T. PETER PIERCE (Bar No. 160408)
ppierce@rwglaw.com
LISA BOND (Bar No. 172342)
lbond@rwglaw.com
AARON C. O'DELL (Bar No. 281851)
ao'dell@rwglaw.com
RICHARDS, WATSON & GERSHON
A Professional Corporation
355 South Grand Avenue, 40th Floor
Los Angeles, California 90071-3101
Telephone: 213.626.8484
Facsimile: 213.626.0078

Attorneys for Defendants
CITY OF REDONDO BEACH, JOSEPH LEONARDI and TODD HEYWOOD

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHARLES NICHOLS, Plaintiff, vs. KAMALA D. HARRIS, Attorney General, in her official capacity as Attorney General of California, CITY OF REDONDO BEACH, CITY OF REDONDO BEACH POLICE CHIEF JOSEPH LEONARDI, OFFICER TODD HEYWOOD and DOES 1 to 10, Defendants.	Case No. CV-11-9916 SJO (SS) **REDONDO BEACH DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT OR, IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT** **[EVIDENTIARY OBJECTIONS FILED CONCURRENTLY HEREWITH]** Magistrate: Hon. Suzanne H. Segal Date: NA Time: NA Ctrm: 23 Action Filed: November 30, 2011

Defendants City of Redondo Beach, City of Redondo Beach Police Chief Joseph Leonardi, and Todd Heywood (collectively "Redondo Beach Defendants") hereby submit this reply in support of their motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6), or, alternatively, motion for a more definite statement pursuant to Federal Rule of Civil Procedure 12(e).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont.)

Page(s)

Statutes

TABLE OF AUTHORITIES (cont.)

Page(s)

Other Authorities

REPLY IN SUPPORT OF MOTION TO DISMISS

I.

INTRODUCTION

The opposition blatantly misrepresents the law as it pertains to *Younger* abstention. This case represents a classic case for mandatory *Younger* abstention so as to avoid federal court interference with the ongoing state court criminal prosecution of Charles Nichols ("Plaintiff") by the City of Redondo Beach ("City"). Accordingly, the proper course of action would be to (1) dismiss Plaintiff's first claim for declaratory and injunctive relief; (2) stay the second claim for relief for damages as to the City pending resolution of the state court criminal proceedings; and (3) dismiss the second claim for relief for damages as to the individual police officers because they enjoy qualified immunity.

Plaintiff's opposition does not refute the Redondo Beach Defendants' argument that Plaintiff lacks standing as to the first and second claims for relief, the only claims asserted against the Redondo Beach Defendants.

Plaintiff's opposition further fails to demonstrate that Plaintiff has alleged sufficient facts to state claims for relief as to the Redondo Beach Defendants.

II.

ARGUMENT

A. This Court Should Abstain from Exercising Jurisdiction Over this Matter Pursuant to *Younger*

Plaintiff advances four arguments for the notion that the *Younger* abstention doctrine, as stated by the United States Supreme Court in *Younger v. Harris,* 401 U.S. 37 (1971), should not apply in this case. Plaintiff incorrectly posits that (1) *Younger* abstention is not mandatory; (2) this action is beyond the "embryonic stage" outlined in *Doran v. Salem Inn, Inc.*; (3) the third prong of the *Younger* abstention test has not been satisfied; and (4) this case represents an exception to the *Younger* abstention test. These allegations will be addressed in order.

1. *Younger* Abstention is Mandatory When the Test is Met

Plaintiff asserts that the *Younger* abstention doctrine is not mandatory. The Ninth Circuit, among many other Circuit courts, disagrees. *See Canatella v. State of California*, 404 F.3d 1106, 1113 (9th Cir. 2005) ("We recognize that we generally regard both *Younger* abstention and intervention as of right as mandatory doctrines. District courts applying *Younger* 'must exercise jurisdiction except when specific legal standards are met, and may not exercise jurisdiction when those standards are met; there is no discretion vested in the district courts to do otherwise. [Citation.]'") (emphasis added); *Parent v. New York*, 2012 U.S. App. LEXIS 12267, *5 - *6 (2nd Cir. 2012); *Walck v. Edmondson*, 472 F.3d 1227, 1223 (10th Cir. 2007); *Nommensen v. Lundquist*, 630 F.Supp.2d 994, 999 (2009); *Coleman v. Ahlin*, 2012 U.S. Dist. LEXIS 44052, *5 (N.D. Cal. 2012).

Plaintiff cites *Doran v. Salem Inn, Inc.* in support of his notion that *Younger* abstention is not mandatory, even where there are ongoing state judicial proceedings. Plaintiff's Opposition to Motion to Dismiss First Amended Complaint ("Opp."), 1:22-25 (citing *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 929 (1975)). This is an incorrect characterization of the law as stated by the Court in *Doran*.

The Court in *Doran* heard a case in which three corporate appellees brought an action under 42 U.S.C. § 1983 challenging a Nassau County, New York ordinance making it unlawful for waitresses, barmaids, and entertainers to appear in their establishments with breasts uncovered. *Doran*, 422 U.S. at 924. The appellees argued that the ordinance violated their rights under the First and Fourteenth Amendments to the United States Constitution. *Id.* One of the appellees, M & L Restaurant ("M&L"), resumed its presentation of topless dancing the day after the appellees' federal complaint was filed and after their application for a temporary restraining order and preliminary injunction was denied. *Id.* at 925. On that day, M&L was served with criminal summonses in state court based on the violation of

///

the Nassau County ordinance. *Id.* The other two appellees did not resume the presentation of topless entertainment and were not issued criminal summonses. *Id.*

Justice Rehnquist, writing for the 9-0 majority, stated, "[w]e do not agree with the Court of Appeals, therefore, that all three plaintiffs should automatically be thrown into the same hopper for *Younger* purposes, and should thereby each be entitled to injunctive relief." *Doran*, 422 U.S. at 928. Rather, the Court decided that each of the respondents should be placed in the position as if that respondent stood alone. *Id.* at 929. Upon making this determination, the Court then stated that "[w]hen the criminal summonses issued against M&L on the days immediately following the filing of the federal complaint, the federal litigation was in an embryonic stage and no contested matter had been decided. In this posture, M&L's prayer for injunction is squarely governed by *Younger*." *Id.* Accordingly, because M&L violated the ordinance and was issued criminal summonses in state court, *Younger* abstention applied. The Court continued, "absent a showing of *Younger*'s special circumstances, even though the state prosecution was commenced the day following the filing of the federal complaint" M&L was subject to *Younger* abstention. *Id.* "Having violated the ordinance, rather than awaiting the normal development of its federal lawsuit, M&L cannot now be heard to complain that its constitutional contentions are being resolved in a state court." *Id.* Therefore, the Court singled out the M&L appellee for *Younger* abstention because it violated the Nassau County ordinance and state court proceedings were commenced. This is the exact opposite proposition for which Plaintiff cites the *Doran* decision.

Here, Plaintiff is situated almost exactly as M&L was situated in the *Doran* case. Plaintiff filed his original federal complaint in this action on November 30, 2011. This Court dismissed said complaint without prejudice as to the Redondo Beach Defendants and with prejudice as to the Redondo Beach Police Department on May 7, 2012. (Order Accepting Findings, Conclusions and Recommendations of United States Magistrate Judge, 2:14-22, May 7, 2012.) On May 21, 2012, Plaintiff

appeared in public within the Redondo Beach city limits carrying an unloaded firearm. Upon Plaintiff entering a City of Redondo Beach public park, police officers seized Plaintiff's firearm and informed him that he was violating City law. On May 30, 2012, Plaintiff filed a First Amended Complaint in this action. Shortly thereafter, prosecutors for the City filed misdemeanor charges against Plaintiff for violation of the City's Ordinance challenged in this lawsuit, based on his action on May 21, 2012. Accordingly, the state court criminal proceeding against Plaintiff began shortly after the filing of the First Amended Complaint. Like the M&L appellee in *Doran*, Plaintiff should not be permitted to avail himself of the jurisdiction of the federal court by violating the very laws of which he complains. Also like the M&L appellee in *Doran*, the *Younger* abstention doctrine should be applied in this case.

2. This Action Is in the Embryonic Stage and *Younger* Abstention Applies

Plaintiff next contends that *Younger* abstention does not apply if the federal action has proceeded past the "embryonic stage" and where substantive rulings or findings have been made. (Opp. 1:19-21.) The present action has not proceeded beyond the "embryonic stage" and, as such, *Younger* abstention applies here.

Plaintiff again cites *Doran v. Salem Inn, Inc.* as "concluding that 'a federal court action in which a preliminary injunction is granted has proceeded well beyond the 'embryonic stage.'" (Opp. 2:1-3 [citing *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 929 (1975)].) This assertion is, once again, a misrepresentation of the law as stated in *Doran*. First, the Court in *Doran* was not convinced that the ruling on the preliminary injunction was a decision on the merits of the case therein. "We also are less than completely certain that the Court of Appeals did in fact hold [the Nassau County ordinance] to be unconstitutional, since it considered the merits only for the purpose of ruling on the propriety of the preliminary injunctive relief." *Doran*, 422 U.S. at 927. The Supreme Court did not resolve this issue because it had been

neither briefed nor argued. *Id.* Therefore, despite a ruling on the preliminary injunction by the district court, the Supreme Court was uncertain that a decision on the merits had actually been reached.

The *Doran* decision goes even further. The Court stated "[w]hen the criminal summonses issued against M&L on the days immediately following the filing of the federal complaint, the federal litigation was in an embryonic stage and no contested matter had been decided." *Id.* at 929 (emphasis added). The criminal summonses in the *Doran* case were issued after the filing of the federal complaint and, more importantly, after their application for a temporary restraining order and preliminary injunction was denied by the district court. Accordingly, the Court explicitly held that the federal litigation was in the "embryonic stage" and "no contested matter had been decided" after the district court decided the preliminary injunction issue. Therefore, by implication, a district court's decision regarding a preliminary injunction does not bring federal litigation beyond the embryonic stage.

A motion to dismiss is less a "decision on the merits" than a decision regarding a preliminary injunction. For example, "[w]hen ruling on a motion to dismiss, [a court] may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Colony Cove Properties, LLC v. City of Carson*, 640 F.3d 948, 955 (9th Cir. 2011) (internal quotation marks omitted). There is no evidentiary hearing or decision on the merits of the claims for relief in the complaint beyond facial plausibility. Beyond this, the court must accept all factual allegations as true even if doubtful. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). Accordingly, a court ruling on a 12(b)(6) motion to dismiss does not even address, much less issue a ruling, regarding the merits of the causes of action beyond facial plausibility.

Similarly, *Adultworld Bookstore v. City of Fresno*, relied upon by Plaintiff for the proposition that *Younger* abstention is not required if state criminal proceedings began after the district court had conducted an 'extended evidentiary hearing on the

question of a preliminary injunction" is inapplicable to the facts of this case. (Opp. 2:3-6 [citing *Adultworld Bookstore v. City of Fresno*, 758 F.2d 1348, 1350-51 (9th Cir. 1985)].)

Here, there has been no "extended evidentiary hearing" and the action is still in the "embryonic stage" as defined by the Supreme Court in *Doran*. As such, a motion to dismiss cannot bring federal litigation beyond the "embryonic stage" quoted by Plaintiff. Thus, this action remains in the "embryonic stage" and Plaintiff's constitutional challenges are subject to the mandatory provisions of *Younger* abstention.

Plaintiff's First Amended Complaint is the operative complaint. Plaintiff was given leave to file a First Amended Complaint following this Court's granting of the Redondo Beach Defendants' motion to dismiss. The Redondo Beach Defendants have now moved for dismissal pursuant to the Federal Rules of Civil Procedure 12(b)(6) for a second time. This second motion to dismiss is the subject of Plaintiff's opposition and this reply. Accordingly, this case is in the "embryonic stage" and this Court should apply the mandatory provisions of the *Younger* abstention doctrine. Further, Plaintiff's statement that this case is "ready to go to trial" (Opp., 2:18) is disingenuous in light of the fact that no party has answered and motions to dismiss are still pending. Based on the fact that Plaintiff has failed to identify a single substantive ruling made by this Court, *Younger* abstention should apply.

3. The Third Prong of the *Younger* Abstention Test Has Been Satisfied

Plaintiff's third contention is that the third prong of the *Younger* abstention test has not been satisfied. The third prong of the *Younger* test is satisfied because Plaintiff will be able to raise his constitutional challenges over which Redondo Beach has any control in the state court criminal proceeding.

The Supreme Court stated in *Middlesex County Ethics Commission v. Garden State Bar Association*, "[w]here vital state interests are involved, a federal court should abstain 'unless state law clearly bars the interposition of the constitutional

claims.' *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982) (quoting *Moore v. Sims*, 442 U.S. 415, 426 [1979]). Moreover, "[the] . . . pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims. . . ." *Middlesex*, 457 U.S. at 432 (quoting *Moore*, 442 U.S. at 430).

A plaintiff's ability to bring constitutional claims in *any* forum is contingent on said plaintiff having standing. Article III, section 2, of the United States Constitution restricts the federal judicial power to the resolution of "cases" and "controversies." U.S. Const., art. III, § 2. The case-or-controversy requirement is satisfied only where a plaintiff has standing. See *Spring Communications Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 273 (2008). In order to establish standing under Article III, a plaintiff must show that (1) he "has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011).

Here, the first and second claims for relief in Plaintiff's First Amended Complaint are the only claims directed against the Redondo Beach Defendants. Plaintiff will have the opportunity in the state court criminal proceeding to advance constitutional challenges to the Redondo Beach Municipal Code under which Plaintiff has been charged. This is not at issue. Plaintiff explained, "[i]n short, if this Court were to dismiss [Plaintiff's] equitable claims with prejudice, [Plaintiff] would lose his ability to raise his Constitutional claims regarding California Penal Code §§ 25850 and 26155 forever." (Opp., 3:11-13.) Plaintiff has not been charged by the Redondo Beach Defendants with a violation of California Penal Code section 25850 or 26155. (Plaintiff's Request for Judicial Notice in Support of Opp., Ex. 1.) The state court criminal proceedings therefore adequately establish a forum for Plaintiff

to bring constitutional challenges to the Redondo Beach Municipal Code. It is of no consequence that Plaintiff has chosen to include separate claims for relief in the same complaint not directed at the Redondo Beach Defendants. Therefore, the third prong of the *Younger* abstention test is satisfied and the *Younger* abstention doctrine applies to the claims against the Redondo Beach Defendants.

4. The Narrow Exception to *Younger* Abstention Cited by Plaintiff Does Not Apply Here

Finally, Plaintiff claims that *Younger* abstention is inappropriate here – regardless of the *Younger* abstention test – because Redondo Beach Municipal Code section 4-35.20 is "flagrantly and patently violative of constitutional prohibitions." (Opp., 3:21-28 [citing *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975); *World Famous Drinking Emporium, Inc. v. City of Tempe*, 820 F.2d 1079, 1082 (9th Cir. 1987)].)

Exceptions to the *Younger* abstention doctrine are extremely narrow. See *Zalman v. Armstrong*, 802 F.2d 199, 205, fn. 8 (6th Cir. 1986) ("According to one commentator: Although later Supreme Court decisions have not shed a great deal of additional light on the exceptions to *Younger*, what the Court has done confirms that the Court is right when it describes them as 'these narrow exceptions.' [17. C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4255 (1978 & Supp. 1986)].") The Supreme Court reemphasized the rarity of these exceptions, noting that *Younger* applies "'except in the very unusual situation that an injunction is necessary to prevent great and immediate irreparable injury.'" *Id.* (quoting *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 626 [1986])(emphasis added). The *Younger* exception for statutes that are "flagrantly and patently violative" of express constitutional prohibitions appears to be even narrower than the bad faith or harassment exception. See *Zalman*, 802 F.2d at 199 (citing *Moore v. Sims*, 422 U.S. 415 [1979]; *Trainor v. Hernandez*, 431 U.S. 434 [1977]). In fact, to date as far as we are aware, the Supreme Court has *never* found

this exception to be applicable since the Court first announced the exception in *Younger*. *Id.* Plaintiff's attempts to invoke this very narrow exception fail.

First, Plaintiff cites *Huffman v. Pursue* for the narrow opinion that a federal court may hear and decide federal constitutional questions despite satisfaction of the *Younger* abstention test where a statute is flagrantly and patently violative of constitutional prohibitions. (Opp., 3:21-28.) The full quote from the *Huffman* decision reads: "*Younger*, and its civil counterpart which we apply today, do of course allow intervention in those cases where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith, or where the challenged statute is 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply to it.'" *Huffman*, 420 U.S. at 611 (internal citations omitted in original). In *Huffman*, the District Court did not rule on the *Younger* issue and, thus, "apparently has not considered whether its intervention was justified by one of these narrow exceptions." *Id.*

The Supreme Court went even further. "Even if the District Court's opinion can be interpreted as a *sub silentio* determination that the case fits within the exception for statutes which are 'flagrantly and patently violative of express constitutional prohibitions,' such a characterization of the statute [in question] is <u>not possible</u> after the subsequent decision of the Supreme Court of Ohio in *State ex rel. Ewing v. A Motion Picture Film Entitled "Without a Stitch,"* 37 Ohio St.2d 95 (1974). That case narrowly construed the nuisance statute [in question], with a view to avoiding the constitutional difficulties which concerned the District Court." *Id.* at 611-12. The Court in *Huffman* remanded to the District Court for consideration of whether irreparable injury can be shown of such a nature that the District Court would be permitted to assume jurisdiction under an exception to the *Younger* abstention doctrine. *Id.* at 612. Accordingly, even the *Huffman* decision advanced

///

by Plaintiff does not stand for application of the extremely narrow "patently violative" *Younger* exception.

Second, Plaintiff cites *World Famous Drinking Emporium, Inc. v. City of Tempe* for the same "patently violative" exception to *Younger* abstention. The Ninth Circuit in *World Famous* stated, "World Famous has failed to demonstrate how review of the adverse judgments in the state courts would not have permitted an opportunity to litigate its constitutional claims. That World Famous failed to avail itself of the opportunity to litigate its constitutional claim in the state forum, does not demonstrate that the state forum did not provide an opportunity to litigate that claim." *World Famous*, 820 F.2d at 1083. Further, the court ruled that the record revealed no harassment or bad faith on the part of the city in brining the criminal proceedings which would make abstention improper. *Id.* In fact, nowhere on the page cited by Plaintiff – page 1082 – or anywhere else in the *World Famous* decision, is the notion of the "patently violative" exception ever mentioned. Accordingly, Plaintiff failed to provide a single example of an application of this extremely narrow "patently violative" exception to the *Younger* abstention doctrine.

As stated in the previous section, Plaintiff will have the opportunity to address constitutional challenges to the Redondo Beach Municipal Code in the state court criminal proceeding. The California state court is the appropriate forum for said constitutional challenge because the mandatory provisions of the *Younger* abstention doctrine apply here. Finally, Plaintiff has failed to show how Redondo Beach Municipal Code section 4-35.20 is "patently violative" of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply to it.

Therefore, each prong of the *Younger* abstention test has been satisfied in this case. Further, no narrow exception to the application of the *Younger* abstention doctrine has been adequately shown. Accordingly, this Court should apply the *Younger* abstention doctrine to this case.

B. Chief Leonardi, Heywood and Officer Doe Are Entitled to Qualified Immunity Despite the Contentions in the Opposition

In his opposition, Plaintiff argues that the individual Redondo Beach police officers should not be afforded qualified immunity because the Second Amendment to the United States Constitution has been in existence for well over two hundred years. (Opp. 5:17-21.) Yet, Plaintiff has failed to cite any case whatsoever that would stand for the proposition that the Second Amendment protects the unlocked, open carrying of an unloaded rifle with ammunition at hand in a public park – because no such authority exists. As stated by the Court in *Heller*, "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *District of Columbia v. Heller*, 554 U.S. 570, 626-627 (2008). "Like most rights, the right secured by the Second Amendment is not unlimited. … commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id. at 627*(citations omitted). The individual Redondo Beach police officers enjoy qualified immunity from Plaintiff's damages claims because there is no existing precedent placing "beyond debate" the question of whether the ordinance the officers were enforcing violates the Second Amendment. *Ashcroft v. al-Kidd*, 2011 U.S. LEXIS 4021, 131 S. Ct. 2074, 2083 (2011). Accordingly, the doctrine of qualified immunity protects the officers "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

///

///

C. Plaintiff Lacks Standing to Bring This Lawsuit

Plaintiff's original complaint was dismissed for lack of standing. Plaintiff's staged antics causing Redondo Beach police officers to seize his firearm do not confer standing.

The Magistrate Judge, in granting the prior motion to dismiss determined "Plaintiff's injury, as currently alleged, would not be redressed by a favorable decision against the [Redondo Beach Defendants]. Even if the Court could construe enforcement of state law by the [Redondo Beach Defendants] as a municipal 'policy,' enjoining the [Redondo Beach Defendants] from implementing that 'policy' would not provide any real relief if the provisions of section 25850 remain intact." (Report and Recommendation of the United States Magistrate Judge, 26:17-22, April 5, 2012.)

Accordingly, Plaintiff still lacks standing because Plaintiff's alleged injury would not be redressed by a favorable decision against the Redondo Beach Defendants. *Maya*, 658 F.3d at 1067.

D. Plaintiff Has Failed to Allege Facts Sufficient to State a Claim for Relief

Plaintiff's opposition spends much time disagreeing with the United States Supreme Court's interpretation of the Second Amendment. (Opp. 7-8.) Yet, nowhere in the opposition does Plaintiff point to any facts alleged in the First Amended Complaint to address the deficiencies discussed in the moving papers. For example, as argued in the moving papers, a plaintiff asserting an Equal Protection claim must establish "that the law is applied in a discriminatory manner or imposes different burdens on different classes of people." *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995). "Once the plaintiff establishes governmental classification, it is necessary to identify a 'similarly situated' class against which the plaintiff's class can be compared." *Freeman*, 68 F.3d at 1187.

As pointed out in the moving papers, Plaintiff has failed to allege that the law in question was applied in a discriminatory manner or imposes different burdens on

different classes of people. Plaintiff has failed to allege government classification or any similarly situated class that may be compared to the class to which Plaintiff contends he belongs. Plaintiff has failed to allege he has been treated differently than any similarly situated group. Accordingly, the First Amended Complaint fails to properly allege an Equal Protection claim.

Plaintiff did not respond at all to this argument pertaining to Equal Protection and has thus waived it. As a result, the first and second claims for relief should be dismissed for failure to state claims upon which relief may be granted.

E. The First Amended Complaint Fails to Comply with Federal Rule of Civil Procedure 10(b), Making It Subject to a Motion for More Definite Statement

In the opposition, Plaintiff has failed to address the requirements of Federal Rule of Civil Procedure 10(b) or the argument that where several separate claims for relief are jumbled together in a "shotgun pleading" (no pun intended), a motion for more definite statement may be used to require pleading separate counts under Rule 10(b). *Anderson v. District Bd. of Trustees of Central Florida Comm. College*, 77 F. 3d 364, 366 (11th Cir. 1996). Instead, Plaintiff responds that the First Amended Complaint must be adequate because "the Defendants used its allegations to draft a rather lengthy Motion to Dismiss." (Opp. 10:3-5.)

The first and second claims for relief combine multiple claims (Second, Fourth, Fourteenth Amendments, 42 U.S.C. §§1983, 1988) all in a single claim for relief in violation of Rule 10(b). Pleading in this manner will potentially deprive the Redondo Beach Defendants from being able to file a motion for partial summary judgment as to the individual claims bound up within one claim for relief. Therefore, to the extent the Court does not grant the motion to dismiss without leave to amend, or does not abstain from hearing the claims against the Redondo Beach Defendants, the Court should order a more definite statement as to the jumbled first and second

///

claims for relief and require the factual allegations that pertain to each such claim to be set forth under the relevant claim.

III.

CONCLUSION

For all of the foregoing reasons, the Redondo Beach Defendants' motion to dismiss should be granted. Alternatively, to the extent the Court does not dismiss the claims without leave to amend, the Court should abstain from hearing the claims against the Redondo Beach Defendants. Otherwise, the Court should require Plaintiff to make a more definite statement by separating out the combined claims.

Dated: July 20, 2012

RICHARDS, WATSON & GERSHON
A Professional Corporation
T. PETER PIERCE
LISA BOND
AARON C. O'DELL

By: _____
LISA BOND
Attorneys for Defendants
CITY OF REDONDO BEACH, JOSEPH LEONARDI and TODD HEYWOOD