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12   *Attorneys for Defendants CHARLIE BECK and LOS ANGELES POLICE  
13   DEPARTMENT*

14   JONATHAN BIRDT,

15                         Plaintiff,

16                         v.

17   CHARLIE BECK, LEE BACA, THE LOS  
18   ANGELES POLICE DEPARTMENT and  
19   THE LOS ANGELES COUNTY SHERIFFS  
20   DEPARTMENT, DOES 1 to 50, *inclusive*,

21                         Defendants.

22 } CASE NO. CV10-8377 RGK (JEM)

23 }  
24 } **DEFENDANT CITY OF LOS  
25 } ANGELES' REPLY TO  
26 } PLAINTIFF'S OPPOSITION TO  
27 } MOTION TO STAY;  
28 } MEMORANDUM OF POINTS  
   } AND AUTHORITIES**

29                         Date:                     March 14, 2011  
30                         Time:                     9:00 a.m.  
31                         Courtroom:             850

## **MEMORANDUM OF POINTS AND AUTHORITIES**

1. Plaintiff Fails to Establish He Will Suffer any Damage if This Case is Stayed Pending a Decision by the Ninth Circuit Regarding the Contours of the Second Amendment

As stated in the moving papers, in deciding whether to issue a stay a court must consider whether a plaintiff will suffer any damage or inequity resulting from the stay. CMAX, Inc. v. Hall, 300 F.2d 265 268 (9<sup>th</sup> Cir. 1962). Plaintiff concedes a stay in this action will not cause him any harm, other than the alleged infringement of his constitutional right to bear arms. “The moving papers then callously suggest that other than the denial of a fundamental civil liberty, Plaintiff would not otherwise suffer any harm by the Stay. And while such assertion is true, Plaintiff would state that delayed redress of the denial of a fundamental civil liberty is in fact a substantial harm that should not be countenanced by the Court.” (Opposition, 2:27-3:2)(emphasis added). Plaintiff provides no legal authority that the conflict which is at the heart of the lawsuit constitutes the damage necessary to preclude a court from staying a case for purpose of judicial economy. As such, there is no impediment to issuing a stay in this case until the Ninth Circuit provides clearer guidance on the scope of the Second Amendment.

**2. Plaintiff Fails to Persuasively Argue the LAPD's and the San Diego County Sheriff Department's CCW Policies Are Significantly Different to Prevent this Court from Staying this Case until the Ninth Circuit Considers the Legal Issues in the Peruta Case**

Plaintiff concludes the County of San Diego's policy of "being placed in harm's way" is as different as "night and day" from LAPD's policy requiring a "clear and present danger" prior to issuing a CCW permit. (Opposition, 3:22-23). Plaintiff does not describe how these are different policies. Other than different words being used, both policies articulate the same fundamental idea. Both department's policies mean the same thing—a CCW permit will not issue until an

1 applicant presents evidence for an immediate need for a concealed carry permit  
2 beyond a general claim of self defense. They articulate a “good cause” requirement  
3 which is required under Penal Code section 12050.

4 Next, Plaintiff attempts to distinguish this case from Peruta because the  
5 right to open carry was recognized as an alternative. Plaintiff contends he does not  
6 have such a right because he lives across the street from an elementary school.  
7 (Opposition, 4:3-6). This argument lacks merit. Plaintiff did not allege he was  
8 challenging California’s Gun-Free School Zone Act as a violation of his Second  
9 Amendment rights in his Complaint.<sup>1</sup> Accordingly, it is not an issue in this lawsuit.  
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- 11       <sup>1</sup> See Cal. Penal Code Section 626.9 which provides in part,  
12 (a) This section shall be known, and may be cited, as the Gun-Free School Zone Act  
13 of 1995.  
14 (b) Any person who possesses a firearm in a place that the person knows, or  
15 reasonably should know, is a school zone, as defined in paragraph (1) of subdivision  
16 (e), unless it is with the written permission of the school district superintendent, his or  
her designee, or equivalent school authority, shall be punished as specified in  
subdivision (f).  
17 (c) Subdivision (b) does not apply to the possession of a firearm under any of the  
following circumstances:  
18       (1) Within a place of residence or place of business or on private property, if the place  
of residence, place of business, or private property is not part of the school grounds  
and the possession of the firearm is otherwise lawful.  
19       (2) When the firearm is an unloaded pistol, revolver, or other firearm capable of being  
concealed on the person and is in a locked container or within the locked trunk of a  
motor vehicle.  
20       This section does not prohibit or limit the otherwise lawful transportation of any  
other firearm, other than a pistol, revolver, or other firearm capable of being concealed  
on the person, in accordance with state law.  
21       (3) When the person possessing the firearm reasonably believes that he or she is in  
grave danger because of circumstances forming the basis of a current restraining order  
issued by a court against another person or persons who has or have been found to  
pose a threat to his or her life or safety. This subdivision may not apply when the  
circumstances involve a mutual restraining order issued pursuant to Division 10  
(commencing with Section 6200) of the Family Code absent a factual finding of a

1 That is likely because in District of Columbia v. Heller, 128 S. Ct. 2783 (2008), the  
2 Supreme Court recognized gun regulation in particular areas did not historically  
3 violate the Second Amendment. Specifically, the Court stated:

4 "Like most rights, the right secured by the Second Amendment is  
5 not unlimited. From Blackstone through the 19th-century cases,  
6 commentators and courts routinely explained that the right was not a  
7 right to keep and carry any weapon whatsoever in any manner  
8 whatsoever and for whatever purpose. ....For example, the majority  
9 of the 19th-century courts to consider the question held that  
10 prohibitions on carrying concealed weapons were lawful under the  
11 Second Amendment or state analogues.... Although we do not  
12 undertake an exhaustive historical analysis today of the full scope of  
13 the Second Amendment, nothing in our opinion should be taken to  
14 cast doubt on longstanding prohibitions on the possession of  
15 firearms by felons and the mentally ill, or laws forbidding the  
16 carrying of firearms in sensitive places such as schools and  
17 government buildings, or laws imposing conditions and  
18 qualifications on the commercial sale of arms

19  
20 Id. at 2817 (citations omitted)(emphasis added). Accordingly, assuming Plaintiff  
21 has a right to bear arms for general self-defense, he infringed on his own Second  
22 Amendment rights by choosing to live across the street from a school because Penal

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23  
24 specific threat to the person's life or safety. Upon a trial for violating subdivision (b),  
25 the trier of a fact shall determine whether the defendant was acting out of a reasonable  
belief that he or she was in grave danger.

26 (4) When the person is exempt from the prohibition against carrying a concealed  
27 firearm pursuant to subdivision (b), (d), (e), or (h) of Section 12027.  
28

1 Code section 626.9 does not exempt CCW permit holders from its regulation. This  
2 does not present an argument to deny a stay of this action.

3 Plaintiff also argues Peruta is distinguishable because the Sheriff took  
4 actions on the applications but in Plaintiff's case, Chief Beck did not. (Opposition,  
5 4:13-16). This argument contradicts the allegations in the Complaint. Plaintiff  
6 alleged "Plaintiff is a resident of Los Angeles who has applied for and been denied  
7 a permit to carry a concealed weapon by the Los Angeles Police and Sheriffs'  
8 Departments because he failed to identify an imminent or specific threat."  
9 (Complaint, ¶ 1). Next, Plaintiff alleged he "has appealed the LAPD denial in or  
10 about April, 2010, but received no response to the appeal." (Complaint, ¶ 2).  
11 Plaintiff's frustration the appeal process has taken longer than he wants does not  
12 mean no action was taken on his application. The fallacy of this argument  
13 highlights that Plaintiff, like the plaintiffs in Peruta were in the same position, i.e.  
14 their applications were denied because they were based on generalized claims of  
15 self-defense.

16 **3. The Legal Decisions Plaintiff Relies On Do Not Prevent this Court from  
17 Staying This Action and In Fact Further Support Defendant's Request  
18 for a Stay**

19 Plaintiff contends the decision from the Fourth Circuit in United States v.  
20 Chester, 628 F.3d 673 (4<sup>th</sup> Cir. 2010), "fundamentally altered the landscape for this  
21 case and if anything, will likely mean that Peruta will be remanded for consideration  
22 consistent with Chester." (Opposition, 5:4-5). The Chester decision does no such  
23 thing. Chester speculates the Supreme Court would likely apply a heightened  
24 scrutiny standard to a government's gun regulations. Chester did not hold that strict  
25 scrutiny was the standard to measure the government regulation of guns carried  
26 outside the home. Just as in Chester, the district court in Peruta applied a  
27 heightened scrutiny standard to the County of San Diego's CCW permitting process  
28 and concluded it was constitutional. Therefore, Chester and Peruta are in accord

1 with one another. The purpose of the stay is to determine what standard the Ninth  
2 Circuit will apply—a question left open in Heller and not yet answered in this circuit.  
3 As such, this justifies granting the stay and letting the Ninth Circuit decide the issue  
4 without unnecessarily burdening this Court’s docket and defense counsel’s limited  
5 time.

6 Contrary to Plaintiff’s suggestion, the City of Los Angeles did not rely on  
7 Richards v. Prieto, CV 09-01235 MCE (DAD) as a basis for the stay. (Opposition,  
8 5:25-28). The Richards case does not provide a basis for the stay because it would  
9 not be binding on this court. Plaintiff’s discussion of this case is just puzzling.

10 However, Plaintiff’s citation to the rehearing en banc by the Ninth Circuit  
11 of the vacated opinion in Nordyke v. King, 563 F.3d 439 (9<sup>th</sup> Cir. 2009) provides  
12 another basis for the stay. At issue in Nordyke was whether the Second  
13 Amendment prohibited a local government from regulating gun possession on its  
14 property. Id. at 442. The order vacating the opinion does not state specifically what  
15 the en banc panel will decide, only that it must reconsider its decision in light of  
16 McDonald v. City of Chicago, 130 S. Ct. 3020 (2010). Accepting as true Plaintiff’s  
17 statement it will decide “the level of scrutiny [for gun regulation on government  
18 property] any day now” this further justifies staying the present case. (Opposition,  
19 6:4-5). Nevertheless, Defendant contends the stay should be in effect until a  
20 decision is reached in the Peruta decision because it is factually similar to the  
21 present lawsuit.

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#### **4. Conclusion**

Plaintiff admits he will not suffer any damage as a result of a delay in this lawsuit. Plaintiff fails to articulate why the Peruta decision would not control the legal issues in this case. By comparing the allegations of the present lawsuit to those presented and ruled upon in Peruta, judicial economy will be served by staying this case until the Ninth Circuit makes its own determination whether the Second Amendment is violated by a law enforcement agency's policy to issue a CCW permit based on a specific threat of harm and not merely a generalized fear for one's own safety.

DATED: February 16, 2011

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