

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY, NEWARK DIVISION**

ISRAEL ALBERT ALMEIDA and)
MICHAEL R. TUMMINELLI)HON. KEVIN MCNULTY, U.S.D.J.
) Case No. 2:16-cv-03411-KM-JBC
Plaintiffs,)
)
v.)
)
THE HON. N. PETER CONFORTI, et al.)
)
Defendants.)
)

**PLAINTIFFS’ COMBINED BRIEF IN RESPONSE TO DEFENDANTS’
MOTION TO DISMISS AND REPLY TO DEFENDANTS’ OPPOSITION
TO PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION
(DOCKETS #27 & #34)**

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Introduction

The Defendants misapprehend Plaintiffs' argument in their Verified Complaint. The Defendants claim that Plaintiffs conceded a facial challenge to N.J.S.A. 2C:58-4 in a telephonic conference with the Honorable Judge Clark but this is incorrect. As stated during the conference call, Plaintiffs conceded that this Court is bound by the Third Circuit Court of Appeals decision in *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), cert. denied, 134 S.Ct. 2134 (U.S. 2014) and that the Plaintiffs were reserving a facial challenge for further review.¹ Further, while Plaintiff Almeida has been issued a permit to carry after commencement of litigation, however, Almeida's due process rights were still violated by certain Defendants. Almeida was initially denied his permit to carry for not satisfying the "justifiable need" standard. Almeida was made to suffer additional and substantial threats to his life before Defendant Conforti issued his permit, and it should be noted, that after Almeida reapplied for his permit to carry, no hearing was required this time.

While the preliminary injunction for Almeida is most likely mooted since he received his permit, Almeida has separate and distinct injury for violation of his due process rights and standing to continue as a Plaintiff in this case. The *Rooker-Feldman* doctrine does not apply as neither Plaintiff has requested this Court to

¹ This is also plainly set forth in the Verified Complaint, Count VII, ¶¶134,135.

vacate any other court's order or opinion but to address the Defendants' constitutional violations towards Plaintiffs.

Corrections to the Defendants' Procedural History and Statement of Facts

Defendants stated that Plaintiffs "...seek injunctive relief prohibiting any of the Defendants from denying permits to any applicant based on the 'justifiable need' standard contained in N.J.S.A. 2C:58-4(c)-(d). Pl. Comp., at Prayer for Relief (d)-(f)" Def. Brief in Support, p. 4. Plaintiffs' prayer is not as broad as Defendants claim, and instead is narrowly tailored for an injunction on enforcing "... the justifiable need standard... for any reason other than those reasons specifically codified in the statutes and regulations of the State of New Jersey[]" and that the New Jersey Administrative Code is essentially ultra vires itself regarding the definition of justifiable need.

Additionally, with respect to Plaintiff Tumminelli, Defendants contend that his application was neither granted or denied because Tumminelli "expressly withdrew it..." Def. Brief in Support, p. 7. It is true that Tumminelli withdrew his appeal as Exhibit "B" to Defendants' Brief in Support demonstrates. However, Defendant Conforti's Order specifically styles it as an "ORDER DENYING APPLICANT A PERMIT TO CARRY." However, Tumminelli's permit was denied by Chief Richards who acts as the gatekeeper for the permitting process. Regardless of whether it was a denial or a withdrawal of appeal, it does not make a difference

as the United States Supreme Court concluded that "... exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 516 (1982).

Standard of Review

"Plaintiff bears the burden of persuasion when subject matter jurisdiction is challenged, but the legal standard for surviving a Rule 12(b)(1) motion is a low one." *Amberg-Blyskal v. Transp. Sec. Admin.*, 832 F. Supp. 2d 445, 447 (E.D. Pa. 2011) (citing *Kehr Packages v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir.1991)). "[D]ismissal for lack of jurisdiction is not appropriate merely because the legal theory alleged is probably false, but only because the right claimed is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Amberg-Blyskal*, 832 F. Supp. 2d at 447 (quoting *Kulick v. Pocono Downs Racing Ass'n*, 816 F.2d 895, 899 (3d Cir.1987)).

To survive a 12(b)(6) motion, a Plaintiff does not need to plead "detailed factual allegations," but only "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47(1957)). In

evaluating a 12(b)(6) motion, a court must accept “all allegations in the complaint as true, viewing them in the light most favorable to the plaintiffs” and “determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.” *Gould Elecs., Inc. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000); *Pinkerton v. Roche Holdings Ltd.*, 292 F.3d 361, 374 n.7 (3d Cir. 2002). “The defendant bears the burden of showing that no claim has been presented.” *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005). A motion to dismiss “does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations.” *Twombly*, 550 U.S. at 556 (quoting *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989)). “When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

ARGUMENT

As Defendants have set forth various points of argument, Plaintiffs will address each one in turn as they have been presented to assist the Court’s review. Because Defendants filed a combined Motion to Dismiss and a Response to Plaintiffs’ Motion for Preliminary Injunction, Plaintiffs will also rely on the briefing in the Memorandum in Support of Their Motion for Preliminary Injunction (Docket # 11) and incorporate those arguments as if fully set forth herein.

I. Drake v. Filko and the Facial Challenge

It is true this Court is bound by the Third Circuit Court of Appeals decision in *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), cert. denied, *Drake v. Jerejian*, 134 S. Ct. 2134 (2014). Plaintiffs reserved a facial challenge to justifiable need in their Complaint and intend to preserve this challenge for appellate review, including en banc appellate review by the Third Circuit Court of Appeals. As the current law stands, justifiable need has been upheld by the Third Circuit, and thus, this Court is bound by that precedent. However, this is merely for the facial challenge and not on the Plaintiffs' as-applied challenge. Plaintiffs respectfully request that this Court acknowledge that Plaintiffs have properly preserved the facial challenge to justifiable need as unconstitutional.

II. Almeida's Claims are not Moot

Defendants raise a standing argument that Almeida's claims are moot because the Defendants (namely Chief Danielson and the Honorable Judge Conforti) issued Almeida a permit to carry and that this Court has no jurisdiction as there is no longer a case or a controversy. This argument is incorrect as the case in front of this Court turns on whether Almeida's constitutional rights were violated by certain Defendants. In order to prevail in this lawsuit, this Court is not required to vacate or overrule any state court, which is where the *Rooker-Feldman* doctrine applies. On the contrary, as the Third Circuit has made pellucid,

If the matter was previously litigated, as long as the “federal plaintiff ‘present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party ..., then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion.’ ” *Id.* (quoting *GASH Assocs. v. Rosemont*, 995 F.2d 726, 728 (7th Cir.1993)) (further citation omitted).

Great W. Mining & Mineral Co. v. Fox Rothschild LLP, 615 F.3d 159, 166 (3d Cir. 2010).

This is precisely the case here as the Defendants’ conduct violated Plaintiffs’ constitutional rights as an *independent claim*. The Third Circuit established a test to determine if *Rooker-Feldman* applies. It is as follows:

1) the federal plaintiff lost in state court; (2) the plaintiff “complain[s] of injuries caused by [the] state-court judgments”; (3) those judgments were rendered before the federal suit was filed; and (4) the plaintiff is inviting the district court to review and reject the state judgments. (citation omitted) The second and fourth requirements are the key to determining whether a federal suit presents an independent, non-barred claim.

Great W. Mining & Mineral Co., 615 F.3d at 166. For Almeida, we can concede numbers 1 and 3. As to number 2, the “state court judgment” is not the thing complained of; it is more than that as Almeida’s due process rights were violated by the ultra vires application of the justifiable need standard, because taken from the Verified Complaint and the facts submitted therein, Almeida met that standard. Additionally, Almeida contests the application of the justifiable need standard as-applied to him specifically and that the State of New Jersey has no legitimate reason

to prevent him from carrying, concealed or openly, a firearm for self-defense. Under number 4, Almeida is not requesting this Court to review and reject the state judgments, but to state that Almeida's rights were violated by those proceedings and the Defendants responsible for the denial. It is clear that Almeida has his permit to carry now, only after filing this lawsuit and reapplying to receive his permit, but this is not a guarantee that the Defendants will apply the correct standard in less than two years when Almeida must renew his permit to carry.

III. Tumminelli

For Tumminelli, Defendants contest that he "lost" in state court as they claim there was no "denial," and as such, Tumminelli's claims cannot be seriously considered to be avoidable by the *Rooker-Feldman* doctrine. "When, however, a federal plaintiff asserts injury caused by the defendant's actions and not by the state-court judgment, *Rooker-Feldman* is not a bar to federal jurisdiction." *Great W. Mining & Mineral Co.*, 615 F.3d at 167. "At bottom, an examination of the federal constitutional challenge presented here against the [statute] does not require scrutinizing and invalidating any individual state court judgment. As such, the plaintiffs' federal suit did not require the prohibited exercise of appellate jurisdiction by the district court." *Id.* at 168–69 (punctuation and citation omitted). *See also Goodson v. Maggi*, 797 F. Supp. 2d 624, 635 (W.D. Pa. 2011).

As to standing, the United States Supreme Court set forth a three-factor test:

(1) the invasion of a concrete and particularized legally protected interest and resulting injury in fact that is actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of, meaning that the injury must be fairly traceable to the challenged action of the defendant; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Blunt v. Lower Merion Sch. Dist., 767 F.3d 247, 278 (3d Cir. 2014). Under the first factor, “[a]n injury is “concrete” if it is real, or distinct and palpable, as opposed to merely abstract, and is sufficiently particularized if ‘it affect[s] the plaintiff in a personal and individual way.’” *Blunt*, 767 F.3d at 278 (additional citations omitted). But, the “[i]njury-in-fact element is not Mount Everest. The contours of the injury-in-fact requirement, while not precisely defined, are very generous, requiring only that claimant allege [] some specific, identifiable trifle of injury.” *Id.* (citing *Danvers Motor Co.*, 432 F.3d 286, 294 (3d Cir. 2005) (Holding that allegations that a Ford Motor Co. program violated federal law and caused economic injury enough to satisfy injury-in-fact) (citation omitted)).

The first factor is easily met, as both Plaintiffs applied for a permit to carry which invoked their Second Amendment rights under the United States Constitution and did not receive a permit to carry.² Additionally, Plaintiffs are entitled to due process and did not receive it because of the Defendants’ ultra vires construction of the justifiable need standard and the foregone conclusion by the Defendants that they

² After commencement of this suit, Almeida was issued his permit.

would not issue a permit even when Plaintiffs met justifiable need as set forth by the legislature. Statistics demonstrate that the Defendants' application is ultra vires. In 2015, only 637 permits to carry were issued to non-law enforcement.³ Contrast this number with 23,004, which is the number of "violent crimes" listed by the New Jersey State Police for 2014.⁴ Assuming these individual victims met justifiable need, as they were involved in violent crime, one would expect New Jersey to have more permits to carry issued. However, out of those 23,004 individuals, we are left with the proposition that only .027% were issued permits which demonstrates that New Jersey's justifiable need statute is being improperly applied. If one took the entire population of New Jersey at 8,899,339 and divided it by the number of permits issued, it equals 0.00007158% of New Jersey residents with a permit to carry a firearm. This figure demonstrates that New Jersey essentially has a complete ban on permits to carry.

The second factor weighs in Plaintiffs' favor as the Defendants participated in the denial of Plaintiffs' permits to carry and currently apply an erroneous standard to license the Plaintiffs to carry a firearm for self-defense. Additionally, Defendants'

³ <http://c4snj.org/wp-content/uploads/2016/04/2015-chart.jpg> (last accessed September 2, 2016).

⁴ State and Urban Crime Index Offenses, http://www.njsp.org/ucr/2014/pdf/2014_sect_6.pdf (last accessed September 2, 2016).

conduct violated Plaintiffs' due process rights, which is directly traceable to the Defendants.

Likewise, the third factor is easily met as this Court has the authority to rule on whether Defendants' conduct violated Plaintiffs' constitutional rights and to hold the offending statutes unconstitutional as-applied to Plaintiffs. As such, it is likely that Plaintiffs' injuries will be redressed by a favorable decision by this Court. Plaintiffs have demonstrated that they have standing to bring this lawsuit against Defendants.

IV. Almeida's Claims are not Precluded

Defendants raise a preclusion defense and claim that the Full Faith and Credit Act control the outcome of this litigation as this Court, they claim, is "...now required to apply the same *res judicata* effect that New Jersey State Courts would apply to that previous litigation and court adjudication." Defs. Brief at p. 16. This is the crux of Defendants misunderstanding of the Plaintiffs' lawsuit. The Plaintiffs are not seeking this Court overturn the State Court. Plaintiffs seek to have the law held to be unconstitutional as-applied to them and to demonstrate that the "process" put into place by the State of New Jersey is *ultra vires* and denies them of their due process rights. As Plaintiffs have previously demonstrated that *Rooker-Feldman* does not apply, Defendants' allegation that Almeida's claims are precluded are likewise

easily disposed of as this is a separate and distinct claim from the State Court proceedings and Almeida's claim is not precluded.

Defendants' citation to *Gulf Offshore Co., Div. of Pool Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) for the proposition that Almeida could bring his federal claim in state court also misses the mark as it presumes Almeida knew that his Second Amendment rights and due process rights were being violated during his so-called due process. This wild assumption is based purely on speculation and seeks to again deprive Almeida of another right; to vindicate himself through this Honorable Court.

V. Rooker-Feldman Does Not Apply

Rooker-Feldman has been briefed in Section II, *supra*, and for those reasons, Plaintiff Almeida relies on the aforementioned briefing.

VI. Tumminelli Has Article III Standing to Bring His Claims

This was also briefed in Section II, *supra*, but out of an abundance of caution, Plaintiff Tumminelli will address the additional arguments raised herein. Defendants state boldly that it was Tumminelli's own fault that he lacks Article III standing because "... that fact is preeminently the consequence of his own actions in withdrawing his application before it was either granted or denied." Defs. Brief p. 23. The Defendants claim that Tumminelli's withdrawal "... prevented it from

being either granted or denied.” *Id.* However, as stated before, Defendant Conforti’s Order styles the dismissal as an “Order Denying Applicant a Permit to Carry.”

As discussed in Section II, *supra*, New Jersey issues a paltry number of permits to carry, despite having a very high violent crime rate. Defendants counter Tumminelli’s futility argument about applying for permits that it is an “... unsupported, conclusory argument at best, and does not excuse Tumminelli’s lack of standing.” Defs. Brief p. 21-22. New Jersey’s own statistics show that the futility argument has merit, as New Jersey hardly issues any permits at all, and the basis for those permits, i.e, those issued to non-law enforcement personnel, is not made public. It could be that those permits are issued as favors or for people more politically connected and politically influential than Tumminelli. Despite the fact that Tumminelli has literally placed his life in danger and he continues to do so in spite of the multitude of threats posed by ISIS/ISIL and associated terrorist organizations.

Defendants classify those threats as just generalized fears. Perhaps when those organizations make good on their threats New Jersey will change its tune, but as of now, the Court should find that Tumminelli has sufficiently demonstrated that the permit laws are unconstitutional as applied to him, and that New Jersey has no basis to prevent him from carrying a firearm, concealed or openly, outside his home.

VII. Tumminelli Has Plead Sufficient Facts to Mount an As Applied Challenge to New Jersey’s Handgun Permit Law

Unlike a facial challenge, an as-applied challenge to a law “does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right.” *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010) (citing *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410, 411-12 (2006) (per curiam)).

Here, Mr. Tumminelli has proffered sufficient facts to demonstrate that New Jersey’s handgun carry laws are unconstitutional as applied to him. Mr. Tumminelli is currently a GS-13 employed by the Department of Defense (Operations and Intelligence Program Manager to US Special Operations). *See* Complaint ¶ 83. Mr. Tumminelli is responsible for safe-keeping highly classified documents which make him a target. *Id.* ¶ 90. Mr. Tumminelli regularly transports said materials throughout the State of New Jersey. *Id.* ¶¶ 91, 92.

Mr. Tumminelli’s specific duties make him a target because of the classified information he transports. Mr. Tumminelli himself is at a high risk of kidnapping due to the knowledge and information he possesses. His interest in self-protection is not simply that of the average service member or Defense employee. Rather he is in a key position that places him at an unusually high risk of danger. Unlike a person that transports money or jewelry, Mr. Tumminelli must transport classified information and he must retain this knowledge. He cannot change jobs. He cannot

change his location. He must do his duty or America's security is placed in jeopardy. His personal security and the security of some of the Nation's most guarded secrets serves as a compelling government interest that supersedes any interest New Jersey may have in regulating his carrying of a firearm. Thus, New Jersey's handgun carry laws are unconstitutional as applied to him.

Defendants do not actually dispute any of these contentions. Rather they simply argue that the Second Amendment right does not extend outside the home at all. This position finds no support in any Circuit decision. Three Circuit Courts have upheld so-called "good cause" requirements. *See Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012), cert. denied, 133 S. Ct. 1806 (U.S. 2013); *Drake v. Filko*, 724 F.3d 426, 427-28 (3d Cir. 2013), cert. denied, 134 S.Ct. 2134 (U.S. 2014); *Woollard v. Gallagher*, 712 F.3d 865, 882 (4th Cir. 2013), cert. denied, 134 S. Ct. 422 (U.S. 2013). Yet, all three of those Circuits either assumed or found that there is a right to keep and bear arms outside the home. Their holdings were derived from an application of intermediate scrutiny in determining the constitutionality of the respective statutes at issue.

Their decisions are in accord with *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) which is the only Circuit decision to deal with a complete ban on the carry of firearms. There, the Court struck Illinois's complete ban on the carrying of handguns and explicitly found that the Second Amendment right extends outside the home. No

Circuit Court has found that the Second Amendment right does not extend outside the home. Unless this Court agrees with Defendants contention that the Second Amendment right does not apply outside the home *at all*, Defendants have waived any argument as to why Mr. Tumminelli should be denied a firearm.

The Second Amendment right extends outside the home. Thus, at the very least intermediate scrutiny applies. Defendants are either unwilling or unable to offer an important government interest in why it should be able to restrict Mr. Tumminelli's Second Amendment rights. Thus, any protest as to this issue has been waived. *See, e.g., U.S. v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (“unless the conduct at issue is not protected by the Second Amendment at all, the Government bears the burden of justifying the constitutional validity of the law”). This Court should find as applied to Mr. Tumminelli, New Jersey's handgun carry laws violate his Second Amendment rights.

A. Defendants Conduct Violates Due Process because it is Ultra Vires

Defendants misconstrue Plaintiff's Due Process argument. Mr. Tumminelli does not contend that New Jersey does not have enough procedure within its court system to appeal an erroneous denial of a firearm carry permit. Rather, Mr. Tumminelli argues that Defendants handgun carry policies violate Due Process because its handgun carry policies are ultra vires. As established in Plaintiffs' Memorandum in Support of Their Motion for Preliminary Injunction (Docket #11), Defendants

interpretation of New Jersey's handgun carry law is ultra vires. This is the exact same position the Second Circuit has found in the property rights context.

In *Cine SK8, Inc. v. Town of Henrietta*, the owners of a family recreation business called Fun Quest obtained a special use permit to host youth dances at their facility. *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 779 (2d Cir. 2007).⁵ Fun Quest's business quickly grew to the point that it attracted over 600 teenage customers every night. One night, in 2002, a very large group of teenagers arrived at Fun Quest. They came from a nearby movie theater that had lost power. It was a cold night in Henrietta, New York, so most of the teenagers began elbowing their way into Fun Quest's foyer. The crowd became so dense that ingress and egress was cut off and the fire marshal was summoned to the scene.

Thousands of people were trying to push their way into Fun Quest by the time the fire marshal arrived and cleared the area with the help of police. Days later, one of the Henrietta town supervisors sent a letter to the owners of Fun Quest asking that they immediately discontinue teen dances. The letter threatened to revoke or amend Fun Quest's special use permit if the owners did not comply. The supervisors held a special meeting the next day at which they reviewed the overcrowding incident. The board then held its regular meeting and passed a resolution calling for a public

⁵ The d/b/a of Cine SK8 is Fun Quest and will be referred to as Fun Quest.

hearing to consider the revocation or amendment of Fun Quest's special use permit. After a contentious hearing, the board voted unanimously to adopt a resolution amending Fun Quest's special use permit to forbid teen dances. Fun Quest later went bankrupt and had to close because the dance ban destroyed its business. The owners sued the town for violating their substantive due process rights because, they argued, the Board did not have authority to amend a validly issued special use permit under town regulations.

The Second Circuit concluded that the appropriate question to ask in this situation was whether the town infringed on the owners' property rights in an arbitrary or irrational manner. The court examined the town regulations and discovered that the Board could approve, deny, suspend, or revoke a special use permit, but nowhere did the code provide that the Board had the authority to amend a duly issued special use permit and place limitations on it. The Second Circuit thus agreed with the property owners: "[I]f the Town Board did not have authority for the actions it took regarding Fun Quest's permit—as it appears it did not—the Board's actions were ultra vires and, as a result, sufficiently arbitrary to amount to a substantive due process violation." The Second Circuit reversed the lower court's award of summary judgment to the town, and remanded the case to allow Fun Quest's owners to proceed on their substantive due process claim.

Similarly, Plaintiffs have had their Due Process rights violated by Defendants ultra vires conduct. If the government did not have authority for the actions it took regarding Plaintiffs' permits — as it appears it did not — Defendants' "actions were ultra vires and, as a result, sufficiently arbitrary to amount to a substantive due process violation". *Id.* 790.

In order to invoke Due Process a litigant must establish a liberty or property interest is at stake. Once that is done a court balances the risk of erroneous deprivation through the procedures used, and the probable value of any additional or substitute procedural safeguards with the importance of the state interest involved and the burdens which any additional or substitute procedural safeguards would impose on the state. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

In *Cine SK8*, the litigants were able to invoke Due Process because they were able to establish a protected property interest. Here, Plaintiffs' invoke Due Process because they have a protected liberty interest in their right to carry a firearm for purposes of lawful self-defense.

As in *Cine SK8*, Defendants ultra vires conduct is inherently arbitrary and the decision to issue or deny Plaintiffs a permit was made through a process tainted with fundamental procedural irregularities. Here, Defendants have failed to respond to Plaintiffs' ultra vires claims, so they concede that their conduct is ultra vires. Here,

as in *Cine SK8*, if the Defendants do not have authority for the actions it took regarding Plaintiffs' firearm permit, their actions "were ultra vires and, as a result, sufficiently arbitrary to amount to a substantive due process violation".

The government has the right to put in place laws regarding the issuance of handgun permit assuming that procedure complies with the Second Amendment. Now that those laws are in place Defendants are bound to follow those laws. Defendants are acting outside of the scope of the laws promulgated by the New Jersey legislature and this violates Due Process. Mr. Tumminelli has a protected liberty interest in his firearm permit because the Second Amendment right applies outside the home. Defendants' conduct is ultra vires. The government can have no interest in acting outside of the scope of its own law, and as such, Defendants conduct violates Plaintiffs' Due Process rights.

B. Defendants Do Not Raise Any Argument Regarding Plaintiff's Ultra Vires Argument

Defendants have not actually made any legal argument as to why this Court should not hear Plaintiffs' ultra vires argument. And they certainly do not make any argument as to why Defendants' construction of the justifiable need statute is not ultra vires. Defendants aver that "Tumminelli's ultra vires claims must be dismissed because the courts of the State of New Jersey possess the judicial power granted by the sovereign State to interpret the State's own laws and regulations". Plaintiffs

accept that proposition. State Courts do in fact have the authority to interpret its State's laws.

What is unclear about Defendants' discussion is how this relates to Plaintiffs' case. This matter is not before New Jersey's judicial branch. Other than this Court addressing Plaintiffs' constitutional claims, the only other court that was involved in any capacity did not act within its judicial capacity. Presumably, Defendants are alluding to the fact a New Jersey State Court is involved in issuing firearm permits. However, when engaged in that matter a state judge is clearly not acting within a judicial capacity. He is engaging in a governmental administrative function.

There is no dispute that New Jersey State Courts can review New Jersey's laws however that is not the issue before this Honorable Court. Defendants have made no argument as to why this Court cannot review New Jersey's laws and Defendants have made no argument as to why its interpretation of justifiable need is not ultra vires. As these Defendants have failed to make any argument in defense of their conduct, this Court should find that the conduct of Defendants unconstitutional as applied to Plaintiffs.

VIII. Preliminary Relief is Justified Now

The Defendants already conceded that Almeida met the justifiable need standard and issued him his permit. The same holds true for Tumminelli. As

applied, the justifiable need standard is unconstitutional to Tumminelli and there is no reason that this Court should not order that Tumminelli be issued a permit to carry through the pendency of this litigation. Defendants' argument that Tumminelli cannot demonstrate irreparable injury means essentially that Tumminelli must wait until the threats are acted upon and he is either murdered or national security is compromised. This is simply an untenable position as both constitute irreparable harm. Defendants state that the Plaintiffs "are not likely to even withstand a motion to dismiss" when they misconstrue and misunderstand Plaintiffs' main points. It is not contested that Almeida met justifiable need and was issued his permit to carry a firearm, either openly or concealed, under New Jersey law. As such, Plaintiff Almeida, before Defendant Conforti issued his permit, *could* meet all the standards, and but for the ultra vires application of the standard, Almeida would have had his permit long ago.

Tumminelli, for reasons that are classified and unable to be discussed in public forums where readers without proper security clearance are present, even under seal, likewise meets this justifiable need. The limited access and classification of the information known and carried by Tumminelli is reason alone that as applied, New Jersey's justifiable need standard is unconstitutional. Tumminelli meets the standard but cannot provide by way of documentation, due to the sensitive nature of his work.

The Courts are required to do a case-by-case analysis under current New Jersey law⁶ under which Tumminelli is likely to prevail on the merits.

Defendant Richards' Motion to Dismiss

Defendant Richards filed a Motion to Dismiss on August 18, 2016 (Docket # 27). Defendant Richards only addresses Counts 1 & 2, and adopted the Attorney General's position on the remaining counts "to the extent Count 3-7 do purport to assert claims against Richards..." See Richards' Brief, p.4 fn.1. Defendant Richards asks this Court to dismiss both counts.

Specifically, Richards downplays the threats against Tumminelli and states that "... the Complaint fails to allege any facts to demonstrate a justifiable need to carry a handgun." Richards Brief, p. 9. However, Richards then addresses facts set forth in the Verified Complaint by Tumminelli, specifically that his employment "places him at an increased risk of harm from terrorist organizations..." *Id.* Richards cites to *In re Application of Borinski*, 363 N.J. Super. 10, 26 (App. Div.

⁶ Coincidentally, the Supreme Court in *Heller* specifically disagreed with this case-by-case framework. "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *D.C. v. Heller*, 554 U.S. 570, 634 (2008)

2003) for the proposition that the court rejected a categorical rule for issuing permits for individuals in certain occupations. Again, Tumminelli's employment is not the typical employment where he is merely carrying sums of money or diamonds or other property that can be insured and paid for if stolen. Tumminelli's employment supersedes what *Borinski* contemplated because national security concerns were not implicated in that case. It should be remembered by the Court that Tumminelli's challenge, in light of *Drake*, is as applied, and that New Jersey has absolutely no basis for denying Tumminelli a permit to carry.

Richards, as the State Defendants have, misconstrues the Due Process claim of the Plaintiffs, and Tumminelli incorporates the previously briefed points. Additionally, Richards assertion that "... Tumminelli is precluded from asserting a procedural due process violation in federal court" lacks any citation to authority for this proposition.

Defendant Richards' Response to Plaintiffs' Motion for Preliminary Injunction

The only argument that Defendant Richards raised that merits a response is that "Tumminelli cannot show he is subject to a 'special danger' on his life." Richards, p. 16. This argument completely discredits Tumminelli's role in national security and the dangers that Tumminelli faces that for the very security purposes that place his life in danger, cannot be written or disclosed. There is no danger to

public safety by allowing Tumminelli to carry a firearm to protect himself and the Nation's most guarded secrets. Defendant Richards has not proffered any information, not even speculation, that Tumminelli would cause a danger to the public. Defendant Richards does not want to grant Tumminelli a permit for reasons unknown and his application of justifiable need is ultra vires and should be enjoined.

Defendant Sussex County

Defendant Sussex County is in default. See Docket #39. Sussex has refused to participate in this litigation. As a result, the relief requested as to Sussex should be granted. See *USNile Ltd. Liab. Co. v. StormIPTV*, 2:13-CV-00067 JLL, 2014 WL 4637218, at *4 (D.N.J. Sept. 16, 2014) (“The ... order granting the preliminary injunction was a foregone conclusion as soon as default was entered because (1) the Court was required to consider the allegations as true upon entry of default, and (2) USNile's prior counsel did not oppose the motion.”)

Conclusion

For the foregoing reasons, Plaintiffs Albert Almeida and Michael Tumminelli respectfully request that this deny Defendants' Motions and grant Plaintiffs' Motion for Preliminary Injunction and for any other relief this Court deems necessary and proper.

This, the 2nd day of September, 2016.

Respectfully submitted,

/s/ Ryan S. Watson
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CERTIFICATE OF SERVICE

I hereby certify that on September 2nd, 2016, I electronically filed the foregoing document or pleading using the CM/ECF system which generated a NEF for all counsel of record.

I further certify that a courtesy copy, marked as such, was mailed to the Honorable Judge McNulty by United States Postal Service, postage prepaid at the following address:

The Honorable Judge McNulty
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& U.S. Courthouse
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I hereby certify that the following non-CM/ECF participants were served a copy of the foregoing document or pleading by United States Postal Service, postage prepaid:

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By: /s Ryan S. Watson
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