No. 13-17132 [Dist Ct. No.: 3:12-CV-03288-WHO]

IN THE
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

JOHN TEIXEIRA; et al.,
Plaintiffs - Appellants,

vs.

COUNTY OF ALAMEDA; et al.,
Defendants - Appellees.

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

APPELLANTS' REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

THE CALGUNS FOUNDATION, INC., (CGF) is a non-profit organization incorporated under the laws of California with its principal place of business in Roseville, California. CGF supports the California firearms community by promoting education for all stakeholders about California and federal firearms laws, rights and privileges, and by defending and protecting the civil rights of California gun owners. CGF is not a publicly traded corporation.

SECOND AMENDMENT FOUNDATION, INC., (SAF) is a non-profit membership organization incorporated under the laws of Washington with its principal place of business in Bellevue, Washington. SAF has over 650,000 members and supporters nationwide, including California. The purposes of SAF include education, research, publishing and legal action focusing on the Constitutional right to privately owned and possess firearms, and the consequences of gun control. SAF is not a publicly traded corporation.

CALIFORNIA ASSOCIATION OF FEDERAL FIREARMS LICENSEES, INC., (Cal-FFL) is a non-profit industry association of,

by, and for firearms manufacturers, dealers, collectors, training professionals, shooting ranges, and others, advancing the interests of its members and the general public through strategic litigation, legislative efforts, and education. Cal-FFL is not a publicly traded corporation.

These institutional plaintiffs have provided funding for this suit.

Dated: August 25, 2014

/s/ Donald Kilmer
Donald Kilmer
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I. INTRODUCTION

The emerging analysis of Second Amendment claims is that they should mirror how First Amendment claims are adjudicated, *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011); *U.S. v. Chovan*, 735 F.3d 1127 (9th Cir. 2013) and *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014). *See also: District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

The court below could not have relied upon the precedential authority of either *Chovan* or *Peruta* because those cases were published after the judgment/order [ER 7, 10] that dismissed the First Amended Complaint (FAC).

The County wants to pretend that the trial court, never-the-less, conducted the correct legal analysis and still managed to reach a defensible conclusion that should be affirmed. However, neither the Appellees' Answering Brief (AB) [DktEntry 39] or their amici [DktEntry 45], have successfully addressed the most pressing issues presented by this case. Namely: (1) Can zoning laws and other land use regulations impact fundamental rights? And (2) If they do, what is the appropriate form of judicial scrutiny when they are challenged?

That is the two-step approach required by *Chovan* in the context of Second Amendment rights. No satisfactory answer is given by the decision below or by the briefs filed by the County (or that amici).

Appellants' FAC fairly alleged that the County's ordinance acts as virtual *de facto* ban on all new gun stores in unincorporated Alameda County. [ER 50, ¶ 60, 61 of the FAC] This assertion, if supported by evidence, is fatal to the County's ordinance because it will have the effect of diminishing the public's market access to firearms, thus burdening a fundamental right. Plaintiffs should have been given the opportunity to prove this fact.

The County's assertion that Second Amendment rights are not impacted because current non-conforming gun stores in Alameda County are exempt from the ordinance (thus insuring a supply of guns for the public) is a weak enough argument[1]; but in the context of evaluating an equal protection claim involving fundamental rights actually makes a strong argument for reversal.

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[1] What happens if/when those store apply to expand? Relocate? Remodel? Go out of business? Through the natural attrition of (mostly) small business gun stores, the ordinance will have the (future) effect intended by the Defendants – a ban on gun stores within its jurisdiction, namely unincorporated Alameda County.

Because the FAC should be construed in the light most favorable to the Appellant/Plaintiffs, the dismissal order should be reversed and the case remanded to the trial court.

II. "Law of the Case" is not Binding on this Court.

The trial court's order challenged herein [ER 10, 16] purported to follow the "law of the case" from a prior order of dismissal [SER_001]. There are two reasons for this Court to disregard that rule.

First, the "law of the case" doctrine comes in to play when an appellate court decides a legal issue, whether explicitly or by necessary implication, such that that decision generally is not open to relitigation in subsequent proceedings in the same case. *See United States v. Jingles*, 702 F.3d 494, 499, 502 (9th Cir. 2012); *Chevron USA, Inc. v. Bronster*, 363 F.3d 846, 849 (9th Cir. 2004), rev'd on other grounds 544 U.S. 528, 125 S.Ct. 2074 (2005); *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1329-1393 (9th Cir. 1995) – even summarily-treated issues become law of the case.

Since the standard of review for this Appellate Court's review of a trial court's order of dismissal under Fed.R.Civ.Proc. 12 is *de novo*, this Court is not bound by the law of the case doctrine.

The second reason is that there has been an intervening change in the law (See opinions issued in *Chovan*[2] and *Peruta*[3].) after the trial court's decision. *See generally: Agostini v. Felton*, 521 U.S. 203 (1997); *Kirkbride v. Continental Cas. Co.*, 933 F.2d 729, 732 (9th Cir. 1991) and *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 281-282 (9th Cir. 1996).

III. The Alameda Ordinance Burdens the Second Amendment.

Under the Ninth Circuit's two-step Second Amendment framework: (1) the trial court asks whether the challenged law burdens conduct protected by the Second Amendment, and (2) if so, the court determines whether the law meets the appropriate level of scrutiny. See *Chovan*, 735 F.3d at 1136-38; see also *National Rifle Ass'n of Am. v. Bureau of Alochol, Tobacco, Firearms and Explosives*, 700 F.3d 185, 194-95 (5th Cir. 2012) ("N.R.A."); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010). The first step is a historical inquiry that seeks to determine whether the conduct at issue was understood to be within the scope of the right to keep and bear arms at the time of ratification. *Chester*, 628 F.3d at 680; see *Chovan*, 735 F.3d at 1137; *N.R.A.*, 700 F.3d at 194;

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[2] *U.S. v. Chovan*, 735 F.3d 1127 (9th Cir. 2013).

[3] *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014).

Ezell v. City of Chicago, 651 F.3d 684, 702-03 (7th Cir. 2011). If a law burdens conduct that falls outside of the Second Amendment's scope, then the analysis ends and there is no violation. See *N.R.A.*, 700 F.3d at 195; *Ezell,* 651 F.3d at 703.

As to the second step, rational basis review is not to be used. *Heller*, 554 U.S. at 628 n.27; *Chovan*, 735 F.3d at 1137. Instead, if a law burdens a right within the scope of the Second Amendment, either intermediate or strict scrutiny will be applied. See *Chovan*, 735 F.3d at 1138; *N.R.A.*, 700 F.3d at 195; *Chester*, 628 F.3d at 682. Whether intermediate or strict scrutiny applies depends on: (1) how close the law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on the right. *Chovan*, 735 F.3d at 1138; N.R.A., 700 F.3d at 195; *Ezell*, 651 F.3d at 703. A regulation that threatens a core Second Amendment right is subject to strict scrutiny, while a less severe regulation that does not encroach on a core Second Amendment right is subject to intermediate scrutiny. See *N.R.A.*, 700 F.3d at 195; *Chester*, 628 F.3d at 682. The "intermediate scrutiny" standard requires: (1) that the government's stated objective must be significant, substantial, or important, and (2) that there is a reasonable fit between

the challenged regulation and the government's asserted objective. *Chovan*, 735 F.3d at 1139-41; *N.R.A.*, 700 F.3d at 195; *Chester*, 628 F.3d at 683.

For there to be a "reasonable fit," the regulation must not be substantially broader than necessary to achieve the government's interest. See *Reed v. Town of Gilbert*, 707 F.3d 1057, 1074 n.16 (9th Cir. 2013); *Fantasyland Video, Inc. v. County of San Diego*, 505 F.3d 996, 1004 (9th Cir. 2007); *United States v. Marzzarella*, 614 F.3d 85, 98 (3d Cir. 2010).

A. Appellants' Second Amendment Facial Challenge is Valid.

Though Appellants' theory of their own case is somewhat at odds with the result achieved in *Jackson v. City and County of San Francisco,* 746 F.3d 953 (9th Cir., March 25, 2014), that Court was prepared to indulge a Second Amendment facial challenge to San Francisco's ordinance for the same reasons Appellants advance herein. Like the storage law and ammunition ban in *Jackson*, Appellants contend that the "500 Foot Rule" at issue in this case amounts to a *de facto* ban on all new gun stores in unincorporated Alameda County. *Jackson* at 962. That proposition must be accepted as true.

The trial court, Alameda County and San Francisco County in the *Jackson* case, all make the same mistake by construing facial challenges too narrowly. First as noted, the FAC alleged that the challenged ordinance amounts to virtual ban on future stores. Second, *United States v. Salerno*, 481 U.S. 739 (1987) is not applicable in all facial challenges. Indeed, the *Jackson* Court cited *Gonzales v. Carhart*, 550 U.S. 124, 167-68 (2007) for the proposition that a plaintiff need only show that a challenged law "would be unconstitutional in a large fraction of relevant cases" to proceed with a facial challenge.

Like the policy challenged in *Jackson*, the "500 foot rule" is either burden on the Second Amendment or it not. The *Jackson* court had no trouble finding an ammo ban and gun storage law to be a burden as part of the first prong of historical analysis required by *Chovan*. Unless the County can produce evidence that a "500 Foot Rule" for zoning gun stores existed in 1791 and/or 1868, the burden then shifts to the government to make a case – with evidence – that their rule advances an important and/or compelling government interest.

Because this case on appeal from an order of dismissal under Fed.R.Civ.Pro. 12, there are no facts, other than the allegations set

forth in the FAC, that are before the court. The Defendants haven't even filed an answer alleging facts that would support a causal relationship between public safety and their policy. They appear to rely on a prejudice that goes something like: "Because guns are dangerous, any rule is justified."

The Supreme Court in *McDonald v. City of Chicago* took care to make clear that:

> The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category. See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 591, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006) ("The exclusionary rule generates 'substantial social costs,' *United States v. Leon*, 468 U.S. 897, 907, [104 S. Ct. 3405, 82 L. Ed. 2d 677] (1984), which sometimes include setting the guilty free and the dangerous at large"); *Barker v. Wingo*, 407 U.S. 514, 522, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) (reflecting on the serious consequences of dismissal for a speedy trial violation, which means "a defendant who may be guilty of a serious crime will go free"); *Miranda v. Arizona*, 384 U.S. 436, 517, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (Harlan, J., dissenting); id., at 542, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (White, J., dissenting) (objecting that the Court's rule "[i]n some unknown number of cases . . . will return a killer, a rapist or other criminal to the streets . . . to repeat his crime"); *Mapp*, 367 U.S., at 659, 81 S. Ct. 1684, 6 L. Ed. 2d 1081. [...]
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> *McDonald v. Chicago*, 130 S. Ct. 3020, 3045 (2010)

Until/unless the County produces evidence that its "500 Foot Rule" is an effective public safety measure it is arbitrary and capricious. And must give way to the Constitutional rights asserted by Appellants.

B. Appellants' As-Applied Second Amendment Challenge is Viable.

The County itself has a split personality when it comes to Appellants' particular situation. Its West County Board of Zoning Adjustment granted Plaintiffs a variance to the ordinance in its December 14, 2011 findings. [ER 178-183] It did so after an exhaustive investigation by county staff, which included input from: Alameda County Building Department, Alameda County Land Development, Public Works Agency, Traffic, Alameda County Sheriff's Office, Zoning Enforcement, and the Alameda County Fire Department. The Board took a reasoned approach to the fact that the only parcels disqualifying the proposed site of Appellants' gun store were residential properties that just barely qualified under the "500 Foot Rule." This must be contrasted with the Board of Supervisor summary reversal of those findings, with no new facts except appeals that were lodged by the San Lorenzo Village Homes Association. [ER 48-49, FAC ¶¶ 50-56]

The objections lodged by the homeowners' association cited no studies, no evidence, no facts to suggest that Appellants' proposed gun

store posed a public safety risk. That association merely voiced an objection to people exercising their Second Amendment their rights to sell, buy and acquire firearms and ammunition at a local business.

This land-use version of a heckler's veto is not sanctioned in this Circuit. *See Young v. City of Simi Valley*, 216 F.3d 807 (9th Cir. 2000) Furthermore, *Young* is part and parcel with the line of cases that tells us that zoning restrictions that impact fundamental rights are fact specific and therefore driven by evidence when a Court is assessing primary or secondary effects of particular land uses. *Id*., at 818. *See also: Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981); and *City of L.A. v. Alameda Books*, 535 U.S. 425 (2002); *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986); *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560 (1991).

Interpreting the rationale set forth in *City of Los Angeles v. Alameda Books, Inc.*, (2002) 535 U.S. 425, the Seventh Circuit held:

> [...] [B]ecause books (even of the "adult" variety) have a constitutional status different from granola and wine, and laws requiring the closure of bookstores at night and on Sunday are likely to curtail sales, the public benefits of the restrictions must be established by evidence, and not just asserted. The evidence need not be local; Indianapolis is entitled to rely on findings from Milwaukee or Memphis (provided that a suitable effort is made to control for other

> variables). See *Andy's Restaurant*, 466 F.3d at 554-55. **But there must be evidence; lawyers' talk is insufficient**. (Emphasis added.)
>
> *Annex Books v. City of Indianapolis*,
> 581 F.3d 460, 463 (7th Cir. 2009)

Indeed, it is incongruous that Appellees would even rely on the residential characteristic of a disqualifying structure to prohibit a gun store from opening, when their own brief acknowledges that a core protection afforded law-abiding citizens under the Second Amendment is possession of firearms in the home! [AB, pg. 17]

If the presence of firearm within a 500 foot radius of a homeowner was dangerous, then given the ubiquitousness of firearms, apartment buildings and houses closer to each other than 500 feet should presumably be war zones. They are not.

The County's "500 Foot Rule" has no basis in fact or common sense. Firearms shoot further than 500 feet, even assuming the ordinance was crafted to mitigate stray bullets. The Fire Department signed off on the storage of combustible (gun powder) material and other fire hazards. [ER 153, 162, 164] The Sheriff's Office mandated security measures. [ER 167] The more mundane issue of parking availability was also addressed. [ER 125]

All this invites the question: Why deny these men a permit to open an otherwise lawful business in Alameda County? The strong inference, as alleged in the Complaint [ER 32, FAC ¶¶ 7], is because the County finds the products and services to be offered by that business repugnant. The County's problem is that this proposed business is not selling payroll advances, adult literature, massages, lottery tickets, liquor or cigarettes. They are seeking to engage in commerce that is essential for the exercise of a fundamental right. They seek to provide the arms that their customers want to "keep and bear" to exercise their own constitutional right of self-defense. *See Craig v. Boren,* 429 U.S. 190 (1976) and the Amendment II.

The point missed by the County (and the Court below) is that the protection of fundamental rights must be given an expansive reading, regardless of popularity of the right.

> Judges know very well how to read the Constitution broadly when they are sympathetic to the right being asserted. We have held, without much ado, that "speech, or . . . the press" also means the Internet, see *Reno v. ACLU*, 521 U.S. 844, 138 L. Ed. 2d 874, 117 S. Ct. 2329 (1997), and that "persons, houses, papers, and effects" also means public telephone booths, see *Katz v. United States*, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967). When a particular right comports especially well with our notions of good social policy, we build magnificent legal edifices on elliptical constitutional phrases

> – or even the white spaces between lines of constitutional text. See, e.g., *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (en banc), *rev'd sub nom. Washington v. Glucksberg*, 521 U.S. 702, 138 L. Ed. 2d 772, 117 S. Ct. 2258, 117 S. Ct. 2302 (1997).
>
> *Silveira v. Lockyer,* 328 F.3d 567, 568 (9th Cir. 2003) Kozinski - Dissenting from petition for *en banc* review

As noted above, the emerging analysis for Second Amendment claims is to treat them like First Amendment claims (*e.g., Chovan, Peruta, Ezell*) as modified by *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). And while the First Amendment provides the best framework for analyzing enumerated rights, some courts are finding lateral support in their Second Amendment analysis by comparing and contrasting the "undue burden" test as applied to right to an abortion. *See generally Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012)(en banc) and collected iterations of that case therein.

A more recent example is presented by the District Court for the Middle District of Alabama. In *Planned Parenthood Southeast, Inc. v. Strange*, Civil Case No.: 2:13cv405-MHT (August 4, 2014) a trial Court was analyzing the plethora of regulations that were aimed at closing down three of the five remaining abortion clinics in the State of

Alabama. In applying the related but qualitatively different "undue burden" test the trial judge drew on two general principles from his reading of *Planned Parenthood of Se. Pa. v.Casey*. 505 U.S. 833 (1992) and *Gonzales v. Carhart*, 550 U.S. 124 (2007). Those principles are equally relevant under the *Chovan/Peruta/Ezell* analysis.

> [...] The first principle was that "[c]ontext matters" in the sense that "[c]ourts must perform a careful, fact-specific analysis of how the restrictions would impede women's ability to have an abortion, in light of the circumstances of their lives." The second principle was that "[c]ourts must examine the strength of the State's justifications for regulations, not just the effects of the regulation."
>
> *Planned Parenthood Southeast, Inc. v. Strange*,
> Civil Case No.: 2:13cv405-MHT (Slip Opinion at 24)

That court went on to remark on:

> [...The] parallel in some respects between the right of women to decide to terminate a pregnancy and the right of the individual to keep and bear firearms, including handguns, in her home for the purposes of self-defense. See *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (incorporating this right in the liberty interest protected by the Fourteenth Amendment due-process clause); District of Columbia v. Heller, 554 U.S. 570 (2008) (first recognizing this right as protected by the Second Amendment). At its core, each protected right is held by the individual: the right to decide to have an abortion and the right to have and use firearms for self-defense. However, neither right can be fully exercised without the assistance of someone else. The right to abortion cannot be exercised without a medical professional, and the right to keep and bear arms means little if there is no one from whom to acquire the

> handgun or ammunition. In the context of both rights, the Supreme Court recognizes that some regulation of the protected activity is appropriate, but that other regulation may tread too heavily on the right. Compare *Heller*, 554 U.S. at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited.") with *Casey*, 505 U.S. at 876 ("Not all burdens on the right to decide whether to terminate a pregnancy will be undue."). Finally, as to each right, there are many who believe, as a matter of law, that the Supreme Court's reasoning in articulating the right was incorrect and who also believe, as a matter of strong moral or ethical convictions, that the activity deserves no constitutional protection.
>
> With this parallelism in mind, the court poses the hypothetical that suppose, for the public weal, the federal or state government were to implement a new restriction on who may sell firearms and ammunition and on the procedure they must employ in selling such goods and that, further, only two vendors in the State of Alabama were capable of complying with the restriction: one in Huntsville and one in Tuscaloosa. The defenders of this law would be called upon to do a heck of a lot of explaining – and rightly so in the face of an effect so severe. Similarly, in this case, so long as the Supreme Court continues to recognize a constitutional right to choose to terminate a pregnancy, any regulation that would, in effect, restrict the exercise of that right to only Huntsville and Tuscaloosa should be subject to the same skepticism.
>
> *Planned Parenthood Southeast, Inc. v. Strange*,
> Civil Case No.: 2:13cv405-MHT (Slip Opinion at 166)

In the case at hand the FAC fairly alleges that the Alameda County "500 Foot Rule" is designed and intended, and will have the eventual effect through attrition of existing stores, of banning gun stores in

Alameda County. The same skepticism should apply to this Alameda County policy here in California as if Appellant/Plaintiffs were seeking to open/maintain an abortion clinic in Alabama.[4]

IV. Appellants' Equal Protection Claims are Sound.

Appellants' Equal Protection claim is not based on suspect class. It is based on unequal treatment of similarly situated persons under the law with respect to a fundamental right. The Supreme Court has recognized that "an equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination, but instead claims that she was been irrationally singled out as a so-called 'class of one.' *Enquist v. Dep't of Agric.*, 553 U.S. 591, 601 (2008) (citing *Villiage of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)(per curiam)." *Gerhart v. Lake County Mont.*, 637 F.3d 1013 (9th Cir. 2011).

Properly extending the First Amendment approach to Second Amendment rights, the any Equal Protection claim based on the

[4] For an example of how a court moved beyond summary judgment (keeping in mind that this case is on appeal from a Rule 12 motion) to a court trial in order to develop fact relating to a Second Amendment challenge another type of regulation of the commercial sale of firearms, *See Silvester, et al. v. Harris et al.*, Case No.: 1:11-cv-02137-AWI (EDCA, Judgment and Order filed August 25, 2014).

exercise of Second Amendment rights must also address those instances when the law make irrational distinctions among similarly situated persons. "*Quite apart from the purpose or effect of regulating content, [...] the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. [...] The First Amendment protects speech and speaker, and the ideas that flow from each.*" *Citizens United v. F.E.C.,* 175 L. Ed. 2d 753, 899 (2010).

The FAC fairly pleads that existing gun stores (and other retail stores), not subject to the "500 Foot Rule" are being favored over the Appellants, who are seeking to open a new gun store. This fact is not even controverted by the Defendants. Indeed they cite this aspect of the case for the general proposition that there are enough gun stores in Alameda County to address any demand for guns by the public.

The Defendants argued for, and the Court entertained, the proposition that Appellants had not sufficiently plead facts to allege a "class of one" claim. First, the trial court erroneously applied a rational basis test. Second, the trial court erred when it did not accept Plaintiffs' allegations (along with rational inferences) as true that well regulated gun stores that sell only to the law-abiding public are no

different in kind than a retail store selling shoes. [ER 34-52, specifically FAC ¶¶ 17-25, 55-61, 66, 67]

Although the analysis was conducted in the context of a false arrest case, an appropriate "class-of-one" analysis was applied recently in *Williams v. County of Alameda*, 2014 U.S. Dist. LEXIS 17589 (filed February 10, 2014)(at pages 26 to 29 of the slip opinion.)

> An equal protection claim based on a "class of one," which does not depend on a suspect classification such as race or gender, requires a plaintiff to allege that he has been (1) "intentionally treated differently from others similarly situated" and (2) "there is no rational basis for the difference in treatment." *Village of Willowbrook*, 528 U.S. at 564; see also *Gerhart v. Lake County, Mont.*, 637 F.3d 1013, 1022 (9th Cir. 2011). "Such circumstances state an Equal Protection claim because, if a state actor classifies irrationally, the size of the group affected is constitutionally irrelevant." *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 592 (9th Cir. 2008). The rationale is that "[w]hen those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being 'treated alike, under like circumstances and conditions.' " *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 602, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008).

That court went on to find:

> Here, Defendants do not argue that Plaintiff cannot bring a class-of-one claim as a matter of law under Engquist.7 Rather, Defendants argue that Plaintiff has failed to plead sufficient facts to establish that he was treated differently from others similarly situated. The Court disagrees. Plaintiff

> has identified his fiancé as an individual whom he can be compared to. SAC ¶ 35. Plaintiff's equal protection claim is predicated on his assertion that he was treated differently than his fiancé (i.e., he was arrested) even though he and his fiancé were engaged in the same behavior that gave rise to his arrest (i.e., arguing about their child's behavior). Id. Defendants have not cited any controlling authority holding that Plaintiff's allegations are insufficient to survive a motion to dismiss. Nor have Defendants provided persuasive legal analysis demonstrating that dismissal of Plaintiff's equal protection claim is warranted. Accordingly, Defendants' motion to dismiss Plaintiff's equal protection claim is DENIED.

Without any facts alleged in an answer or revealed after discovery, the County gets away with the implied presumption that gun store customers are somehow more dangerous and likely to cause some form of public harm than customers of shoe stores. This is not something that is subject to judicial notice. Indeed Plaintiffs were looking forward to making exactly that kind of inquiry of the County during discovery if/when the Defendants are compelled to answer the complaint.

Plaintiffs didn't get that chance below, and for that reason the decision below must be reversed and remanded.

V. CONCLUSION

There were legal developments in this Circuit that the Trial Court did not have the benefit of reviewing when it made its September 9, 2013 Order dismissing Appellants' FAC. That development, sprinkled

with the fact finding errors that necessarily grow out of that deficiency compel reversal. The County should be ordered to answer the FAC so that the parties can conduct discovery and provide the courts with a better record to adjudicate these claims of fundamental rights violations.

Respectfully Submitted on August 25, 2014

/s/ Donald Kilmer

Attorney for Plaintiff/Appellants

NOTICE OF RELATED CASES

Plaintiff/Appellants are not aware of any pending cases in Northern District of California or the Ninth Circuit that could be related to this action.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of this Circuit because it consists of 4535 words and because this brief has been prepared in proportionally spaced typeface using WordPerfect Version X5 in Century Schoolbook 14 point font. Dated: August 25, 2014.

/s/ Donald Kilmer
Donald Kilmer, Attorney for Appellants

CERTIFICATE OF SERVICE

On August 25, 2014, I served the foregoing APPELLANTS' REPLY BRIEF by electronically filing it with the Court's ECF/CM system, which generated a Notice of Filing and effects service upon counsel for all parties in the case. I declare under penalty of perjury that the foregoing is true and correct. Executed August 25, 2014.

/s/ Donald Kilmer

Attorney for Appellants