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' REPLY BRIEF

C. D. Michel (S.B.N. 144258)
Glenn S. McRoberts (S.B.N. 144852)
Sean A. Brady (S.B.N. 262007)
Bobbie K. Ross (S.B.N. 273983)
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
Tel. No. (562) 216-4444
Fax No: (562) 216-4445
e-mail: cmichel@michellawyers.com

Paul Neuharth, Jr. (S.B.N. 147073)
PAUL NEUHARTH, JR., APC.
1140 Union St., Suite 102
San Diego, CA 92101
Tel. No.: (619) 231-0401
Fax No.: (619) 231-8759
e-mail: pneuharth@sbcglobal.net

Counsel for Plaintiffs-Appellants

TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

FEDERAL CASES

TABLE OF AUTHORITIES (CONT.)

PAGE(S)

FEDERAL CASES (CONT.)

TABLE OF AUTHORITIES (CONT.)

PAGE(S)

FEDERAL CASES (CONT.)

STATE CASES

TABLE OF AUTHORITIES (CONT.)

PAGE(S)

STATE CASES (CONT.)

CONSTITUTION, STATUTES, RULES & REGULATIONS

TABLE OF AUTHORITIES (CONT.)

PAGE(S)

CONSTITUTION, STATUTES, RULES & REGULATIONS

PUBLICATIONS

INTRODUCTION

This is a case of first impression concerning the fundamental individual right to keep and bear arms for self-defense purposes outside the home and, more specifically, whether local governments may deny that right to people who cannot prove a special, unique need to bear arms. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court left no doubt that the Second Amendment will not tolerate prohibitions on keeping and bearing handguns in the home for self-defense purposes–and did so without *any* consideration of whether Mr. Heller could distinguish himself from other residents in terms of his "need" to exercise the right to arms. The essential question in this case is whether the same holds true outside the home.

Appellees (collectively "County") begin by arguing that the Second Amendment's protections against government infringement do not apply outside the home. County contends that *Heller* and *McDonald v. City of Chicago*, --- U.S. ---, 130 S. Ct. 3020 (2010) "went to great lengths to explain that the scope of *Heller* extends only to the right to keep a firearm in the home for self-defense." Appellee's Answering Brief (AB) at 9. But as explained in Section I, the Supreme Court did no such thing.

Notably, the issue here is *not* whether there is a "constitutional right to bear

a loaded, concealed weapon" in public, as County and their amici repeatedly claim is the issue. AB at 10. Plaintiff-Appellants ("Plaintiffs") assert no such right. Rather, they assert the right to bear loaded firearms for self-defense in whatever manner the state Legislature constitutionally directs. In California, that is by licensed, concealed carry. This is a critical distinction.

In addition to misstating the issue presented, County inaccurately argues that Plaintiffs are actually challenging California Penal Code sections 12050 through 12054, and 12031. But Plaintiffs' Complaint shows otherwise. The denial of their licenses to carry a firearm was the direct result of *County*'s policy. And as explained in Section II, County fails to identify any legal mandate that would compel Plaintiffs to challenge the State's statutory regime in full in order to seek relief for their County-inflicted injuries. Plaintiffs have sued to have County's policy declared constitutionally invalid. While the Second Amendment's protections may reach beyond the discrete issues presented in this case, Plaintiffs need not address all such situations here.

County next argues that even if the right to bear arms outside the home exists, its "good cause" policy does not substantially burden that right. *See* AB at 11-16. As explained in Section III, that argument flies in the face of reality. Had Plaintiffs sought carry licenses in most states in this country – or even most

counties in California – they would have gotten them because most jurisdictions do not require law-abiding, competent adults to provide documentary evidence that they have a unique *need* for a license to exercise their fundamental right to bear arms. Indeed, in some states no license is even required.[1] But in San Diego, because of County's (not California's) definition of "good cause," Plaintiffs were denied the licenses. That is not just a "burden," it is a prohibition directly at odds with the right to bear arms. County's "no substantial burden" position is indefensible, unless one first accepts the equally indefensible notion that the right to bear arms does not exist outside the home.

County alternatively argues that even if its "good cause" policy *does* burden the right to bear arms, it nonetheless meets any standard of scrutiny. *See* AB at 17-27. Here again, County relies heavily on its "home-bound" Second Amendment, claiming: "Where regulations do not affect the possession of firearms in the home . . . there is no trend toward any heightened level of scrutiny." AB at 21. As

---

[1] The states of Vermont, Alaska, Arizona and Wyoming allow their residents to carry concealed firearms without a permit. *See* Associated Press, *Wyoming governor signs concealed gun bill*, Billings Gazette, Mar. 2, 2011, *available at* http://billingsgazette.com/news/state-and-regional/wyoming/article_a70b73fc-452e-11e0-9751-001cc4c03286.html#ixzz1X1dt32JL (last visited Sept. 4, 2011) ("Wyoming has become the fourth state to allow citizens to carry concealed guns without a permit. . . . Alaska, Arizona and Vermont already don't require permits for carrying concealed guns.").

explained in Section IV, that is simply wrong. For example, this Court in *Nordyke v. King* ("*Nordyke V*"), 644 F.3d 776 (9th Cir. 2011), a case that did not involve in-home possession, recently found that "regulations which substantially burden the right to keep and to bear arms trigger heightened scrutiny under the Second Amendment." *Nordyke V*, 644 F.3d at 786. And County fails to even mention the recent *Ezell* case out of the Seventh Circuit, *Ezell v. City of Chicago*, --- F.3d ---- , No. 10-3525, 2011 WL 2623511 (7th Cir. July 6, 2011), another case applying heightened scrutiny to restrictions on the right to arms unrelated to in-home possession. *See Ezell*, 2011 WL 2623511 at * 15, citing *United States v. Skoien*, 614 F.3d 638, 641, 649 (7th Cir. 2010), *cert denied*, 131 S. Ct. 1674 (2011); *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 n.4 (3d Cir. 2010), *cert denied*, 131 S. Ct. 958 (2011). In short, County has mischaracterized the state of the law.

Finally, County fails to answer *either* of Plaintiffs' Equal Protection challenges. As explained in Section V, County improperly treats Plaintiffs' facial challenge as only deserving rational basis review. County ignores the fundamental right involved and that strict scrutiny must be applied to the classifications it makes, regardless of whether Plaintiffs have an adequate alternative for bearing arms to licenses from County. County's policy, on its face and in practice,

provides certain individuals with a superior form of carriage (i.e., with a loaded firearm not subject to the same restrictions) in violation of equal protection. Regarding their as-applied claim, Plaintiffs have provided evidence, sufficient even to meet rational basis review, to show County's practices of issuing carry licenses to people similarly situated to Plaintiffs violates equal protection.

This is a somewhat novel, highly political, but nonetheless relatively straightforward civil rights case, albeit involving a newly recognized civil right. By conjuring up claims that Plaintiffs do not make and inventing rights Plaintiffs do not assert, County has tried to make this case seem complex in the hope of misdirecting the Court to avoid the appropriate civil rights analysis. The Court should see through this effort.

ARGUMENT

I. THE FUNDAMENTAL RIGHT TO BEAR ARMS EXISTS OUTSIDE THE HOME

County's contention that *Heller* and *McDonald* confine the right to bear arms to defense of "hearth and home" lacks support. Nothing in either case, nor in the plain text of the Second Amendment, suggests its protections are so limited. And, the Third and Fourth Amendments demonstrate that the Constitution's drafters knew just how to tether an enumerated right to the home when they

wanted to.[2]

Neither *Heller* nor *McDonald* expressly limits its holding to its narrow facts. To the contrary, both cases *expressly* include outdoor activities as being protected by the Second Amendment. *Heller* pointed out that "preserving the militia" was only one aim of the Second Amendment, as the founders "most undoubtedly thought it *even more important for self-defense and hunting*." *Heller*, 554 U.S. at 599 (emphasis added); *see also McDonald*, 130 S. Ct. at 3042 n.27. *Heller* added that one's "practices in safe places the use of [a firearm]" falls within the right to arms. *Heller* 554 U.S. at 619.

When the Court wishes to limit a case to its facts–especially a landmark case concerning the Bill of Rights–it is easily done. *See, e.g.*, *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987) ("We limit our holding to the facts presented."). Instead, the *Heller* Court devoted 66 pages of commentary to an explanation of the Second Amendment's protections, without once qualifying the right as being confined to the home.

---

[2] *See* U.S. Const. amend. III ("No Soldier shall, in time of peace be quartered *in any house*, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.") (emphasis added); *see also* U.S. Const. amend. IV ("The right of the people to be secure in their persons, *houses*, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .") (emphasis added).

Moreover, an "in the home" based Second Amendment would render superfluous *Heller*'s detailed discussion approving of the four nineteenth-century right to arms opinions explicating the rule that *a manner* of carrying guns may be forbidden, but not the entire practice itself. *See Heller*, 554 U.S. at 629 (*discussing Nunn v. State*, 1 Ga. 243 (1846); *Andrews v. State*, 50 Tenn. 165 (1871); *State v. Reid*, 1 Ala. 612, 616-17 (1840)); *id.* at 613 (*citing State v. Chandler*, 5 La. Ann. 489, 489-90 (1850)); *see also* Plaintiffs' Motion for Partial Summary Judgment, Appellants' Excerpts of Record (ER), Vol. V, Tab 37 at 827-29.

The very sentence in *Heller* relied upon by County to claim total carry bans are valid *also* states that regulations prohibiting the carrying of arms in "sensitive places" are presumptively valid. The Court's necessary implication is that the Second Amendment protects the right to carry arms in "non-sensitive places." *See Heller*, 554 U.S. at 626-27 & n.26. County fails to explain the contradiction. Nor can it reconcile its "home-bound" version of the right to bear arms with the multiple findings in *Heller* indicating the right to bear arms outside the home is protected activity–and, if for self-defense purposes, "core conduct."

Tellingly, *no* federal court has expressly held the right to bear arms is restricted to the home. Even the trial court found the right to bear arms exists outside the home ("*Heller* does not preclude *Second Amendment* challenges to

laws regulating firearm possession outside of home") ER, Vol. I, Tab 3 at 86:19, and recognized a right under the Second Amendment to publicly "carry a firearm for self defense," albeit *unloaded*. Appellants' Opening Brief (AOB) at 30 n.20, (*citing* the lower court, ER, Vol. I, Tab 3 at 86:18-87:2. And the most recent federal appellate court to consider the issue, held the Second Amendment protects the right to practice the use of firearms at a range outside the home. *Ezell*, 2011 WL 2623511, at *19.[3] County nevertheless wholly ignores this case.

Most telling, however, is County's and its *amici*'s lack of textual or historical support for why *Heller* should be limited to its facts, as well as their inability to articulate an alternative definition for "bear arms" that would support tethering the right to the home.

County's implied premise that *Heller*'s recognition of firearm possession in the home as being a "core right" means it is the *only* "core right" protected under the Second Amendment is false. Just as "[t]he freedoms of speech, press, and assembly, expressly guaranteed by the First Amendment, share a common core purpose of assuring freedom of communication on matters relating to the

[3] This Court has also implicitly recognized the right to bear arms extends beyond one's threshold. *See, e.g.*, *Nordyke V*, 664 F.3d at 787-91; *see also United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 294 (2010).

functioning of government," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 556 (1980), the Second Amendment's guarantee of the ability "to keep *and* bear arms," two distinct concepts, is to assure the core right to self-defense at home *and* in public. *See* ER, Vol. V, Tab 37 at 826-29. And just as *each* of those rights explicitly recognized in the First Amendment are of a "'fundamental nature' and therefore made immune from state invasion by the Fourteenth, or some part of it . . .," *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963) (footnote omitted), so too are the Second Amendment's.

In short, County's foundational argument in favor of a "home-bound" Second Amendment is untenable, if not disingenuous.

II. COUNTY'S POLICY OF DENYING LICENSES REQUIRED FOR CARRYING FIREARMS IN PUBLIC, BY DEFINITION, BURDENS THE RIGHT TO BEAR ARMS

County tries to conflate Plaintiffs' claim of a right to carry a firearm for self-defense in the manner prescribed by the California Legislature with claiming a general constitutional right to carry a concealed firearm without restriction. Plaintiffs have repeatedly explained that they do not assert such a right. Rather, Plaintiffs assert the right to bear arms in *some manner*. County and its amici ignore this critical distinction and cite authority generally supporting restrictions on concealed carry. But considered in the proper context, all of that authority is

irrelevant.

As Plaintiffs' have explained, *Heller* notes that some 19th century courts upheld restrictions on *concealed* carry, but only where *open* carry was generally allowed. *See* AOB at 28-31. Those cases all recognized a right to bear arms in public in some manner. *See* ER, Vol. I, Tab 3 at 88:1-90:2. Here, California generally prohibits open carry of operable firearms, but specifically allows for licenses to carry them concealed. County's policy denies those licenses to law-abiding adults and, thereby, effectively bans their ability to lawfully be "armed and ready" for self-defense.

To claim a ban does not "burden" Plaintiffs' right is to claim they have no such right in the first instance. For the reasons in Plaintiffs' opening brief (*see* AOB at 30-33, 36-43) and the amicus brief of International Law Enforcement Educators and Trainers Association (ILEETA), et al., et al. (Dkt. No. 24), that argument is untenable. County's fallback position, that California's allowing (in limited areas) carriage of an *unloaded*, unconcealed firearm with ammunition separate (also known as unloaded open carry or "UOC") that can be loaded into the firearm only when a person reasonably believes he or she is in imminent, grave danger provides an adequate alternative to licensed, loaded carry, is equally untenable, as shown in Part IV-D below.

III. PLAINTIFFS' CHALLENGE TO COUNTY'S "GOOD CAUSE" POLICY STANDS ALONE; IT IS NOT PLAINTIFFS' BURDEN TO ATTACK CALIFORNIA'S REGULATORY SCHEME

County asserts Plaintiffs are challenging–and apparently that they *must* challenge–California's overall regulatory scheme for "bearing arms" in public, including Penal Code sections 12050 through 12054. County further argues that "Appellants' argument, at its core, is a challenge to Penal Code section 12031." AB at 1. In their First Amended Complaint ("FAC"), however, Plaintiffs chose *not* to challenge State law (deleting such claims from their initial Complaint). Instead, Plaintiffs challenged and sought relief from the *one* aspect of *County*'s policy that has caused their constitutional injury.

That *one* aspect is County's policy of rejecting "self-defense" as sufficient "good cause" for issuing a license to carry a concealed firearm. Plaintiffs attack *County*'s "good cause" policy regarding "self-defense," directly and singularly. Plaintiffs do not challenge the Sheriff's discretion in issuing CCWs for other "good causes," such as for commercial purposes (e.g., private security or investigators, bail agents, or entertainment productions). Plaintiffs ask the federal court only to declare what is obvious: because "self-defense" is the "central component" of the Second Amendment right to keep and bear arms, *Heller*, 554 U.S. at 599, "self-defense" must be considered "good cause" for purposes of

issuing a license to carry a firearm.

In other words, while the fundamental right to keep and bear arms for self-defense purposes outside the home undoubtedly is subject to *some* restrictions–one of those restrictions *cannot* be that "self-defense" is insufficient cause to exercise the right.

Equally obvious is that County, not the State, caused Plaintiffs' injuries. For example, in most California counties (all operating under the identical state law regulatory scheme), Plaintiffs would have been issued licenses to carry for self-defense, provided they met all other requirements. If Mr. Peruta moved to Sacramento County, he could obtain a license to carry without forcing any change in state law.[4] So the notion that County's "good cause" policy–that the *County*, not the State, defines[5]–was not the direct cause of Plaintiffs' constitutional injury here is preposterous.

Plaintiffs do not examine, nor do their claims require examination of, what else might constitute "good cause," nor of any other provision in Penal Code

---

[4] *See* Howard Nemerov, *New shall-issue carry policy in Sacramento, California*, Pajamas Media, June 8, 2011, http://pajamasmedia.com/tatler/2011/06/08/new-shall-issue-carry-policy-in-sacramento-california (last visited Sept. 6, 2011).

[5] See AB at 6.

section 12050. Thus, if this Court focuses on Plaintiffs' actual injury, the one caused by County's wrongful denial of their applications for licenses to carry, this is not a difficult case.

As noted in their opening brief, Plaintiffs believe the doctrine of constitutional avoidance warrants this type of measured approach, especially given the nascent state of Second Amendment jurisprudence. *See* AOB at 49-52. Regardless, Plaintiffs' decision to plead their right to arms claims simply, with the relief sought relatively unintrusive (compared to striking down the State's entire licensing scheme) is a decision they were entitled to make.

Finally, in focusing on arguments Plaintiffs did not (and need not) make, County failed to address Plaintiffs' actual arguments. First, County offers no explanation of how *Heller*, which removed the District of Columbia's discretion for issuing firearm licenses, *Heller*, 554 U.S. at 635, sanctions County's unfettered discretion to not issue licenses to carry here. Second, County does not rebut the reasonableness of Plaintiffs' proposed interpretation of California Penal Code section 12050 (*see* AOB at 49-53).[6]

---

[6] If this Court finds Plaintiffs' proposed interpretation of section 12050 to not be reasonable, nothing precludes striking that section down as an illegal prior restraint or the equivalent thereof. *See* Amicus Br. of Second Amendment Foundation (SAF) (Dkt. No. 28) at 9-17.

IV. STANDARD OF REVIEW

County and its *amici* argue that restrictions on the core Second Amendment right to bear arms are entitled to, and satisfy, some lesser form of review. But, they make no serious effort to address Plaintiffs' point that this Court need not adopt *any* standard of review here, but should instead follow the *Heller* Court's guidance and declare County's "good cause" policy invalid *per se* because it prohibits, not merely regulates, the right of law-abiding adults to bear arms.[7]

Heller instructs courts to consider the historical scope of the right to bear arms in considering whether a restriction infringes the right. *See* AOB at 25-28; *see generally* Amicus Br. of Congress of Racial Equality (CORE) (Dkt. No. 17). While County ignores Plaintiffs' invitation to provide historical support for banning the carry of loaded firearms in public, its amici Brady Center to Prevent Gun Violence (Brady Center), et al., provide the underwhelming evidence of a single ordinance from 1876 Wyoming that never faced a court challenge. *See* Amicus Br. of Brady Center, et al. (Dkt. No. 48) at 11.[8] But, as *Heller*

---

[7] *See* Amicus Br. of Center for Constitutional Jurisprudence, et al. (Dkt. No. 32) at 2-6.

[8] Amici Legal Community Against Violence (LCAV), et al., claim some states allowed complete bans on carry "in some circumstances," but their support

admonished, "we would not stake our interpretation of the Second Amendment upon a single law . . . that contradicts the overwhelming weight of other evidence . . . ." *Heller*, 554 U.S. at 632.

Compare the evidence of County's amici with Plaintiffs' evidence, cited with approval in *Heller*, demonstrating that this country's historical acceptance of bans on *concealed* carry was contingent upon effective (i.e., loaded), open (i.e., unconcealed) carry being available. *See* AOB at 29.

A. County's and Its Amici's Denunciations of Strict Scrutiny Review for Restrictions on Firearm Carriage Are Unsupported and Unconvincing

Contrary to County's assertions, Plaintiffs do not claim that restrictions on *all* activities concerning a fundamental right demand review under strict scrutiny. But at least *some* do (e.g., content based restrictions on political speech versus commercial speech under the First Amendment. *See* ER, Vol. I, Tab 1 at 11:18-20; *see also Berger v. City of Seattle*, 569 F.3d 1029, 1091-92 (9th Cir. 2009) (explaining the varying degrees of protection afforded to different types of speech). County's "good cause" policy, to the extent this Court finds it necessary to adopt a standard of review for this case, demands strict scrutiny review. *See*

---

is relegated to a footnote with no explanation. *See* Amicus Br. of LCAV, et al. (Dkt. No. 56) at 25, 26 n.7. The rest of the authority amici rely on concern *concealed* carry restrictions, which are irrelevant here.

AOB at 46-47; *see also* Amicus Br. of National Rifle Association (NRA) (Dkt. No. 20) at 2-14.

County's almost exclusive reliance on the *dissent* in *Heller* in arguing against the application of strict scrutiny in this case speaks volumes. *See* AB at 18-19. The dissent was thoroughly repudiated by the *Heller* majority. County and its amici argue that the majority's list of "presumptively lawful measures" is inconsistent with strict scrutiny, but even if that were the case, bans on carrying firearms in public (outside of "sensitive places") are not among those listed measures.

County concludes its argument against strict scrutiny's application here by saying only one federal case has applied it in the Second Amendment context, entirely ignoring the most recent opinion on the subject, *Ezell v. City of Chicago*, for which Plaintiffs submitted a letter to this Court pursuant to Federal Rule of Appellate Procedure 28(j). *Ezell* indicated scrutiny higher than intermediate, "if not quite strict scrutiny," should apply to infringements on Second Amendment rights, even outside the home. *Ezell*, 2011 WL 2623511, at *17.

B. County's Claim That State Courts Do Not Apply Heightened Scrutiny to Firearms Laws Is Misleading and Incorrect

County claims that "[i]t does not appear that any state's courts apply strict

scrutiny or another type of heightened review to firearms laws." AB at 20. This assertion is patently false. *See, e.g., People v. Davis*, 408 Ill. App. 3d 747, 749 (App. Ct. 2011) ("[W]e apply intermediate scrutiny to determine whether the statutes at issue here violate the second amendment."); *People v. Ellison*, 196 Cal. App. 4th 1342, 1347 (Ct. App. 2011) ("[W]e adopt the 'intermediate scrutiny' standard, because the statute, on its face, does not completely prohibit or unduly burden the right of law abiding persons to bear arms."); *City of Lakewood v. Pillow*, 180 Colo. 20, 23 (1972) (striking down an ordinance prohibiting the carrying or possession of any handgun outside the home after analyzing whether the ends of the ordinance could been "more narrowly achieved").

County's assertion that state courts have "uniformly applied a deferential reasonableness standard," AB at 20, to firearm restrictions is thus likewise untrue. And, Plaintiffs' amici, Independence Institute, et al. provide a thorough repudiation of County's, and its amici's, characterization and application of a "reasonableness" standard. *See* ER, Vol. II, Tab 26 at 339:10-342:7.

C. County's Licensing Policies and Procedures Fail to Meet Any Heightened Standard of Review

County's "statement of facts" section claims its "good cause" policy is valid because it has been approved by courts in the past, citing several *Heller* and

McDonald cases. *See* AB at 2-3. That begs the question of whether a policy found merely "rational" before the right to bear arms was recognized as fundamental can survive judicial scrutiny in a radically different post-*Heller* and *McDonald* analytical environment. It cannot.

Even if the proper standard of review here were something less than strict scrutiny, County still cannot meet its burden. The interest County claims its policy[9] furthers is to limit the number of CCWs issued for the "safety of public from unknown persons carrying concealed, loaded firearms," AB at 17,[10] and preventing concealed carry in general, *see* AB at 25; in other words, crime reduction. County's amici echo its claimed interests.[11] But they ignore the

[9] To be accurate, County claims these interests are furthered by the California statutes that authorize County to issue licenses to carry, *see* AB at 17, but since Plaintiffs are not challenging those statutes, such an argument is irrelevant; Plaintiffs thus address it as if County intended to say its challenged *policy* furthers those interests.

[10] County's purported interest in preventing "unknown" persons from carrying firearms is unaffected here since Plaintiffs seek a CCW, which will allow County to *know* they are carrying. Moreover, this interest is not valid, since license holders from any other California county can carry a loaded firearm in San Diego County.

[11] It is curious that County's amicus California State Sheriff's Association asserts there is a compelling interest in its members having unfettered discretion to issue, or not issue, a license to carry a firearm, when the majority of its members feel no need to exercise that discretion, and in fact do not by having a "shall issue" policy." *See* Amicus Br. of California State Sheriff's Association, et al. (Dkt. No. 55-1) at 4-5.

Supreme Court's and this Circuit's unambiguous edicts that the right to bear arms cannot be held hostage to its controversial public safety implications.

The *McDonald* Court examined this issue and rejected the notion that the Second Amendment is unique in its potential impact on public safety, stating:

> Municipal respondents maintain that the Second Amendment differs from all of the other provisions of the Bill of Rights because it concerns the right to possess a deadly implement and thus has implications for public safety. And they note that there is intense disagreement on the question whether the private possession of guns in the home increases or decreases gun deaths and injuries.
>
> The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category.
>
> . . .
>
> Municipal respondents cite no case in which we have refrained from holding that a provision of the Bill of Rights is binding on the States on the ground that the right at issue has disputed public safety implications.

McDonald, 130 S. Ct. At 3045 (citations omitted).

This Court's decision in *Nordyke* likewise explained "[n]owhere did [*Heller*] suggest that some regulations might be permissible based on the extent to which the regulation furthered the government's interest in preventing crime." *Nordyke*, 644 F.3d at 784.

Even if crime were relevant to this analysis, County provides no evidence that license holders cause increased crime. And, even under intermediate scrutiny the government "bears the burden of justifying its restrictions, [and] it must affirmatively establish the reasonable fit" that the test requires. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (internal citation omitted). In other words, "the public benefits of the restrictions must be established by evidence, and not just asserted[;] . . . . lawyers' talk is insufficient." *Annex Books, Inc. v. City of Indianapolis, Ind.*, 581 F.3d 460, 463 (7th Cir. 2009). County merely conflates criminal use of *unlicensed* firearms with license holders and relies on baseless platitudes concerning the "evils" of firearms; an exemplary specimen of insufficient "lawyer's talk."[12]

Contrarily, Plaintiffs have provided ample evidence that liberalized issuance of licenses to carry has either no effect or a reducing effect on the crime rate. *See* ER, Vol. II, Tab 22 at 248:20-251:15, Tab 23 at 260:1-7. Amici for County, Brady Center, et al., and LCAV, et al, provide statistics they claim demonstrate there is a

---

[12] Most, if not all of what County and its amici put forth as supporting their position, whether in the form of case law (*e.g., People v. Flores*, 169 Cal. App. 4th 568 (Ct. App. 2008); *People v. Yarborough*, 169 Cal. App. 4th 303 (Ct. App. 2008); *People v. Hale*, 43 Cal. App. 3d 353 (Ct. App. 1974), etc.) or general platitudes, is mere "lawyers' talk" and, for the reasons set forth in Plaintiffs' Consolidated Opposition/Reply, irrelevant to the discussion at hand. *See* ER, Vol. II, Tab 19 at 219:17-220:8.

problem with violence committed by license holders. *See* Amicus Br. of Brady Center, et al. (Dkt. No. 48) at 22; Amicus Br. of LCAV, et al. (Dkt. No. 56) at 18-22. But these claims have been thoroughly rebutted by Plaintiffs and their amici. *See* ER, Vol. II, Tab 22 at 248:20-251:15; Tab 23 at 260:1-7, Tab 26 at 340:2-16.

County's and its amici's assertion of a compelling interest being furthered by restricting license issuance based on *speculation* that violence and crime will ensue otherwise is inconsistent with the reality that the overwhelming majority of states in this country, and even the majority of counties in this State, issue carry licenses for self-defense to applicants who meet non-discretionary standards.[13]

And County's conclusion that granting licenses to carry for self-defense to law-abiding citizens would result in "widespread" carrying of handguns by San Diegans is unfounded. *See, e.g.*, Carlos Alcalá, *Concealed Weapons Permits Jump in Sacramento, El Dorado Counties*, Sacramento Bee, Sept. 2, 2011, *available at* http://www.sacbee.com/2011/09/02/3879332/concealed-weapons-permits-jump.html (last visited Sept. 4, 2011); *see also* ER, Vol. II, Tab 22 at 250:8-21.

---

[13] As of January 2011, there were 37 "shall issue" states. *See* James Frazier, *Iowa Joins States with Eased Policy on Concealed Arms*, Washington Times, Jan. 30, 2011, *available at* http://www.washingtontimes.com/news/2011/jan/30/iowa-joins-states-with-eased-concealed-arms-policy (discussing the state of Iowa going "shall issue" and noting that "[s]ince 1987 . . . the number of 'shall-issue' states has gone from nine to 37.").

As amici Independence Institute, *et al.* put it, "[m]ere fretting about the dangers of carrying guns in general does not address the reasonableness of carrying by adults who have passed a rigorous background check, and taken safety classes, and whose carrying has been determined to be for the constitutionally supreme good cause of lawful self-defense." ER, Vol. II, Tab 26 at 339:24-340:1. All County and its amici do is fret over speculative dangers. That is an insufficient defense.

D. Neither County Nor Its Amici Address Plaintiffs' Explanation for Why Requiring Firearms to Be Carried *Unloaded* Is Not an Adequate Alternative to CCW

County and its amici repeat the baseless mantra–accepted by the district court on mere faith–that UOC is an adequate alternative to a CCW for bearing arms. As such, County contends that the availability of UOC removes any constitutional burden placed on Plaintiffs and thereby satisfies this Court's test in *Nordyke*. *See* AB at 16. But they again fail to offer any historical support for limiting the right to bear arms to UOC.

They also refuse to address Plaintiffs' arguments for why UOC is insufficient for self-defense, even claiming that Plaintiffs "offer no credible explanation" why UOC is inadequate. AB at 15. But Plaintiffs and their amici

introduced ample evidence on this subject. *See* AOB at 39; *see generally* Amicus Br. of ILEETA, *et al.*, and ER, Vol. II, Tab 12.

The "statutory right" to carry an *unloaded* handgun is significantly restricted geographically by law, *see* AOB at 41, subjects the carrier to searches by law enforcement, *see* AOB at 7, and physically disadvantages one from defending against a criminal attack. *See id*. at 7-8; *see also* ER, Vol. II, Tab 12 at 165:16-166:23. State law permits the carrier to load the firearm only after she reasonably believes she is under attack and in imminent grave danger. This is a dangerous practice that, if by chance successful, may subject the person to arrest, criminal prosecution, and a jury's determination of whether the person acted reasonably even just in loading the firearm.

So it is County and its amici that "offer no credible explanation" as to how this restrictive practice allows Plaintiffs to be "armed and ready for offensive or defensive action in a case of conflict with another person," as is their Second Amendment right. *Heller*, 554 U.S. at 584. Moreover, neither County nor its amici explain how allowing unscreened, untrained people to carry unloaded firearms openly, while denying licenses to carry concealed and loaded that require background checks and training, *see* Cal. Penal Code §§ 12050(a)(1)(A),(E), 12052, furthers County's interest in public safety.

V. EQUAL PROTECTION

A. Plaintiffs' Facial Equal Protection Challenge Is Deserving of Strict Scrutiny Review

County argues that no Equal Protection claim can be made because Plaintiffs are not "similarly situated" to those with a specific threat against them, and that:

> [a]n equal protection claim will not lie by "conflating all persons not injured into a preferred class receiving better treatment than the plaintiff." *Thornton*, [*v. City of St. Helens*, 425 F.3d 1158,] 1166 (quoting *Joyce v. Mavromatis*, 783 F.2d 56, 57 (6th Cir. 1986). Appellants failed to provide any evidence from which such an inference can be drawn.

AB at 22.

County's reliance on *Thornton* is misplaced. The plaintiffs in that case brought an equal protection challenge against a city, alleging the city conspired to deny renewal of their business permit because one plaintiff was a Native American. In ruling for the city, the court explained that the plaintiffs had not offered *any* evidence of racial discrimination to support their claim. *Thornton*, 425 F.3d at 1167.

Plaintiffs here challenge County's policy *on its face*, as it expressly creates a class of individuals who *may* be issued a CCW and another class of those who are *categorically barred* from obtaining one. Plaintiffs need not provide any

"evidence" of different treatment of individual applicants beyond County's policy itself.[14]

Because carrying a firearm for self-defense is a fundamental right, and all persons are similarly situated in their worthiness to exercise fundamental rights,[15] County's policy distinguishing between individuals who County subjectively deems are and are not targets of a specific threat should have been reviewed under strict scrutiny. *See* AOB at 58-59.

County's admitted goal of limiting the number of licenses issued[16] cannot be a valid government interest. County therefore cannot meet its burden under strict (or even intermediate) scrutiny.

County relies on *Nordyke V* to argue its policy need only meet rational basis. *Nordyke V* held that "although the right to keep and to bear arms for self-defense is a fundamental right, that right is more appropriately analyzed under the

---

[14] Even if such a showing were required, Plaintiffs have provided evidence, and County itself admits, that County has issued CCWs to individuals who asserted as their "good cause" having a specific threat against them, while denying Plaintiffs for not doing so. *See* ER, Vol. IV, Tab 37 at 852 (Plaintiffs' Statement of Undisputed Facts (SUF) 17).

[15] *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440; *Hussey* v. *City of Portland*, 64 F.3d 1260, 1265 (9th Cir. 1995) (quoting *Harper v. Va. Bd. 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.

[16] *See* AB at 27, 29-30.

Second Amendment," but for some reason proceeded to analyze classifications infringing on that right under rational basis review. *Nordyke V*, 644 F.3d at 794 (citations omitted).

Respectfully, the *Nordyke V* panel's holding is inconsistent with binding precedent. *Nordyke V* relied on *Albright v. Oliver*, 510 U.S. 266, 144 S.Ct. 807, which provides:

> Where a particular Amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of '*substantive due process*,' must be the guide for analyzing these claims."

Id. at 273 (citing *Graham v. Connor*, 490 U.S. 386, 395 (1989)) (emphasis added).

The Fourteenth Amendment's Equal Protection Clause (entirely separate from its Due Process Clause[17] and not even mentioned in *Albright*) in fact "provides an explicit textual source of constitutional protection against a particular sort of government behavior." It protects against unequal application of the law.[18] Hence Plaintiffs' argument in their opening brief that even if limiting carry to UOC were a valid regulation of the right to bear arms, allowing some people to

---

[17] *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *see also Ross v. Moffitt,* 417 U.S. 600, 609 (1974) (distinguishing claims under those clauses).

[18] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV.

carry *loaded* firearms would still implicate a strict scrutiny, equal protection analysis. *See* AOB at 57-58.

Moreover, how the *Nordyke V* panel made the doctrinal leap from finding that analyzing Second Amendment infringements under equal protection is not appropriate, to finding that rational basis review is appropriate for classifications infringing on Second Amendment rights, is a mystery; especially, in light of *Heller*'s express rejection of rational basis review, *see Heller*, 554 U.S. at 628 n.27, and the myriad cases, both from the U.S. Supreme Court and this Court, which not only sanction equal protection claims where enumerated fundamental rights are involved, but also demand strict scrutiny review. "[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized." *Harper v. Va. Bd. of Elections*, 383 U.S. at 670; *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) ("[L]aws imping[ing] on personal rights protected by the Constitution" are subject to strict scrutiny); *Hussey v. City of Portland*, 64 F.3d at 1265; *Kramer v. Union Free School Dist.*, 395 U.S. 621, 628-29 (1969).

County has not met its burden to justify the classifications its policy makes. Accordingly, if this Court finds there is a fundamental right to carry a firearm for self-defense, it necessarily must rule in Plaintiffs' favor on this claim.

B. County Failed to Rebut Plaintiffs' Allegations that its License Issuance Practices Violate Equal Protection

The ultimate question for this Court concerning this claim is: assuming County issued certain people a license to carry for self-defense reasons without demanding from them evidence of a specific threat of harm, which showing is required under County's policy, *see* AB at 6, while County denied Plaintiffs *because* they could not provide evidence of a specific threat of harm, would that practice violate equal protection?

If the answer is yes, which Plaintiffs submit is compelled by *Willowbrook v. Olech*, 528 U.S. 562 (2000))[19] the only remaining question for this Court is whether Plaintiffs provided sufficient evidence showing County has issued a license to carry to individuals for self-defense reasons without demanding from them evidence of a specific threat of harm, as County required of Plaintiffs.

Plaintiffs have easily met their evidentiary burden on this claim, at least sufficient to survive summary judgment, *see* AOB at 59-61. County attempts to obfuscate the issue, as it successfully did in the district court, by harping on the differences between initial and renewal license applications, insisting that

---

[19] *See also Guillory v. County of Orange*, 731 F.2d 1379 (9th Cir. 1984) (holding that equal protection claims can be appropriate in challenging CCW issuance practices, regardless of whether a fundamental right is involved).

individuals renewing their licenses are not "similarly situated" to Plaintiffs, who are seeking an *initial* license to carry. But, the distinction is meaningless here.

Plaintiffs are "similarly situated" to certain Honorary Sheriffs' Association (HDSA) members who received a license to carry from County inasmuch as both sought one for self-defense and none provided documentation of a specific threat. Plaintiffs rely on renewal applications of those HDSA members as evidence those members *never* provided County with documentation of a specific threat against them, *not even in their initial applications*. *See* AOB at 59-60. County could easily refute Plaintiffs' allegations by providing such documentation from those HDSA members' initial applications, but has failed to do so, despite having two opportunities in the district court and one before this Court.[20]

Whether the HDSA members' initial applications contain evidence of a specific threat against them is at bare minimum "a genuine issue of material fact" in dispute, making the district court's granting of County's motion on this claim improper.

---

[20] Plaintiffs' mention of *March v. Rupf*, No. 00-03360, 2011 WL 1112110 (N.D. Cal 2001) being pre-*Heller* is simply to remind the Court that *if* it holds, as it should, there is a fundamental right to carry a loaded firearm for self-defense, that this claim must be reviewed under strict scrutiny, not mere rational basis. Plaintiffs claim is not dependent on Second Amendment rights being implicated, for County cannot even meet its burden under rational basis.

County makes at least one incorrect description of the record, claiming Plaintiffs only offered the application of Peter Q. Davis as evidence of a person with "good cause" almost identical to Plaintiff Peruta who County issued a license to carry. In fact, Plaintiffs provided the application of a completely different person, who explained his "good cause" to be: when driving in desolate areas with his wife he 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.

Moreover, County completely ignores Plaintiffs' allegations as to the HDSA member mentioned in their Opening Brief. *See* AOB at 10-11. And, County's attributing the suspicious notations on certain HDSA members' applications to "[l]ine staff . . . merely [noting] everything that is said by the applicant during the interview process," AB at 35, is risible in light of comments such as: "Comma[nder] for HDSA (SDSO) considered VIP @ sheriff level – *okay to renew standard personal protection.*" ER, Vol. II & VI, Tab 24 at 316; *see also* Vol. IV, Tab 37 at 853 (Pls.' SUF #23) (emphasis added).

CONCLUSION

County hardly responds to Plaintiffs' opening brief directly at all. It misconstrues Plaintiffs' constitutional claims to be what it wants them to be, disregards the authority Plaintiffs cite (including the most recent federal appellate

court decision concerning the Second Amendment - *Ezell*), and simply ignores that it has the burden to justify its challenged policy; a burden it did not, and really cannot, meet. Instead, County largely just recites political dogma to argue in essence that the newly recognized fundamental right to bear arms is too dangerous a right, and invites this Court to disregard the *Heller*'s admonition and hold that the rights protected by the Second Amendment are not "really worth insisting upon." *Heller*, 554 U.S. at 634-635 (emphasis in original). The Court should decline the County's invitation.

Date: September 6, 2011

MICHEL & ASSOCIATES, P.C.

s/ C. D. Michel
C. D. Michel
Attorneys for *Plaintiffs -Appellants*

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

Case No. 10-56971

Pursuant to Federal Rules of Appellate Procedure, rule 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached Appellants' Reply Brief is double-spaced, typed in Times New Roman proportionally spaced 14-point typeface, and the brief contains 6972 words of text as counted by the Word Perfect word-processing program used to generate the brief.

Date: September 6, 2011

MICHEL & ASSOCIATES, P.C.

s/ C. D. Michel
C. D. Michel
Attorneys for *Plaintiffs -Appellants*

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2011, an electronic PDF of this Appellants' Reply Brief was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Date: September 6, 2011

MICHEL & ASSOCIATES, P.C.

s/ C. D. Michel
C. D. Michel
Attorneys for *Plaintiffs -Appellants*