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9
 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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13
 14 **THERESE MARIE PIZZO,**

Plaintiff,

15
 16 v.

17
 18 **CITY AND COUNTY OF SAN FRANCISCO, etc.,**

Defendants.
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Case No. 4:09-cv-04493-CW

DEFENDANT CALIFORNIA ATTORNEY GENERAL'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Date: July 26, 2012
 Time: 2:00 p.m.
 Dept: Courtroom 2, 4th Floor
 Judge: The Honorable Claudia Wilken
 Trial Date: October 9, 2012
 Action Filed: September 23, 2009

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that, on July 26, 2012, at 2:00 p.m., or a soon thereafter as counsel may be heard by the Honorable Claudia Wilken, Courtroom 2, 4th Floor, United States District Court for the Northern District of California, 1301 Clay Street, Oakland, California, 94512-5212, defendant Kamala D. Harris, as California Attorney General, will and hereby does move for summary judgment.

Pursuant to Federal Rule of Civil Procedure 56, defendant Attorney General moves for summary judgment on all claims against her on the grounds that there is no genuine dispute as to any material fact and the Attorney General is entitled to judgment as a matter of law.

This Motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities and Request for Judicial Notice filed concurrently herewith, the declarations of Allan Harjala, Joel Tochtermann, and George Waters, all pleadings, records, and files herein, those matters of which the Court may or must take judicial notice, and upon such oral argument as may be made at the hearing on this Motion.

Dated: June 28, 2012

Respectfully Submitted,
KAMALA D. HARRIS
Attorney General of California
PETER A. KRAUSE
Supervising Deputy Attorney General

/s/ George Waters

GEORGE WATERS
Deputy Attorney General
*Attorneys for Defendant Kamala D. Harris
as California Attorney General*

ISSUES PRESENTED

- 1 1. Whether the Eleventh Amendment bars this suit as to the Attorney General.
- 2
- 3 2. Whether plaintiff lacks standing to pursue her claims against the Attorney General
- 4 because her alleged injuries are not traceable to any action of the Attorney General.
- 5 3. Whether California Penal Code sections 26150 and 26155, which govern the issuance
- 6 of licenses to carry concealed weapons, are constitutional.
- 7 4. Whether California Penal Code sections 25450 and 25900, which generally exempt
- 8 retired peace officers from prohibitions on carrying concealed or loaded weapons, are
- 9 constitutional.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

11 This motion is filed by defendant Kamala D. Harris, Attorney General of California.¹

12 California has for decades closely regulated the possession of firearms in public places.

13 While Californians generally may keep firearms in their homes, businesses, and other private

14 property without a license, a license (known as a “CCW” license) is required to carry a concealed

15 weapon in public. A CCW license may be issued only by a sheriff or chief of police (the

16 “licensing authority”). An applicant for a CCW license must establish that she is “of good moral

17 character,” that “good cause exists for issuance of license,” and a number of other things.

18

19 Plaintiff Theresa Marie Pizzo, a San Francisco resident, claims to have been denied a CCW

20 license by the licensing authority in San Francisco. The San Francisco defendants deny that

21 claim. At the outset, the Court will have to decide whether San Francisco did in fact deny a

22 license to plaintiff. The Attorney General has no information on that issue because her office was

23 not involved in the application process and has no knowledge of the facts and circumstances

24 surrounding plaintiff’s alleged application.

25

26 ¹ Plaintiff’s action names former California Attorney General (now Governor) Edmund

27 G. Brown Jr. as defendant in his official capacity. (Complaint ¶ 62 [Dkt. #1, 7:15].) In January

28 2011, Kamala D. Harris replaced Edmund G. Brown Jr. as California Attorney General. As a

result of her election, she is automatically substituted as defendant. *See* Fed. R. Civ. P. 25(d).

1 Should the Court conclude that plaintiff’s CCW application was denied and she therefore
2 has standing to pursue her claims against San Francisco, the Court will then be presented with
3 plaintiff’s challenge to California’s CCW licensing statutes. As we will show below, summary
4 judgment should be awarded to the Attorney General as a matter of law for three reasons.

5 First, the Attorney General has no authority to grant, deny, or revoke CCW licenses, and
6 had no involvement whatsoever in processing plaintiff’s alleged application. Thus plaintiff’s
7 claims against the Attorney General are barred by the Eleventh Amendment, and plaintiff lacks
8 standing to make those claims as to the Attorney General.

9 Second, should the Court reach the merits, the Second Amendment does not protect the
10 right to carry a firearm in public. The challenged provisions of California’s CCW licensing
11 statutes therefore are subject to rational basis review and, for obvious reasons, pass that review.

12 Third, the Court should reject plaintiff’s equal protection challenge. The Equal Protection
13 Clause of the Fourteenth Amendment commands that all persons similarly situated should be
14 treated alike. Here, however, the groups receiving different treatment—civilians and retired
15 peace officers—are not similarly situated, and any differential treatment is well-justified under
16 the governing rational basis review.

17 For all these reasons, and as more fully explained below, the Attorney General respectfully
18 requests that the Court enter summary judgment in her favor.

19 **II. FACTUAL AND LEGAL BACKGROUND**

20 **A. Californians May Keep Loaded and Concealable Firearms in Their Homes, 21 Businesses and Other Private Property Without a License.**

22 The carrying of firearms in California is governed by the Deadly Weapons Recodification
23 Act of 2010.² Cal. Penal Code § 16000 et seq.³ Several categories of people, such as those
24 convicted of certain crimes, those subject to a temporary restraining order, and those suffering

25 ² The Deadly Weapons Recodification Act took effect on January 1, 2012 and replaces
26 the prior Control of Deadly Weapons Law. *See* Cal. Penal Code § 16000. The recodification “is
intended to be entirely nonsubstantive in effect.” *Id.* § 16001.

27 ³ Unless otherwise noted, all statutory citations are to the California Penal Code.
28

1 from a mental condition are excluded from possessing firearms.⁴ Those who do not fall into an
 2 excluded category may keep a handgun, either openly or concealed, in their residence, place of
 3 business, or on their own private property:

4 No permit or license to purchase, own, possess, keep, or carry, either openly or
 5 concealed, shall be required of any citizen of the United States or legal resident over
 6 the age of 18 years who resides or is temporarily within this state, . . . to purchase,
 7 own, possess, keep, or carry, either openly or concealed, a handgun within the
 citizen's or legal resident's place of residence, place of business, or on private
 property owned or lawfully possessed by the citizen or legal resident.

8 § 25605(b).

9 **B. California Closely Regulates the Carry of Firearms in Public.**

10 **1. Concealed Firearms**

11 Carrying a concealed weapon in public (either on one's person or in a vehicle) is generally
 12 prohibited without a license. §§ 25400, 25655. A violation is punishable as a misdemeanor,
 13 unless one or more enhancing circumstance is present. § 25400(c)(7).

14 California has prohibited the unlicensed, public possession of concealed handguns in cities
 15 since 1917. (Harjala Decl., Exh. A-002 [§ 3].) The prohibition was extended to counties in 1923.
 16 (Harjala Decl., Exh. B-004 [§ 5].)

17 **2. Loaded Firearms**

18 California law generally prohibits the carrying of a loaded firearm in public:

19 A person is guilty of carrying a loaded firearm when the person carries a loaded
 20 firearm on the person or in a vehicle while in any public place or on any public street
 21 in an incorporated city or in any public place or on any public street in a prohibited
 area of unincorporated territory.

22 § 25850(a). A violation is punishable as a misdemeanor, unless one or more enhancing
 23 circumstance is present. § 25850(c)(7).

24 The prohibition on possession of a loaded firearm is subject to several important exceptions.
 25 Most notably, it does not apply to (a) persons in their place of residence, including a temporary

26 ⁴ See, e.g., § 29800(a) [persons convicted of felony or addicted to narcotic drugs];
 27 § 29805 [persons convicted of certain misdemeanors]; § 29825 [persons subject to temporary
 28 restraining order or protective order]; § 29825 [persons adjudged a ward of juvenile court for
 certain offenses]; Cal. Welf. & Inst. Code §§ 8100–8108 [mental health clients].

1 residence or campsite (§ 26055), (b) persons engaged in a lawful business, and their authorized
 2 employees, within the place of business (§ 26035), (c) holders of a license to carry a concealed
 3 weapon (§ 26010), (d) hunters in areas where hunting is legal (§ 26040), (e) persons who believe
 4 that either they or their property are in immediate, grave danger and that carrying of a weapon is
 5 necessary (§ 26045), (f) persons making a lawful arrest (§ 26050), (g) members of the military
 6 engaged in their duties (§ 26000), (h) persons at a firing range or shooting club (§ 26005), and
 7 (i) armored vehicle guards (§ 26015).

8 California has prohibited the public possession of loaded firearms since 1967. (Tochterman
 9 Decl., Exh. F-002 [§ 12031(a)].)

10 **3. Open Carry of Unloaded Handguns**

11 As a general rule, the open carrying of an unloaded handgun in public is prohibited.

12 § 26350(a). A violation is punishable as a misdemeanor unless the handgun and ammunition are
 13 in immediate possession of the bearer, and the bearer is not in lawful possession of the handgun.

14 § 26350(b). This prohibition is subject to several exceptions. See §§ 26351–26389.

15 Significantly, it does not apply to holders of a license to carry concealed weapons. § 26362. It
 16 also does not apply to open possession of an unloaded handgun within a residence, business, or
 17 private property, if done with the permission of the person in possession. § 26383. And finally, it
 18 does not apply to licensed hunters when engaged in hunting. § 26365.

19 The prohibition on open carry of an unloaded handgun in public became effective January 1,
 20 2012. *See* § 26350.

21 **4. CCW Licensing Process**

22 A CCW license can be issued only by a chief of police or county sheriff (the “licensing
 23 authority”). §§ 26150, 26155. The licensing authority may issue a license to an applicant who has
 24 established that she is of good moral character, that good cause exists for issuance, that the
 25 applicant resides in the jurisdiction, and that the applicant has completed a course in firearm
 26 safety.⁵ *Id.* Each applicant must submit her fingerprints and may, at the discretion of the

27 _____
 28 ⁵ Section 26150 states in its entirety:

1 licensing authority, be required to undergo psychological testing. §§ 26185, 26190. The
 2 licensing authority is required to publish its policy for reviewing applications. § 26160. With
 3 certain exceptions, a license is good for up to two years and is valid throughout the state.⁶
 4 § 26220(a). A weapon carried pursuant to a CCW license may be carried loaded. § 26010.

5 The Attorney General has only two responsibilities in connection with the CCW application
 6 process. First, the Attorney General, after consultation with local law enforcement
 7 representatives, is charged with preparing a uniform application form to be used throughout the
 8 state. (§ 26175; Waters Decl., Exh. L-001.) Second, upon receipt of an applicant's fingerprints
 9 from a licensing authority, the California Department of Justice (which is under the supervision of
 10 the Attorney General) provides to the licensing authority a report as to whether the applicant is
 11 prohibited by state or federal law from possessing a firearm. (The California Department of

12 _____
 13 (...continued)

14 (a) When a person applies for a license to carry a pistol, revolver, or other
 15 firearm capable of being concealed upon the person, the sheriff of a county may issue
 16 a license to that person upon proof of all of the following:

17 (1) The applicant is of good moral character.

18 (2) Good cause exists for issuance of the license.

19 (3) The applicant is a resident of the county or a city within the county, or the
 20 applicant's principal place of employment or business is in the county or a city within
 21 the county and the applicant spends a substantial period of time in that place of
 22 employment or business.

23 (4) The applicant has completed a course of training as described in Section
 24 26165.

25 (b) The sheriff may issue a license under subdivision (a) in either of the
 26 following formats:

27 (1) A license to carry concealed a pistol, revolver, or other firearm capable of
 28 being concealed upon the person.

(2) Where the population of the county is less than 200,000 persons according
 to the most recent federal decennial census, a license to carry loaded and exposed in
 only that county a pistol, revolver, or other firearm capable of being concealed upon
 the person.

⁶ Licenses for state or federal judges may be issued for up to three years. § 26220(c).

1 Justice is the statewide repository of criminal histories, sometimes known as “rap sheets.” Cal.
2 Gov’t Code § 11105.)

3 California law has authorized sheriffs and chiefs of police to issue CCW licenses, on a
4 showing of good cause, since 1923. (Harjala Decl., Exh. B-005 – B-006 [§ 8].)

5 **5. Peace Officers and Retired Peace Officers**

6 Active duty and honorably retired peace officers are generally exempt from the prohibitions
7 on carrying concealed firearms and loaded weapons. §§ 25450, 25900, 26300. Active peace
8 officers remain exempt as long as they continue in good standing. At the time of retirement,
9 honorably retiring peace officers are issued an identification certificate by the agency that
10 employed them. §§ 25455, 25905. The certificate is stamped with an endorsement stating that
11 the holder is authorized to carry a concealed weapon and/or a loaded weapon. §§ 25460(c),
12 25905(c). Officers who retire due to a psychological disability are not eligible. § 26305(a).
13 Every five years, the holder may petition the issuing agency for renewal. §§ 25465, 25915. The
14 issuing agency may, at initial retirement or any time thereafter, revoke a retired officer’s
15 privileges for good cause. §§ 25470, 25920. A retired officer must qualify with the firearm
16 annually. § 25475(a).

17 Peace officers must complete extensive training in the carrying and use of firearms as
18 prescribed by the Commission on Peace Officer Standards and Training (POST). § 832(a). They
19 must complete a minimum of 24 hours of firearm training. § 832; POST Firearms Training
20 Manual at D-18. In addition, peace officers must “[b]e of good moral character, as determined by
21 a thorough background investigation.” Cal. Gov’t. Code § 1031(d). They must be evaluated by a
22 licensed physician or psychologist to determine if the candidate is free from any emotional or
23 mental conditions that might adversely affect the exercise of those powers. Cal. Gov’t. Code
24 § 1031(f). Test criteria include social competency, impulse control, integrity and ethics,
25 tolerance, and avoiding substance abuse or other risk-taking behaviors. Cal. Code Regs. tit. 11,
26 § 9055(c)(2). All peace officers have the power to make arrests. § 836.

1 **C. Plaintiff's Claims**

2 Plaintiff Therese Marie Pizzo resides with her same-sex registered partner and two minor
 3 children (ages two and six) in San Francisco. (Dkt. # 61, p. 2 [¶ 3].) Ms. Pizzo alleges that she
 4 has been harassed her entire life due to her sexual orientation. (Dkt. # 61, p. 4 [¶ 20].) Plaintiff
 5 further asserts that because of five alleged incidents over the past 30 years involving individuals
 6 who allegedly threatened, harassed, or called her names due to her sexual orientation,⁷ she
 7 “intend[s] to possess a readily accessible operable handgun ready for immediate use, loaded with
 8 proper ammunition, within [her] home for self-defense, on [her] person, and in [her] vehicle.”
 9 (Dkt. # 61, p. 6 [¶ 36].) She also wants to use “semi-jacketed hollow point ammunition that
 10 expands and fragments upon impact [because it is] clearly better for home defense.” (Dkt. # 61,
 11 p. 5 [¶ 29].) Plaintiff avers that she will no longer go camping⁸ or visit Texas⁹ “unless [] issued a
 12 CCW permit.” (Dkt. # 61, p. 4 [¶¶ 18-19].)

13 Plaintiff claims to have applied for a CCW license in San Francisco, or tried to apply for a
 14 license. The San Francisco defendants dispute this claim.

15 **D. Legal Issues Raised by the Cross-Motions for Summary Judgment.**

16 Plaintiff's 269-paragraph complaint challenges San Francisco ordinances regulating
 17 ammunition, the San Francisco permitting scheme for CCW licenses, and state law regulating
 18 CCW licenses. Defendants fall into two categories: (1) San Francisco officials allegedly
 19 involved in San Francisco CCW permitting and ammunition regulation, and (2) the California
 20 Attorney General concerning generally applicable CCW statutes. All claims are pled against all
 21 defendants. The following chart briefly summarizes the claims alleged in plaintiff's complaint:
 22
 23

24 ⁷ See Dkt. # 61, pp. 2-3, ¶¶ 12, 13, 14, 15, 16 & 17.

25 ⁸ This self-imposed ban on camping is puzzling given that California permits the
 26 possession of a loaded weapon at “any temporary residence or campsite.” § 26055.

27 ⁹ Plaintiff's avoidance of Texas is inexplicable as well given that none of the alleged acts
 28 of harassment occurred there. Moreover, Texas will issue CCW licenses to out-of-state residents
 for use within Texas. Tex. Gov't Code, § 411.173..

Number	Claim	Relief Sought
1	SF Ordinance # 4512 re storage of handgun in residence violates 2nd Amendment. (Dkt. # 1-1, pp. 19-20.)	Declaration/Injunction.
2	SF Ordinance # 1290 re discharge of firearms in city violates 2nd Amendment. (Dkt. # 1-1, p. 20.)	Declaration/Injunction.
3	Penal Code § 26150 et seq. regarding issuance of CCW permits violate 2nd Amendment. (Dkt. # 1-1, pp. 20-21.)	Declaration/Injunction.
4	Penal Code § 26150 et seq. regarding issuance of CCW permits violate the Equal Protection Clause of the 14th Amendment. (Dkt. # 1-1, pp 21-23.)	Declaration/Injunction.
5	Penal Code § 25900 et seq. regarding CCW permits for honorably retired peace officers violate the Equal Protection Clause of the 14th Amendment. (Dkt. # 1-1, pp. 23-24.)	Declaration/Injunction.
6	18 U.S.C. §§ 926B, 926C regarding CCW permits for honorably retired peace officers violate the Equal Protection Clause of the 14th Amendment. (Dkt. # 1-1, p. 24.)	Declaration/Injunction.
7	SF Ordinance # 613.10(g) re transfer of ammunition violates 2nd Amendment. (Dkt. # 1-1, p. 25.)	Declaration/Injunction.
8	SF Ordinance # 613.10(g) re transfer of ammunition violates Due Process Clause of Fifth Amendment. (Dkt. # 1-1, p. 26.)	Declaration/Injunction.
9	SF Ordinances # 4512, 1290, 613.10(g) and Penal Code § 26150 et seq. violate constitution and laws of California. (Dkt. # 1-1, pp. 26-28.)	Declaration/Injunction.
10	SF Ordinances # 4512, 1290, 613.10(g) and Penal Code § 26150 et seq. violate Due Process Clause of the 14th Amendment. (Dkt. # 1-1, p. 28.)	Declaration/Injunction.

Of these original ten claims, only five conceivably sought relief from the Attorney General because only five challenged the California Penal Code (numbers 3, 4, 5, 9, and 10). Of these, plaintiff's motion for summary judgment withdraws all but two: the third claim asserting that state statutes governing the issuance of CCW licenses violate the Second Amendment (*see* plaintiff's memorandum, Dkt. # 60, p. 6, ll. 15-19), and the fifth claim asserting that a separate statutory standard for issuing CCW licenses to retired peace officers violates the equal protection clause of the Fourteenth Amendment (*see* plaintiff's memorandum Dkt. # 60, p. 7, ll. 12-22).

1 **ARGUMENT**

2 **I. STANDARD FOR ISSUANCE OF SUMMARY JUDGMENT**

3 The purpose of summary judgment is to avoid unnecessary trials when, as here, there is no
 4 dispute as to the facts before the court. *Zweig v. Hearst Corp.*, 521 F.2d 1129 (9th Cir. 1975).
 5 The basic standard for granting summary judgment is that the court must find there is “no genuine
 6 dispute as to any material fact and that the movant is entitled to judgment as a matter of law.”
 7 Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Fed. Civ. Pro. Before Trial* ¶ 14:202 (The
 8 Rutter Group 2011) (quoting Fed.R.Civ.P. 56(c)(2), emphasis added by treatise). Material facts
 9 which would preclude entry of summary judgment are those which, under applicable substantive
 10 law, may affect the outcome of the case. The substantive law will identify which facts are
 11 material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

12 **II. THE ATTORNEY GENERAL IS IMMUNE FROM SUIT PURSUANT TO THE ELEVENTH
 13 AMENDMENT.**

14 The Eleventh Amendment bars suit against a state or its instrumentalities for legal or
 15 equitable relief in the absence of consent by the state or an abrogation of that immunity by
 16 Congress.¹⁰ *Papasan v. Allain*, 478 U.S. 265, 276-77 (1986); *Pennhurst State Sch. & Hosp. v.*
 17 *Halderman*, 465 U.S. 89, 100 (1984). Section 1983 does not abrogate a state’s Eleventh
 18 Amendment immunity. *Quern v. Jordan*, 440 U.S. 332, 341 (1979). The State of California has
 19 not waived that immunity with respect to claims brought under section 1983 in federal court.
 20 *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985).

21 “The Eleventh Amendment [also] bars a suit against state officials when ‘the state is the
 22 real, substantial party in interest.’” *Pennhurst*, 465 U.S. at 101 (citations omitted); see *Almond*
 23 *Hill Sch. v. U.S. Dept. of Agric.*, 768 F.2d 1030, 1033 (9th Cir. 1985). The “general rule is that

24 _____
 25 ¹⁰ The Eleventh Amendment states in its entirety:

26 The Judicial power of the United States shall not be construed to extend to any suit in
 27 law or equity, commenced or prosecuted against one of the United States by Citizens
 28 of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

1 relief sought nominally against an officer is in fact against the sovereign if the decree would
2 operate against the latter.” *Pennhurst*, 465 U.S. at 101 (citation omitted). “[A]s when the State
3 itself is named as the defendant, a suit against state officials that is in fact a suit against a State is
4 barred regardless of whether it seeks damages or injunctive relief.” *Id.* at 101-02 (citation
5 omitted).

6 *Ex parte Young*, 209 U.S. 123 (1908), created an exception to Eleventh Amendment
7 immunity for “suits for prospective declaratory and injunctive relief against state officers, sued in
8 their official capacities, to enjoin an alleged ongoing violation of federal law.” *Wilbur v. Locke*,
9 423 F.3d 1101, 1111 (9th Cir. 2005) (quoting *Agua Caliente Band of Cahuilla Indians v. Hardin*,
10 223 F.3d 1041, 1045 (9th Cir. 2000)). However, this exception applies only where “it is plain
11 that such officer [has] some connection with the enforcement of the act, or else it is merely
12 making him a party as a representative of the State, and thereby attempting to make the State a
13 party.” *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998) (quoting *Ex parte Young*, 209 U.S.
14 at 157). “This connection must be fairly direct; a generalized duty to enforce state law or general
15 supervisory power over the persons responsible for enforcing the challenged provision will not
16 subject an official to suit.” *L.A. County Bar Ass 'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992)
17 (citing *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992); *L.A. Branch NAACP v. L.A.*
18 *Unified Sch. Dist.*, 714 F.2d 946, 953 (9th Cir. 1983)).

19 Plaintiff makes no claim that the Attorney General played a role in allegedly denying her a
20 CCW license, and for good reason. ***As explained above, the Attorney General has no statutory***
21 ***authority to grant, deny, or revoke CCW licenses.*** Only sheriffs and chiefs of police are
22 authorized to perform these functions (§§ 26150, 26155), and review of their CCW license
23 decisions is available only from state courts in mandamus proceedings under section 1085 of the
24 Code of Civil Procedure. *See, e.g., Gifford v. City of Los Angeles*, 88 Cal. App. 4th 801, 806
25 (2001) (upholding denial of CCW license for failure to show good cause). The Attorney General
26 has no authority to control, manage, or review these decisions. The Attorney General has only
27 two duties in relation to CCW licensing process: the Department of Justice must prepare a
28 uniform CCW application form to be used throughout the state, and must check applicants’

1 fingerprints against a statewide database of criminal histories. §§ 26175, 26185. Plaintiff 's
2 declaration, which describes the factual basis for her claims in detail, makes clear that she does
3 not challenge the CCW application form or the requirement that applicants undergo a fingerprint
4 check. (Dkt. # 61, pp. 1-9.)

5 It appears that the Attorney General is a defendant here merely as a result of her general law
6 enforcement supervisory duties as a state constitutional officer. See Cal. Const., art. V, § 13
7 (Attorney General is "to see that the laws of the State are uniformly and adequately enforced").
8 But the Attorney General's general supervisory duties are not in themselves sufficient to
9 overcome the Eleventh Amendment. *L.A. County Bar Ass'n*, 979 F.2d at 704. Rather "there
10 must be a connection between the official sued and enforcement of the allegedly unconstitutional
11 statute, and there must be a threat of enforcement." *Long*, 961 F.2d at 152. Accordingly, the
12 Ninth Circuit has held that "[a]bsent a real likelihood that the state official will employ his
13 supervisory powers against plaintiffs' interests, the Eleventh Amendment bars federal court
14 jurisdiction." *Id.*; see also *Snoeck*, 153 F.3d at 987 (members of judicial discipline commission
15 immune from suit under Eleventh Amendment where they have no enforcement power under
16 challenged rule); *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir.
17 2012) (university president does not enjoy Eleventh Amendment immunity from suit challenging
18 affirmative action provision of state constitution where he is "duty bound to ensure that his
19 employees follow it and refrain from using race as a criterion in admissions decisions.").

20 Plaintiff offers no evidence establishing the Attorney General's connection to the
21 administration or enforcement of the CCW statutes (because there is none) and cites no threat of
22 enforcement. Indeed, there is no danger that the Attorney General will employ her advisory
23 powers against plaintiffs' interests. Her powers are restrained by statute, and under the statutory
24 structure for implementing California's CCW licensing scheme, the Attorney General has no
25 power to grant, deny, or revoke CCW licenses. The Eleventh Amendment therefore bars this
26 action in its entirety as against the Attorney General.

27 ///

1 **III. PLAINTIFF LACKS STANDING**

2 **A. Plaintiff Lacks Standing to Sue the Attorney General Because Plaintiff's**
3 **Alleged Injuries are not Traceable to any Action or Authority of the**
4 **Attorney General.**

5 Article III of the United States Constitution restricts the jurisdiction of federal courts "to the
6 resolution of cases and controversies." *Valley Forge Christian Coll. v. Ams. United for*
7 *Separation of Church & State*, 454 U.S. 464, 471 (1982) (internal quotation marks omitted). To
8 establish a "case or controversy," plaintiff's burden is to show as an "irreducible minimum" the
9 following three elements: (1) a concrete "injury in fact"; (2) a causal connection between the
10 injury and defendant's conduct; (3) and a likelihood that the injury will be redressed by a
11 favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). These
12 constitutional requirements are "rigorous." *Valley Forge*, 454 U.S. at 475.

13 In the present case, plaintiff fails to establish standing as to the Attorney General because at
14 best she has traced the shadowy outlines of an injury, and has failed entirely to establish causation
15 or redressability. Plaintiff lacks standing for the same reasons that her suit is barred by the
16 Eleventh Amendment: The Attorney General's powers are defined by statute, and under the
17 statutory structure for implementing California's CCW licensing scheme, the Attorney General
18 has no authority to grant, deny, or revoke CCW licenses. *See Long*, 961 F.2d at 152 (lack of
19 threatened enforcement by the Attorney General means that the "case or controversy"
20 requirement of Article III is not satisfied); *Southern Pac. Transp. Co. v. Redden*, 651 F.2d 613,
21 615 (9th Cir. 1980) (attorney general's stated intention to advise and direct the district attorneys
22 to prosecute is insufficient to establish a justiciable controversy where they are not obligated to
23 comply).

24 Failure to establish any of the three elements necessary for standing would deprive the
25 Court of Article III jurisdiction, and plaintiff has failed to demonstrate all three.

26 ///

27 ///

28 ///

///

1 **B. Defendant Attorney General Joins in the Motion for Summary Judgment**
 2 **Filed by the San Francisco Defendants to the Extent that it Argues that**
 3 **Plaintiff was not Denied a CCW License and Therefore Lacks Standing.**

4 The Attorney General is informed that the San Francisco defendants will move for
 5 summary judgment on the ground that plaintiff was not denied a CCW license. The Attorney
 6 General joins in that portion of the San Francisco defendants' motion for summary judgment.

7 **IV. CALIFORNIA'S SCHEME FOR REGULATING CONCEALED WEAPONS PASSES**
 8 **CONSTITUTIONAL MUSTER.**

9 **A. California Penal Code sections 26150 and 26155, Which Govern the**
 10 **Issuance of CCW Licenses, are a Permissible Element of a Regulatory**
 11 **Scheme that Seeks to Regulate the Number of Firearms Carried in Public**
 12 **While Allowing Ready Access to Concealed Weapons for Legitimate**
 13 **Reasons.**

14 Plaintiff's Second Amendment challenge to California's CCW licensing scheme is
 15 premised on the notion that "permits to carry arms may not be denied to ordinary, law-abiding
 16 citizens such as plaintiff who can demonstrate basic competence with a firearm and who [wish] to
 17 carry a handgun for self-defense of her or her family." (Dkt. # 60, p. 16, ll. 6-9.) Plaintiff asserts
 18 that the Second Amendment invests individuals with a fundamental right to carry firearms in
 19 public. There is no Ninth Circuit authority on this issue. However, the weight of authority in
 20 California and elsewhere is that the Second Amendment generally does not protect the right to
 21 carry a firearm in public.

22 The Second Amendment provides: "A well regulated Militia, being necessary to the
 23 security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In
 24 *District of Columbia v. Heller*, 554 U.S. 570 (2008), the United States Supreme Court concluded
 25 that the Second Amendment "protects the right to keep and bear arms for the purpose of self-
 26 defense" and that a law "that banned the possession of handguns in the home" violates that right.
 27 *McDonald v. Chicago*, — U.S. —, 130 S. Ct. 3020, 3026; *Heller*, 554 U.S. at 635. The Due
 28 Process Clause of the Fourteenth Amendment incorporates the Second Amendment right
 29 recognized in *Heller*, thus it is applicable to the States. *McDonald*, 130 S. Ct. at 3050.

30 While it is clear that the Second Amendment protects the right to possess a handgun in the
 31 home, the Supreme Court has made clear that the right is "not unlimited":

1 From Blackstone through the 19th-century cases, commentators and courts routinely
 2 explained that the right was not a right to keep and carry any weapon whatsoever in
 3 any manner whatsoever and for whatever purpose. For example, the majority of the
 4 19th-century courts to consider the question held that prohibitions on carrying
 5 concealed weapons were lawful under the Second Amendment or state analogues. . . .
 [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions
 on the possession of firearms by felons and the mentally ill, or laws forbidding the
 carrying of firearms in sensitive places such as schools and government buildings, or
 laws imposing conditions and qualifications on the commercial sale of arms.²⁶

6 FN26. We identify these presumptively lawful regulatory measures only as
 7 examples; our list does not purport to be exhaustive.

8 *Heller*, 554 U.S. at 626-627 & fn. 26 (internal citations omitted). This language

9 warns readers not to treat *Heller* as containing broader holdings than the Court set out
 10 to establish: that the Second Amendment creates individual rights, one of which is
 11 keeping operable handguns at home for self-defense. What other entitlements the
 Second Amendment creates, and what regulations legislatures may establish, were
 left open.

12 *U.S. v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010).

13 **1. A Majority of Courts to Consider the Issue have Applied Rational**
 14 **Basis Scrutiny and Upheld Laws Restricting the Concealed Carry of**
Weapons in Public.

15 Because neither the Supreme Court nor the Ninth Circuit has addressed the standard of
 16 review for Second Amendment challenges, it is appropriate to review decisions from other
 17 jurisdictions for guidance. The Third Circuit, for example, takes a two-pronged approach. “First,
 18 we ask whether the challenged law imposes a burden on conduct falling within the scope of the
 19 Second Amendment’s guarantee. If it does not, our inquiry is complete. If it does, we evaluate
 20 the law under some form of means-end scrutiny.” *U.S. v. Marzzarella*, 614 F.3d 85, 89 (3rd Cir.
 21 2010). The Fourth, Seventh, Tenth, and D.C. circuits do much the same. *See United States v.*
 22 *Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *Ezell v. City of Chicago*, 651 F.3d 684, 702–04 (7th
 23 Cir. 2011); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010); *Heller v. District of*
 24 *Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011).

25 A similar approach was taken by the Eastern District in a recent challenge to Yolo County’s
 26 CCW policy. *Richards v. County of Yolo*, 821 F. Supp.2d 1169 (E.D. Cal. 2011). That policy –
 27 adopted pursuant to the same statutes that are at issue in the present case – enumerated several
 28 written criteria for the issuance of a CCW license, though the final decision depended on whether

1 the ““Sheriff or his designee feels there is sufficient reason to grant the license.”” *Id.* at 1172.
2 Plaintiffs, two individuals who were denied CCW licenses and two non-profit organizations
3 “designed to promote the rights of firearm holders,” challenged the policy both on its face and as
4 applied. The Court concluded that the Second Amendment “does not create a fundamental right
5 to carry a concealed weapon in public” and applied rational basis review. *Id.* at 1174. The Court
6 held that the concealed-weapon policy was rationally related to Yolo County’s efforts to maintain
7 public safety and prevent gun-related crime, and granted summary judgment to defendant Yolo
8 County. *Id.* at 1175.

9 In concluding that the Second Amendment right identified in *Heller* does not extend to the
10 carrying of a concealed weapon in public, *Richards* agrees with the majority of decisions that
11 have considered similar issues. *See Moore v. Madigan*, -- F. Supp. 2d --, 2012 WL 344760, *10
12 (C.D. Ill. 2012) (individuals do not have a Second Amendment right to carry to bear arms,
13 concealed or otherwise, outside their homes; Illinois statute criminalizing carrying a firearm
14 outside the home, with certain exceptions, upheld); *Piszczatoski v. Filko*, -- F. Supp. 2d --, 2012
15 WL 104917, *1, *2 (D. N.J. 2012) (Second Amendment does not include a general right to carry
16 handguns outside the home; New Jersey licensing statute permitting licenses to carry weapons in
17 public only where applicant establishes “an urgent necessity for self-protection” based on
18 “specific threats or previous attacks demonstrating a special danger to the applicant’s life that
19 cannot be avoided by other means” upheld); *Kachalsky v. Cacace*, 817 F. Supp. 2d 235, 240,
20 264 (S.D.N.Y. 2011) (open and concealed carry of firearms in public are “outside the core Second
21 Amendment concern articulated in *Heller*: self-defense in the home”; New York licensing statute
22 permitting licenses to carry weapons in public only where applicant establishes “a special need
23 for self-protection distinguishable from that of the general community” upheld); *People v. Flores*,
24 169 Cal. App. 4th 568, 577 (2008) (California prohibition on carrying loaded weapon in public
25 (§ 25850(a)) does not burden the core Second Amendment right announced in *Heller* to any
26 significant degree); *Williams v. State*, 10 A.3d 1167, 1177 (Md. 2011), *cert. denied sub nom.*
27 *Williams v. Maryland*, ___ U.S. ___, 132 S. Ct. 93 (2011) (if the Supreme Court meant its
28 holdings in *Heller* and *McDonald* to extend beyond home possession, “it will need to say so more

1 plainly”); *cf. Woollard v. Sheridan*, -- F. Supp. 2d --, 2012 WL 695674, *7, *13 (D. Md. 2012)
 2 (the right to bear arms is not limited to the home; Maryland requirement of a “good and
 3 substantial reason” for issuance of a handgun permit is insufficiently tailored to state interest in
 4 public safety and crime prevention).

5 **2. California’s CCW Laws Withstand Rational Basis Scrutiny.**

6 A regulation is constitutional under rational basis review if it bears “a reasonable
 7 relationship to a legitimate government interest.” *United States v. Whitlock*, 639 F.3d 935, 941
 8 (9th Cir. 2011) (citing *United States v. LeMay*, 260 F.3d 1018, 1031 (9th Cir. 2001)). For the
 9 following reasons, the Court should grant summary judgment to the Attorney General because
 10 California’s CCW licensing statutes (§§ 26150, 26155) are subject to rational basis review and
 11 pass that standard of constitutional scrutiny.

12 First, the California licensing scheme accords generous protection to the Second
 13 Amendment right defined by *Heller* and *McDonald* – the right to possess an operable firearm in
 14 the home for self-defense. Moreover, as noted in Section II above, Californians may keep loaded
 15 and concealable firearms not only in their homes, but also in their businesses and other private
 16 property. (§ 25605(b).) Californians may also carry a loaded firearm when they believe that they
 17 or their property are in immediate, grave danger and that carrying a weapon is necessary.
 18 (§ 26045.) There are other exceptions to the licensing requirement for hunters, persons at a firing
 19 range, and the like. (See §§ 26000 – 26060.)

20 Second, California’s CCW licensing scheme is the sort of “longstanding” regulation that is
 21 presumptively legal under *Heller*. *See Heller*, 554 U.S. at 626-627. California has prohibited the
 22 carry of concealed weapons in public without a license, and has given sheriffs and police chiefs
 23 discretion to issue CCW licenses upon a showing of good moral character and good cause, since
 24 1923. (Harjala Decl., Exh. B-005 – B-006 [§ 8].) The ban on carrying loaded firearms without a
 25 license was signed into law as an urgency measure by Governor Ronald Reagan on July 28,
 26 1967.¹¹ (Tochterman Decl., Exh. H-002, Exh. I-002.) The prohibition on open carry of unloaded

27 ¹¹ The bill was affirmed in the California Assembly by a vote of 62-9, and by the
 28 California Senate by a vote of 28-8. (Tochterman Decl., Exh. J-002, Exh. K-003.)

1 handguns without a license is of more recent vintage (it took effect January 1, 2012), but the
2 prohibition is subject to numerous exceptions and is subject to the same licensing scheme that
3 applies to concealed and loaded weapons. (*See* § 26350, §§ 26351 – 26389.) In any event, “the
4 same rationales apply equally, or almost equally, to the regulation of open carry [as to concealed
5 carry].” *Kachalsky*, 817 F. Supp. 2d at 270; *accord Piszczatoski*, 2012 WL 104917 at *22.

6 Third, the general purpose of the CCW law is “to control the threat to public safety in the
7 indiscriminate possession and carrying about of concealed and loaded weapons. “ *People v.*
8 *Melton*, 206 Cal. App. 3d 580, 589 (1988) (discussing pre-recodification law). This is an
9 important, even compelling, interest. *See U.S. v. Salerno*, 481 U.S. 739, 745, (1987) (describing
10 government interest in public safety as “compelling”); *Peruta v. County of San Diego*, 758 F.
11 Supp. 2d 1106, 1117 (S.D.Cal. 2010) (“government has an important interest in reducing the
12 number of concealed weapons in public in order to reduce the risks to other members of the
13 public who use the streets and go to public accommodations.”).

14 Fourth, to the extent that plaintiff asserts, without evidentiary support, that the CCW
15 licensing scheme invests sheriffs with “unbridled discretion,” she is mistaken. (Dkt. # 60, p. 16,
16 ll. 16-22.) California has concluded that the determination of good cause to carry a concealed or
17 loaded weapon may be very different in a rural county than in an urban county, and that local law
18 enforcement officials are best suited to make this determination. Sheriffs must publish their
19 policy for reviewing applications. (§ 26160.) While sheriffs enjoy discretion in the issuance of
20 CCW licenses, such discretion is hardly unique and is reviewable in state court mandamus
21 proceedings to determine whether a decision is arbitrary, capricious, or lacking in evidentiary
22 support. *See Gifford*, 88 Cal. App. 4th at 805-806 (stating general rule); *Salute v. Pitchess*,
23 61 Cal.App.3d 557, 560 (1976) (sheriff’s determination in advance that only selected public
24 officials can show good cause for CCW license is an abuse of discretion). The discretion
25 afforded local law enforcement officers, being subject to judicial review for abuse, is reasonable
26 and far from “unbridled”.¹²

27 ¹² To the extent that Plaintiff might rely upon the Declaration of David Orsay to support
28 her claim of “unbridled discretion,” that declarant is incompetent to render legal opinions.

1 For all the foregoing reasons, rational basis review is the appropriate standard here and
2 California's CCW licensing statutes easily withstand such review.

3 **3. Even if Intermediate Scrutiny Applied, California's CCW Laws**
4 **Would Pass Muster.**

5 Even if the Court were to disagree with the decisions cited above and conclude that some
6 form of intermediate scrutiny is appropriate, California's CCW licensing system would pass that
7 level of scrutiny also. The Ninth Circuit has not yet adopted an intermediate scrutiny standard
8 applicable to Second Amendment cases. But in a challenge to San Diego's CCW policy, the
9 Southern District applied the intermediate scrutiny test articulated by the Third Circuit:

10 Pursuant to that standard, intermediate scrutiny requires the asserted governmental
11 end to be more than just legitimate; it must be either "significant," "substantial," or
12 "important," and it requires the "fit between the challenged regulation and the
asserted objective be reasonable, not perfect."

13 *Peruta*, 758 F. Supp. 2d at 1117, quoting *United States v. Marzzarella*, 614 F.3d 85, 98 (3rd Cir.
14 2010). For the same reasons set forth above, California's CCW licensing system meets even a
15 more elevated standard of review. See *Peruta*, 758 F. Supp. 2d at 1117 ("At most, Defendant's
16 policy is subject to intermediate scrutiny"; San Diego policy satisfies that standard). Plaintiff has
17 submitted no evidence to the contrary.

18 **B. Penal Code sections 25450 and 25900, Which Create a Separate Licensing**
19 **Scheme for Retired Peace Officers, Does not Offend the Equal Protection**
20 **Clause Because Retired Peace Officers are Differently Situated Than the**
Public at Large.

21 Plaintiff asserts that the separate licensing scheme for retired peace officers is
22 unconstitutional on its face because it has "no rational basis." (Dkt. # 60, p. 22, ll. 12-24.)

23
24 _____
(...continued)

25 Testimony in the form of a legal conclusion is an inappropriate matter for expert testimony. See
26 *U.S. v. Scholl*, 166 F.3d 964, 973 (9th Cir.1999) (excluding expert testimony offering a legal
conclusion); *Aguilar v. International Longshoremen's Union*, 966 F.2d 443, 447 (9th Cir.1992)
27 (noting matters of law are for the court's determination, not that of an expert witness); see also
Marx & Co. v. Diners' Club, Inc., 550 F.2d 505, 509-10 (2d Cir.1977) (expert testimony
28 consisting of legal conclusions inadmissible). The Attorney General incorporates by reference
the Objections lodged concurrently herewith.

1 A statute that burdens a fundamental right or targets a suspect class receives heightened
2 scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *Silveira v. Lockyer*,
3 312 F.3d 1052, 1087 (9th Cir. 2003). Statutes infringing on fundamental rights are subject to
4 strict scrutiny. *Id.* However, statutes that neither affect the exercise of a fundamental right, nor
5 classify persons on protected interests, will be upheld if the classification drawn by the statute is
6 rationally related to a legitimate government interest. *Id.* The legislative record need not contain
7 empirical evidence to support the classification so long as the legislative choice is reasonable. *Id.*,
8 312 F.3d at 1089. “[T]he burden is on the one attacking the legislative arrangement to negative
9 every conceivable basis which might support it[.]” *Heller*, 509 U.S. 320 (citation and quotation
10 marks omitted). As set forth in the previous section, the Second Amendment does not create a
11 fundamental right to carry a weapon in public. The licensing scheme for retired peace officers
12 therefore is subject to rational basis review and plaintiff cannot carry her burden on summary
13 judgment.

14 Retired peace officers who remain in good standing retain the right to possess and carry
15 concealed weapons unless the agency from which they retired concludes that “good cause” exists
16 to deny that privilege. The public must establish “good character” and “good cause” to the
17 satisfaction of a sheriff or chief of police.

18 The Equal Protection Clause of the Fourteenth Amendment commands that all persons
19 similarly situated should be treated alike. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432,
20 439 (1985). Hence, “in order for a state action to trigger equal protection review at all, that action
21 must treat similarly situated persons disparately.” *Silveira*, 312 F.3d at 1088. A threshold defect
22 in plaintiff’s equal protection claim is that non-peace officers are not similarly situated with
23 retired peace officers who were authorized and did carry firearms in the course of their duties.
24 Retired peace officers may be at risk of retaliation from felons whom they have arrested and
25 incarcerated. “The general law enforcement character of all California ‘peace officers’ is
26 underscored by the fact that all have the power to make arrests, § 836, and all receive a course of
27 training in the exercise of their respective arrest powers and in the use of firearms. § 832.”
28 *Cabell v. Chavez-Salido*, 454 U.S. 432, 443-444 (1982). Peace officers enforce “the sovereign's

1 coercive police powers over the members of the community[.]” *Id.*, 454 U.S. at 444. Put simply,
2 peace officers are not similarly situated to the public in general because peace officers are
3 invested with the authority to arrest and incarcerate people. The separate treatment of retired
4 officers is motivated by the state’s legitimate interest in providing them with the means of self-
5 defense in the event that someone they arrested carries a grudge.¹³

6 Further, the mandatory training and experience received by honorably retired peace officers
7 when they were employed as peace officers, means that they have qualifications not shared by the
8 general public. A person cannot qualify as a peace officer without completing rigorous training
9 in procedures and conduct. § 832(a); see also Cal. Code Regs. tit. 11, § 1000 et seq. In order to
10 carry a firearm, a peace officer must undergo meticulous training in firearm proficiency, safety
11 and rules of engagement. Cal. Code Regs. tit. 11, § 1005. One also cannot become a peace
12 officer without obtaining a psychiatric clearance. Cal. Gov’t Code § 1031(f); Cal. Code Regs.
13 tit. 11, § 9055(c).

14 A retired peace officer cannot qualify to carry a concealable firearm unless the employing
15 agency at the time of retirement issues an identification certificate showing the officer was
16 honorably retired. §§ 25455, 25905. A retired peace officer also is not entitled to carry a
17 concealed weapon unless the employing agency, the agency most knowledgeable about the
18 officer’s status and qualifications, certifies on the identification that it approves the officer’s
19 carrying of a loaded, concealed firearm. §§ 25460(c), 25905(c). The employing agency is
20 prohibited from providing an endorsement for a peace officer who is retired for a psychiatric
21 disability. § 26305(a). Additionally, that agency is authorized to deny or revoke for cause the
22 retired officer’s privilege. §§ 25470, 25920.

23 In sum, retired peace officers are differently situated from the general public in that
24 California has put them in harm’s way during the course of their employment and they face a
25 plausible risk of retaliation during retirement, and, because they have extensive training and

26 _____
27 ¹³ The Court should note that the federal law enforcement officers also are entitled to
28 carry concealed weapons so long as they retired in good standing and meet active duty
requirements to carry firearms. *See* 18 U.S.C. §§ 926C(a), 926C(b), 926C(d).

1 experience in the use of firearms, they are just as trustworthy as they were when they were
2 employed full-time and working within their communities. Their separate treatment withstands
3 equal protection scrutiny because it is at the very least rationally related to a legitimate
4 government interest. *See Silveira*, 312 F.3d at 1087.¹⁴

5 **V. TO THE EXTENT PLAINTIFF HAS NOT WITHDRAWN THE FOURTH, NINTH, AND**
6 **TENTH CLAIMS, SUMMARY JUDGMENT SHOULD BE ENTERED ON THOSE CLAIMS**
7 **ALSO.**

8 Of plaintiff's original ten claims, only five conceivably sought relief from the Attorney
9 General because only five were directed to the California Penal Code (claims number 3, 4, 5, 9,
10 and 10). Of these, plaintiff's motion for summary judgment apparently withdraws all but two:
11 the third claim asserting that state statutes governing the issuance of CCW licenses violate the
12 Second Amendment (*see* plaintiff's memorandum, Dkt. # 60, p. 6, ll. 15-19), and the fifth claim
13 asserting that a separate statutory standard for issuing CCW licenses to retired peace officers
14 violates the equal protection clause of the Fourteenth Amendment (*see* plaintiff's memorandum
15 Dkt. # 60, p. 7, ll. 12-22).

16 In the event that plaintiff has not withdrawn claims four, nine, and ten, the Court should
17 enter summary judgment in favor of the Attorney General on these claims for the following
18 reasons.

19 The fourth claim asserts that separate licensing procedures applicable to retired peace
20 officers violate the equal protection clause of the 14th Amendment. This claim is
21 indistinguishable from the fifth claim, which also asserts an equal protection claim directed to the
22 licensing procedures applicable to retired peace officers.

23 The ninth claim (San Francisco ordinances and state law violate the California constitution)
24 is barred by the Eleventh Amendment. *See Pennhurst*, 465 U.S. at 121 (claim that state officials
25 violated state law in carrying out their official responsibilities is a claim against the State that is
26 barred by the Eleventh Amendment).

27 ¹⁴ Significantly, retired peace officers are treated separately under federal law as well. See
28 18 U.S.C. § 926C.

1 The tenth claim (municipal ordinances and state law violate Due Process Clause of the 14th
 2 Amendment) apparently was pled to provide a jurisdictional basis for plaintiff's Second
 3 Amendment claims. This cause of action is redundant now that the Supreme Court has held that
 4 the Due Process Clause of the 14th Amendment incorporates the Second Amendment. See
 5 *McDonald*, 130 S. Ct. at 3050; *see also Albright v. Oliver*, 510 U.S. 266, 273 (1994) ("Where a
 6 particular Amendment 'provides an explicit textual source of constitutional protection' against a
 7 particular sort of government behavior, 'that Amendment, not the more generalized notion of
 8 substantive due process, must be the guide for analyzing these claims.'" (quoting *Graham v.*
 9 *Connor*, 490 U.S. 386, 395 (1989). *See also Peruta*, 758 F. Supp. 2d at 1120 (plaintiff has no due
 10 process claim in CCW license because there is no property or liberty interest in a CCW license).

11 The Court should note that the sixth claim does not appear targeted at any of the present
 12 defendants. The sixth claim asserts that 18 U.S.C. §§ 926B, 926C – which give current and
 13 retired federal law enforcement officers the right to carry concealed firearms – violate the Equal
 14 Protection Clause of the 14th Amendment. There is no federal defendant in this action. The
 15 present defendants are bound by the Supremacy Clause to give these statutes effect.

16 VI. CONCLUSION

17 For the reasons set forth above, the Attorney General respectfully requests that her motion
 18 for summary judgment be granted, and that plaintiff's motion for summary judgment be denied.

19 Dated: June 28, 2012

Respectfully Submitted,

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