UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DAVID D. BACH,

Plaintiff,

-against-

02-CV-1500
(NAM/DRH)

GEORGE E. PATAKI, in his official capacity as Governor of New York; ELIOT SPITZER, in his official capacity as Attorney General of New York; JAMES W. McMAHON, in his official capacity as Superintendent, New York State Police; J. RICHARD BOCKELMANN, in his official capacity as Ulster County Sheriff,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF STATE DEFENDANTS' CROSS-MOTION TO DISMISS THE COMPLAINT AND IN OPPOSITION TO PLAINTIFF'S MOTIONS FOR A PRELIMINARY INJUNCTION AND TO CONSOLIDATE THE TRIAL ON THE MERITS WITH A HEARING ON THE APPLICATION FOR A PRELIMINARY INJUNCTION

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Preliminary Statement

Plaintiff pro se commenced this action challenging New York's statutory mechanism by which individuals apply for permits to carry or possess concealed firearms.[1] He contends that New York's system, which limits the ability of persons without significant contacts to New York to carry or possess a firearm in New York, is unconstitutional and seeks injunctive and declaratory relief. Specifically, he alleges violations of the Second Amendment right to bear arms and the Privileges and Immunities Clauses found in the Fourteenth Amendment and Article IV of the United States Constitution, as well as the denial of equal protection and substantive due process. Simply stated, plaintiff contends that the New York statute unlawfully discriminates against individuals who are not residents of the State of New York.

Defendants George Pataki, Eliot Spitzer and James McMahon[2] move to dismiss the complaint on the following grounds:

1) plaintiff lacks standing to maintain this action;

2) Spitzer and McMahon are not proper parties;

3) plaintiff's Second Amendment claim should be dismissed because that amendment does not bind the actions of the state and does not protect the individual right to bear arms asserted by plaintiff;

4) the challenged statute does not run afoul of the Privileges and Immunities Clause of

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1 Plaintiff has not served any document denominated as a complaint. Instead, with the summons, plaintiff served, inter alia, "Plaintiff's Application for Preliminary and Permanent Injunction, and Declaratory Relief." This document sets forth the factual background underlying his claim and plaintiff's causes of action and it is to this document which defendants herein respond. For ease of reference, citations to this document will be made by reference to "Pl.'s Appl."

2 Plaintiff also names the Sheriff of Ulster County as a defendant, but the Sheriff is not represented by the Attorney General's Office and is not a party to this motion. Defendants Pataki, Spitzer and McMahon are collectively referred to herein as the "state defendants."

Article IV;

5) the Fourteenth Amendment Privileges and Immunities Clause is not implicated on these facts;

6) Penal Law § 400.00(3) is rationally related to legitimate state interests and thus does not deprive plaintiff of equal protection; and

7) the facts as alleged do not state a claim for a violation of substantive due process.

Already pending are motions by plaintiff for a preliminary injunction enjoining defendants from enforcing the challenged provisions of New York's Penal Law and a motion to consolidate the trial on the merits of this matter with a hearing on the preliminary injunction. Because the state defendants submit that plaintiff's claims cannot, as a matter of law, state a claim for relief, the complaint should be dismissed and the motions for preliminary injunctive relief and consolidation denied.

Statutory Framework

New York Penal Law section 400.00 provides the statutory framework under which individuals may apply for permits to carry and possess firearms[3] in New York. Holding a permit issued under section 400.00 exempts an individual, in most circumstances, from prosecution under New York's criminal statutes proscribing unlawful possession of a weapon. N.Y. Penal Law § 265.20(3). Other exemptions from prosecution, not at issue here, are also provided for in section 265.20. Subdivision three of section 400.00 provides, in relevant part:

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[3] This case, of course, concerns only plaintiff's ability to carry a concealed pistol or revolver. See N.Y. Penal Law § 400.00(3)(a) (application process for pistol or revolver permit). Though they may not be plaintiff's weapons of choice, on these facts it appears that nothing prohibits plaintiff from carrying a rifle or shotgun while traveling in New York. See N.Y. Penal Law, Practice Commentary to Article 263, McKinney's p. 95 ("the Penal Law does not make it a crime per se for a citizen to possess a rifle or shotgun").

> (a) Applications shall be made or renewed, in the case of a license to carry or possess a pistol or revolver, to the licensing officer in the city or county, as the case may be, where the applicant resides, is principally employed or has his principal place of business as merchant or storekeeper; and in the case of a license as gunsmith or dealer in firearms, to the licensing officer where such place of business is located.

A variety of persons with significant contacts with the State, therefore, are statutorily eligible to apply for a permit, namely New York residents and non-residents who have their principal place of employment or principal place of business as a merchant or storekeeper in New York. Id.; see also New York State Rifle & Pistol Ass'n v. Mt. Vernon, 148 A.D.2d 616, 617 (2d Dep't 1989); People v. Moore, 127 Misc. 2d 402 (Crim. Ct. N.Y. City 1985) (discussing case of Pennsylvania resident holding permit under section 400.00). The identity of the licensing officer referred to in this section depends on the locality. See N.Y. Penal Law § 265.00(10). Whether a permit is, in turn, actually granted is within the discretion of that licensing officer. Under these provisions, persons, even when granted a permit, are not provided a blanket license to carry any weapon. Instead, each license specifies in detail each weapon covered by that license and whether that license is issued as a license to carry or possess on the premises. N.Y. Penal Law § 400.00(7); see also Moore, 127 Misc.2d at 403-05.

Argument

Plaintiff's allegations set forth two distinct types of claim. One is a direct challenge to New York's limitation on firearms permits premised on an asserted fundamental right to bear arms under the Second Amendment and the right to substantive due process. Plaintiff's remaining claims allege that the New York statute has denied plaintiff his constitutionally protected rights to travel and equal protection based on an unjustifiable distinction between residents and nonresidents with regard to the ability to seek firearms permits. At the outset, the state defendants must note that plaintiff has

mischaracterized the scope of permit eligibility by contending that only residents of New York are able to apply. On the contrary, the statute imposes a type of substantial contacts test, making those who reside, work, or operate a business in New York eligible to apply for a permit. N.Y. Penal Law § 400.00(3) ("Applications shall be made . . . in the city or county, as the case may be, where the applicant resides, is principally employed or has his principal place of business as a merchant or storekeeper) (emphasis added); Moore, 127 Misc.2d 402. To the extent that plaintiff's legal arguments are based on this mischaracterization, defendants are unable to directly respond and instead will simply address the applicable legal standards with reference to the proper scope of section 400.00(3).

POINT I

PLAINTIFF LACKS STANDING TO MAINTAIN THIS ACTION

Plaintiff appears to concede that he has not applied for a permit under section 400.00. See Bach Aff., ¶ 11. "As a general rule, to establish standing to challenge an allegedly unconstitutional policy, a plaintiff must submit to the challenged policy." Prayze FM v. Federal Communications Comm'n, 214 F.3d 245, 251 (2d Cir. 2000) (quoting Jackson-Bey v. Hanslmaier, 115 F.2d 1091, 1096 (2d Cir. 1997) (internal quotations omitted). The failure to submit an application for a license, therefore, precludes a party from obtaining the standing necessary to assert an as applied challenge to the policy. Id. Absent standing, plaintiff's as applied challenge must be dismissed. See Thompson v. County of Franklin, 15 F.3d 245, 248 (2d Cir. 1994) (quoting Hodel v. Irving, 481 U.S. 704, 711 (1987)("standing is at heart 'a jurisdictional prerequisite to a federal court's deliberations'").

Plaintiff will undoubtedly argue that he should be excused from the obligation to apply because such an application would have been futile. See Bach Aff., ¶ 11. While there is a futility

exception to this requirement, Prayze FM, 214 F.3d at 251, it is a narrow one. Plaintiff can be excused of this obligation only upon a "substantial showing" of futility. Jackson-Bey, 115 F.3d at 1096. Nothing in plaintiff's papers suggest that he could demonstrate such a showing. While he sought advisory opinions from several New York law enforcement agencies, see Bach Aff., ¶ 11, those agencies are not responsible for the issuance of permits under the statute and, therefore, cannot be said to have definitely addressed the question of plaintiff's eligibility *to apply* for a permit. Having received no input from any individual responsible for actually issuing a license, plaintiff cannot in good faith argue that it would be futile for him to apply. His concern about losing a "nonrefundable fee" is no basis to excuse him from the normal standing requirements. Nor does this case present the type of First Amendment question for which special exemptions to the standing rules have been developed. See Right to Life of Dutchess Co., Inc. v. Federal Election Comm'n, 6 F. Supp.2d 248, 252 (S.D.N.Y. 1998).

Having failed to avail himself of the statutory process for obtaining a firearms permit of which he complains, plaintiff lacks standing to challenge that process and the complaint should be dismissed.

POINT II

THE ATTORNEY GENERAL AND THE SUPERINTENDENT OF THE STATE POLICE ARE NOT PROPER PARTIES TO THIS ACTION

In seeking declaratory and injunctive relief, plaintiff improperly names New York's Attorney General and the Superintendent of the State Police as defendants. Each is named solely in his official capacity. Spitzer is sued in his capacity as the "Chief Legal Officer" of the State. Pl.'s Appl., ¶ 5. Superintendent McMahon is apparently named because he "is responsible for

administering New York State's firearms licensing system through the New York State Police, Pistol Permit Bureau." Id. at ¶ 6. Neither of these allegations, however, is sufficient to make these individuals proper defendants in this case.

The Attorney General is not in any way involved in the application of the statutes under attack in this case. As is apparent from the statute itself, he has no role in the licensing process and has no role in enforcing the statute. Courts have long recognized that the Attorney General is not a proper party to an action merely because the constitutionality of a statute is raised. See, e.g., Filler v. Port Washington Union Free Sch. Dist., 436 F. Supp. 1231, 1234-35 (E.D.N.Y. 1977). When a state official has no role is enforcement of the statute at issue, he simply is not a proper party to an action challenging that statute. See Ex Parte Young, 209 U.S. 123, 157 (1908). "Although he has a duty to support the constitutionality of challenged state statutes and to defend actions in which the state is interested, the Attorney General does so, not as an adverse party, but as a representative of the State's interest in asserting the validity of its statutes." Mendez v. Heller, 530 F.2d 457, 460 (2d Cir. 1976) (internal citations omitted). The Attorney General, therefore, should be dismissed as a defendant.

While plaintiff apparently names Superintendent McMahon based on his authority over the State Police Pistol Permit Bureau such involvement is insufficient on these facts to warrant McMahon's continued involvement as a party. Plaintiff does not allege any impropriety in the manner in which permits are maintained or registered, but issued in the first instance. The statute is clear that, insofar as it would involve plaintiff, it is a judicial official or local municipal official, not the Superintendent of the State Police that would initially make a determination regarding an application for a permit. N.Y. Penal Law § 265.00(10); see also Attorney General's Informal

Opinion, 1986 N.Y. A.G. Lexis 26, at * 2 (1986) ("police authority for the county or city where an application for a license to carry a firearm is made has responsibility for investigating the statements made in the application"). And while the statute requires the Superintendent to approve the form of the general permit application, that is a purely ministerial function, McMahon's performance of which is not truly an issue here. Therefore, as noted above, since McMahon has no role in enforcing the statutory structure attacked here, he should be dismissed as improperly joined. Ex Parte Young, 209 U.S. at 157.[4]

Accordingly, all claims brought against the Attorney General and the Superintendent of the State Police should be dismissed.

POINT III

PLAINTIFF'S SECOND AMENDMENT CLAIM FAILS TO STATE A CLAIM FOR RELIEF AND MUST BE DISMISSED

Plaintiff's first enumerated cause of action alleges that the New York statute violates his rights under the Second Amendment to the United States Constitution which plaintiff alleges protects his personal right to keep and bear arms. See Pl.'s Appl., ¶¶ 51- 55. Because the Second Amendment binds only the actions of the federal government and, in any event, does not provide for the individual right to bear arms plaintiff asserts, this cause of action must be dismissed.

A. The Second Amendment Binds Only The Federal Government

It is well-settled that the amendments constituting the Bill of Rights represent, in the first instance, a restriction on the power of only the federal government. Clark v. Town of Ticonderoga,

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[4] The State Police, of course, enforce these statutes to the extent that the agency arrests individuals who violate New York's gun control laws. This places them in no different position from every other law enforcement agency in the state, however, and is insufficient to make the Superintendent a proper party to this claim.

213 F. Supp.2d 198, 201 (N.D.N.Y. 2002) (Kahn, J.) (citing cases). Our constitutional jurisprudence has seen fit, in some circumstances, to apply the strictures of those amendments to the states as well, through the auspices of the Fourteenth Amendment. See generally Duncan v. Louisiana, 391 U.S. 145, 148 (1968) (discussing incorporated rights). Thus, a state is bound by these amendments only if specifically incorporated by the Fourteenth Amendment. See Lanfranco v. Murray, No. 02-2305, ___ F.3d ___, 2002 U.S. App. Lexis 24661, at * 14 (2d Cir. Dec. 5, 2002) (error to consider grand jury claim against state when Fifth Amendment grand jury protection had not been incorporated through Fourteenth Amendment) (copy annexed in Appendix as Exhibit 1); see also Quilici v. Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982), cert. denied, 464 U.S. 863 (1983) (citing Supreme Court cases rejecting notion that entire Bill of Rights applies to states).

The Supreme Court has twice before ruled that the Second Amendment is a limitation only on actions of the federal government. In United States v. Cruikshank, the Court stated that the Second Amendment was "one of the amendments that has no other effect than to restrict the powers of the national government." 92 U.S. 542, 553 (1876). Ten years later, the Court reaffirmed this holding, citing Cruikshank for the proposition that the Second Amendment "is a limitation only upon the power of Congress and the National government, and not upon that of the States." Presser v. Illinois, 116 U.S. 252, 265 (1886). While plaintiff, and some courts, have criticized these cases as lacking authoritive value inasmuch as they predate the beginning of the Court's incorporation doctrine, see Pl's Brief, p. 22; they have never been overruled by the Supreme Court and must bind this Court. The Supreme Court itself has subsequently cited Presser in an incorporation era case for the proposition that the guarantees of the Second Amendment does not bind the states. Malloy v. Hogan, 378 U.S. 1, 5 (1964). Indeed, Cruikshank and Presser have routinely been cited by courts

holding that the Second Amendment do not bind the states. See, e.g., Peoples Rights Org. v. City of Columbus, 152 F.3d 522, 538 n. 18 (6th Cir. 1998); Quilici, 695 F.2d at 270; Nollet v. Justices of the Trial Court, 83 F. Supp.2d 204, 214 (D. Mass.), aff'd, 248 F.3d 1127 (1st Cir. 2000). In any event, plaintiff has cited no binding precedent for the proposition that the Second Amendment has in fact been incorporated to bind the state.

Since the Second Amendment has never been specifically incorporated through the Fourteenth Amendment to restrict the power of the states, plaintiff's Second Amendment challenge to the New York statute must be dismissed.

B. The Second Amendment Does Not Guarantee An Individual Right To Bear Arms

Were the Court to reach the merits of plaintiff's Second Amendment claim it should nonetheless dismiss it for failure to state a claim. In United States v. Miller, the lower court dismissed a criminal indictment charging the defendant with illegal possession of a weapon on the ground that the National Firearms Act under which the charge had been lodged violated the Second Amendment. 307 U.S. 174, 76-77 (1939). The Supreme Court reversed. In so doing the Court noted that the Second Amendment was designed "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces" and "must be interpreted and applied with that end in view." Id. at 178. Considered under this standard, the Court held that unless "a weapon has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." Id. Plaintiff's papers make plain that he purports to assert an individual right to carry a weapon to New York for his own personal protection, not in conjunction with a "regulated militia." Pl.'s Appl., 12. As such, Miller precludes his assertion of a protected Second Amendment right. Miller was

reaffirmed in Lewis v. United States, when the Court ruled that "legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties." 445 U.S. 55, 65 n.8 (1980) (citing cases).

This "collective rights" view of the Second Amendment, as it has often been called, that the Amendment does not protect an individual's right to bear arms, is consistent with the approach taken by the majority of courts to have considered the question. Those courts have overwhelmingly found that the amendment protects only the collective right to bear arms as part of a well regulated militia. See, e.g., Silveira v. Lockyear, No. 01-15098, 312 F.3d 1052, ___, 2002 U.S. App. Lexis 24612, at * 88 (9th Cir. Dec. 5, 2002) (copy annexed in Appendix as Exhibit 2)[5]; United States v. Graham, 305 F.3d 1094, 1106 (10th Cir 2002), cert. denied, ___ U.S. ___, 2003 U.S. Lexis 527 (Jan. 13, 2003); United States v. Napier, 233 F.3d 394, 402-03 (6th Cir. 2000); Love v. Pepersack, 47 F.3d 120, 124 (4th Cir.), cert. denied, 516 U.S. 813 (1995); United States v. Milheron, No. 02-CR-26-B-S, ___ F. Supp.2d ___, 2002 U.S. Dist. Lexis 22495, at * 4-5 (D. Maine Nov. 20, 2002) (noting that only Fifth Circuit recognizes an individual right to bear arms) (copy annexed in Appendix as Exhibit 3); see also United States v. Hale, 978 F.2d 1016, 1020 (8th Cir. 1992), cert. denied, 507 U.S. 997 (1983) (holding right protects possession only when "related to preservation or efficiency of a militia"); but see United States v. Emerson, 270 F.3d 203, 260 (5th Cir. 2001), cert. denied, 122 S. Ct. 2362 (2002).

While no published opinion of the Second Circuit has ever addressed this issue, but see Pl.'s Brief, p. 8, n. 20 (citing United States v. Scanio), several Southern District of New York cases have

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[5] The Silveira Court also provided a collection of cases adopting the collective rights model in a footnote to its opinion. 2002 U.S. App. Lexis 24612, at 22 n.11. The Court then noted that only the Second Circuit and District of Columbia Circuit had not yet passed on the question.

presented the issue, each resulting in a holding consistent with the collective rights view. "It is settled constitutional law that the Second Amendment is not a source of individual rights. Rather, the Second Amendment grants a collective right to the States to preserve 'a well regulated militia'." Dew v. United States, No. 97-Civ.-6409, 1998 U.S. Dist. Lexis 4176, at * 18-19 (S.D.N.Y. Apr. 1, 1998) (citing cases), aff'd, 192 F.3d 366 (2d Cir. 1999), cert. denied, 529 U.S. 1053 (2000) (copy annexed in Appendix as Exhibit 4); see also DeMuro v. Westchester Co. Dep't of Corrections, No. 85-Civ.-4708, 1986 U.S. Dist. Lexis 20095, at * 3-4 (S.D.N.Y. Sept. 25, 1986) ("no individual right under second amendment") (copy annexed in Appendix as Exhibit 5); Engblom v. Carey, No. 79-Civ.-4785, 1981 U.S. Dist. Lexis 14442, at * 3-4 (S.D.N.Y. Sept. 3, 1981) (copy annexed in Appendix as Exhibit 6).

In light of the overwhelming weight of authority against him, it is not surprising that plaintiff relies heavily on the Fifth Circuit's decision in Emerson. Plaintiff's principal argument appears to be that inasmuch as only Emerson undertook an extensive review of the context and history of the Second Amendment, its view must be accorded significant deference. See Pl.'s Brief, pp. 12-14. Now that Silveira has undertaken the same type of detailed legal analysis, and reached the contrary conclusion, plaintiff's initial argument simply is no basis for adopting the view of the Emerson Court. Significantly, even Emerson acknowledges that the right to possess a weapon it recognizes is subject to "reasonable" restrictions. 270 F.3d at 261.

Plaintiff's other arguments are equally unavailing. Plaintiff overstates many of the citations he claims support his view. He relies heavily, for example, on the third edition of Professor Lawrence Tribe's treatise American Constitutional Law as "unequivocally" embracing the individual rights view. What plaintiff fails to note, however, is that the two previous editions of that text fell

squarely with the collective rights view and Professor Tribe's own writings since publication of the third edition have called into question the view he expressed there. See Silveria, 2002 U.S. App. Lexis 24612, at * 33 n.22. Plaintiff also cites a long list of congressional enactments which he contends endorse an individual rights view, Pl.'s Brief, p. 15, but completely fails to articulate how this is so. Finally, in an effort to overcome Miller's clear precedent that the Second Amendment protected only militia related activities, plaintiff argues, without a single authoritative citation, that Miller merely stands for the proposition that the Second Amendment creates a "weapon at issue" test whereby the constitutionality of the subject law or regulation is decided by application of the law to the particular type of weapon at issue. This solution is patently unworkable in practice and simply to state the principle demonstrates why it should be rejected.

Accordingly, plaintiff's contention that he has an individual right to carry a weapon, unrelated to any role in a well regulated militia, must be rejected and this cause of action dismissed.

POINT IV

NEW YORK'S LICENSING CRITERIA ARE SUBSTANTIALLY JUSTIFIED AND, THEREFORE, DO NOT UNLAWFULLY IMPACT PLAINTIFF'S RIGHT TO TRAVEL

Plaintiff also alleges that section 400.00 constitutes a violation of his constitutional right to travel. Specifically he alleges a denial of his "fundamental constitutional right to travel . . . uninhibited by statutes, rules or regulations which unreasonably burden or restrict this movement." Pl.'s Appl, ¶ 70. He attributes this denial to an alleged statutory structure which unreasonably discriminates against nonresidents of New York. Id. at ¶¶ 71 & 73. New York's restrictions on permit applications, which are not based solely on residency, foster a legitimate state interest and do not unduly burden the right to travel. Accordingly, this claim, set forth in the Fifth Cause of Action,

should be dismissed.

The right to travel is well-established. See Attorney Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 901-02 (1986) (citing cases). In Saenz v. Roe, the Supreme Court held, as had been previously noted, that there are three component parts to the right to travel: 1) protection of the right to enter and leave another state; 2) the right to be treated as a welcome guest while temporarily present in another state; and 3) the right to be treated as a citizen when a person permanently moves to another state. 526 U.S. 489, 500 (1999); see also Romer v. Cohen, 265 F.3d 118, 126 (2d Cir. 2001). Here, only the second of these - the right to be treated as a welcome guest in a state other than his home state - is at issue in this action.[6] The Saenz Court also determined that this component was protected under the Article IV Privileges and Immunities Clause. Saenz, 526 U.S. at 501.[7] Having identified this textual source for the right, a review of the history of that clause and the purposes underlying the statute demonstrate that plaintiff's claim must fail.

The Privileges and Immunities Clause does not prohibit all distinctions in treatment, barring only "discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." Toomer v. Witsell, 334 U.S. 385, 396 (1948). Because the statute at issue is substantially justified by strong governmental interests it does not impinge upon plaintiff's right to travel.

As noted above, the statute permits residents of New York and those who either operate a

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[6] Nothing in plaintiff's papers suggests either that New York law prohibits him from freely entering or leaving New York or that he has would become a permanent New York resident but for the challenged statute.

[7] Significantly, the dissenters in the case did not disagree with this categorization of that aspect of the right to travel. See Saenz, 526 U.S. at 512. The holding of the case actually dealt with a different aspect of the right to travel, namely the right to leave one state and become a full citizen of another. Id. at 502.

business in New York or have their principal place of employment in New York to apply for a permit. See Penal Law § 400.00; Moore, 127 Misc.2d 402. As such, plaintiff's arguments that New York cannot discriminate against nonresidents as a class is no support for his claim that section 400 is unconstitutional. Instead, this Court must consider whether New York's substantial contacts test runs counter to the long established purpose of the Privileges and Immunities Clause.

The Privileges and Immunities Clause "was intended to create a national economic union." Supreme Ct. of N.H. v. Piper, 470 U.S. 274, 280 (1985). As such it is only "with respect to those privileges and immunities bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally." Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 383 (1978) (internal quotations omitted). The Clause, therefore, protects those privileges necessary to help "fuse into one Nation a collection of independent, sovereign States." Toomer, 334 U.S. at 395. Indeed, while much of the Supreme Court's Article IV jurisprudence has focused on furthering interstate unity in the fields of employment, education and commerce, section 400.00 is entirely consistent with fostering these goals in permitting those who have their principal place of business or employment in New York to seek a permit. In this way, New York encourages, at least tacitly, those who wish to work or operate a business in New York to apply for the permit they may believe is necessary to protect their economic interest in this state. In denying that same opportunity to plaintiff, who wishes only to travel to New York for recreational purposes, New York clearly does not run afoul of the guarantees protected under the Constitution.

Nothing in the history of this provision suggests that plaintiff's asserted personal right to carry a loaded weapon in interstate travel for his personal protection is that sort of right. "[T]he States possess primary authority for defining and enforcing the criminal law." United States v.

Lopez, 514 U.S. 549, 561 n. 3 (1995). Though criminalizing no conduct, section 400.00 must be read together with Penal Law § 265.00 et seq., regarding criminal possession of a weapon and, therefore, viewed with the particular deference accorded the individual States in such matters. A review of state laws from around the nation is particularly instructive to the privileges and immunities analysis. That review reveals a wide divergence in licensing practices for non-residents. California, like New York, requires applicants for a pistol permit to either live in the county of application or "spend[] a substantial period of time in the applicants's principal place of employment or business in the county." Calif. Penal Code § 12050(a)(1)(D) (2002). Connecticut requires applicants to have a "bona fide residence or place of business within the jurisdiction." Conn. Gen. Stat. § 29-28 (2002). Delaware maintains an even more restrictive policy, permitting only residents to obtain a firearms license. In re Ware, 474 A.2d 131, 132 (Del. Sup. Ct. 1984) (interpreting 11 Del. Code § 1441 to permit only residents to apply to carry a concealed weapon). Significantly, the Ware decision upheld Delaware's restrictive policy against challenges under the Privileges and Immunities and Equal Protection Clauses, relying in large part on a New York case affirming section 400.00. Id. at 133 (citing People v. Perez, 67 Misc.2d 911 (Co. Ct. Onondaga Co. 1971)). Minnesota too requires applications for a permit to be made "where the applicant resides." Minn. Stat. § 624.714 (2000). In addition to the states listed above, at least twenty-three other states impose a residency requirement for those seeking a concealed weapons permit, though some recognize permits issued in other states pursuant to mutual reciprocity agreements.[8] Plaintiff's argument that

[8] Ala. Code § 13A-11-75 (2002); Alaska Stat. § 18.65.700 (2002); Ark. Code § 5-73-301 (1999); Ga. Code § 16-11-129 (2002); Ind. Code § 35-47-2-3 (2002); Ky. Rev. Stat. § 237.110 (2002); La. Rev. Stat. Ann. § 1379.3 (2003); Mich. Comp. Laws § 28.425b (2002); Miss. Code Ann. § 45-9-101 (2002); Mo. Rev. Stat. § 571.090 (2002); Mont. Code Ann. § 45-8-321 (2002); Nev. Rev. Stat. Ann. § 202.350 (2002); N.C. Gen. Stat. § 14-415.12 (2002); N.D. Cent. Code § 62.1-04-03 (2001); Okla. Stat. tit. 21, § 1290.9 (2002); Or. Rev. Stat. § 166.291 (2001); S.C. Code. Ann. 23-31-215 (2002);

he has some ingrained federal protection to apply for a permit as a nonresident is significantly undermined by the fact that a majority of the States do not permit such applications by nonresidents. The particular right plaintiff asserts, therefore, is not among those protected under the Privileges and Immunities Clause.[9]

Even were the right one undeniably protected by the Privileges and Immunities Clause, section 400.00 is readily justified by legitimate and compelling state interests in any event and, therefore, does not run afoul of the Privileges and Immunities Clause. New York's interest in licensing firearms is clear:

> Licensing allows the State to review the reasons individuals apply for a weapon permit, to determine the validity of those reasons, and ultimately to be informed of what individuals are legally armed and with what weapons.

Moore, 127 Misc.2d at 404. In furthering that state interest, the Legislature clearly was justified in acting to stem the "substantial danger to the public interest which would be caused by the unrestricted flow of dangerous weapons into and through the State, possessed by countless travelers." Perez, 67 Misc.2d at 913. And in seeking to limit the number of weapons, New York acted reasonably in denying the privilege to those with only the most remote contacts to New York.

Numerous other considerations provide ample justification for the dividing line adopted by New York. Prior to granting a permit a background investigation must be conducted. N.Y. Penal Law § 400.00(4). The practical implications of requiring New York to accept applications from all

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S.D. Codified Laws § 23-7-7 (2002); Tenn. Code Ann. § 39-17-1351 (2002); Tex. Gov't Code Ann. § 411.172 (2002); Va. Code Ann. § 18.2-308 (2002); W. Va. Code § 61-7-4 (2002); Wyo. Stat. § 6-8-104 (2002).

[9] Moreover, federal law protects plaintiff from criminal prosecution when traveling between states in which he may lawfully possess a firearm, even when passing through a state where he may not be licensed. 28 U.S.C. § 926A (2002).

nonresidents are apparent. First, the strain on investigatory resources would be significantly increased. More importantly, however, the ability to obtain, and verify, information would be negatively impacted were New York officials required to make inquiries in other states. Nor can it be argued that New York could simply enter into agreements with other jurisdictions to do such work for the licensing county as to do so would run a significant risk of a lack of uniformity in the licensing regime.

> Further, a rule permitting a person to obtain a pistol permit in any county where he or she is a temporary or occasional inhabitant could result in a person possessing multiple pistol permits covering different weapons and issued by different licensing officers. The revocation for proper cause of such a person's pistol permit in one county would not be effective to prevent that person from possessing weapons required to be licensed, as the licensing officer in one locality would not have knowledge of the existence of additional permits issued to the same person for different weapons. This result would be clearly inimical to the purpose of the statute, for the control of weapons possession intended to be afforded thereby would be defeated.

In re Davies, 133 Misc.2d 38, 41 (Oswego Co. Sup. Ct. 1986). This also creates an undue risk of forum shopping for those seeking the easiest means to obtain a firearms permit. Id. Likewise, the risk of New York officials not learning of a disqualifying event or subsequent action bearing on a person's ability to carry a weapon is heightened the further from New York the person may reside.

Both because the asserted right is not one historically protected by the Privileges and Immunities Clause and because the New York statute is substantially justified in furtherance of legitimate state interests, plaintiff's right to travel claim fails to state a claim for relief and should be dismissed.[10]

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[10] To the extent plaintiff also seeks to assert this claim under the Privileges and Immunities Clause of the Fourteenth Amendment the claim must be dismissed. In Saenz, the Court found that provision to be the textual source for that portion of the right to travel which guarantees the right of a citizen to move and become a citizen of a different state. 526 U.S. at 503. This case presents no question regarding

POINT V

NEW YORK'S RESIDENCY REQUIREMENT IS RATIONALLY RELATED TO A LEGITIMATE GOVERNMENT INTEREST AND, THEREFORE, DOES NOT VIOLATE PLAINTIFF'S EQUAL PROTECTION RIGHTS

"The Equal Protection Clause of the Fourteenth Amendment 'is essentially a direction that all persons similarly situated should be treated alike'." Roth v. City of Syracuse, 96 F. Supp. 2d 171, 178 (N.D.N.Y. 2000) (Mordue, J.) (quoting City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985)). The Clause does not, of course, prohibit all 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). Because the scope of review depends on the nature of the right allegedly violated, the first step in equal protection analysis is identifying the proper standard of review.

A. Rational Basis Review is the Appropriate Level of Equal Protection Scrutiny

When the objected to classification is made against a "suspect class" of persons or implicates a fundamental constitutional right, the highest level of review - strict scrutiny - is required. Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 457-58 (1988); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976). "Where the alleged classification is not based on a suspect class or does not impair a fundamental right, the classification and the actions are reviewed on a rational basis standard, i.e., whether the legislative judgements are rationally related to a legitimate state purpose." Benjamin v. Town of Fenton, 892 F. Supp. 64, 67 (N.D.N.Y. 1995); see also Romer v. Evans, 517

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this aspect of that right and so plaintiff's Fourteenth Amendment claim is no basis for relief.

U.S. 620, 631 (1996).[11] Plaintiff does not contend that the New York statutory framework discriminates against any suspect class of individuals. Instead, he contends that it implicates what he asserts is his fundamental Second Amendment right to bear arms and his constitutionally protected right to travel and, therefore, triggers strict scrutiny. A review of the applicable legal standards, however, makes clear that only rational basis review is appropriate.

"[T]he right to possess a gun is clearly not a fundamental right" and a statute regulating that conduct is constitutional if it passes rational basis review. United States v. Toner, 728 F.2d 115, 128 (2d Cir. 1984). The Second Circuit's rule, which of course controls in this case, is supported by authority from around the nation. See, e.g., Olympic Arms v. Buckles, 301 F.3d 384, 388-89 (6th Cir. 2002); United States v. Hancock, 231 F.3d 557, 565-66 (9th Cir. 2000), cert. denied, 532 U.S. 989 (2001); Gillespie v. City of Indianapolis, 185 F.3d 693, 709 (7th Cir. 1999), cert. denied, 528 U.S. 1116 (2000). Plaintiff's equal protection claim, insofar as it is based on the Second Amendment, therefore, must be analyzed under the rational basis standard.

Nor may plaintiff rely on the right to travel to subject his claim to heightened review. As noted above, plaintiff admittedly travels to New York on a "periodic" basis. Pl.'s Appl., ¶ 12. The statutory system he now attacks clearly, therefore, does not impede, deter or chill his exercise of his right to travel. Nor, as outlined above, does plaintiff state any other basis for relief on his right to travel claim since any restriction on the ability of those without significant New York contacts to apply is justified by important state interests in effective gun control and public safety. See Point IV supra. Unable to state an independent claim under the right to travel, plaintiff cannot now bootstrap

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[11] An intermediate level of scrutiny, applied to gender-based classifications, also exists in equal protection jurisprudence. See United States v. Virginia, 518 U.S. 515, 532-33 (1996).

this claim under the rubric of heightened equal protection review. Nordlinger, 505 U.S. at 10-11.

Accordingly, plaintiff's equal protection claims must be dismissed if Penal Law § 400.00 is rationally related to a legitimate state purpose.

B. New York's Penal Law Provision is Rationally Related to Legitimate State Interests

"Rational basis review is deferential." Weinstein v. Albright, 261 F.3d 127, 140 (2d Cir. 2001). This level of review does not permit the Court to "pass judgment upon the wisdom, fairness, or logic of legislative decisions; it turns on whether there are plausible reasons for [the legislative] choices." General Media Comm., Inc. v. Cohen, 131 F.3d 273, 286 (2d Cir. 1997), cert. denied, 524 U.S. 951 (1998). In general, "legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." Nordlinger, 505 U.S. at 10 (quoting McGowan v. Maryland, 366 U.S. 420, 425-426 (1961)). As such, "an equal protection challenge to a government classification must be denied if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Weinstein, 261 F.3d at 140. Indeed, "those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it." FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993). "These laws are therefore entitled to a strong presumption of validity." Vacco v. Quill, 521 U.S. 793, 800 (1997).

Guns are dangerous weapons which pose an undeniable risk of harm. Through New York's statutory framework, the state has endeavored to permit only those individuals with a substantial connection to New York to carry weapons while in the state. In its effort to delineate that group, New York chose to restrict permits to those who live, work or own a business in New York. This was an entirely reasonable classification on which the Legislature could base its judgment. "Lines

must inevitably be drawn, and it is the legislature's province to draw them." Brown v. Bowen, 905 F.2d 632, 635 (2d Cir. 1990), cert. denied, 498 U.S. 1093 (1991). Here the Legislature cannot be said to have acted arbitrarily in drawing that line to include only those with the closest ties to the state.

As outlined in much more detail in the preceding point, New York has strong interests in its permit restriction. Through that statute, the State seeks to guarantee the uniformity and accuracy of the background checks that are a predicate to the actual issuance of a license. It seeks to preserve resources in managing its application process and minimize the risk for fraud or abuse in the permitting process. Finally, the current mechanism limits the number of weapons permitted in the State. These factors and the similar, or more restrictive, statutes in many of New York's sister States more than amply demonstrate that the application limitations inherent in section 400.00 are rationally related to the State's legitimate interest in regulating guns.

Taken together, these factors preclude plaintiff from demonstrating his burden that there is no conceivable justification for the classification under attack. His equal protection claim, therefore, should be dismissed.

POINT VI

THE ALLEGATIONS BY PLAINTIFF DO NOT GIVE RISE TO FACTS SUPPORTING A SUBSTANTIVE DUE PROCESS CLAIM AND THAT CLAIM MUST BE DISMISSED

"The protections of substantive due process are available only against egregious conduct which goes beyond merely offending some fastidious squeamishness or private sentimentalism and can fairly be viewed as so brutal and offensive to human dignity as to shock the conscience." Smith v. Half Hollow Hills Cent. Sch. Dist., 298 F.3d 168, 173 (2d Cir. 2002) (citing cases) (internal

quotations omitted); see also County of Sacramento v. Lewis, 523 U.S. 833, 847 (1998). "Substantive due-process rights guard against the government's 'exercise of power without any reasonable justification in the service of a legitimate governmental objective'." Tenenbaum v. Williams, 193 F.3d 581, 600 (2d Cir. 1999) (citing County of Sacramento, 523 U.S. at 846). Accordingly, "[o]nly the most egregious official conduct can be said to be arbitrary in the constitutional sense." Id. Indeed, the Second Circuit has noted that "[s]ubstantive due process standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority." Natale v. Town of Ridgefield, 170 F.3d 258, 263 (2d Cir. 1999). Governmental action that is or may be viewed as merely "incorrect or ill-advised" does not give rise to a substantive due process claim. Padberg v. McGrath-McKechnie, 203 F. Supp.2d 261, 284 (E.D.N.Y. 2002) (citing Lowrance v. Achtyl, 20 F.3d 529, 537 (2d Cir. 1994)). Viewed in light of this "high standard," Leeandy Dev. Corp. v. Town of Woodbury, 134 F. Supp.2d 537, 543 (S.D.N.Y. 2001), plaintiff's due process allegations clearly fail to state a claim.

This action challenges New York's Penal Law and New York's statutory judgment regarding what conduct should be criminalized. In making that judgment, New York has established a regulatory scheme in which only those with significant ties to New York may apply for permission to carry a concealed weapon while in the state. In this regard, New York is not unlike some twenty-seven sister states which likewise restrict the ability of non-residents to apply for firearms licenses. See Footnote 8 supra & accompanying text. This common state practice is justified by the strong interests of those states in regulating gun possession and transportation within their borders. There can be no question that this is not the type of egregious, offensive and conscience shocking conduct at which the Due Process Clause is directed.

Plaintiff's substantive due process claim, therefore, should be denied.[12]

POINT VII

PLAINTIFF IS NOT ENTITLED TO INJUNCTIVE RELIEF

The well-established standard for preliminary injunctive relief requires the movant to demonstrate that he will suffer irreparable harm in the absence of the injunction and either a likelihood of success on the merits of the underlying claim or a sufficiently serious question going to the merits to make them fair ground for litigation and a balance of the hardships tipping decidedly in the movant's favor. TCPIP Holding Co. v. Haar Communications, Inc., 244 F.3d 88, 92 (2d Cir. 2001); Cochran v. Town of Marcy, 143 F. Supp.2d 235, 237 (N.D.N.Y. 2001). However, as this Court has previously noted, when "the moving party seeks (i) an injunction that will alter, rather than maintain, the status quo, or (ii) an injunction [that] will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits . . . the moving party must demonstrate a clear or substantial likelihood of success on the merits, or that it will suffer extreme or very serious damage if denied preliminary relief." Anderson v. Mexico Academy, 186 F. Supp. 2d 193, 201 (N.D.N.Y. 2002) (Mordue, J.) (citing Tom Doherty Assocs., Inc. v. Saban Entertainment, Inc., 60 F.3d 27, 33-34 (2d Cir. 1995)) (internal quotations omitted). Here, plaintiff's application for injunctive relief would substantially alter the status quo of New York's Penal Law and provide him with substantially all the relief he seeks and, therefore, he bears the

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[12] This substantive due process must be dismissed for the additional reason that "[w]here another provision of the Constitution provides an explicit textual source of constitutional protection, a court must assess a plaintiff's claims under that explicit provision and not the more generalized notion of substantive due process." Conn v. Gabbert, 526 U.S. 286, 293 (1999) (internal quotations omitted). Plaintiff has rested his claim on several other constitutional grounds including the Second Amendment and Article IV Privileges and Immunities Clause claims addressed above and, therefore, is precluded from also asserting a substantive due process claim.

higher burden outlined in Anderson. On this record, plaintiff cannot satisfy this standard.

Inasmuch as the harm alleged is a denial of one or more constitutionally protected rights, we can presume plaintiff establishes that he may suffer an irreparable harm were his motion denied. See Brewer v. West Irondequoit Cent. Sch. Dist., 212 F.3d 738, 745 (2d Cir. 2000); Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984). He cannot, however, demonstrate the requisite showing of a likelihood of success on the merits. As outlined above, each of plaintiff's individual constitutional claims fails to state a basis for relief and his complaint should be dismissed in its entirety.

Accordingly, because plaintiff cannot establish a clear likelihood of success on the merits, the motion for preliminary injunctive relief should be denied.

POINT VIII

PLAINTIFF'S MOTION TO CONSOLIDATE THE TRIAL ON THE MERITS SHOULD BE DENIED

Plaintiff's motion, pursuant to Fed. R. Civ. P. 65(a), to consolidate a trial on the merits with a hearing on his application for a preliminary injunction should be denied either as moot or as premature. First, the state defendants respectfully submit that inasmuch as plaintiff has failed to state a claim for relief as to any of his asserted causes of action, the complaint should be dismissed and judgment entered against plaintiff thus obviating the need for a trial on the merits. This motion, therefore, should be dismissed as moot. In the alternative, however, issue has not yet been joined in this case and no trial on the merits should be ordered until such time as the parties have had an adequate opportunity to review what, if any, issues of fact may be presented by this complaint and to conduct discovery if necessary as to those issues. Playskool, Inc. v. Product Dev. Group, Inc., 699 F. Supp. 1056, 1063 (E.D.N.Y. 1988). Significantly, no trial on the merits could be held prior to a

ruling on the instant cross-motion to dismiss since, even if the motion is not granted in its entirety, it may well limit the substantive issues to be tried.

Conclusion

For the reasons set forth above, the state defendants' motion to dismiss should be granted and plaintiff's motions for a preliminary injunction and consolidation under Fed. R. Civ. P. 65(a) denied.

Dated: Albany, New York
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