

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

ARMANDO PLIEGO GONZALEZ,)	
SECOND AMENDMENT FOUNDATION, INC.,)	
and NEBRASKA FIREARMS OWNERS ASSOCIATION,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 8:11-CV-335
)	
CITY OF OMAHA, NEBRASKA, a municipal)	
corporation, JIM SUTTLE, individually and in his)	
official capacity as Mayor of Omaha, Nebraska,)	
and ALEX HAYES, individually and in his official)	
capacity as Chief of Police of Omaha, Nebraska,)	
)	
Defendants.)	

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

NOW COME the Plaintiffs, ARMANDO PLIEGO GONZALEZ, SECOND AMENDMENT FOUNDATION, INC. and NEBRASKA FIREARMS OWNERS ASSOCIATION, by and through undersigned counsel, by and through undersigned counsel, and submit their Memorandum of Points and Authorities in Support of their Motion for Preliminary Injunction.

Dated: November 18, 2011

Respectfully submitted,

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

PRELIMINARY STATEMENT

Omaha Municipal Code § 20-253(9), which denies otherwise-qualified legal aliens the ability to register concealable firearms for home possession, flatly violates the Plaintiffs' Second Amendment rights to keep and bear arms. Also, because otherwise-qualified U.S. citizens are not restricted from registering concealable firearms in Omaha, Plaintiffs' right to equal protection of the law under the Fourteenth Amendment is being violated. The deprivations of constitutional rights subject Plaintiffs to irreparable harm, and is such a clear-cut unconstitutionally-inflicted harm that Plaintiffs are likely to succeed on the merits by the conclusion of this litigation. The City's law, if not preliminarily enjoined, also poses an immediate threat to public safety, as an entire class of Omaha residents has been and continues to be wrongfully denied the right and ability to defend their persons and homes from criminal intruders. Omaha has no valid interest in completely banning legal aliens from registering concealable firearms for home possession when citizens are not so banned. Therefore, the balance of interests falls heavily on Plaintiffs' side, and preliminary injunctive relief is warranted and appropriate.

STATEMENT OF FACTS

A. Omaha's Ordinance Bans Legal Aliens from Concealable Firearm Registration

The City of Omaha requires that its residents who wish to purchase and possess a "concealable" firearm for their homes must register said firearm with the Omaha Police Department ("OPD"). Omaha Municipal Code § 20-251(a) states that "[i]t shall be unlawful for any person to own, have possession of, or maintain control over any concealable firearm which

has not been registered to said person with the chief of police in accordance with this division, except when such possession or control is with the knowledge and express consent of the person in whose name such concealable firearm is registered. “

“Concealable firearm” is defined as “A firearm having a barrel less than 18 inches in length.” Omaha Municipal Code § 20-191. This definition includes handguns.

While the Plaintiffs are not challenging Omaha’s entire registration scheme in this proceeding, the gravamen of Plaintiffs’ Complaint is Omaha Municipal Code § 20-253, which states, in relevant part:

- (a) Any person desiring to register a concealable firearm shall make an application to the chief of police stating therein that he or she holds the qualifications to register a concealable firearm in accordance with this section.
- (b) The chief of police will conduct an investigation to determine if the applicant is qualified to register the firearm. A concealable firearm may not be registered to any person who:

...

(9) Is not a citizen of the United States. (Emphasis added.)

This Code section prohibits PLIEGO and all other legal aliens residing in Omaha from registering and possessing handguns for possession in their homes.

If a resident of Omaha purchases a concealable firearm outside of Omaha, it must be brought to the OPD and turned in until the purchaser’s registration application is approved. If the firearm is purchased in Omaha, the purchaser cannot take it from the place of purchase, but must instead take the receipt to OPD and apply for a registration permit.

Omaha Municipal Code § 20-256 states that “Any person whose application for registration of a concealable firearm is denied shall have ten days in which to provide for

proper registration or other lawful disposition of the concealable firearm. During this time the chief of police shall maintain custody of the concealable firearm. If the applicant fails to provide for the proper registration or other lawful disposition of the concealable firearm within this time, it shall be presumed that the concealable firearm is an unregistered concealable firearm and the chief of police may apply to the municipal court for an order of confiscation.”

The penalty for possessing an unregistered concealable firearm in Omaha is “. . . a fine of not exceeding \$500.00, or by imprisonment not to exceed six months, or both such fine and imprisonment in the discretion of the court.” Omaha Municipal Code § 1-10. “Each day any such violation or failure to perform such act shall continue shall constitute a separate offense, unless otherwise specifically provided.” *Id.* The firearm will also be confiscated and destroyed by the City upon conviction for a violation. Omaha Municipal Code §20-193.

It is unclear what Omaha’s purpose was for enacting this prohibition, which serves solely to discriminate against Omaha’s qualified legal alien population, including PLIEGO and members of SAF and NFOA, though there is no purpose Omaha can offer that passes constitutional muster.

B. The Registration Prohibition’s Impact on PLIEGO and Similarly-Situated Omaha Residents.

PLIEGO has been a permanent resident alien of the United States since on or about October 9, 2008. He has lived in Omaha for more than a decade. His wife is also a lawful permanent resident and has been in Omaha since 1999. They are both employed in Omaha, and their four children are all products of the Omaha educational system, including its institutions of higher learning. His family was victimized by a home invasion in 2010. PLIEGO has a Nebraska State permit to purchase a handgun under R.R.S. Neb. §§ 69-2401 through 69-

2425. PLIEGO is concerned about his ability to defend his family and himself in the event of a further violence in his home. *See* Declaration of Armando Pliego-Gonzalez.

SAF is a non-profit membership organization incorporated under the laws of Washington with its principal place of business in Bellevue, Washington. SAF's membership includes lawfully admitted aliens residing in Omaha, Nebraska. SAF has over 650,000 members and supporters nationwide, including more than one thousand in the City of Omaha, Nebraska. The purposes of SAF include education, research, publishing and legal action focusing on the Constitutional right privately to own and possess firearms. SAF litigates this action on behalf of itself and its members, and as such has organizational standing to pursue this action and Motion. *See* Declaration of Julianne H. Versnel, Director of Operations of SAF.

NFOA is an organization incorporated under the laws of Nebraska with its principal place of business in Syracuse, Nebraska. The purposes of NFOA include education, political lobbying and legal action focusing on the Constitutional right privately to own and possess firearms in Nebraska. NFOA litigates this action on behalf of itself and its supporters, which include lawfully admitted aliens residing in Omaha, Nebraska, and as such has organizational standing to pursue this action and Motion. *See* Declaration of Andreas J. Allen, President of NFOA.

Every day that passes without relief from Omaha's registration prohibition, all legal aliens residing in Omaha who are otherwise qualified to possess firearms, including PLIEGO and the members and supporters of Plaintiffs SAF and NFOA, are frustrated in their ability to purchase and possess handguns for self-defense, and to enjoy their constitutional rights.

But for the criminal enactments challenged in this complaint, PLIEGO and the qualified legal alien members of SAF and NFOA would possess concealable firearms including handguns in their homes, but refrain from doing so for fear of arrest, prosecution, fine and incarceration.

SUMMARY OF ARGUMENT

Omaha's prohibition on legal aliens registering handguns for home possession and self-defense, regardless of said legal alien's possession of a State permit, unquestionably violates the constitutional guarantees of keeping arms and equal protection under the laws, as do any other of Omaha's various ordinances that, regardless of their validity as generally applied, undeniably frustrate constitutionally-secured rights of handgun possession.

Considering the certainty of success on the merits, Plaintiffs are entitled to preliminary injunctive relief. Plaintiffs are suffering, and will continue to suffer, irreparable harm in the absence of injunctive relief, for which there is no adequate remedy at law. Granting Plaintiffs relief cannot injure Defendant. And given the degree to which Omaha's registration prohibition threatens the safety of Plaintiffs, their families and the affected general public, the public interest - already favoring the exercise of fundamental rights - is clearly satisfied by immediately enjoining Omaha's unconstitutional practices.

ARGUMENT

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). Plaintiffs easily satisfy all three threshold requirements for obtaining preliminary injunctive relief, and the balance of interests weigh heavily in their favor.

I. THE SECOND AMENDMENT APPLIES TO PLAINTIFF PLIEGO AND THE ORGANIZATIONAL PLAINTIFFS' LEGAL ALIEN MEMBERS

The question of whether PLIEGO, a lawful alien residing in Omaha, and the similarly-situated organizational Plaintiffs' members, enjoy Second and Fourteenth Amendment rights is an easy one – the Supreme Court has ruled that they do. ". . . '[T]he people' protected by the . . . Second [Amendment] . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). That includes those who are legally in the country. *See United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904).

"The Fourteenth Amendment provides, 'Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'" It has long been settled, and it is not disputed here, that the term 'person' in this context encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside.'" *Graham v. Richardson*, 403 U.S. 365, 371 (1971) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

State action violates equal protection rights if it separates individuals into discrete classes based on citizenship and subjects those individuals to disparate treatment. *Graham*, 403 U.S. at 371, 377. A classification based on an individual's status as an alien is "inherently suspect and subject to close judicial scrutiny." *Id.* at 372. "Aliens as a class are a prime example of a 'discrete and insular' minority (*see United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, n. 4 (1938)) for whom such heightened judicial solicitude is appropriate." *Graham*,

403 U.S. at 372. “The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide ‘in any state’ on an equality of legal privileges with all citizens under non-discriminatory laws.” *Id.* at 374 (quoting *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 420 (1948)).

Further, legal aliens in the United States have been extended the same Constitutional rights as citizens in a variety of other situations for more than one hundred years. *See, e.g., Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (resident alien is a “person” within the meaning of the Fifth Amendment); *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (resident aliens have First Amendment rights); *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931) (Just Compensation Clause of Fifth Amendment); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (resident aliens entitled to Fifth and Sixth Amendment rights). Even illegal aliens then-presently in the Country receive protection under the Fourteenth Amendment’s Due Process Clause. (*See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 693 (2001)).

Recently, the Seventh Circuit compared the analysis of infringements of Second Amendment rights to those of infringements of First Amendment rights (*See Ezell v. City of Chicago*, 2011 U.S. App. LEXIS 14108 (7th Cir., July 6, 2011) (ban on gun ranges within City limits ruled unconstitutional). According to *Ezell*, infringements on the core Second Amendment right of possession for self-defense must satisfy a level of scrutiny approaching strict scrutiny. *Id.* at *60. This means Omaha’s prohibition, “. . . 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.” *Id.* at *59. Though the Eighth Circuit has yet to consider the issue, the *Ezell* decision is comprehensive, well-considered, and its

holdings and reasoning should be followed by this Court. Doing so, it is evident Omaha cannot defend its ban. Further, under any level of scrutiny (rational basis not even being up for consideration under *District of Columbia v. Heller*, 128 S. Ct. 2783, 2818, fn 27 (2008)), Omaha's ordinance fails.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF PRELIMINARY INJUNCTIVE RELIEF.

PLIEGO, and other members and supporters of SAF and NFOA, enjoy a fundamental right to keep and bear arms. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3042 (2010) (majority op.) (Alito, J.). "[T]he inherent right of self-defense has been central to the Second Amendment right." *Heller*, 128 S. Ct. at 2817. The denial of constitutional rights, even if such deprivation were temporary, constitutes irreparable harm for purposes of granting injunctive relief (*See, e.g., Lowry v. Watson Chapel School District*, 540 F.3d 752, 762 (8th Cir. 2008) (First Amendment freedom of expression) (citing *Elrod v. Burns*, 427 U.S. 347, 373, (1976)); *See also Shrink Missouri Government PAC v. Adams*, 151 F.3d 763, 764 (8th Cir. 1998) (unconstitutional campaign contribution limits as violative of freedom of speech).

As noted above, in *Ezell* the Seventh Circuit favorably compared the fundamental freedoms of the Second Amendment to those fundamental freedoms of the First Amendment and deemed the deprivation of either to be irreparable harm. The *Ezell* Court held that "[t]he loss of a First Amendment right is frequently presumed to cause irreparable harm based on "the intangible nature of the benefits flowing from the exercise of those rights; and the fear that, if those rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future." . . . The Second Amendment protects similarly intangible and unquantifiable interests. *Heller* held that the Amendment's central

component is the right to possess firearms for protection. (cite omitted). Infringements of this right cannot be compensated by damages.” See *Ezell*, 2011 U.S. App. 14108 at *32.

Put simply, if OMC § 20-253(9) is not struck down, legal aliens including the plaintiffs will continue to be unconstitutionally frustrated in their ability to exercise their fundamental Second Amendment rights.

Considering that the Second Amendment exists to secure the right of armed self-defense, the inability to access constitutionally-protected arms also causes a profound loss of a sense of one's security, to say nothing of the irreparable harm resulting from a successful criminal attack, or tragic accident that could have been averted with access to a firearm. The irreparable harm flowing from any delays in obtaining relief is palpable.

III. TRADITIONAL LEGAL REMEDIES ARE INADEQUATE TO RELIEVE THE HARM OF THE BAN ON REGISTRATION BY LEGAL ALIENS.

There is no way to quantify, in terms of money damages, the inability to engage in protected Second Amendment activity such as possession of a concealable firearm such as a handgun. The infringement of constitutional rights is frequently considered to be beyond quantification with money damages. See *Ezell*, 2011 U.S. App. 14108 at *32; See also, e.g., *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) (First Amendment free speech rights).

No legal remedies will be available to legal aliens whose registration applications for handguns for home possession will be refused because non-citizens are denied equal protection of Omaha’s firearms laws. And quite obviously, no legal remedies will suffice to compensate those killed or injured for lack of lawfully-possessed defensive arms, owing to Omaha’s registration ban.

IV. PLAINTIFFS WILL PREVAIL ON THE MERITS, AS OMAHA'S BAN ON CONCEALABLE FIREARM REGISTRATION VIOLATES THEIR SECOND AND FOURTEENTH AMENDMENT RIGHTS.

Possession of Handguns for Lawful Purposes Including Self-Defense Lies at the Core of the Second Amendment.

"[T]he standard for preliminary injunctive relief requires a showing of a "likelihood of success on the merits rather than actual success" as necessary for permanent relief." *Sierra Club v. United States Army Corps of Engineers*, 645 F.3d 978, 993 (8th Cir. 2011).

"[T]he Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees . . . fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 579-80 (1980). Unsurprisingly, the Supreme Court has noted that the enumerated, articulate right to possess a firearm for lawful purposes, most notably for self-defense, are fundamentally core to the Second Amendment. *McDonald*, 130 S.Ct. at 3043.

In *Heller*, neither the D.C. Circuit nor the Supreme Court bothered to engage in any balancing test or other extended analysis before striking down Washington, D.C.'s ban on the possession of functional firearms for self-defense, as that law literally contradicted a "core" aspect of Second Amendment rights. *Heller*, 128 S. Ct. at 2818. A complete ban on possession of concealable firearms by an entire class of legal Omaha residents, based on nothing more than citizenship status, will meet the same fate.

Omaha's Ordinance fails all four factors. It is not within the City's constitutional power to ban otherwise qualified legal alien residents from possessing concealable firearms, including handguns which have been expressly deemed constitutionally protected by the Supreme Court

(*See Heller*, 128 S.Ct. at 2817-18 (“Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home ‘the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family,’ would fail constitutional muster.”) - doing so violates the Second and Fourteenth Amendments. The city has no interest, let alone an extremely strong one, in denying all legal aliens their fundamental Second Amendment right of handgun possession. The Plaintiffs are those who are otherwise qualified to possess firearms, including having a State permit. In light of the above, a preliminary injunction against the enforcement of OMC § 20-253(9) should be immediately entered.

V. THE BALANCE OF INTERESTS FAVOR IMMEDIATE INJUNCTIVE RELIEF.

The Plaintiffs are certain to prevail on the merits. Absent relief they will continue to suffer irreparable injury in the loss of Second and Fourteenth Amendment rights, if not actual physical harm. The City has no legitimate interest in the prohibition; and the public interest strongly favors equal protection of the law, and the respecting of fundamental rights, to say nothing of the ability of all qualified Omaha residents to defend their families and themselves. The balance of interests could not more completely tilt in favor of immediate injunctive relief.

CONCLUSION

Omaha cannot deny fundamental constitutional rights to an entire class of its residents.

Plaintiffs respectfully request that the motion for preliminary injunctive relief be granted.

Dated: November 18, 2011

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CERTIFICATE OF ATTORNEY AND NOTICE OF ELECTRONIC FILING

The undersigned certifies that:

1. On November 18, 2011, the foregoing document was electronically filed with the District Court Clerk *via* CM/ECF filing system;
2. Pursuant to F.R.Civ.P 5, the undersigned certifies that, to his best information and belief, there are no non-CM/ECF participants in this matter.

 /s/ David G. Sigale
One of the Attorneys for Plaintiffs