

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

JUL 08 2013

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DAVID K. MEHL; et al.,

No. 08-15773

Plaintiffs - Appellants,

D.C. No. 2:03-CV-02682-MCE-KJM

and

FRANK FLORES,

MEMORANDUM*

Plaintiff,

v.

LOU BLANAS; et al.,

Defendants - Appellees.

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, Chief District Judge, Presiding

Argued and Submitted December 10, 2012
Pasadena, California

Before: SCHROEDER, ROTH**, and BERZON, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Jane R. Roth, Senior Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation.

California generally prohibits the carrying of concealed firearms, *see Cal.* Penal Code § 25400, but provides for county sheriffs to license individuals to carry concealed firearms pursuant to certain requirements, *see id.* §§ 26150 *et seq.*¹ During the tenure of former Sheriff Lou Blanas, plaintiffs unsuccessfully applied to the Sacramento County Sheriff's Department for concealed-carry licenses. They contend that Sacramento County's implementation of the California concealed-carry licensing scheme, as applied to them, violated the Equal Protection Clause of the Fourteenth Amendment.²

1. Plaintiff Mehl lacks standing to challenge Sacramento County's concealed-carry policies, because he failed fully to complete the county's application process as directed, even after he was informed of the deficiencies. "[A] plaintiff lacks standing to challenge a rule or policy to which he has not submitted himself by actually applying for the desired benefit." *Madsen v. Boise*

¹ At the time this appeal was filed, the relevant provisions were codified at Cal. Penal Code § 12025 and § 12050 *et seq.* Pursuant to the Deadly Weapons Recodification Act of 2010, the provisions were recodified effective January 1, 2012. *See Cal. Penal Code § 16005.* The recodification was not "intended to substantively change the law relating to deadly weapons." *Id.* We, therefore, cite throughout to the recodified Penal Code.

² At oral argument, plaintiffs clarified that they are not challenging California's concealed-carry ban or licensing scheme as violative of the Second Amendment. Plaintiffs' counsel stated: "This is more of an equal protection case. But the Second Amendment issue comes into play because it involves a fundamental right under the Equal Protection Clause."

State Univ., 976 F.2d 1219, 1220 (9th Cir. 1992) (per curiam). We, therefore, affirm the district court’s grant of summary judgment in favor of the defendants as to all of Mehl’s claims.

2. Unlike Mehl, plaintiff Lau did complete and submit the concealed-carry license application form. He therefore does have standing with regard to his contention that the Sheriff’s Department impermissibly discriminated by issuing concealed-carry licenses to Blanas’s political supporters while denying them to non-supporters.

Lau argues that a strict scrutiny standard applies to equal protection claims concerning the right to carry firearms, relying on *District of Columbia v. Heller*, 554 U.S. 570 (2008), as establishing that right as fundamental. *See Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (“[E]qual protection analysis requires strict scrutiny . . . when the classification impermissibly interferes with the exercise of a fundamental right.”). Even if Lau is correct as to the level of scrutiny — which we do not decide — viewing the evidence in the light most favorable to Lau as the nonmoving party, there is no genuine issue for trial on his claims. *See Balint v. Carson City, Nev.*, 180 F.3d 1047, 1054 (9th Cir. 1999) (en banc).

For “state action to trigger equal protection review at all, that action must treat similarly situated persons disparately.” *Silveira v. Lockyer*, 312 F.3d 1052,

1088 (9th Cir. 2002), *abrogated on other grounds by Heller*, 554 U.S. 570.

Although Lau offered evidence that some supporters of Blanas received concealed-carry licenses, he did not present evidence that applications of similarly situated non-supporters were routinely rejected. To the contrary, the record evidence shows that over 200 non-contributors received licenses during Blanas's tenure, while several Blanas donors had their applications denied or, when they made inquiries to Blanas directly, were told they must apply through the regular application process.

Nor is Lau's own application a useful comparison. Lau stated in his application that he needed a concealed-carry license due to lingering dangers from his services as an FBI agent. But Lau also submitted documents to the Sheriff's Department in which the FBI stated that it was "not aware" of any lingering dangers to Lau's safety. Also, the committee that reviewed Lau's application unanimously agreed to deny his application and noted that he had "too many issues," an assessment with support in the record concerning problems during his FBI career and his subsequent disability status. Lau did not present any evidence that similarly situated Blanas supporters — i.e., applicants whose own application materials included third-party statements negating their purported reasons for

needing to carry a concealed firearm *and* a substantive basis for rejecting the application — received concealed-carry licenses.

3. Lau also maintains that Sacramento County impermissibly discriminated in denying him a concealed-carry license because, under the retired-officer exception to the concealed-carry licensing requirement, *see Cal. Penal Code § 25450*, honorably retired California peace officers may carry concealed firearms without a license. As to this issue, Lau lacks standing, as he does not explain how he has suffered any “injury in fact” as a result of that exception. *See United States v. City of Arcata*, 629 F.3d 986, 989 (9th Cir. 2010). Lau is not seeking to invalidate the concealed-carry licensing requirement itself, and there is nothing in the record to suggest that the decision on Lau’s licensing application would have been any different had there been no retired officer exception.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See Advisory Note to 9th Cir. R. 40-1* (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - West Publishing Company; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Kathy Blesener, Senior Editor);
 - and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

[Redacted] v. [Redacted] 9th Cir. No. [Redacted]

The Clerk is requested to tax the following costs against: [Redacted]

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record	[Redacted]	[Redacted]	\$ [Redacted]	\$ [Redacted]	[Redacted]	[Redacted]	\$ [Redacted]	\$ [Redacted]
Opening Brief	[Redacted]	[Redacted]	\$ [Redacted]	\$ [Redacted]	[Redacted]	[Redacted]	\$ [Redacted]	\$ [Redacted]
Answering Brief	[Redacted]	[Redacted]	\$ [Redacted]	\$ [Redacted]	[Redacted]	[Redacted]	\$ [Redacted]	\$ [Redacted]
Reply Brief	[Redacted]	[Redacted]	\$ [Redacted]	\$ [Redacted]	[Redacted]	[Redacted]	\$ [Redacted]	\$ [Redacted]
Other**	[Redacted]	[Redacted]	\$ [Redacted]	\$ [Redacted]	[Redacted]	[Redacted]	\$ [Redacted]	\$ [Redacted]
TOTAL:				\$ [Redacted]	TOTAL:			

* Costs per page may not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Form 10. Bill of Costs - *Continued*

I, [REDACTED], swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature [REDACTED]

("s/" plus attorney's name if submitted electronically)

Date [REDACTED]

Name of Counsel: [REDACTED]

Attorney for: [REDACTED]

(To Be Completed by the Clerk)

Date [REDACTED]

Costs are taxed in the amount of \$ [REDACTED]

Clerk of Court

By: [REDACTED], Deputy Clerk