UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

APPEAL No.: 08-15773
CASE No.: CIV S 03 2682 MCE/KJM

On Appeal from the United States District Court
Eastern District of California

APPELLANTS' OPENING BRIEF

DAVID K. MEHL; LOK T. LAU; FRANK FLORES

Appellants/Plaintiffs

vs.

LOU BLANAS, individually and in his official capacity as SHERIFF OF COUNTY OF SACRAMENTO; COUNTY OF SACRAMENTO, SHERIFF'S DEPARTMENT; COUNTY OF SACRAMENTO; BILL LOCKYER Attorney General, State of California; RANDI ROSSI, State Firearms Director and Custodian of Records.

Appellees/Defendants.

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2. Whether the District Court erred in dismissing the State (i.e. Lockyer) for failure to state a claim under 42 U.S.C. § 1983 (Equal Protection) under the Second and Third Causes of Action of the First Amended Complaint and denying Plaintiff's counter motion on the same issues for an unconstitutional statute in that it abridges a fundamental individual right to keep and bear arms in that it is not narrowly tailored to meet a compelling governmental interest.

3. Whether the District Court erred in granting summary judgment to Defendants BLANAS, individually and in his official capacity as Sheriff of County of Sacramento; County of Sacramento, Sheriff's Department; County of Sacramento on 42 U.S.C. § 1983 Equal Protection under the Second and Third Causes of Action of the First Amended Complaint and denying Plaintiff's counter motion on the same issues?

4. Whether the District Court erred in dismissing the Fourth, Fifth, and Sixth Causes of Action of the First Amended Complaint under the Second and Fourteenth Amendment?

5. Whether the Second and Fourteenth Amendments protect the rights of individual persons to keep and bear arms for personal, family, business and community defense, without arbitrary and discretionary licensing or state-decreed monopolization?

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[1] "CR" denotes the District Court Clerk's Record number. "ER" is the Excerpts of Record number. There are six volumes of the Excerpts of Record.

6. Whether the right to keep and bear arms should be substantially incorporated into the Fourteenth, applied to the States, and *Presser v. Illinois* (US 1886) limited by conflicting precedent?

7. Whether the Second Amendment should be held to be part of the Fourteenth Amendment protected privileges and immunities of citizens, as the documentary history suggests, and *Heller* and *Saenz v. Roe* (US 1999) , applied. Then, whether United *States v. Cruikshank* (US 1876) , and the *Slaughterhouse Cases* (US 1873), are thus limited by conflicting precedent?

8. Whether the judgment of the District Court should be reversed and the case remanded for trial on the merits, and a record of expert and factual testimony developed concerning the specific Carry Concealed Weapon (hereinafter CCW) control laws and factual issues involved in this case?

9. Whether the District Court caused prejudicial error by withholding action on its own order of March 27, 2007, regarding the production of documents?

10. Whether Plaintiffs have standing to challenge the Appellees' CCW law, and whether they were denied equal protection under the law when their applications for a CCW license were denied?

11. Whether the District Court's orders entered on February 5, 2008, granting summary judgment (CR 169, ER 000001) and September 3, 2004, dismissing state defendants (CR 17, ER 000040) are replete with reversible errors of both law and fact, and based upon the presumption that the errors were prejudicial? See *Obrey v. Johnson (Obrey I)*, 400 F.3d 691, 699 –701 (9th Cir.2005)(affirming and readopting harmless error standard stated in *Haddad v. Lockheed Calif. Corp.*, 720 F2d 1454, 1459 (9th Cir. 1983) and abrogating inconsistent standard "inadvertently" stated in *Kisor v. Johns–Manville Corp.*, 783 F2d 1337, 1340 (9th Cir. 1986)); *Dang v. Cross*, 422 F3d 800, 811 (9th Cir. 2005).

12. District Court Order entered on September 3, 2004, dismissing state defendants. (CR 17, ER 000040)The Ninth Circuit's harmless error analysis for civil cases begins with an initial presumption that error in the district court

proceedings was prejudicial. The court of appeals must reverse unless it concludes that the result in the lower court was not tainted by the error.

13. Whether for remand this Court should order assessment of §1988 interim litigation expenses and counsel fees for Appellants prior to trial on the merits of the remaining factual and legal questions?

STATEMENT OF JURISDICTION

The District Court had jurisdiction over the original federal question matter under 28 U.S.C. §§ 1331 & 1343 which provides for original jurisdiction of this court and all actions authorized by 42 U.S.C. § 1983 for violations of the United States Constitution. This court has jurisdiction over the appeal from a final order and judgment granting summary judgment to defendants and against plaintiff, under 28 U.S.C. sec. 1291, filed on February 5, 2008. (CR 169, ER 1)[2] Judgment was entered the same day. This Court thus has jurisdiction over remaining issues in the District Court Order entered on March 27, 2007, ordering production of documents in camera (CR 95, ER 16) and the Order entered on September 3, 2004, dismissing state defendants. (CR 17, ER 40) (CR 103, Vol 1, ER 3)

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[2]"CR" denotes the docket number of the District Court's record. "ER" denotes the page number of the Excerpts of Record of which volume 1 is pages 1 through 55, volume 2 is 56 to 352, volume 3 is 353 to 652, and volume 4 is 653 to 953, volume 5 is 954 to 1253, and volume 6 is 1254 to end.

Notice of Appeal timely filed on March 4, 2008. (CR 172, ER 1487).

INTRODUCTION[3]

This appeal addresses two primary issues, one of law and one of fact, regarding the issuance of carrying concealed weapon (CCW) permits. California Penal Code § 12025 prohibits the carrying of a concealed weapon unless an individual applies for, and receives, permission to do so pursuant to § 12050(a)(1)(A), which gives Defendant Sheriff a great amount of discretion in choosing whom should be granted a license to carry a handgun in the State of California. In addition to concealed carry permits, sheriffs have extremely broad discretion to issue permits to carry "loaded and exposed", but only in counties with a population less than 200,000. Likewise, California Penal Code § 12031 prohibits the carrying of any loaded weapon on his or her person or in his or her car.

Thus, by law, the only place one may possess a loaded firearm in California without prior authorization from the government is in the home or place of business.

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[3]This introduction contains no references to the record for ease of reading. All assertions are repeated in the statement of case, facts, or argument, with appropriate record citations.

This appeal presents a question of law on whether the Second Amendment as an fundamental individual right should be held applicable to the state of California through both the 14th Amendment's Due Process and Privileges and Immunities clause.

In addition, this appeal addresses whether the District Court erred in treating "triable issues of fact" as a "standing" issue from the grant of summary judgment by the District Court in favor of Defendants and against Plaintiff, in a 42 U.S.C. §1983 action under both the Equal Protection Clause of the Fourteenth Amendment and the Second Amendment right to keep and bear arms.

This appeal challenges the court's ruling granting summary judgment to Defendants and motion to dismiss against the State, while simultaneously denying Plaintiff's counter-motion on the same issues, on grounds of errors of law and fact.

STATEMENT OF THE CASE

Plaintiffs/Appellants filed a complaint against Defendants/Appellees County of Sacramento, Sheriff's Department (hereafter "Department") and former Sheriff Louie Blanas (hereafter "Blanas") with the District Court under 28 U.S.C. §§ 1331 & 1343 which provides for original jurisdiction of this court and all actions authorized by 42 U.S.C. § 1983 for violations of the United States

Constitution. All relevant causes of actions are addressed in the District Court's Orders of February 5, 2008 (granting summary judgment)(CR 169, ER 1) and the Order entered on September 3, 2004 (dismissing state defendants). (CR 17, ER 40). In sum, all of Plaintiff's 42 U.S.C. § 1983 claims under the noted in the First Amended Complaint (CR 8, ER 1505) were dismissed in the District Court.

STATEMENT OF FACTS

Appellants/Plaintiffs Mehl and Lau (hereafter simply Appellants, Mehl or Lau) filed a First Amended Complaint (CR 8, ER 1505) pursuant to 42 U.S.C. § 1983 challenging the Constitutionality of California's Concealed Carry Weapon (CCW) law (i.e. California Penal Code § 12025) on both Second Amendment and Fourteenth Amendment Equal Protection grounds. Initially, the District Dismissed the Second Amendment Claim, and a portion of the Equal Protection claim challenging the retired peace officer exception to the CCW law (e.g. Cal. Penal Code § 12027). See Order entered September 3, 2004, dismissing state. (CR 17, ER 40).

Thereafter, the remaining cause of actions were prosecuted pursuant to 42 U.S.C. § 1983, stating that Defendants Sheriff Blanas and Sacramento County (collectively referred to as "Defendants") violated Appellants' constitutional rights

under the First, Second, Ninth and Fourteenth Amendments to the United States Constitution by denying their applications for a "Carry Concealed Weapon ("CCW") permit.

Based upon the collateral estoppel affect of the initial order and Ninth Circuit precedent which, at the time, barred Appellants Fourth and and Sixth Causes of Action predicated on the Second and Ninth Amendments, respectively the only claims as to which Appellants opposed summary judgment were the Second Cause of Action, which asserted equal protection violations, the Third Cause of Action, for alleged violations of Plaintiffs' First Amendment Rights, and the Fifth Cause of Action asserting that Defendants' conduct ran afoul of the Privileges and Immunities clause of the Fourteenth Amendment.

Remaining Defendants prevailed on summary judgment entered February 5, 2008. (CR 169, ER 1)

Individuals seeking permission to carry a concealed weapon in Sacramento County must apply to the Sacramento County Sheriff's Department for the necessary CCW permit. In opposing summary judgment, and creating a triable issue of fact, Appellants relied upon the expert witness declaration of Timothy G. Twomey, a former member of the Defendants management team, and who

conducted numerous administrative reviews of Defendants policies and procedures, and internal affairs investigations. (CR 150, ER 117-134)

Appellants disclosed Timothy G. Twomey as an expert witness on the ultimate issues to be decided regarding the CCW permit process. (CR [docket], ER 1539), whereas the docket reflects that Defendants disclosed no experts on the issues to be decided, especially on summary judgment. (See ER 1539) The unrebutted declaration of expert witness Timothy G. Twomey (CR 150, ER 117-180) outlines the actual application process, which does not entail any systematic and objective system of review, and the equitable application of the law which authorizes such discretion. Rather, Twomey outlines a system of favoritism, preferential treatment, and complete lack of fairness - regardless whether an application was actually completed.

In his declaration, Twomey marshals the evidence ((CR 150, ER 117-180) to established his unrebutted opinions as to the ultimate issues to be decided as follows:

"I can state to a degree of reasonable certainty that there is no 'good cause' policy or criteria for issuance or denial of a CCW application, and at a minimum, it is simply arbitrary and capricious with absolutely no sense objectivity or

baseline criteria being used." (CR 150, ER 145, ¶153)

"Therefore, it is my expert opinion, based upon a degree of reasonable certainty, that the County of Sacramento Sheriff's Department and then Sheriff Blanas, and now Sheriff McGinniss have absolutely no policy or criteria as to whom is issued a CCW for non-prima facie good cause applications. At best, it is random and capricious with approval more likely to be given to well-known employers, campaign contributors, or those with Departmental affiliations." (CR 150, ER 146, ¶162)

"Therefore, based upon my education, training and experience, and to a degree of reasonable certainty, I can state that Defendants CCW permit process is wrought with capriciousness and arbitrariness, and continues till this day." (CR 150, ER 171, ¶265)

"I further opine, based upon my education, training and experience, and to a degree of reasonable certainty, that Plaintiffs were denied an equal and fair opportunity to receive a CCW as compared to those who received CCWs." (CR 150, ER 171, ¶ 266)

"I further opine, based upon my education, training and experience, and to a degree of reasonable certainty, that Plaintiffs were denied equal opportunity under

the law to receive a CCW from Defendants." (CR 150, ER 171, ¶267)

I further opine, based upon my education, training and experience, and to a degree of reasonable certainty, that selective issuance of CCWs to those with close affiliation to the Sheriff (i.e. elected official) is a systemic problem that is inherent in a system whereby money influences those with the 'power' to issue CCWs, which in this case, is the Sheriff of Sacramento County." (CR 150, ER 171, ¶268)

"I further opine, based upon my education, training and experience, and to a degree of reasonable certainty, that what this evidence demonstrates is that those who have access to the Sheriff indeed have a very high probability of receiving a CCW, if they apply for one, as compared to a very low probability for those who do not have access to the Sheriff, nor contributed to his campaign, such Plaintiffs." (CR 150, ER 171-2, ¶269)

"I further opine to a degree of reasonable certainty, that Plaintiffs Mehl and Lau did not receive equal treatment for the review, if any, of their CCW applications since they did not contribute or have any relationship to then Sheriff Blanas or then Undersheriff McGinniss. I can state to a degree of reasonable certainty that both Plaintiffs CCW applications were denied simply because they were not known contributors to Sheriff Blanas' political campaigns for Sheriff, and

his Undersheriff's quest to become sheriff. This is what the evidence shows." (CR 150, ER 172, ¶ 270)

" . . . . [I]t is my opinion to a degree of reasonable certainty that the prima facie good cause standard lacks any merit or support, and creates a separate privileged class of citizens who are rewarded for their affiliation with law enforcement." (CR 150, ER 172-3, ¶ 273)

"In sum, it is my opinion, based upon a degree of reasonable certainty, that the CCW policy of the Sacramento County Sheriff's Department, as both written and unwritten, is applied in a discriminatory, unfair, biased, prejudicial, and capricious manner, and that there is obviously extreme favoritism towards two distinct groups, to the exclusion of all other citizens of Sacramento County: 1) those with political influence and ties (e.g. campaign contributors and other who can contact the Sheriff directly and receive CCWs, Badges, and I.D.s.) and, 2) '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' are also provided preferential treatment (i.e. the prima facie good cause standard for issuance)." (CR 150, ER 173, ¶ 277)

"It is my opinion, to a degree of reasonable certainty, that the CCW

approval process is not a process at all, but consists of a committee of political appointments who serve at the pleasure of the Sheriff. It is reasonable to infer that these appointees are also in direct contact with the Sheriff's campaign contributors, or have knowledge of who they are." (CR 150, ER 177, ¶ 298)

STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo*. *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989); *State Farm Fire and Casualty Co. v. Martin*, 872 F.2d 319, 320 (9th Cir. 1989). The appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party in the lower court, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant law. *Tzung v. State Farm Fire and Casualty Co.*, 873a F.2d 1338, 1339-40 (9th Cir.1989); Judie v. Hamilton, 872 F.2d 919, 920 (9th Cir. 1989). The appellate court's review is governed by the same standard used by the District Court under Fed.R.Civ.P. 56(c). *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986).[4]

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[4] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505 (1986). Because Summary Judgement is a drastic remedy and deprives a party of the right to a jury trial, it is to be *granted cautiously*. *Id.* See also, *British Airways Board v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978); *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986).

Since the state's CCW statute and county's CCW policy burdens a fundamental right, that statute and policy receives heightened scrutiny under the Second Amendment and Fourteenth Amendment's Equal Protection Clause. *Silveira v. Lockyer*, 312 F.3d 1052, 1087-8 (9th Cir. 2002).

Errors in the District Court are presumed prejudicial. *Obrey v. Johnson (Obrey I)*, 400 F.3d 691, 699 –701 (9th Cir.2005)(affirming and readopting harmless error standard stated in *Haddad v. Lockheed Calif. Corp.*, 720 F2d 1454, 1459 (9th Cir. 1983) and abrogating inconsistent standard "inadvertently" stated in *Kisor v. Johns–Manville Corp.*, 783 F2d 1337, 1340 (9th Cir. 1986)); *Dang v. Cross*, 422 F3d 800, 811 (9th Cir. 2005).

SUMMARY OF ARGUMENT

District of Columbia v. Heller, 554 U.S. ___,128 S.Ct. 2783(2008), eviscerates current Ninth Circuit precedent regarding the Second Amendment, and this is a case of first impression regarding the extent of incorporation under the Fourteenth and standard of review, which is strict scrutiny. Since *Heller* had not been decided as the time the District Court granted judgement in Defendants favor, remand is required.

Furthermore, the District Court failed to draw all reasonable inferences in

favor of Appellants. The District Court erred in finding that the factual and legal disputes over the reason for Plaintiffs denial of a CCW, which itself is a question of fact at a minimum.

In sum, the District Court failed to view facts in a light most favorable to the party opposing summary judgment, misinterpreted substantive Federal law, and erred in granting Defendants motion for summary judgment and denying Plaintiff's Counter-Motion for Summary Judgment.

ARGUMENT

I. THE SUPREME COURT'S DECISION IN DISTRICT OF COLUMBIA V. HELLER, 554 U.S. ___,128 S.Ct. 2783(2008) REQUIRES REMAND ON CAUSES OF ACTIONS DISMISSED BY THE DISTRICT COURT'S ORDERS OF SEPTEMBER 3, 2004 (ER 000040) AND FEBRUARY 5, 2008 IN THAT THOSE ORDERS ARE FUNDAMENTALLY FLAWED BASED UPON 9TH CIRCUIT PRECEDENT WHICH IS NOW OVERRULED.

District of Columbia V. Heller, 554 U.S. ___, 128 S.Ct. 2783(2008) overrules current Ninth Circuit precedent (e.g. *Silveira v. Lockyer*, 312 F.3d 1062 (9th Cir. 2002) reh'g en banc denied, 328 F.3d 567, cert. denied, 124 S. Ct. 803 (2003)), to the extent that Ninth Circuit precedent states the Second Amendment does not confer and individual right to keep and bear arms. Thus, the only issue to consider is whether the Second Amendment is held applicable to State actors.

A. The State of California Attorney General is a Proper party under the Case or Controversy Requirement (ER 43)

Before and after *McMillian v. Monroe County*, 520 U.S. 781, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997), the Ninth Circuit has considered a California sheriff a local law enforcement agent for purposes of establishing section 1983 liability under *Monell*. In *McMillian*, the Supreme Court relied heavily on provisions of the state Constitution to determine the scope of executive authority.

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. See, e.g., *Robinson v. Solano County*, 00 C.D.O.S. 5735, 5737 (9th Cir. July 12, 2000); *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." This provision was added in 1934, when the voters approved Proposition 4. As then Alameda County District Attorney Earl Warren told the voters, this amendment was designed to "address the lack of organization of our law enforcement agencies" by providing coordination and supervision by the Attorney General "[w]ithout curtailing the right of local self government." *Argument in Favor of Proposition 4 by Earl Warren*, District Attorney of Alameda County, 1934 General Election Ballot Pamphlet. Here, the CCW application is designed and implemented by the state Attorney General, and uniform standards are then set for the local agencies to comply with. Thus, the Attorney General has the ultimate authority for setting forth policy on how CCW's are issued and processed, leaving the actual review up to local officials.

Article V, section 13 is fleshed out in several California statutes which give the Attorney General direct supervisory power over sheriffs, including the power to require written reports concerning any investigation, detection, and punishment of crime in their jurisdiction, see *Cal. Gov't Code* § 12560; to appoint persons to perform the duties of sheriff in particular circumstances; see *Cal. Gov't Code* § 12561; and to call a conference of district attorneys, sheriffs, and police chiefs to

further "uniform and adequate enforcement" of state law, see *Cal. Gov't Code* § 12524. In addition, a county board of supervisors in California is limited in its general supervisory control over the county sheriff from interfering with his power to investigate and prosecute state crimes. See *Cal. Gov't Code* § 25303. The *McMillian* Court drew support from analogous statutory provisions in Alabama in finding that Alabama sheriffs are state officials. See *McMillian*, 520 U.S. at 790, 117 S.Ct. 1734.

In sum, the AG is really charged with ensuring uniform enforcement of states laws, especially CCWs, and is thus a proper party for the case and controversy requirement.

B. The SECOND CAUSE OF ACTION is viable under Fourteenth Amendment Equal Protection Clause as it pertains to Retired Peace Officer Exception (ER 46, 49)

The State of California essentially creates three distinct groups of citizens when it comes to who is able to obtain a CCW license. 1) retired California peace officers, 2) state and federal judges, and 3) "the People" who are not part of the class of individuals included in the statute. See California Penal Code Sections 12027, 12031(b), 12050-12054.

Not only did Appellants/Plaintiffs oppose Defendants motions to dismiss and for summary judgment on the Second Cause of Action, they brought a counter motion pursuant to Local Rule 78-230(e) for judgment on the pleadings as a matter of law on in line with the holding in *Silveira v. Lockyer*, 312 F.3d 1052, 1090 (9th Cir.)(Reinhardt, J), rehearing en banc denied, 328 F.3d 567 (9th Cir. 2003)(six dissents). (See CR 169, ER 15 fn. 7 regarding Appellants' county motion for judgment) Both Penal Code Sections 12027, 12031(b), 12050-12054 and Defendants' "prima facie" good cause standard (for Defendants "Prima Facie Good Cause policy" see CR 150-2, ER 182) for CCW issuance are unconstitutional in that this CCW issuance scheme specifically exempts retired California law enforcement personnel from those provisions and burdens which are held applicable to common good citizens, including Appellants. The holding in *Silveira v. Lockyer*, mandates that these statutory and policy provisions be struck down under the Fourteenth Amendments Equal Protection clause which was used to strike down an identical exemption in the State's Semi-Automatic Rifle's statute. Similarly, Penal Code 12050 is unconstitutional which makes exceptions in the statutory scheme for state and federal court judges as well.

Since moving Defendants are proper parties to be sued for an

unconstitutional CCW policies, Plaintiffs counter motion must be granted as to the prima facie standard and retired peace officer execption.

Plaintiffs can discern no legitimate state interest in permitting retired peace officers and judges to possess and enjoy for the increase it affords them regarding their personal safety concealed handguns. "Rather, the retired officers exception arbitrarily and unreasonably affords a privilege to one group of individuals that is denied to others, including plaintiffs." See *Silveira*.

Furthermore, the so-called "good cause" standard for Plaintiffs and other average citizens is addressed by the CCW application itself in the form of "investigator's interview notes", but information for the "prima facie" good cause standard for retired peace officers is not addressed in the application itself – even though the statute requires such. However, there is a block which separates judges from other members of the Bar and Plaintiffs.

In *Silveira v. Lockyer*, 312 F.3d 1052, 1087-8 (9th Cir. 2002), the 9th Circuit acknowledged that if the Second Amendment conferred a fundamental right, then strict scrutiny would apply. In *Silveira v. Lockyer*, at 1090 this Circuit held that "... the retired officers exception arbitrarily and unreasonably affords a privilege to one group of individuals that is denied to others, including plaintiffs."

Here, the statute and policy in question affords retired "California" peace officers a life time CCW, without the application fees and procedures afforded to non-law enforcement personnel. It must be clear the retired peace officer exception is not a privilege that is even bestowed upon retired law enforcement officers from other states or federal agencies, such as the FBI.

Had Appellants been given their day in Court, the unrebutted testimony of appellants expert witness testimony would have been presented, to wit:

> " . . . . [I]t is my opinion to a degree of reasonable certainty that the prima facie good cause standard lacks any merit or support, and creates a separate privileged class of citizens who are rewarded for their affiliation with law enforcement." (CR 150, ER 172-3, ¶ 273)
>
> "In sum, it is my opinion, based upon a degree of reasonable certainty, that the CCW policy of the Sacramento County Sheriff's Department, as both written and unwritten, is applied in a discriminatory, unfair, biased, prejudicial, and capricious manner, and that there is obviously extreme favoritism towards two distinct groups, to the exclusion of all other citizens of Sacramento County: 1) those with political influence and ties (e.g. campaign contributors and other who can contact the Sheriff directly and receive CCWs, Badges, and I.D.s.) and, 2) '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' are also provided preferential treatment (i.e. the prima facie good cause standard for issuance)." (CR 150, ER 173, ¶ 277)

C. The Fifth Cause of Action is viable under the

Fourteenth Amendment Privileges and Immunities Clause as the Second Amendment conveys an individual right (ER 52).

Section 1 of the Fourteenth Amendment provides in pertinent part that :

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Senator Howard, who introduced the Fourteenth Amendment for passage in the Senate, stated:

> "Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution [the Senator had just read from the old opinion of Corfield v. Coryell, 6 Fed. Cas. 546 (No. 3,230) (E. D. Pa. 1825), also cited in n14 of Saenz v. Roe, 526 U.S. 489]. To these privileges and immunities, whatever they may be - for they are not and cannot be fully defined in their entire extent and precise nature - to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.

"Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution; and it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guarantied by the Constitution or recognized by it, are secured to the citizens solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation. . . .

". . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."

Cong. Globe, 39th Cong., 1st Sess., 2765-2766 (1866).

The Ninth Circuit acknowledged in *Silveira* at 1067 that :

Fresno Rifle itself relied on *United States v. Cruikshank*, 92 U.S. 542, 23 L. Ed. 588 (1876), and *Presser v. Illinois*, 116 U.S. 252, 29 L. Ed. 615, 6 S. Ct. 580 (1886), decided before the Supreme Court held that the Bill of Rights is incorporated by the Fourteenth Amendment's **Due Process Clause**. Following the now-rejected *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 8 L. Ed. 672 (1833) (holding that the Bill of Rights did not apply to the states), *Cruikshank* and *Presser* found that the Second Amendment restricted the activities of the federal government, but not those of the states. One point about which we are in agreement with the Fifth Circuit is that *Cruikshank* and *Presser* rest on a principle that is now thoroughly discredited. See *Emerson*, 270 F.3d at 221 n.13. Because we decide this case on the threshold issue of standing, however, we need not consider the question whether the Second Amendment presently enjoins any action on the part of the states.

This is important because all Ninth Circuit Second Amendment decisions

have held that the Second Amendment does not confer an individual right, and never addressed the Privileges and Immunities Clause of the Fourteenth Amendment. The Fifth Cause of Action does not seek to define the Second Amendment; rather, it seeks to define the outer parameter of the Privileges and Immunities Clause of the Fourteenth Amendment.

Now with the *Heller* decision resolving the Second Amendment fundamental rights issue, it is now appropriate to address the effect of *Heller* on the interpretation of the Privileges and Immunities Clause.

Pockets of bias against firearms are not unlike the all too frequent prejudice toward persons of color, women and sometimes men as a class, quirky religions, access to birth control, homosexual persons, and the next prejudice de jour. Broad bias typically persists because of misinformation and insufficient thoughtful study. The Bill of Rights and this Court are the citizens' protection from such bias. See Sandra Day O'Connor, *The Majesty of the Law* 59 (N.Y.: Random House 2003). *Brown v. Board*, 347 U.S. 483 (1954) took pains to be unanimous and to overrule *Plessy v. Ferguson*, 163 U.S. 537 (1896) after many hours of argument and reargument. The Supreme Court struggled with the issues leading up to *Brown* for what today seems to have been a very long time. See Del Dickson ed., *The*

Supreme Court in Conference 635-671 (1940-1985)(N.Y.: Oxford 2001).

Bradwell v. The State, 83 U.S. 130 (1873) is now seen as a curiosity of condescending patriarchy. It follows the *Slaughter-House Cases*, 83 U.S. 36 (1873) that have been roundly criticized, but not yet finally put to rest, but the tide has changed recently. Categorical discrimination against women was not remedied by the Fourteenth Amendment. The government endorsed the irrational bias of sex discrimination even in the very hour when it was abolishing slavery and empowering freed-men-only to vote. Millions of qualified women were denied the right to vote from 1868 to 1920, and before.

After *Slaughter-House* and *Cruikshank*, Congress was powerless to correct those judicial transgressions. The Supreme Court allowed Reconstruction to fail and abandoned the freedmen to an unkind fate. The Supreme Court from 1873 into the next century, perpetuated the same errors, often over the lone dissent of the first Justice Harlan, and sometimes Justice Field.

The progression of decisions following the narrow *Slaughter-House* mode included *Presser v. Illinois*, 116 U.S. 252 (1886)(Woods, J), holding that the First and Second Amendments did not inhibit state action infringing the rights to assemble and to keep and bear arms without a discretionary permit from the

Governor. *Presser* remains on the books, but has essentially now been overruled by *Heller*. Prior to *Heller*, lower State and federal courts have followed *Presser* sporadically, but often declined to do so, or even apologized.

The right to keep and bear arms should further be considered a privilege or immunity protected by Section 1 of the Fourteenth Amendment. The right is express throughout the history of the Fourteenth. It is of stature similar to the travel right upheld in *Saenz v. Roe*, 526 U.S. 489 (1999), and earlier in *Doe v. Bolton*, 410 U.S. 179 (1973). See also *Mapp v. Ohio*, 367 U.S. 643, 655 (1961)(applying the exclusionary rule to the States because "without that rule the freedom from state invasions of privacy would be so ephemeral . . . as [citation omitted] not to merit this Court's high regard as a freedom `implicit in the concept of ordered liberty'")

Though *Mapp* Court applied the Due Process Clause, the Supreme Court has always held that "the full scope of the liberty guaranteed by the Due Process Clause . . . is not a series of isolated points. . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints. . . ." *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (dissenting opinion). It is worthwhile to emphasize that the Fourth Amendment

itself does not apply to state actors. It is only because the Court has held that the privacy rights protected against federal invasion by that Amendment are implicit in the concept of ordered liberty protected by the Due Process Clause of the Fourteenth Amendment that the Fourth Amendment has any relevance in this case.

Fundamentally important is the wording of the Fourteenth Amendment in relation to "due process" and "privileges or immunities." Section One reads in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This is a continuum of broadly enumerated rights by the mere fact that semicolons were used, and not periods, and this continuum of rights is consistent with the Supreme Court's jurisprudence on matters of fundamental liberty.

> "Due process [just like privileges or immunities] has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take

> them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.
>
> No formula could serve as a substitute, in this area, for judgment and restraint. ". . . [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This `liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." Poe v. Ullman, supra, at 542-543 (dissenting opinion). [emphasis added]

Moore v. East Cleveland, 431 U.S. 494, 501-2 (1977); see also, *Roe v. Wade*, 410 U.S. 113, 169 (1973).

At least three generations of law students and constitutional lawyers have understood that the *Slaughter-House Cases*, 83 U.S. 36 (1873)(5-4), and *United States v. Cruikshank*, 92 U.S. 542 (1876), were not well considered. Many of the Justices of that era chose to disregard the historical circumstances, legislative debates, and plain purposes of the Fourteenth Amendment and related legislation.

Justice Black has leveled that specific criticism against them: "[P]revious decisions of this Court ... however, had not appraised the historical evidence on that subject." *Adamson v. California*, 332 U.S. 46, 74 (1947)(separate opinion). It is no coincidence that *Slaughter-House* in the U.S. Reports is followed immediately by *Bradwell v. The State*, 83 U.S. 130 (1873), another legacy of the then judicial disregard for the Fourteenth Amendment and individual rights. Adherence to *Slaughter-House* and *Cruikshank* can only provoke continued solid criticism and frustration with the system of justice. The evidence of past error is too strong and widely known.

Justice Noah Swayne observed in *Slaughter-House* that the majority turned "what was meant for bread into a stone." 83 U.S. at 129. One need not be a constitutional scholar to shudder at the reasoning and brutal reality of *Slaughter-House* and *Cruikshank* as they attempted to gutt the Fourteenth Amendment, leaving next to no protection for the lives and liberty of freedmen, freedwomen, and those who supported their cause.

Cruikshank did so following the murderous "Colfax massacre" in Louisiana of freedmen. Federal prosecutors charged Klansmen with conspiracy to prevent blacks from exercising civil rights, including the rights to vote and to bear arms

for community defense. The *Cruikshank* Court freed the Klansmen to ride again and again, with no reference to the massacre, without any mention of the refusal of Louisiana to enforce its laws, or the complicity of state and local officials in the massacre. The Colfax incident today fits the pattern of a mass crime against humanity, of the kind perpetrated by past despotic regimes in Germany, Iraq, and Bosnia.

Slaughterhouse and *Cruikshank* may be precedent on the books, but they are not entitled to controlling recognition any more than *Bradwell* or *Plessy*. The Courts today have far better insights and knowledge of the documented events leading up to the Fourteenth Amendment.

As historian Flack noted, "the decisions in the above cases have given to the Fourteenth Amendment a meaning quite different from that which many of those who participated in its drafting and ratification intended it to have." Flack, *The Adoption of the Fourteenth Amendment* 7 (Johns Hopkins 1908).

Professor Antieau is even more blunt about the *Slaughter-House* majority opinion:

> Of the outrageous decision, a contemporary scholar wrote: 'Ninety-nine out of every hundred educated men, upon reading this (Privileges and Immunities) section over, would at first say that it forbade a state to make or

> enforce a law which abridged any Privilege or Immunity whatever of one who was a citizen of the United States.'

Antieau, *The Intended Significance of the Fourteenth Amendment* (Wm. Hein, Buffalo, N.Y. 1997), citing Royall, *The Fourteenth Amendment: The Slaughter House Cases*, 4 So. L. Rev. (N.S.) 558, 563 (1879). All of the authorities from varying venues cited in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), cert. denied, 536 U.S. 907 (2002), *Silveira v. Lockyer*, 328 F.3d 567 (9th Cir. 2003) and *Nordyke v. King*, 364 F.3d 1025 (9th 2004) agree, and explain themselves well, as do Story, Blackstone, Rawle, and many others.

Akhil Reed Amar of Yale writes:

> [T]he framers of the Fourteenth Amendment strongly believed in an individual's right to own and keep guns for self-protection. Blacks and Unionists down South could not always count on the local police to keep white night-riders at bay. When guns were outlawed, only Klansmen would have guns. Thus, the Reconstruction Congress made quite clear that a right to keep a gun at home for self-protection was indeed a constitutional right -- a true 'privilege' or 'immunity' of citizens.

The post-Civil War Freedmen's Bureau Act attempted to protect newly freed men in their personal "constitutional right to bear arms." 14 Stat. 173, 176 (1866). That Act of Congress has enormous significance for interpreting the Fourteenth Amendment as protecting the right to arms for family and community

defense against official and Klan violence, or contemporary gangs. The same Congress drafted and passed both overwhelmingly.

The *Cruikshank* Court, however, restored the Klan and supporting reactionary officialdom to power. The Supreme Court has never undone that wrong. The evil of the Klan persists today, as we were recently reminded in *Virginia v. Black*, 538 U.S. 343 (2003):

> [A]cts of violence included bombings, beatings, shootings, stabbings, and mutilations. ... Members of the Klan burned crosses on the lawns of those associated with the civil rights movement, assaulted the Freedom Riders, bombed churches, and murdered blacks as well as whites whom the Klan viewed as sympathetic toward the civil rights movement.

Id. at 355.

State and local lawmen all too often have been supportive of the Klan with pervasive state inaction: refusal to provide protection, refusal to prosecute, tacit cooperation, and obstruction of justice at every level.

The disarmament of blacks via the Black Codes and oppressive state gun control legislation left the power of firearms in the hands of the Klan, gangs, and looters. The Fourteenth Amendment was intended in part to redress that imbalance and provide means of self defense to law abiding citizens, black and white. Again,

a single handgun would mean the difference between life or death from an assault by a truckload of Klansmen.

Here, California and County Defendants have essentially perpetuated this same type of disarmament of its own citizens by granting privileges to a "class" of citizens.

Here, the local Sheriff abuses his authority by issuing CCWs to campaign contributors, or in other words, those with the resources to donate money to a political campaign or those who are privileged enough to have direct access to the Sheriff, or maybe even own a house with Sheriff.

Likewise, in order to keep law enforcement officials pleased when California decides to pass laws that only favor the privileged, it carves an exception to nullify local officials absolute discretion regarding issuance of CCWs by exempting retired "California" peace officers from the abuses and power of the local sheriff.

In conclusion, Appellants are protected from arbitrary and capricious issuance of CCWs under the Privileges and Immunities Clause of the 14th Amendment.

D. The fourth and sixth claims under the Second and

Ninth Amendments are now viable in the Ninth Circuit (ER 54)

District of Columbia V. Heller, 554 U.S. ___, 128 S.Ct. 2783(2008) overrules current Ninth Circuit precedent (e.g. *Silveira v. Lockyer*, 312 F.3d 1062 (9th Cir. 2002) reh'g en banc denied, 328 F.3d 567, cert. denied, 124 S. Ct. 803 (2003)) Thus, the only issue to consider is whether the Second Amendment is held applicable to State actors, and it is Appellants' position that the Ninth Amendment can also be read to broaden the right to self preservation, and the right to self defense is useless unless one has the tools to defend against crime and violence.

In *Heller* at 340, the Court states

> "The right to bear arms has always been the distinctive privilege of freemen. Aside from any necessity of self-protection to the person, it represents among all nations power coupled with the exercise of a certain jurisdiction. ... [I]t was not necessary that the right to bear arms should be granted in the Constitution, for it had always existed."

J. Ordronaux, Constitutional Legislation in the United States 241-242 (1891). Thus, it can be inferred that the Ninth Amendment embodies the idea that the right to self defense and to bear arms for such a purpose is a right which cannot be licensed or arbitrarily controlled.

II. BECAUSE THE SUPREME COURT HAS DETERMINED THAT THE SECOND AMENDMENT GUARANTIES A

FUNDAMENTAL INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS, IT IS APPLICABLE TO THE STATE THROUGH THE 14TH AMENDMENT.

District of Columbia V. Heller, overrules current Ninth Circuit precedent.

A. The Second Amendment is held applicable to the states through the Fourteenth amendment's Due Process clause.

This issue has been partially addressed in section I.C. above. In *Heller*, at footnote 23, the Supreme Court states "[w]ith respect to *Cruikshank's* continuing validity on incorporation, a question not presented by this case, we note that Cruikshank also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." [emphasis added] Thus, it is apparent that the Supreme Court recognizes that *Cruikshank* is no longer viable based on prior incorporation decisions.

The Ninth Circuit acknowledged in *Silveira* at 1067 that:

> *Fresno Rifle* itself relied on *United States v. Cruikshank*, 92 U.S. 542, 23 L. Ed. 588 (1876), and *Presser v. Illinois*, 116 U.S. 252, 29 L. Ed. 615, 6 S. Ct. 580 (1886), decided before the Supreme Court held that the Bill of Rights is incorporated by the Fourteenth Amendment's **Due Process Clause**. Following the now-rejected *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 8 L. Ed. 672 (1833) (holding that the Bill of Rights did not apply to the states), *Cruikshank* and *Presser*

> found that the Second Amendment restricted the activities of the federal government, but not those of the states. One point about which we are in agreement with the Fifth Circuit is that *Cruikshank* and *Presser* rest on a principle that is now thoroughly discredited. See *Emerson*, 270 F.3d at 221 n.13. Because we decide this case on the threshold issue of standing, however, we need not consider the question whether the Second Amendment presently enjoins any action on the part of the states.

It is obvious that both the Supreme Court and the Ninth Circuit tacitly acknowledge that the Second Amendment is applicable to the states since it confers and individual right.

Decades after *Cruikshank*, the Supreme Court used the due process clause of the Fourteenth to strengthen individual rights against oppressive state action, by incorporating most of the Bill of Rights provisions into due process, one by one, and also recognizing home and family rights, as in *Troxel v. Granville*, 530 U.S. 57 (2000)(O'Connor, J)(fundamental family rights). See also *Lawrence v. Texas*, 539 U.S. 558 (2003). The Court still takes care to enforce important corporate and economic rights as well, as with commercial speech. See *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *Lorillard v. Reilly*, 121 S. Ct. 2404 (2001).

B. The Second Amendment is held applicable to the states through the

Fourteenth amendment's Privileges and Immunities clause.

Saenz v. Roe, 526 U.S. 489 (1999)(Stevens, J) is important here as a step toward recognizing the intended original strength of the privileges or immunities clause. The *Saenz* majority followed *U.S. v. Guest*, 383 U.S. 745 (1966), in recognizing the right to travel as protected by that neglected clause of the Fourteenth Amendment. *Saenz* recalled that "Justice Stewart reminded us in Shapiro v. Thompson, 394 U.S. 618, 643 (1969), [that] the right is so important that it is 'assertable against private interference as well as governmental action ... a virtually unconditional personal right, guaranteed by the Constitution ...."'(concurring opinion). The same could be said of the Fourteenth Amendment right of individuals to keep and bear arms.

Because of *Saenz*, the present case presents for this Court a rare opportunity after 130 years to ignore the wrongful legacy of *Slaughter-House* and its progeny. The issue should finally be reached as were the dual constitutional questions in *Loving v. Virginia*, 388 U.S. 1 (1967). In this case we have the explicit right to keep and bear arms, protected by the Second Amendment and the privileges or immunities clause of the Fourteenth Amendment, and specifically mentioned in

the legislative history such as the Freedmen's Bureau Act, overwhelmingly passed by the same Congress that proposed the Fourteenth Amendment. The Supreme Court has so stated in *Heller*. In addition, all of the authorities from varying venues cited in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), cert. denied, 536 U.S. 907 (2002), *Silveira v. Lockyer*, 328 F.3d 567 (9th Cir. 2003) and *Nordyke v. King*, 364 F.3d 1025 (9th 2004) agree, and explain themselves well, as do Story, Blackstone, Rawle, and many others.

In comparison, Senator Saulsbury of Delaware, opposed the Fourteenth Amendment privileges or immunities clause, the Freeman's Bureau, and the Civil Rights Bills since they "deprive the state of their police power, and would nullify the laws of his State which forbade negroes to keep-arms or ammunition." *Flack* at 22, 25, 38.

Senator Trumbull recognized "the right to keep and bear arms was a right all were entitled." *Flack* at 20-22. Senator Trumble was adamant that the "privileges or immunities clause" was necessary to "destroy the discrimination made against the negro in the laws of the Southern States . . . .", citing the reenactment of slave codes prohibiting the right to travel and firearm ownership.

In conclusion, whether through the Due Process or the Privileges and

Immunities clause of the Fourteenth Amendment, the right to keep and bear arms shall not be infringed by the State, as it has in this case.

III. THE DISTRICT COURT ERRED IN TREATING TRIABLE ISSUES OF FACT AS QUESTIONS OF LAW AS TO STANDING TO PRESENT A CLAIM UNDER THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT, WHICH ALSO EMBODIES A FUNDAMENTAL RIGHT TO KEEP AND BEAR ARMS.

There are triable issue of fact as to the Second and Third Causes of Action (Fourteenth Amendment - Equal Protection and First and Fourteenth Amendment-Political Association/Speech].

The order on Summary Judgment at the District Court, however, approaches standing in an atypical awkward way. (CR 169, ER 1) The District Court judge relates standing to the merits, which he also determined incorrectly. The applications of Mehl and Lau are more than adequate for standing and ripeness under decisions of the Supreme Court. The fact is Appellants submitted applications, paid the fee, and were denied equal treatment and access.

The Supreme Court has repeatedly decided important standing cases where the existence of statute or the reasonable possibility of prosecution allows a challenge on the merits for persons adversely affected. *Gratz v. Bollinger*, 539

U.S. 244 (2003)("injury in fact" is the inability to compete on an equal footing in the application process, not the denial of the application), *Thompson v. Western States Medical Center*, 534 U.S. 357 (2002)(pre-enforcement standing found), *Epperson v. Arkansas*, 393 U.S. 97 (1968)(ripeness without enforcement). See also *Ashcroft v. Free Speech Coalition*, 534 U.S. 1389 (2002), on the Amendment adjacent to the Second (Note: "The prospect of crime, by itself, does not justify laws suppressing protected speech." *Id.* at 1399) See Note, *Declaratory Relief in the Criminal Law*, 80 HARV. L. REV. 1490 (1967).

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), is a leading standing case that conflicts with the court below. 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.

The order (CR 169, ER 3) fails to discern the difference in how applications are processed, for example, one Ed Gerber was able to approach the Sheriff directly to obtain his CCW, while others, use simple the word "self defense", or others who do not even have applications on file. The factual issue to be determined is whether the application process is uniformly applied. It is up to the jury to decide if this happened, not the Court.

A. Since the State of California has an absolute banned on both the open carry and concealment of handguns, Plaintiffs right to keep and bear arms has been substantially impacted, and limits their right to self defense and self preservation.

California Penal Code § 12025 prohibits the carrying of a concealed weapon unless an individual applies for, and receives, permission to do so pursuant to California Penal Code § 12050(a)(1)(A), which gives Defendant Sheriff a great amount of discretion in choosing whom should be granted a license to carry a handgun in the State of California. In addition to concealed carry permits, sheriffs has a monopoly on the issuance of permits to carry "loaded and exposed", but only in counties with a population less than 200,000. Likewise, California Penal Code § 12031 prohibits the carrying of any loaded weapon on his or her person or in his or her car.

Thus, by law, the only place one may possess a loaded firearm in California without prior permission is in the home or place of business. Such a state decreed monopolization runs afoul of the Second Amendment. See *District of Columbia V. Heller*, 554 U.S. ___, 128 S.Ct. 2783(2008).

The Court in *Heller* notes, by implication, that though firearms may be regulated in public, a complete ban of carrying or bearing firearms for self-defense

is runs afoul of one of the intended purposes of the Second Amendment - "self defense." The Court made it perfectly that though "concealed" firearms have historically been regulated by the States, as well as possession by felons and the mentally ill, and carrying firearms in sensitive public places, a constructive ban that results in an abrogation of the individual right to self defense is unconstitutional.

Here, Appellants cannot carry a loaded weapon in their car to protect there family on a desolate highway in the Mojave Desert, or through gang infested territories of Oakland, Richmond, Los Angeles and South San Francisco. This a right only bestowed upon the privileged class.

Keeping in mind that the one of the significant purposes of the Fourteenth Amendment was to allow the Freemen to keep and carry arms for self preservation in the South. Had California's laws been in place in the South during reconstruction, then the right to keep and bear arms would have been a nullity for such laws would obviously result in arbitrary and capricious enforcement based upon race (i.e. The Freemen would have been denied CCWs). Why should we think the situation is any different today, except that arbitrariness and capriciousness has evolved from race to status (e.g. political and retired law

enforcement) and economics (e.g. campaign contributions)? Power corrupts; absolute power corrupts absolutely.

In *Heller*, the Supreme Court cites *Nunn v. State*, 1 Ga. 243, 250-251 (1846), as a example whereby a State court banned the conceal carry of weapons, but not the open. The Supreme Court seemed to rely on State Courts interpreting the Second Amendment to gather insight as to what the Framer's thought would constitute permissible regulation of arms. A review of *Heller* leads to the obvious conclusion that a complete ban on both the open and concealed carry of a handgun, combined with an absolutely discretionary licensing scheme, runs afoul of the Second Amendment.

i. Since the State has prevented it citizens from carrying firearms openly, and requires a discretionary license for concealment, the issuance of a license cannot be premised upon a subjective need criteria since a fundamental right is being infringed.

In *Heller* at 128 S.Ct. 2818-2022, and footnote 27, the Supreme Court makes it implicitly clear that the State statute and Defendants' policy for issuance of CCWs must be "narrowly tailored to achieve a compelling governmental interest." See also, *Abrams v. Johnson*, 521 U.S. 74, 82, 117 S.Ct. 1925, 138

L.Ed.2d 285 (1997)

In *Heller* at 128 S.Ct. 2821, the Court had this to say, rejecting an "interest-balancing inquiry":

> Justice BREYER moves on to make a broad jurisprudential point: He criticizes us for declining to establish a level of scrutiny for evaluating Second Amendment restrictions. He proposes, explicitly at least, none of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis), but rather a judge-empowering "interest-balancing inquiry" that "asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." Post, at 2852. After an exhaustive discussion of the arguments for and against gun control, Justice BREYER arrives at his interest-balanced answer: because handgun violence is a problem, because the law is limited to an urban area, and because there were somewhat similar restrictions in the founding period (a false proposition that we have already discussed), the interest-balancing inquiry results in the constitutionality of the handgun ban. QED.
>
> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government-even the Third Branch of Government-the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an "interest-balancing" approach to the prohibition of a peaceful neo-Nazi march through Skokie. See National Socialist Party of America v. Skokie, 432 U.S. 43, 97 S.Ct.

> 2205, 53 L.Ed.2d 96 (1977) (per curiam). The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. Like the First, it is the very product of an interest-balancing by the people-which Justice BREYER would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.
>
> ***
>
> In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. [emphasis added]

In this case, the very enumeration of the right takes out of the hands of government-even the Third Branch of Government-the power to decide on a case-by-case basis who shall be issued a CCW. If there is a licensing scheme in place, it must be equally applied to all citizens, and not just those who happen to be retired California peace officers or friends of the Sheriff.

ii. Plaintiffs have a fundamental right to keep and bear arms, and any licensing scheme infringing that right must be narrowly tailored to meet a compelling government interest.

Here, the licensing scheme challenged gives absolute power to a single licensing official, without any system of checks or balances. As Twomey opined,

"I can state to a degree of reasonable certainty that there is no 'good cause' policy or criteria for issuance or denial of a CCW application, and at a minimum, it is simply arbitrary and capricious with absolutely no sense objectivity or baseline criteria being used." (CR 150, ER 145, ¶153)

"Therefore, it is my expert opinion, based upon a degree of reasonable certainty, that the County of Sacramento Sheriff's Department and then Sheriff Blanas, and now Sheriff McGinniss have absolutely no policy or criteria as to whom is issued a CCW for non-prima facie good cause applications. At best, it is random and capricious with approval more likely to be given to well-known employers, campaign contributors, or those with Departmental affiliations." (CR 150, ER 146, ¶162)

In sum, Appellants presented admissible evidence that established that the CCW laws and its application by the Defendants simply creates a privileged class of citizens who can obtain a CCW. See CR 150, ER 172-3, ¶ 273; ER 173, ¶ 277; ER 177, ¶ 298.

This case must be remanded for trial on the merits.

B. Plaintiff Mehl has standing to challenge Defendants policies since he 1) completed the standardized state application per the instructions, 2) paid the required

fee, and 3) his application was treated differently than others similarly situated.

The District stated in its order of 2/5/2008, that "[t]he evidence shows that Plaintiff Mehl's application was denied not because of any unconstitutional conduct on Defendants' part but instead simply because he never submitted a completed application." (CR 169; ER 10, line 9-12)

First, Twomey's expert opinion absolutely refutes this factual determination (See CR 150, ER 145, ¶153; ER 146, ¶162; ER 171, ¶265; ER 171, ¶ 266; ER 171, ¶267; ER 171, ¶268; ER 171-2, ¶269; ER 172, ¶ 270; ER 172-3, ¶ 273; ER 173, ¶ 277; ER 177, ¶ 298), despite the District Court's refusal to consider it, let alone even mention it in its order.

Mr. Mehl submitted two separate applications, paid his fee, and was denied a CCW. (CR 147, ER 845;See also CR 129-9, ER 56)

Mr. Mehl is not a campaign contributor, nor was he a retired law enforcement officer, nor a person who knew the Sheriff personally. These circumstances, these "deficiencies", in and of themselves, were an immediate and serious impediment to any possibility that Mr. Mehl's application might be approved. Mr. Mehl had followed the written instructions on the form, wherein on

page 2 it states that Section 7 "must be completed in the presence of an official of the licensing agency" and that, the applicant "be prepared to answer these questions [in Section 7] *orally*". And, Section 7 specifically denotes the "details of reason for Applicant desiring a CCW license". Mr. Mehl was waiting to be contacted by the Department, and had not filled out this information.

On March 4, 2004, Mr. Mehl, who, according to written instruction, had been waiting for a Department representative to contact him in order that he might provide his reasoning for a CCW, instead received a form letter. This letter informed him that his application had been denied. The reason for his denial was that he "did not provide convincing evidence that [he] or family members are in any immediate danger associated with everyday course of living as to justify the need to carry a concealed weapon." Incredibly there were additional instructions informing him that if his "circumstances change" he could re-apply after one year. Now aware of his "deficiencies", Mr. Mehl believes that this letter might be a solicitation for the "prerequisite" campaign contribution.

The Court makes note of Chief Denham's letter of August 1, 2002 (ER 83), but makes no mention of the fact that this letter was a "rejection" letter, and not a letter to fill out the application nor does the Court mention the a sticky note

attached to the application. Regardless, the state mandated for require and "investigator" to fill out the form and at least witness the information. Here, there were conflicting instructions, with no reply to Plaintiff's letter marked as (CR129-9, ER 80)

The lower court relied upon the Ninth Circuit's decision in *Madsen v. Boise State Univ.*, 976 F.2d 1219 (9th Cir. 1992). However, that case is light years from the present matter in that Madsen never submitted an application. In this case, Mehl not only submitted an application, but the County cashed his check, and kept the proceeds. Mehl complied with the state's instructions on the form, and the Court never addressed a single issue regarding this very important point.

Further, an un-rebutted expert witness declaration created a triable issue of fact on this point in that Mehl's application was denied for reasons other than those stated by Chief Denham.

C. Plaintiff Lau has standing as *post hoc* reasoning cannot be substituted to defeat standing when there is a triable issue of fact as to the reason why his CCW application was denied, per an unrebuted expert witness declaration.

Here, the Court interjects its own opinion as to who should be granted a CCW. This issue is up to the trier of fact to either accept or reject the proffered

reason for rejection, since there are two: 1) "two many issues" or 2) those contained in Mr. Lau's rejection letter in that he did not prove a compelling need. Declaration of Lok Lau (CR 148, ER 849).

The District Court relied on a single cryptic note: "too many issues". However, the District Court completely ignores that "too many issues" was not the stated reason for rejection. See Declaration of Lok Lau CR 148, ER 849-853) Rather, a letter of rejection stating that Mr. Lau had not shown "good cause" for issuance of a CCW. There is the obvious argument that since this single letter is the only known published *contemporaneous* but rely solely on the memory of those writing them they will not be as accurate as the original documentation.

Apparently, the District Court agrees that Defendants can *just tell* when someone has some psychological or emotional "issues", or is about to commit a crime, or just shouldn't be able to have a gun; and certainly should not be able to have a CCW; it being common knowledge that law enforcement training and experience, such as theirs, is only one rung on the ladder down from a certified psychologist. And they are even able to do it without actually meeting the person. The problem with this concept is that even if one accepts this rather novel idea of the experienced-law-enforcement-officer-as-psychologist, the reviewers did not

further document their unique perceptions anywhere on the application; so we are left to speculate. Moreover, the reviewer's far-fetched abilities to discern-the-problems-via-documentation has nothing to do with the established criteria regarding whether or not a person can be denied or approved for a CCW.

On the form letter Mr. Lau received denying his application for a CCW, he too was advised that, "If your circumstances change and you wish to re-apply you may do so after one year from the date of denial". If Mr. Lau had ever been informed by those reviewing his application that there were "too many issues", perhaps he could be working on these issues in order to get them rectified.

Though contrasting in one aspect, Mr. Lau's application did share something with Mr. Mehl's application; there was nothing written on the application that disqualified him from being approved for a CCW. The applicant clearance questions in Section 2 are answered in a manner similar to everyone who has been granted a CCW permit in Sacramento County.

In sum, there were triable issues of fact, requiring the case to go before a jury.

D. Plaintiffs paid the required fee, and applied for CCWs, and there is a triable issue of fact as to the real reason why such applications were denied in that triable issues of fact clearly indicated that "but for"

the fact that neither were campaign contributors of the Sheriff, the outcome would have been different.

Plaintiffs paid a fee, submitted applications, only to receive a boiler plate rejection letter. (CR 147, ER 845-853). Compare this to the CCW application of David Fite retired business owner, denied by committed but overruled by Sheriff and approved, and signed off by investigatory. (CR 163-2, ER 1169)

Similarly, others were denied a CCW though they submitted detailed reasons, or did not complete section 7. For example, to Exhibit "8" three CCW Application of James Rothery (CR 164-3, ER 1376), Mohammad Ali denied on blank section 7(ER 1387), Cassim Bharoocha denied on blank section 7 (ER 1390), John Brown denied on blank Section 7 (ER 1393), Melissa Jill Gosuico denied though employed by the FBI and Section 7 blank (ER 1403). Pete Halimi approved by Sheriff with investigatory interview (i.e. "Carries cash from business") after denied by committee (ER 1407), Joseph Long denied for wanting protection for making bank deposits and investigator interview (ER1416), Ahmed Mohamed denied even after appeal for cash payment and investigator interview with blank section 7 (ER 1426, 1433), Kermit Schayltz denied at ER 1435, but approved with no investigator interview (ER 1435), Terry Stark denied after

appeal still no section 7 completed though signed off by investigator (ER 1442).

While granting CCWs to his wealthy and influential contributors for the flimsiest of reasons, even in the face of written applications wherein the applicant admits he faces no threat, or wants to protect his property against vandalism, Defendant Blanas has allowed those on the CCW panel that approves or denies CCW permits to deny those who really require the ability to protect themselves; time, after time, after time. (CR 150, ER 117) Twomey Decl. ¶s 82-306.

This idea that the Sheriff never gets involved with the issuance of CCWs, or that there is this strict procedure of review falls to the way side by simply reviewing Twomey Exhibit "G".(CR 154, ER 525) See also (CR 150, ER 117) Twomey Decl. ¶s 89-99.

Take for instance, Jim Rothery, an attorney, who applied no less than three times, exercised the appellate review twice, only be denied each and every time – at total of five times. (CR 149, ER 802) Mr. Lau, a former FBI agent on disability, and since the FBI does not issue CCWs, he is stuck with the local Sheriff determining whether he has a need for a CCW. Mr. Mehl, well, they never even attempted to complete his application per the written instructions. All three of these individuals applied in different ways, all unique, but yet common – common

in that none of them knew Defendant Blanas.

Compare this to obvious friends of Defendant Blanas like Jack Kimmel, Mike Koewler, Ed Gerber, Ernest Martini, Ben Upton, Jim Anderson, Richard Hill, Bob and Patrick Frink, and the list just goes on. (CR 150, ER 152, et seq.) Twomey Decl. ¶s 186, 197-256. After reviewing this evidence, the favoritism becomes glaringly obvious.

Even under the pre-*Heller* decision of *Guillory v. County of Orange*, 731 F.2d 1379 (9th Cir. 1984), wherein this Circuit previously held there was no liberty or property right to a gun permit; a concealed weapons licensing program that is administered arbitrarily so as to unjustly discriminate between similarly situated people may deny equal protection. *Guillory v. County of Orange*, 731 F.2d 1379, 1383 (9th Cir.1984); *Wedges / Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56, 67 (9th Cir.1994).

In *CBS v. Block* (1986) 42 Cal.3d 646, the "good cause data" was deemed critical for the proper sorting out of equal protection violations. However, the District Court judge completely ignored all the evidence produced by Appellants in support of their opposition that clearly show that approved CCW applications were not based upon an criteria, let alone a so-called "good cause" criteria.

As Lt. Twomey (Ret.) states in his declaration (CR 150, ER 117), after reviewing thousands of pages of documents, including approved and denied CCW applications, and as comparison between Plaintiffs' Exhibits "D, E, F, and P" demonstrate, there is no continuity as to who is approved a CCW and who is denied. However, when the applications are compared after adding information from campaign contribution records (Exhibit O), the results are clear – the more money a CCW applicant gives, the greater the chance of an applicant obtaining a CCW. And, if you just happen to own a house with the Sheriff, Defendant Blanas will accept an oral application and bypass the normal protocols for issuance.

The order (ER 5) fails to discern the difference in how applications are processed, for example, one Ed Gerber was able to approach the Sheriff directly to obtain his CCW, while others, use simple the word "self defense", or others who do not even have applications on file. The factual issue to be determined is whether the application process is uniformly applied.

Further, an un-rebutted expert witness declaration created a triable issue of fact on this point in that Mehl's application was denied for reasons other than those stated by Chief Denham.

IV. PLAINTIFFS HAVE A FUNDAMENTAL RIGHT TO

KEEP AND BEAR ARMS, AND ANY LICENSING SCHEME INFRINGING THAT RIGHT MUST BE NARROWLY TAILORED TO MEET A COMPELLING GOVERNMENT INTEREST.

As stated above, the Second and Fourteenth Amendments protect the rights of individual persons to keep and bear arms for personal, family, business and community defense, without arbitrary and discretionary licensing or state-decreed monopolization. This is a case whereby both the State of California and a local Sheriff monopolize the right to keep and bear arms. What this case clearly shows, and why it must be remanded to the District Court for a jury trial on the merits, is that the CCW permit process in California is ripe with inequities, arbitrariness, capriciousness and corruption.

This case must be remanded back to the District Court, with clear direction from this Court, that this case is to be judged under a strict scrutiny standard, as implicitly indicated in *Heller*.

V. THE COURT CONSTRUCTIVELY DENIED PLAINTIFFS OF EVIDENCE WHEN IT FAILED TO COMPLY WITH ITS OWN DISCOVERY ORDER OF MARCH 27, 2007, ORDERING PRODUCTION OF DOCUMENTS IN CAMERA, AND THEN NEVER ISSUING AN ORDER ON WHETHER SUCH DOCUMENTS WERE RELEVANT AND SHOULD BE PRODUCED AND ERROR IS ASSUMED SINCE THERE

IS NO RECORD OF WHAT THE DOCUMENTS EVIDENCED. (CR 95, ER 16)

The District Court denied committed prejudicial error regarding its Order entered on March 27, 2007, whereby it ordered Defendants to produce documents *in camera* relating to officer McAttees arrest of a James Collanfrancesco. (CR 95, ER 16) However, after this order, there was no further action from the District Court indicating that the documents were reviewed, or even produced for inspection by the Court.

The Deposition Sacramento County Detective, Aaron McAtee, was taken whereby he gave very detailed testimony regarding his arrest of a James Collanfrancesco for brandishing a firearm. As it turns out, he had both a Honorary Deputy Sheriff's Badge and CCW issued by Defendants. (See CR 162-3, ER 979) Attached to that deposition, is Exhibit 4, the Collanfrancesco Police Report. (CR 162-8, ER 1107) Detective McAtee provides a detail description in his arrest report commencing at ER 1123, whereby Collanfrancesco admits to the Detective that he obtained his badge and CCW because he gave money to Defendants. (Compare with Exhibit "Q", affidavit of James Colafrancesco. (CR 164-4, ER 1445)).

Twomey, who was familiar with this incident, opined that Detective McAtee was punitively transferred from patrol to the branch jail immediately following his arrest of a campaign supporter of the Sheriff. (CR 150, ER 178-179)

This error is presumed prejudicial. See *Obrey v. Johnson (Obrey I)*, 400 F.3d 691, 699 –701 (9th Cir.2005).

VI. THIS COURT SHOULD REVERSE THE JUDGMENT OF THE DISTRICT COURT AND REMAND FOR FURTHER PROCEEDINGS, INCLUDING AN ASSESSMENT OF REASONABLE INTERIM COUNSEL FEES UNDER 42 U.S.C. §1988 PRIOR TO TRIAL OF THE REMAINING FACTUAL QUESTIONS.

If Appellants prevail in this Court sufficiently on the legal issues set out above, they will have assisted this Circuit in sorting out the law of the Second and Fourteenth Amendments from the past 64 years. As substantially prevailing parties, Petitioners should receive costs, reasonable counsel fees, and appropriate litigation expenses under 42 U.S.C. §1988.

This would fit the requirement from *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980)(per curiam), that: "Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims." Prevailing on the principal questions presented by this appeal would be a

far greater victory than an award of nominal damages, sufficient in *Farrar v. Hobby*, 506 U.S. 103 (1992). *Hensley v. Eckerhart*, 461 U.S. 424 (1983), applies. This Court should order that the fees be assessed before other proceedings below on remand in the district court.

In sum, the Court erred in granting Summary Judgment to defendants and denying it for Plaintiff.

REQUEST FOR ATTORNEY FEES

Pursuant to Ninth Circuit Rule 28-2.3, appellants hereby notify the court of their intention to request attorney fees on appeal, based upon 42 U.S.C. Sec. 1988.

The Ninth Circuit will exercise this discretion when the successful party has conferred a substantial benefit on the public. See United States for Use & Benefit of Reed v. Callahan, 884 F.2d 1180, 1185 (9th Cir. 1989).

CONCLUSION

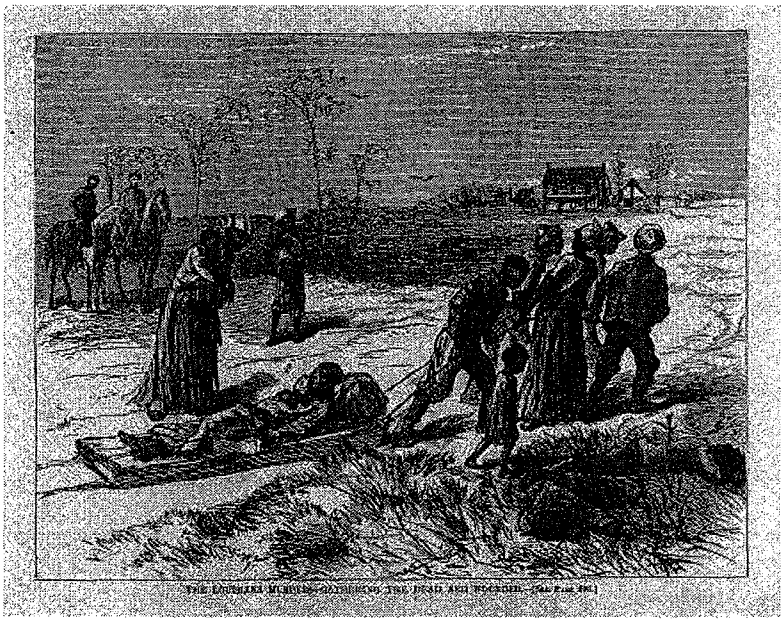
Appellants should have been given an opportunity to litigate their very substantial claims against Defendants in this matter. Instead of treating Appellants' case in a light most favorable to them (as this court has suggested numerous times the district court should do, (see *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir.1990)) the district court was dismissive of

Appellants' claims, giving essentially no reasons for rejecting them out of hand. Therefore, summary judgment and motion to dismiss must be reversed, and the matter remanded to the district court for completion of trial.

Respectfully submitted,

Date: 8/13/08

Gary W. Gorski



GATHERING THE DEAD AND WOUNDED
Harpers, May 10, 1873
(After the Colfax Massacre, before *US* v. *Cruikshank)*

STATEMENT OF RELATED CASES

There are no other related cases.

Respectfully submitted,

Date: 8/13/08

Gary W. Gorski

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CERTIFICATE OF COMPLIANCE CIRCUIT RULE FRAP 32(a)(7)(B)

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Respectfully submitted,

Date: 8/13/08

Gary W. Gorski

Certificate of Service

The undersigned hereby is a U.S. Citizen over 18 years of age and not a party to this action. The foregoing Appellant's Opening Brief in this case was served this date by hand delivery, addressed to:The undersigned hereby is a U.S. Citizen over 18 years of age and not a party to this action. The foregoing Appellant's Opening Brief in this case was served this date by regular U.S. Mail, first class postage prepaid, and delivered to a U.S. Post office box, and the Excerpts of Record were hand delivery, addressed to:

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I declare under penalty of perjury that the foregoing is true and correct, and that this certificate was executed in Sacramento, California on

August 13, 2008

Gary W. Gorski