No. 12-55115 [DC# CV-08377-JAK]

IN THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

JONATHAN BIRDT,

Plaintiff-Appellant, v.

LOS ANGELES SHERIFFS
DEPARTMENT, et. al.,

Defendants-Appellees.

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

APPELLANTS' OPENING BRIEF

Jonathan W. Birdt (S.B.N. 183908) Law
Office of Jonathan W. Birdt
18252 Bermuda St.
Porter Ranch, CA 91326
Tel. No. (818) 400-4485
Fax No: (818) 428-1384
e-mail: Jon@jonbirdt.com
Plaintiff-Appellant

CORPORATE DISCLOSURE STATEMENT

No corporate Apellants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

ISSUES PRESENTED

Did the District Court err in finding, under an intermediate scrutiny standard, that Defendants were justified in denying Appellants' Fundamental Rights under the Second Amendment to possess a firearm for self-defense, outside of the home, by denying his application for a permit to carry a concealed weapon (hereinafter CCW Permit) by determining that there was a nexus between criminals who commit crimes and law abiding citizens seeking statutory permits to exercise their Fundamental Rights who might then commit a homicide because they were granted a permit?

From the Undersheriff himself, the issue could not be any more clear:

> Q. Okay. Can you point to any study or correlation between increased issuance of CCW permit and gun violence?
> A No.
> Waldie deposition at page 25 line 4-12.
> Excerpt of the Record (hereinafter ER) Vol. II, Page 155.

STATEMENT REGARDING ORAL ARGUMENT

Appellant waives oral argument due to the simple and straightforward nature of the matter and the urgency for resolution by this Court.

STATEMENT OF JURISDICTION

This is a 42 U.S.C. § 1983 action. The District Court had jurisdiction pursuant to 28 U.S.C. § 1343. The District Court granted summary judgments for

Defendants-Appellees (hereinafter "Appellees"), and entered judgment in their favor under Federal Rule of Civil Procedure 56 on January 13, 2012. A Clerk's Judgment on that order was entered pursuant Federal Rule of Civil Procedure 58 the same day.

Appellant filed a notice of Appeal on January 14, 2012 in accordance with Federal Rules of Appellate Procedure 3 and 4 and Ninth Circuit Rules 3-1, 3-2and 3-4. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Appellant does not challenge California's statutory scheme of requiring a permit before a resident can exercise their Second Amendment rights outside of the home. Appellant does challenge Appellees' interpretation of the "good cause" requirement of that permit scheme as requiring evidence of a clear and present danger before they will issue a permit. Appellees denied Appellant's requests for a permit because he had not demonstrated a clear and present danger to his life, this standard is so draconian and arbitrary it precludes virtually anyone from gaining the statutory permit in Los Angeles.

Appellant contends that Appellees' interpretation of the statutory scheme is so oppressive and discretionary that it amounts to a complete abrogation of his ability to exercise his Fundamental Constitutional Right. The District Court found that Appellees' fears of criminals using guns in crimes was sufficient to establish a

nexus, such that Appellees could deprive law abiding citizens of the necessary permit to exercise their rights. Appellees' evidence never even mentioned CCW holders and their witnesses denied any knowledge of any correlations between the policies and their effect. Conversely, Appellant presented substantial evidence of both.

STATEMENT OF FACTS

The underlying matter proceeded without argument or factual dispute, with all parties agreeing on the facts and the language of each department's policy. The sole dispute presented in this action was whether Appellees "good cause" policies passed constitutional muster. The District Court found that they did on cross-motions for Summary Judgment which all parties stipulated would be case dispositive.

A. LAPD Good Cause Policy

In its' ruling, the District Court confirmed the City's Policy:

> [G]ood cause exists if there is convincing evidence of a clear and present danger to life or of great bodily injury to the applicant, his (or her) spouse, or dependent child, which cannot be adequately dealt with by existing law enforcement resources, and which danger cannot be reasonably avoided by alternative measures, and which danger would be significantly mitigated by the applicant's carrying of a concealed firearm….
> ER Vol. I, Page 2.

According to the LAPD:

> Plaintiffs application was denied because Plaintiff did not present evidence of an immediate threat of harm to himself or his family that could not be addressed through law-enforcement. In other words, Plaintiffs application was based on a generalized fear of harm. Plaintiff did not present evidence he was protected by a restraining order or other court order. Plaintiffs application states he was subjected to threats in the past. However, Plaintiff fails to present evidence that he filed police reports regarding these threats or otherwise sought protection from a court. Without more, Plaintiff fails to establish LAPD's CCW policies violated the Second Amendment as applied to him.
> ER Vol. II, Page 23.

When asked about justifying their infringement upon Appellants' rights, the LAPD designated witness was unable to respond:

> Q. And can you please tell me all evidence, facts, studies or information upon which you rely for the assertion that your very strict policy protects officers?
> A. I don't. I have any of the information for you, sir.
> Q. Would your answer be the same if I asked about how it would protect the community?
> A. That's correct. LAPD Deposition, Page 30 line 24 to Page 31, line 10.
> Q. Any other reason you provide for why you have a very strict policy to limit the number of permits other than the two you gave me?
> A. If we make the policy any less strict, the vast majority of the people in Los Angeles would have – or would qualify for CCW, and would put more guns on the street and lead to more gun violence, and the fear of the gun violence.
> Q. And can you please tell me all of the facts, evidence, information, studies, or other information upon which you support your statement that issuing more permits would lead to more gun violence….
> A. I don't have any of information, Sir.
> ER Vol. II, Pages 151-152

B. LASD Good Cause Policy

In the Ruling, the Court confirmed the County's Policy:

> Convincing evidence of a clear and present danger to life or of great bodily harm to the applicant, his spouse or dependent child, which cannot be adequately dealt with by existing law enforcement resources and which danger cannot be reasonably avoided by alternative measures, and which danger would be significantly mitigated by the applicant's carrying of a concealed firearm.
> ER Vol. I, Page 2.

The Opposing papers to the Appellees motions made clear their lack of knowledge and diligence:

> Larry Waldie is the Under Sheriff, vested with full authority under California Law, and the arbiter of "Good Cause" for Los Angeles Residents. Unfortunately, he is not familiar with any recent case law, and has not reviewed his policy in 44 years:
>
> Q. Okay. Are you aware of any recent change in law by the United States Supreme Court as it would relate to a citizen's right to keeping bear arms?
> A. No. Waldie Deposition, Page 4 line 24 to page 5, line 2.
> Q. Okay. So unless a person has been a victim of a criminal threat, they will not receive a CCW permit from your department; true?
> A. For the most part, yes….
>
> As set forth above, for a Los Angeles resident, the only way they can exercise their inherent right in Los Angeles is after they have been the victim of a crime and the only way to carry a functional firearm is with a CCW Permit:
>
> Q. Under normal circumstances -- a citizen who just wants to walk out of their house and walk their dog -- the only way that person can carry a loaded firearm, legally, is if they have a concealed weapons permit; true?
> A. I would think that would be true.
> ER Vol. II, Page 149

C. Appellees Evidence Consisted of the Declaration of Franklin Zimring

LASD states its' position clearly in the moving papers:

> The LASD Defendants' policies and practices in limiting concealed carry licensing to individuals with specifically identifiable and documented needs for concealed carry withstand intermediate scrutiny. Maintaining public safety and preventing crime are clearly important governmental interests…. Handguns are unquestionably dangerous and contribute to the majority of criminal cases that result in a person's death.… A 2001 study revealed that a ten percent increase in handgun ownership correlates with a two percent increase in homicides…. Handgun possession is a particular problem in Los Angeles County due to the influx of gang members in recent years…. Concealed handguns, in particular pose an obvious threat to the public as a concealed handgun generates no special notice until the weapon is brandished.
> ER Vol. 1, Pages 53-54

Appellees relied solely on the declaration of Franklin Zimring to support these assertions. Mr. Zimring discussed crime in general and the fact that guns in the hands of criminals are a bad thing, but nowhere does he discuss any correlation to CCW holders or dispute the data provided by Appellant. Appellees simply have no evidence that their policy does anything but further a political agenda as stated again by Larry Waldie:

> Q. Can you provide any support for how your policy of drastically restricting the issuance of CCW permits prevents violence?
> A. I -- I think just the -- putting more guns on the street, I think could clearly create much more violence in the County of Los Angeles, and I think we need to restrict the number of weapons that are available on the streets legally.
> ER Vol. II, Page 155.

D. Appellant Offered the Declaration of Lawrence Mudgett who provided undisputed evidence directly contradicting Appellees Nexus Argument

Appellant presented the declaration of the Lawrence Mudgett who the Court found to be equally credible. Mr. Mudgett discussed the direct nexus between CCW permits and public safety and offered clear, un-refuted, testimony that CCW holders present no risk to public safety and in fact increase public safety and reduce injury rates. Specifically, Mr. Mudgett testified:

> 7. It is my opinion, based upon my education, training, experience and being intimately familiar with firearms research, regulation, publications and studies, that there is no correlation between the issuance of CCW permits and violence. In fact as a retired law enforcement officer, it has been my experience that criminals do not seek out training or licensing for the purpose of carrying concealed weapons, and CCW permit holders are not in any way likely to increase crime or violence, and among the gun owning population are safer and more likely to reduce the accident rate because of their increased training and awareness. What facts I am aware of indicate that armed and trained citizens reduce crime by their very existence, as criminals do not know which citizens are in fact armed. For instance I note the following upon which I have also relied:
> Supporting Documentation
> • The Lott-Mustard Report- John Lott and David Mustard, in connection with the University of Chicago Law School, examining crime statistics from 1977 to 1992 for all U.S. counties, concluded that the thirty-one states allowing their residents to carry concealed, had significant reductions in violent crime. Lott writes, "Our most conservative estimates show that by adopting shall-issue laws, states reduced murders by 8.5%, rapes by 5%, aggravated assaults by 7% and robbery by 3%. If those states that did not permit concealed handguns in 1992 had permitted them back then, citizens might have been spared approximately 1,570 murders, 4,177 rapes, 60,000 aggravated assaults and 12,000 robberies. To put it even more simply criminals, we found, respond rationally to deterrence threats... While support for strict gun-control laws usually has been strongest in large

cities, where crime rates are highest, that's precisely where right-to-carry laws have produced the largest drops in violent crimes." (Source: "More Guns, Less Violent Crime", Professor John R. Lott, Jr., The Wall Street Journal, August 28, 1996, (The Rule of Law column).

• "Crimes are stopped with guns about five times as frequently as crimes are committed with guns." John Lott "Gun Laws Can Be Dangerous, Too" Wall Street Journal, May 12, 1999 http://www.tsra.com/Lott22.htm

• "In Florida, where 315,000 permits have been issued, there are only five known instances of violent gun crime by a person with a permit. This makes a permit-holding Floridian the cream of the crop of law-abiding citizens, 840 times less likely to commit a violent firearm crime than a randomly selected Floridian without a permit." (David Kopel – "More Permits Mean Less Crime..." Los Angeles Times, Feb. 19, 1996, Monday, p. B-5

• "Dade County, Florida, kept meticulous records for six years, and of 21,000 permit holders, there was no known incident of a permit holder injuring an innocent person. In addition, since Virginia passed a right-to-carry law more than 50,000 permits have been issued, but not one permit holder has been convicted of a crime and violent crime has dropped." H. Sterling Burnett, No Smoking Guns http://www.ncpa.org/oped/sterling/mar899.html

8. The declaration of Franklin Zimring is not consistent with my knowledge, training or experience. Mr. Zimring expresses theories which are not related to CCW permits and are not consistent with any peer reviewed statistics. By way of example one of the undisputed facts used by Zimring was the so called fact that 39 percent of people who commit murder had at the time no disqualifying convictions. My first thought is that these are juveniles who commit a good percentage of the crime in Los Angeles. Their juvenile arrests may not be used against them as adults and they may comprise a portion of this supposed 39 percent. The second factor is people who are arrested for serious crimes in LA are often allowed to plea the case down to a far lesser crime and the minor crime is the one they are actually convicted of. These are weaknesses in the criminal justice system that should not be used to deny you the right of self-defense. I find the statistic suspicious in any case.

ER Vol. III, Pages 11-13.

Additionally, Appellants' own declaration identified current peer reviewed material demonstrating:

> 2. I conducted a very simple literature search and immediately discovered a peer reviewed article directly on point to the ramblings of Professor Zimring using the keywords guns & crime and located, on the first hit a Stanford Peer reviewed Law Review Article that refutes the essence of everything Professor Zimring says. Moreover, I could find no peer reviewed study that in any way confirmed any of Professor Zimring's ramblings.
> 3. The article I located is attached hereto as Exhibit A and is entitled "Confirming More Guns, Less Crime", Stanford Law Review, Florenz Plassmann and John Whitley, 2003, p. 1361.
> 4. The Stanford article confirms the following points:
> a. Analyzing county-level data for the entire United States from 1977 to 2000, we find annual reductions in murder rates between 1.5% and 2.3% for each additional year that a right-to-carry law is in effect.
> b. For the first five years that such a law is in effect, the total benefit from reduced crimes usually ranges between approximately $2 billion and $3 billion per year.
> c. Robbery rates in right-to carry states were rising until the laws were passed and then fell continually after that point. The pattern is very similar to that shown earlier by Lott in examining county-level data from 1977 to 1996.
> d. By the time the law has been in effect for six years, the county and state level data imply a drop in robbery rates of eight and twelve percent respectively.
> e. By the time the law has been in effect for six years, Ayres and Donohues very own county and state estimates imply that murder rates had fallen by at least ten percent.
> f. On the risks to police, David Mustard finds that police officers are murdered at a lower rate after concealed handgun laws are passed, and that the longer the laws are in effect, the greater the decline.
> ER Vol. III, Page 20.

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 Federal Rule of Civil Procedure 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, Appellees have the burden of proving a nexus between their policy and their stated goal. Appellees have not offered a specific legitimate goal, save for a general utterance of "public safety" or "crime reduction". Nor have Appellees profferred any evidence to

demonstrate how their abrogation of a fundamental right furthers that, as yet unidentified, overbroad and vague, goal, beyond the impermissible statements related to public safety, a goal hampered, not furthered by their policy as demonstrated by the expert testimony.

Because the Second Amendment establishes a Fundamental Right to Self-Defense, and Appellees policy infringes thereon, the Appellees have 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.

SUMMARY OF ARGUMENT

Appellant does not dispute any of the underlying factual findings, or the Courts' application of Intermediate Scrutiny. As set forth herein, Appellant contends that the District Court erred in conducting an incomplete analysis of the significant Fundamental Rights at issue. Appellant also does not even challenge the statutory scheme for the issuance of permits, as many Sheriffs across the state exercise a fair system of defining good cause as the "right of self-defense, or defense of others" and don't infringe upon or abuse their authority by issuing law abiding citizens the permit necessary for the exercise of their Rights. Unfortunately, the Appellees herein have adopted a system with the sole purpose of preventing those rights- that is their stated purpose- to limit the number of

concealed weapons in the community- justified as they claim because criminals use guns. For instance, in 2011, the LASD issued only 4 new Civilian permits, and even more astounding, that is the same number of permits issued by the LAPD in the past 15 years.

The District Court acknowledged the credibility of both experts who provided information on the issues presented and decided that the motions should properly be viewed under Intermediate Scrutiny, but then, without analysis, made a gigantic leap finding that the Appellees were justified in infringing upon a Fundamental Right because of unsubstantiated fears. It is that leap that necessitates this appeal. The District Court ignored, and in fact, decided contrary to well established law finding public safety fears alone could not be the basis for infringement upon Fundamental rights. The District Court failed to identify any clear basis for how the refusal to issue permits is a narrowly tailored policy that furthered the goal of public safety, unless of course it made the unstated assumption contrary to the expert testimony that CCW holders will become criminals. Because of the failure to state any valid goal, or any evidence of how the draconian definition of "good cause" furthered any goal, there was no nexus even discussed by the trial court as required for proper Constitutional analysis.

ARGUMENT

I. THAT THE SECOND AMENDMENT CREATES A FUNDAMENTAL RIGHT TO SELF DEFENSE IS BEYOND ARGUMENT, THE ONLY QUESTION BEING WHAT MINIMAL REGULATION WILL BE TOLERATED BY THE COURT

The Second Amendment provides "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court answered the question of whether the Second Amendment confers an individual right to bear arms, or protects only the right to possess and carry a firearm in connection with militia service, finding the former to be the case. After a lengthy examination of the historical record, the *Heller* majority held that the Constitution guarantees the individual right to possess and carry weapons in case of confrontation. *Id*. at 592. Two years later, in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the Supreme Court held that the Second Amendment's protections, whatever their bounds, apply fully to the States through the Fourteenth Amendment.

II. APPELLEES HAVE NOT IDENTIFIED ANY VALID GOAL FOR THEIR POLICY OF DRASTICALLY RESTRICTING CCW PERMITS

The District Court identified the goal or objective as "It is clear that the protection of public health and safety are important government objectives, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996), as is crime prevention, *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992)". ER, Vol. 1 Page 6. But then makes the giant leap concluding "California's concealed weapons regime is substantially related to the important government objective identified above." ER, Vol. 1 Page 6. What is missing from the Court's analysis is the fact that the scheme is not in question, but Appellees policy of refusing to follow the scheme because of "public safety" and "crime prevention" concerns.

It is not the statute, but the discretionary acts of the Appellees that violate Appellants' Fundamental rights. It is Appellees who must identify a nexus between their goal (which is not a valid one for these purposes) and the definition of "good cause" (which serves as a complete discretionary bar to exercise of the statutory right), as Appellant does not challenge the States licensing scheme, just Appellees draconian and exclusionary definition of "good cause." It is axiomatic that the Constitution does not permit fundamental civil rights to be abridged by public safety fears. See, e.g., *Near v. Minnesota*, 283 U.S. 697, 721-22 (1931).

"But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right." *Hague v. Committee for Indus. Org.* 307 U.S. 496, 516 (1937). Accordingly, the Ninth Circuit has rejected alleged public health and safety concerns as a substitute for objective standards and due process. *Desert Outdoor Advertising v. City of Moreno Valley* 103 F.3d 814, 819 (1996).

"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, Appellees 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. Appellees have offered no evidence, much less made any effort to refute the clear and convincing evidence presented to the contrary.

III. APPELLEES HAVE NOT PRESENTED ANY EVIDENCE OF ANY NEXUS BETWEEN THEIR POLICY AND THEIR GOAL

The trial Court, without analysis, simply flipped a coin and chose the theory that criminals might apply for CCW permits and commit crimes, so Appellees were justified in abrogating the civil rights of all law abiding citizens in the county. "Thus, if the regulations were invalidated, rescinded, or severely restricted, those with no prior felony convictions could more readily obtain CCW licenses and go on to commit homicides. Zimring Decl. ¶ 5, Dkt. 56-5. By contrast, Appellant has provided competing expert testimony arguing that CCW permits reduce crime. Mudgett Decl. ¶ 7, Dkt. 69-1." ER, Vol. 1 at Page 7. This is perhaps the most crucial part of the decision. The Court is specifically admitting there is evidence that CCW permits reduce crime, but then stating because someone might get a CCW permit and then might commit a homicide, the Appellees are free to abrogate Appellant's Fundamental Right. It is important to note that while Mr. Mudgett provided extensive testimony and citation to actual statistics related to the effects of CCW permits across the country, the above is the extent of the Courts' analysis of his opinions contained in the 10 page order.

Appellees carry the burden of establishing the nexus between their need or goal (ostensibly that of crime reduction and public safety) and their infringement upon a Fundamental Right. Under *Cantwell v. Connecticut* 310 U.S. 296 (1940),

and progeny, States and localities may not condition a license necessary to engage in constitutionally protected conduct on the grant of a license officials have discretion to withhold. Further, a host of prior restraint cases establish that "the peaceful enjoyment of freedoms which the Constitution guarantees" may not be made "contingent upon the uncontrolled will of an official." *Staub v. Baxley* 355 U.S. 313, 322 (1958).

> 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.
> *United States v. Chester, 628 F.3d 673at 680 (4th Cir. 2010)*

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).

CONCLUSION

As a benchmark we often refer to those bastions of fundamental rights embodied in the freedom of speech or religion, but somehow pay only passing lip service to something right in between, the right to keep and bear arms for the purpose of self-defense, a fundamental right no less trivial than the right to free speech or religion.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, there are no related cases pending at the appellate level. There are two similar District Court Cases expected to be elevated to this Court in the near future, and for which a decision in this case may have some effect, they are:

> Sigitas Raulinaitis et al v. Los Angeles County Sheriffs Department, Central District of California, 2:11-cv-08026-MWF-JCG
>
> Robert Thomson v. Los Angeles County Sheriffs Department et al, Central District of California, 2:11-cv-06154-SJO

Both Cases directly challenge the same issues presented in this matter, though include additional parties, documents and evidence further defining the central issue- does the clear and present danger standard violate Appellants rights.

Date: May 23, 2011

s/ Jonathan Birdt
Jonathan W. Birdt (SBN# 183908)
Plaintiff -Appellant

Form 6. Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☒ this brief contains 4,922 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

☐ this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

☒ this brief has been prepared in a proportionally spaced typeface using *(state name and version of word processing program)* Microsoft Word
(state font size and name of type style) _____, *or*

☐ this brief has been prepared in a monospaced spaced typeface using *(state name and version of word processing program)* _____
with *(state number of characters per inch and name of type style)*

_____.

Signature /s/

Attorney for pro se

Date May 26, 2012

9th Circuit Case Number(s) 12-55155

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) May 26, 2012 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) /s/

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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:

Signature (use "s/" format)