia are therefore substituted parties by operation of law (Fed.R.Civ.Pr. 25 and Fed.R.App.Pr. 43(c), Davis and Garcia shall be referred to throughout the remainder of this Brief, even where the events described occurred when LaCabe or Weir were the office holder(s) of interest.

[2] Peterson is mindful that the licenses discussed in this Brief are referred to by different names in different states, and that the license issued in Colorado is a license to engage in varied activities within the state and within the city and county of Denver. For the sake of brevity, Peterson refers to all such licenses as CHLs, regardless of the differences described.

gives reciprocity to certain states' CHLs, but only to residents of those other states (and not to people who have CHLs from other states as non-residents).

Peterson asserts that the administration of these regimes by Davis and Garcia violates Peterson's Second Amendment rights, his equal protection rights, his right to travel, and his privileges and immunities.

Proceedings Below

Peterson commenced the case in the District Court for the District of Colorado. The District Court dismissed Davis as a defendant based on Davis' motion to dismiss pursuant to Fed.R.Civ.Pr. 12(b)(6). Peterson and Garcia filed cross motions for summary judgment. The District Court denied Garcia's motion, deferred ruling on Peterson's motion, and permitted Colorado Attorney General John W. Suthers ("Suthers") to intervene. Thereafter Suthers responded to Peterson's motion (against Garcia) and filed his own motion for summary judgment. The District Court then granted Suthers' motion and denied Peterson's motion, thus terminating the case.

Statement of the Facts

On or about June 2, 2009, Peterson filled out an application in Denver County for a Colorado CHL. Applt. Append., p. 80.. Garcia is the Manager of Safety for the City and County of Denver and the *ex officio* sheriff of Denver County. *Id.*. Pursuant to C.R.S. § 18-12-203, Garcia or his designee

is vested with statutory authority to issue CHLs to an applicant who meets all statutory criteria for obtaining a CHL. *Id.*, p. 81. Peterson is not a resident of the State of Colorado. *Id.* On or about July 2, 2009, Garcia sent Peterson a letter notifying Peterson that his application was denied. *Id.* Garcia denied Peterson's application for a CHL because Peterson is not a resident of the State of Colorado as required by C.R.S. § 18-12-303(1)(a). *Id.* Davis is the Executive Director for the Department of Public Safety of the State of Colorado. *Id.*

As Executive Director of the Department of Public Safety for the State of Colorado, Davis is primarily responsible for administering the recognition and reciprocity of CHLs issued by other states. *Id., p. 13*.[3] Peterson has a CHL issued by the State of Washington. *Id.*, p. 12. Peterson has a CHL issued by the State of Utah.[4] The State of Colorado does not recognize and provide reciprocity to Washington CHLs. *Id.*, p. 13. The State of Colorado provides reciprocity to some other states' CHLs (including

[3] The propriety of taking as true facts asserted in the Amended Complaint against Davis is discussed below in the arguments for why Davis should not have been dismissed as a defendant.

[4] At the time of filing the Amended Complaint, Peterson had a CHL issued by the State of Florida. *Id.* Since that time, Peterson has allowed his Florida CHL to expire and instead has obtained a CHL from the State of Utah. For the purposes of this case, the CHLs from Florida and Utah are interchangeable, as Colorado recognizes CHLs issued by both states, but only for residents of the state of issuance.

Florida and Utah), but only to residents of the state of issuance. C.R.S. § 18-12-213(1)(b)(I).

Peterson is a frequent visitor of Colorado and Denver. Appllt. Append., p. 63. Peterson does not have a dwelling, automobile, or place of business in Denver. Appllt. Append., pp. 63-64, 112-113.

Statement on the Standard of Review

1. As to Dismissal of Davis

Davis did not state in his Motion to Dismiss whether he was moving for dismissal under Fed.R.Civ.Proc. 12(b)(1) or 12(b)(6). His Motion rested on 11th Amendment immunity grounds, but there is case law indicating that a motion to dismiss on the grounds of immunity could be under either rule. The District Court did not announce under which rule it dismissed Davis. Peterson will show below why the dismissal must have been under Rule 12(b)(6), but in an abundance of caution, the standard of review for all instances will be stated here. Review of an 11th Amendment immunity question is *de novo. Steadfast Insurance Company v. Agricultural Insurance Company*, 507 F.3d 1250, 1253 (10th Cir. 2007). Review of a district court's dismissal under Rule 12(b)(1) or 12(b)(6) is *de novo. Colorado Environmental Coalition v. Wenker,* 353 F.3d 1221, 1227 (10th Cir. 2004). To the extent that this Court must review the District Court's rulings on

Colorado law, such review also is *de novo.* *Wade v. EMCASCO Insurance Co.*, 483 F.3d 657, 665 (10th Cir. 2007).

2. As to Grant of Garcia's Motion for Summary Judgment and Denial of Peterson's Motion for Summary Judgment

On cross motions for summary judgment, the review is *de novo*, and inferences to be drawn from documents must be in the light most favorable to the party that did not prevail. *Allen v. Sybase, Inc.*, 468 F.3d 642, 649 (10th Cir. 2006). The District Court's findings of fact are reviewed on a clearly erroneous standard. *United States v. Bradley*, 417 F.3d 117, 1114 (10th Cir. 2005). A finding of fact is clearly erroneous if it is without factual support in the record. *Manning v. United States*, 146 F.3d 808, 812 (10th Cir. 1998).

Summary of the Argument

The District Court erred by dismissing Davis as a party. The District Court failed to accept Peterson's well-pleaded facts to be true. The District Court also relied upon Colorado law in determining that Davis had no involvement in administering the state's CHL reciprocity regime, but the statute cited by the District Court does not address that issue.

The District Court also erred by granting Suthers' motion for summary judgment and denying Peterson's motion for summary judgment. The District Court erroneously attributed declarations of an investigator for Adams County to be made by an investigator for Denver County. It matters, because the practices of an investigator from a different county have no bearing on the propriety of the actions of Garcia, the sheriff of Denver County. In addition, Garcia provided no evidence indicating that his practices are similar to the Adams County investigator, or that the general experiences of Adams County manifested themselves in Garcia's investigation of Peterson.

Moreover, the District Court misapplied the law pertaining to the right to travel and applied an incorrect standard of review for Peterson's constitutional claims.

Argument and Citations of Authority

1. The District Court Incorrectly Rejected Peterson's Well-Pled Facts

In its order dismissing Davis as a defendant, the District Court observed that Peterson had alleged in his Amended Complaint [Applt. Append., p. 13] that Davis is "primarily responsible for administering the recognition and reciprocity of concealed handgun licenses by other states." *Id.*, p. 126. The District Court continued, however, by saying, "I 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." *Id.*

The District Court did not cite authority for the proposition that it may disregard an allegation contained in a complaint when deciding a motion to dismiss. Ordinarily, a court must "accept all the well-pleaded allegations of the complaint as true and … construe them in a light most favorable to the plaintiff." *Ellis v. Ogden City*, 589 F.3d 1099, 1102 (10th Cir. 2009), *citing David v. City & County of Denver*, 101 F.3d 1344, 1352 (10th Cir. 1997). This requirement applies both for motions to dismiss under Rule 12(b)(1) (*Black Hills Aviation, Inc. v. United States*, 34 F.3d 968, 972 (10th Cir. 1994)) and under Rule 12(b)(6) (*Issa v. Comp USA*, 354 F.3d 1174, 1178 (10th Cir. 2003)).

Peterson pointed out to the District Court that Davis did not state whether his motion to dismiss was filed pursuant to Rule 12(b)(1) or Rule 12(b)(6). *Id.*, p. 33. Davis alleged that the Court "has no subject matter jurisdiction over [Davis]." *Id*., p. 28. This phrase suggestions both a subject matter jurisdiction and a personal jurisdiction question. Davis also alleged that the "Amended Complaint fails to set forth any allegations…," [*Id*, p. 26], a phrase that seems to suggest a failure to state a claim for which relief may be granted, pursuant to Rule 12(b)(6).

"When a complaint is drawn to rely directly upon a federal statute, so that the question of the court's jurisdiction is intertwined with the merits of the case, the general rule is that a federal court possesses jurisdiction and should decide the case on its merits." *Bloomer v. Norman Regional Hospital*, 2000 U.S. App. LEXIS 16099, 5, 2000 Colo. J.C.A.R. 4252 (10th Cir. 2000), *citing Bell v. Hood*, 327 U.S. 678, 681-83; *Davoll v. Webb*, 194 F.3d 1116, 1129 (10th Cir. 1999). "Under these circumstances, the court should resolve its jurisdictional inquiry either 'under Fed. R. Civ. Proc. 12(b)(6) or, after proper conversion into a motion for summary judgment, under Rule 56.'" *Bell*, 327 U.S. at 682-83; *Davoll*, 194 F.3d at 1129.

In the instant case, Plaintiff has drawn his complaint to rely directly on several provisions of the Constitution of the United States and therefore

on 42 U.S.C. § 1983. Under *Bloomer*, *Bell*, and *Hood*, the Court has subject matter jurisdiction and must therefore consider Davis' Motion as one under Rule 12(b)(6) or under Rule 56. Conversion of a motion from Rule 12(b)(6) to Rule 56 only applies when "matters outside the pleadings are presented to and not excluded by the court." *R.W. Beck, Inc. v. E3 Consulting LLC*, 577 F.3d 1133, 1146 (10th Cir. 2009). Because Davis did not include any evidence or affidavits with his Motion, he did not present matters outside the pleadings to the Court. His Motion, therefore, should have been treated as one under Rule 12(b)(6).

The Court should have determined "whether the complaint contains enough facts to state a claim to relief that is plausible on its face." *Ellis*, 589 F.3d at 1102. "[O]nce a claim for relief has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint…. Once a claim for relief has been stated, a plaintiff receives the benefit of imagination so long as the hypotheses are consistent with the complaint." *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 562 (2007) [citations omitted]. "[W]hen a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder." *Id.* at 563.

In the instant case, the District Court declined to articulate if it was deciding Davis' Motion under Rule 12(b)(1) or Rule 12(b)(6), making it all the more difficult to review the District Court's decision. Either way, however, the District Court was obligated to accept Peterson's well-pleaded facts to be true.

Assuming *arguendo* that a court may disregard this requirement if there is statutory authority contrary to the facts alleged in the complaint, consider the facts alleged and the "contrary" authority relied upon by the District Court.

The District Court concluded that Davis has no involvement in administering Colorado's reciprocity regime because Colorado law placed the "authority for implementing and administering the state's concealed handgun law solely with local sheriffs." Appllt. Append., p. 127. The District Court thus confused reciprocity among the states and the issuance of CHLs. Nothing in the authority cited by the District Court addresses reciprocity of CHLs between Colorado and the other states. Moreover, it defies logic that each county sheriff would have authority to determine which states' CHLs Colorado honors and which ones it does not. Such a scheme would lead to the result that a particular state's CHL might be honored in Denver but not in Colorado Springs. Clearly, that is not the case.

Finally, Davis himself admitted in his motion to dismiss that he has a role in the reciprocity system, albeit a more limited role than Peterson alleged in the Amended Complaint. Davis admits that he "maintain[s] a database of states with which Colorado maintains reciprocity." *Id.*, p. 26. With that admission, it simply is erroneous to conclude that Davis has nothing to do with reciprocity.

Noticeably absent from Davis' briefs and from the District Court's analysis is any indication of who the state officer is that ***is*** responsible for deciding which states' CHLs are honored in Colorado. Given that Davis admits he administers the data base of reciprocity, he must interact directly with the official that decides which states go into the data base. Peterson alleges that the responsible person is Davis. Davis dances around that issue but does not actually assert that he does not have that responsibility. Neither does he allege that another state official does. The District Court did not find a statute that affirmatively vests another officer with that responsibility. At the motion to dismiss stage, especially with no directly conflicting statutory authority, the District Court was obligated to accept Peterson's allegation as true.

The District Court also overlooked the minimum requirement necessary to obtain jurisdiction over a state official in a case attacking a state

system's constitutionality. "In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have ***some connection*** with the enforcement of the act…. The fact that the state officer by virtue of his office has some connection with the enforcement of the act is the important and material fact…." *Ex parte Young*, 209 U.S. 123, 157 (1908). [emphasis supplied]

Peterson alleged, and Davis himself confirmed, that Davis has ***some connection*** with the reciprocity system. Under these circumstances, it was error for the District Court to dismiss Davis as a party. This is especially true when neither the Court nor Davis was able to point to a statute that vested the primary responsibility for this system with a different official.

Davis' Motion consists largely of a series of straw men that Davis builds up and then methodically tears down. Peterson pointed out to the District Court that each straw man had no bearing on Peterson's claims, but the District Court did not address this argument at all. Davis likewise declined to address the argument in his reply brief. A recap of Davis' straw men follows.

1A. Straw Man No. 1: Issuance of a License is Not Pertinent to Davis

Davis argued that he has no involvement in the local matter of issuing (or not issuing) a CHL to Plaintiff. While Peterson agrees with this general proposition, the statement has no bearing on the case. Peterson made no claims against Davis related to whether (or not) Davis issued Peterson a CHL. It was Garcia that denied Peterson's application, not Davis, and Peterson makes no claim against Davis that Davis had anything to do with that denial.

1B. Straw Man No. 2: Reciprocity Granted by Other States is Not Pertinent to Davis

Davis further argued that he is not responsible for ***other states'*** recognition of the validity of Colorado CHLs. Again, this statement is no doubt true, but it has absolutely nothing to do with this case. Peterson made no claims regarding other states' recognition of a Colorado CHL (a license that Peterson does not have and that Garcia will not issue him). Rather, Peterson made a claim against Davis for Davis' refusal to give recognition to Peterson's CHLs issued by other states. Both the District Court and Davis failed to address this claim.

Peterson alleged in his Amended Complaint that Davis "is primarily responsible for administering the recognition and reciprocity of [concealed handgun licenses] issued by ***other*** states." Appllt. Append., p. 13 [Emphasis

supplied]. It is in Davis' capacity as the state official responsible for administering Colorado's reciprocity that Peterson sued Davis.

1C. Straw Man No. 3: Davis' 11th Amendment Argument is Circular

Davis argues that under *Ex parte Young*, 209 U.S.123 (1908), he cannot be sued because he has no connection with "the issuance or denial of permits to carry concealed handguns or in granting reciprocity from another state." Appllt. Append., p. 37. Again, however, Peterson made no claims of either character against Davis. Peterson's claim is against Davis for refusing to recognize Peterson's CHLs from another state (not for another state's refusing to grant reciprocity to Peterson (for a CHL that Peterson does not possess and cannot get from Garcia).

In essence, Davis' 11th Amendment argument was that he cannot be sued because he is not responsible for something of which Peterson does not complain: administering ***another state's*** reciprocity. Davis is, however, responsible for something of which Peterson does complain: administering ***Colorado's*** reciprocity. The District Court did not cite any competent authority for the proposition that Davis does not administer Colorado's reciprocity.

2. The District Court Erred in Granting Suthers' Motion for Summary Judgment and Denying Peterson's

2A. The District Court Did Not Apply the Correct Standard for Right to Travel Cases

Peterson alleged that Garcia's denial of Peterson's application for a CHL violated Peterson's right to travel as guaranteed by the Constitution. Some additional background is necessary to understand this claim fully.

Under Colorado law, Colorado residents who qualify can obtain a Colorado CHL from their county sheriff. C.R.S. § Holders of Colorado CHLs can freely carry a handgun throughout Denver and the rest of Colorado (except in certain sensitive places where firearms carry is not allowed by state law). In addition, residents from 28 other states with CHLs issued by their home States can freely carry a handgun, openly or concealed, throughout Denver and the rest of Colorado. On the other hand, Washington residents, including Peterson, cannot obtain a Colorado CHL, and cannot obtain a CHL from any state and have such other CHLs recognized by Colorado.

Carrying a concealed firearm in Colorado without a CHL is a Class 2 misdemeanor. C.R.S. § 18-12-105. Class 2 misdemeanors are punishable by a minimum sentence of three months' imprisonment or a $250 fine, or both, and a maximum sentence of 12 months' imprisonment or a $1,000 fine, or both. C.R.S. § 18-1.3-5-1. Carrying a firearm openly or concealed

in Denver without a CHL is an offense. Denver Municipal Code, § 38-117(b). Violators are subject to a minimum fine of $500 [*Id.*] and a term of imprisonment not to exceed one year. Denver Municipal Code, § 1-13(a). The only exceptions to these crimes apply to carrying a firearm in one's dwelling, a private passenger automobile, or a person's place of business.

Because Peterson does not have a dwelling, a private passenger automobile, or a place of business in Denver (or anywhere else in Colorado), Peterson is completely disarmed when he visits Denver unless he obtains a Colorado CHL. Garcia denied Peterson's application for a Colorado CHL solely on account of Peterson's non-residency in Colorado. Thus, Garcia denied Peterson the right to keep and bear arms on account of Peterson's non-residency.

The District Court relied on *Saenz v. Roe,* 526 U.S. 489 (1999) as authority for its assumption that the right to travel is embodied entirely within the Privileges and Immunities Clause of the Constitution. Applt. Append., p. 219. The District Court, therefore, did not consider Peterson's right to travel and Privileges and Immunities claims separately. Instead, the District Court applied only a Privileges and Immunities Clause analysis to both claims. The problem with this approach is that it results in an incorrect analysis of the right to travel claims. *See, e.g., Selevan v. N.Y. Thruway*

Authority, 584 F.3d 82 (2nd Cir. 2009) (separately analyzing right to travel and Privileges and Immunities Clause claims).

A right to travel infringement is subject to strict scrutiny. *Selevan*, 584 F.3d at 102 ("District Court shall determine whether the [policy] implicates the right to travel…and, if so, the District Court shall apply strict scrutiny."); *United States v. Bredimus*, 352 F.3d 200, 209 (5th Cir. 2003), *rehearing en banc denied, cert. denied* ("We agree that the right to travel is a fundamental right and that a government infringement on that right will be subject to strict scrutiny"); *United States v. Klinzing*, 315 F.3d 803, 808 (7th Cir. 2003) ("[T]he right to travel is fundamental and any burden on it is subject to strict scrutiny"). But *see Barber v. Hawaii*, 42 F.3d 1185, 1196 (9th Cir. 1994) (Strict scrutiny not applicable unless there is a "significant penalty on the right to travel"). Applying a pure Privileges and Immunities Clause analysis to right to travel cases is not consistent with the widespread application of strict scrutiny to such cases. Thus, the District Court misapplied the law as it relates to right to travel cases.

Certainly, *Saenz* is an appropriate starting point for determining whether the right to travel is implicated. Under *Saenz*, there are three ways by which the right to travel can be infringed. Only one of those is at issue in

this case: the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in another state. 526 U.S. at 500.

The right to keep and bear arms will be discussed in more detail below, but for the purposes of right to travel analysis, it is sufficient to state that the Supreme Court has found the right to keep and bear arms to be a fundamental constitutional right. *District of Columbia v. Heller,* 554 U.S. 570, 593 (2008). ("By the time of the founding, the right to have arms had become fundamental for English subjects"). *McDonald v. City of Chicago,* 130 S.Ct. 3020 (2010) ruled that the right applies to the states and reiterated that it is a fundamental right. *Id.* at 30243.

Because Garcia has denied Peterson the fundamental constitutional right to keep and bear arms when Peterson temporarily is present in Colorado generally and Denver in particular, Garcia hardly is treating Peterson as a welcome visitor. Garcia has relegated Peterson's right to defend himself to the back of the bus.

The District Court did not reach the question of whether the right to travel was implicated, but instead went directly into an analysis of the Privileges and Immunities Clause. Applt. Append., p. 219. Because *Saenz* dealt with a different aspect of the right to travel [526 U.S. at 502] ("What is at issue in this case … is … right of the newly arrived citizen to the same

privileges and immunities enjoyed by other citizens of the same State"), *Saenz* is not particularly helpful in analyzing the welcome visitor/unfriendly alien case, and anything it says on that flavor of the right to travel is of course *dicta.*

Instead, the cases cited earlier pertaining to strict scrutiny and right to travel cases are more helpful. For example, *Selevan* tells us that the right to travel is grounded in the Privileges and Immunities Clause, the Privileges or Immunities Clause, and the Equal Protection Clause. 584 F.3d at 99. The right to travel is implicated when a state law "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." *Attorney General of New York v. Soto-Lopez,* 476 U.S. 898, 903 (1986). Peterson does not claim that Garcia actually deters Peterson's travel to Colorado or has impeding travel as his primary objective. Rather, Garcia has penalized Peterson by disallowing him from exercising his fundamental right to keep and bear arms when he visits Denver and Colorado.

Being denied the exercise of a fundamental right can hardly be considered "minor." Because a "minor" infringement on the right to travel is the only exception to the application of strict scrutiny, Garcia's restriction on Peterson's right to travel must be reviewed under strict scrutiny. To

survive strict scrutiny, Garcia has the burden of proving that his actions are narrowly tailored to further a compelling state interest. *Yes on Term Limits, Inc. v. Savage,* 550 F.3d 1023, 1029 (10th Cir. 2008).

Neither Garcia nor Intervenor Suthers made an attempt to carry this burden. Not even acknowledging the possibility of applying strict scrutiny in the alternative, they make arguments only in support of intermediate scrutiny, which are addressed below. Suthers does assert that strict scrutiny does not apply to right to travel cases in the 10th Circuit, but his sole authority for this proposition is *Buchwald v. University of New Mexico School of Medicine*, 159 F.3d 487 (10th Cir. 1998). *Buchwald* never states what the standard of review is, but decides the case on standing and immunity grounds. *Buchwald* thus does not have the holding Suthers claims it does.

Suthers' stated governmental interest is "public safety." Apparently satisfied that the rubric of public safety is broad enough to cover most any firearm regulation, Suthers asserts that it is important to keep firearms out of the hands of non-residents of Colorado because Garcia cannot determine whether such non-residents are prohibited under Colorado and Denver law from bearing arms.

Even assuming *arguendo* that public safety qualifies as a compelling governmental interest under a strict scrutiny analysis, Garcia's denial of Peterson's right to bear arms is hardly narrowly tailored. First, Garcia never introduced evidence that he was unable to obtain desired background information on Peterson. Instead, he blindly rejected Peterson's application solely on account of Peterson's non-residency. Second, Garcia, who asserts he is just following state law, presumably would issue a CHL to an otherwise-qualified applicant who just moved to Colorado. Because the amount of "local" information available on both Peterson and the hypothetical new resident would be similarly lacking, Garcia's practice is not narrowly tailored.

If, as Suthers asserts, the lack of available information is the reason for the denial, then the denial should be based at a minimum on the actual lack of available information. Because Garcia did not allege any lack of available information for Peterson, Garcia's denial cannot withstand strict scrutiny.

Third, lack of available information is not a valid reason for denying someone the fundamental right to keep and bear arms. We do not deny a citizen the right to assemble or the right to free speech based on the availability of information about the citizen. While the Supreme Court has

affirmed that certain statuses, such as being a convicted felon, are subject to having the right to keep and bear arms infringed, there is no support for the notion that the right can be infringed because the government ***does not know*** if a person is a convicted felon.

Garcia administers a system that decides who may exercise the right to keep and bear arms and who may not. If he is going to have such a system that potentially infringes on the right to exercise a fundamental constitutional right, he may not rest such infringement on the arbitrary conclusion that he may not be able to find sufficient information regarding the citizen. Garcia did not, for example, offer Peterson the option of submitting additional background information on himself.[5]

Even if this Court concludes that intermediate scrutiny applies, as the District Court did, Garcia's infringement on Peterson's fundamental constitutional right does not meet that standard. As noted earlier, Suthers asserts that the governmental interest at stake is "public safety." He further asserts that "reasonable regulation of firearms" is an essential component of public safety. There are several problems with this argument.

[5] It should be noted that Garcia never even asserted that he denied Peterson's right to keep and bear arms because of a lack, or even a supposed lack, of information. That argument was solely a product of Suthers, based on evidence Suthers gathered from ***other*** counties. Suthers introduced no evidence about Garcia's ability to obtain sufficient information about Peterson.

First, "reasonable regulation" implies some sort of rational basis review. Even Suthers agrees that rational basis is not applicable. Second, Suthers never argues exactly how it is that disarming non-residents from approximately half the states is "reasonable" nor how it is related to "public safety." Suthers never asserts that Peterson is not law-abiding nor provides any other evidence indicating that Peterson should be deprived of the fundamental constitutional right to bear arms. With no evidence indicating how Peterson is more dangerous to public safety than a CHL holder from Colorado, or than a resident CHL holder from Utah, there is no relationship between Suthers asserted goal of public safety and Garcia's denial of Peterson's right to bear arms.[6]

2B. The District Court Did Not Apply the Correct Second Amendment Standard.

Suthers argued, unsuccessfully, that there is no constitutional right to carry a handgun outside the home. Applt. Append., p. 166. The District Court rejected that argument, assuming without deciding that there is such a right. *Id.*, p. 225. It should be noted that the Supreme Court in *Heller* held that the Second Amendment does not affect "laws forbidding the carrying of

[6] It is important to keep in mind that Peterson's challenge is as-applied. It is therefore immaterial whether Suthers' argument might apply to some other hypothetical applicant. It only is material whether Peterson's exercise of the right to bear arms would pose a threat to public safety.

firearms in sensitive places such as schools and government buildings." 554 U.S. at 626. It would have been unnecessary for the Court to make that pronouncement if there is no Second Amendment right to carry firearms outside the home at all. Given the Court's ruling that "bear" in the Second Amendment is synonymous with "carry" [554 U.S. at 584], it would be odd to conclude that the Court found a right to carry a firearm in one's home, but nowhere else, and that carrying in a sensitive place (which is not in the home, anyway), can be banned.

Despite the District Court's assumption (that carrying outside the home is protected), the Court still found Garcia's denial of Peterson's right to keep and bear arms to be warranted. The District Court provided several reasons for this conclusion, and they will be addressed in turn.

First, the District Court concluded that Garcia's denial of Peterson's applicaiton "burdens only a narrow class of persons." *Id.*, p. 226. Again, it should be noted that Peterson's challenge is as-applied. It is immaterial in an as-applied challenge whether zero or a million other people might have a similar complaint. There is no support for the notion that an infringement on a fundamental constitutional right is valid if the infringement affects a small number of people. The District Court did not explain why an as-applied challenger must allege and prove that his misery is enjoyed by a large

company. If a constitutional right may not be exercised unless a critical mass of similarly-inclined citizens can be assembled, then constitutional rights cease to be enjoyed by the individual. Instead, they are only enjoyed by pluralities, or even majorities.

The District Court further ruled that Garcia's infringement of Peterson's right was permissible because the infringement "does not completely prevent this class of persons from possessing firearms while in the state." *Id*. This is at least theoretically true, because a person can carry a firearm in his dwelling, private automobile, or place of business. Peterson testified, unrebutted, that he has no dwelling, private automobile, or place of business in Denver or the State of Colorado. Peterson is therefore completely disarmed in Denver.

Even if Peterson had one or more of the narrow exceptions available to him, it can hardly be claimed with a straight face that carrying a firearm only in one's dwelling, private automobile, or place of business is adequate to satisfy Second Amendment scrutiny.

The District Court pointed to two other cases where restrictions on possession of firearms was deemed valid. In *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010), this Court found that 18 U.S.C. § 922(g)(8), making it a felony to possess a firearm while subject to a domestic protective

order, did not violate the Second Amendment. In *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010), *en banc*, the Court upheld that application of 18 U.S.C. § 922(g)(9), which forbids the possession of firearms by a person convicted of a misdemeanor crime of domestic violence.

The District Court is correct that the statutes at issue in *Reese* and *Skoien* are slightly more restrictive of the right to keep and bear arms than the Denver ordinance, in that they constitute outright bans. What the District Court did not consider is that both Reese and Skoien were criminal defendants, whose rights to possess firearms were restricted on account of judicial determinations that they had committed crimes or otherwise were especially dangerous. No such determination has been made regarding Peterson. His "crime" is being a resident of Washington.

The District Court somewhat downplays the effect of Garcia's ruling against Peterson. Acknowledging that Peterson only can possess a firearm in Denver "in … private vehicles … and in private dwelling areas," the Court concluded that Garcia's denial of Peterson's application "does not severely limit the possession of firearms but rather regulates the manner in which persons may lawfully exercise their Second Amendment rights." Appellt. Append., p. 226.

The District Court overlooked the factual record, which clearly reveals that Peterson has neither a private vehicle nor a dwelling place in Denver. Appellt. Append., p. 64; *Id.* p. 113. Thus, Peterson has ***no places*** in Denver where he may carry a firearm.

Even if Peterson had both a private vehicle and a dwelling, however, being restricted to car and dwelling carrying can hardly be characterized accurately as "not a severe limitation." Others whom Garcia has not infringed upon are free to carry firearms, openly or concealed, in almost all locations in Denver. The difference between virtually everywhere and virtually nowhere could not be more stark.

The District Court concluded by finding that, under an intermediate scrutiny standard, Garcia's denial of Peterson's right to keep and bear arms was appropriate. The District Court referred back to its right to travel analysis, in which it found that "public safety" is an important governmental interest and that denial of Peterson's right to keep and bear arms is substantially related to that interest.

The District Court made no Peterson-specific findings, ruling instead on Garcia's generic application of Colorado law. Aside from this overbroad approach, the implication that "public safety" is sufficient reason to deprive a specific person of the right to keep and bear arms, with no finding of

dangerousness or other reason why that person should be so deprived, is without bounds. If Peterson can be denied the right to keep and bear arms, who cannot be? Again, there is nothing in the record to indicate Peterson should be deprived of that right. Logically, all persons could be likewise deprived. If everyone can be denied the right to keep and bear arms, except in their vehicles and dwellings, then there is virtually no right. If this Court affirms the District Court, then a governmental entity within the 10th Circuit that chooses to ban carrying firearms except in vehicles and dwellings, with no possibility of a license, would have *carte blanche* to do so.

Furthermore, at least one court recently ruled that the Second Amendment guarantees a right to bear arms ***outside the home.*** *Ex parte Roque Cesar Nido Lanausse*, Court of Appeals of Puerto Rico, Guyama Judicial Region, Panel XII, Case No. KLAN201000562 (Jan. 31, 2011).[7] The Court found that the plain text of the *Heller* opinion indicates that there is a fundamental constitutional right to carry firearms for protection, so that a Puerto Rican law interpreted to require good cause to obtain a CHL was unconstitutional.

[7] The original opinion is in Spanish, but several translations appear on the Internet, including one at http://volokh.com/2011/05/18/the-puerto-rico-appellate-case-recognizing-a-second-amendment-right-to-carry-guns-in-public/

It is important to keep in mind that this case concerns the imposition of a licensing requirement in order to exercise a fundamental constitutional right. To be sure, such a licensing requirement is not *per se* prohibited. But a licensing scheme that denies licenses on an arbitrary basis is prohibited:

> [A]n ordinance which … makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon … a permit or license which may be granted or withheld in the discretion of such official is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Staub v. City of Baxley, 355 U.S. 313, 322 (1958). In the instant case, the District Court approved Garcia's denial of Peterson's CHL application, not because Peterson possesses any characteristics that might make him unsuitable for exercising the right to keep and bear arms (e.g., status as a convicted felon), but because Suthers' asserted that Garcia ***might*** not have sufficient information available to him to assess Peterson's suitability.

Suthers' excuse for Garcia's denial of Peterson's permit reveals just how arbitrary Garcia's denial was. The denial ostensibly was based on an objective criterion: Peterson's non-residency. The District Court ruled, however, that the rationale for the criterion is the "increased difficulty" of "monitoring a potential licensee's eligibility … for out-of-state residents." Applt. Append., p. 226. In other words, residency is used as a proxy for "difficulty."

Garcia relies upon circular logic. He is administering a licensing scheme that has built into it provisions that make its administration at times difficult. In order to reduce the difficulty, he bars certain people from exercising a fundamental constitutional right. It does not seem to matter to Garcia that he is prohibited from having an overly-burdensome or arbitrary licensing scheme in the first place. Garcia is not free to "fix" flaws in the licensing scheme by making participation in the scheme difficult or impossible. If the licensing scheme is too difficult to administer, that difficulty is the licensor's problem, not the person seeking to exercise a fundamental constitutional right that the government has chosen to license.

The effect of Garcia's decision is to deny to Peterson the exercise of the fundamental constitutional right to bear arms in Denver, solely on account of Peterson's residence in Washington. Garcia made no showing that he was unable to obtain adequate information about Peterson. Neither is there any indication that Peterson is not a law-abiding citizen and in all other respects perfectly capable and qualified to exercise this right.

The standard of review for Second Amendment cases has not been conclusively determined. The Supreme Court in *Heller* indicated that rational basis is not appropriate. 554 U.S. at 629. The Court did not announce a standard, however, holding that the law at issue in that case (the

District of Columbia's ban on possession of functioning firearms in the home) would not pass constitutional muster under any standard. 554 U.S. at 628.

If the District of Columbia may not ban possession of functioning firearms 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. Given that the purpose of the Second Amendment is to guarantee the right to keep and carry firearms in case of confrontation [554 U.S. at 592], restricting the right to carry firearms to but a narrow list of places (that do not even apply to Peterson) likewise cannot pass muster under any standard.

That said, the infringement on Peterson's fundamental constitutional rights in this case must be subject to strict scrutiny. A recent Fourth Circuit decision helps explain why Suthers' proposed standard of review is inappropriate. First, the Fourth Circuit joined other circuits in ruling that Second Amendment cases should be reviewed analogously to First Amendment cases. *United States v. Chester,* 2010 U.S. App. LEXIS 26508, 24, No. 09-4084 (4th Cir. December 30, 2010) ("[W]e agree with those who advocate looking to the First Amendment as a guide in developing a standard of review for the Second Amendment"), *citing* cases from the Third

and Seventh Circuits. Second, the *Chester* court determined that "severe burdens" on the Second Amendment right should be subject to strict scrutiny, and that lesser burdens should be subject to intermediate scrutiny. *Id.* at 26. Because Plaintiff in the instant case has been completely disarmed in Denver, his Second Amendment rights have been eradicated and strict scrutiny must therefore apply.

Even assuming *arguendo* that an intermediate scrutiny should be applied, the form of intermediate scrutiny that would apply is very different from what Suthers urges. The *Chester* court explained that intermediate scrutiny in Second Amendment cases means there must be "a reasonable fit between the challenged regulation and a substantial government objective." *Id.* at 27.

Conclusion

Peterson has shown that the District Court's dismissal of Davis was erroneous. The District Court was obligated to accept as true Peterson's allegation that Davis is responsible for administering the State's reciprocity system. Moreover, Davis himself admitted that he has some connection to the system, which is adequate to overcome 11th Amendment immunity.

The District Court also erred in granting Suthers' Motion for Summary Judgment and denying Peterson's. The District Court applied the

wrong legal standards for both Second Amendment and right to travel cases. All but minor infringements of the right to travel must be examined under strict scrutiny. Suthers failed to carry his burden of showing that Garcia's denial of Peterson's fundamental constitutional right to keep and bear arms was narrowly tailored to advance a compelling state interest.

For the foregoing reasons, the judgment of the District Court must be reversed, with instructions to reinstate Davis as a defendant and to grant Peterson's Motion for Summary Judgment and to deny Suthers'.

Statement on Oral Argument

Peterson requests oral argument. The appeal involves the exercise of important fundamental Constitutional rights, namely, Peterson's ability to bear arms in case of confrontation and Peterson's right to travel to Colorado and Denver and be treated as a welcome guest. To the best of Peterson's knowledge, this is a case of first impression both in this Circuit and in every other Circuit in the country on a post-*Heller* basis.

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ATTORNEY FOR APPELLANT**S**

Certificate of Compliance

I certify that this Brief of Appellants complies with F.R.A.P. 32(a)(7)(B) length limitations, and that this Brief of Appellants contains 7,853 words as determined by the word processing system used to create this Brief of Appellants.

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Certificate of Service

I certify that I served a copy of the foregoing Brief of Appellants via ECF on June 6, 2011 upon:

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I further certify that the ECF-filed version of the foregoing Brief of Appellant is an exact copy of the hard copies that will be mailed to the Clerk.

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Certificate of Redaction and Virus Protection

I certify that I have performed all required redactions for the foregoing Brief of Appellants and that the computer systems used to create the foregoing Brief of Appellants have up-to-date virus protection software.

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Attachments

1. District Court Order on Motion to Dismiss and Cross Motions for Summary Judgment [Doc. 26]

2. District Court Order on Motions for Summary Judgment [Doc. 45]

3. Judgment of the District Court [Doc. 46]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Walker D. Miller

Civil Action No. 10-cv-00059-WDM-MEH

GRAY PETERSON,

Plaintiff,

v.

ALVIN LACABE, in his official capacity as Manager of Safety for the City and County of Denver, and
PETER WEIR, in his official capacity as Executive Director of the Colorado Department of Public Safety,

Defendants.

ORDER ON MOTION TO DISMISS AND CROSS MOTIONS FOR SUMMARY JUDGMENT

Miller, J.

This case is before me on the Motion to Dismiss Executive Director Peter Weir and Colorado Attorney General's Request to Be Heard (ECF No. 6), filed by Defendant Peter Weir and Colorado Attorney General John W. Suthers, as well as Plaintiff's Motion for Summary Judgment against Defendant LaCabe (ECF No. 17) and Defendant LaCabe's Cross Motion for Summary Judgment Against Plaintiff (ECF No. 19). I have reviewed the pertinent portions of the record and the legal authorities and arguments contained in the parties' briefs. For the reasons that follow, Defendant Weir's Motion to Dismiss will be granted and Defendant LaCabe's Cross Motion for Summary Judgment will be denied. I will reserve ruling on Plaintiff's Motion for Summary Judgment against Defendant LaCabe.

Background

Plaintiff alleges that Colorado's state statutes regarding permits to carry concealed handguns, C.R.S. § 18-12-201 *et seq*., are unconstitutional as applied to him. Specifically, Plaintiff alleges that the statute requiring an applicant for a permit to carry a concealed handgun be a resident of the state violates the Privileges and Immunities Clause of the United States Constitution, the Second Amendment of the United States Constitution, and the Fourteenth Amendment of the United States Constitution.

Authority to issue concealed handgun permits is granted to the county sheriffs. C.R.S. § 18-12-203. The statute provides that "except as otherwise provided in this section, a sheriff shall issue a permit to carry a concealed handgun to an applicant who . . . (a) Is a legal resident of the state of Colorado." C.R.S. § 18-12-203 (1). Other application criteria include age; ineligibility factors such as criminal convictions, chronic use of alcohol or controlled substances, or being the subject of a protection order; and evidence of competence with a handgun. *Id*. The statute further provides that the sheriff shall "deny, revoke, or refuse to renew a permit if an applicant or a permittee fails to meet one of the criteria listed . . . ." C.R.S. § 18-12-203 (3).

Pursuant to reciprocity principles, Colorado will recognize certain concealed handgun permits issued by other states. C.R.S. § 18-12-213. Plaintiff is a resident of Washington and has a permit issued by the State of Washington but Washington is not among the states with which Colorado grants reciprocity. Plaintiff also has a permit issued by Florida; however, under the statute, Colorado does not recognize permits issued by a state to a non-resident of that state. C.R.S. § 18-12-213(1)(b)(I).

On or about June 2, 2009, Plaintiff filled out an application in Denver County for a

Colorado concealed handgun permit.[1] Defendant LaCabe is the Manager of Safety for the City and County of Denver and acts as the sheriff of Denver County. On or about July 2, 2009, Defendant LaCabe sent Plaintiff a letter notifying Plaintiff that Plaintiff's application was denied because Plaintiff was not a Colorado resident. Defendant Weir, the Executive Director for the Department of Public Safety of the State of Colorado, apparently had no role in the denial of Plaintiff's application.

Plaintiff's lawsuit, filed pursuant to 42 U.S.C. § 1983, asserts several claims for relief. Plaintiff seeks, *inter alia*, an injunction "prohibiting Defendants from denying nonresidents of Colorado the right to apply for an obtain a [concealed handgun permit], solely on account of their non-resident status." Amended Complaint (ECF No. 4) at ¶ 62. He also seeks an injunction "requiring Defendants to give reciprocity and recognition to [concealed handgun permits] issued by other states to nonresidents of such states . . . ." *Id*. at ¶ 64. Defendant Weir seeks dismissal of the claims against him on Eleventh Amendment immunity grounds and because he has no enforcement power to issue or deny a permit to carry a concealed handgun in the State of Colorado. Accordingly, he argues that he does not have authority to implement the actions sought by Plaintiff through this lawsuit. Defendant LaCabe seeks summary judgment on the grounds that he has no discretion in the granting or denial of a concealed handgun permit and that he is not a proper defendant to defend the statute on behalf of the state.

Attorney General John W. Suthers also seeks the opportunity to be heard regarding the constitutionality of the state statutes pursuant to statute and rule.

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[1]The parties have stipulated to the facts concerning Plaintiff's application for a permit and the denial of that application.

Discussion

1. Immunity of Defendant Weir

In general, the Eleventh Amendment immunity is available to agencies deemed to be arms of the state. *Griess v. State of Colo.,* 841 F.2d 1042, 1044 (10th Cir. 1988) (concluding that Eleventh Amendment immunity was not waived for State of Colorado or CDOC). However, immunity does not apply to the extent that a plaintiff seeks prospective declaratory or injunctive relief pursuant to *Ex Parte Young,* 209 U.S. 123 (1908). *See Hill v. Kemp*, 478 F.3d 1236, 1255-56 (10th Cir. 2007) (under *Ex Parte Young*, "the Eleventh Amendment generally will not operate to bar suits so long as they (i) seek only declaratory and injunctive relief rather than monetary damages for alleged violations of federal law, and (ii) are aimed against state officers acting in their official capacities, rather than against the State itself."); *Roe No. 2 v. Ogden*, 253 F.3d 1225, 1233 (10th Cir. 2001). Nonetheless, there must be some connection between the defendant's enforcement power and the law at issue. *Ex parte Young*, 209 U.S. at 157; *Weston v. Cassata*, 37 P.3d 469, 474 (Colo. App. 2001) ("[I]n actions for declaratory or injunctive relief . . . [state] government entities and their officers are properly considered 'persons' under § 1983 so long as they are responsible for the implementation and enforcement of a state statute.").

Although Plaintiff has alleged that Weir is "primarily responsible for administering the recognition and reciprocity of [concealed handgun licenses] issued by other states" (Amended Complaint ¶ 54), I 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. *See United States v. Coffman,* 638 F.2d 192, 194 (10th Cir.1980) (court may take judicial notice of state statutes). The enabling legislation makes clear that the General

Assembly placed the authority for implementing and administering the state's concealed handgun law solely with local sheriffs, not with Defendant Weir. C.R.S. § 18-12-201(3) ("the general assembly hereby instructs each sheriff to implement and administer" the statutory provisions concerning concealed handgun permits). Plaintiff cites no provision of law showing that Weir has any authority or ability to provide the relief sought by Plaintiff and I find none. Accordingly, Defendant Weir's motion should be granted.

Dismissal of Defendant Weir is without prejudice to substituting or naming an alternative defendant to represent the State of Colorado, if appropriate.

2. Opportunity for Attorney General to be Heard

The Attorney General of the State of Colorado seeks an opportunity to be heard on the constitutionality of the statute. I interpret this as a request to intervene to present evidence and argument on the question of the constitutionality of the Colorado statute pursuant to 28 U.S.C. § 2403(b) and Fed. R. Civ. P. 5.1(c). The statute permits the state to intervene while the rule permits the attorney general in his or her own name to intervene on behalf of the state. Given that authority, the Colorado Attorney General has the unconditional right to intervene pursuant to Rule 24(a)(1). Accordingly, the Attorney General shall be permitted to intervene on behalf of the State of Colorado in his own name and to respond to Plaintiff's motion for summary judgment.

3. Plaintiff's Motion for Summary Judgment

I will reserve ruling on this motion until briefing is complete. Within 30 days of the date of this order, the Attorney General shall file a response to Plaintiff's Motion for Summary Judgment; Plaintiff may thereafter file a reply brief in accordance with the local rules of this court.

4. Defendant LaCabe

In Plaintiff's Motion for Summary Judgment, he asserts that Defendant LaCabe's denial of the permit violated Plaintiff's constitutional right to travel, violated Plaintiff's rights under the Privileges and Immunities clause of the United States Constitution, and violated Plaintiff's rights under the Second Amendment. Plaintiff presents various legal arguments regarding the residency requirement and his constitutional challenges to it. As relief, he requests that Defendant LaCabe "should be ordered to disregard Plaintiff's residency status and process Plaintiff's [concealed handgun permit] accordingly." Pl.'s Mot. for Summ. J., ECF No. 17, at 14.

In response, Defendant LaCabe does not address Plaintiff's constitutional arguments on the merits but rather asserts that LaCabe is not a proper defendant and/or was acting only in a ministerial capacity without the ability to exercise discretion in denying the application. He argues that Plaintiff's constitutional arguments are directed at the state, but that LaCabe is not a representative of the state. LaCabe contends that Plaintiff's arguments amount to a facial challenge to the statute, not an as-applied challenge, and that Plaintiff must seek a declaration that the statute is unconstitutional. Therefore, LaCabe notes that Plaintiff cannot receive the relief requested, *i.e.*, a mandatory injunction ordering LaCabe to process Plaintiff's handgun permit application, absent such a declaration.

I am not entirely persuaded by LaCabe's contention that he is not a proper defendant in this action. I note that a basic element of standing for Article III purposes is an injury "fairly traceable to the challenged action of the defendant" and a likelihood that the injury will be redressed by a favorable decision. *Bronson v. Swensen*, 500 F.3d 1099, 1106 (10th Cir. 2007). Here, it is undisputed that LaCabe is the responsible official in

enforcing the statutory scheme in Denver. Moreover, LaCabe's action in denying Plaintiff's application is the cause of Plaintiff's alleged injury (inability to obtain a concealed handgun permit) and a favorable decision will redress the injury. Therefore, for the purposes of Article III standing, it appears that LaCabe is an appropriate defendant.

Moreover, that LaCabe could not exercise discretion does not necessarily bar an action against him. *See, e.g., Finberg v. Sullivan,* 634 F.2d 50, 54 (3d Cir. 1980) (examining whether, under *Ex Parte Young*, local officials enforcing statutory scheme were proper defendants and concluding that the fact that their duties were entirely ministerial was not a defense to liability; "Under *Ex Parte Young* the inquiry is not the nature of an official's duties but into the effect of the official's performance of his duties on the plaintiff's rights"). The court in *Finberg* similarly rejected any notion that the defendants did not have a sufficient interest in the constitutionality of the rules to be adverse to the plaintiff, similar to what LaCabe argues here. *Id*. ("Once the [local officials] have relied on the authority conferred by the [state] procedures to work an injury to the plaintiff, they may not disclaim interest in the constitutionality of these procedures."). Accordingly, I disagree that the motion for summary judgment should be denied on this basis.

LaCabe has provided no legal authority to show why he cannot address the constitutional arguments presented by Plaintiff regarding the statute. Nonetheless, given that the Attorney General is now a party and will presumably respond to these issues, I will also reserve ruling on Defendant LaCabe's liability.

Defendant LaCabe's Cross Motion for Summary Judgment is based on the same

arguments as his response brief and, for the reasons set forth above, will be denied.

Accordingly, it is ordered:

1. The Motion to Dismiss Executive Director Peter Weir and Colorado Attorney General's Request to Be Heard (ECF No. 6) is granted .
2. All claims against Defendant Peter Weir shall be dismissed.
3. John W. Suthers, Attorney General for the State of Colorado, is a party to this action as an intervenor.
4. The Attorney General may file a response to Plaintiff's Motion for Summary Judgment against Defendant LaCabe (ECF No. 17) within 30 days of the date of this order and Plaintiff may file a reply brief in accordance with D.C.COLO.LCivR 56.1.A..
5. Defendant LaCabe's Cross Motion for Summary Judgment Against Plaintiff (ECF No. 19) is denied.

DATED at Denver, Colorado, on October 20, 2010.

BY THE COURT:

s/ Walker D. Miller
United States Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Walker D. Miller

Civil Action No. 10-cv-00059-WDM-MEH

GRAY PETERSON,

Plaintiff,

v.

ALVIN LACABE, in his official capacity as Manager of Safety for the City and County of Denver,

Defendant,

JOHN W. SUTHERS, Attorney General for the State of Colorado,

Intervenor.

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Miller, J.

This case is before me on Plaintiff's Motion for Summary Judgment against Defendant LaCabe (ECF No. 17) and Intervenor Attorney General's Cross-Motion for Summary Judgment (ECF No. 34).[1] I have reviewed the pertinent portions of the record and the legal authorities and arguments contained in the parties' briefs. For the reasons that follow, Plaintiff's Motion for Summary Judgment will be denied and the Attorney

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[1]The briefing in this case is in a somewhat unusual posture. Plaintiff's motion was filed before the Attorney General intervened as a party. I resolved the motion in part by denying LaCabe's procedural defenses, see October 20, 2010 Order (ECF No. 26), and in the same order permitted the Attorney General to intervene. Because Defendant LaCabe did not respond to the merits of Plaintiff's motion for summary judgment, I reserved ruling on the substantive issues presented. The Attorney General thereafter assumed the defense of Defendant LaCabe by addressing Plaintiff's challenges on the merits in a response brief. The Attorney General also filed his own motion for summary judgment.

General's Cross-Motion for Summary Judgment will be granted. I conclude that the statute at issue does not violate Plaintiff's constitutional rights.

Background

Plaintiff alleges that Colorado's state statutes regarding permits to carry concealed handguns, C.R.S. § 18-12-201 *et seq*., are unconstitutional as applied to him. Specifically, Plaintiff alleges that the statute requiring an applicant for a permit to carry a concealed handgun be a resident of the state violates the Privileges and Immunities Clause of the United States Constitution, the Second Amendment of the United States Constitution, and the Fourteenth Amendment of the United States Constitution.

In general, it is unlawful to carry a concealed firearm in the State of Colorado without a license. C.R.S. § 18-12-105. The law contains several exceptions, most relevant here are for "[a] person in his or her own dwelling or place of business or on property owned or under his or her control at the time of the act of carrying" and for "[a] person in a private automobile or other private means of conveyance who carries a weapon for lawful protection of such person's or another's person or property while traveling." C.R.S. § 18-12-105(2)(a) & (b).

Authority to issue concealed handgun permits is granted to the county sheriffs. C.R.S. § 18-12-203. The statute provides that "except as otherwise provided in this section, a sheriff shall issue a permit to carry a concealed handgun to an applicant who . . . (a) Is a legal resident of the state of Colorado." C.R.S. § 18-12-203 (1). Other application criteria include age and evidence of competence with a handgun; in addition, the applicant must not be disqualified by any ineligibility factors such as criminal convictions, chronic use of alcohol or controlled substances, or being the subject of a

protection order. *Id*. The statute further provides that the sheriff shall "deny, revoke, or refuse to renew a permit if an applicant or a permittee fails to meet one of the criteria listed . . . ." C.R.S. § 18-12-203 (3).

The Attorney General presents evidence concerning the methods used to verify an applicant's eligibility for a permit. Michael Ostrander, a detective from the Sheriff's Office of Denver County, Colorado, works as a concealed handgun permit background investigator and provides an affidavit regarding his background checks. Exh. A to Intervenor's Resp., ECF No. 33-1. He states that applicants must submit to a face-to-face interview, present a Colorado driver's license or identification card, evidence of citizenship, proof of training, and, if the applicant has served in the military, copy of the relevant DD214 form. *Id*. ¶ 4. Fingerprints are collected, which are forwarded to the Colorado Bureau of Investigation ("CBI"). *Id*. at ¶ 5. The CBI processes the fingerprints and runs the identity of the applicant through national and other databases. *Id*. Detective Ostrander states, however, that nationwide databases are often incomplete and inaccurate and so he supplements the CBI background check by requesting information from law enforcement agencies in jurisdictions where an applicant reports previous residence. *Id*. at ¶¶ 6-7. He emphasizes that much of the pertinent information from the local sources, including misdemeanor crimes or official contacts resulting from drug and alcohol abuse, is not available in national databases. *Id*. at ¶ 8. Local databases also contain information about mental health contacts, aggressive driving tendencies, 911 calls indicative of domestic violence or other violent contacts not resulting in arrest, juvenile arrest records, and plea agreements, any of which could disqualify an applicant for a permit. *Id*. at ¶ 9. He asserts that he does not have access to these local databases in jurisdictions outside of the state

and local agencies are not always cooperative in providing assistance. *Id*. at ¶ 11. He provides specific examples of difficulties he has had obtaining information regarding residents who previously lived in other states from those local authorities. *Id*. Detective Ostrander also explains that out-of-state jurisdictions sometimes charge for providing background information, but funds available for processing applications are limited, only $100 per application. *Id*. at ¶ 12. He also explains that the statute requires a background check to be completed within 90 days but out-of-state jurisdictions are slow in responding to information requests. *Id*. at ¶ 14.

The Attorney General also provides an affidavit from James Spoden, who is an InstaCheck Data Supervisor at the CBI. Exh. B to Intervenor's Resp., ECF No. 33-2. Mr. Spoden explains that the CBI's background check involves access to five state and national databases, including the FBI's National Instant Criminal Background Check System ("NICS"), the Integrated Colorado Online Network ("ICON"), National Crime Information Center ("NCIC"), the Colorado Crime Information Center ("CCIC"), and the Interstate Identification Index ("III"). *Id*. at ¶ 8. He asserts that many important records relevant to the background check are maintained only at the state level and are available only to state and local authorities. *Id*. at ¶ 9. While he has access to the databases for Colorado, he does not have the ability or authorization to access the criminal justice or judicial databases of other states. *Id*. at ¶ 10. Therefore, he would not be able to obtain certain information about a non-resident whose history might disqualify him or her from obtaining a handgun permit. *Id*. at ¶ 11. He notes also that in Colorado, fingerprints of concealed permit holders are flagged in the CCIC, which permits the issuing agency to be immediately notified of an arrest of a permittee. *Id*. at ¶ 12. This assists in ensuring the ongoing eligibility of permit

holders; however, the state would not have that same ability to monitor non-state residents for law enforcement contacts outside of Colorado, where they would be more likely to occur. *Id*. at ¶ 12.

Pursuant to reciprocity principles, Colorado will recognize certain concealed handgun permits issued by other states. C.R.S. § 18-12-213. Plaintiff is a resident of Washington and has a permit issued by the State of Washington but Washington is not among the states with which Colorado grants reciprocity. Plaintiff also has a permit issued by Florida; however, under the statute, Colorado does not recognize permits issued by a state to a non-resident of that state. C.R.S. § 18-12-213(1)(b)(I).

In addition, the City and County of Denver has a municipal ordinance that generally prohibits open carry of a firearm or other weapon. Denver Code § 38-117(b). Denver requires a permit for carrying a concealed weapon, consistent with the state statute. Denver Code § 38-117(a) and (f). The prohibition on concealed or open carry, however, does not apply if the person "is carrying the weapon concealed within a private automobile or other private means of conveyance, for hunting or for lawful protection of such person's or another person's person or property, while travelling [sic]." Denver Code § 38-117(f)(2). It is also an affirmative defense if the weapon is carried by a person "in his or her own dwelling, or place of business, or on property owned or under such person's control at the time of carrying such weapon." Denver Code § 38-118(a). Plaintiff does not challenge the municipal regulations but argues that the combined effect of the state and city laws means that he is unable to carry any handgun anywhere within the city limits of Denver, whether open or concealed, because he has no private vehicle or dwelling.

On or about June 2, 2009, Plaintiff filled out an application in Denver County for a

Colorado concealed handgun permit.[2] Defendant LaCabe is the Manager of Safety for the City and County of Denver and acts as the sheriff of Denver County. On or about July 2, 2009, Defendant LaCabe sent Plaintiff a letter notifying Plaintiff that Plaintiff's application was denied because Plaintiff was not a Colorado resident.

Plaintiff's lawsuit, filed pursuant to 42 U.S.C. § 1983, asserts several claims for relief. Plaintiff seeks, *inter alia*, an injunction "prohibiting Defendants from denying nonresidents of Colorado the right to apply for an obtain a [concealed handgun permit], solely on account of their non-resident status." Amended Complaint (ECF No. 4) at ¶ 62. He also seeks an injunction "requiring Defendants to give reciprocity and recognition to [concealed handgun permits] issued by other states to nonresidents of such states . . . ." *Id*. at ¶ 64. However, there is no proper defendant[3] with authority to modify the state's rules regarding reciprocity and Plaintiff does not address any arguments to this aspect of the regulations. Therefore, I conclude that Plaintiff has abandoned his challenge to Colorado's permit regime to the extent it concerns reciprocity issues.

Standard of Review

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. A factual issue is genuine if "the evidence is such that a reasonable jury could return a verdict

[2]The parties have stipulated to the facts concerning Plaintiff's application for a permit and the denial of that application.

[3]The only state defendant named in Plaintiff's pleadings was Peter Weir, who was dismissed on Eleventh Amendment immunity grounds and because he had no authority to implement or modify the state's reciprocity regime. See October 20, 2010 Order, ECF No. 26. Plaintiff has not sought to name an alternative defendant.

for the nonmoving party." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

Where "the moving party does not bear the ultimate burden of persuasion at trial, it may satisfy its burden at the summary judgment stage by identifying 'a lack of evidence for the nonmovant on an essential element of the nonmovant's claim.'" *Bausman v. Interstate Brands Corp.*, 252 F.3d 1111, 1115 (10th Cir. 2001) (quoting *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998)). Then, "[t]o avoid summary judgment, the nonmovant must establish, at a minimum, an inference of the presence of each element essential to the case." *Id*.

Plaintiff's arguments indicate that he is challenging the concealed handgun licensing regulations as applied to him. In particular, he challenges the law as it applies to him when he is visiting Denver, because of the municipality's prohibition on open carry. Nonetheless, because of the broad relief he seeks, at least part of his arguments appear to be premised on the principle that the statute is unconstitutional on its face in all applications. "Facial challenges are disfavored[,]" *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450, (2008), and generally fail if any "set of circumstances exists under which the [law] would be valid," *id*. at 449. In other words, to succeed on a facial challenge, Plaintiff must show that the law is unconstitutional in all of its applications. *United States v. Salerno,* 481 U.S. 739, 745 (1987).

Discussion

Plaintiff broadly challenges the residency requirement for a concealed handgun license on three constitutional grounds: (1) the Privileges and Immunities Clause; (2) the Second Amendment; and (3) the Equal Protection Clause. I will address the arguments and applicable law for each in turn.

1. Privileges and Immunities/Right to Travel

Defendant argues that the ban on issuing concealed weapons licenses to non-residents means that he "is prohibited from engaging in an activity that residents of Colorado (and many other states) are permitted to do." Pl.'s Mot. for Summ. J., ECF No. 17, at 5. He argues that he is therefore "penalized when he travels to Denver (and all of Colorado)," which violates his constitutional right to travel. *Id*. at 6.[4] Plaintiff further contends that a fundamental right is abridged by this regulation and so it must be examined under a strict scrutiny standard of review. I disagree.

Although not expressly provided for in the United States Constitution, the right to travel from one state to another is considered to be "a virtually unconditional personal right, guaranteed by the Constitution." *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969) (Stewart, J., concurring)). In *Saenz*, the U.S. Supreme Court summarized the three components of the "right to travel" as developed in Supreme Court jurisprudence: (1) "the right of a citizen of one State to enter and to leave another State;" (2) "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State;" and (3) "for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." 526 U.S. at 500. Plaintiff does not assert that he is prevented from entering or leaving Colorado or that he wishes to relocate, and so only the second component of the right to travel is at issue here, *i.*e., the right to be treated as a "welcome visitor" when in the state.

[4]Plaintiff makes a separate argument that his rights under the Privileges and Immunities Clause are violated as well; however, as discussed below, the right to travel at issue here is derived from the Privileges and Immunities Clause and so only one analysis is required.

Saenz makes clear that this right is protected by the Privileges and Immunities Clause, Art. IV § 2, which provides that "The Citizens of Each State shall be entitled to all Privileges and Immunities of Citizens in the several States." 526 U.S. at 501. "Thus, by virtue of a person's state citizenship, a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the 'Privileges and Immunities of Citizens in the several States' that he visits." *Id.* Although these protections are not absolute, the Clause generally bars discrimination against non-residents of the states "where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." *Id*. at 502 (quoting *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)).

In order to prevail, Plaintiff must first establish that the "privilege" at issue falls within the scope of the Privileges and Immunities Clause. In general, the Clause applies only to rights that "bear upon the vitality of the Nation as a single entity" and are "sufficiently basic to the livelihood of the Nation." *Supreme Court v. Friedman*, 487 U.S. 59, 64 (1988). If the right is protected, the regulation may nonetheless be constitutional if the state can show "substantial reason" for the discrimination against non-citizens, *i.e*., "something to indicate that non-citizens constitute a peculiar source of evil at which the statute is aimed." *Hicklin v. Orbeck*, 437 U.S. 518, 526 (1978) (quoting *Toomer*, 334 U.S. at 398). Although the existence of a less restrictive means may be considered, *see Friedman*, 487 U.S. at 67, in general the evaluation must "be conducted with due regard for the principle that States should have considerable leeway in analyzing local evils and prescribing appropriate cures." *Toomer*, 334 U.S. at 396. The state must also demonstrate a reasonable "fit" between the regulation and the evil to be avoided, in other words, "the degree of

discrimination exacted must be substantially related to the threatened danger." *Bach v. Pataki*, 408 F.3d 75, 92 (2d Cir. 2005) (citation omitted), *cert. denied*, 546 U.S. 1174 (2006).

Plaintiff asserts that his right to carry a concealed weapon, or, when in Denver, to carry a handgun outside of a dwelling or automobile, is a fundamental right and therefore within the scope of the Privileges and Immunities Clause. His legal authority on this issue, however, addresses only Second Amendment issues generally and does not demonstrate how concealed or open carry implicates "the vitality of the Nation as a single entity." As discussed further below, while the Supreme Court has recently made clear that the Second Amendment strongly protects an individual's right to have a firearm in the home for the purpose of self-defense, the right may nonetheless be restricted to certain persons and is entitled to less protection outside the home. *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008). Nevertheless, I need not resolve this issue because I conclude that, even if the Privileges and Immunities Clause extends to the conduct that Plaintiff wishes to engage in, Colorado has demonstrated a substantial reason for restricting concealed handgun permits to state residents and a substantial relationship between the restriction and the interest it seeks to promote.

The Attorney General argues that the state has a public safety interest in regulating firearms and that it has a greater ability to monitor residents for compliance with the requirements of the concealed handgun licensing scheme than non-residents. There are numerous factors that disqualify an applicant for a concealed weapons permit, or that would require revocation of a license previously issued, including criminal convictions, chronic use of alcohol or controlled substances, or being the subject of a protection order. In addition,

a license may be denied if there is "a reasonable belief that documented previous behavior by the applicant makes it likely that the applicant will present a danger to self or others if the applicant receives a permit to carry a concealed handgun." C.R.S. § 18-12-203(2). The Attorney General has presented competent and uncontradicted evidence in the form of affidavits showing the superior availability of information regarding these matters for residents as opposed to non-residents. This evidence establishes that from the initial background check of an applicant through ongoing monitoring needed to determine whether revocation is appropriate, 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. Information 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. Colorado has a substantial interest in restricting permits to those persons whose information is more readily available; moreover, the restriction is tailored to that need.

I note that other courts that have considered the issue have concluded that the state's interest in monitoring eligibility is a substantial reason for restricting weapon permits to residents. *Bach*, 408 F.3d at 92-93 (noting that state has an interest in the entirety of a licensee's relevant behavior and the state can only monitor activities that take place in the state; other states cannot adequately play the part of monitor or provide the issuing state with the stream of behavioral information needed to ensure that eligibility criteria are met); *Peruta v. County of San Diego*, __ F. Supp. 2d __, 2010 WL 5137137 (S.D. Calif. 2010) (adopting analysis in *Bach* to hold that residency requirement for concealed weapon permit does not violate Privileges and Immunities Clause).

In response, Plaintiff argues that the restriction is less than perfect because the availability of information for a person who moves to Colorado and shortly thereafter applies for a concealed weapons permit is no greater than for an out-of-state resident. This argument is only relevant to the initial background check and not to the state's interest in ongoing monitoring of the permittee for continued eligibility. Again, that interest is a substantial one and is not implicated by Plaintiff's hypothetical situation. Moreover, in general, where the law requires a fit between the means chosen and ends to be achieved by a regulation, that fit only needs to be reasonable, not perfect. *See, e.g., Bd. of Trs. of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989) (in First Amendment context, requirement of narrow tailoring means "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served."); *Peruta* at *8. Plaintiff also argues that the state's interest in monitoring is not genuine because it grants reciprocity to a number of other states, permitting concealed weapons license holders of those states to carry concealed in Colorado. However, this does not demonstrate that the regulation is not substantially related to the state interest to be promoted. Colorado may reasonably rely on other states to confirm and monitor the eligibility of their own concealed weapons permit holders, while still restricting issuance of its own permits to state residents.

I agree that Colorado's interest in obtaining information about licensees is a substantial reason for restricting the issuance of concealed handgun permits to residents of the state and that there is a reasonable relationship between the interest sought to be promoted and the regulations created. Therefore, the residency requirement does not violate Plaintiff's right to travel as guaranteed by the Privileges and Immunities Clause.

2. Second Amendment

Plaintiff next argues that his inability to obtain a concealed weapon permit infringes on his Second Amendment[5] right to keep and bear arms. He argues that the Supreme Court's recent decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), which held that the Second Amendment confers an individual right, establishes that he has a fundamental right to carry a concealed weapon and that, therefore, the law must be subjected to strict scrutiny. Again, I disagree.

In *Heller*, the Supreme Court examined the history of the Second Amendment and contemporaneous jurisprudence to determine whether the Amendment was violated by several District of Columbia statutes which generally prohibited the possession of handguns and required any other lawful firearms in the home to be kept inoperable (unloaded and disassembled or bound by a trigger lock). The Court concluded that the Second Amendment confers an individual right to "to possess and carry weapons in case of confrontation." 554 U.S. at 592. It found that the District's prohibition on operable handguns in the home was unconstitutional because the inherent right to self-defense is central to the Second Amendment and the regulation extends to the home, "where the need for defense of self, family, and property is most acute." *Id*. at 628. However, the Court held that the right was not unlimited, noting that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were

[5]The Second Amendment provides that "A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." The Supreme Court recently held that the Second Amendment is fully applicable to the states by virtue of the Fourteenth Amendment. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

lawful under the Second Amendment or state analogues." *Id*. at 626. The Court goes on to state that its opinion should not cast doubt on "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places . . . or laws imposing conditions and qualifications on the commercial sale of arms." *Id*. at 626-27. In general, the Court appears to suggest that the core purpose of the right conferred by the Second Amendment was to allow "law-abiding, responsible citizens to use arms in defense of hearth and home." *Id*. at 635.

Because the *Heller* decision is fairly recent, few Circuit Courts of Appeals have had the opportunity to opine on how to implement its principles. The Tenth Circuit is one of them, however, and it adopts an approach outlined by the Third Circuit in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010). *United States v. Reese*, 627 F.3d 792, 800 (10th Cir. 2010). This is a two-pronged approach, whereby the reviewing court examines: (1) whether the law imposes a burden falling within the scope of the Second Amendment's guarantee; and (2) if it does, whether the law passes muster under "some form of means-end scrutiny." *Reese*, 627 F.3d at 800-1 (quoting *Marzzarella*, 614 F.3d at 89). Although the *Heller* Court did not specify what level of scrutiny should be applied to a challenged law, other than indicating that rational basis would generally be inappropriate, several courts have applied intermediate scrutiny to federal firearm laws. *See Reese*, 627 F.3d at 801-2 (discussing *Marzzarella* and *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (*en banc*)).

The *Mazzarella* court examined a Second Amendment challenge to a federal law prohibiting the possession of firearms with obliterated serial numbers. Analogizing to the First Amendment, the Third Circuit in *Marzzarella* concluded that the Second Amendment

can trigger more than one type of scrutiny, depending on the type of restriction. 614 F.3d at 96-97. The court decided intermediate scrutiny was appropriate because the law did not "severely limit the possession of firearms." *Id*. at 97. The Seventh Circuit in *Skoien* similarly applied intermediate scrutiny to a federal statute prohibiting the possession of firearms by any person convicted of a misdemeanor crime of domestic violence. 614 F.3d at 641. The intermediate scrutiny test applied by both courts generally requires an analysis of whether the challenged law serves a substantial state interest and whether there is a reasonable fit between the objective and the law. *Marzzarella*, 614 F.3d at 98.

The Tenth Circuit in *Reese* used a similar approach in examining a federal law which prohibits possession of a firearm by a person subject to a domestic protection order. 627 F.3d at 802. Although the regulation addresses a right protected by the Second Amendment, in that it creates a complete prohibition on possession of a firearm, the Tenth Circuit concluded that the statute applies to a narrow class of persons "who, based on their past behavior, are more likely to engage in domestic violence" and was therefore subject to intermediate scrutiny. *Id*. Applying this standard, the court found that the government had a substantial interest in keeping firearms out of the hands of people who have been found to pose a credible threat to the physical safety of a family member and that there was a reasonable relationship to that objective in the defendant's case. *Id*. at 803-4.

I will assume 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 purpose of self-defense. However, I disagree that the statute should be reviewed under strict scrutiny and conclude, like the cases discussed above, that intermediate scrutiny is appropriate. I agree with the Attorney General and the authorities discussed above that

Heller indicates that the Second Amendment extends the strongest protection to the right of self-defense in the home. The statute at issue does not infringe on that right, even for Plaintiff, as he is permitted to have a firearm in any dwelling area under his control while in the state. C.R.S. § 18-12-105(2)(a). Moreover, the statute burdens only a narrow class of persons, *i.e.*, otherwise qualified out-of-state residents who wish to obtain a license to carry a concealed weapon in Colorado. Moreover, as noted above, the statute is even less restrictive that the federal statutes discussed in *Reese* and *Skoien*, as it does not completely prevent this class of persons from possessing firearms while in the state. Rather, non-residents may carry openly outside of Denver and in Denver may have firearms in their private vehicles while traveling and in private dwelling areas. Therefore, it does not severely limit the possession of firearms but rather regulates "the manner in which persons may lawfully exercise their Second Amendment rights." *Marzzarella*, 614 F.3d at 97; *see also Peruta*, 2010 WL 5137137 at *8 (applying intermediate scrutiny to concealed weapons permit regulation, and holding that licensing requirements did not violate Second Amendment because of state's substantial interest in public safety and reducing the rate of gun use in crime).

The intermediate scrutiny test articulated by the Tenth Circuit and other courts is nearly identical to that employed in examining discrimination against non-residents under the Privileges and Immunities Clause, *i.e.*, there must be a substantial interest at stake and a good fit between the regulation and the asserted objective. Therefore, for the reasons discussed above, I conclude that the state's interest in monitoring a potential licensee's eligibility for a concealed handgun permit, and the increased difficulty of doing so for out-of-state residents, also overcomes Plaintiff's Second Amendment challenge.

3. Equal Protection

The Attorney General moves for summary judgment on Plaintiff's Equal Protection challenge to the statute on the grounds that a non-resident is not similarly situated to a resident of the state. Moreover, the Attorney General argues, even if Plaintiff could show that he was similarly situated, the statute nonetheless survives because there is a rational basis for the different treatment of out-of-state residents. I agree.

The Equal Protection Clause provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Clause "does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

As discussed above, I conclude that residents and non-residents are not similarly situated in terms of the state's ability to obtain information about and monitor the potential licensee's eligibility for a concealed weapons permit. Because states "must treat like cases alike but may treat unlike cases accordingly," *Vacco v. Quill*, 521 U.S. 793, 799 (1997), and this involves unlike cases, Colorado's different treatment of non-residents does not violate the Equal Protection Clause. *See Peruta,* 2010 WL 5137137 at *10 (finding residents and non-residents to be situated differently for the purposes of concealed weapons permit in light of state's substantial interest in monitoring gun licensees).

This disposes of all of Plaintiff's constitutional challenges to Colorado's requirement that only residents of the state are eligible to apply for concealed handgun permits.

Accordingly, it is ordered:

1. Plaintiff's Motion for Summary Judgment against Defendant LaCabe (ECF

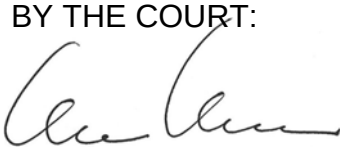
No. 17) is denied.

2. Intervenor Attorney General's Cross-Motion for Summary Judgment (ECF No. 34) is granted. The claims against all parties are dismissed with prejudice. Judgment shall be entered in favor of Defendants and Intervenor and against Plaintiff on all of his claims.

3. Defendants LaCabe and Intervenor Attorney General may have their costs.

DATED at Denver, Colorado, on March 8, 2011.

BY THE COURT:



s/ Walker D. Miller
United States Senior District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Civil Action No. 10-cv-00059-WDM-MEH

GRAY PETERSON,

Plaintiff,

v.

ALVIN LACABE, in his official capacity as Manager of Safety for the City and County of Denver,

Defendant,

JOHN W. SUTHERS, Attorney General for the State of Colorado,

Intervenor.

FINAL JUDGMENT

Pursuant to and in accordance with the Order On Motion To Dismiss And Cross Motions For Summary Judgment (Doc. No. 26), signed by Senior District Judge Walker D. Miller on October 20, 2010, incorporated herein by reference, it is

ORDERED that the Motion To Dismiss Executive Director Peter Weir and Colorado Attorney General's Request to be Heard (Doc. No. 6) is GRANTED. It is

FURTHER ORDERED that all claims against Defendant Peter Weir shall be DISMISSED. It is

FURTHER ORDERED that John W. Suthers, Attorney General for the State of Colorado, is a party to this action as an Intervenor.

Pursuant to and in accordance with the Order On Cross Motions For Summary Judgment (Doc. No. 45) signed by Senior District Judge Walker D. Miller on March 8, 2011, incorporated herein by reference, it is

ORDERED that Plaintiff's Motion For Summary Judgment against Defendant LaCabe (Doc. No. 17) is DENIED. It is

FURTHER ORDERED Intervenor Attorney General's Cross-Motion For Summary Judgment (Doc. No. 34) is GRANTED. It is

FURTHER ORDERED that judgment shall be entered in favor of the Defendant, Alvin LaCabe, and Intervenor, John W. Suthers, Attorney General, and against the Plaintiff, Gray Peterson. It is

FURTHER ORDERED that all claims against the parties are DISMISSED WITH PREJUDICE. It is

FURTHER ORDERED that the Defendant and Intervenor may have their costs.

DATED at Denver, Colorado this 15th day of March, 2011.

FOR THE COURT:

GREGORY C. LANGHAM, CLERK

s/ Edward P. Butler
Edward P. Butler, Deputy Clerk