Docket No. 11-1149

The United States
Court of Appeals
For
The Tenth Circuit

Gray Peterson, Appellant
v.
Ashley Kilroy*, *et.al.*, Appellees

Appeal from the United States District Court
For
The District of Colorado
The Hon. Walker D. Miller, Senior District Judge

Reply Brief of Appellant

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***Ashley Kilroy has been substituted for Charles Garcia (who was substituted for Alvin LaCabe) and James Davis has been substituted for Peter Weir**

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There are no prior or related appeals for this case.

Summary of the Argument

Peterson will show that his right to bear arms in Denver is severely burdened by Kilroy's denial of Peterson's CHL application. The proper standard of review for Second Amendment cases involving law-abiding citizens such as Peterson is "not quite strict scrutiny," and Kilroy has failed to meet her burden. Moreover, Kilroy has treated Peterson as an unwelcome guest and violated Peterson's privileges and immunities and right to travel.

Davis has not shown that he is entitled to 11th Amendment immunity because he is unable to demonstrate a statute that shows he has nothing to do with administering Colorado's CHL reciprocity system. Peterson alleged in his Amended Complaint that Davis has such responsibility, and the District Court was obligated to accept this allegation as true in the absence of a clear statute to the contrary. Even Kilroy disputes Davis' claims on this issue.

Argument and Citations of Authority

1. Denver Severely Limits Nonresidents' Right to Bear Arms

Appellees Davis and Suthers (the "State") begrudgingly admit that Peterson has "some limits on the places and situations in which Peterson may carry a pistol while he is within Denver city limits." State Brief, p. 4. The State attempts to soften this reality, however, by listing what the State apparently believes is a long list of places where Peterson can carry a handgun even without a CHL: his dwelling, his place of business, on property he owns or controls, or in a private automobile. *Id.*, p. 6. Aside from the lack of length in this list, Peterson testified below that he has no place of business in Colorado, he neither owns nor controls property in Colorado, and he uses public transportation when he visits Denver. He also testified that he has no dwelling, but the State offers up that "dwelling" would include a "hotel room or acquaintance's residence." *Id.*, p. 46.

Assuming *arguendo* that the State is correct, that Peterson may "keep and bear arms" under his pillow at night in Denver, then the State has been successful in finding one location in all of Denver where Peterson may exercise his Second Amendment rights. The State offers no explanation of how Peterson might get his handgun from the Denver airport to his

"dwelling," but the State is not one to dwell on such details. Instead, the State insists that Peterson's Second Amendment rights have been vindicated because, after all, who would want to exercise a fundamental constitutional right anywhere else? The State goes so far to assert that "Denver's laws are still far more permissive than *Heller's* minimum requirements." State Brief, p. 47.

It is beyond question that the Second Amendment applies to more places than one's "dwelling." The Supreme Court emphasized in *District of Columbia v. Heller,* 554 U.S. 570, 584 (2008), "At the time of the founding, as now, to 'bear' meant to 'carry.'" The Court went on to say that in the context of the Second Amendment, used with "arms," the term "bear" means to carry arms in case of confrontation. *Id.*

The State attempts to justify Denver's restrictions on Peterson's unlicensed carrying of firearms by relying on an "emergency exception." Denver Code § 38-118(b)(1) allows unlicensed carrying of a firearm in "defense of home, person, or property, when there is a direct and immediate threat thereto." The State concludes that this emergency exception is adequate to deal with "*Heller's* concern over confrontation." State Brief, p. 47.

The absurdity of the State's position is apparent even with very little thought of how it would work in practice. The State's argument is that, on a "normal" day, it would be a crime for Peterson to leave his "dwelling" in Denver while carrying a firearm. But, while out and about in Denver on that normal day, if Peterson should suddenly be "confronted" with a threat to his person or property, it would be perfectly legal for Peterson to conjure up a firearm and carry it for the duration of the confrontation. Or, perhaps it would be legal for Peterson to suspend the confrontation long enough to run back to his "dwelling" to retrieve his handgun.

2. The Second Amendment Applies Outside the Home

The State thus espouses a truly warped interpretation of the Supreme Court's holdings. *Heller* says that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." 554 U.S. at 592. The State would have this Court believe that means ***only*** during a confrontation (or "emergency," in the State's terminology). The simple example above illustrates how absurd such an interpretation is. "In case of confrontation" means exactly what it says. The amendment guarantees the right to carry a firearm so that the carrier is able to deal with a confrontation if and when one occurs.

Other Supreme Court holdings support this conclusion. The earliest Supreme Court case directly interpreting the Second Amendment, *U.S. v. Miller*, 307 U.S. 174 (1939), dealt with whether the Second Amendment guaranteed a right to carry a short-barreled shotgun across state lines. The Court concluded that there was no evidence in the record indicating whether such firearms are of the type ordinarily used in the militia. 307 U.S. at 178. The Court seemed to assume that, if short-barreled shotguns are included within the right, then driving such a shotgun from Oklahoma to Arkansas would be protected activity. Surely travelling from Oklahoma to Arkansas would be "outside the home," and there is nothing in the *Miller* opinion indicating that the litigants in that case were suffering from an ongoing confrontation during their entire trip.

Moreover, *Heller* itself signals that carrying outside the home is protected. The *Heller* opinion notes that the opinion "should [not] be taken to cast doubt on … laws forbidding the carrying of firearms in sensitive places such as schools and government buildings…." 554 U.S. at 626. If the Second Amendment does not guarantee the right to carry firearms outside the home, then it was completely unnecessary for the Court to point out the exceptions of schools and government buildings. The Court obviously was saying that many places outside the home besides schools and

government buildings ***are*** constitutionally protected for firearm carry by law-abiding citizens.

The State's *amicus* makes the somewhat disingenuous argument that *Heller* actually "made clear that 'carry' did not imply 'outside the home.'" Brady Center Brief, p. 4. Peterson has no doubt that *amicus* wishes it were so, but the argument simply is untenable, for several reasons. First, the *Heller* case was about keeping a firearm in one's home. Naturally, much of the discussion therefore involved keeping a firearm at home. The inclusion of the word "home" in the opinion hardly "makes clear" that the Second Amendment does not apply outside the home.

Second, as already discussed, the *Heller* court announced that laws banning carrying weapons in "sensitive places" are presumptively lawful, i.e., do not violate the Second Amendment. *Amicus* fails to explain why the Court bothered to announce that certain laws that only apply ***outside the home*** are presumptively lawful, if in fact all laws that apply outside the home have no bearing on the Second Amendment.

Third, it is self evident that if a person may "keep" and arm in his home, he must be able to bear (i.e., "carry") the arm in his home. If one can keep a handgun in one's living room or in one's bedroom, then surely one can carry the handgun from the living room to the bedroom. The only

reason to include "bear" at all in the Amendment would be to apply ***outside*** the home.

Finally, *Ezell v. City of Chicago*, 2011 U.S.App. LEXIS 14108, *60, No. 10-3525 (7th Cir. July 6, 2011), decided nearly two weeks before *amicus* filed its brief, is about the right to maintain firearm proficiency by using gun ranges. Except for the very few who can afford to have a gun range in their home, gun ranges are exclusively outside the home. With the Seventh Circuit ordering a preliminary injunction against Chicago's gun range ban, it is quite clear that the *Ezell* court considers the Second Amendment to apply outside the home.

Amicus also argues that the Puerto Rican case cited by Peterson in his opening Brief does not stand for the proposition that the Second Amendment guarantees a right outside the home. It is difficult to understand how *amicus* comes to that conclusion. The case cited pertains to a Puerto Rican citizen who appealed the denial of his application for a license to carry a firearm. Reversing the denial, the court found that, based on *Heller* and *McDonald*, the Second Amendment applies to Puerto Rico and the Puerto Rican and that a fundamental right exists to carry a firearm. *Ex parte Roque Cesar Nido Lanausse*, Court of Appeals of Puerto Rico, Guyama Judicial Region, Panel XII, Case No. KLAN201000562 (Jan. 31, 2011). While it should be

obvious to *amicus* that a license to carry a firearm does not apply only within a home, nothing in the Puerto Rican opinion has the "in the home" language that *amicus* finds so limiting in *Heller*.

In spite of this, however, Denver forbids Peterson from carrying a firearm ***anywhere*** outside the home. Peterson cannot carry a firearm while he shops, dines, visits a museum, or strolls in a park. He is prohibited from carrying the "quintessential self-defense weapon" in America (*Heller,* 554 U.S. at 629) while he is in Denver.

3. This Case is Not About Concealed Weapons

Both the State and its *amicus* try to skirt this blatant violation of Peterson's Second Amendment rights by arguing that the Second Amendment does not guarantee the right to carry a ***concealed*** weapon.[1] They cite various authorities that supposedly support this proposition, most notably *Robertson v. Baldwin,* 165 U.S. 281 (1897). They fail to mention that *Robertson* is a case about holding seamen to their obligations to work and has nothing to do with firearms. The *Robertson* court, to emphasize its point that constitutional rights are not unlimited, threw out in *dicta* that the

[1] The State goes so far as to raise for the first time on appeal that Peterson lacks standing to bring a Second Amendment claim. While normally issues raised for the first time on appeal should not be considered, Peterson acknowledges that questions of subject matter jurisdiction can be raised at any time. Peterson nevertheless disposes of the State's ***concealed*** weapon argument without difficulty.

Second Amendment does not protect the right to carry a concealed weapon. The Court provided no analysis of this point.

The State's *amicus* goes so far as to assert that *Heller* "found public concealed-carry restrictions to be in line with permissible gun laws." Brief of Brady Center, p. 2. In fact, neither the pages *amicus* cites, nor any other pages of *Heller,* say any such thing. At no point in *Heller* does the Court address whether laws against carrying concealed weapons impact the Second Amendment right.

Whether the Second Amendment is implicated by laws banning concealed weapons is, however, of little import in this case. Both the State and its *amicus* attack their own straw man by arguing, for pages in their briefs, that the Second Amendment does not protect such a right. What they fail to recognize is that ***Peterson does not assert a Second Amendment right to carry a*** concealed ***weapon.*** In the Amended Complaint, Peterson asserts, "When he visits Denver, Peterson wishes to exercise his right to keep and bear arms by carrying a functional handgun for self defense." Applt. Append., p. 8, ¶ 8. In Count 5 of the Amended Complaint, Peterson alleges, "By prohibiting any meaningful opportunity for Plaintiff to bear arms in the City and County of Denver through a licensing scheme that precludes Plaintiff from obtaining a necessary license to bear arms, Defendants have

violated Plaintiff's right to bear arms guaranteed by the Second Amendment to the Constitution of the United States." *Id.*, p. 15, ¶59.

Thus, it is clear that Peterson's Second Amendment claim is not premised on his inability to carry ***concealed*** weapons. It is premised on his inability to carry weapons ***at all.*** The State and its *amicus* have fabricated the claim that Peterson is suing because he cannot carry a ***concealed*** weapon.[2]

Perhaps anticipating that Peterson would call the State on its straw man argument, the State argued *a priori* that if Peterson wants an adequate "outlet" for exercising his Second Amendment rights, then "it was incumbent upon [Peterson] to challenge a law that actually implicated those rights." State Brief, p. 41. The State seems to have forgotten that Peterson sued the Denver sheriff (Kilroy) for denying Peterson's application for a license to be able to carry a firearm in Denver. The State inserted itself into the case by intervening and now seems to complain that it finds itself carrying the weight of Kilroy's defense. The State's argument begs the

[2] The State's *amicus* incorrectly asserts that the "permitting process at issue here … only impacts the concealed carrying of weapons *in public*…." [Emphasis in original]. Brady Center Brief, p. 14. As already discussed, Denver requires a CHL to carry a firearm ***at all,*** either openly or concealed, and Peterson has challenged his ability to get a CHL in order to carry a firearm ***at all.*** Because of this fundamental misunderstanding of the issues in this case, large portions of *amicus'* Brief are inapplicable.

question, if the State of Colorado believes Denver's licensing requirement is unconstitutional, then why hasn't the State of Colorado do something about it?

The State further argues that Peterson somehow was obligated to attack Denver's licensing requirement rather than Kilroy's refusal to issue Peterson a CHL. The State fails to recognize that a CHL ***is*** the license issued by Denver (via Kilroy) for compliance with Denver's licensing requirement. The State faults Peterson for attempting to comply with the licensing requirement by actually applying for a license, instead of just suing to overturn the licensing requirement. Peterson is not claiming that Denver may not require a license to carry a firearm (but if the State believes that to be the case, the State can bring its own action against Denver). Rather, Peterson is arguing that a licensing requirement for the exercise of a fundamental constitutional right must not be implemented in an arbitrary or unreasonable fashion.

Perhaps the State would have been happier if Denver had created its own licensing system for carrying firearms instead of "piggybacking" on the State's system for CHLs. The reality is, however, that Denver did piggyback on the State's system, requiring a State CHL to carry a firearm, even openly, in Denver. If this were not complicated enough, the State

chose to delegate the issuance of ***State*** CHLs in Denver to the Denver Manager of Safety - Kilroy. We are therefore left with the somewhat convoluted situation where Denver controls the issuance of a State CHL, which Denver requires one to have in order carry a firearm in Denver, but Denver refuses to defend the licensing process that Denver chose to use because it is a State licensing process.

Of course, if the State does not like that arrangement, it is free to change its laws in any number of ways, including taking control of State CHL issuance away from Denver, or prohibiting Denver from requiring a State CHL (as opposed to some kind of City license) to carry a firearm in Denver. Instead, however, the State complains that Peterson tried to follow the law and applied for the license that Denver requires him to have in order to carry a firearm in Denver – a State CHL.

The combined licensing laws of Colorado and Denver, and Kilroy's denial of Peterson's application, are not of Peterson's making. He merely is trying to address the result that he is disarmed in the City and County of Denver.

4. The Second Amendment Is Implicated By Denver's Ban

When Peterson filed his opening Brief, he argued that the bulk of the case law regarding the standard of review for Second Amendment claims

applies to people who have been judicially determined not to be law-abiding. The application of intermediate scrutiny in those cases may have been appropriate, but not in a case such as the instant one where Peterson is a law-abiding citizen and no allegations to the contrary have been introduced. Brief of Appellant, p. 34. Since the filing of that the Brief, the Seventh Circuit has ratified and adopted that argument. In *Ezell*, the Court said, "Intermediate scrutiny was appropriate in *Skoien* because the claim was not made by a 'law-abiding, responsible citizen' as in *Heller*, 554 U.S. at 635; nor did the case involve the central self-defense component of that right…. Here, in contrast, the plaintiffs *are* the 'law-abiding, responsible citizens' whose Second Amendment rights are entitled to the full solicitude under *Heller*, and their claim comes much closer to implicating the core of the Second Amendment right." [Emphasis in original]

In the instant case, Peterson has been deprived of the ability to "carry arms in case of confrontation." "[A] severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end…. [T]he City must demonstrate that [non-residents' carrying firearms in Denver] creates such genuine and serious risks to public safety that prohibiting [such non-resident carry] throughout the city is justified."

Id. at pp. 59, 61. The *Ezell* court referred to this as "not quite strict scrutiny." *Id.*

Of course, Kilroy cannot meet that burden.[3] There is no "extremely strong public interest justification" in keeping non-residents disarmed in Denver, while allowing Colorado residents (with licenses) and other non-residents (with recognized out of state CHLs) to exercise the right to bear arms freely. The *Ezell* court made clear that "anecdotal justifications" were insufficient. *Id.* at p. 62. The *Ezell* court also criticized the poor justification of the government (the City of Chicago) because "[T]he City produced no empirical evidence whatsoever and rested its entire defense of the [ban] on speculation about accidents and theft." *Id.* at p. 63. The *Ezell* court was extremely pessimistic that Chicago could justify city-wide bans of gun ranges.

Applying these concepts to the instant case, Kilroy and Denver have introduced no empirical evidence that non-residents from states whose resident CHLs are not recognized cause more gun violence than residents do. In fact, Kilroy introduced no evidence at all that licensed non-residents

[3] This appeal exhibits the unusual situation where the defendant below, Kilroy, has declined to file a brief at all, leaving the State intervenor to defend Kilroy's and Denver's refusal to license residents to carry firearms openly in Denver, but not non-residents. The State has not attempted to do so, instead defending its ***concealed*** carry licensing system.

cause violent crime. The State claims that less information is available about non-residents, but stops there, without giving any indication that licensed non-residents are inherently more dangerous than licensed residents. The State offers no explanation for why Colorado residents should be able to carry firearms in Denver but that non-residents only from those states without reciprocity should not.

Instead, the State argues that Denver's ban on non-resident carry of firearms does not even affect a right protected by the Second Amendment. Of course, this argument relies on the conclusion that the Second Amendment does not protect carrying firearms outside the home, a conclusion that already has been discussed and refuted.

The State prefers to confine the discussion to where a non-resident from a non-reciprocity state ***may*** carry a firearm in Denver without a license, rather than the much larger (unlimited) list of places where the nonresident such as Peterson ***may not*** carry a firearm. Off limits are sidewalks, streets, parks, restaurants, banks, office buildings, gas stations, convenience stores, other retail stores, shopping malls, parking ramps, empty lots, people's homes (other than Peterson's own "dwelling"), athletic fields, movie theaters, grocery stores, and street fairs. The list truly is limitless, yet the State dogmatically insists that the Second Amendment is not implicated by a

ban on nonresident carry in any one of these places. Even the "village green," upon which people might assemble as a militia, is off limits to nonresidents (despite the fact that nonresidents are constitutionally entitled to membership in the state national guard -- see *Lee v. Miner*, below). The State's position on this issue is untenable.

5. Intermediate Scrutiny Applies Only in Second Amendment Cases Involving Non-Law-Abiding Citizens

The State next argues that, even if the Second Amendment does apply, Kilroy's refusal to license Peterson to carry a firearm in Denver is subject to intermediate scrutiny. The State relies primarily on *U.S. v. Reese*, 627 F.3d 792 (10th Cir. 2010), saying, "[*Reese's*] application of intermediate scrutiny set the precedent for the level of scrutiny to be applied to Second Amendment challenges in this circuit." State Brief, p. 49.

Not quite. *Reese* examined the standard of review for the application of 18 U.S.C. § 922 (g)(8), the federal statute criminalizing possession of firearms by persons subject to certain domestic relations orders. The *Reese* Court compared § 922(g)(8) to § 922(g)(9), which bans possession of firearms by persons convicted of misdemeanor crimes of domestic violence. What *Reese* actually said was, "[B]oth statutes prohibit the possession of firearms by narrow classes of persons who, based on their past behavior, are more likely to engage in domestic violence. ***Based upon these***

characteristics, we conclude that § 922(g)(8) … is subject to intermediate scrutiny." 627 F.3d at 802 [emphasis supplied].

Reese did not make the sweeping pronouncement that the State claims it did, applying intermediate scrutiny to all Second Amendment claims. Unless the State is prepared to argue that Peterson, based on his past behavior, is more likely to engage in domestic violence, then *Reese's* application of intermediate scrutiny has no bearing on this case.

The proper level of scrutiny, according to *Ezell* (which the State favorably cites), is "not quite strict scrutiny." Just like the plaintiffs in *Ezell*, Peterson is a law-abiding, responsible citizen. His "crime" is being a resident of Washington, and his punishment is disarmament when he is in Denver. Kilroy has not articulated ***any*** justification for this punishment, let alone have they "[borne] the burden of establishing a strong public-interest justification] for Peterson's punishment. The State's attempted justification for its own CHL requirements do not fill the gap.

6. Peterson's Injury is Traceable to Kilroy and Peterson Has Standing

As noted above, the State has introduced the defense of Peterson's standing for the first time on appeal. In particular, the State focuses on "traceability," the requirement that a plaintiff's injury be traceable to the defendant. In this case, Peterson has complained that Kilroy has violated

Peterson's Second Amendment rights by enforcing a licensing requirement that precludes Peterson from carrying a firearm in Denver because Peterson is not a resident of Colorado or a resident of a reciprocity state. Kilroy admits that she denied Peterson's license application on account of Peterson's nonresidency, and the State does not assert that someone besides Kilroy was responsible. The State only complains that Peterson has attacked the Colorado statute and concludes, without explanation, "Peterson cannot simply pick and choose which law to challenge based on his own preferences." State Brief, p. 41.

A party has standing if he 1) has suffered an injury that is 2) concrete and particularized, and actual or imminent and not conjectural or hypothetical, and that is 3) fairly traceable to the challenged action of the defendant, and 4) it is likely that the injury will be redressed by a favorable decision. *Friends of the Earth v. Laidlaw Environment Services, Inc.,* 528 U.S. 167, 180 (2000) The State's argument that Plaintiff attacked the wrong statute does not fit into the concept of traceability. Perhaps it would fit into the final prong, redressability, even though that is not what the State has argued.

It is clear from the Amended Complaint, however, that Peterson has attacked the "licensing scheme that precludes Plaintiff from obtaining the

necessary license to bear arms," [Applt. Append., p. 15], and not the Colorado law directly. The only aspect of the Amended Complaint that suggests an attack on Colorado law is the Prayer for Relief. *Id.*, p. 16.

The State overlooks that a prayer for relief does not affect standing. A "final judgment should grant the relief to which a party is entitled, even if the party has not demanded that relief in its pleadings." Fed.R.Civ.Proc. 54(c). Thus, if this Court (or the District Court on remand) believes a better or different remedy can be fashioned, that is of no consequence on Plaintiff's standing. The fact remains that Plaintiff was injured by Kilroy's denial of Plaintiff's application, because Plaintiff is left with no ability to carry a firearm in Denver solely on account of his nonresidency. While invalidating the Colorado law is but one way to remedy the situation, there certainly are others.

7. Davis Is Responsible for Administering Colorado's CHL Reciprocity

The State makes the awkward argument that Davis has nothing to do with reciprocity of CHLs between Colorado and other states, but that ***Kilroy does.*** There is nothing in the law or in practice to indicate that Kilroy and her fellow county sheriffs are responsible for deciding which states' CHLs the State of Colorado will recognize and which ones it will not. It goes without saying that if the Adams County sheriff decided that Colorado ***does***

recognize Washington CHLs and Kilroy decides that Colorado ***does not,*** a great deal of chaos and confusion would result.

Adding to the confusion is the disagreement among the Appellees regarding who ***is*** responsible for administering the reciprocity system. The State insists it is Kilroy and her fellow sheriffs. Kilroy insists that it is not:

> [The State argues that the statute] somehow places upon [Kilroy], and the other county sheriffs, the duty to administer and implement reciprocity agreements between the state of Colorado and other states. Appellee's Answer Brief, pp. 18, 19. This statute however, is completely silent as to administration and implementation and the county sheriffs would have no way of knowing whether any reciprocity agreements exist between the state of Colorado and any other state. Denver cannot agree with this argument.[4]

Kilroy's Notice of Non-Filing of Brief, p. 2. Kilroy therefore agrees with Peterson, that the "statute is silent." Given that the law is silent as to who ***should*** administer the system, it is merely a matter of fact as to who ***does*** administer the system. The District Court should therefore have left undisturbed Peterson's allegation that Davis administers it, because courts are obligated to take well-pleaded facts to be true when considering a motion to dismiss. This is especially so given that Davis admits that he "maintain[s] a database of states with which Colorado maintains reciprocity." Applt.

[4] Kilroy likewise disagrees with the State's conclusion that Peterson has no standing to bring his Second Amendment claim.

Append., p. 26. With that admission, it simply is erroneous to conclude that Davis has nothing to do with reciprocity.

8. The Privileges and Immunities Clause Protects More Than Economic Rights

The State argues (for the first time on appeal) that the "Privileges and Immunities clause protects fundamental *economic* rights, and nothing more." [Emphasis in original]. State Brief, p. 24. While it is true that most Privileges and Immunities cases tend to involve economic interests, it simply is not true that ***only*** economic rights are protected. What is truly astonishing, however, is that the State cites a case for that proposition when the case holds just the opposite. In *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), the Court ruled that the Privileges and Immunities Clause does ***not*** protect just economic rights:

> The lawyer's role in the national economy is ***not*** the only reason that the opportunity to practice law should be considered a "fundamental right" [for Privileges and Immunities Clause purposes]. We believe that the legal profession has a ***noncommercial*** role and duty that reinforce the view that the practice of law falls within the ambit of the Privileges and Immunities Clause. Out-of-state lawyers may – and often do – represent persons who raise unpopular federal claims. In some cases, representation by nonresident counsel may be the only means available for the vindication of federal rights. The lawyer who champions unpopular causes surely is as important to the "maintenance or well-being of the Union" as was the shrimp fisherman in *Toomer* or the pipeline worker in *Hicklin.*

470 U.S. at 281. [Emphasis supplied, internal citations omitted]. The *Piper* Court was even more explicit in a footnote that appeared in the above passage: ***This Court has never held that the Privileges and Immunities Clause protects only economic interests.*** *Id.*, FN 11 [emphasis supplied].

The *Piper* Court cited an earlier Supreme Court case for this latter point. In *Doe v. Bolton*, 410 U.S. 179, 200 (1973), the Court said, "Just as the Privileges and Immunities Clause protects persons who enter other States to ply their trade, so it must protect persons who enter Georgia seeking medical services that are available there." It is important to note that the economic aspects of practicing medicine were not part of the analysis in *Doe*. In fact, the lead appellant, Mary Doe, alleged that she could not afford to pay for an abortion and only could get one if it were provided for free. *Id.* at 185-186. Surely if an unenumerated right, such as the right to obtain an abortion, is protected by the Privileges and Immunities Clause, a fundamental and enumerated right, such as the right to bear arms, also enjoys such protection.

Finally, at least two Circuit Courts, including this Court, relying on *Piper* and *Bolton*, have found Privileges and Immunities Clause protection on noneconomic grounds. *See, e.g., Nelson v. Geringer*, 295 F.3d 1082, 1090 (10th Cir. 2002) ("We therefore hold that participating in the Wyoming

National Guard … is a privilege under the Privileges and Immunities Clause…. [W]e hold that participation in the National Guard constitutes a privilege protected for other, noneconomic reasons….”); *Lee v. Miner,* 458 F.3d 194 (2006) (invalidating state law limiting access to public records to residents of that state – and explicitly repeating the quote from *Piper* that the Privileges and Immunities Clause does not apply just to economic issues).

9. Denver Treats Peterson As an Unwelcome Guest

The State agrees that the right to travel is not found in any particular source in the Constitution, but then insists that this Court must find it only in the Privileges and Immunities Clause and must apply intermediate scrutiny. The State then goes into a discussion of its rationale for requiring CHL applicants to be residents. The State loses sight, however, that a Colorado CHL has a separate purpose in this case. Under Denver law, a person must have a Colorado CHL to carry a firearm in public in Denver ***at all*** (i.e., not just concealed). Peterson therefore applied for a Colorado CHL from Kilroy, and Kilroy denied the application solely on the grounds that Peterson is not a Colorado resident.

As already discussed, whether Denver may require a license to carry a firearm is not the issue before this Court. Peterson accepted the license requirement and duly applied for the required license. Kilroy denied his

application. It is not Peterson's problem that Denver is using a license intended for one purpose (carrying a concealed weapon in Colorado) for another purpose (carrying a firearm at all in Denver).

The State emphasizes "public safety" as its end and residency as its means to the end. But, that end, under state law, only applies to concealed carry of firearms. It does not apply to open carry. Only Denver law applies to open carry. The State fails to explain why public safety is not implicated if Peterson were to carry a firearm openly outside of Denver, but that public safety is severely threatened if Peterson were to carry the same firearm concealed.

Even more removed from the State's analysis is how public safety is threatened if Peterson carries a firearm in Denver in any manner. The State offers no explanation at all for why one must be a resident to carry a firearm in Denver – and that is the crux of this case. The State only attempts to defend its own ***concealed*** licensing statute. It makes no attempt to defend the Denver use of a residency requirement for firearm carry. Of course, by declining to file a brief or otherwise participate in this appeal, Kilroy (and Denver) have opted to sit on the sidelines and hope the State will carry the ball for them.

The reality of this case is that Denver has chosen to use a state-created license for a local purpose – the regulation of carrying firearms, even openly. While there is nothing inherently wrong in using a license for multiple purposes, the license requirements have to be constitutionally sound for the particular application. Denver implicitly adopted all the state licensing requirements when it chose to use the State CHL as its local carry license. This means Denver has adopted a residency requirement to obtain a license to carry a firearm in Denver. Kilroy administers that requirement, and the requirement infringes on the right to travel by treating non-residents as unwelcome guests. While the State may discuss to its heart's content why residency is important for carrying concealed in Colorado, in the end those arguments (questionable as they may be) are irrelevant to this case.

It would be the same if Denver were to adopt an ordinance requiring a Colorado driver's license to obtain an abortion in Denver. Denver could say the ordinance just seeks to ensure age and identification, but the fact that a person must be a Colorado resident to obtain a Colorado driver's license would come with the package. Denver would have passed, in effect, an ordinance requiring a person to be a Colorado resident to obtain an abortion in Denver, and we know from *Bolton*, discussed above, that such an ordinance would be unconstitutional. Denver likewise cannot pass an

ordinance requiring a person to be a resident in order to carry a firearm, and that is just what Denver has done. Kilroy has implemented that ordinance by denying Peterson a license to carry a firearm solely on account of Peterson's non-residency.

Conclusion

Peterson has shown that the Second Amendment protects the right to carry firearms outside the home at its core, and the Denver's licensing scheme infringes on that right. Intermediate scrutiny is not the appropriate standard of review for core Second Amendment cases involving law-abiding citizens. Denver's scheme also burdens Peterson's privileges and immunities and right to travel. Finally, Davis is responsible for administering the State's CHL reciprocity system. For the foregoing reasons, the judgment of the District Court should be reversed regarding Peterson's Second Amendment, Right to Travel, and Privileges and Immunities Clause claims. Davis also should be reinstated as a defendant on the issue of reciprocity.

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Certificate of Compliance

I certify that this Reply Brief of Appellants complies with F.R.A.P. 32(a)(7)(B) length limitations, and that this Reply Brief of Appellants contains 6,088 words as determined by the word processing system used to create this Reply Brief of Appellants.

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Certificate of Service

I certify that I served a copy of the foregoing Reply Brief of Appellants via ECF on August 8, 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 Reply Brief of Appellants and that the computer systems used to create the foregoing Reply Brief of Appellants have up-to-date virus protection software.

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