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THE UNITED STATES DISTRICT COURT

IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

THERESE MARIE PIZZO, Plaintiff, vs. CITY AND COUNTY OF SAN FRANCISCO MAYOR GAVIN NEWSOM, in both his individual and official capacities; FORMER SAN FRANCISCO POLICE DEPARTMENT; CHIEF OF POLICE HEATHER FONG, in both her individual and official capacities; SAN FRANCISCO POLICE DEPARTMENT CHIEF OF POLICE GEORGE GASCON, in his official capacity; SAN FRANCISCO SHERIFF MICHAEL HENNESSEY, in both his individual and official capacities; CITY AND COUNTY OF SAN FRANCISCO; and STATE OF CALIFORNIA ATTORNEY GENERAL EDMUND G. BROWN, in his official capacity, Defendants.	Case No. 09-cv-04493-CW PLAINTIFF'S REPLY AND OPPOSITION RE: MOTION FOR SUMMARY JUDGMENT AND/OR ADJUDICATION OF ISSUES, AND MEMORANDUM OF POINTS AND AUTHORITIES (Federal Rule of Civil Procedure Rule 56) Hearing Date: July 26, 2012 Time: 2:00 p.m. Place: Oakland Courthouse, Courtroom 2 - 4th Floor 1301 Clay Street, Oakland, CA 94612 Judge: Hon. Claudia Wilken

REPLY/OPPOSITION MEMORANDUM OF POINTS AND AUTHORITIES

This reply/opposition will address the facts and law, broken down as to the State and then the City.

A. INTRODUCTION

As Madison pointed out in The Federalist No. 46, at 299(c). Rossiter, ed. 1961 and, in particular, Blackstone in his 1803 Commentaries, and as quoted extensively by the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), "the fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence …. [for] the natural right of resistance and self-preservation… the right of having and using arms for self-preservation and

defence. And all these rights and liberties it is our birth-right to enjoy entire …."

Also noted *Columbia v. Heller*, 554 U.S. 570, 628 at fn 27 (2008),

> If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.

The concept of liberty forms the core of all democratic principles; the state of being free and enjoying various social, political, or economic rights and privileges. Liberty implies fundamental basic rights which date back to the writings of seventeenth and eighteenth century theorists such as Francis Hutcheson and John Locke. Hutcheson believed that all people are equal and that they possess certain basic rights that are conferred by natural law. Locke postulated that humans are born with an innate tendency to be reasonable and tolerant. He also believed that all individuals are entitled to liberty under the natural law that governed them before they formed societies. Locke's concept of natural law required that no one should interfere with another's life, health, liberty, or possessions. According to Locke, governments are necessary only to protect those who live within the laws of nature from those who do not. For this reason, he believed that the power of government and the rule of the majority must be kept in check, and that they are best controlled by protecting and preserving individual liberties. Locke's philosophies gave rise to the Separation of Powers and the system of checks and balances that are the basis of U.S. government.

It is conceded limitless freedom is untenable in a peaceful and orderly society. Yet, the founders of the United States were concerned that individual liberty would be shackled by the police state. Therefore, echoing Locke's natural-law theory, the Declaration of Independence states that all people have inalienable rights, including the right to life, liberty, and the pursuit of happiness. Similarly, the Preamble to the Constitution outlines the Framers' intent to establish a government structure that ensures freedom from oppression. It reads, in part, "We the People … in Order to … secure the Blessings of Liberty to ourselves and our Posterity…." The Bill of Rights sets forth a number of specific protections of individual liberties, one of which was the Second Amendment ---- the right to be armed.

Through these documents, U.S. citizens are guaranteed freedom of speech, press, assembly, and religion; the right to keep and bear arms, rooted in the inherent and natural human right of

self-defense; freedom from unreasonable searches and seizures; and freedom from slavery or involuntary servitude. Criminal law and procedure require that a person may not be detained unlawfully and that a person who is accused of a crime is entitled to reasonable bail and a speedy trial. The right to be free from unlawful detention has been interpreted to mean not only that the government may not deprive a person of liberty without due process of law, but also that a citizen has a right "to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his living by any lawful calling; and to pursue any livelihood or vocation". *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S. Ct. 427, 41 L. Ed. 832 (1897). State governments may not regulate individual rights except for compelling reasons narrowly tailored to achieve that purpose.

The Court has engendered bitter and sustained controversy with its defense of privacy rights in cases such as *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), which found the constitutional right to privacy to include the right to obtain an Abortion. Critics of such decisions contend that such liberties are not enumerated in the Constitution and that the Court should uphold only rights found in the Constitution. But the Court has consistently held that the liberties enumerated in the Constitution are a continuum that, in the words of Justice John Marshall Harlan, "includes a freedom from all substantial arbitrary impositions and purposeless restraints … and which also recognizes … that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement". *Poe v. Ullman*, 367 U.S. 497, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961).

The Court justified its findings of liberty rights that are not enumerated in the Constitution by stating that some rights are basic and fundamental, and that the government has a duty to protect those rights. It has held that the Constitution outlines a "realm of personal liberty which the government may not enter." As an example, it noted that marriage is not mentioned in the Bill of Rights and that interracial marriage was illegal in many places during the nineteenth century, but that the Court has rightly found these activities to be within the liberty interests guaranteed by the Constitution.

The Court has repeatedly held that individual liberties must be protected no matter how

repugnant some find the activity or individual involved. For example, in *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 28 674 (1992), the Court stated, "Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code." In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), the Court invalidated a law mandating that all students salute the flag, and in *Texas v. Johnson*, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989), it invalidated a law prohibiting burning of the flag. In all of these cases, the Court emphasized that individuals may disagree about whether the activity is socially and morally acceptable, but the liberty inherent in the activity may not be proscribed even if a majority of the populace thinks that it should be, which is exactly what is happening in California in general, and San Francisco in particular. Gun control is no different. Just take a look at the amicus filings in this case by various "interest" groups. Rights are not based upon the political whims at the time — they run in perpetuity until the Constitution is amended or abolished.

Justice Louis D. Brandeis summarized the Court's general wariness of government intrusion into liberty interests, in *Whitney v. California*, 274 U.S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927): "Those who won our independence believed that the final end of the state was to make men free."

EXPERT WITNESS DAVID ORSAY

Each of the Defendants proffered some boilerplate objection as to why Mr. Orsay is not qualified to be an expert, and to render an opinion in this case. It is highly doubtful that anyone employed by any of the Defendants has equal or greater education, training and most importantly, experience is as varied disciplines pertaining to the safe and effective use of firearms and self defense as Mr. Orsay.

Mr. Orsay is a former Special Forces operative, CAPO (Cleared American Protective Officer) government contractor, former Deputy U.S. Marshal, all of which involved providing PSD (Protective Services Detail) duties, threat analysis and threat assessments, target analysis, all of which are the crux of the discretionary decisions regarding what constitutes good cause (or in other words, the need for a CCW). (See, for example, Orsay Decl. ¶ 3, o, q, r, s, u.)

He has gone through every detail, cited every reference to documents relied upon, and he has supported each and everyone of his opinions with thoughtful and deliberate analysis.

His testimony and opinions are admissible to assist the court in the factual analysis of this case.

I.

OPPOSITION AND RESPONSE TO DEFENDANT KAMALA D. HARRIS, AS CALIFORNIA ATTORNEY GENERAL, MOTION FOR SUMMARY JUDGMENT

Initial observations regarding the difficulty for citizens who want to arm themselves under current law, one just need read page 4, commencing at line 24, of the Attorney General's brief. California says its ok to have a "loaded", but not "concealed" gun at a "campsite." So, when it becomes cold at a campsite, and an individual wears a jacket and "conceals" the gun, that individual is now in violation of the law. This is true even in an individuals own home. Or, how about when a person walks 100 yards to the river or lake from their campsite, the government will argue they were not at their campsite, and therefore in violation of the law.

The most common result is under the new federal law which allows possession of loaded firearms in national parks, but subject to the firearm laws of the states where the parks are located. Yellowstone spans portions of the states of Idaho, Montana, and Wyoming. All three states allow open carry of loaded handguns and rifles on one's person or in a vehicle. They all also allow concealed carry of firearms with a permit, unless you're a resident of Wyoming, which allows its citizens to carry a concealed weapon without a permit.

In California, those same campers at Yellowstone, who then travel to Yosemite, must keep the handgun in a locked container and unloaded unless they are at their campsite — they cannot drive into the park with a loaded handgun nor keep the loaded handgun locked in their car while at the campsite – Cal. Penal Code Section § 25850(a).

To further elaborate on the confusion, how does one transport a loaded handgun while backpacking into deep country of Yosemite until they arrive at their campsite? Carry a heavy metal container with the handgun locked up, and inaccessible for "immediate" use. Cal. Penal Code Section § 26045 supposedly allows "a person who reasonably believes that any person or the

property of any person is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property." This is a dangerously ambiguous exception in the law. The problem is how does one get access to the firearm at the moment of "immediate" danger? The Cary Stayners who hover around national parks love California — for they are adequately protected.

In sum, the State has created a regulatory scheme that is complex, confusing, and administered arbitrarily – essentially legislating away plaintiff's rights. Plaintiff's only avenue for certainty in the legality of her possessing an immediately accessible loaded firearm while camping is to have a CCW permit. In fact, it is more appropriate to have a weapon concealed at a national park than to be flaunting it.

A. Plaintiff Has Standing to Sue the Attorney General Because Plaintiff's Injuries Are Traceable to State Law, and thus, ultimately, State Action and pre-enforcement decisions of law are always proper.

In California, a sheriff is not designated by the constitution as a member of the executive branch, which is defined in Article V, titled "Executive." Instead, sheriffs in California are defined in Article XI of the Constitution, titled "Local Government". The California Constitution recognizes two forms of local government: counties and cities, with the sheriff designated as the chief law enforcement officer of the county. See Cal. Const. art. XI, §§ 1, 2; *Headwaters Forest Defense v. County of Humboldt*, 211 F.3d 1121, 1126 n. 2 (9th Cir.2000); *LaLonde v. County of Riverside*, 204 F.3d 947, 961 (9th Cir.2000).

California Constitution Article V, section 13 grants the Attorney General a supervisory role over "every district attorney and sheriff and over such other law enforcement officers as may be designated by law." Thus, the Attorney General is a ultimately the proper party for the case and controversy requirement; because ultimately, the Attorney General can tell a local Sheriff how to conduct its affairs.

Individual standing is not a difficult question. The Court has repeatedly decided important standing cases where the existence of a new statute, and the reasonable possibility of prosecution, allows a pre-enforcement decision on the merits for persons adversely affected. *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Thompson v. Western States Medical Center*, 535 U.S.

357(2002)(pre-enforcement standing found), *Epperson v. Arkansas*, 393 U.S. 97 (1968)(ripeness without enforcement).

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), is a leading standing. Justice Harlan noted there: "the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Id.* at 152.

Since the action against the state only seeks a declaration as to the constitutionality of state law, only the State can defend the laws constitutionality ---- here, if the Attorney General was not named, the State would be arguing that the City and County is not the proper party. Therefore, the State is the proper party and there is standing since the injury is a direct and proximate result of state law.

Moreover, the State also caused harm to Plaintiff. As the State admits at 11:26 of its brief, "the Department of Justice must prepare a uniform CCW application form to be used throughout the state." The same application that does not provide for Plaintiff to disclose her address and which the City defendants proffer as a defense. However, since Plaintiff was never allowed to be "interviewed" by an "investigator", the City never did get plaintiff's address.

B. Defendant Attorney General's Joinder to Motion for Summary Judgment Filed by the San Francisco Defendants is address under the Below Opposition to those Defendants.

II.

A. California Penal Code Sections 26150 and 26155, Which Govern The Issuance of CCW Licenses, Are the Root of the of the Constitutional Deprivation of Rights under the Second Amendment and the Due Process and Equal Protection Clause of the Fourteenth Amendment.

California's licensing scheme is the root of the Constitutional deprivations. Without the subject State law, plaintiff would not be prohibited from traveling with a loaded, immediately accessible, handgun for personal self-defense or defense of family.

1. The Supreme has not Ruled what Level of Scrutiny applies, but it has ruled out a Rational Basis Test.

The Supreme Court has made clear that the rational basis test "could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear

arms." *District of Columbia v. Heller*, 554 U.S. 570, 628 at fn 27 (2008) and *McDonald v. City of Chicago*, —— U.S. ——, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010). The Fifth Circuit utilizes a version of strict scrutiny to evaluate gun laws under the Second Amendment, permitting regulations that are "limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country." *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001).

2. California's CCW Laws Cannot Withstand Even Rational Basis Scrutiny

When reviewing the State's brief, it becomes patently obvious that there is no set standard for what constitutes "good cause" or "good moral character." Nowhere does the State set out to define these vague terms. The State's only defense is that these terms have been used since 1923, at 7:3 of the State's brief. What the state fails to mention, throughout most the history of California, is that the People were not prohibited from carrying a loaded firearm openly.

The California Legislature adopted a major new arms law in 1967, for the first time prohibiting the open carrying of firearms in cities. This law easily passed after the Black Panthers walked into the Assembly Chamber carrying "pistols, rifles, [and] at least one sawed-off shotgun" peacefully protesting. *Capitol Is Invaded*, Sacramento Bee, May 2, 1967, A1, A10. This demonstration of course pushed through The Mulford Act, and became California Penal Code 12031.

What the evidence shows is that there is absolutely no standard or equality with regards to who is issued a CCW and who is denied. The reasoning behind the denial is never explained because it cannot be explained in most instances. It cannot be explained because there is no standard for determining who will be denied. Because there is no standard, there is no equality.

The State does not attempt to conjure up a *per se* definition as to what constitutes "good cause" or "good moral character" for the issuance of a CCW — because it can't.

It is obvious from former Deputy City Attorney Hoctor's easy issuance of a CCW and abrupt revocation several months later that issuance in many instances is linked directly to being a member

of the city or county government. Retiring policemen, demonstrating no imminent threat, or even a request for a CCW are issued one. Thus, government employees become a privileged group who are more "equal" than the common citizen. The government would have us ignore that there is a separate criteria, yet believe that the criteria is equal. Attempts at equality through "separate but equal" policies, procedures and systems met with failure during the civil rights era in America's history and required court intervention for correction.

The San Francisco Police Department's consistent reason for denying a CCW is exemplified by CCSF000497. Without further explanation by the department, the following verbiage is used in almost every denial of the police department. Lieutenant Groshong states in part, "There is no guarantee that your carrying a weapon would mitigate or prevent the incidents you describe in your letter that ultimately led to your request."

Is articulating a "guarantee" that a CCW will prevent the incident one describes the standard? This statement is so ridiculous that none of the defendants even attempted to explain it. As Mr. Orsay opined, “I feel very comfortable with opining that this ‘guarantee’ standard cannot be met by anyone, anywhere, at any time.”

Further, Groshong writes that, "A generalized request based upon personal protection and self-defense does not establish good cause for the issuance…". However, it is patently obvious that many of the requests are extremely timely, specific, and well documented, unlike retired peace officers who don’t have to meet a “standard.” It must be assumed then that this statement means nothing, and the 'generalness' of the request has nothing to do with whether it is granted or not.

For the these reasons, and the reasons delved into herein below, there is no rationale basis for establishing a “good cause” standard simply because there is no standard, especially when compared to exempting retired law enforcement from the same standards and thresholds made applicable to the general public. Simply put, the "good cause" and "moral character" standard are arbitrary terms of art which are abused by governmental officials, some of whom are elected.

3. Under Intermediate Scrutiny or Strict Scrutiny, the State of California’s CCW Laws have no support in fact.

For the reasons stated under a rational basis test, the defendants cannot support and of the current gun laws under an intermediate or strict scrutiny test.

B. Penal Code Sections 25450 and 25900 – Which Creates a Separate Privileged Class for Retired Peace Officers – Offends the Equal Protection Clause Because Retired Peace Officers Are No Longer Acting in an Official Governmental Capacity and They Are Simply Members of the Public at Large.

Georgetown Emeritus Professor Antieau points out that in the debates on the Fourteenth Amendment, Senator Howard assured supporters "that Black freedmen would have equality of right 'to keep and bear arms.'" Congressional Globe, 39th Cong., 1st Sess., pp. 2765-66, *Antieau, the Intended Significance of the Fourteenth Amendment* 286 (Wm. Hein, Buffalo, N.Y. 1997)

Surely the first relevant reference to the Second Amendment in the US Reports appears in the denial of all rights to Dred Scott in *Scott v. Sandford*, 60 U.S. (19 Howard) 393, 416-17 (1856)(Taney, CJ). Taney attempts to justify his denial of rights to slaves:

> "For if they were so received, and entitled to the privileges and immunities of citizens … . It would give to persons of the negro race … the full liberty of speech … ; to hold public meetings upon political affairs, and to keep and carry arms wherever they went." [emphasis added]

Today, it is really no different – though the class is much larger, the impact is the same. California allows retired law enforcement to keep and carry arms wherever they go, to the exclusion of all else.

That the CCW law violates the Equal Protection Clause is obvious from its plain text. The Supreme Court has explained that the interest in self-defense informs the right to bear arms. Presumably, everyone who seeks a permit to carry a handgun does so for the purpose of being able to exercise the right of self-defense. Yet some people who have this plainly sufficient interest (e.g., Plaintiff) are denied a permit, while others, for no reason, are granted permits. The classification cuts through the very purpose of the right and is therefore irrational. It follows that a higher level of scrutiny would also defeat the classification. For example, there can be no important or compelling government interest in denying the interest in self-defense, nor can such a broad denial of the right to bear arms be substantially related to an important interest, to say nothing of being narrowly tailored with respect to an individual right.

The State argues that honorably retired California peace officers are not similarly situated to plaintiff. Maybe not when they are active law enforcement; but when a peace officer retires, they have no more duties or responsibilities to the public than any other citizen. That is why they retire

— to collect a government pension become nothing more than a "civilian" and as a "civilian" they have no further law enforcement duties. To apply a presumptive test for "good cause" is a *per se* equal protection violation. To conclude otherwise, then this Court would have to hold that honorably retired peace officers are more special than the People – that would include retired military.

With regard to the position that "California has put them in harm's way..." at page 21 of the Attorney General's brief; first, California had nothing to do with placing them in harms way, they volunteered for a job – no different than the owner of a liquor store in a high crime neighborhood or near a freeway. In fact, if anything, the data shows that being a peace officer is actually safer than other occupations, such as a cab driver – DOJ's own data points to this conclusion. Regardless, there is not a single fact to support such a contention and to make such a contention now is too late — the State had its chance and failed miserably to produce a single shred of evidence that proves that honorably retired peace officers are at a greater risk of violence than "civilians". What the State is really saying is that retired officers are more important and more entitled than "civilians."

At page 20 of its brief, the State is comparing apples with grapes. Retired police get a CCW for life, and it can only be revoked for "good cause", which would seem to imply revocation for something such as a felony conviction – it has nothing to do with the same standard of "good cause" for issuance to anyone other than retired.

Once a peace officer retires, they are similarly situated to all the other common folks – they may not like the fact that they retired and gave up the right to carry a handgun wherever and whenever they like, but retired they did, and with it, went their peace officer authority. The State carved out an exception to cater to this privileged class – an exception which is not supported by fact. Mr. Orsay explains this in detail at Orsay Decl. generally, 200-396, specifically, ¶s 230-232, 263, 265-312, 326-329, 369, 389, 395, and 396.

Assuming an officer retires after 20 or 30 years of service, and lives an additional 20 years with a lifetime CCW. They are not required to undergo periodic psychological testing, unlike the rest of the population. Their firearms qualifications standards are the same as the general public. In fact, other than being a retired government employee, retired officers are now on par with the rest

their fellow citizens.

Anticipating defendants would raise the red-herring defense: "retired peace officers who were authorized and did carry firearms in the course of their duties. Retired peace officers **may be at risk** of retaliation from felons whom they have arrested and incarcerated." Harris Brief 20:23-24. What this court has to pay particular attention to is the fact they the State (and the City and County defendants) cited no facts to support such a preposterous statement. To the contrary, the State's DOJ data even shows that on-duty law enforcement officer are less likely to be the victim of homicide compared to the general public. RJN #28, also found at ag.ca.gov/cjsc/publications/homicide/hm06/preface.pdf

From 1997 to 2006, "the general population homicide rate decreased 15.4 percent (7.8 to 6.6). The homicide rate for peace officers killed in the line of duty decreased 38.3 percent (10.7 to 6.6)." There is not a single fact that off-duty or retired officers are more likely to be the victim of crime. To the contrary, from a pure statistical standpoint, active duty peace officers are killed at the same rate as the general population ---- all the more reason why plaintiff should have been issued a CCW. Therefore, this hypothetical victimization is not supported by DOJ's own data.

Moreover, when given the opportunity in discovery, Defendant State of California Attorney General Edmund G. Brown (now Kamala D. Harris) has taken a cavalier approach in providing a factual basis supporting the law.

Throughout the course of this case, the Attorney General continually referred to this URL (http://oag.ca.gov/crime) in its boilerplate responses, as noted below. Here is a typical response example: RESPONSE: Defendant Attorney General, the federal Bureau of Justice Statistics, the Justice Research and Statistics Association, and the Statistical Analysis Centers of individual states, all collect and publish extensive crime data, which is available on Defendant's website at http://oag.ca.gov/crime. That data may [emphasis added] be responsive to this request. Beyond that, Defendant Attorney General presently has no non-privileged, responsive documents in its possession, custody or control in regard to the laws that are the direct subject of this lawsuit.

There is no factual basis supporting the Attorney General's proposition stated at 20:23-24 of its brief. At RJN # 25, Defendant Attorney General's Response to Plaintiff's Request for Admissions,

Set One, anytime the State is requested to support any conclusion that retired peace officers are not similarly situated to the general public, the State's boilerplate response is: "Defendant has made a reasonable inquiry and determined that, prior to expert discovery, it lacks sufficient knowledge to admit or deny the requested admission." The problem with the response is two fold: first, the time to disclose experts has passed, and the State did not disclose an expert; hence, the State cannot deny the admission. Second, if the State had any facts to support a denial, they would have so stated; therefore, it is reasonable to infer that the State has no factual support for the current regulatory CCW scheme in California, especially exempting retired peace officers of its burdens and disabilities applicable to all other citizens.

For example, RJN # 25 with emphasis added in bold and underline:

REQUEST FOR ADMISSION NO. 4
There is no evidence that the prohibition of carrying concealed handguns by members of the public, who are otherwise legally permitted to own a handgun, actually reduces firearm related deaths and crime.
RESPONSE: The requested admission, and its bearing on CCW laws, is a matter of controversy among researchers and advocates. Accordingly, defendant believes that the requested admission is properly a matter of expert opinion. Defendant has made a reasonable inquiry and determined that, prior to expert discovery, **it lacks sufficient knowledge** to admit or deny the requested admission.

REQUEST FOR ADMISSION NO. 7
There are no documents or data supporting YOUR contention that your enactment or enforcement of any firearm law, policy, regulation or ordinance has actually reduced crime and saved lives.
RESPONSE: Defendant objects to this request as overbroad as to scope and time, unduly burdensome, compound, and vague. Defendant further objects on the ground that this request seeks an admission on a contention that she has not made in this litigation. Defendant has made a reasonable inquiry and determined that, prior to expert discovery, **it lacks sufficient knowledge** to admit or deny the requested admission.

REQUEST FOR ADMISSION NO. 8
In state jurisdictions with UNRESTRICTED and SHALL-ISSUE laws, which allows their citizens to carry a concealed handgun, spend less on law enforcement services than states with MAY-ISSUE and NO-ISSUE type of conceal carry laws.
RESPONSE: Defendant objects to this request as overbroad as to scope and time, unduly burdensome, compound, and vague. Furthermore, the requested admission, and its bearing on CCW laws, is a matter of controversy among researcher and advocates. Accordingly, defendant believes that the requested admission is properly a matter of expert opinion. Defendant has made a reasonable inquiry and determined that, prior to expert discovery, **it lacks sufficient knowledge** to admit or deny the requested admission.

REQUEST FOR ADMISSION NO. 11
There are no documented cases of any **honorably retired California peace officer being murdered** by someone they either arrested or investigated while employed as a California peace officer.
RESPONSE: After a reasonable inquiry, the information that defendant knows or can readily

obtain is insufficient to allow it to admit or deny this requested admission. **Defendant does not maintain such information.**

REQUEST FOR ADMISSION NO. 12
There are no documented cases of any honorably retired California peace officer being **threatened** by someone they either arrested or investigated while employed as a California peace officer.
RESPONSE: After a reasonable inquiry, the information that defendant knows or can readily obtain is insufficient to allow it to admit or deny this requested admission. **Defendant does not maintain such information.**

REQUEST FOR ADMISSION NO. 13
Once a California peace officer is honorably retired, he or she is not required to undergo periodic psychological testing in order to have CCW permit.
RESPONSE: **Admit.**

REQUEST FOR ADMISSION NO. 14
Once an individual passes a psychological test and is employed as a California peace officer, he or she is not required to undergo periodic psychological testing in order to maintain their status as a peace officer unless specifically ordered to do so in very limited circumstances.
RESPONSE: Admit that once an individual passes a psychological test and is employed as a California peace officer, he or she is **not required to undergo periodic psychological testing in order to maintain their status as a peace officer** unless specifically ordered to do so in specific circumstances.

REQUEST FOR ADMISSION NO. 16
A California peace officer is more likely to commit suicide than a person who is not a California peace officer.
RESPONSE: Defendant objects to this request as irrelevant to any party's claim or defense. Defendant objects that this request for admission calls for expert opinion. Without waiving its objections, defendant responds that, after a reasonable inquiry, the information that defendant knows or can readily obtain is **insufficient to allow it to admit or deny this requested admission**.

REQUEST FOR ADMISSION NO. 17
The average psychological profile of a California peace officer, as determined by the Minnesota Multiphasic Personality Inventory I and II, is very similar to the average criminals psychological profile.
RESPONSE: Defendant objects to this request as irrelevant to any party's claim or defense. Defendant objects that this request for admission calls for expert opinion. Without waiving its objections, defendant responds that, after a reasonable inquiry, the information that defendant knows or can readily obtain is **insufficient to allow it to admit or deny this requested admission**.

REQUEST FOR ADMISSION NO. 18
The FBI held a Conference on **Domestic Violence by Police Officers**, in Quantico, VA, September 16, 1998, the focus of which was the profiled personalities of male law enforcement personnel who battered their female domestic partners.
RESPONSE: Defendant objects to this request as irrelevant to any party's claim or defense. Without waiving its objection, defendant responds that she **lacks sufficient information** to allow her admit or deny this request.

REQUEST FOR ADMISSION NO. 20
Two reports that followed the Rodney King beating--the 1991 report of the Independent Commission To Study the Los Angeles Police Department and the 1992 Los Angeles County Sheriff's Report by James G. Kolt and staff--questioned the effectiveness of existing

psychological screening to predict propensity for violence by California peace officers.
RESPONSE: Defendant objects to this request as irrelevant to any party's claim or defense. Without waiving its objection, defendant responds that she **lacks sufficient information** to allow her admit or deny this request.

REQUEST FOR ADMISSION NO. 21
Issuing concealed weapons permits to citizens who have never been peace officers has no measurable effect on the increase in crime or gun violence.
RESPONSE: The requested admission, and its bearing on CCW laws, is a matter of controversy among researcher and advocates. Accordingly, defendant believes that the requested admission is properly a matter of expert opinion. Defendant has made a reasonable inquiry and determined that, prior to **expert** discovery, **it lacks sufficient knowledge to admit or deny the requested admission**.

REQUEST FOR ADMISSION NO. 22
Every single Federal Bureau of Investigation (FBI) report since 1987 shows that in the fifteen (15) years following the passage of Florida's "shall issue" concealed carry law in 1987, 800,000 CCW permits have been issued and the homicide rate in Florida, which in 1987 was much higher than the national average, fell 52% bringing it below the national average.
RESPONSE: Defendant objects to this request as irrelevant to any party's claim or defense. Defendant further objects that the subject matter of this request is properly a subject of expert discovery. Without waiving its objection, defendant responds that prior to expert discovery, defendant **lacks sufficient information to admit or deny this request**.

REQUEST FOR ADMISSION NO. 23
There is no factual reason why Plaintiff should not have been issued a CCW permit.
RESPONSE: Defendant **lacks sufficient information** to admit or deny this request.

REQUEST FOR ADMISSION NO. 24
There are no facts supporting any law that favors the issuance of CCWs to honorably retired California peace officers as compared to the same laws also being applied equally to honorably retired members of the United States Armed Forces.
RESPONSE: Defendant objects to this request as overbroad as to scope and time, unduly burdensome, and vague. Defendant further objects to this request as irrelevant to any party's claim or defense. Defendant further objects that the subject matter of this request is properly a subject of expert discovery. **Prior** to **expert** discovery, defendant **lacks sufficient information** to admit or deny this request.

REQUEST FOR ADMISSION NO. 25
There is no evidence that CCW permit holders in "shall issue" states commit more gun related crimes per capita as compared to the citizens of the State of California.
RESPONSE: Defendant objects to this request as overbroad as to scope and time, unduly burdensome, and vague. Defendant further objects to this request as irrelevant to any party's claim or defense. Defendant further objects that the subject matter of this request is properly a subject of expert discovery. Prior to **expert** discovery, defendant **lacks sufficient information** to admit or deny this request.

At RJN # 26, Defendant Attorney General's Response to Plaintiff's Request for Inspection and Production of Documents and Things, Set One, anytime the State is requested to support any conclusion that retired peace officers are not similarly situated to the general public, the State's boilerplate response is: "Defendant Attorney General, the federal Bureau of Justice Statistics, the Justice Research and Statistics Association, and the Statistical Analysis Centers of individual states,

all collect and publish extensive crime data, which is available on defendant's website at http://oag.ca.gov/crime. **That data may be responsive to this request**. Beyond that, Defendant Attorney General presently has no non-privileged, responsive documents in its possession, custody or control in regard to the laws that are the direct subject of this lawsuit." [emphasis added] The problem again with the response is if the State had any facts to support a the currently CCW statutory scheme, they would have so stated; instead of saying "[t]hat data may be responsive to this request."

For example, with emphasis added in the key response Plaintiff is relying upon:

> REQUEST NO. 4
> Please produce all documents relating to any study or research YOU conducted proving that after enacting the firearm laws, policies, regulations and ordinances which are the subject matter of this action, the firearm laws pass have **reduced firearm related deaths and crime**.
> RESPONSE: Defendant Attorney General, the federal Bureau of Justice Statistics, the Justice Research and Statistics Association, and the Statistical Analysis Centers of individual states, all collect and publish extensive crime data, which is available on defendant's website at http://oag.ca.gov/crime. That data may be responsive to this request. Beyond that, Defendant Attorney General presently has **no non-privileged, responsive documents in its possession**, custody or control in regard to the laws that are the direct subject of this lawsuit.
>
> REQUEST NO. 17
> Please produce any and all documents supporting any contention that **honorably retired California peace officers have a greater probability of being a victim of crime than citizens of the CITY AND COUNTY OF SAN FRANCISCO who were never associated with law enforcement**.
> RESPONSE: Defendant Attorney General objects to this request as overbroad, vague and ambiguous, requiring speculation, and beyond the permissible scope of discovery. The proposed contention is unrestricted in time and jurisdiction, and it fails to define what is meant by "crime" much less identify any specific crimes for defendant to evaluate. The word "crime," as used in this request, is also vague and ambiguous because it does not convey the nature of the offenses for which information is sought. If it means every violation of law, then it is grossly overbroad and beyond the scope of discovery. If it means only violations of law with some bearing on carrying concealed weapons, then plaintiff should list the violations that she asserts would belong in this category. To the extent that Defendant Attorney General could conceivably respond, it would be in the form of an expert report or testimony, which is not subject to discovery at this time.
> Without waiving the foregoing objections, Defendant Attorney General responds as follows. Defendant Attorney General, the federal Bureau of Justice Statistics, the Justice Research and Statistics Association, and the Statistical Analysis Centers of individual states, all collect and publish extensive crime data, which is available on defendant's website at http://oag.ca.gov/crime. That data may be responsive to this request. Beyond that, Defendant Attorney General has **no non-privileged, responsive documents** in its possession, custody or control in regard to the laws that are the direct subject of this lawsuit.
>
> REQUEST NO. 18
> Please produce any and all documents which evidences that **honorably retired** peace officers are at a greater risk of harm than individuals who have never been peace officers.
> RESPONSE: Defendant Attorney General objects to this request as overbroad, vague and ambiguous, requiring speculation, and beyond the permissible scope of discovery. The proposed contention is unrestricted in time, jurisdiction, and the populations to be measured, and it fails to define what is meant by "risk of harm." To the extent that Defendant Attorney

General could conceivably respond, it would be in the form of an expert report or testimony, which is not subject to discovery at this time.
Without waiving the foregoing objections, Defendant Attorney General responds as follows. Defendant Attorney General, the federal Bureau of Justice Statistics, the Justice Research and Statistics Association, and the Statistical Analysis Centers of individual states, all collect and publish extensive crime data, which is available on defendant's website at http://oag.ca.gov/crime. That data may be responsive to this request. Beyond that, Defendant Attorney General has **no non-privileged, responsive documents** in its possession, custody or control in regard to the laws that are the direct subject of this lawsuit.

REQUEST NO. 21
Please produce all documents identifying all active or **honorably** separated member of the criminal justice system directly responsible for the investigation, arrest, incarceration, prosecution or imposition of sentence on criminal offenders, and who has actually filed a crime report regarding a crime committed against them while OFF-DUTY OR AFTER THEY RETIRED and which said crime was directly associated with the fact that they were responsible for the investigation, arrest, incarceration, prosecution or imposition of sentence of the criminal offender.
RESPONSE: Defendant Attorney General objects to this request as vague, overbroad, and unduly burdensome. The request is overbroad because it apparently applies to all present and former members of "the criminal justice system" statewide and is not limited as to the period of time for which plaintiff seeks information. The request is unduly burdensome because **Defendant Attorney General does not collect such information and has no practical way to gather it - crime reports are kept by local jurisdictions**. On the basis of the foregoing objections, Defendant Attorney General will not respond to this request.

REQUEST NO. 26
Please produce all research that you have ever had in your possession which proves that CCW permit holders in "shall issue" states commit more gun related crimes per capita as compared to the citizens of the State of California.
RESPONSE: Defendant Attorney General objects to this request as overbroad in regard to "ever had in your possession" because it is unlimited as to time and requests documents that may no longer be in Defendant Attorney General's possession, custody or control. It is vague and ambiguous in using the terms "proves" and "research." The request is also outside the scope of discovery. Only policies and practices for CCW licensing in California are at issue in this litigation.
Without waiving the foregoing objections, Defendant Attorney General responds as follows. Defendant Attorney General, the federal Bureau of Justice Statistics, the Justice Research and Statistics Association, and the Statistical Analysis Centers of individual states, all collect and publish extensive crime data, which is available on defendant's website at http://oag.ca.gov/crime. That data may be responsive to this request. Beyond that, Defendant Attorney General has no non-privileged, responsive documents in its possession, custody or control in regard to the laws that are the direct subject of this lawsuit.

REQUEST NO. 57
Produce all documents supporting any contention you have that honorably retired California Peace Officer's can be trusted more with a firearm than an **honorably discharged member of the armed forces**, including, but not limited to, the peace officers identified in the San Francisco Chronicle articles attached to the Initial Disclosures.
RESPONSE: Defendant Attorney General, the federal Bureau of Justice Statistics, the Justice Research and Statistics Association, and the Statistical Analysis Centers of individual states, all collect and publish extensive crime data, which is available on Defendant Attorney General's website at http://oag.ca.gov/crime. Some of that data may be responsive to this request. Beyond that, Defendant Attorney General has **no** non-privileged, responsive documents in its possession, custody or control in regard to the laws that are the direct subject of this lawsuit.

At RJN # 24, Defendant Attorney General's Response to Plaintiff's Special Interrogatories, Set One, again at anytime the State is requested to support any conclusion that retired peace officers are not similarly situated to the general public, the government cannot support even even its most basic contention.

For example, with emphasis added:

INTERROGATORY NO. 4:
Is it your contention that gun control laws decrease gun related deaths and injuries?
RESPONSE:
*** Defendant takes **no position** on the contention as drafted. To the extent that defendant has responsive information in its possession, custody or control, that information is located on defendant's website, http://oag.ca.gov/crime.

INTERROGATORY NO. 8:
Is it your contention that honorably retired California peace officers have a greater probability of being the **victim of crime** than members of the public who have never been California peace officer?
RESPONSE:
*** Defendant takes **no position** on the contention as drafted. To the extent that defendant has responsive information in its possession, custody or control, that information is located on defendant's website, http://oag.ca.gov/crime.

INTERROGATORY NO. 12:
Is it your contention that states that are "SHALL-ISSUE" and UNRESTRICTED have a higher percentage of crimes committed with a handgun than states that are "MAY-ISSUE" and "NO-ISSUE"?
RESPONSE:
***Without waiving the foregoing objections, defendant responds as follows: Defendant takes **no position** on the contention as drafted. To the extent that defendant has responsive information in its possession, custody or control, that information is located on defendant's website, http://oag.ca.gov/crime.

INTERROGATORY NO. 16:
Is it your contention that an honorably retired California peace officer has a greater probability of being physically attacked as compared to a person who was never employed as a California peace officer?
RESPONSE:
*** Without waiving the foregoing objections, defendant responds as follows. Defendant takes no position on the contention as drafted. To the extent that defendant has responsive information in its possession, custody or control, that information is located on defendant's website, http://oag.ca.gov/crime.

The common denominator in every single response of the Attorney General is that whatever evidence that “may” exist, it “may” be located at “http://oag.ca.gov/crime” – good luck finding it! If the Attorney General can take such a cavalier approach regarding a fundamental right, this alone is a sufficient basis to strike down the law.

Regardless, after all the smoke and mirror responses directing Plaintiff to

"http://oag.ca.gov/crime", the Attorney General does not even dare cite this hyperlink in any part of its brief or supporting documents for the simple fact there is no evidence supporting any hypothetical reason the Attorney General "may" conjure up in its brief, especially honorably retired peace officer exemption.

In fact, it is well established that when peace officers are exempted from firearm laws (RJN # 31, ¶s 16, 138, 169), they abuse their State granted rights. For example, at RJN # 31, which is an affidavit by Special Agent Sara Lewis of the ATF, she identifies active and retired peace officers of the Roseville PD (RJN # 31, ¶ 29, 175), Retired Roseville Police officer (RJN # 31, ¶ 191), Sacramento City PD (RJN # 31, ¶ 30, 172), Sacramento County SD (RJN # 31, ¶ 25, 26, 28), and CHP (RJN # 31, ¶ 179, 180) abusing their State carved right to buy, sell, and trade firearms that are not available to the public, including high capacity magazines.

The gist of RJN # 31 is that peace officers who are exempted from the very laws they enforce, are not the paragons of virtue that defendants make them out to be ---- peace officers (active or retired) will make mistakes just like the general population.

After all, can the state explain why a citizen is limited to purchasing one gun a month from a very limited list of guns approved by the state, but peace officers can purchase an unlimited amount of firearms and traffic in them. Its not as if they need a new gun every month. Keep in mind this is the same privileged group claiming the dangers of the public possessing firearms — the same public they need protection from when they retire. If anything, the State's gun laws created a black market for peace officers to make a profit on; at the same time, this privileged group of government employees are responsible for putting more guns on the streets than the gun dealers themselves --- "Fast and Furious" also comes to mind. RJN # 31, ¶ 44 is also very telling in the handgun business that its "cops" and everyone else (i.e. "non-cops"). Plaintiff would also direct the court to RJN # 31, ¶ 60, and take a look at what is commonly called an "Uzi" – and ask, why would a "cop" be allowed to purchase an Uzi which is banned to the general public, including plaintiff? A "cop" cannot carry an Uzi on duty, and should they really be allowed to carry one off duty – does the Attorney General think this is acceptable?

The Attorney General will argue RJN # 31 has no relevance since different laws are involved.

To the contrary, the privilege is the same – irrationally exempting the law enforcement community from firearm laws applicable to everyone else. Besides, it is relevant, since the UZI is purchased while a peace officer is employed, they can carry the weapon concealed anytime and anywhere. Taking this to its logical conclusion, the day before a "cop" retires, they can purchase hundreds of Uzis, sell and trade them after retirement, and also carry an Uzi concealed with their lifetime CCW issued at the time of retirement. Simply put, this privilege class gets all the rights while the rest of the public is deprived of their rights.

More importantly, RJN # 31 brings to the light the very abuses Mr. Orsay opined about. "There are more similarities than there are differences. Thus, across the board expectations that all peace officers will be paragons of virtue, or any other attribute, is as atavistic as the concept of 'good moral character'." (Orsay Decl. ¶ 230, see also footnote 44)

This becomes even more applicable and particularly relevant when assuming retired peace officers can all be counted upon to display some singular attribute. These are a group of citizens who are no longer being employed, no longer training, no longer being assessed by a superior for adherence to standards, and no longer have any other relationship with law enforcement! (Orsay Decl. ¶ 231) Beyond the benefits of granting a well-deserved retirement, to automatically grant a CCW permit to all retired peace officers is irresponsible and without rationale. (Orsay Decl. ¶ 232)

Especially noteworthy is in the CCW permit issued to attorney Akins (attorney for the Police Department), which specifically states in the CCW application (RJN # 2): "Some of them [San Francisco Police Officers] are or become unstable and all of them are armed. This requires that I have a gun for self protection." There are several points to draw from this. First, since Akins had his application approved, his good cause statement must be true. The second point is that the head of the agency knew this to be true and approved the application. Third, knowing this to be true shows that the police would rather issue a CCW to an employee of the department rather than disarm any officer who is deemed a deadly threat to the public's safety." (Orsay Decl. ¶ 233)

The case of Attorney Harrigan (Sheriff's attorney) involves more specificity, but has the same rationale in the good cause statement (RJN # 3). An "armed deputy" was exhibiting "psychological instability" and made a threat, but was not arrested. Instead of disarming, psychologically

evaluating, or charging the deputy with a crime, the Sheriff issues Harrigan a CCW. The file is devoid of any substantive facts, other than Harrigan's own personal opinion. It simply boggles the mind that given this threat (that we must assume the sheriff's department felt was credible due to their issuance of a CCW) the sheriff's department would not go ahead and immediately disarm the threatening officer whom they had armed in the first place or even arrest him for a terroristic threat! (Orsay Decl. ¶ 234)

What is still more difficult to understand however is why these "unstable" police officers that Akins and Harrigan are referring to were allowed to remain armed with "enhanced-lethality ammunition", while the rest of the public is both prohibited from carrying a concealed weapon and deprived of the use of "enhanced-lethality ammunition". Why isn't the instability documented? (Orsay Decl. ¶ 235)

III.

Plaintiff Has Withdrawn the Fourth and Ninth Claims as to the State.

OPPOSITION AND RESPONSE TO SAN FRANCISCO'S MOTION FOR SUMMARY JUDGMENT

I. THE COURT SHOULD DENY SAN FRANCISCO'S MOTION FOR SUMMARY JUDGMENT AND GRANT PLAINTIFFS MOTION FOR SUMMARY JUDGEMENT AS TO SAN FRANCISCO ON PLAINTIFF'S STORAGE ORDINANCE CLAIMS.

A. Plaintiff has Standing To Challenge The Storage Ordinance.

Plaintiff's declaration is sufficient to support injury, and she has standing. In addition to being prohibited from carrying a concealed handgun on her person or in her vehicle, access to her handgun in her home is extremely made difficult by the City ordinances. (Pizzo Depo. 26:1-4, 43:4). Plaintiff considers a "readily accessible operable handgun" as a "loaded weapon within a few – few feet of where I'm at, at all times, or on my person." (Pizzo Depo. 132:2-7). Plaintiff considers a "readily accessible operable handgun" as a "unlocked" and "outside of a safe." (Pizzo Depo. 132:10-14).

State and local laws are so restrictive, and constantly becoming more restrictive and vague, Plaintiff is "unclear" as to exactly when and how she can use her firearm, and even transport her firearm. At the time this action was filed, Plaintiff was prohibited from discharging a firearm for

self-defense in San Francisco. Because she fears prosecution under such restrictive and vague firearm and ammo ordinances, she currently stores her firearms without ammunition and disassembled. For instance, she keeps no ammunition in her house because she fears prosecution for the possession of "enhanced lethality ammunition" which is a vague term to her since all ammunition is "lethal". Second, she keeps her handguns dismantled. In other words, because of fear or prosecution, Plaintiff is precluded from maintaining a handgun in her home or in her vehicle in a way which would make them immediately accessible. She does not even transport her firearm to a gun range to target practice for fear of prosecution. (Pizzo Depo. 48:2-49:25, 58:16-61:5).

If Plaintiff were allowed to make the decision on safe storage of firearm in her home, her method of storing an immediately accessible loaded handgun with hollow-point ammunition would be based upon the facts and situation at the time. She would balance the interest of self defense with safety. The law deprives her decision making responsibilities; the law is attempting to regulat common sense regarding gun safety. (Pizzo Depo. 52:1-11, 53:2-56:18, 57:25-13)

B. The Storage Ordinance Is Unconstitutional.

1. Standard Of Review For Second Amendment Claims has been addressed above.

It is clear that intermediate, and most likely strict scrutiny applies, shifting the burden to the government, which the government failed to meet.

2. Heller mandates an accessible hand gun for immediate self-defense.

San Francisco misses the mark. San Francisco is attempting to legislate both common sense and the safe handling of firearms. San Francisco is all about gun control (i.e. people control) – not safety. As plaintiff testified to, Gun laws are designed for "unreasonable" people; Plaintiff is a "reasonable" person. (Pizzo Depo. 71:23-72:6)

San Francisco's takes out of context a quote *Heller* regarding "fire-safety laws" equating storing black gunpowder (when people use to be able to maintain a fire in their house) which is highly explosive and could be ignited with a simple spark with handgun that can only be fired if a person's finger is on the trigger.

The storage ordinance interferes with plaintiff's right to choose the best gun safety practices under the particular circumstance, and creates a danger to the safety of plaintiff and her family in a

single moment of stress during an home invasion. (Orsay Decl. ¶ 134-154) Defendants would argue that a woman has the right to choose what constitutes life under Roe v. Wade, but the same woman has no right to choose how to practice gun safety.

One thing plaintiff is certain about is that the "Framing-era Bostonians" or "New Yorkers" the City cites at 12:12 of its brief had less accidental discharges in both those cities over a 100 year period than the San Francisco police department did in a 5 year period of time. (See RJN # 29, "Officer Involved Shootings, a Five Year Study." January 20, 2010. A study examining San Francisco Police Department procedures followed in officer-involved shootings (OIS) for a five-year period, from January 1, 2005 to August 27, 2009.)

In sum, this ordinance is actually a danger to the public. This ordinance actually increase the risk of either accidental discharge and/or the used of deadly force. (Orsay Decl. ¶ 134-154)

3. The Storage Ordinance Does Not Reasonably Advances San Francisco's Compelling Interest In Public Safety.

San Francisco has not rebutted the expert witness Declaration of David Orsay. Mr. Chinn does not dispute Mr. Orsay's expert witness declaration. He does not say Mr. Orsay has is not a qualified expert. Most importantly, Mr. Orsay spells out his methodology and reasoning, and identifies a plethora of supporting facts — unlike Mr. Chinn who states his experience, and his opinion with no underlying explanation as to how he came to his opinions.

In addition, Mr. Orsay addresses the purported facts in his declaration at paragraphs 175-191.

Simply, the City cannot overcome the expertise of Mr. Orsay in the field of firearms.

II. THE COURT SHOULD DENY SAN FRANCISCO'S MOTION FOR SUMMARY JUDGMENT AND GRANT PLAINTIFFS MOTION FOR SUMMARY JUDGEMENT AS TO SAN FRANCISCO ON PLAINTIFF'S STORAGE ORDINANCE CLAIMS TO SAN FRANCISCO ON PLAINTIFF'S AMMUNITION ORDINANCE CLAIMS.

A. Plaintiffs Has Standing To Challenge The Ammunition Ordinance.

The City establishes plaintiff's standing on several grounds. 1) The City has made obtaining ammunition so burdensome and oppressive, it acts as a constructive ban, assuming possession is legal. 2) S.F. Police Code § 613.10 exempts law enforcement. 3) Inability to obtain proper and adequate ammunition impedes a fundamental right to self-defense. 4) The purpose of the ordinance is to burden a fundamental right. 5) The fundamental right to self-defense includes the ability to

purchase the correct ammunition and firearms that serve that purpose. 6) The City intimidates its citizens with convoluted ordinances that a reasonable person cannot even interpret. 7) The ordinance is written in such a way that it dissuades citizens from owning, possessing, or transferring ammunition among family members or neighbors. 8) And, for all the reasons stated by Mr. Orsay in Plaintiff's motion.

B. The Ammunition Ordinance impedes Fails Plaintiff's Right to Adequate Self Defenses under the Second Amendment Challenge.

Reiterating the point already made by plaintiff in the opening brief, the City wants its citizens to use ammunition that is more likely to ricochet and hit a bystander, pass through the intended target and hit a bystander, and require more shots to stop an assailant which thereby increases the probability of a bystander getting shot. In other words, this law endangers everyone in the vicinity of a discharged firearm. (Orsay Decl. ¶ 399-461)(Pizzo Decl. ¶ 26-30, 40-42, 61-67)(Pizzo Depo. 48:2-49:25, 58:16-61:5)

The purpose of this law is obvious; it is trying to take the lethal force option and make it less effective.

This ordinance, coupled with the term "Enhanced Lethality Ammunition" would make any use of force expert for CITY defendants cringe. By allowing their own officers to use "Enhanced Lethality Ammunition", that would mean there is a policy of excessive force. (Orsay Decl. ¶ 397-461)(Pizzo Decl. ¶ 40-42, 61-67)

1. The Ammunition Ordinance Burdens Plaintiff's Second Amendment Rights.

As already stated, the ordinance attempts to take lethal force and make it less lethal. The next law passed will be that Plaintiff will have to use a rubber bullet. (Orsay Decl. ¶ 397-461)(Pizzo Decl. ¶ 40-42, 61-67)

2. There is no Legitimate Interest because there is no evidence it saves lives

Chinn at paragraph 5 of his declaration that the City uses so-called "enhanced lethality ammunition", which would be in violation of the the San Francisco Police Department's (SFPD) own General Order 5.01, Rev. 10/04/05 on "Use of Force" also uses the term "adequate". (RJN # 30)

Therefore, plaintiff would request that she be granted leave to amend the complaint to add a

separate cause of action seeking an injunction against the City for having a written policy of excessive force by allowing its offers to use "enhanced lethality ammunition" which would constitute a public danger and a danger to the 21 police officers who accidentally discharged their weapon and injured someone over a 5 year span. (See RJN # 29)

In addition, Mr. Orsay addresses the purported facts in his declaration at paragraphs 175-191.

This ordinance cannot be justified under any standard of review. (Orsay Decl. ¶ 397-461)(Pizzo Decl. ¶ 40-42, 61-67)

C. The Ammunition Ordinance Is Unconstitutionally Vague.

Both Plaintiff and Mr. Orsay find the terms used vague and ambiguous. (Orsay Decl. ¶ 397-461)(Pizzo Decl. ¶ 40-42, 61-67) This ordinance is unconstitutionally vague and therefore void.

IV. THE COURT SHOULD DENY SAN FRANCISCO'S MOTION FOR SUMMARY JUDGMENT AND GRANT PLAINTIFFS MOTION FOR SUMMARY JUDGEMENT AS SAN FRANCISCO'S DENIAL OF CONCEALED WEAPONS LICENSES VIOLATED PLAINTIFF'S RIGHTS.

A. Plaintiff Has Standing To Challenge The Concealed Weapons Statutes Or San Francisco's Administration Of Concealed Weapons Licenses

There is not a single declaration from a the ultimate policy making official (Chief or Sheriff). There is not a single declaration from a current or former CCW permit hold who has ever been a peace officer. There is not a single declaration from an honorably retired peace officer stating the necessity and need for a CCW. There not a single piece off evidence that honorably retired peace officers are more likely to be the victim crime.

There is not dispute plaintiff did not submit her application. Not once, but twice to each department. Besides, adequate facts are present to establish futility, which the City does not address.

Unlike the plaintiff in *Madsen v. Boise State Univ.*, 976 F.2d 1219 (9th Cir. 1992), Plaintiff subjected herself to the licensing process which provided Defendants the opportunity to treat plaintiff the same as other well connected applicants.

Regardless, the Sheriff and Police department denied policies existed, had no policies, and the Sheriff's Department said the application process was futile. The City is attempting *post hoc* reasoning. Plaintiff never had a chance, and standing is met under *Madsen*. (See Orsay Decl.

B. Plaintiff's CCW-Related Claims are actionable because, 1) Plaintiff Has Proven That The City Denied Her Federal Rights, 2) Pursuant To A

Custom Or Policy.

The City is creating an ever changing moving target for plaintiff. (Orsay Decl. ¶ 114-116, 122, 192-212, 216-218, 229-396)

The City is arguing a moving phantom policy by mentioning fees, what fees? Are Defendants arguing that a CCW application must be accompanied by a fee? Not a single declaration stating exactly what the fee is or how Plaintiff would even know of such a fee. There is mention of a $273 firearm course for "applicants who are granted approval by the Chief of Police."

The State application also states at third page (page 2) that: "Each licensing authority, in addition to using the state standard application form, will have a written policy summarizing what they require pursuant to PC section 12050(1)(1)(A) and (B).

It also states on page 3 under "Important Instructions", that [s]ections 6, 7, and 8 must be completed in the presence of an official of the licensing agency" and "... and be prepared to answer these questions orally. Do not write anything in Section 7 ..."

The only place fees are even mentioned in the State DOJ application is at page 2, under discretionary psychological testing with a max fee of $150.00 for an initial test and on page 10, second paragraph, which states fees are non-refundable (keeping in mind section 6 on page 10 is not to be signed unless witnessed by an investigator and instructed to do so by the investigator).

2. Plaintiff Has a right to self-defense, which means government has to provide the method, open carry or concealed.

And

3. Plaintiff's Fourteenth Amendment Rights Were Not Violated.

As already stated, Plaintiff's position is that she is entitled to a CCW since the State has banned open carry of firearms in 1967. Plaintiff had no chance for a fair and impartial review of her two applications. (Orsay Decl. ¶ 114-116, 122, 192-212, 216-218, 229-396)

Where does Captain Johnson of the San Francisco Sheriff's Department ("SFSD") even indicate a fee requirement as there was never a written policy – its like a floating target (no pun intended). It is admitted SFSD never had a written policy prior to June 23, 2011. Johnson Decl. ¶ 6. The fascinating aspect of Captain Johnson's declaration is that she clearly differentiates that "civilians" are not issued CCWs – or another words, there are two distinct classes of CCW permit

holders – those affiliated with law enforcement and civilians. (Jonhson Dec. ¶ 9)

Captain Johnson dances around when Mr. Harrigan retired or where he resides (as residence would dictate who issues the CCW). The real question is why was it not renewed. His CCW expired after Plaintiff filed this action and Harrigan's shenanigans became a matter of public record. Johnson Decl. ¶ 9. Captain Johnson has to admit Harrigan lied to Mr. Gorski when he denied that "civilians" are issued CCWs by the then Sheriff. Johnson Decl. ¶ 12.

Captain Mceachern of the San Francisco Police Department ("SFPD") states a fee schedule was included with the blank application. Where did SFPD advise Ms. Pizzo to enclose a check, which should be payable to who, SFPD or State DOJ? Better yet, Captain Mceachern states that there is essentially a "custom" that applicants provide cover letters or that they fill out sections 6-8 in person – this again is in direct contradiction Harrigan's policy statement of "futile exercise." Mceachern Decl. ¶ 14.

Also, Captain Johnson states SFSD's "procedures" for dealing with "deficient" applications. Where was this written policy in 2009? Johnson Decl. ¶ 14.

The City blames laintiff for not providing contact information but fail to even address the issue it was government that create the form.

Its funny how government said it could not locate Plaintiff though they had her name, date of birth, place of birth, and county of residence – all the information necessary to run the simplest of DMV or CLETS checks. Is the City somehow arguing that she would have been called in for an interview and the remainder of the application would have been filled out in the presence of an investigator?

The current CCW policy spells out in exacting details how CCWs are now processed – as if Plaintiff were Nostradamus to know this.

Commencing at paragraph 236, Mr. Orsay goes through a litany of other well deserving applicants who were denied CCWs thought well documented. Besides official actions, there was clearly an established policy that CCWs were not being issued to civilians – the City has not identified a single "civilian" who was not government employee.

Defendants have produced no evidence, nor do they even contend, that "retired peace

officers" have more need for a CCW than the rest of the population. (RJN # 20, RFA responses 7, 8, 10, 11)(RJN # 19, RPD responses 7, 17-18, 28-29, 41, 57)(RJN # 21, ROG responses 4, 8, 12, 16)(RJN # 22, ROG responses 4, 8, 12, 16)(RJN # 23, ROG responses 4, 8, 12, 16)(RJN # 24, ROG responses 4, 8, 12, 16)(RJN # 26, RPD responses 17, 18, 29, 53)(RJN # 19, RFD response 17, 18(See also, RJN #s 1-4, 27-29, 31-32)(Orsay Decl. ¶ 54-64, 114-117, 192-394)

There is no correlation between the issuance of CCW permits and violence. (Orsay Decl. ¶ 54-64, 114-117, 192-394)

The entire CCW issuance law, policy, and procedures are completely arbitrary and capricious and have no support in fact, and Plaintiff was denied equal rights, privileges and protections under the law, and only result in abuse by those exempted from the laws themselves. (Orsay Decl. ¶ 54-64, 114-117, 192-394)(RJN # 31)

The facts are undisputed that it was "futile" for plaintiff to apply to the City for a CCW. After all, unlike Defendant City's employees Akins, Harrigan, and Hoctor, plaintiff has never worked for government. (Pizzo Decl. ¶ 7) When she contacted the employer of Akins, Harrigan, and Hoctor, she was ignored and told it was "futile" to even submit an application since she did not work for law enforcement. (Pizzo Decl. ¶ 42-62) Had plaintiff been contacted, she would have articulated the reasons for a CCW. She was denied this right before she even applied. (Orsay Decl. ¶ 54-64, 114-117, 192-394)

STATES AND CITY'S OBJECTIONS TO DECLARATION OF DAVID ORSAY

F.R.E. Rule 704(a) specifically states that "[a]n opinion is not objectionable just because it embraces an ultimate issue."

Contrary to what the State and City says, Mr. Orsay's opinions are not based on speculations; they are entirely supported by the record, and the lack of facts supporting the current laws and ordinances. The State is arguing that Mr. Orsay is not qualified to render and opinion in light of the fact the State has not even disclosed an expert on the subject matter. So, the State is making an empty argument as to what is or is not a proper expert opinion.

Likewise, Mr. Chinn was not disclosed as an expert on the CCW application process, unlike Mr. Orsay, who provided two reports on the subject matter prior to his deposition.

Second, the issue of law enforcement discretion, and abuse thereof, is a proper subject matter for Mr. Orsay to provide an opinion. Further, Mr. Orsay's experience and training in Vulnerability Assessments and Threat Assessments makes him uniquely qualified to determine what would constitute good cause and good moral character.

The City says Mr. Orsay is not an expert, well then who is? Chief Fong? Sheriff Hennesy? Following defendants logic, then not a single police officer is an expert in anything, including agent Chinn

OBJECTION TO AGENT CHINN'S DECLARATION

Agent Chinn's declaration fails to identify the specific data her relied upon and lacks foundation for his opinions.

CONCLUSION

Plaintiff's motion should be granted all in or part as a matter of law, and Defendants denied.

Respectfully submitted,
LAW OFFICES OF GARY W. GORSKI

Date: July 16, 2012

/s/ Gary W. Gorski
GARY W. GORSKI
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