

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THERESE MARIE PIZZO,
Plaintiff,

v.

CITY & COUNTY OF SAN FRANCISCO;
KAMALA HARRIS, in her official
capacity as California Attorney
General; EDWIN LEE, in his
official capacity as Mayor of the
City & County of San Francisco;
GREG SUHR, in his official
capacity as San Francisco Police
Chief; and ROSS MIRKARIMI, in his
official capacity as the Sheriff
of San Francisco,

Defendants.

No. C 09-4493 CW

ORDER DENYING
PLAINTIFF'S MOTION
FOR SUMMARY
JUDGMENT (Docket
No. 60) AND
GRANTING
DEFENDANTS' CROSS-
MOTIONS FOR
SUMMARY JUDGMENT
(Docket Nos. 71
and 90)

United States District Court
For the Northern District of California

Plaintiff Therese Marie Pizzo moves for summary judgment on her claims against Defendants Edwin Lee in his official capacity as the Mayor of the City and County of San Francisco, Greg Suhr in his official capacity as the San Francisco Police Chief, Ross Mirkarimi in his official capacity as the San Francisco Sheriff (collectively, the City) and Kamala Harris in her official capacity as California Attorney General.¹ Defendants oppose Plaintiff's motion and have filed cross-motions for summary judgment, which Plaintiff has opposed. Amicus Legal Community Against Violence (LCAV) has filed a brief in support of Defendants' cross-motions. Amicus National Rifle Association,

¹ Pursuant to Federal Rule of Civil Procedure 25(d), the Court SUBSTITUTES Sheriff Mirkarimi in place of former Acting Sheriff Vicki Hennessy.

1 Inc. (NRA) has filed a brief supporting none of the parties.
2 Having considered the papers filed by the parties and the amici,
3 and their arguments at the hearing on these motions, the Court
4 GRANTS Defendants' motions and DENIES Plaintiff's motion.

5 BACKGROUND

6 I. Regulation of firearms and ammunition in San Francisco

7 The carrying of weapons, including firearms, in California is
8 governed by the Deadly Weapons Recodification Act of 2010. Cal.
9 Penal Code § 16000, et seq. This law, along with several other
10 state statutes, prohibit certain categories of people from
11 possessing firearms, including people convicted of certain crimes,
12 people subject to a temporary restraining order and people
13 receiving inpatient mental health treatment and determined to be a
14 danger to themselves or others. See, e.g., Cal. Penal Code
15 §§ 29800(a) (persons convicted of certain felonies or addicted to
16 narcotic drugs), 29825 (persons subject to a protective order or
17 temporary restraining order); Cal. Wel. & Inst. Code § 8100(a)
18 (certain patients receiving mental health treatment). For people
19 who do not fall into these excluded categories, state law
20 provides,

21 No permit or license to purchase, own, possess, keep, or
22 carry, either openly or concealed, shall be required of
23 any citizen of the United States or legal resident over
24 the age of 18 years who resides or is temporarily within
25 this state, . . . to purchase, own, possess, keep, or
26 carry, either openly or concealed, a handgun within the
27 citizen's or legal resident's place of residence, place
28 of business, or on private property owned or lawfully
possessed by the citizen or legal resident.

Cal. Penal Code § 25605(b).

Although state law does not restrict the open or concealed
possession of a firearm on private property, various state laws

1 restrict the carrying of firearms in public. State law generally
2 prohibits carrying a concealed weapon in public without a license.
3 Cal. Penal Code §§ 25400, 25655. State law also generally
4 prohibits carrying a loaded firearm in public. Cal. Penal Code
5 § 25850. There are a number of exceptions to this prohibition of
6 possession of a loaded firearm. For example, it does not prohibit
7 "any person from having a loaded weapon, if it is otherwise
8 lawful, at the person's place of residence, including any
9 temporary residence or campsite." Cal. Penal Code § 26055. It
10 also does not apply to, among others, individuals with a license
11 to carry a concealed weapon or people who reasonably believe that
12 either they or their property are in immediate, grave danger and
13 that carrying a weapon is necessary for the preservation of their
14 person or property. See Cal. Penal Code §§ 26010, 26045. State
15 law also generally restricts the open carrying of an unloaded
16 firearm in public. Cal. Penal Code § 26350(a). This prohibition
17 also has exceptions, including for holders of a license to carry
18 concealed weapons and for individuals in a residence or place of
19 business or on private property, if done with the permission of
20 the owner or lawful possessor. Cal. Penal Code §§ 26362, 26383.

21 The City and County of San Francisco also has ordinances that
22 regulate the sale, possession and use of firearms and ammunition
23 within its boundaries.

24 At the time that Plaintiff filed her complaint, San Francisco
25 had two ordinances related to the discharge of firearms. The
26 first, Police Code section 1290, provided in relevant part, "No
27 person or persons, firm, company, corporation or association shall
28 fire or discharge any firearms or fireworks of any kind or

1 description within the limits of the City and County of San
2 Francisco." S.F. Police Code § 1290 (2009). The second ordinance
3 provided that, "It shall be unlawful for any person to at any time
4 fire or discharge, or cause to be fired or discharged, any firearm
5 or any projectile weapon on or into any street, highway or other
6 public place within the City and County of San Francisco." S.F.
7 Police Code § 4502 (2009). At the time, the latter ordinance had
8 an exception, stating that the "provisions of Section 4502 shall
9 not apply . . . to persons using said firearms or projectile
10 weapons in necessary self defense." S.F. Police Code § 4506(a)
11 (2009).

12 In 2011, these ordinances were amended. Section 1290 was
13 amended to remove any reference to firearms. S.F. Police Code
14 § 1290 (2011). By its terms, it now prohibits only fireworks.
15 Id. Section 4502 was amended to note that it was "[s]ubject to
16 the exceptions in Section 4506." S.F. Police Code § 4502 (2011).
17 Section 4506 was amended to provide that the

18 provisions of Section 4502 shall not apply to or affect:

19 . . .

20 (2) Persons in lawful possession of a handgun who
21 discharge said handgun in necessary and lawful defense
of self or others while in a personal residence; or

22 (3) Persons in lawful possession of a firearm or
23 projectile weapon who are expressly and specifically
24 authorized by federal or state law to discharge said
firearm or projectile weapon under the circumstances
present at the time of discharge.

25 App. A-15, S.F. Police Code § 4506(a) (2011).

26 In 2007, San Francisco enacted Police Code section 4512 (the
27 storage ordinance) mandating, "No person shall keep a handgun
28 within a residence owned or controlled by that person unless the

1 handgun is stored in a locked container or disabled with a trigger
2 lock that has been approved by the California Department of
3 Justice." App. A-2-6, A20-21. This section includes an exception
4 stating that it does not apply if the "handgun is carried on the
5 person of an individual over the age of 18." S.F. Police Code
6 § 4512(c)(1). In 2011, San Francisco adopted legislative findings
7 in support of its storage ordinance, which are set forth in Police
8 Code section 4511. See App. A-16-19. The legislative findings
9 provide in part that "[h]aving a loaded or unlocked gun in the
10 home is associated with an increased risk of gun-related injury
11 and death," guns kept in the home are most often used in suicides,
12 against family and friends and in an unintentional shootings,
13 rather than in self-defense, and that using "trigger locks or
14 using lock boxes when storing firearms in the home reduces the
15 risk of firearm injury and death." S.F. Police Code § 4511.

16 San Francisco regulates the sale of firearms and ammunitions
17 and requires that any person selling firearms or ammunitions be
18 licensed and adhere to certain restrictions. See, e.g., App. A-7-
19 10, S.F. Police Code §§ 613, 613.2, 613.9. Among these
20 restrictions on licensees is a prohibition on the sale, lease or
21 transfer of ammunition that

22 (1) Serves no sporting purpose;

23 (2) Is designed to expand upon impact and utilize the
24 jacket, shot or materials embedded within the jacket or
25 shot to project or disperse barbs or other objects that
26 are intended to increase the damage to a human body or
27 other target (including, but not limited to, Winchester
28 Black Talon, Speer Gold Dot, Federal Hydra-Shok, Homady
XTP, Eldorado Starfire, Hollow Point Ammunition and
Remington Golden Sabre ammunition[]); or

1 (3) Is designed to fragment upon impact (including, but
2 not limited to, Black Rhino bullets and Glaser Safety
3 Slugs).

4 This subsection does not apply to conventional hollow-
5 point ammunition with a solid lead core when the
6 purchase is made for official law enforcement purposes
7 and the purchaser is authorized to make such a purchase
8 by the director of a public law enforcement agency such
9 as the Chief of the San Francisco Police Department or
10 the Sheriff of the City and County of San Francisco.

11 S.F. Police Code § 613.10(g) (the ammunition ordinance). In 2011,
12 San Francisco adopted legislative findings in support of its
13 ammunition ordinance, which are set forth in Police Code section
14 613.9.5. App. A-11. The legislative findings explain in part
15 that "enhanced-lethality ammunition is more likely to cause severe
16 injury and death than is conventional ammunition that does not
17 flatten or fragment upon impact" and that the City has an interest
18 "in reducing the likelihood that shooting victims in San Francisco
19 will die of their injuries by reducing the lethality of the
20 ammunition sold and used in the City and County of San Francisco."
21 S.F. Police Code § 613.9.5(2),(6). The findings also state that
22 the City believes that banning such sales "does not substantially
23 burden the right of self defense" because the "right to use
24 firearms in self defense can be fully exercised using
25 conventional, non-collapsing, non-fragmenting ammunition." S.F.
26 Police Code § 613.9.5(4).

27 State law provides that only a police chief or county sheriff
28 "may" issue a license to carry a concealed weapon (a CCW license),
but does not require that they do so. Cal. Penal Code §§ 26150,
26155. A police chief or county sheriff may issue a CCW license
to a person only upon a showing that the applicant is of good
moral character, good cause exists for the issuance of the

1 license, the applicant resides in the jurisdiction of the police
2 chief or county sheriff and the applicant has completed a firearm
3 safety course. Cal. Penal Code §§ 26150(a), 26155(a), 26165.
4 Each police chief or county sheriff is required to publish and
5 make available a written policy summarizing these requirements.
6 Cal. Penal Code § 26160.

7 State law sets forth various procedural requirements for
8 applications for CCW licenses. An applicant for a CCW license
9 must have his or her fingerprints taken and sent to the California
10 Department of Justice. Cal. Penal Code § 26185(a)(1). After
11 receiving the fingerprints, the California Department of Justice
12 is required to provide the relevant police chief or county sheriff
13 with a report of the person's record, including whether the
14 applicant is prohibited by state or federal law from possessing a
15 firearm. Cal. Penal Code § 26185(a)(2). A police chief or county
16 sheriff must receive this report from the California Department of
17 Justice before he or she is allowed to issue a CCW permit. Cal.
18 Penal Code § 26185(a)(3). Applicants must submit a filing fee
19 established by the California Department of Justice when applying
20 for a CCW permit, to cover the costs of furnishing this report.
21 Cal. Penal Code § 26190(a)(1). If a police chief or county
22 sheriff requires psychological testing for someone who is applying
23 for a CCW license, the testing must be done by the same licensed
24 psychologist used by the police chief or county sheriff for the
25 psychological testing of his or her own employees. Cal. Penal
26 Code § 26190(f)(1).

27 Active duty and honorably retired peace officers are
28 generally exempt from the state law prohibitions on carrying

1 concealed and loaded weapons in public. See Cal. Penal Code
2 §§ 25450, 25900, 26300. At the time of retirement, honorably
3 retiring peace officers are issued an identification certificate
4 by the agency that employed them, stamped with an endorsement
5 stating that the issuing agency approves of their carrying a
6 concealed firearm. See Cal. Penal Code §§ 25455, 25460, 25905.
7 Officers who retire due to a psychological disability are not
8 eligible for such an endorsement. Cal. Penal Code § 26305(a).
9 The issuing agency may, at initial retirement or any time
10 thereafter, revoke for good cause a retired peace officer's
11 privilege to carry a concealed firearm. Cal. Penal Code §§ 25470,
12 25920. A retired officer must qualify with the firearm annually.
13 Cal. Penal Code § 25475(a).

14 In conjunction with a committee of representatives from the
15 California State Sheriffs' Association, the California Police
16 Chiefs Association and the Department of Justice, the California
17 Attorney General is responsible for creating and revising a
18 standard form for CCW license applications, which must be used
19 uniformly throughout the state. Cal. Penal Code § 26175. The
20 California Attorney General has created such a form. See
21 McEachern Decl. ¶ 6, Ex. 3.0.² The form directs applicants to
22 "[f]ill out, read, and sign Section 1 through 5, as directed," but
23

24
25 ² Defendants object to certain evidence presented by
26 Plaintiff and Plaintiff objects to certain evidence presented by
27 Defendants. The Court has reviewed these evidentiary objections
28 and has not relied on any inadmissible evidence. The Court will
not discuss each objection individually. To the extent that the
Court relies on evidence to which the parties object, such
evidence has been found admissible and the objections are
overruled.

1 states that "Sections 6, 7, and 8 must be completed in the
2 presence of an official of the licensing agency." Id. at 2.
3 Section 1 asks for the applicants' names, but does not ask for
4 contact information. Id. at 3. Section 7, which is titled
5 "Investigator's Interview Notes," contains spaces for other
6 information for the applicants, including their address and
7 telephone number. Id. at 11. This contact information is not
8 requested anywhere else on the form.

9 In San Francisco, both the Sheriff and the Police Chief have
10 adopted policies setting forth the criteria they consider when
11 deciding when to issue a CCW license. The Police Chief first
12 issued a CCW license policy in May 2000 and the current policy was
13 issued on January 12, 2012. McEachern Decl. ¶¶ 4-5. As to the
14 good cause requirement, the Police Chief's current policy states,

15 In light of the fact that San Francisco is the second
16 most densely populated urban area in the country, and
17 weighing the defensive benefit of carrying concealed
18 firearms in public against the risk of surprise to law
19 enforcement, the risk of avoidable and dangerous
20 conflict escalation in a public setting, and the risk to
21 general public safety that discharging firearms poses to
22 law enforcement and bystanders alike, the Chief has
23 determined on the basis of experience and judgment that
24 good cause to issue a CCW license to San Francisco
25 residents will generally only exist in conditions of
26 necessity. Accordingly, applicants should be able to
27 supply convincing evidence of the following:

28 1. There is a reported, documented, presently existing,
and significant risk of danger to life or of great
bodily injury to the applicant and/or his or her spouse,
domestic partner or dependents;

2. The danger of harm is specific to the applicant or
his or her immediate family and is not generally shared
by other similarly situated members of the public;

3. Existing law enforcement resources cannot adequately
address the danger of harm;

1 4. The danger of harm cannot reasonably be avoided by
alternative measures; and

2 5. Licensing the applicant to carry a concealed weapon
3 is significantly likely to reduce the danger of harm.

4 While each of the above factors is considered in the
5 decision making process, the Chief makes a good cause
determination based on the totality of the circumstances
presented in each individual case.

6 McEachern Decl. ¶ 4, Ex. 1.0, CCSF001971. The Police Chief's
7 policy goes on to state, "Once an eligible applicant makes a
8 preliminary showing of good cause, the SFPD will conduct a
9 background investigation to determine whether the applicant is of
10 good moral character." Id. at CCSF001972. The Police Chief's
11 policy is currently published on the SFPD's website, along with
12 the application form; however, it may not have been published
13 there prior to January 2012. McEachern Decl. ¶¶ 7, 11, Ex. 4.0.

14 Then-Sheriff Michael Hennessy first issued a CCW license
15 policy in June 2011, after this case had been initiated. Johnson
16 Decl. ¶ 6. Prior to that time, the Sheriff did not have a written
17 policy. Id. Sheriff Hennessy held his position for over thirty
18 years. Id. After Ross Mirkarimi became Sheriff, he updated the
19 policy in January 2012. Id. at ¶ 4. While acting Sheriff Vicki
20 Hennessy was in office, she did not issue a new CCW policy and
21 instead implemented the policy issued by Sheriff Mirkarimi. Id.
22 at ¶ 5.

23 The Sheriff's current policy states, "Good cause to issue a
24 CCW license generally exists in the conditions of necessity," and
25 sets forth five factors relevant to the good cause determination
26 that are similar to the Police Chief's policy. Id. at ¶ 4, Ex. A,
27 CCSF004499. Like the Police Chief's policy, the Sheriff's policy
28 states, "If good cause is demonstrated, the SFSD shall conduct a

1 background investigation in order to determine whether the
2 applicant is of good moral character." Id. The Sheriff also
3 requires applicants to "provide a letter explaining the good cause
4 the applicant believes justifies issuance of the CCW license."
5 Id. at ¶ 7. However, the letter requirement is not stated in the
6 Sheriff's written policy. See id. at ¶ 4, Ex. A.

7 At the hearing, the City represented that the Police Chief
8 and Sheriff both now require applicants to submit in person
9 applications for CCW permits and that their contact information is
10 obtained at the time of submission. See also Johnson Decl. ¶ 11.

11 II. Facts relevant to the named Plaintiff

12 Plaintiff is a lesbian woman who lives in San Francisco with
13 her same-sex registered domestic partner and two children, who are
14 two and six years old. Pizzo Decl. ¶ 3. She owns handguns for
15 "personal self-defense." Id. at ¶ 11.

16 Plaintiff has been the victim of repeated harassment and
17 threats in the past due to her sexual orientation. Id. at ¶ 12.
18 In the 1980s, she was pushed down a flight of stairs by a man who
19 called her a "dyke." Id. at ¶ 13. In 1999, when she was kissing
20 her partner in San Francisco, a man screamed obscenities at her
21 and threw gum and garbage at her. Id. at ¶ 14. Sometime later,
22 when she and her partner travelling through Arizona, a man
23 approached them and tried to "push his body up against me," while
24 making harassing comments about their sexual orientation. Id. at
25 ¶ 15. At another unspecified time, in Los Alamos, California,
26 when she and her partner were in a restroom at a bar, another
27 couple pounded on the door, yelled obscenities and threats at them
28 based on their sexual orientation and made them fear that they

1 would be hurt or killed. Id. at ¶ 16. On another occasion, while
2 she was crossing a street in San Francisco, a man in a truck
3 yelled obscenities having to do with her sexual orientation and
4 revved his engine. Id. at ¶ 17.

5 In Plaintiff's declaration in support of her motion for
6 summary judgment, she attests, "In San Francisco, I can usually be
7 more open and act freely," but "when I leave San Francisco, and
8 especially when I leave California, I have to change the way I act
9 and dress, otherwise I am targeted." Id. at ¶ 18. She especially
10 fears threats and assaults in "more rural areas of California and
11 in rural areas out-of-state." Id. at ¶ 32. She has "no way to
12 adequately defend or protect myself from the numerous threats and
13 assaults" that she has received because of the laws described and
14 complying with the laws "place[s] my family at unnecessary risk."
15 Id. at ¶¶ 35, 37. She intends to have a "readily accessible
16 operable handgun ready for immediate use, loaded with proper
17 ammunition, within my home for self-defense, on my person, and in
18 my vehicle," but can do so only if she is "issued a valid CCW
19 permit." Id. at ¶¶ 36, 38. She also declares, "I will no longer
20 go camping. I will no longer visit Texas unless I am issued a CCW
21 permit." Id. at ¶ 19. Plaintiff further attests that she does
22 not keep ammunition in her house because she believes that to do
23 so would subject her to prosecution for "possession of 'enhanced
24 lethality ammunition,'" because she believes all ammunition is
25 lethal. Id. at ¶ 26. She wants to "use semi-jacketed hollow
26 point ammunition that expands and fragments upon impact," because
27 she believes that it is better than "full metal jacket"
28 ammunition, which she believes "increases the risk of innocent

1 people getting shot if someone discharges a firearm due to
2 ricochet and pass-through of walls and the assailant." Id. at
3 ¶ 29.

4 At Plaintiff's earlier deposition, when asked if she would
5 have a loaded weapon in her home outside of a gun safe or without
6 any sort of locking mechanism on it if she were permitted to do so
7 by law, she at first answered, "I don't know," and that she would
8 be concerned about her children being around a loaded weapon.
9 Pizzo Depo. 50:16-51:4. She said she could imagine leaving a
10 loaded weapon outside of the gun safe, but locked. Id. at 51:5-8.
11 After a sidebar with her attorney, she stated,

12 With my children present in the home, it would depend on
13 the circumstance. If they were--if it were in my room
14 and they didn't have access to it, for instance, if I
15 were to go to bed at night and I wanted to have a loaded
16 weapon in the room with me with the door locked, the
17 kids in bed, I could see an instance like that.

18 Id. at 51:10-52:11. She then stated that, if the ordinances were
19 struck down, she would not start storing a loaded handgun outside
20 of her gun safe and lock the bedroom door between her and her
21 children "on a regular basis" but

22 there may be times where I feel the need to do something
23 like that if--if the--as long as I felt as though it was
24 a reasonable thing to do at the time. If there were
25 say, riots outside my neighborhood or there was some--
26 some eminent threat, then I--I may do that.

27 Id. at 57:25-58:13.

28 Plaintiff also testified that she believed that she could
defend herself in her home using traditional full metal jacket
ammunition, but that she did not believe that it was the best
ammunition to use. Id. at 71:12-18. She stated that she believed
that all gun shops had left San Francisco and did not know that

1 there was still one gun shop open within the city, High Bridge
2 Arms. Id. at 41:9-21; Chin Decl. ¶ 11. She further testified
3 that she had never tried to buy hollow-point bullets at any gun
4 shop in San Francisco and that when she had last purchased bullets
5 at High Bridge Arms in the late 1980s, she was able to purchase
6 what she was seeking at the time, lead bullets. Pizzo Depo.
7 41:23-42:20.³

8 Plaintiff searched online on the websites of the San
9 Francisco Police Department and the San Francisco Sheriff's
10 Department for information on how to obtain a CCW permit. Pizzo
11 Decl. ¶ 43. Finding no information, she turned to her attorney,
12 Gary W. Gorski. Id.

13 Plaintiff attaches to her declaration a letter that she
14 states Gorski sent on her behalf to the San Francisco Police
15 Department and the San Francisco Sheriff's Department by regular
16 mail, fax and email on May 26, 2009. Pizzo Decl. ¶ 44, Exs. 1, 2.
17 In this letter, Mr. Gorski wrote,

18 I have been retained by a gay female who has been
19 attempting to apply for a CCW . . . To date, her
20 attempts have been futile as there is no published
21 policy on either website about the CCW application
22 process and your employees have been obstructive to say
23 the least.

24 When my client attempted to apply by contacting your
25 departments, she was given the run-around in that 1)
26 employees had no knowledge of any CCW policy, 2) had no
27 knowledge about how to apply, and 3) they stated that
28 your department does not process CCW applications.

26 ³ The City contends that Pizzo said that she has not used
27 hollow-point ammunition since at least the early 1990s and that
28 she frequents a gun store in San Bruno, but they have not filed
the cited pages of her deposition transcript. See City's Mot. for
Summ. J. at 14 (citing Pizzo Depo. 39, 69-70); Docket No. 76-10
(omitting these pages).

1 This letter constitutes a formal request of the
following, pursuant to the Public Records Act:

2 Please provide a DOJ CCW application.

3 Please provide a list of all current and past CCW permit
4 holders since your tenure in office, inclusive of all
good cause data relied upon for issuance.

5 Please provide a copy of your written CCW issuance
6 policy.

7 If your department defers to the other for the
processing of CCWs, please provide that policy or letter
8 of understanding.

9 In addition to this request, please provide a date and
time that my client can meet with an "investigator" of
10 your department to complete section 7 of the
application, and have the application "witnessed" by the
investigator and "signed."

11 Id. Mr. Gorski provided his full contact information, but did not
12 include Plaintiff's name or contact information. Id. The Police
13 Department attests that it could not locate these letters in its
14 files. McEachern Decl. ¶ 19. The Sheriff's Department generally
15 attests that it could not find any material related to any CCW
16 application by Plaintiff. Johnson Decl. ¶ 11.

17 Plaintiff states that her attorney received responses from
18 the San Francisco Police Department and San Francisco Sheriff's
19 Department on May 28, 2009 and May 29, 2009, respectively. Pizzo
20 Decl. ¶¶ 45, 51, Exs. 3, 4. Mr. Gorski has not attested to this
21 fact personally. Both departments declare that they could not
22 locate a responsive letter in their files. McEachern Decl. ¶ 19;
23 Johnson Decl. ¶ 11. In the instant motions, the City has not
24 challenged that these letters were sent by individuals at the
25 Police Department or the Sheriff's Department.

26 The letter from the San Francisco Police Department was
27 signed by Lieutenant Daniel J. Mahoney, who identifies himself as
28

1 Commanding Officer of the Legal Division. Pizzo Decl. ¶ 45, Ex.

2 3. In the letter, he states

3 In response to item number 1 of your request, please be
4 advised that the California Department of Justice is the
5 custodian of the Application for License to Carry a
6 Concealed Weapon. As a courtesy, I am enclosing a copy
7 of the Application.

8 In response to item number 2, please be advised that the
9 SFPD does not maintain a list of all current and past
10 CCW permit holders. I can tell you that we have one
11 active concealed weapon permit at this time. That
12 permit was issued to Mr. Robert Menist on 7/1/07 and
13 expires on 6/30/10.

14 In response to item number 3 and 4, we do not have
15 responsive documents.

16 With regards to your request for a date and time that
17 your client can meet with an "investigator", please be
18 advised that only if it becomes necessary to complete
19 section 7 of the application, an investigator will
20 contact your client. We do not schedule appointments
21 for this process of the application.

22 Id. Although Lieutenant Mahoney stated that there were no
23 responsive documents to the request for Mr. Gorski's request for
24 the written CCW issuance policy, there was such a policy in effect
25 at that time, as described above. Lieutenant Mahoney attached a
26 blank copy of the application form and copy of the fee structure
27 for the application. Id. At present, Retired Army General Robert
28 Menist continues to be the sole current holder of a CCW license
issued by the San Francisco Police Department. McEachern Decl.

¶ 13.

The responsive letter from the San Francisco Sheriff's
Department was signed by James F. Harrigan, who identified himself
as Legal Counsel to the Sheriff. Pizzo Decl. ¶ 51, Ex. 4. In the
letter, Mr. Harrigan stated in full,

1 I write to respond to your confusing and inflammatory
2 letter of May 26, 2009. Please place yourself in my
shoes for a moment and read your letter, attached.

3 First, and foremost, you never identify your client
4 which, of course, prevents us from researching any
5 correspondence that may have been received from her.
6 Secondly, you identify her as a "gay female" as if that
7 actually matters. I presume you have permission to
8 express such personal information but you might be
9 surprised to learn that we don't maintain carry
10 concealed weapons (CCW) applicant files by sexual
11 preference, or even by gender.

12 Third, you ascribe obstructionist behavior to Sheriff's
13 employees without any facts, who they might have said
14 their name was, or even when such event(s) occurred.

15 It isn't often that I get such a poorly crafted letter
16 and it is not ameliorated by your ending paragraph,
17 which attempts to be solicitous after making such
18 unsupported accusations.

19 Perhaps I can clarify the Sheriff's position for your
20 consideration. Mr. Hennessey is obligated to issue CCWs
21 to retired law enforcement personnel in limited
22 circumstances under state law. There are a host of
23 conditional factors which apply. He is not obligated to
24 issue a CCW to any private citizen although he has the
25 authority to do so. He has never issued a CCW to such
26 an applicant and has no intention of doing so.

27 Should you wish to file an application you may write a
28 letter to me or the Sheriff which will be replied to
with a denial. It is a useless exercise but please do
so if you wish [sic] to. Obviously, that letter must
identify the applicant and reason(s) for the request.

No meeting with an "investigator" will be scheduled
because his decision is as it has been for twenty-nine
(29) years, a denial. Such is his right and his
practice.

22 Id.

23 Although Mr. Harrigan stated that the Sheriff's Department
24 had never issued CCW licenses to private citizens, the
25 then-Sheriff had issued at least two to individuals who were not
26 retired law enforcement officers. At the time of Mr. Harrigan's
27 letter, he himself held a CCW license issued by the Sheriff on
28 October 3, 2008, while he was a civilian employee of the Sheriff's

1 Department. Johnson Decl. ¶ 9. Mr. Harrigan's license expired on
2 October 3, 2010 and was not renewed. Id. Mr. Harrigan has since
3 retired from the Sheriff's Department. Id. On or about November
4 17, 2006, Sheriff Hennessey also issued a CCW license to a Deputy
5 City Attorney in the San Francisco City Attorney's Office who was
6 responsible for civil gang injunction prosecutions and reported
7 receiving threats in connection with those prosecutions. Id. at
8 ¶ 10. On March 5, 2007, Sheriff Hennessey notified the Deputy
9 City Attorney that, because she was leaving employment with the
10 City Attorney's Office, the CCW license that he had issued to her
11 in connection with her duties would be revoked effective May 1,
12 2007. Id.; Johnson Decl. ¶ 10, Ex. C.

13 On June 4, 2009, Plaintiff filled out and signed the DOJ
14 standard application form. Pizzo Decl. ¶ 56. She completed
15 sections one through five of the application but did not complete
16 or sign sections 6 through 8 because the form's instructions
17 directed her not to. Id. at ¶¶ 57, 59. Thus, her filled-in
18 application included her name and date of birth, but did not
19 contain her address, telephone number or any other contact
20 information. Pizzo Decl. ¶ 56, Ex. 5. It also did not contain
21 Mr. Gorski's name or contact information. Id.

22 Plaintiff gave the application to her attorney to send; she
23 did not personally send it to the Sheriff's Department or the
24 Police Department. Pizzo Decl. ¶ 56; Pizzo Depo. 89:7-19.
25 Plaintiff states that Mr. Gorski mailed it and faxed it to the
26 Sheriff's Department or the Police Department, but does not offer
27 testimony or evidence from him stating that he did so. Pizzo
28 Decl. ¶¶ 56-60. Plaintiff did not write a check to send with her

1 application. Pizzo Depo. 89:25-90:2. Plaintiff includes with her
2 declaration two fax confirmation pages that show that, on June 29,
3 2009, Mr. Gorski faxed a twenty page document to the Sheriff's
4 Department and the Police Department, the first page of which was
5 the cover page of the standard DOJ application form. Pizzo Decl.
6 ¶ 60, Ex. 6; see also Johnson Decl. ¶ 15; McEachern Decl. ¶ 23.
7 Plaintiff does not provide evidence that Mr. Gorski included with
8 the application a cover letter or any information that would have
9 associated it with him or his earlier letter or that would have
10 provided the Sheriff's Department and the Police Department with
11 contact information for Plaintiff or himself.

12 To date, Plaintiff has not received a response to her
13 application from either department. Pizzo Decl. ¶ 8. Neither the
14 Sheriff's Department nor the Police Department could locate any
15 record of having received her application. McEachern Decl.
16 ¶¶ 24-25; Johnson Decl. ¶ 14. Neither department processed her
17 application or made a determination of whether to grant or deny
18 it. McEachern Decl. ¶ 25; Johnson Decl. ¶ 14. For every other
19 CCW application file that each department could locate, it has
20 records that show that action was taken on the application.
21 McEachern Decl. ¶ 24; Johnson Decl. ¶ 16.

22 On September 23, 2009, Plaintiff filed the instant suit. In
23 her complaint, she brings claims against the City and County of
24 San Francisco and the San Francisco Mayor, the San Francisco
25 Sheriff, the San Francisco Police Chief and the Attorney General
26
27
28

1 of California in their official capacities only.⁴ She asserts the
2 following ten claims against all Defendants in her complaint:

3 (1) S.F. Police Code section 4512 (the storage ordinance)
4 violates the Second Amendment;

5 (2) S.F. Police Code section 1290, addressing the discharge
6 of firearms within San Francisco, violates the Second Amendment;

7 (3) Cal. Penal Code section 26150, et seq., regarding the
8 issuance of CCW permits, violates the Second Amendment;

9 (4) Cal. Penal Code section 26150, et seq., regarding the
10 issuance of CCW permits, and the policies of the San Francisco
11 Sheriff and Police Chief, violate the Equal Protection Clause of
12 the Fourteenth Amendment;

13 (5) the sections of the California Penal Code that create an
14 exception to concealed and loaded carry laws for honorably retired
15 police officers with CCW permits violate the Equal Protection
16 Clause of the Fourteenth Amendment;

17 (6) the Federal Law Enforcement Officers Safety Act, 18
18 U.S.C. §§ 926B, 926C regarding CCW permits for qualified retired
19 law enforcement officers violates the Equal Protection Clause of
20 the Fourteenth Amendment;

21 (7) S.F. Police Code section 613.10(g) (the ammunition
22 ordinance) violates the Second Amendment;

23
24
25
26 ⁴ Plaintiff also brought claims against former San Francisco
27 Mayor Gavin Newsom, former San Francisco Chief of Police Heather
28 Fong, and former San Francisco Sheriff Michael Hennessey in their
individual capacities. She subsequently dismissed her claims
against them in their individual capacities by stipulation.
Docket No. 58.

1 (8) S.F. Police Code section 613.10(g) (the ammunition
2 ordinance) is unconstitutionally vague under the Fifth Amendment's
3 due process clause;

4 (9) S.F. Police Code sections 4512, 1290, 613.10(g) and Cal.
5 Penal Code section 26150, et seq., violate the constitution and
6 laws of the state of California; and

7 (10) S.F. Police Code sections 4512, 1290, 613.10(g) and Cal.
8 Penal Code section 26150, et seq., violate the Due Process Clause
9 of the Fourteenth Amendment.⁵

10 As relief, Plaintiff seeks a declaration that the complained-
11 of laws, and Defendants' application and enforcement thereof, are
12 unconstitutional, and an injunction enjoining them from
13 enforcement.

14 In her reply in support of her motion for summary judgment
15 and opposition to Defendants' motions for summary judgment,
16 Plaintiff withdraws her ninth cause of action as to all Defendants
17 and her fourth cause of action as to the Attorney General only.
18 Docket No. 104, 21, 25.

19 LEGAL STANDARD

20 Summary judgment is properly granted when no genuine and
21 disputed issues of material fact remain, and when, viewing the
22 evidence most favorably to the non-moving party, the movant is
23 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
24

25
26 ⁵ A separate suit against the City and County of San
27 Francisco and its Mayor and Police Chief, challenging the validity
28 of S.F. Police Code sections 613.10(g), 1290 and 4512 under the
Second, Fifth and Fourteenth Amendments, remains pending in this
district. See Jackson v. City and Cnty. of San Francisco, Case
No. 09-2143 (N.D. Cal.), Docket No. 18.

1 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
2 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
3 1987).

4 The moving party bears the burden of showing that there is no
5 material factual dispute. Therefore, the court must regard as
6 true the opposing party's evidence, if supported by affidavits or
7 other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg,
8 815 F.2d at 1289. The court must draw all reasonable inferences
9 in favor of the party against whom summary judgment is sought.
10 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
11 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952
12 F.2d 1551, 1558 (9th Cir. 1991).

13 Material facts which would preclude entry of summary judgment
14 are those which, under applicable substantive law, may affect the
15 outcome of the case. The substantive law will identify which
16 facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S.
17 242, 248 (1986).

18 DISCUSSION

19 I. Standing

20 Defendants contend that Plaintiff does not have standing to
21 pursue her challenges to the storage and ammunition ordinances or
22 to the CCW license statutes and policies. Amicus NRA also argues
23 that she does not have standing to challenge the storage and
24 ammunition ordinances, but disputes the legal standard that
25 Defendants seek to apply to the standing issue. Plaintiff
26 responds that she does have standing to pursue these issues.

1 A. Challenges to the storage ordinance

2 To establish standing, a plaintiff must show: "(1) he or she
3 has suffered an injury in fact that is concrete and
4 particularized, and actual or imminent; (2) the injury is fairly
5 traceable to the challenged conduct; and (3) the injury is likely
6 to be redressed by a favorable court decision." Salmon Spawning &
7 Recovery Alliance v. Gutierrez, 545 F.3d 1220, 1225 (9th Cir.
8 2008). "Because plaintiffs seek declaratory and injunctive relief
9 only, there is a further requirement that they show a very
10 significant possibility of future harm; it is insufficient for
11 them to demonstrate only a past injury." Bras v. California
12 Public Utilities Com'n, 59 F.3d 869, 873 (9th Cir. 1995).

13 The City contends, based on San Diego Gun Rights Comm. v.
14 Reno, 98 F.3d 1121 (9th Cir. 1996), that to satisfy the injury-in-
15 fact requirement, "a plaintiff must show that she has violated or
16 intends to violate the law and that she has been prosecuted under
17 the law, that she has been individually threatened with imminent
18 prosecution, or that there is a robust history of enforcement of
19 the law." City's Cross-Mot. for Summ. J. at 8. The NRA argues
20 that she need not show a likelihood of enforcement, relying
21 largely on Jackson v. City & County of San Francisco, 829 F. Supp.
22 2d 867, 872 (N.D. Cal. 2011), in which the court considered the
23 continuing vitality of San Diego Gun Rights Committee in light of
24 the Supreme Court's recent decision in District of Columbia v.
25 Heller, 554 U.S. 570 (2008).

26 A concrete injury is one that is "'distinct and palpable
27 . . . as opposed to merely abstract.'" Schmier v. U.S. Court of
28 Appeals for 9th Circuit, 279 F.3d 817, 821 (9th Cir. 2002)

1 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).
2 However, when "contesting the constitutionality of a criminal
3 statute, 'it is not necessary that [the plaintiff] first expose
4 himself to actual arrest or prosecution to be entitled to
5 challenge [the] statute that he claims deters the exercise of his
6 constitutional rights.'" Babbitt v. UFW Nat'l Union, 442 U.S.
7 289, 298 (1979) (quoting Steffel v. Thompson, 415 U.S. 452, 459
8 (1974)) (formatting in original). The Supreme Court has
9 explained, "When the plaintiff has alleged an intention to engage
10 in a course of conduct arguably affected with a constitutional
11 interest, but proscribed by a statute, and there exists a credible
12 threat of prosecution thereunder, he should not be required to
13 await and undergo a criminal prosecution as the sole means of
14 seeking relief." Id. See also MedImmune, Inc. v. Genentech,
15 Inc., 549 U.S. 118 (2007) (a "plaintiff's own action (or inaction)
16 in failing to violate the law eliminates the imminent threat of
17 prosecution, but nonetheless does not eliminate Article III
18 jurisdiction"). "But 'persons having no fears of state
19 prosecution except those that are imaginary or speculative, are
20 not to be accepted as appropriate plaintiffs.'" Babbitt, 442 U.S.
21 at 298 (quoting Younger v. Harris, 401 U.S. 37, 42 (1971); Golden
22 v. Zwickler, 394 U.S. 103 (1969)). "When plaintiffs 'do not claim
23 that they have ever been threatened with prosecution, that a
24 prosecution is likely, or even that a prosecution is remotely
25 possible,' they do not allege a dispute susceptible to resolution
26 by a federal court." Id. at 298-99 (quoting Younger, 401 U.S. at
27 42). Further, "a vague and unspecified" intention to engage in
28 the proscribed conduct "at some unknown point in the future" is

1 not enough to support standing. Jackson, 829 F. Supp. 2d at 872.
2 See also Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992)
3 ("Such 'some day' intentions -- without any description of
4 concrete plans, or indeed even any specification of when the some
5 day will be -- do not support a finding of the 'actual or
6 imminent' injury that our cases require.").

7 Regardless of whether or not Plaintiff can establish that
8 prosecution is even remotely possible, she has not alleged a
9 sufficient intention to engage in conduct proscribed by the
10 storage ordinance to support Article III jurisdiction. As
11 explained above, in her declaration, Plaintiff states that she
12 intends to possess a "readily accessible operable handgun ready
13 for immediate use, loaded with proper ammunition, within my home
14 for self-defense, on my person, and in my vehicle." Id. at ¶¶ 36,
15 38. However, the storage ordinance does not prohibit her from
16 having such a handgun in her vehicle or on her person in her home.
17 See S.F. Police Code § 4512(a), (c)(1) (prohibiting people from
18 keeping a handgun within their residence unless it is stored in a
19 locked container or disabled with a trigger lock, but creating an
20 exception if the "handgun is carried on the person of an
21 individual over the age of 18").⁶

22 To the extent that Plaintiff may have intended this statement
23 to mean that she would like to have an operable handgun within
24 reach but not on her person, her only intentions of doing so are
25 speculative and based on potential future events that are not

26 _____
27 ⁶ Residence is defined to include "vehicles where human
28 habitation occurs," S.F. Police Code § 4512(b)(1), but Plaintiff
has not offered any evidence that she lives in her vehicle.

1 connected to whether the ordinance is still in effect. She
2 testified that she may only keep her handgun unlocked at some
3 unspecified future point if she were to feel unsafe based on
4 events that may or may not happen, such as a riot, and then only
5 if she also locked her children out of her room or otherwise kept
6 her children away from the loaded weapon. Cf. Jackson, 829 F.
7 Supp. 2d at 872 (finding standing based on allegations "that based
8 on their personal views of how it would enhance their personal
9 safety, they want to keep their guns unlocked now for potential
10 use in self defense") (emphasis added).

11 At the hearing, Plaintiff clarified that she asserts that she
12 has standing because the ordinance currently prevents her from
13 making her own decision as to whether or not to store her operable
14 gun outside of her gun locker, even if she ultimately may decide
15 not to do so. Plaintiff offers no authority to support her
16 argument that this deprivation can support standing, where she has
17 expressed no intention to actually engage in any conduct that may
18 be prohibited by the statute. Under these circumstances, the
19 Court concludes that there is no material dispute of fact that
20 Plaintiff does not have an intention to engage in a course of
21 conduct prohibited by the statute that is not "vague and
22 unspecified."

1 Accordingly, the Court GRANTS the City's motion for summary
2 judgment on Plaintiff's claims that seek to challenge the storage
3 ordinance.⁷

4 B. Challenges to the ammunition ordinance

5 The City contends that Plaintiff does not have standing to
6 challenge the ammunition ordinance, because the law acts to
7 restrict the sales made by licensed gun dealers within city limits
8 but does not prohibit individuals from possessing any type of
9 ammunition inside city limits, and Plaintiff is not a licensed gun
10 dealer. Thus, by the City's reasoning, the ordinance does not
11 restrict her behavior. However, even if the restriction is aimed
12 at limiting the conduct of gun dealers, such a restriction may
13 still impose a burden on a gun user's ability to obtain the
14 relevant types of ammunition. See Jackson, 829 F. Supp. 2d at 872
15 n.3 ("While it may be that plaintiffs will be unable, as a factual
16 matter, to establish that a ban on sales within the City and
17 County of San Francisco actually presents a significant burden on
18 their ability to obtain such ammunition, that would only undermine
19 the merits of the claim, not plaintiffs' standing to bring it.").

20 Plaintiff contends that she has standing because the City has
21 made obtaining ammunition so burdensome that it amounts to a
22 constructive ban. However, Plaintiff has not offered evidence
23 that she intends to purchase the prohibited ammunition anywhere,
24 _____

25 ⁷ Plaintiff does not respond to the Attorney General's
26 argument that she is not a proper Defendant for the claims
27 challenging the City's storage, ammunition and discharge
28 ordinances. Plaintiff also has moved for summary judgment on
those claims against only the City. Accordingly, the Court GRANTS
the Attorney General summary judgment on the claims that challenge
the City ordinances.

1 including within San Francisco, and thus has not established that
2 the ordinance has caused her an injury-in-fact. In her
3 declaration, Plaintiff states, "I want to use semi-jacket hollow
4 point ammunition that expands and fragments upon impact," which
5 she believes is better than full metal jacket ammunition for self-
6 defense. Pizzo Decl. ¶ 29. However, she does not express an
7 intention to purchase such ammunition from a gun shop located in
8 San Francisco or anywhere else if the ordinance were struck down
9 or offer evidence that she has been burdened by having to purchase
10 ammunition outside of San Francisco. In fact, she testified that
11 she believed that there were no gun shops within San Francisco
12 itself at which she could make purchases if the ordinance were
13 invalidated, although this belief has since proven to be untrue.
14 She further stated that she had last shopped at a particular gun
15 shop in San Francisco more than twenty years ago and did not
16 express any plans to shop there again in the future, although this
17 gun shop is in fact still open. Thus, Plaintiff has not expressed
18 a present intention to engage in conduct prohibited by the
19 ordinance and her argument that the ordinance burdens her ability
20 to purchase or keep the ammunition is speculative.

21 Accordingly, the Court finds that Plaintiff lacks standing to
22 challenge the ammunition ordinance and GRANTS the City's motion
23 for summary judgment on these claims.

24 C. Challenges to the CCW licensing scheme

25 The City, joined by the Attorney General, contends that
26 Plaintiff lacks standing to challenge the CCW permit process
27 because she did not submit proper applications to the Police Chief
28 or to the Sheriff.

1 "It is a long-established rule 'that a plaintiff lacks
2 standing to challenge a rule or policy to which he has not
3 submitted himself by actually applying for the desired benefit.'" Friery v. L.A. Unified Sch. Dist., 448 F.3d 1146 (9th Cir. 2006)
4 (quoting Madsen v. Boise State Univ., 976 F.2d 1219, 1220-1221
5 (9th Cir. 1992) (per curiam)). In Madsen, the plaintiff sued a
6 university "claiming handicap discrimination based on the fact
7 that the University did not offer free handicap parking permits on
8 campus." 976 F.2d at 1220. Prior to filing suit, he called
9 various offices at the university asking about "free handicap
10 parking permits" and was told that none were available. Id. He
11 did not apply for a permit, seek a waiver or pay the fee and ask
12 for a refund. Id. Instead, he filed a complaint with the
13 Department of Education, Office of Civil Rights. Id. The Ninth
14 Circuit concluded that he did not have standing to bring suit.
15 Id. at 1222. In ruling, the court stated, "Requiring a party to
16 have actually confronted the policy he now challenges in court has
17 several prudential and practical advantages." Id. at 1221. The
18 court noted that one of these advantages is "that only those
19 individuals who cannot resolve their disputes without judicial
20 intervention wind up in court." Id. Further, "requiring a formal
21 application as the normal prerequisite for bringing a case to
22 court limits those who can claim injury from a policy which may
23 not have harmed them at all, or that they may not have even known
24 about." Id. at 1222.

25
26 Plaintiff responds that she "submitted her two applications;
27 not once, but twice to each department." Am. Pl.'s Reply and Opp.
28 Re: Summ. J. 26. Plaintiff cites her attorney's letter to the

1 departments; however, this was not an application. It was a
2 request for information about the application process. Plaintiff
3 also cites the applications that she represents her attorney faxed
4 and mailed to the departments. Although she filled in the
5 applications according to their terms and she complains that the
6 "City refused to appoint an investigator so that plaintiff could
7 complete the application process," id. at 26, Plaintiff did not
8 provide the City with any information that would have allowed
9 either department to contact her in order to process these
10 applications. Further, Plaintiff never submitted payment of the
11 relevant application processing fee to the City. Accordingly,
12 Plaintiff did not properly avail herself of the application
13 process.

14 Such a conclusion furthers the practical advantages discussed
15 by the Ninth Circuit in Madsen as well. By not submitting an
16 application that would have allowed the City to provide her with a
17 response, Plaintiff did not allow either department the
18 opportunity to resolve the dispute without judicial intervention.

19 Plaintiff further argues that this requirement should be
20 excused because it would have been futile for her to apply. In
21 Madsen, the Ninth Circuit stated, "To begin with, it is unclear
22 whether futility can, by itself, establish standing where it does
23 not otherwise exist. It may well be that futility excuses some
24 aspects of proving injury-in-fact while standing, a constitutional
25 requirement, may not be so easily finessed." 976 F.2d at 1220.
26 The court declined to resolve this issue because it found the
27 plaintiff had not alleged enough facts to establish futility. Id.
28 However, in a later case, the Ninth Circuit stated, "We have

1 consistently held that standing does not require exercises in
2 futility." Taniguchi v. Schultz, 303 F.3d 950, 957 (9th Cir.
3 2002). Thus, in cases where the challenged policy or ordinance
4 unambiguously rendered an application futile, courts have not
5 required plaintiffs to submit a formal application to establish
6 standing. See, e.g., id. at 950 ("the [challenged] statute
7 unambiguously precludes Taniguchi, as [a lawful permanent
8 resident] convicted of an aggravated felony, from the
9 discretionary waiver. To apply for the waiver would have been
10 futile on Taniguchi's part and, therefore, does not result in a
11 lack of standing."); Desert Outdoor Advertising, Inc. v. City of
12 Moreno Valley, 103 F.3d 814 (9th Cir. 1996) ("Applying for a
13 permit would have been futile because: (1) the City brought state
14 court actions against [the plaintiffs] to compel them to remove
15 their signs; and (2) the ordinance flatly prohibited [the
16 plaintiffs'] off-site signs[.]"); see also Dragovich v. United
17 States Dep't of the Treasury, 764 F. Supp. 2d 1178, 1185 (N.D.
18 Cal. 2011) (same sex couples was not required to submit an
19 application for state-maintained long-term care insurance plan in
20 order to establish standing where the government agency made
21 abundantly clear in written and oral communications that their
22 applications would be rejected and the relevant laws "plainly
23 result" in the exclusion of same sex couples).

24 In Friery, the Ninth Circuit considered a case in which a
25 plaintiff attempted to establish standing through the futility
26 exception. 448 F.3d at 1149-50. The plaintiff, a teacher at a
27 high school in Los Angeles Unified School District (LAUSD), had
28 approached the principal at a school at which he taught and asked

1 about the possibility of transferring to a vacant position at
2 another school. Id. at 1147-48. The school district had in place
3 a policy which "bars intra-district faculty transfers that would
4 move the destination school's ratio of white faculty to nonwhite
5 faculty too far from LAUSD's overall ratio." Id. at 1147. The
6 principal told him that "he would not be eligible for the transfer
7 because he was . . . of 'the wrong ethnic origin.'" Id. at 1148.
8 The teacher did not file a formal transfer application in light of
9 this representation. Id. The Ninth Circuit found that the record
10 was not sufficiently developed for it to determine whether he had
11 standing and remanded for further fact-finding by the district
12 court. Id. at 1150. In doing so, the court noted, "If [the
13 principal] correctly interpreted the Transfer Policy, if [the
14 principal] had the authority to deny [the teacher] the ability to
15 transfer, and if any exceptions in the Transfer Policy did not
16 apply to [the teacher], then [the principal]'s assurances to him
17 might make Friery's application futile." Id. at 1149-50.

18 Here, Plaintiff's primary basis for arguing that her
19 application would have been futile is the letter sent by Mr.
20 Harrigan, the then-Sheriff's legal counsel, in which he stated
21 that any application from a private citizen would be rejected.
22 Plaintiff, however, has offered no evidence that this was actually
23 the policy of the former Sheriff or that Mr. Harrigan had the
24 authority to deny an application or to set policy. There is
25 evidence in the record that the Sheriff has issued CCW permits to
26 unsworn individuals and that the Sheriff has denied such permits
27 to former federal or local employees. Further, even if it would
28 have been futile for Plaintiff to apply for a permit from the

1 Sheriff, there were two licensing authorities in San Francisco and
2 this letter did not make it appear that it would have been futile
3 for Plaintiff to submit an application to the Police Chief.
4 Finally, Plaintiff's own actions belie this argument. After
5 receiving this letter from Mr. Harrigan, Plaintiff attempted to
6 submit a CCW license application to the Sheriff's Department.
7 Although she did not complete it properly, this demonstrates that
8 she herself did not believe that it was futile to apply.

9 Accordingly, the Court finds that Plaintiff lacks standing to
10 challenge the CCW permit process and GRANTS Defendants' motions
11 for summary judgment on these claims.⁸

12 II. Challenges to the discharge ordinance

13 Plaintiff states that Police Code section 1290 "prohibits the
14 'discharge [of] any firearms' within the City and County of San
15 Francisco, and provides no exception for discharges related to in-
16 home self-defense." Pl.'s Mot. for Summ. J. 15. On this basis,
17 Plaintiff argues that the ordinance is unconstitutional and
18 requests that the Court enjoin enforcement of it. Id. However,
19 in 2011, Police Code section 1290 was changed and no longer
20 applies to firearms at all. It was replaced with the amendments
21 to sections 4502 and 4506 that contain the specific exceptions
22

23 ⁸ Plaintiff also has not responded to Defendants' arguments
24 that she has not named any proper federal defendant for her sixth
25 cause of action, which challenges the provisions of Federal Law
26 Enforcement Officers Safety Act, 18 U.S.C. §§ 926B, 926C, that
27 allow qualified retired law enforcement officers to obtain CCW
28 permits, and that the named Defendants, who are all state and city
officials, are required by the Supremacy Clause to give these
statutes effect. In fact, in her motion and opposition papers,
Plaintiff does not make a single reference to these statutes.
Accordingly, the Court GRANTS Defendants summary judgment on the
sixth cause of action.

1 that Plaintiff complained section 1290 had lacked. Plaintiff also
2 raises no argument that sections 4502 and 4506 are
3 unconstitutional and does not seek to enjoin enforcement of these
4 sections. Because the complained-of section has been repealed,
5 Plaintiff's request to enjoin its enforcement is moot.

6 Plaintiff contends that, although her request for relief is
7 moot, she should be able to obtain an award of attorneys' fees
8 that she incurred during the pendency of this action. Plaintiff
9 argues, "To the extent the law was changed after plaintiff filed
10 her action," she is entitled to "an adjudication that plaintiff is
11 deemed a prevailing party for an award of attorney fees pursuant
12 to 42 U.S.C. Section 1988," because a "[p]ost hoc legislative
13 change altered the legal relationship between the parties and
14 constituted a direct benefit to plaintiff." Id.

15 Title 42 U.S.C. § 1988 provides in relevant part that, in any
16 action or proceeding to enforce various civil rights statutes,
17 including 42 U.S.C. § 1983, "the court, in its discretion, may
18 allow the prevailing party, other than the United States, a
19 reasonable attorney's fee as part of the costs." 42 U.S.C.
20 § 1988(b).

21 A "plaintiff who does not secure a judgment on the merits
22 'but has nonetheless achieved the desired result because the
23 lawsuit brought about a voluntary change in the defendant's
24 conduct' is not a 'prevailing party' for purposes of awarding
25 attorney's fees." Benton v. Or. Student Assistance Comm'n, 421
26 F.3d 901, 906-907 (9th Cir. 2005) (quoting Buckhannon Bd. & Care
27 Home, Inc. v. West Virginia Dept. of Health & Human Res., 532 U.S.
28 598, 600 (2001)). Following the Supreme Court's decision in

1 Buckhannon, the Ninth Circuit held that "to qualify as a
2 'prevailing party' under 42 U.S.C. § 1988 a party must obtain a
3 'judicially sanctioned change in the legal relationship of the
4 parties.'" Bennett v. Yoshina, 259 F.3d 1097, 1101 (9th Cir.
5 2001) (quoting Buckhannon, 532 U.S. at 1840 and holding that,
6 "even if" the "political branches were motivated to enact" a
7 legislative change "solely by this litigation, this result 'lacked
8 the necessary judicial imprimatur' to qualify plaintiffs as
9 prevailing parties") (emphasis in original).

10 Accordingly, even if the City changed the ordinance in
11 reaction to this lawsuit, and not, for example, in reaction to the
12 Supreme Court's decisions in Heller and McDonald v. City of
13 Chicago, 130 S. Ct. 3020 (2010), the City's voluntary change does
14 not qualify Plaintiff as a prevailing party for the purposes of
15 obtaining attorneys' fees.

16 CONCLUSION

17 For the reasons set forth above, the Court DENIES Plaintiff's
18 motion for summary judgment (Docket No. 60) and GRANTS Defendants'
19 cross-motions for summary judgment (Docket Nos. 71 and 91).

20 The Clerk shall enter judgment. Defendants shall recover
21 their costs from Plaintiff.

22 IT IS SO ORDERED.

23
24 Dated: 12/5/2012

25
26
27
28

CLAUDIA WILKEN
United States District Judge