

The Honorable Ricardo S. Martinez

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NATIONAL RIFLE ASSOCIATION OF
AMERICA, INC., SECOND AMENDMENT
FOUNDATION, INC., ADRIAN J.
COOMBES, ROELOF KROES, PHILIP
GRADY,

Plaintiffs

v.

STATE OF WASHINGTON, LIZ LUCE,
DIRECTOR, DEPARTMENT OF LICENSING
and PAUL D. AYERS, CHIEF OF POLICE
ISSAQUAH POLICE DEPARTMENT,

Defendants.

No. C08-1613RSM

MOTION AND MEMORANDUM
FOR PRELIMINARY INJUNCTION
FED. R. CIV. P. 65

ORAL ARGUMENT REQUESTED

NOTE ON MOTION CALENDAR
JANUARY 23, 2009

Plaintiffs National Rifle Association of America, Inc., *et al.*, by counsel, pursuant to Rule 65, Fed. R. Civ. P., hereby move this Court to issue a preliminary injunction requiring Defendant Director of Licensing Liz Luce forthwith to renew or issue alien firearm licenses to Plaintiffs Adrian J. Coombes, Philip Grady, and such other lawful permanent resident aliens who may apply pursuant to RCW § 9.41.170. Plaintiffs further move the Court to issue a

1 preliminary injunction restraining Defendant Police Chief Paul D. Ayers from enforcement of
2 RCW § 9.41.170 and RCW § 9.41.070(4) as applied to lawful permanent resident aliens.

3 **Introduction**

4 The individual Plaintiffs are lawful permanent resident aliens who own firearms.
5 Washington makes it a felony for an alien to possess a firearm without an Alien Firearm
6 License issued by the Director of Licensing. However, she refuses to issue such licenses.
7 Coombes' license expires on February 19, 2009, and Grady is unable even to apply for a
8 license. Plaintiffs thus seek a preliminary injunction requiring Defendant Luce forthwith to
9 issue said licenses. In the alternative, a preliminary injunction is sought against enforcement
10 of RCW § 9.41.170, which makes it a felony for a non-U.S. citizen to possess a firearm
11 without a license, and RCW § 9.41.070(4), which requires such license to qualify for issuance
12 of a license to carry a concealed pistol.

13 Washington law and its application here violate the right of lawfully admitted resident
14 aliens to keep and bear arms as guaranteed by the Second and Fourteenth Amendments to the
15 U.S. Constitution, denies them the equal protection of the laws under the Fourteenth
16 Amendment, and denies them the full and equal benefit of all laws and proceedings for the
17 security of person and property as is enjoyed by citizens as provided by 42 U.S.C. § 1981(a).

18 Plaintiffs Coombes, Kroes, and Grady are aliens lawfully admitted into the United
19 States for permanent residence. Declarations of Adrian J. Coombes ("Dec. Coombes,")
20 Roelof Kroes ("Dec. Kroes"), and Philip Grady (Dec. Grady), ¶ 1 of each. Plaintiffs National
21 Rifle Association ("NRA") and the Second Amendment Foundation ("SAF") have numerous
22
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1 members in the State of Washington, including lawful resident aliens. Declaration of Chris
 2 W. Cox (“Dec. Cox”), ¶ 3; Declaration of Alan M. Gottlieb (“Dec. Gottlieb”), ¶ 4.

3 Defendant Liz Luce is the Director, Department of Licensing, State of Washington.
 4 Answer ¶ 8. Defendant Paul D. Ayers is the Chief of Police of the municipality of Issaquah
 5 Washington, where Coombes resides, and as such enforces State law and is in charge of
 6 issuing licenses to carry concealed pistols.

7 **Statutory Background**

8 Plaintiffs are “lawfully admitted for permanent residence,” which means that each has
 9 been “lawfully accorded the privilege of residing permanently in the United States as an
 10 immigrant in accordance with the immigration laws” 8 U.S.C. § 1101(a)(20). Aliens
 11 with criminal records are inadmissible. 8 U.S.C. § 1182(a)(2).¹

12 Revised Code of Washington (“RCW”) § 9.41.170 provides in part:

13 (1) It is a class C felony for any person who is not a citizen of the United States
 14 to carry or possess any firearm, without first having obtained an alien firearm
 15 license from the director of licensing. In order to be eligible for a license, an
 alien must provide proof that he or she is lawfully present in the United States,
 which the director of licensing shall verify through the appropriate authorities.

16 . . .

(2) . . .

17 (b) Before issuing an alien firearm license . . . , the director of licensing shall
 18 ask the local law enforcement agency of the jurisdiction in which the alien
 resides to complete a background and fingerprint check to determine the alien's
 19 eligibility under RCW 9.41.040 to own, possess, or control a firearm. The law
 enforcement agency shall complete a background check within thirty days after
 the request. . . .

21 ¹ The application for an immigrant visa must include a certification by foreign police authorities stating what
 22 their records show concerning the immigrant. 8 U.S.C. § 1202(b). The Department of State searches for any
 23 criminal history records for a visa applicant in the National Crime Information Center's Interstate Identification
 Index (NCIC-III), Wanted Persons File, and other files maintained by the NCIC. 8 U.S.C. § 1105(b)(1).

1 Violation is punishable with five-years imprisonment and a \$10,000 fine. RCW §
2 9A.20.021. In addition, RCW § 9.41.070 provides in part:

3 (1) The chief of police of a municipality or the sheriff of a county shall within
4 thirty days after the filing of an application of any person, issue a license to
5 such person to carry a pistol concealed on his or her person within this state for
6 five years from date of issue, for the purposes of protection or while engaged
7 in business, sport, or while traveling. . . .

The applicant's constitutional right to bear arms shall not be denied, unless:

8 (a) He or she is ineligible to possess a firearm under the provisions of RCW
9 9.41.040 or 9.41.045;² . . .

10 (2) The issuing authority shall check with the national crime information
11 center, the Washington state patrol electronic data base, the department of
12 social and health services electronic data base, and with other agencies or
13 resources as appropriate, to determine whether the applicant is ineligible under
14 RCW 9.41.040 or 9.41.045 to possess a firearm and therefore ineligible for a
15 concealed pistol license. . . .

16 (4) . . . A person who is not a citizen of the United States shall meet the
17 additional requirements of RCW 9.41.170 and produce proof of compliance
18 with RCW 9.41.170 upon application. . . .

19 In contrast with Washington law, federal law treats lawful resident aliens identical
20 with citizens. *United States v. Sandoval-Barajas*, 206 F.3d 853, 856 (9th Cir. 2000), explains:

21 the federal statute [18 U.S.C. § 922(g)(5)] applies only to some aliens, those
22 who are “illegally or unlawfully in the United States,” but the Washington
23 statute [RCW § 9.41.170(1)] applies to all aliens, “any person who is not a
citizen.” . . . The federal statute does not prohibit legal aliens from possessing
firearms, but the Washington statute does, unless they obtain licenses. Thus a
legal alien may be in compliance with the federal statute yet in violation of the
Washington statute.

Facts

24 Plaintiff Coombes has held an Alien Firearms License (AFL) and a Concealed Pistol
25 License (CPL) since 1999. His AFL expires on February 19, 2009. Answer ¶ 15. His CPL,
26 which must be renewed by the Issaquah Police Department, expires on April 1, 2009.
27 Defendant Chief of Police Paul D. Ayers will not renew the license without a valid AFL.

28 _____
29 ² These provisions prohibit firearm possession by convicted criminals and other dangerous persons.

1 Coombes is employed in Service and Sales at Wade's Eastside Guns & Bellevue Range,
2 Bellevue, WA, and will lose his job if his licenses are not renewed. He has a valuable
3 firearm collection which he will lose if his AFL is not renewed. Dec. Coombes, ¶ 3-5.

4 Plaintiff Kroes has an Alien Firearms License which expires in 2010. Answer ¶ 17.

5 Plaintiff Grady, who recently moved to Washington, sought to obtain an application
6 for an AFL, but was refused because the Director of Licensing is no longer issuing such
7 licenses and the application forms were not available. He has a valuable firearm collection
8 which he cannot lawfully possess in Washington without an AFL. Dec. Grady, ¶ 2-4.

9 Coombes, Kroes, and Grady are members of Plaintiff NRA. There are other lawful
10 resident aliens in Washington who are members of Plaintiffs NRA and/or SAF, own firearms,
11 and are required to have an alien firearm license. Dec. Cox, ¶ 6; Dec. Gottlieb, ¶ 4.

12 Other than the citizenship requirement, plaintiffs fulfill all other requirements under
13 Washington Law to possess firearms and to obtain a license to carry a concealed pistol. They
14 also meet all requirements under the laws of the United States to possess firearms. Dec.
15 Coombes, ¶ 8-14; Dec. Kroes, ¶ 7-13; Dec. Grady, ¶ 6-12.

16 The Department of Licensing (DOL) no longer will issue an alien firearm license
17 pursuant to RCW § 9.41.170. Answer ¶ 22. Its website states:

18 We are unable to issue alien firearms licenses at this time. The Federal Bureau
19 of Investigation (FBI) has told law enforcement agencies it is against federal
20 law to use federal databases for background checks if they share the results
21 with a non-criminal justice agency such as the Department of Licensing. As a
22 result: Law enforcement agencies cannot perform the background checks
23 required by state law for issuing an alien firearms licenses. We cannot
complete the application process or issue alien firearms licenses.
<http://www.dol.wa.gov/business/firearms/faalien.html>

Answer ¶ 22.

1 By email dated August 6, 2008, Bruce W. Tanaka, Firearms Unit Program Manager,
 2 Department of Licensing, wrote Coombes that the DOL cannot access FBI criminal history
 3 records through local law enforcement and thus would not issue or renew an Alien Firearm
 4 License to Coombes. Tanaka warned: "DOL's hands are tied. I would recommend you not
 5 be in possession of your weapons when and if your license expires. . . . [I]f charged and
 6 convicted of a class C felony, you would never be able to be in possession of a firearm and
 7 it's a deportable offense." Answer ¶ 23.

8 As a proximate cause of RCW §§ 9.41.170 and 9.41.070, the refusal of the
 9 Department of Licensing to issue Alien Firearm Licenses, and the resultant inability of the
 10 Chief of Police to issue Concealed Pistol Licenses to non-citizens, Plaintiffs Coombes, Kroes,
 11 and Grady, together with other members of Plaintiffs NRA and SAF who are lawful resident
 12 aliens, will suffer irreparable injury in that they will imminently³ lose valuable property and
 13 will no longer be able to possess firearms for recreational purposes and lawful self defense.
 14 In addition, Coombes will lose his job.

15 ARGUMENT

16 "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed
 17 on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief,
 18 that the balance of equities tips in his favor, and that an injunction is in the public interest."
 19 *Winter v. Natural Resources Defense Council, Inc.*, 129 S.Ct. 365, 374 (2008).

20 I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

21 A. Washington's Firearms Prohibitions Deny the Equal 22 Protection of the Laws to Lawful Resident Aliens

23 ³ Except for Kroes, whose AFL expires in 2010.

1
2 RCW § 9.41.170(1) and § 9.41.070(1) and Defendants' refusal to issue firearm
3 licenses thereunder deny to Plaintiffs the equal protection of the laws in violation of the
4 Fourteenth Amendment. Plaintiffs are likely to prevail on the merits of this claim, which is
5 Count Two of the Complaint.

6 "[T]he term 'person' in this [Fourteenth Amendment] context encompasses lawfully
7 admitted resident aliens as well as citizens of the United States and entitles both citizens and
8 aliens to the equal protection of the laws of the State in which they reside." *Graham v.*
9 *Richardson*, 403 U.S. 365, 371 (1971) (denial of welfare benefits). "[C]lassifications based
10 on alienage . . . are inherently suspect and subject to close judicial scrutiny." *Id.* at 372. This
11 is the case "whether or not a fundamental right is impaired." *Id.* at 373.

12 Similarly, *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 421 (1948),
13 invalidated a state law excluding "aliens who are lawful residents of the State from making a
14 living by fishing in the ocean off its shores while permitting all others to do so." "*Takahashi*
15 and *Graham* stand for the broad principle that 'state regulation not congressionally sanctioned
16 that discriminates against aliens lawfully admitted to the country is impermissible if it
17 imposes additional burdens not contemplated by Congress.'" *Toll v. Moreno*, 458 U.S. 1, 12-
18 13 (1982) (invalidating state law denying tuition benefits to nonimmigrant aliens)

19 In contrast to federal laws, "State alienage classifications create a 'suspect class' to
20 which we apply strict scrutiny." *United States v. Lopez-Flores*, 63 F. 3d 1468, 1473 (9th Cir.
21 1995). Such "overriding national interests" as immigration and foreign relations "justify
22 selective federal legislation that would be unacceptable for an individual State." *Id.*
23

1 In a case similar to the case at bar, a state law which discriminated against lawful
2 resident aliens in issuance of firearm licenses was held violative of equal protection. *Say v.*
3 *Adams*, 2008 WL 718163, 2008 U.S. Dist. LEXIS 20183 (W.D. Ky. 2008) (Case 3:07-cv-
4 00377-TBR, copy attached hereto for the Court's convenience, Attachment A). State law
5 authorized the state police to issue and renew licenses to carry a concealed deadly weapon
6 ("CCDW license"), applications for which were obtained from the county sheriff of one's
7 residence. Only U.S. citizens were eligible for a license. 2008 WL 718163 at *1.

8 The citizenship requirement was passed to gain federal approval to allow a CCDW
9 license holder to purchase a firearm without a background check by the National Instant
10 Criminal Background Check System ("NICS"). A NICS check for a non-citizen requires an
11 "Illegal Alien Query" ("IAQ") through the U.S. Immigration and Customs Enforcement. The
12 state police conducted a NICS check for a CCDW license, but not an IAQ check. When
13 Plaintiff Say, an alien with lawful permanent residence, attempted to apply for a CCDW
14 license, the county sheriff told him that he was ineligible due to the citizenship requirement.
15 Say then sued the head of the state police and the sheriff. *Id.*

16 Federal law requires a NICS check for receipt of a firearm, but exempts purchasers
17 who have certain state-issued permits, such as a CCDW license. 18 U.S.C. § 922(t)(1), (3).
18 The citizenship requirement was imposed so that the state police could conduct their own non-
19 NICS background check to issue such licenses, but in doing so they were unable to check the
20 IAQ for lawful alien status. *Say* at *3. The court held, *id.*:

21 The Court cannot find that a state's interest in substituting a state background
22 check for a federal background check is compelling enough to justify creating
23 a classification that discriminates against a suspect class.

1 Furthermore, the citizenship provision is not narrowly tailored to achieve this
2 governmental interest. A blanket prohibition discriminating against aliens is
3 not precisely drawn to achieve the goal of facilitating firearms purchases when
4 there exists a nondiscriminatory way to achieve the same goals. As discussed
5 below, if the Kentucky State Police undertakes some administrative burden, it
6 is possible to allow permanent resident aliens to obtain a CCDW license, and
7 still meet the requirements necessary to allow CCDW holders to avoid the
8 NICS inquiry at the time of purchase.

9 *State v. Hernandez-Mercado*, 124 Wash. 2d 368, 378, 879 P.2d 283 (1994), which
10 involved an unlawful alien, flatly stated that “RCW 9.41.170 is not necessary to safeguard the
11 State's interest in keeping ‘firearms out of dangerous hands’.” The state’s public safety
12 argument was “weak,” but the record was too limited to find the statute facially violative of
13 equal protection. *Id.* at 380.

14 By contrast, Plaintiffs here are lawful permanent resident aliens, and alien firearm
15 licenses are no longer being issued. As applied now, RCW § 9.41.170 is an absolute
16 prohibition on possession of a firearm by an alien, like similar state laws which have been
17 invalidated on equal protection grounds. *Chan v. City of Troy*, 559 N.W.2d 374, 379-80
18 (Mich. Ct. App. 1997), held that “the statute, which prohibits the purchase of pistols by all
19 noncitizens, fails to distinguish between dangerous noncitizens and those noncitizens who
20 would pose no particular threat if allowed to purchase the weapons.” *Id.* at 380. “Had the
21 statute excluded only illegal aliens, as opposed to all noncitizens, it may well have passed
22 constitutional muster.” *Id.* n.3.⁴

23 ⁴ See also *People v. Nakamura*, 62 P.2d 246, 247 (Colo. 1936) (“the act wholly disarms aliens for all purposes. The state . . . cannot disarm any class of persons or deprive them of the right . . . to bear arms in defense of home, person, and property.”); *Sandiford v. Commonwealth*, 217 Va. 117, 118-19, 225 S.E.2d 409 (1976) (invalidating presumption for possession of sawed-off shotgun by alien: “We see no rational connection between a person's place of birth and his disposition to commit offensive or aggressive acts.”); *State v. Poolsawas Chumphol*, 97 Nev. 440, 442, 634 P.2d 451 (1981) (invalidating prohibition on possession of pistol: “A person does not exhibit a tendency toward crime merely because he or she is a noncitizen”); *People v. Rappard*, 28 Cal.

1 In sum, Plaintiffs are likely to prevail on their equal protection claim.

2 **B. Washington's Firearm Prohibitions Deny Lawful Resident Aliens the**
 3 **Full and Equal Benefit of Laws and Proceedings for the Security of**
 4 **Person and Property, Contrary to 42 U.S.C. § 1981(a)**

5 RCW §§ 9.41.170(1) and 9.41.070(1) and Defendants' refusal to issue firearm licenses
 6 thereunder violate 42 U.S.C. §1981(a), which provides in part: "All persons within the
 7 jurisdiction of the United States shall have the same right in every State . . . to the full and
 8 equal benefit of all laws and proceedings for the security of person and property as is enjoyed
 9 by white citizens . . ." Plaintiffs are likely to prevail on this claim, which is Count Three of
 10 the Complaint.

11 Originally enacted as the Civil Rights Act of 1866, the provision only protected
 12 "citizens," but was amended in 1870 to protect "persons." "Congress chose with care the
 13 word 'persons' to replace 'citizens' in the statute when, in reenacting the 1866 Civil Rights
 14 Act, it extended the safeguards of the civil rights statutes to aliens." *Sagana v. Tenorio*, 384
 15 F.3d 731, 737 (9th Cir. 2004). *Takahashi*, 334 U.S. at 419-20, explained:

16 The protection of this section has been held to extend to aliens as well as to
 17 citizens. Consequently the section and the Fourteenth Amendment on which it
 18 rests in part protect "all persons" against state legislation bearing unequally
 19 upon them either because of alienage or color. . . . The Fourteenth Amendment
 20 and the laws adopted under its authority thus embody a general policy that all
 21 persons lawfully in this country shall abide "in any state" on an equality of
 22 legal privileges with all citizens under non-discriminatory laws.

23 Lawfully admitted resident aliens "are entitled to the full and equal benefit of all state
 laws for the security of persons and property." *Graham*, 403 U.S. at 378. This would include
 not only the lawful possession of firearms, but also the ability to work, as does Coombes, in a

App.3d 302, 304-05, 104 Cal.Rptr. 535 (1972) (invalidating prohibition on possession of concealable firearm: "a
 person does not . . . show a tendency toward crime simply because he is not a citizen of this country.").

1 firearms business just as citizens may do. “The assertion of an authority to deny to aliens the
2 opportunity of earning a livelihood when lawfully admitted to the state would be tantamount
3 to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot
4 live where they cannot work.” *Id.* at 379 (citation omitted).

5 Washington’s provisions which recognize the right of citizens to possess firearms
6 constitute “laws and proceedings for the security of person and property” in the meaning of
7 §1981(a). Wash. Const., Art. I, § 24, provides: “The right of the individual citizen to bear
8 arms in defense of himself, or the state, shall not be impaired” RCW § 9.41.070(1)
9 provides for a license to carry a concealed pistol “for the purposes of protection or while
10 engaged in business, sport, or while traveling” RCW § 9.41.170 recognizes the same
11 interests by *not* making it a felony for a *citizen* to possess a firearm without a special license.

12 A purpose of the Civil Rights Act of 1866 was to prevent states from prohibiting
13 firearm possession to disfavored classes. See discussion below of *District of Columbia v.*
14 *Heller*, 128 S. Ct. 2783, 2809-10 (2008). A companion enactment with similar phraseology
15 was the Freedmen's Bureau Act of 1866, which stated in part: “[T]he right . . . to have full and
16 equal benefit of all laws and proceedings concerning personal liberty, personal security, and
17 the acquisition, enjoyment, and disposition of estate, real and personal, including the
18 constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . .
19 without respect to race or color, or previous condition of slavery” § 14, 14 Stat. 176-177
20 (1866), quoted in *Heller*, 128 S. Ct. at 2810 (noting that “The understanding that the Second
21 Amendment gave freed blacks the right to keep and bear arms was reflected in congressional
22 discussion of the bill”).
23

1 The Freedmen's Bureau Act "re-enacted, in virtually identical terms for the
 2 unreconstructed Southern States, the rights granted in §1 of the Civil Rights Act of 1866."
 3 *Georgia v. Rachel*, 384 U.S. 780, 797 n.26 (1966). See *Jones v. Alfred H. Mayer Co.*, 392
 4 U.S. 409, 424 n.31 (1968) (noting identical objectives of Freedmen's Bureau Bill and Civil
 5 Rights Act). Section 1981 not only forbids discrimination, it also protects substantive rights.⁵
 6 "If we are to give [the law] the scope that its origins dictate, we must accord it a sweep as
 7 broad as its language." *Id.* at 437 (brackets in original).⁶

8 In sum, Plaintiffs are likely to prevail on their claim that the discriminations in RCW
 9 §§ 9.41.170(1) and 9.41.070(1) and the unavailability of licenses thereunder violate § 1981(a).

10 **C. Washington's Firearm Prohibitions Infringe on the Right of Lawful Resident**
 11 **Resident Aliens to Possess Arms Under the Second and Fourteenth Amendments**

12 RCW §§ 9.41.170(1) and 9.41.070(1) and Defendants' refusal to issue firearm licenses
 13 thereunder, as alleged in Count One of the Complaint, infringe on Plaintiffs' Second
 14 Amendment right to keep and bear arms, which applies to the States and political subdivisions
 15 thereof through the Fourteenth Amendment. This guarantees an individual right to possess
 16 firearms by law-abiding persons, including lawful permanent resident aliens.

17 *1. Lawful Permanent Resident Aliens are Protected by the Second Amendment*

18 Lawful resident aliens are among "the people" protected by the Second Amendment.
 19 *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), explained:

20 _____
 21 ⁵ "Senator Trumbull's bill would, as he pointed out, 'destroy all [the] discriminations' embodied in the Black
 22 Codes, but it would do more: It would affirmatively secure for all men, whatever their race or color, what the
 23 Senator called the 'great fundamental rights'" *Jones*, 392 U.S. at 432.

⁶ See *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 672 (1987) (Brennan, J., joined by Marshall and Blackmun,
 JJ., concurring in part and dissenting in part) (noting that the Black Codes "forbade owning firearms").

1 The Second Amendment protects “the right of the people to keep and bear
 2 Arms” While this textual exegesis is by no means conclusive, it suggests
 3 that “the people” protected by the Fourth Amendment, and by the First and
 4 Second Amendments, . . . refers to a class of persons who are part of a national
 5 community or who have otherwise developed sufficient connection with this
 6 country to be considered part of that community.

7 More specifically, “aliens receive constitutional protections when they have come
 8 within the territory of the United States and developed substantial connections with this
 9 country.” *Id.* at 271. “But once an alien lawfully enters and resides in this country he
 10 becomes invested with the rights guaranteed by the Constitution to all people within our
 11 borders.” *Id.* (citation omitted).⁷

12 In holding that the Second Amendment guarantees the individual right to possess
 13 firearms, *Heller*, 128 S. Ct. at 2796, recalled the above formulation that “the people” “refers
 14 to a class of persons who are part of a national community or who have otherwise developed
 15 sufficient connection with this country to be considered part of that community.”

16 *Heller* overrules this Circuit’s rulings that the Amendment protects only a “collective”
 17 state right to maintain militias and not an individual right. *See Hickman v. Block*, 81 F.3d 98
 18 (9th Cir. 1996), *cert. denied*, 519 U.S. 912 (1996); *Silveira v. Lockyer*, 312 F.3d 1052, *reh.*
 19 *denied*, 328 F.3d 567 (9th Cir. 2003), *cert. denied*, 540 U.S. 1046 (2003).

20 2. *The Second Amendment Applies to the States Through the Fourteenth Amendment*

21 Nineteenth-century cases stating that the First and Second Amendments do not apply
 22 to the States “did not engage in the sort of Fourteenth Amendment inquiry required by our
 23 later cases.” *Heller*, 128 S. Ct. at 2813 n.23. Relying on those same cases, *Fresno Rifle &*

⁷ “Aliens who are lawfully present in the United States are among those ‘people’ who are entitled to the protection of the Bill of Rights” *Id.* at 279 (Stevens, J., concurring).

1 *Pistol Club v. Van de Kamp*, 965 F.2d 723, 729-31 (9th Cir. 1992), held that the Second
 2 Amendment is not incorporated into the Fourteenth Amendment so as to protect the right to
 3 keep and bear arms from State infringement. *Heller* supercedes *Fresno Rifle*.⁸

4 a. The Right To Keep And Bear Arms Is A Fundamental Right

5 “By the time of the founding, the right to have arms had become fundamental for
 6 English subjects.” *Heller*, 128 S. Ct. at 2798. Moreover, “the Second Amendment, like the
 7 First and Fourth Amendments, codified a *pre-existing* right.” *Id.* at 2797.

8 The explicit nature of the right precludes use of the rational-basis standard of review.
 9 “Obviously, the same test could not be used to evaluate the extent to which a legislature may
 10 regulate a specific, enumerated right, be it the freedom of speech, the guarantee against
 11 double jeopardy, the right to counsel, or the right to keep and bear arms.” *Id.* at 2818 n.27.

12 Noting that “the inherent right of self-defense has been central to the Second
 13 Amendment right,” *Heller* continued: “The handgun ban amounts to a prohibition of an entire
 14 class of ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose.
 15 The prohibition extends, moreover, to the home, where the need for defense of self, family,
 16 and property is most acute.” *Id.* at 2817-18. The prohibitions and actions here are far worse –
 17 for aliens, all firearms of all classes are banned, in the home and everywhere else.

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 21 ⁸ “Where intervening Supreme Court authority is clearly irreconcilable with our prior circuit authority” –
 22 including when the irreconcilability is in the “mode of analysis” and not just in square conflict with the specific
 23 holdings – “a three-judge panel of this court and district courts should consider themselves bound by the
 intervening higher authority and reject the prior opinion of this court as having been effectively overruled.”
Miller v. Gammie, 335 F.3d 889, 899-900 (9th Cir. 2003).

1 b. The Fourteenth Amendment Was Intended To Protect the
2 Right To Keep and Bear Arms From State Infringement

3 The Fourteenth Amendment was intended to supercede *Barron v. Mayor of Baltimore*,
4 7 Pet. 243, 8 L.Ed. 672 (1833), which held that the Bill of Rights did not apply to the states.⁹
5 “In the aftermath of the Civil War, there was an outpouring of discussion of the Second
6 Amendment in Congress and in public discourse, as people debated whether and how to
7 secure constitutional rights for newly free slaves.” *Heller*, 128 S. Ct. at 2809-10, citing S.
8 Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876*
9 (1998). This included Second Amendment rights which were violated by the Southern Black
10 Codes. *Id.* at 2810.¹⁰

11 The Freedmen’s Bureau Act of 1866 protected the right to “personal liberty, personal
12 security, and . . . estate, . . . including the constitutional right to bear arms” *Id.* at 2810.
13 This was passed by over two-thirds vote of the same Congress that proposed the Fourteenth
14 Amendment,¹¹ and sought to guarantee the same rights.¹² *Id.* (“With respect to the proposed
15 Amendment, Senator Pomeroy described as one of the three ‘indispensable’ ‘safeguards of
16 liberty . . . under the Constitution’ a man’s ‘right to bear arms for the defense of himself and
17

18

19 ⁹ “Representative [John] Bingham . . . explained that he had drafted § 1 of the Fourteenth Amendment with the
20 case of *Barron v. Mayor of Baltimore*, 7 Pet. 243 (1833), especially in mind.” *Monell v. Dep’t of Social Services*,
21 436 U.S. 658,686-87 (1978). On the same page of that speech, Bingham characterized “the right of the people to
22 keep and bear arms” as one of the “limitations upon the power of the States . . . made so by the Fourteenth
23 Amendment.” Cong. Globe, 42nd Cong., 1st Sess., App. 84 (Mar. 31, 1871).

¹⁰ See *Bell v. Maryland*, 378 U.S. 226, 247-48 & n. 3 (1964) (Douglas, J., concurring) (Fourteenth Amendment
intended to eradicate the black codes, under which “Negroes were not allowed to bear arms.”).

¹¹ Halbrook, *Freedmen*, 41-42.

¹² *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 423-24, 436 (1968).

1 family’’). The Fourteenth Amendment was intended to protect Second Amendment rights
 2 from State infringement.

3 c. Nineteenth-Century Cases “Did Not Engage in the Sort of
 4 Fourteenth Amendment Inquiry Required by Our Later Cases”

5 *Heller* clarifies that the Court has left open whether the Second Amendment applies to
 6 the states through the Fourteenth Amendment, and implies that it does. Nineteenth-century
 7 cases holding that the First, Second, and Fourth Amendments do not directly apply to the
 8 states did not consider whether such rights are incorporated into the Fourteenth Amendment.

9 *United States v. Cruikshank*, 92 U. S. 542, 553 (1876), held that “members of a white
 10 mob” could not be convicted “for depriving blacks of their right to keep and bear arms,” since
 11 the Second Amendment only applied to the United States. *Heller*, 128 S. Ct. at 2812. “With
 12 respect to *Cruikshank*’s continuing validity on incorporation, . . . we note that *Cruikshank* also
 13 said that the First Amendment did not apply against the States and did not engage in the sort
 14 of Fourteenth Amendment inquiry required by our later cases.” *Id.* at 2813 n.23.

15 *Heller* added that two later decisions “reaffirmed that the Second Amendment applies
 16 only to the Federal Government.” *Id.* (citing *Presser v. Illinois*, 116 U. S. 252, 265 (1886),
 17 and *Miller v. Texas*, 153 U. S. 535, 538 (1894)). *Presser* made no mention of the Fourteenth
 18 Amendment in this discussion. 116 U.S. at 265. *Miller* agreed that the Second and Fourth
 19 Amendments did not apply directly to the states, but refused to consider whether they applied
 20 to the states through the Fourteenth Amendment. 153 U.S. at 538.¹³

21 _____
 22 ¹³ “If the Fourteenth Amendment limited the power of the States as to such rights [to bear arms and against
 23 warrantless searches] as pertaining to citizens of the United States, we think it was fatal to this claim that it was
 not set up in the trial court.” *Id.*

1 Since these cases “did not engage in the sort of Fourteenth Amendment inquiry
2 *required* by our later cases,” *Heller*, 128 S. Ct. at 2813 n.23, this Court must do so.

3 d. *Heller* Supercedes Circuit Precedent Rejecting Incorporation

4 *Heller* supercedes the Ninth Circuit’s decision in *Fresno Rifle*, 965 F.2d at 729-31,
5 which rejected incorporation of the Second Amendment into the Fourteenth Amendment.
6 *Fresno Rifle* stated that since *Miller* predated the first incorporation case, “there is no reason
7 to believe that *Miller* left open the incorporation question any more than *Cruikshank* or
8 *Presser*.” *Id.* at 730. Yet none of these cases even considered the incorporation question.

9 As the Ninth Circuit noted in *Silveira*, 312 F.3d at 1067, *Cruikshank* and *Presser* were
10 “decided before the Supreme Court held that the Bill of Rights is incorporated by the
11 Fourteenth Amendment’s Due Process Clause,” adding: “*Cruikshank* and *Presser* found that
12 the Second Amendment restricted the activities of the federal government, but not those of the
13 states. . . . *Cruikshank* and *Presser* rest on a principle that is now thoroughly discredited.”¹⁴
14 *See Nordyke v. King*, 319 F.3d 1185, 1193 & n.3 & 4 (9th Cir. 2003) (Gould, C.J., specially
15 concurring) (“We should . . . revisit whether the requirements of the Second Amendment are
16 incorporated into the Due Process Clause of the Fourteenth Amendment.”).

17 Moreover, “in interpreting a constitutional provision, the fundamental principle of
18 construction is to give the provision the effect intended by the framers and the people
19 adopting it.” *Tom v. Sutton*, 533 F.2d 1101, 1105 (9th Cir. 1976). *Heller*’s statement that
20 “nothing in our precedents forecloses our adoption of the original understanding of the
21

22 ¹⁴ *Id.*, citing *United States v. Emerson*, 270 F.3d 203,221 n.13 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002)
23 (noting that *Cruikshank*, *Presser*, and *Miller* “came well before the Supreme Court began the process of

1 Second Amendment” also applies to the Fourteenth Amendment, and indeed *Heller* adds: “It
 2 should be unsurprising that such a significant matter has been for so long judicially
 3 unresolved. For most of our history, the Bill of Rights was not thought applicable to the
 4 States” 128 S. Ct. at 2816.¹⁵

5 *Fresno Rifle* refused to consider what it characterized as “remarks by various
 6 legislators during passage of the Freedmen’s Bureau Act of 1866, the Civil Rights Act of
 7 1866, and the Civil Rights act of 1871.” 965 F.2d at 730. This included, for instance, Senator
 8 Jacob M. Howard’s introduction of the Fourteenth Amendment which referred to “the
 9 personal rights guaranteed and secured by the first eight amendments of the Constitution; such
 10 as . . . the right to keep and bear arms. . . . The great object of the first section of this
 11 amendment is, therefore, to restrain the power of the States and compel them at all times to
 12 respect these great fundamental guarantees.” Cong. Globe, 39th Cong., 1st Sess. 2766 (May
 13 23, 1866), quoted in *Duncan v. Louisiana*, 391 U.S. 145, 166-67 (1968) (Black, J.,
 14 concurring).¹⁶

15 Moreover, far more was involved than “remarks” – the Freedmen’s Bureau Act, *supra*,
 16 protected from State infringement “personal liberty, personal security, and . . . estate . . . ,

17 incorporating certain provisions of the first eight amendments into the Due Process Clause of the Fourteenth
 18 Amendment, and . . . they ultimately rest on a rationale equally applicable to all those amendments”).

19 ¹⁵ “The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central
 20 role in the preservation of basic liberties than that which was contemplated by its Framers when they added the
 Amendment to our constitutional scheme.” *Malloy v. Hogan*, 378 U.S. 1, 5 (1964).

21 ¹⁶ “A substantial part of the debate in Congress on the Fourteenth Amendment was its necessity to enable blacks
 22 to protect themselves from White terrorism and tyranny in the South. . . . When the state itself abets organized
 23 terrorism, the right of the people to keep and bear arms against a tyrant becomes inseparable from the right to
 self-defense.” *Silveira*, 328 F.3d at 577 (Kleinfeld, C.J., joined by C.J.s Kozinski, O’Scannlain, & T.G. Nelson,
 dissenting from denial of rehearing en banc).

1 including the constitutional right to bear arms” The Fourteenth Amendment also protects
 2 from state infringement the “indefeasible right of personal security, personal liberty and
 3 private property.” *Griswold v. Connecticut*, 381 U.S. 479, 485 n. (1965). No state may
 4 violate the “constitutional right to personal security, a liberty interest protected by the
 5 fourteenth amendment.”¹⁷ *Wood v. Ostrander*, 879 F.2d 583, 591 (9th Cir. 1989). At the core
 6 of the right to personal security is the right to have arms: “The Second Amendment embodies
 7 the right to defend oneself and one’s home against physical attack.” *United States v. Gomez*,
 8 92 F.3d 770, 774 n.7 (9th Cir. 1996).

9 In sum, *Heller* supersedes the *Fresno Rifle* holding that the Second Amendment is not
 10 incorporated into the Fourteenth Amendment, in that it relied on cases that “did not engage in
 11 the sort of Fourteenth Amendment inquiry required by our later cases.” *Heller*, 128 S. Ct. at
 12 2813 n.23.

13 e. The “Fourteenth Amendment Inquiry Required By Our Later
 14 Cases” Mandates Incorporation of the Second Amendment

15 Most substantive Bill of Rights guarantees have been incorporated because they are
 16 explicitly recognized and thus fundamental.¹⁸ A right is “fundamental” if it is “explicitly or

17
 18 ¹⁷ See also *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1220 (9th Cir. 1988) (“The absolute rights of
 19 individuals may be resolved into the right of personal security, the right of personal liberty, and the right to
 acquire and enjoy property.”) (quoting 2 J. Kent, *Commentaries* 1 (1827)), *rev’d on other grounds* 494 U.S. 259
 (1990).

20 ¹⁸ See *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 237 (1897) (Just Compensation Clause of Fifth
 21 Amendment among the “implied reservations of individual rights . . . which are respected by all governments
 22 entitled to the name.”); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“freedom of speech and of the press . . .
 are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the 14th
 23 Amendment from impairment by the states.”); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (“The right of
 peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.”);
Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (“The Fourteenth Amendment has rendered the legislatures of

1 implicitly protected by the Constitution, thereby requiring strict judicial scrutiny.” *San*
 2 *Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17, 33 (1973). No constitutional right is
 3 “less ‘fundamental’ than” others, and “we know of no principled basis on which to create a
 4 hierarchy of constitutional values” *Valley Forge Christian Coll. v. Americans United for*
 5 *Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982).¹⁹

6 *Planned Parenthood v. Casey*, 505 U.S. 833, 848 (1992), explains that “the full scope
 7 of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the
 8 precise terms of the specific guarantees elsewhere provided in the Constitution,” including
 9 free speech and press and “the right to keep and bear arms.”

10 Most procedural Bill of Rights guarantees have also been incorporated,²⁰ excluding
 11 those not inherently required for a fair procedure.²¹ “In resolving conflicting claims
 12 concerning the meaning of this spacious language, the Court has looked increasingly to the
 13 Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to
 14 the Constitution have been held to be protected against state action by the Due Process Clause
 15 of the Fourteenth Amendment.” *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968) (Sixth

16 the states as incompetent as Congress to enact such laws [respecting an establishment of religion or prohibiting
 17 the free exercise thereof.]”); *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947) (same for Establishment Clause).

18 ¹⁹ “To view a particular provision of the Bill of Rights with disfavor . . . is to disrespect the Constitution.”
 19 *Ullmann v. United States*, 350 U.S. 422, 428-29 (1956).

20 ²⁰ See *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949) (Fourth Amendment rights “implicit in ‘the concept of ordered
 liberty’” and based on “the conception of human rights enshrined in the history and the basic constitutional
 documents of English-speaking peoples.”), *overruled on other grounds*, *Mapp v. Ohio*, 367 U.S. 643 (1961).

21 ²¹ See *Hurtado v. California*, 110 U.S. 516, 532 (1884) (Fifth Amendment right to indictment by grand jury not
 22 required because due process “must be held to guaranty, not particular forms of procedure, but the very
 substance of individual rights to life, liberty, and property.”); *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974)
 23 (Seventh Amendment right to jury trial in civil cases where the value in controversy exceeds \$20).

1 Amendment right to jury trial in a criminal case incorporated).²² Like other substantive
 2 guarantees, the Second Amendment is not subject to the question of whether a particular
 3 procedure is necessary for due process.

4 In sum, since the Second Amendment encompasses an explicitly-guaranteed,
 5 substantive right, it meets the standards of the Supreme Court's jurisprudence on
 6 incorporation of fundamental rights into the Fourteenth Amendment. Given *Heller's* holding
 7 that a handgun ban violates the Second Amendment, Washington's ban on all firearms
 8 possession by lawful resident aliens cannot stand.

9 II. PLAINTIFFS ARE LIKELY TO SUFFER IRREPARABLE INJURY

10 Plaintiffs are "likely to suffer irreparable harm in the absence of preliminary relief,"
 11 *Winter*, 129 S.Ct. at 374. Threatened with serious criminal penalties involving arrest,
 12 prosecution, and incarceration, they stand to lose valuable property and, in the case of
 13 Coombes, his job. They will not be able to possess firearms for any reason, including self
 14 defense.

15 "[A] plaintiff can demonstrate that a denial of an injunction will cause irreparable
 16 harm if the claim is based upon a violation of plaintiff's constitutional rights." *Overstreet v.*
 17 *Lexington-Fayette Urban County Gov't.*, 305 F.3d 566, 578 (6th Cir. 2002). See
 18 *Sammartano v. First Judicial District Court Carson City*, 303 F.3d 959, 973 (9th Cir. 2002)
 19 ("the loss of First Amendment freedoms, for even minimal periods of time, unquestionably
 20 constitutes irreparable injury' for purposes of the issuance of a preliminary injunction"); *Tom*
 21 *v. Suttan*, 533 F.2d 1101, 1106 (9th Cir. 1976) ("all constitutional provisions are of equal

22 _____
 23 ²² *Accord Benton v. Maryland*, 395 U.S. 784, 794 (1969) ("the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage").

1 dignity"). “[T]he violation of the Equal Protection Clause qualifies as an irreparable injury . .
2 . .” *Say*, 2008 WL 718163, *3.

3 III. THE BALANCE OF EQUITIES TIPS IN PLAINTIFFS’ FAVOR

4 In this case, “the balance of equities tips in [Plaintiffs’] favor,” *Winter*, 129 S.Ct. at
5 374. Being lawfully admitted for permanent residence and by having previous firearm
6 licenses, Plaintiffs have been subjected to intensive background checks. No legitimate State
7 interest is served by the denial of such licenses to lawful permanent residents or by applying
8 criminal penalties against them for not having such licenses.

9 *Say* found that an injunction would require the state police to conduct a manual case-
10 by-case background check on alien CCDW applicants, as well as update its electronic
11 database software, amend its forms, and change its record check procedures. However, “any
12 harm to others caused by the granting of a preliminary injunction is not substantial enough to
13 justify the violation of Plaintiff’s constitutional rights.” *Say*, 2008 WL 718163, *4.

14 *Say* enjoined enforcement of the state law requiring applicants for a license to carry a
15 concealed weapon to be a U.S. citizen. Order Granting Plaintiff’s Motion for Preliminary
16 Injunction, *Say v. Adams* (Case 3:07-cv-00377-TBR, copy attached hereto for the Court’s
17 convenience, Attachment B). Defendants were also ordered to furnish *Say* with a license
18 application and to “accept and process the application and issue the license in accordance with
19 the established procedures for processing such application and issuing such license, but
20 without requiring proof of United States citizenship.” *Id.*

21 Any additional administrative burden required for Defendant Director of Licensing
22 Luce to issue or renew Alien Firearms Licenses would not be substantial. Enjoining
23

1 Defendant Police Chief Ayers from enforcement of RCW § 9.41.170 against Coombes and
2 similarly-situated persons would only remove a burden.

3 IV. THE PUBLIC INTEREST IS TO UPHOLD CONSTITUTIONAL RIGHTS

4 The injunction sought “is in the public interest.” *Winter*, 129 S.Ct. at 374.
5 “Generally, public interest concerns are implicated when a constitutional right has been
6 violated, because all citizens have a stake in upholding the Constitution.” *Preminger v.*
7 *Principi*, 422 F.3d 815, 826 (9th Cir. 2005). “[I]t is always in the public interest to prevent the
8 violation of a party’s constitutional rights.” *Sammartano*, 303 F.3d at 974 (citation omitted).
9 The *Say* injunction was found to be in the public interest because “Plaintiff is asserting a
10 violation of the Equal Protection Clause.” *Say*, 2008 WL 718163, *4.

11 No public interest exists in denying firearm licenses to or prohibiting firearm
12 possession by lawful permanent resident aliens. No such discrimination exists in the federal
13 Gun Control Act, which prohibits firearm possession only to aliens who are (1) “illegally or
14 unlawfully in the United States” or (2) “admitted to the United States under a nonimmigrant
15 visa,” 18 U.S.C. § 922(g)(5), and the latter prohibition is lifted if the alien is here “for lawful
16 hunting or sporting purposes or is in possession of a hunting license.” § 922(y)(2)(A).

17 Most alien gun restrictions were passed by the states in the early twentieth century
18 “during an era of irrational fear and prejudice against immigrants.” P. Gulasekaram, “Aliens
19 With Guns: Equal Protection, Federal Power, & the Second Amendment,” 92 Iowa L. Rev.
20 891, 908-09 (2007). RCW 9.41.170 was enacted in 1911. *Hernandez-Mercado*, 124 Wash.
21 2d at 376. “There is nothing in the ‘statutory scheme’ which establishes that the status of
22
23


1 being foreign-born of itself creates 'dangerous hands' in the context of firearms control." *Id.*
2 at 377-78.


3 **CONCLUSION**

4 The Court should issue a preliminary injunction requiring Defendant Director of
5 Licensing Liz Luce forthwith to renew or issue alien firearm licenses to Plaintiffs Adrian J.
6 Coombes, Philip Grady, and such other lawful permanent resident aliens who may apply
7 pursuant to RCW § 9.41.170. The Court should further issue a preliminary injunction
8 restraining Defendant Police Chief Paul D. Ayers from enforcement of RCW § 9.41.170 and
9 RCW § 9.41.070(4) as applied to lawful permanent resident aliens.

10 Respectfully Submitted, *Dec. 30, 2008*

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