No. 10-56971 [DC# CV 09-02371-IEG]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD PERUTA, et. al.,

Plaintiffs-Appellants,

v.

COUNTY OF SAN DIEGO, et. al.,

Defendants-Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

CALIFORNIA RIFLE & PISTOL ASSOCIATION FOUNDATION

The California Rifle & Pistol Association Foundation has no parent corporations. Since it has no stock, no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS (CONT.)

PAGE(S)

TABLE OF CONTENTS (CONT.)

PAGE(S)

TABLE OF CONTENTS (CONT.)

PAGE(S)

TABLE OF CONTENTS (CONT.)

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

FEDERAL CASES

TABLE OF AUTHORITIES (CONT.)

PAGE(S)

FEDERAL CASES

TABLE OF AUTHORITIES (CONT.)

PAGE(S)

FEDERAL CASES

TABLE OF AUTHORITIES (CONT.)

PAGE(S)

FEDERAL CASES

TABLE OF AUTHORITIES (CONT.)

PAGE(S)

BOOKS, ARTICLES, REPORTS

STATUTES, RULES AND OTHER AUTHORITY

ISSUES PRESENTED

1. Does the Second Amendment right to "bear arms" protect the right to carry a loaded handgun in public in some manner, either openly or concealed?
2. Does allowing restricted open carry of unloaded handguns that may be loaded only *after* one is faced with "immediate, grave danger" provide a reasonable alternative means to bear arms, one that satisfies the Second Amendment right to be "armed and ready" for action in case of confrontation?
3. Was there undisputed, or any, evidence that openly carrying an unloaded handgun allows one to be "armed and ready" for immediate self-defense, or that reducing the number of law-abiding citizens permitted to carry loaded handguns (by denying them concealed carry permits) reduces crime or otherwise serves an important public purpose?
4. Do the classifications created by County's concealed weapon permit issuance policies and practices violate the equal protection clause in light of recent Supreme Court authority that confirms the right to bear arms is fundamental?
5. Did the district court err in relying on cases distinguishing between residents and non-residents in granting County's motion for summary judgment on

Plaintiff Peruta's right to travel, equal protection, and Privileges & Immunities claims, when no determination concerning his residency was ever made?

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 32(a)(7)(B)(iii) and 34(a)(1), Appellants request the opportunity to present oral argument. Oral argument is required in this case in light of the fact that it is a case of first impression in this Circuit, and involves numerous constitutional issues that once clarified will determine the scope of the Second Amendment's protections of the right to bear arms.

STATEMENT REGARDING ADDENDUM

An addendum setting out relevant statutory and regulatory provisions is bound together with this brief.

STATEMENT OF JURISDICTION

This is a 42 U.S.C. § 1983 action. The district court had jurisdiction pursuant to 28 U.S.C. § 1343. Because this suit arises under the United States Constitution, the district court also had jurisdiction pursuant to 28 U.S.C. § 1331 and, to the extent that state law issues were involved, 28 U.S.C. § 1367.

The district court entered an order granting summary judgment for Defendants-Appellees (hereinafter "County"), and entered judgment in their favor

under Federal Rule of Civil Procedure 56 on December 10, 2010. A clerk's judgment in accordance with that order was entered pursuant to Fed. R. Civ. P. 58 that same day.

Appellants filed a timely notice of appeal on December 14, 2010 in accordance with Federal Rules of Appellate Procedure 3 and 4 and Ninth Circuit Rules 3-1, -2, and -4. This Court of Appeals has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

This case involves a constitutional challenge to the policies and practices of County in issuing permits to carry a concealed firearm ("CCW"). Each of the Plaintiffs-Appellants (hereinafter "Plaintiffs") seeks to obtain a CCW for self-defense, but is barred by County because they cannot document a "special need" beyond self-defense as County requires, and because Plaintiffs were not exempted, as some are, from that requirement. Plaintiffs contend County's policies and practices violate their Second Amendment right to bear arms and their Fourteenth Amendment right to equal protection under the law.

Plaintiff Edward Peruta filed the original Complaint in this matter on October 23, 2009 after being denied a CCW by County. Appellants' Excerpts of

Record, Volume V, Tab 58.[1] County moved to dismiss Plaintiff Peruta's Complaint on November 12, 2009,[2] and the district court ultimately denied this motion in an order issued on January 14, 2010. ER Vol. I, Tab 3. Leave to amend the Complaint was thereafter granted, adding the remaining Plaintiffs as parties to the case on June 25, 2010. ER, Vol. IV, Tabs 47-48.

After agreeing to a stipulated briefing and hearing schedule, Plaintiffs filed a motion for summary judgment on their Second Amendment and certain Equal Protection claims. ER, Vol. IV, Tabs 35-36. County filed a cross-motion for summary judgment as to all claims. ER, Vol. III, Tab 28. A hearing on both motions was held on November 15, 2010. ER, Vol. I, Tab 2.

On December 10, 2010, the district court issued an order denying Plaintiffs' Motion and granting County's. ER, Vol. I, Tab 1. A clerk's judgment was entered that same day. ER, Vol. II, Tab 5.

Plaintiffs timely filed their notice of appeal on December 14, 2010. ER, Vol.

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[1] Appellants' Excerpts of Record are hereinafter referred to as "ER." All page numbers cited refer to the bate stamp number on the bottom right corner of the documents referenced. For clarity and ease of reference, the leading zeros have been removed in the citations within this brief, and any relevant line numbers are preceded by a colon.

[2] ER, Vol. V, Tab 57.

II, Tab 4.

STATEMENT OF FACTS

A. Applicable State Law Regulatory Scheme

California laws regulating the possession of firearms in public are somewhat complex. Except in a few sparsely populated counties where one may obtain a permit to carry a loaded handgun openly, California law essentially prohibits carrying a loaded firearm on one's person or in a vehicle in public without a CCW. See also ER, Vol. IV, Tab 37 at 847 (Pls.' Statement of Undisputed Facts ("SUF") 1-2). To obtain a CCW one must apply to the Chief of Police or Sheriff (the "Issuing Authority") of the city or county where the applicant either resides or spends substantial time at their business or principal place of employment. ER, Vol. IV, Tab 37 at 847 (Pls.' SUF 3). CCW applicants must pass a criminal background check[3] and successfully complete a handgun training and safety course of up to 16 hours. ER, Vol. IV, Tab 37 at 848 (Pls.' SUF 5). Even then, the Issuing Authority may deny a CCW application if it finds the applicant lacks either "good moral character" or "good cause" to carry a handgun. ER, Vol. IV, Tab 37 at 848 (Pls.' SUF 6).

Without a CCW, the only way to possess a firearm in public is if it is

[3] ER, Vol. IV, Tab 37 at 848 (Pls.' SUF 4).

unloaded and carried either openly – e.g., in an uncovered hip holster – or in a locked container. *See generally* Cal. Penal Code §§ 12031, 12025, 12026.1, and 12026.2. Along with an unloaded unconcealed firearm one may legally possess ammunition in public. But it must be kept separate, and the firearm can only be loaded when the person "reasonably believes that the person or property of himself or herself or of another is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property;" "immediate" meaning "the brief interval before and after the local law enforcement agency, when reasonably possible, has been notified of the danger and before the arrival of its assistance." Cal. Penal Code § 12031(j)(1).

Any law enforcement officer may inspect a firearm publicly possessed in such a manner to confirm it is unloaded. *See* Cal. Penal § 12031(e). And even possession of an unloaded unconcealed firearm, unless in a locked container, is illegal in large swaths of California due to state and federal prohibitions on possessing a firearm without a CCW within 1,000 feet of any public or private school. *See* Cal. Pen § 626.9; *see also* 18 U.S.C. § 921(a)(25); 922(q); & 924(a).

Plaintiffs provided testimony from a renowned self-defense expert who opined that keeping a firearm unloaded until a threat arises is not a common self-defense practice, nor is it conducive to being ready for self-defense. ER, Vol. II, Tab 12 at

165:16-166:23. County presented no facts or precedent supporting its position that the ability to possess an unloaded firearm along with ammunition is a sufficient self-defense method.

B. San Diego CCW Issuance Policies and Practices

Local Issuing Authorities have traditionally enjoyed broad discretion in deciding whether applicants have "good cause" under state law. This has resulted in some counties, such as San Diego, imposing restrictive standards, while others issue CCWs to most all competent, law-abiding applicants.[4]

To obtain a CCW in San Diego one must apply to the Sheriff. ER, Vol. IV, Tab 37 at 848 (Pls.' SUF 7-8). San Diego County has CCW applicants attend an initial interview with its License Division staff before submitting an official application to evaluate whether they satisfy County's policy. ER, Vol. III, Tab 31 at 441:3-18; ER, Vol. IV, Tab 37 at 852 (Pls.' SUF 17).

County's written policy states that to show "good cause" "[a]pplicants will be required to submit documentation to support and demonstrate their need." ER, Vol.

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[4] See Kelsey M. Swanson, *The Right to Know: An Approach to Gun Licenses and Public Access to Government Records*, 56 UCLA L. REV. 1579, 1591-92 (2009). *See also* California Department of Justice, Bureau of Firearms - Statistics, Carry Concealed Weapons Licenses Report 1987-2007, http://ag.ca.gov/firearms/forms/pdf/ccwissuances2007.pdf (last visited May 23, 2011).

V, Tab 37 at 848 (Pls.' SUF 9). County *requires* applicants who seek a CCW for purely self-defense purposes (*i.e.*, unrelated to a business/profession) to provide evidence of a specific threat of harm to them ("Current police reports and/or other documentation supporting need (*i.e.*, such as restraining orders or other verifiable written statements))." *See* ER, Vol. IV, Tab 37 at 849 (Pls.' SUF 10). County applies a separate "good cause" standard for applicants seeking a CCW because they engage in certain "risky" businesses. In those cases, County does not require the same proof of a specific threat, but acknowledges that they may be a target due to their business. ER, Vol. IV, Tab 37 at 849 (Pls.' SUF 11). The Sheriff's Department does not issue CCWs based on fear alone. *See* ER, Vol. IV, Tab 37 at 850 (Pls.' SUF 12.)

County's "good cause" policy – by requiring applicants to provide documentation of a special need such as a specific threat or "dangerous" business practice as a precondition to obtaining a CCW[5] – deprives Plaintiffs of the only lawful manner to generally carry a loaded firearm in public under California law. ER, Vol. IV, Tab 37 at 847 (Pls.' SUF 2). County admits the purpose of this policy is to reduce the number of CCWs issued. ER, Vol. I, Tab 1 at 12; Vol. III, Tab 29 at 400 (Def.'s SUF 5).

[5] ER, Vol. III, Tab 29 at 400 (Def.'s SUF 5).

When an applicant is denied a CCW by County, the decision can be appealed to the Assistant Sheriff of the Law Enforcement Bureau, who will make the decision to uphold or reverse the denial. ER, Vol. III, Tab 31 at 443:17-444:4.

The evidence shows that certain CCW applicants enjoy special treatment. County granted renewals of self-defense CCWs to certain members of the Honorary Deputy Sheriff's Association ("HDSA") – a private, civilian entity, wherein membership is achieved merely by being sponsored by a current member, passing a background check, making a "donation" and paying annual dues (ER, Vol. IV, Tab 37 at 854 (Pls.' SUF 26); Vols. IV & VII, Tab 38) – whose CCW applications merely stated "personal protection" or "protection." ER, Vol. IV, Tab 37 at 852 (Pls.' SUF 18). One HDSA member provided as his "good cause" that he drives in desolate areas with his wife and wants "self-defense against anyone that might come" upon them. ER, Vols. II & VI, Tab 24 at 319; Vol. II, Tab 18 at 232:12-233:7. Another HDSA member, who had been denied his renewal CCW, sent a letter to Sheriff Gore personally. He cites his 19 year HDSA membership, explains several reasons why he wants a CCW, but never mentions any specific threat against him. He then states: "I ask you [Sheriff Gore] intercede in the process and direct the Licensing division to reissue my CCW." Nine days later he resubmitted his renewal application – instead of doing a formal appeal as is

County's policy (ER, Vols. II & VI, Tab 24 at 311-314; Vol. II, Tab 18 at 233:1-7) – and it was granted that same day. The "good cause" he provided in his accepted application made no mention of a specific threat, simply stating: "Self-protection, a desire to be able to protect myself and my family from criminal activity, in case response to request to law enforcement is delayed." Although County submitted documents from certain HDSA members' CCW files to rebut Plaintiffs' allegations that HDSA members get special treatment, none of those documents concern any of the four HDSA members that Plaintiffs allege never provided a specific threat against them to meet County's "good cause" policy. ER, Vols. IV & VIII, Tab 38 at 934-953. Plaintiffs also provided notes made by County staff in some HDSA members' applications, such as: "Comma[nder] for HDSA (SDSO) considered VIP @ sheriff level – okay to renew standard personal protection." (*See* ER, Vol. II & VI, Tab 24 at 316; *see also* Vol. IV, Tab 37 at 853 (Pls.' SUF 23)). And, Plaintiff Cleary provided a detailed declaration about his application process with County, in which he explains he was denied a CCW but was subsequently issued one, without having to reapply, after joining the HDSA and meeting personally with then Undersheriff Gore. *See generally* ER, Vol. V, Tab 41.

C. Plaintiffs/Appellants

Plaintiffs are individuals who were either denied a CCW by County[6] or opted not to apply, believing they could not meet County's requirements for a CCW,[7] and an organization – California Rifle and Pistol Association Foundation – representing thousands of individuals in California, many of whom are residents of San Diego and in the same predicament as the individual Plaintiffs. ER, Vol. V, Tab 37 at 851 (Pls.' SUF 15).

All individual Plaintiffs are residents of San Diego County. No Plaintiff is prohibited under federal or California law from possessing firearms. ER, Vol. IV, Tab 37 at 847. Plaintiffs allege they are entitled to a CCW from County under the Second Amendment because such a permit is the only lawful means to generally bear arms for self-defense in public in California. ER, Vol. IV, Tab 37 at 847 (Pls.' SUF 1-2). But for being prevented from obtaining a CCW, and the fear of prosecution and other penalties, each Plaintiff would on occasion carry a loaded handgun in public ready for self-defense. ER, Vol. IV, Tab 37 at 851 (Pls.' SUF 14).

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[6] ER, Vol. IV, Tab 47 at 1104:1-1111:10; Vol. IV, Tab 37 at 851-852 (Pls.' SUF 14, 17).

[7] *Id.*

All Plaintiffs who applied for a CCW asserted self-defense as their "good cause" but were denied for not documenting a specific threat against them. ER, Vol. IV, Tab 37 at 852 (Pls.' SUF 17).

STANDARD OF REVIEW ON SUMMARY JUDGMENT

An order granting summary judgment on the constitutionality of a statute or ordinance is reviewed de novo. *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 940 (9th Cir. 1997). The standard governing this Court's review is the same as that employed by trial courts under Rule 56(c), with the Court determining, after independently viewing the evidence and all inferences therefrom in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact, and whether the district court correctly applied the law. *See Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327, 1328-29 (9th Cir. 1983); *see also*, *Berger v. City of Seattle*, 569 F.3d 1029, 1035 (9th Cir. 2009) (independent review of questions of law and fact in First Amendment case).

On a motion for summary judgment, as at trial, the substantive law determines burden of proof issues and evidentiary standards. It dictates what the moving party must show to prevail on its motion and what the non-moving party must show, if anything, to resist the motion. *See Nissan Fire & Marine Ins. Co. v. Fritz*, 210 F.3d 1099, 1102-03 (9th Cir. 2000). In this case, County's policy infringes upon an

enumerated, fundamental right, so County has the burden of persuasion at trial and thus must prove "beyond controversy" each element of its defense on summary judgment. *Berger*, 569 F.3d at 1035. The district court did not address this added burden.[8] It is a heavy burden, one County failed to carry.

SUMMARY OF ARGUMENT

The reason for this lawsuit is that County's policy of denying concealed carry permits to almost all residents, in conjunction with the State's general ban on open carry of loaded firearms, effectively bans bearing arms in public for self-defense purposes. In light of the Supreme Court's ruling in *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008), confirming that the Second Amendment secures an individual, fundamental right to keep and bear arms for self-defense, the general ban on bearing arms in San Diego is unconstitutional.

The least intrusive and disruptive way to remedy this situation is to force County to change its current local CCW policy under which seeking a permit to generally protect oneself and one's family is insufficient. Because "bearing arms" is now acknowledged as a fundamental right, that restrictive policy is no longer

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[8] The district court's lengthy explanation of burdens on summary judgment failed to address the added burden placed upon the moving party–County, here, as the party whose motion was granted–when that party has the ultimate burden of persuasion at trial. *See* ER, Vol. I, Tab 1 at 4:5-5:4.

valid. But the remedy is simple. "Self-defense" must be considered a "good cause."

The problem with the district court's decision is that it strains to resolve the conflict between the old County policy and the mandates of the Second Amendment by concocting a novel alternative means of exercising the right to bear arms: unloaded open carry ("UOC"). But as this Court will see, the district court's effort is based on a false legal premise and at least two additional prejudicial errors that require reversal.

First, the court fails to find that the Second Amendment right to "bear arms" protects to some degree a right to bear loaded arms. As addressed in Part I.A., that is an untenable position – and a pernicious error negatively affecting the burden of proof, presumptions of validity/invalidity, and the degree of scrutiny.

Next, the court finds that if there *is* a right to bear loaded arms, it is not significantly burdened because state law allows one to carry an unloaded handgun, openly, in some circumstances, with the right to load it after being attacked. As explained in Part II.B.2, UOC eviscerates the right to armed self-defense. UOC is not a viable alternative means of bearing arms. It is also a novel interpretation of the Second Amendment right that should be rejected.

Finally, the court finds that, even if County's policy burdens protected conduct it survives intermediate scrutiny. This too is error, because, as explained in

Part I, bearing arms for self-defense purposes is "core conduct" protected by a fundamental right, and laws restricting that conduct are subject to strict scrutiny. Further, as shown in Part II.C., under any heightened scrutiny, County failed to connect its goal of reducing violent crime to its policy of denying CCW permits to law-abiding citizens. County's policy fails any heightened scrutiny test.

In addition, as shown in Part II.D, County's policy creates classifications that, pre-*Heller*, may have been rational, but because a fundamental right is now implicated, these classifications are impermissible and violate equal protection. An additional classification based on preferential treatment afforded members of an "Honorary Deputies" association also violates Plaintiffs' equal protection rights.

In sum, the court's decision granting County's motion should be reversed; Plaintiffs' motion should be granted. County's CCW policy – by its own admission–is intended to and does impose a severe burden on the right to bear arms. *It is in direct contravention of the Second Amendment's guarantee*. The Amendment says the right "shall not be infringed," and the policy is intended not only to infringe, but to purposefully deny the right to bear arms to Plaintiffs and almost all law-abiding residents of San Diego.

ARGUMENT

I. THE DISTRICT COURT'S INTERPRETATION OF SECOND AMENDMENT RIGHTS CONFLICTS WITH THE SUPREME COURT'S INTERPRETATION IN *HELLER* AND *MCDONALD*

The foundational error underlying the district court's decision to grant County's summary judgment motion was its failure to find the Second Amendment protects, generally, a right to bear loaded firearms for self-defense. This is evident from the way the court framed the question presented:

> At the heart of the parties' dispute is whether the right recognized by the Supreme Court's rulings in [*Heller* and *McDonald*]–the right to possess handguns in the home for self-defense–extends to the right asserted here: the right to carry a loaded handgun in public, either openly or in a concealed manner.

ER, Vol. I, Tab 1 at 1:20-28.

This reflects the court's "minimalist approach" to *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008), and to the people's right to arms.[9] This view permeates the court's ruling and, ultimately, requires its reversal.

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[9] Unless otherwise indicated, the "right to arms" refers to the Second Amendment right to keep and bear arms for lawful purposes, including self-defense. Similarly, Plaintiffs use "self-defense" as shorthand for defense of self, family, and others, as well as hearth and home (property).

A. The District Court Adopts A Minimalist View of *Heller* that Conflates the Second Amendment *Right* Defined in *Heller* with the *Application* of the Right in the *Heller* Case

The district court followed the "minimalist view" of *Heller*. Generally speaking, the minimalist view entails narrowly reading the holding and findings that support it, while broadly reading dicta regarding "presumptively lawful" restrictions on the right to arms in an effort to (1) keep the right to arms home-bound, or (2) at least keep "core conduct" protected by the right home-bound, and thereby (3) lower the level of scrutiny applied to regulations of the right outside the home.

Here, the district court's reading of the Second Amendment conflates the *right* defined in *Heller* with the *application* of the right to the narrow facts of that case, asserting that the narrow holding – as opposed to the detailed analysis and findings – *defines* the scope of the fundamental right to arms. This explains why the district court describes the right "recognized" in *Heller* as "the right to possess handguns in the home for self-defense." ER, Vol. I, Tab 1 at 1: 22-26. Of course *Heller* (and *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020 (2010))[10] did far more than

[10] *See alsoU.S. v. Skoien*, 614 F.3d 638, 647 (7th Cir. 2010) (Sykes, J. dissenting) ("I appreciate [my colleagues'] minimalist impulse, but this characterization of *Heller* is hardly fair. It ignores the Court's extensive analysis of the original public meaning of the *Second Amendment* and understates the opinion's central holdings . . .").

recognize a right to possess handguns in the home for self-defense. Rather, they confirmed that the Second Amendment secures (not "creates") an individual, natural right of armed defense, *Heller*, 554 U.S. at 598-99, and that at the core of this guarantee is the right to keep and bear arms for "defense of self, family, and property." *Id*. at 591-594; *McDonald*, 130 S. Ct. at 3048 (the "inherent right of self-defense has been central to the *Second Amendment* right").[11]

Further, while the *Heller* Court found "the need for defense of self, family, and property is most acute" in the home, where one's right to defend self, family, and property converge, it never suggested the "right" ended at one's threshold, or somehow became "non-fundamental" beyond that point (though it might be "less acute").[12] *Heller* simply noted that the firearms prohibitions at issue were so severe they obviated the need to fashion and apply any particular standard of review; the laws at issue failed *any* heightened scrutiny. *Heller*, 554 U.S. at 627-28.

The *McDonald* decision, in striking down similar laws, emphasized the fundamental nature of the right to arms. As this Court recently noted, *McDonald* went to "great lengths" to demonstrate the right to keep and to bear arms is

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[11] Which makes San Diego's policy of denying CCWs to law-abiding residents who seek permission to carry arms "only" for self-defense all the more incongruous.

[12] *See Heller*, 554 U.S. at 628.

"fundamental" and "rejected the suggestion that the Second Amendment should receive less protection than the rest of the Bill of Rights." *Nordyke v. King*, No. 07-15763, --- F.3d ----, 2011 WL 1632063 at * 2 (9th Cir. May 2, 2011) ("*Nordyke V*"), *citing McDonald*, at 3041-44.

The Supreme Court's and this Court's descriptions of the fundamental right to arms stand in stark contrast to the district court's treatment of the right. Under its "minimalist" view, the right to arms defined in *Heller* remains an enigma, at least beyond the mere right to possess handguns in the home, ER, Vol. I, Tab 1 at 6:15-20. This view leads the court to question even the existence of a right to bear loaded arms outside the home:

> If it exists, the right to carry a loaded handgun in public cannot be subject to a more rigorous level of judicial scrutiny than the "core right" to possess firearms in the home for self-defense. . . . At most, Defendant's policy is subject to intermediate scrutiny.

ER, Vol. I, Tab 1 at 11:18-12:5 (also, repeating the non sequitur that because in-home firearm possession is a "core right," outside possession cannot be).[13]

[13] Ultimately, the court declined to decide whether the Second Amendment encompasses a right to carry a loaded handgun in public. ER, Vol. I, Tab 1 at 9:18-10:3. The court decided to review the policy nonetheless, and in keeping with its minimalist view, applied a low level of intermediate scrutiny, more akin to a "reasonableness" test rejected by this Court in *Nordyke.* (see below, part II.C.).

Compare the district court's view to the Supreme Court's view of the same fundamental, enumerated right:

> The very enumeration of the right [to Arms] 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. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.

Heller, 554 U.S. at 634-35 (emphasis in original).

And further: "The right of the whole people . . .to keep and bear arms of every description, . . . shall not be infringed, curtailed, or broken in upon, in the smallest degree . . . ." *Id*., at 612, *citing Nunn v. State*, 1 Ga. 243, 251 (1846).

In sum, the district court's opinion reflects a view that the Second Amendment is not an affirmative, fundamental right to be exercised responsibly by virtuous citizens, but a right that remains inchoate until one is attacked – a right that is little more than a codification of common law defenses to firearms charges. But it is not. No more than the First Amendment right to free speech is a

codification of common law defenses to libel and slander charges. The right to free speech is not conditioned on having something important to say or a reason for saying it. Likewise, the right to arms is not dependent on first being confronted by grave and immediate danger. That is to confuse the right to arms with the legal justification for acting in self-defense – they are related, but not the same. The rationale for *not* imposing preconditions on the exercise of constitutional rights is particularly evident with respect to the right to bear arms. One cannot use a firearm one does not have or, in this case, does not have "ready" for action in a case of conflict. *Heller*, 554 U.S. at 584.

B. The Court's Failure to Find that the Second Amendment Protects the Right to Bear Loaded Arms Conflicts with *Heller's* Finding that People Have the Right to Be Armed and Ready for Action in Case of Confrontation

The district court's interpretation of the right to bear arms as being inchoate until one's life is in "immediate, grave danger" conflicts with *Heller*'s description of the right to bear arms as "the individual right to possess and carry weapons *in case of confrontation*," *Id.* at 592 (emphasis added), and its adoption of the definition of "carry," which in the context of arms means to "carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being *armed and ready* for offensive or defensive *action* in a case of a conflict with another person."

Id. at 584 (citation omitted) (emphasis added). The *Heller* Court's choice of language shows the right to arms contemplates being prepared for danger, being armed and ready for action, i.e., activity which by definition occurs *before* one is under attack – not *after* one is faced with "immediate, grave danger." This is especially so where the definition of "immediate" used by the district court refers to that "brief interval before and after the local law enforcement agency, when reasonably possible, has been notified of the danger and before the arrival of its assistance." ER, Vol. I, Tab 1 at 7:21-8:2.[14]

People are not "armed and ready for . . .. defensive action" when openly carrying an *unloaded* firearm. The plain language suggests *loaded*, and the Supreme Court's detailed description of the right confirms it. As does a review of dictionary definitions. The Oxford English Dictionary defines the word "armed" as "equipped with or carry a firearm or firearms." Merriam-Webster defines "armed" as "furnished with weapons . . . using or involving a weapon."[15] The word "ready" is defined by Oxford as "in a suitable state for an action or situation; fully prepared

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[14] All further statutory references are to the California Penal Code unless otherwise noted.

[15] Oxford Dictionaries Online, http://oxforddictionaries.com/ (select "Version: World English;" then search "armed") (last visited May 22, 2011); Merriam-Webster Online, http://www.merriam-webster.com/dictionary/armed (last visited May 22, 2011).

. . . made suitable and available for immediate use." Webster defines it as "prepared mentally or physically for some experience or action . . . prepared for immediate use."[16] Put together, "armed and ready" contemplates a loaded firearm.

This is a matter of common sense. Criminal attacks generally are unpredictable, they come unannounced. People carrying unloaded firearms are not "armed and ready" for defensive action when they are legally barred from getting "ready" until the grave threat is immediately upon them.[17] The notion that the "right to keep and bear arms" does not even contemplate bearing loaded arms is untenable. The only valid questions concern the degree to which the government may regulate that right.

II. THE DISTRICT COURT'S APPLICATION OF THE SECOND AMENDMENT IS FLAWED UNDER ANY STANDARD OF REVIEW

After the district court's decision, this Court decided *Nordyke V*, and established an analytical framework for reviewing Second Amendment challenges to firearms regulations and restrictions based, at least in part, on a "substantial burden" test. We discuss that in Part II.B., below. But because *Nordyke V* is not

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[16] Oxford Dictionaries, *supra*, at "ready" and Merriam-Webster, *supra*, at "ready."

[17] It is also a matter of expert opinion. See Declaration of Helsley at 4-5.

yet final,[18] we also discuss the categorical/historical approach outlined in *Heller* (Part II.A), as well as the "traditional" levels of scrutiny applied in free speech jurisprudence (Part II.C).

A. Under *Heller's* Categorical Approach, County's Near Ban on Bearing Loaded Arms in Public is Invalid

The state's regulatory scheme generally prohibits carrying a loaded handgun in public either openly or concealed. *See* Statement of Facts ("SOF"), § A. Consequently, County's policy of denying permits for concealed (and loaded) carry, in combination with state laws, effectively bans carrying loaded handguns in public for self-defense purposes, in any manner. As in *Heller*, where a ban on bearing loaded handguns in private for self-defense was invalidated, County's public ban likewise violates the Second Amendment right to arms. Specifically, it impermissibly prohibits the vast majority of law-abiding San Diego residents from being "armed and ready" to defend themselves. This can be seen by applying to this case the same analytical approach used in *Heller*.

The analytical framework for Second Amendment cases under the categorical approach used in *Heller* was summed up by the Fourth Circuit in

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[18] Judgment was entered in *Nordyke V* on May 2, 2011, and on May 12, 2011, Appellants in that case filed a motion to extend time to file a petition for rehearing. The Court granted that motion the same day it was filed, giving the *Nordyke V* Appellants until May 23, 2011 to file their petition for rehearing.

United States v. Chester, 628 F.3d 673 (4th Cir. 2010). In *Chester*, the defendant had been convicted for illegal possession of a firearm because of a previous misdemeanor conviction for domestic violence. The issue was whether defendant's conviction abridged his right to arms. After a panel rehearing, the court vacated its initial opinion (vacating the judgment and remanding the case) and reissued a similar opinion, but with additional guidance provided to the district court on the framework for deciding Second Amendment challenges. *Id*. at 678.

The court instructed the government to demonstrate under the intermediate scrutiny standard[19] that there was a reasonable "fit" between the challenged law providing permanent disarmament of all domestic violence misdemeanants and a "substantial" government objective of reducing domestic gun violence. The court noted that, on the record before it, it was not able to say whether or not the Second Amendment, as historically understood, did or did not apply to persons convicted of domestic violence misdemeanors. *See id.* at 680-81. After reviewing recent right to Arms cases, the court suggested the following analytical framework.

> Thus, a two-part approach to *Second Amendment* claims seems appropriate under *Heller*, as explained by the Third Circuit Court of

[19] The court settled on intermediate scrutiny because Chester was not a "law-abiding citizen," and thus was not within the core scope of the right to arms identified in *Heller*. *Chester*, at 682-83.

> Appeals, *see Marzzarella,* 614 F.3d at 89, and Judge Sykes in the now-vacated *Skoien* panel opinion, *see* 587 F.3d at 808-09. The first question is "whether the challenged law imposes a burden on conduct falling within the scope of the *Second Amendment's* guarantee." *Id*. This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification. *See Heller,* 128 S. Ct. at 2816. If it was not, then the challenged law is valid. *See Marzzarella,* 614 F.3d at 89. If the challenged regulation burdens conduct that was within the scope of the *Second Amendment* as historically understood, then we move to the second step of applying an appropriate form of means-end scrutiny. *See id. Heller* left open the issue of the standard of review, rejecting only rational-basis review. Accordingly, 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*.

Id. at 680 (emphasis added).

Based on the facts in this case, Plaintiffs easily pass the initial inquiries into whether the conduct being prohibited is within the scope of the Second

Amendment, and whether the challenged policy burdens that conduct.

1. Bearing loaded arms in public for self-defense purposes is conduct within the scope of the Second Amendment

The Second Amendment declares that the "right of the people to keep and bear Arms, shall not be infringed." It seems self-evident that this mandate contemplates loaded firearms, particularly while bearing them for self-defense purposes. Moreover, by definition, "being armed" means having a loaded weapon. *See* § I.B. above. To find otherwise ignores the plain meaning of the words and the parameters of the right so thoroughly examined and described in both *Heller* and *McDonald*.

In *Heller*, the Court engaged in a seven-page, in-depth analysis of the meaning of "bear" when used with "arms." *See Heller*, 554 U.S. at 584-91. At the end of its analysis, the Court concluded that, "[p]utting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation." *Id*. at 592. Nowhere in that extensive analysis did the Court consider bearing *unloaded* arms. *Heller* viewed the right to "bear arms" as being the right to carry them for the specific purpose of being "armed and ready" for "defensive *action* in a case of conflict with another person." *Id.* at 584, citing *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J.,

dissenting opinion) (quoting Black's Law Dictionary 214 (6th ed. 1998)).

In short, the notion that the right to bear arms extends only to *unloaded* arms was so foreign that it was not considered by the Court.

Nor is there any support to find a Second Amendment exception for County's policy, based on the cases cited in *Heller*. None suggest that the right to bear arms contemplated anything other than loaded arms. The two primary cases upheld concealed carry restrictions because open loaded carry was readily available. *See State v. Chandler*, 5 La. Ann. 489, 489-90 (noting the prohibition on carrying concealed weapons "interfered with no man's right to carry arms . . . 'in full view,' which places men upon an equality") *accord*, *Nunn*, 1 Ga. at 251. Neither case discusses unloaded carry, open or concealed, or suggests it would satisfy the Second Amendment. In fact, *Nunn* suggests just the opposite, stating "[a] statute which, under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional." *Nunn*, 1 Ga. at 248. quoting *State v. Reid*, 1 Ala. 612, 616-17 (1840) (emphasis added). Now, as then, an unloaded weapon is useless in a self-defense emergency. ER, Vol. II, Tab 12 at 165:16:166:23.

Further, as seen in Part I.C., the district court correctly noted that "the

unrestricted right to carry weapons openly [w]as recognized in both *Chandler* and *Nunn*," and provided the basis for upholding the restrictions on concealed carry in those cases. ER, Vol. I, Tab 3 at 88:19 n. 7 (emphasis in original). Here, there is no "unrestricted" or even generally available right to carry loaded weapons openly, leaving loaded concealed carry the only option. SOF § A.

Finally, County failed to provide any facts, law, or historical precedent to support the district court's novel interpretation of the right to bear arms, one that does not include a right to bear loaded arms – and the court failed to require any. Thus, there was no historical inquiry like that undertaken in *Heller*. Instead, the court simply opined that UOC and Section 12031satisfy the right to *armed* self-defense. ER, Vol. I, Tab 1 at 8:8-10. Ultimately, the court declined to decide whether loaded carry is protected conduct, at all. ER, Vol. I, Tab 1 at 9:18-10:3.[20]

[20] Because the district court found that "*Heller* does not preclude Second Amendment challenges to laws regulating firearm possession outside of home . . ." ER, Vol. I, Tab 3 at 86:18-87:2, and recognized a right under the Second Amendment to publicly "carry a firearm for self defense" – albeit *unloaded* (ER, Vol. I, Tab 1 at 9:18-10:3) – Plaintiffs feel it unnecessary to reargue here whether such a right to armed self-defense in public exists as it seems beyond dispute that it does, and they fully briefed the issue in their Motion. See generally ER, Vol V, Tab 3 and Vol. II, Tab 18. Moreover, the Ninth Circuit already recognizes the right to carry arms extends beyond the home. *See Nordyke V*; *see also U.S v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010).

In short, the court initially erred by failing to recognize (or protect) the right to bear loaded arms, and by accepting its corollary, that "unloaded" open carry satisfied the right to arms, without any foundation: no historical precedent, no legal authority, no expert opinion. On that flawed basis, the court wrongly found County's CCW policy either did not implicate the fundamental right to arms (because loaded carry is outside the scope) or, if it did, it imposed no significant burden on that right.

2. County's good cause policy, by definition, burdens the right to bear arms

A policy that is designed to and does preclude almost all law-abiding adults who reside in San Diego from bearing loaded arms in the only manner generally available under State law, i.e., pursuant to a CCW permit, necessarily burdens the right to do so.[21] To the extent the court found limiting the right to Arms to *unloaded* arms is a permissible alternative to bearing loaded arms, it is nonetheless a burden on the right to bear arms, generally. As in *Chester*, the government is charged with justifying the constitutional validity of any law that burdens the right to Arms. *Id*. And on summary judgment, County should have been made to do so "beyond controversy." *Berger*, 569 F.3d at 1035.

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[21] County does not dispute its intent is to limit the number of CCW permits issued. See ER, Vol. III, Tab 28 at 383:19-23.

Here, County presented no evidence to suggest the Second Amendment, as historically understood, did *not* contemplate a limitation on the government's authority to infringe upon the people's right to bear *loaded* firearms. Nor did it present any evidence that UOC provides a viable alternative means of exercising the right to bear arms for self-defense purposes.

3. County's CCW policy is not saved by its claim that the burden imposed is mitigated by the availability of UOC

As discussed in detail under the "substantial burden" analysis that follows, the district court erred in finding that the limited ability to carry an unloaded firearm (with ammunition ready for "instant" loading) satisfies the mandates of the Second Amendment, or somehow mitigates the burden on loaded carry. Under the *Heller* categorical/historical approach, the error stems from the court's failure to conduct an historical inquiry into whether the Framers thought the "right to bear Arms" for self-defense purposes and to be "armed and ready in case of conflict" referred to anything other than carrying loaded arms, or whether regulations permitting only unloaded, open carry were common at that time. The answer to both is no; and there is no evidence to the contrary. *See* Section II.A.1.

In sum, based on the analytical approach applied in *Heller*, the court may not hold that the right to bear arms operable for self-defense use, i.e., loaded arms, is

not protected – even "core" – conduct under the Second Amendment without some historical inquiry into the Framer's intent similar to the Court's inquiry in *Heller*. Nor may the court rely on an unloaded, open carry scheme to fill the void created by banning both open and concealed loaded carry; not without first providing some evidence that it actually does fill the void (or, more appropriately, placing the burden on County to do so).

UOC is an impractical, unwieldy, and potentially dangerous practice. The district court's finding to the contrary is theoretical. But when fundamental rights are at stake, theories, suppositions, and imaginings are not enough; that is the stuff of "rational basis" review – a standard specifically rejected in *Heller*. *See id.* at 628 n.27.

Had the district court applied the analytical approach used in *Heller* and treated the right to arms with similar regard, it would have denied County's motion in full. Moreover, it would have granted Plaintiffs' partial motion for summary judgment on its Second Amendment claim.

4. The district court should have granted plaintiffs' motion on their Second Amendment claim under *Heller's* categorical approach because County's CCW policy is intended to and does impose a severe burden on the right to arms

As set out above, County failed to prove that its policy, which is intended to

restrict and does restrict core conduct protected by the fundamental right to Arms, was justified under any applicable standard of review. As in *Heller*, such a severe and direct restriction is categorically void.[22] At the very least, as the party with the burden of proof at trial, County should have been required to show "beyond controversy" that its policy survived heightened scrutiny. But it was not (see part II.C, below). The court simply adopted County's unsubstantiated contention that UOC provides sufficient avenue to be "armed and ready" to engage in self-defense and exercise their Second Amendment rights.

Plaintiffs have shown – and County admits – that County's policy works to deny CCW permits to otherwise qualified, law-abiding adults who cannot *prove* they have a "valid reason" to exercise their Second Amendment right to bear arms. See SOF § B. On its face and as applied, County's policy substantially and unduly burdens that right to almost all San Diegans. Plaintiffs submitted expert

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[22] In its ruling, the district court noted that the ordinance in *Heller* required firearms to be inoperable at all times, whereas California has a self-defense exception. ER, Vol. I, Tab 1 at 8:16-21. But that proves little. Using the district court's own minimalist approach (which would be appropriate, here, as we are viewing *restrictions* on a fundamental right), there is nothing to suggest the *Heller* Court would have ruled differently had there been a self-defense exception. Moreover, while County's law does not make it *impossible* to use arms in self-defense, the evidence in the record shows it comes close. See ER, Vol. II, Tab 12 at 165:26-166:23. Of course, fundamental rights are "infringed" long before they are "impossible" to exercise.

declarations regarding the heavy burden. See generally, ER, Vol. II, Tabs 12, 21-23. And there is nothing in the record to rebut that evidence.

County only provided an expert declaration showing that criminals (without CCW permits) use concealed handguns to cause harm. See generally, ER, Vol. III, Tab 30. But County produced no evidence that denying CCWs to law-abiding adults would help solve that problem or reduce gun violence.[23] ER, Vol. I, Tab 1 at 10:4-12:28. There is nothing in the record connecting a reduction in CCW permits to a reduction in crime – and it was County's burden to provide that evidence. In short, the policy and justification for it do not pass constitutional muster under any test. The policy is in direct contravention of the right. As in *Heller*, this Court need look no further or consider what form of heightened scrutiny is appropriate. County's policy of denying CCWs to law-abiding citizens is invalid in a post-*Heller* world, at least in the absence of generally available open loaded carry. *See Heller*, 554 U.S. at 629 (citing *Nunn*, 1. Ga. at 521).

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[23] As discussed below, this Court in *Nordyke V* decided against a standard of review that would consider crime reduction as a factor, noting that *Heller* discussed only burdens on the right to arms, and nowhere mentioned reducing crime as a possible justification for imposing burdens on the right of law-abiding adults to keep and bear arms. Thus, County's evidence, in addition to being, on whole, a non sequitur, is irrelevant. *Id*. at *5.

B. Under *Nordyke v. King*'s Substantial Burden Analysis, County's Ban on Bearing Loaded Arms for Self-Defense in Public is Invalid

Subsequent to the district court's ruling, this Court issued its opinion that the proper standard of review for Second Amendment challenges is a "substantial burden" test, finding that "regulations that substantially burden the right to keep and to bear arms trigger heightened scrutiny under the Second Amendment." *Nordyke*, 2011 WL 1632063 at *6.

Nordyke involved a Second Amendment challenge to a county ordinance making it a misdemeanor to possess a firearm or ammunition on county property. *Nordyke*, 2011 WL 1632063 at *1-*3. The Nordykes operated a gun show on county property, and claimed the ordinance's effective ban on their gun show violated the Second Amendment. *Id.* at *1-*2. In answering whether the Nordykes' complaint sufficiently alleged that the ordinance substantially burdens their right to keep and to bear arms, the panel drew on the doctrines generated in the contexts of abortion and content-neutral speech restrictions for guidance, explaining, "we should ask whether the restriction leaves law-abiding citizens with reasonable alternative means for obtaining firearms sufficient for self-defense purposes." *Id.* at *7.

In articulating the particulars of this test, however, the *Nordyke* panel

declined to identify a specific level of heightened scrutiny. But it does provide direction. After rejecting a "strict scrutiny" test that would require courts to engage in "judicially unmanageable" inquiries into the likely effectiveness of gun-control regulations and "make empirical findings or predictive judgments for which they lack competence," *id*. at *5, this Court provided its rationale for a substantial burden-based test:

> By contrast, the substantial burden test, though hardly mechanical, will not produce nearly as many difficult empirical questions as strict scrutiny. *See* Volokh, *supra,* at 1459–60 (arguing that it is easier to determine whether a law substantially burdens the right to bear arms than to figure out whether a law "will reduce the danger of gun crime"). Indeed, courts make similar determinations in other constitutional contexts. *See, e.g., Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (holding that pre-viability abortion regulations are unconstitutional if they impose an "undue burden" on a woman's right to terminate her pregnancy); *Clark v. Cmty. for Creative Non–Violence*, 468 U.S. 288, 293 (1984) (stating that content-neutral speech regulations are unconstitutional if they do not "leave open ample alternative channels for communication"). Courts can use the

doctrines generated in these related contexts for guidance in determining whether a gun-control regulation is impermissibly burdensome, as we suggest below.

Id. at *5.

So under *Nordyke*, the questions here become: (1) whether County's CCW policy substantially burdens Plaintiffs' right to arms and (2), if so, does the policy (a) place an undue burden on the right to armed self-defense in public and/or (b) leave Plaintiffs with no reasonable alternative means for exercising that right, *i.e.*, does it essentially preclude them from being armed and ready for defensive action in case of confrontation.

1. County's CCW policy places preconditions on the right to bear arms in public that the vast majority of otherwise qualified law-abiding adults cannot meet–it does not burden their right, it denies it

Based on the 19th century cases cited in *Heller*, the right to carry arms in public in case of confrontation can be regulated, but not generally banned. The Court cited *Nunn*, *e.g.*, where a concealed carry restriction was allowed to stand only because open carry was unrestricted. *See Heller*, 554 U.S. at 629 (citing *Nunn*, 1. Ga. at 521). Here, we have the opposite situation, with open loaded carry being generally banned and concealed loaded carry allowed subject to permits issued by

local authorities.

Perhaps, as Professor Volokh suggests, the shift away from open carry and toward concealed carry reflects a change in social conventions.[24] But whatever the reason, the Second Amendment nonetheless guarantees a right to bear arms in *some* manner that serves the rights' core purposes, one of which is to bear arms for self-defense. In San Diego, the vast majority of residents cannot do so. And not because such residents are felons or have mental problems, nor because they could not pass the required skills. But because County chose to adopt a policy of denying permits to all but the select few who can document some specific threat. SOF § B. On its face, a policy that is both intended to and does bar people from bearing arms substantially burdens the right to do so.

2. The restricted ability to carry unloaded arms openly, and the limitations on loading them in a self-defense emergency, does not provide a reasonable alternative means of exercising the right to bear arms

Under the abortion and time, place, and manner doctrines applied in *Nordyke*, County's policy constitutes an "impermissible burden" on the right to bear arms. The *Nordyke* panel found the ordinance there was not a "substantial burden" on the plaintiffs' Second Amendment rights because it allowed for

[24] *See* Volokh, *infra*, note 27.

sufficient alternative avenues to engage in commerce of firearms (e.g., sales on private land). *Nordyke V*, 2011 WL 1632063 at *7-*8. In so holding, the panel relied in part on *Frisby v. Schultz*, 487 U.S. 474 (1988), which upheld an ordinance banning picketing in a neighborhood because the would-be picketers were still able to march, go door-to-door, distribute literature, and call residents via phone, which provided sufficient avenues for First Amendment activity. *Nordyke* also relied on *Gonzalez v. Carhart*, 550 U.S. 124, 164 (2007), which held a ban on a method of abortion did not constitute an undue burden because "[a]lternatives [were] available" that were methods "commonly used and generally accepted." *Id.* at *7 (internal citation and quotation marks omitted).

Unlike the activities restricted in *Nordyke*, *Frisby*, and *Carhart*, California provides no reasonable alternatives to a CCW for bearing arms in self-defense. The district court found (assumed) that UOC coupled with the 12031(j) exception allowing one to load a firearm when faced with grave and immediate danger provided a reasonable alternative. ER, Vol. I, Tab 1 at 9:13-18 & n.7 ("As a practical matter, should the need for self-defense arise, nothing in *section 12031* restricts the open carry of unloaded firearms and ammunition ready for instant loading"). But there is nothing instant about it. Plaintiffs provided expert testimony showing UOC is *uncommon* for self-defense, and having to load a firearm while

under attack does not generally allow one to be "*armed and ready* for offensive or defensive action in a case of conflict with another person," *Heller*, 554 U.S. at 584. *See also* ER, Vol. II, Tab 12 at 165:26-166:23.[25]

The statutory allowance for UOC is severely restricted geographically, to the point of being practically useless for effective self-defense. Cal. Pen § 626.9, 18 U.S.C. §§ 921(a)(25); 922(q) & 924(a). Those who UOC must learn the location of every school in their route, determine what areas are within 1,000 feet thereof, and either plan to travel around them (which in urban areas is virtually impossible), or stop and place the firearm in a locked container each time they enter such a zone,[26] or risk felony prosecution.[27]

UOC also subjects individuals to random stops and searches to insure the

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[25] Another practical problem with relying upon the availability of open carry (limited though it may be) to justify a ban on concealed carry for most people is that social norms have changed such that an open carry-only restriction may no longer be a viable alternative. *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and A Research Agenda*, 56 UCLA L. REV. 1443, 1523-24 (2009).

[26] See Cal. Penal Code § 626.9(c)(2).

[27] Nor did the court address the unintended legal consequences of declaring UOC the constitutionally protected method of carry. For instance, such a ruling may place in jeopardy the lawfulness of Cal. Pen § 626.9 (Gun Free School Zone Act, banning open carry within 1000 feet of a school facility), a far more drastic result than granting Plaintiffs the relief they seek.

handgun is unloaded. While following their serpentine route through the city to avoid prohibited areas, those who UOC can be stopped and subjected to a search of their firearm by each officer they come into contact with. *See* Cal. Pen § 12031(e).

Each of these limitations alone is a substantial burden on the right to bear arms, but their aggregate is undoubtedly so. Such a scheme is not a reasonable alternative to a CCW.

3. County's policy "unduly burdens" Plaintiffs' right to bear arms under *Casey*; it's purpose and effect is to obstruct plaintiffs' right

In *Casey*, the Supreme Court noted that "[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877. Employing the *Casey* analysis per this Court's direction in *Nordyke V*, a regulation that has the purpose *or* effect of placing a substantial obstacle in the path of persons seeking to exercise the right to bear arms would constitute an unlawful burden. Here, it does both.

As set out above, the purpose of County's policy is to restrict the number of CCWs. County asserted that the interest being furthered by its policy, which the court accepted as valid, was reducing the number of firearms in public, even those carried pursuant to a CCW. ER, Vol. III, Tab 28 at 383:19-22; see also Vol. I, Tab

1 at 12:15-23. County's express purpose is to obstruct people like Plaintiffs from exercising their right to be "armed and ready" for self-defense in public, and leaves Plaintiffs with UOC as the only option for carrying a firearm in public at all. For the reasons explained above, limiting Plaintiffs to UOC with all of its limitations obstructs Plaintiffs' rights. Plaintiffs have thus met their burden to show that County's policy places an "*undue* burden" on their right to bear arms based on the doctrines set forth by the *Nordyke* panel. And, under *Nordyke*, public safety is not an acceptable reason for imposing such a burden. (See part II.C, below) .

4. At minimum, a material issue of fact exists over whether County's policy places a "substantial burden" on the right to bear arms for self-defense

This Court has explained that where an undue burden claim is raised "the usual summary judgment standards apply, and all inferences from the evidence must be made in favor of the nonmoving party." *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 541 (9th Cir. 2004). A grant of summary judgment is inappropriate if plaintiffs have submitted evidence sufficient to create an issue of material fact from which a reasonable fact-finder could find that the challenged regulation constitutes a substantial burden. *Id*. at 541-42.

The evidence Plaintiffs have submitted, at minimum, created factual disputes over whether limiting lawful carry to UOC is a substantial burden on the right to

bear arms for self-defense. *See* ER, Vol. II, Tab 10 at 152:1-155:1; Tab 12 at 165:26-166:23.

5. Under *Nordyke*, Plaintiffs' Motion on their Second Amendment challenge to County's policy should be granted

The doctrines promoted in *Nordyke* support granting Plaintiffs' Second Amendment facial challenge because County's policy burdens "a large fraction" of the people seeking a CCW. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992). *Casey* explains an abortion law is facially unconstitutional if, "in a large fraction of the cases in which [the statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Casey*, 505 U.S. at 895.[28] And, in determining whether there is a substantial burden, "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Id.* at 894.

County "defines 'good cause' under Penal Code section 12050 as a set of

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[28] Facial challenges made under the First Amendment also need only show that the law challenged is unconstitutional in a "substantial number" of its applications. See *New York v. Ferber*, 458 U.S. 747, 769-71 (1982).. As the Supreme Court explained in *McDonald*, the Second Amendment right is no less fundamental than others. See *McDonald*, 130 S.Ct. at 3037. Thus, Plaintiffs' facial challenge easily passes either the abortion "large fraction" or free speech "substantial number" test. (In any event, because County's application of the policy to Plaintiffs blocked them from obtaining CCWs, County's policy also is invalid "as applied.")

circumstances that distinguishes the applicant from other members of the general public." ER, Vol. I, Tab 1 at 2:22-3:3. Thus, the policy is designed to operate as an obstacle in obtaining a CCW for a "large fraction" of applicants (i.e., those unable to distinguish themselves from everyone else). Because UOC is not an adequate alternative to a CCW for armed self-defense, County's policy of denying CCWs to the vast majority of law-abiding adults is facially invalid under *Nordyke*. Accordingly, Plaintiffs' Motion should be granted as to their Second Amendment claim.

C. The District Court Erred in Applying Intermediate Scrutiny and in Holding That County's Policy Survived That Level of Scrutiny

1. County had the burden of justifying its policy

County has the ultimate burden of proving its policy satisfies whatever level of heightened scrutiny applies. *See*, *e.g.,United States v. Chester*, 628 F.3d at 680 ("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"). Moreover, under heightened scrutiny, *the presumption of validity is reversed*, with the challenged law presumed unconstitutional. *See Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989); *R.A.V.v. City of St. Paul*, 505 U.S. 377, 382 (1992) (opinion by Scalia, J.) (content-based regulations on speech are

presumptively invalid).

As the party with the burden of proof at trial, County must establish "beyond controversy" that its policy satisfies each element of the applicable test for heightened scrutiny and thus passes constitutional muster. *See, Southern Calif. Gas Co.,* 336 F.3d 885, 888 (2003).

2. Strict scrutiny is the appropriate standard of review

The district court held "[i]f it exists, the right to carry a loaded handgun in public cannot be subject to a more rigorous level of judicial scrutiny than the "core right" to possess firearms in the home for self-defense," and so at best, intermediate scrutiny is the appropriate standard. ER, Vol. I, Tab 1 at 11:21-12:5.

The court erred as to both its characterization of the right and its selection of intermediate as opposed to strict scrutiny. The district court's incorrect, minimalist view of the right explained above led it to adopt intermediate scrutiny, reasoning "[t]o date, a majority of cases citing to *McDonald* and employing some form of heightened scrutiny—most of which are challenges to *criminal convictions*—have employed intermediate scrutiny. *E.g., United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 97 (3rd Cir. 2010)." ER, Vol. I, Tab 1 at 11:9-13. The key phrase is "criminal convictions." Multiple courts, including this one, have recognized that individuals disqualified from possessing

arms or who illegally use arms do not enjoy the same rights as law-abiding citizens. *See., e.g., Vongxay*. This simple yet important distinction was made clear by this Court in *Nordyke V*, with its repeated references to the right to arms as applied to "law-abiding citizens." *Nordyke*, 2011 WL 1632063 at *7.

It is true that "fundamental constitutional rights are not invariably subject to strict scrutiny." ER, Vol. I, Tab 1 at 11:18-20. Like the First Amendment, certain restrictions on less important activities are subject to lesser scrutiny. But Plaintiffs dispute the court's treatment of the right to be "armed and ready" for self-defense as something less than "core conduct" under the Second Amendment. *See generally*, ER, Vol. IV, Tab 36.

If laws infringing criminals' right to arms are subject to intermediate scrutiny, restrictions on the rights of law-abiding citizens must be held to a higher standard. The general rule, the one that should apply here, is: when a law interferes with "fundamental constitutional rights," it is subject to "strict judicial scrutiny." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973).

3. County's "good cause" policy is not reasonably fitted to achieve an important public interest

"A law will be struck down under intermediate scrutiny unless it can be shown that it is substantially related to achievement of an important governmental

purpose." *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1430 n. 7 (9th Cir. 1989). In defending content-neutral regulations under the First Amendment, the Supreme Court has noted that the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994) (plurality opinion). To meet the standards of intermediate scrutiny, County must show evidence that depriving people of the right to be "armed and ready" for self-defense simply because they cannot document a specific threat against them furthers an important state interest. County can make no such showing.

This Court's decision in *Nordyke* rejects the relevancy of the only justification shown for County's CCW restrictions: crime reduction. This Court found that "*Heller* specifically renounced an approach that would base the constitutionality of gun-control regulations on judicial estimations of the extent to which each regulation is likely to reduce such crime." *Nordyke*, 2011 WL 1632063 at *4. Further, under heightened scrutiny, the only interest considered is the government's actual asserted interest.[29] As this Court rejected the justification provided by County, County's policy fails even intermediate scrutiny.

In any event, County's evidence was both flawed and disputed. Even if crime

[29] *See Carey v. Population Services, Int'l*, 431 U.S. 678, 696 (1977)

reduction were relevant, County provided no evidence that denying qualified people CCWs furthers that interest. The only "evidence" provided was the declaration of Professor Frank Zimring, which merely recited statistics of the misuse of firearms *by unlicensed criminals*. Professor Zimring provided no evidence that people with CCWs threaten public safety. See generally, ER, Vol. III, Tab 30. County failed to show the "fit" or any connection at all between denying CCWs to law-abiding adults and reducing crime, and thus cannot meet its burden under either intermediate or strict scrutiny.

Being a motion for summary judgment, County had the burden of proving "beyond controversy" that its policy furthers its interest of reducing crime. At minimum, Plaintiffs provided evidence to controvert whether County's purported interest is furthered by its "good cause" policy. See generally, ER, Vol. II, Tabs 21-23.

D. SHERIFFS NO LONGER ENJOY THE UNFETTERED DISCRETION IN ISSUING CCWS THAT THEY DID BEFORE *HELLER*, AND PENAL CODE SECTION 12050 MUST BE CONSTRUED TO REFLECT THAT CHANGE TO AVOID THE INVALIDATION OF BOTH PENAL CODE SECTIONS 12050 AND 12031

According to the district court "Plaintiffs' challenge cannot be properly construed as a mere challenge to [County's] policy" because to hold that a desire

for self-defense alone satisfies the "good cause" criterion of Cal. Pen. § 12050 "would eliminate the discretion afforded sheriffs under section 12050." ER, Vol. I, Tab 1 at 10-11 n.7. But the basic premise of Plaintiffs' lawsuit is that sheriffs no longer enjoy unfettered discretion in issuing CCWs post-*Heller*. Plaintiffs are challenging County's "policy *in implementing* section 12050's 'good cause' requirement," (ER, Vol. II, Tab 18 at 218:1-220:8) (emphasis added), instead of 12050 and 12031 themselves. Those sections are not unconstitutional *so long as* 12050's "good cause" requirement is construed as being satisfied by an assertion of self-defense, a "central component" of the Second Amendment right, *Heller*, 554 U.S. at 599.

1. Construing 12050 as conferring unfettered discretion on Sheriffs in determining who has "good cause" to exercise a fundamental right is inconsistent with *Heller*

To the extent the district court found sheriffs still enjoy unfettered discretion in deciding who is entitled to carry a firearm for self-defense post-*Heller*, it is mistaken. In *Heller*, the Court negated the discretionary aspect of one of the challenged ordinances and directed the District to issue a license that would satisfy the prayer for relief, finding:

> Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his

handgun and *must* issue him a license to carry it in the home.

Heller, 554 U.S. at 635 (emphasis added). *Heller* plainly holds that those, like County, charged with licensing the means of exercising the right to arms do not have wide discretion to deny such licenses.

The judicial treatment of state "right to bear arms" provisions supports this view. For example, in 1980 the Supreme Court of Indiana found that a state constitutional right to "bear arms" protected the right to carry handguns, and it accordingly overturned a state law that allowed officials to deny permits to carry handguns on the grounds that such an approach "would supplant a right with a mere administrative privilege." *Schubert v. De Bard*, 398 N.E.2d 1339, 1341 (Ind. 1980). Similarly, the Supreme Court of Rhode Island opined:

> One does not need to be an expert in American history to understand the fault inherent in a gun-permitting system that would allow a licensing body *carte blanche* authority to decide who is worthy of carrying a concealed weapon. The constitutional right to bear arms would be illusory, of course, if it could be abrogated entirely on the basis of an unreviewable unrestricted licensing scheme.

Mosby v. Devine, 851 A.2d 1031, 1050 (R.I. 2004). *See also Kellogg v. City of Gary*, 562 N.E.2d 685, 696 (Ind. 1990) (city officials could not refuse to distribute

applications for permits to carry handguns).

Moreover, drawing on First Amendment jurisprudence (as this Court, the district court, and the Supreme Court have done), construing 12050 as conferring unfettered discretion on County in determining "good cause," creates the equivalent of an unlawful prior restraint. A permissible prior restraint must not place "unbridled discretion in the hands of a government official or agency" and must not allow "a permit or license [to] be granted or withheld in the discretion of such official." *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-26 (1990); *see also Staub* v. *City of Baxley*, 355 U.S. 313, 322 (1958).

A licensing scheme such as County's, where it exercises "unbridled discretion" in determining who may have a permit which is required to exercise the fundamental right to bear arms is impermissible post-*Heller*.

2. The doctrine of constitutional avoidance requires that 12050 be construed as limiting sheriffs' discretion to avoid the invalidation of that section and 12031

Construing 12050 as Plaintiffs suggest is not only consistent with, but likely mandated by, the doctrine of constitutional avoidance.[30] Under that doctrine, the

[30] The canon of constitutional avoidance provides that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council,* 485 U.S. 568, 575 (1988) (quoting *Hooper v. California,* 155 U.S. 648, 657 (1895)).

court should *uphold* California's licensing scheme and ban on unlicensed carrying of loaded firearms by construing 12050's "good cause" criterion to be satisfied where CCW applicants of good moral character assert "self-defense" as their basis, thereby only voiding County's local policy.

Plaintiffs' suggested construction of 12050 also comports with how courts often interpret the word "may." By simply construing "may" in 12050 as permission from the Legislature, it would be read to say "[*only*] upon [completing all the other requirements] may the Sheriff [be permitted to] issue a CCW." In other words, it can be read as prohibiting sheriffs from issuing a CCW to people who do not meet the qualifications, and requiring them to issue a CCW to those who do. In fact, this is the construction 12050 is given, at least in practice, by the *majority* of California counties. Thus, it can hardly be considered an "unreasonable" interpretation.

III. PLAINTIFFS' EQUAL PROTECTION CHALLENGE TO COUNTY'S "GOOD CAUSE" POLICY IMPLICATES A FUNDAMENTAL RIGHT; THE DISTRICT COURT ERRED IN TREATING IT OTHERWISE

A. The court improperly distinguished between similarly situated persons seeking to exercise their right to armed self-defense

The district court held that County's "good cause" policy was valid because "not all law-abiding citizens are similarly situated, as Plaintiffs contend. Those who

can document circumstances demonstrating 'good cause' are situated differently than those who cannot." *Peruta*, 2010 WL 5137137 at *9. The court apparently so held because it found County's policy valid under the Second Amendment (*i.e.*, due process).

The district court's equal protection analysis depends on the prerequisite finding that plaintiff's Second Amendment rights are not unconstitutionally infringed by County's policy. Once that unconstitutional infringement is recognized, the equal protection analysis changes dramatically.

County's policy necessarily creates classifications of people: 1) those like Plaintiffs, who do not qualify for a CCW under County's "good cause" policy because they have no specific threat against them; and 2) those who do qualify because, according to County, they have a *special* need for a CCW.

Those who can document a special need for a CCW acceptable to County are situated differently from Plaintiffs in a legally insignificant, factual sense. There is a more readily identifiable potential danger to them, and arguably a more immediate *need* to exercise their right to self-defense. But any difference in the degree of need to exercise the fundamental right to self-defense is not an appropriate distinction for this constitutional analysis.

All law-abiding persons *are* similarly situated in their worthiness to exercise fundamental rights. *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 440, and *Hussey* v. *City of Portland*, 64 F.3d 1260, 1265 (9th Cir. 1995) (quoting *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 670 (1966)). ER, Vol. IV, Tab 36 at 839:3-843:19; Vol. II, Tab 18 at 232:2-234:20. *Hussey* ruled: "where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized . . .." *Id*., at 1265, quoting *Harper*, 383 U.S. at 670; and citing *Kramer v. Union Free School Dist.*, 395 U.S. 621, 628-29 (1969).

In *Kramer*, the Supreme Court struck down a law limiting the right to vote in school district elections to property owners and parents of school children, finding the classification failed to survive strict scrutiny. *Kramer*, 395 U.S. at 626-629. The court explained, where fundamental rights are concerned, the issue is not whether the legislative judgment and resulting classification had some basis, but whether the distinctions "do in fact sufficiently further a compelling state interest to justify denying the franchise to appellant and members of his class." *Kramer*, 395 U.S. at 633.

As in *Hussey* and *Kramer*, Plaintiffs allege County's official policy creates impermissible classifications that "severely and unreasonably interferes with" their

fundamental rights because they cannot obtain a CCW where others can. *Hussey*, 64 F.3d at 1266. County denies Plaintiffs and other law-abiding San Diegans the right to bear arms by depriving them of the only manner available to be "armed and ready" in public. ER, Vol. IV, Tab 36 at 823:10-22. Since the rights of those who show a constitutionally irrelevant "special need" for armed self-defense are not so infringed, County must justify its different treatment of the two classes.

Any restriction on a class in exercising a fundamental right must pass strict scrutiny review.[31] The court erred in failing to apply strict scrutiny to the classifications created by County's official "good cause" policy. County's admitted goal of limiting the number of CCWs in attempts to reduce crime is not a valid state interest, and does satisfy its burden to show a compelling interest is furthered by preferring those County subjectively deems have a "special need" for a CCW over plaintiffs more general desire for one.

[31] This Court has already indicated strict scrutiny is appropriate in equal protection challenges concerning the right to carry. *See U.S. v. Vongxay*, 594 F.3d 1111 (2010 9th Cir.). It was Vongxay's felony status, not that he was in public or lacked a "special need," that precluded strict scrutiny.

B. Even if section 12031 were enough to satisfy Second Amendment mandates, this alone would not defeat Plaintiffs' equal protection claim

Even if County's policy were valid under the Second Amendment (*i.e.*, Due Process) because people can UOC, an Equal Protection challenge nonetheless requires a separate analysis. The 14th Amendment's Due Process and Equal Protection clauses are "not mutually exclusive," nor "always interchangeable phrases." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *see also Ross v. Moffitt,* 417 U.S. 600, 609, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974) distinguishing claims under those clauses.

It is the carrying of arms – i.e., to be "armed and ready" for self-defense – that is the fundamental right protected by the Second Amendment. Even if limiting carry to unconcealed and unloaded firearms were a valid regulation of that right under due process, creating classifications of people who are allowed to exercise the right to self-defense by carrying a *loaded* firearm (i.e., to exercise a *superior form* of the right) while others are limited to UOC (an *inferior* form of exercising the right), still violates the rules of equal protection. *Cf. Kramer*, at 628-29 (once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection).

IV. THE DISTRICT COURT ERRED IN MATTERS OF LAW AND FACT ON PLAINTIFFS' EQUAL PROTECTION CLAIM ALLEGING PREFERENTIAL TREATMENT OF COUNTY'S "HONORARY DEPUTIES"

A. The District Court Applied the Wrong Standard of Review

The district court erred in relying on *March v. Rupf* to find Plaintiffs failed to prove an "impermissible" classification. First, *March v. Rupf* 2001 WL 1112110 (2001) was pre-*Heller*, before California was compelled to recognize a fundamental right to bear arms for self-defense. *Id*., at * 2. The law in *March* was subject to rational basis review. *Id*. Classifications which restrict the exercise of fundamental rights are subject to strict scrutiny, and under and heightened scrutiny the burden is on the government to justify its classification. *See Hussey*, at 1265, quoting *Harper*, 383 U.S. at 670.

In any case, *March* is not binding precedent and should not be followed. Even if rational basis were the appropriate standard, there is nothing rational about exempting "Honorary Deputies" from its policy requirements, while denying CCWs to others because they do not meet those requirements.[32] *See Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (a "class of one," may bring equal

[32] In addition, the court relied upon a unique brand of rational basis applicable to equal protection challenges in cases of selective prosecution, which has an additional showing of "impermissible grounds." *see id*., at * 30 , citing *Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1349 (9th Cir. 1983).

protection claim for being intentionally treated differently from others similarly situated where there is no rational basis for that treatment).

B. Plaintiffs Provided Compelling Evidence That County Treated Them Differently than "Honorary Deputies" County Provided No Evidence to the Contrary

The court's main basis for granting County's Motion on this claim appears to be Plaintiffs' alleged failure to provide evidence of disparate treatment sufficient to survive summary judgment. *Id*., at *31. The evidence showed, however, that all Plaintiffs who applied for a CCW asserted self-defense as their "good cause" but were denied for not documenting a specific threat against them. ER, Vol. IV, Tab 37 at 852 (Pls.' SUF 17). It also showed that County did not hold certain HDSA members to that heightened need standard. SOF § B.

The court dismisses this evidence by simply relying on County's assertion that renewals of CCWs, as opposed to initial issuance, are subject to less scrutiny, *see*, *id*., at *31-32. But the court did so on blind faith. Plaintiffs have never seen, nor has County produced, evidence from those HDSA members' initial CCW applications that show they *ever* documented specific threats. Plaintiffs assume such documents do not exist based on County's response to Plaintiffs' allegations about these HDSA members: "documentation has been provided *in nearly all cases* by these applicants." ER, Vol. III, Tab 28 at 378:20 (emphasis added). Not only

does County admit here that it did not demand a showing of specific threats from *all* those HDSA members, but the documents provided as supporting its assertion do not concern any of the four HDSA members Plaintiffs alleged sought a CCW for self-defense without documenting a specific threat. SOF § B.

Even in the absence of original CCW applications, some of the renewal records show unmistakably that certain HDSA members were not required to document a specific threat for a self-defense CCW as Plaintiffs were. In short, the evidence showed: 1) an HDSA member, subject to no apparent threat, skipped the appeal process (SOF § B) and had his second renewal application immediately granted, after contacting the Sheriff (*Id.*); 2) another HDSA member was granted a renewal application despite having "good cause" almost *identical* to that of Mr. Peruta, with no evidence of any specific threat (*Id.*); 3) notes made by County staff in some applications indicating special treatment of HDSA members; and 4) that Plaintiff Cleary experienced preferential treatment himself as an HDSA member in obtaining a CCW. ER, Vol. IV, Tab 37 at 854 (Pls.' SUF 24).

Viewing this evidence in a light most favorable to Plaintiffs, as the district court was required to do, a finder of fact could easily conclude Plaintiffs were similarly situated to HDSA members but treated differently; at least to survive summary judgment (and allow for additional discovery).

V. THE DISTRICT COURT RELIED ON ERRONEOUS AUTHORITY IN ANALYZING PLAINTIFF PERUTA'S RESIDENCY CLAIMS

The district court never found Peruta was not a resident of San Diego. In fact, the court itself previously opined "even if the Court adopts the definition [of resident] suggested by [County], [Peruta] appears to be a 'resident' of San Diego County." ER, Vol. I, Tab 3, at 94 n.14. And, County insists Peruta was a resident. ER, Vol. III, Tab 28 at 377:9-11. Yet, the court relied on case law distinguishing between residents and non-residents in granting County's motion on Peruta's equal protection, right to travel, and Privileges & Immunities claims, even though the issue was whether he, as a resident of San Diego, was treated differently than other residents.[33] ER, Vol. IV, Tab 36 at 839:3-843:19. The court applied irrelevant analysis in evaluating these claims, and must be reversed.

[33] Peruta's Privileges & Immunities claim is pled *in the alternative* of the right to travel claim. They are distinct claims. Peruta asserts that *if he is not* a resident, his rights thereunder are violated. Because County does not dispute he is a resident now, Peruta has no standing, as indicated in Plaintiffs' Opposition and the court had no reason to rule on it.

CONCLUSION

This Court should reverse the district court's judgment.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiffs-Appellants identify the following cases as related:

- David Mehl, et al. v. Lou Blanas, et al., No. 08-15773
- *James Rothery, et al. v. County of Sacramento, et al.*, No. 09-16852

Rothery and *Mehl* contain numerous questions presented for review that seem to be unrelated to the case at hand. Nonetheless, to the extent that the *Mehl* and *Rothery* cases challenge the denial of CCWs for lack of self-defense being considered "good cause," the cases are related.

Date: May 23, 2011

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