UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOROTHY McKAY, DIANA KILGORE, PHILLIP WILLMS, FRED KOGEN, DAVID WEISS, and THE CRPA FOUNDATION, Plaintiffs-Appellant, v. SHERIFF SANDRA HUTCHENS, individually and in her official capacity as Sheriff of Orange County; ORANGE COUNTY SHERIFF-CORONER DEPARTMENT; COUNTY OF ORANGE; and DOES 1-10, Defendants-Appellees.	Case No. 12-57049 DC No. 8:12-cv-01458 JVS-JPR

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
HONORABLE JAMES V. SELNA, JUDGE PRESIDING

APPELLEES' BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned, counsel of record for Appellees, SHERIFF SANDRA HUTCHENS (as a governmental employee), and the ORANGE COUNTY SHERIFF-CORONER DEPARTMENT (as a governmental agency), certify that said parties do not know of any corporate entity that may have a direct, pecuniary interest in the outcome of this case.

DATED: January 17, 2013

Respectfully submitted,

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By____/s/ Elizabeth A. Pejeau_____
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I. STATEMENT OF ISSUE PRESENTED

Did the District Court's denial of Plaintiffs'/Appellants' Motion for Preliminary Injunction constitute an abuse of discretion?

II. STATEMENT REGARDING ADDENDUM

Pursuant to Rule 28(f) of the Federal Rules and Circuit Rule 28-2.7, except for the following unpublished judicial orders that are bound together with this brief, all applicable statutes, rules, and regulations are contained in the brief or addendum of Plaintiffs/Appellants:

- *Birdt v. Beck*, No. 10-cv-08377-JAK-JEM (S.D. Cal. January 13, 2011 [sic]), *on appeal* No. 12-55115 (9th Cir. Jan. 17, 2012)
- *Baker v. Kealoha*, No. 11-cv-00528-ACK-KSC (D. Haw. April 30, 2012), *on appeal* No. 12-16258 (9th Cir. May 30, 2012)

III. STATEMENT OF THE CASE

Plaintiffs/Appellants, Dorothy McKay ("McKay"), Phillip Willms ("Willms"), Fred Kogen ("Kogen"), David Weiss ("Weiss") and the California Pistol and Rifle Association Foundation ("CPRA") (collectively, "Plaintiffs") filed this action against Sheriff Sandra Hutchens ("the Sheriff") and the Orange County Sheriff-Coroner Department ("OCSD") (sometimes collectively referred to herein as "OCSD"). Although they have not named the State in their action, Plaintiffs challenge both the constitutionality of Penal Code § 26150(a) ("Section 26150"),

which directs the Sheriff (with certain exceptions) to require good cause to be shown prior to the issuance of a concealed carry (or "CCW") license, and of OCSD's implementation of the Penal Code through the CCW License Policy, Policy 218 ("Policy").

OCSD accepts Plaintiffs' Statement of the Case with respect to the procedural background of this matter; however, OCSD does not agree with the first paragraph of Plaintiffs' Statement of the Case. In particular, OCSD takes issue with Plaintiffs' characterization of the "good cause" component of the Policy, which Plaintiffs erroneously states *requires* specific threats of violence. As is described in the Statement of Facts, this is not what the Policy states, nor is it how it is implemented.

Contrary to Plaintiffs' assertions, this appeal is not about whether Plaintiffs have the right to bear arms in public in some fashion. Nor is it about whether the California Penal Code, taken as a whole, infringes on this right. Rather, this appeal relates only to whether the lower court abused its discretion in declining to enjoin the Sheriff from requiring a showing of "good cause" beyond the general desire of self-defense prior to the issuance of a *concealed carry* license.

IV. STATEMENT OF FACTS

California law prohibits the carrying of a concealed firearm (or "CCW") in public places subject to numerous exceptions. Penal Code § 25400 *et seq*. The

Penal Code sets forth the requirements that applicants for CCW licenses must meet, including the requirement that "good cause" be shown prior to the issuance of a license. Penal Code § 26150(a)(2). The Policy is OCSD's implementation of these requirements, which consistent with Section 26150, requires applicants to show good cause as a prerequisite to the issuance of a license.

A. The California Penal Code

Section 26150 provides, in relevant part:

> (a) When a person applies for a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person, the sheriff of a county may issue a license to that person upon proof of all of the following:
>
> (1) The applicant is of good moral character.
>
> (2) Good cause exists for issuance of the license.
>
> (3) The applicant is a resident of the county or a city within the county, or the applicant's principal place of employment or business is in the county or a city within the county and the applicant spends a substantial period of time in that place of employment or business.
>
> (4) The applicant has completed a course of training as described in Section 26165.

The licensing statute authorizes a procedure for a limited number of persons who meet the statutory criteria to be exempted from California's prohibition on concealed carry as contained in Penal Code section 25400(a). *See*, *e.g.*, Cal. Penal Code § 25450 (excluding peace officers, honorably retired peace officers), § 25505 (excluding transport of unloaded firearm in a locked container), § 25515 (excluding possession of firearm in locked container by member of organization or

club that collects and displays firearms), §§ 25525, 25530, 25535, 25550 (excluding transport between the person's place of business and residence or other private property owned or possessed by that person; transport related to repair, sale, loan or transfer, transportation related to coming and going from gun show or swap meet; transport to or from lawful camping site), § 25600 (allowing for justifiable violation of the statute when a person who possesses a firearm reasonably believes that person is in grave danger because of circumstances forming the basis of a current restraining order issued by a court against another person), § 25605 (exempting § 25400 from application to any person "who carries, either openly or concealed, anywhere within the citizen's or legal resident's place of residence, place of business, or on private property owned or lawfully possessed by the citizen or legal resident, any handgun").

California is a "may issue" state, meaning that law enforcement officials have discretion to grant or deny a CCW permit based on a number of statutory factors. Section 26150's predecessor, Penal Code section 12050,[1] has been interpreted to give "'extremely broad discretion' to the sheriff concerning the issuance of concealed weapons licenses." *Gifford v. City of Los Angeles*, 88 Cal.

[1] Section 26150, operative January 1, 2012, was previously codified in former Penal Code section 12050. Both the current and former section contains the "good cause" requirement and similar licensing requirements. In fact, the Law Revision Committee notes state that Section 26150 continues former section 12050 "without substantive change."

App. 4th 801, 805 (2001) (quoting *Nichols v. County of Santa Clara*, 223 Cal. App. 3d 1236, 1241 (1990)). The section "explicitly grants discretion to the issuing officer to issue or not issue a license to applicants meeting the minimum statutory requirements." *Erdelyi v. O'Brien*, 680 F.2d 61, 63 (9th Cir. 1982). Under state law, this discretion must be exercised in each individual case. "It is the duty of the sheriff to make such an investigation and determination, on an individual basis, on every application under Section 12050." *Salute v. Pitchess*, 61 Cal. App. 3d 557, 560-561 (1976).

B. Orange County's Licensing Program

OCSD administers the licensing program for Orange County. (Dubsky Decl. ¶ 3, ER Vol. II at 177.) The Sheriff has delegated to the CCW License Desk, under the Professional Standards Division, the responsibility for the processing of CCW licenses in Orange County. (Dubsky Decl. ¶¶ 2-4, ER Vol. II at 176-177.) Lieutenant Sheryl Dubsky, as Lieutenant of the Professional Standards Division, has been the Sheriff's authorized representative for reviewing CCW applications and making the final determination for the issuance of all CCW licenses. (*Id*.) CCW licenses are issued pursuant to the Policy, which implements the requirements of Section 26150, including a showing of "good cause." (Dubsky Decl. ¶¶ 4-6, ER Vol. II at 177-178.)

Pursuant to the Policy, "good cause" is determined by OCSD on an individual case-by-case basis. (*See* Dubsky Decl. ¶¶ 3, 6, ER Vol. II at 177-178; Soto Decl. ¶ 3, ER Vol. II at 046.) "Non-specific, general concerns about personal safety are insufficient." (S*ee* Ex. A to Dubsky Decl., ER Vol. II at 182-188; Dubsky Decl. ¶ 5, ER Vol. II at 177-178.) The Policy contains a number of criteria that may establish good cause, but these "are not intended to be all-inclusive." (Ex. A to Dubsky Decl., ER Vol. II at 182-183.) Thus, contrary to Plaintiffs' assertions (*see, e.g.*, Op. Br. at 3, 43, 50), the Policy's permissive language is broader and encompasses more potential criteria than just specific threats of violence. Additionally, the Policy does not concern Plaintiffs' right to bear arms in some places and circumstances, *see* Statement of Facts, IV.A.; thus, Plaintiff's statement that the Policy "prohibits them from exercising their right to bear arms" (*see* Op. Br. at 14) is objectively false.

C. Regulation of Concealed Firearms Benefits Public Safety

There is a strong empirical correlation between the use of guns and violent crime, with 20% of all such crimes involving guns. (Zimring Decl. ¶ 4, ER Vol. II at 114-115). This correlation is even stronger between the use of guns and lethal crimes: 70% of all lethal offenses involved guns. (*Id*.) Thus, the proportion of violent crimes involving guns will have a major impact on the number of victims who die in those crimes. (Zimring Decl. ¶ 6, ER Vol. II at 116.)

Handguns are a particular hazard because they are more likely to be used in criminal violence than shotguns and rifles. (Zimring Decl. ¶ 8, ER Vol. II at 116-117.) Although they only account for one-third of all firearms owned by civilians in the United States, they are used in more than 75% of all gun killings and constitute 86% of all firearms used in assaults and 96% of all firearms used in gun-related robberies. (Zimring Decl. ¶¶ 8, 15, ER Vol. II at 116-117, 119.) The reason for this is that handguns are easily concealed for transportation to a criminal destination. (Zimring Decl. ¶ 13-15, ER Vol. II at 118-119.) People in public cannot avoid and police patrolling the streets cannot detect those who carry deadly concealed weapons until they are brandished. (Zimring Decl. ¶¶ 10, 14, 20-21, ER Vol. II at 117, 119, 121-122.) Since concealed handguns have the advantage of escaping scrutiny, they are the weapon of choice for criminals committing robberies and assaults. (Zimring Decl. ¶¶ 8, 14-15, ER Vol. II at 116-117, 119.)

In addition, most violent crimes are not committed by former felons. A majority of criminal homicides and other serious crimes are committed by individuals who have not been convicted of a felony. (Zimring Decl. ¶ 23, ER Vol. II at 122-123.) Data shows that approximately one-third of people arrested for felonies have a felony conviction at the time of arrest. (Zimring Decl. ¶¶ 24-26, ER Vol. II at 123-124.) That means that two-thirds of felony suspects would have been eligible for CCW permits at the time of their arrest. (*Id.*)

D. Plaintiffs' Claims

Plaintiffs McKay, Kilgore, Willms, Kogen, and Weiss allege that they are residents of Orange County and that each is eligible to possess firearms under state and federal law, and each currently owns a handgun. (First Amended Complaint ("FAC") ¶ 6, ER Vol. II at 269.)

1. Dorothy McKay

Plaintiff McKay alleges she is a public school teacher and National Rifle Association-Certified Firearms Instructor/Range Safety Officer who, on October 25, 2011, applied for a CCW license, asserting a general desire for self-defense as her "good cause" due to her traveling alone in remote areas, sometimes with valuables, for her work. (McKay Decl. ¶ 4, 8, ER Vol. II at 237-238; FAC ¶7, ER Vol. II at 270.) Her CCW application was denied on December 28, 2011. (FAC, ¶ 8, ER Vol. II at 270; McKay Decl. ¶ 9, ER Vol. II at 238.) McKay's application was denied for failure to establish good cause because she demonstrated merely a generalized fear for her safety. (Dubsky Decl. ¶ 12, ER Vol. II at 179; Ex. B to Dubsky Decl., ER Vol. II at 189.)

2. Phillip Willms

Plaintiff Willms alleges he is an Orange County business owner and a professional shooter and that on November 1, 2011, he applied for a CCW license, asserting a general desire for self-defense as his "good cause" due to his

business activities and hobbies requiring him to have valuable possessions on his person. (FAC ¶ 9, ER Vol. II at 270; Willms Decl. ¶9, ER Vol. II at 249-250.) On January 24, 2012, his application was denied for lack of good cause. (FAC ¶ 10, ER Vol. II at 270; Willms Decl. ¶ 10, ER Vol. II at 250.) Willms requested reconsideration of his denial and on March 21, 2012, his denial was confirmed. (FAC ¶ 10, ER Vol. II at 270; Willms Decl. ¶¶ 11-12, ER Vol. II at 250.) Willms' CCW application was denied for failure to establish good cause because he expressed a concern that he *may* be a target due to his business activities, but then stated that "[w]ith what I have told you so far, this is still not the reason I feel I need a CCW." (Dubsky Decl. ¶ 13, ER Vol. II at 180; Ex. C to Dubsky Decl., ER Vol. II at 190-191.)

3. Fred Kogen

Plaintiff Kogen alleges he is a medical doctor who travels performing infant circumcisions, which some consider controversial and for which some have threatened those doctors, including Kogen. (FAC ¶ 11, ER Vol. II at 270; Kogen Decl. ¶ 5, ER Vol. II at 246.) Kogen alleges he submitted an application for a CCW license, which was denied on July 10, 2012, for lack of good cause. (FAC ¶ 12. ER Vol. II at 270; Kogen Decl. ¶ 9, ER Vol. II at 247.) Kogen's application was denied for failing to establish good cause because the alleged threat to him was an unverified email that denounced his profession and contained no

imminent threat. (Dubsky Decl. ¶ 15, ER Vol. II at 181; Ex. E to Dubsky Decl., ER Vol. II at 194-195.)

4. David Weiss

Plaintiff Weiss alleges he is a pastor who travels around the County to meet with church members. (FAC ¶ 13, ER Vol. II at 270-271; Weiss Decl. ¶ 4, ER Vol. II at 240.) He applied for a CCW license, asserting a general desire for self-defense as his "good cause" due to frequenting unknown areas to sometimes meet unknown people in oftentimes emotionally charged situations. (FAC ¶ 13, ER Vol. II at 270-271; Weiss Decl. ¶ 7, ER Vol. II at 240-241.) On March 21, 2012, Weiss's CCW application was denied for lack of good cause. (FAC ¶ 14, ER Vol. II at 271; Weiss Decl. ¶ 8, ER Vol. II at 241.) His application was denied for failing to establish good cause because there was no showing of a particular incident or threat, and instead, Weiss stated he need a CCW License "due to the changing times." (Dubsky Decl. ¶ 14, ER Vol. II at 180-181; Ex. D to Dubsky Decl, ER Vol. II at 193.)

5. Diana Kilgore

Plaintiff Kilgore did not apply for a CCW license, alleging that doing so would be futile because she does not meet the Sheriff's standard of "good cause" articulated in the Policy. (FAC ¶ 15, ER Vol. II at 271; Kilgore Decl. ¶ 6, ER Vol. II at 243.)

6. The CRPA Foundation

Plaintiff CPRA is an association that conducts firearm safety advocacy and advocates in court through litigation brought to benefit CPRA. (FAC ¶ 17, ER Vol. II at 271; Montanarella Decl. ¶ 5, ER Vol. II at 252.) CPRA alleges the Policy frustrates its mission to promote the right to armed self-defense. (FAC ¶ 18, ER Vol. II at 271-272.) CPRA alleges it represents the interests of its members who reside in the County and desire to obtain a CCW license but have been denied based upon lack of good cause or have refrained from applying for a license because they do not meet the good cause requirement. (FAC ¶ 19, ER Vol. II at 272; Montanarella Decl. ¶ 8, ER Vol. II at 253.)

D. The District Court's Ruling

The District Court denied Plaintiffs' Motion for Preliminary Injunction after citing the legal standard used in the Ninth Circuit for deciding whether or not a preliminary injunction should be issued. In making its ruling, the District Court stated, in pertinent part:

> "The Court finds that there is a substantial question as to whether Plaintiffs have a likelihood of prevailing on the merits. . . .Constitutional challenges to comparable laws and policies repeatedly have been rejected in California and other states [and] other courts repeatedly have declined to extend *Heller* beyond its core holding regarding possession in the home for self defense." (Internal Citations omitted.) (ER Vol I. at 004.)

After making the above comments with citation to the various authorities that have refused to extend the right to bear arms outside the home, the District Court stated, "[a]t this stage, the Court finds that this factor [likelihood of success] heavily weighs against a preliminary injunction." (*Id*.) When discussing the "irreparable harm" prong of the preliminary injunction test, the District Court noted that "because of the substantial question about the extent of the Second Amendment right as recognized in *Heller*, the Court does not find that there is a likelihood of a real, immediate, and non-conjectural violation of a constitutional right." (*Id*.) Finally, in discussing the balancing of equities and the public interest prong, the District Court quoted from *Piszczatoski v. Filko*, 840 F. Supp. 2d 813 (D.N.J. 2012), finding that "'the risks associated with a judicial error' in enjoining 'regulation of firearms carried in public are too great' to justify a preliminary injunction." (ER Vol. I at 005.)

V. SUMMARY OF ARGUMENT

For purposes of this appeal, there is only one issue: whether the District Court abused its discretion in denying Plaintiffs' Motion for Preliminary Injunction seeking to enjoin enforcement of the Policy requiring "good cause" prior to the issuance of a CCW license. In an attempt to expand the issues in this appeal, Plaintiffs erroneously assert that this appeal concerns the right to bear arms in public and is "*not* about a constitutional right to carry firearms in a concealed

matter." (Op. Br. at 14.) But it is only the Policy and authorizing statute that are at issue on this appeal. In short, Plaintiffs appear to be attempting to challenge California's statutory limitations on both the public and concealed carry of loaded firearms as contained in Penal Code sections 25400 and 25850 by attacking the CCW licensing policy of a single county sheriff. Plaintiffs' argument is, at its core, a challenge to California's entire statutory scheme regarding firearms rather than OCSD's administration of CCW licensing. (*See, e.g.*, Op. Br. at 5, 7, 9, 38, 41.) Moreover, Plaintiffs explicitly challenge the constitutionality of Section 26150 regulating the issuance of CCW licenses despite failing to name the real party in interest: the State.[2]

The primary focus of Plaintiffs' challenge is on Second Amendment grounds. Contrary to Plaintiffs' contentions, the District Court was not confused about the extent of the Second Amendment right, as is demonstrated from the litany of cases the District Court cited in support of its ruling. Plaintiffs also erroneously assert that the right to bear arms includes the right to carry a loaded concealed firearm in public, based upon "history and tradition." (Op. Br. at 30.) But history and tradition reveal otherwise. Indeed, the Supreme Court recognized over one hundred years ago that the right to keep and bear arms "is not infringed

[2] Even though the State is the real party in interest and is a necessary party to any challenge to the statute, the Sheriff briefly addresses Section 26150 throughout this brief to the extent it is the basis for the Policy and both Section 26150 and the Policy serve the same governmental interest.

by laws prohibiting the carrying of concealed weapons." *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897); *see also District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

Neither the Policy nor Section 21650 substantially burdens the right to bear arms in self-defense of the home as articulated by the Supreme Court. Because concealed carry outside the home has not been established as a protected Second Amendment right and the Policy does not burden the core right articulated in *Heller*, no heightened scrutiny is appropriate. Nevertheless, even assuming *arguendo* that the Policy and Section 21650 substantially burden the Second Amendment right, intermediate scrutiny would be the appropriate level of review. But under any level of scrutiny, the Policy and Section 26150 survive, as the governmental interest in public safety furthered by limiting the licensing of concealed carry of firearms is important and compelling, and both the Policy and Section 26150 are substantially related and narrowly tailored to achieving that government interest.

Additionally, Plaintiffs' claim that the Policy and Section 26150 violate the Equal Protection Clause of the Fourteenth Amendment also fails. As explained herein, Plaintiffs cannot meet the threshold showing of an equal protection claim since they cannot prove that they are treated differently from similarly-situated persons who were granted CCW licenses.

Finally, Plaintiffs' claim that the "good cause" provisions of the Policy and Section 26150 are facially invalid is without merit. A facial challenge can only succeed by establishing that no set of circumstances exists under which the law would be valid, i.e., that the law is unconstitutional in all of its applications. This, Plaintiffs cannot do.

Under the applicable law and the facts as set forth in support of, and in opposition to, Plaintiffs' Motion for Preliminary Injunction, Plaintiffs failed to establish they had a likelihood of success on the merits. They further failed to establish they would suffer irreparable harm and/or the balancing of equities tipped in their favor. Hence, the District Court's decision to deny the injunctive relief sought was not an abuse of discretion and should be affirmed.

VI. ARGUMENT

As the District Court correctly recognized, a preliminary injunction is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. (Order, ER Vol. I at 003, citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 25 (2008).) For the reasons set forth below, the District Court properly concluded that the instant case did not constitute that sort of exceptional case that meets the four-part *Winter* test.

A. The Standard of Review for Denial of a Preliminary Injunction

The denial of a motion for preliminary injunction is reviewed for abuse of discretion. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011) (citing *Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir. 2008)). The abuse of discretion standard requires the reviewing court to determine *de novo* whether the trial court based its decision "on an erroneous legal standard or clearly erroneous finding of fact." *Id*. at 1131. As long as the trial court "got the law right," it will not be reversed even if the appellate court would have arrived at a different result. *Id*.; *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012) (quoting *Thalheimer v. City of San Diego*, 645 F.3d 1109, 115 (9th Cir. 2011) and *Dominguez v. Shwarzenegger*, 596 F.3d 1087, 1092 (9th Cir. 2010)). "This review is limited and deferential, and it does not extend to the underlying merits of the case." *Farris*, 677 F.3d at 864 (quoting *Thalheimer*, 645 F.3d at 115 and *Johnson v. Couturier*, 572 F.3d 1067, 1078 (9th Cir. 2009)).

B. The District Court Applied the Correct Legal Standard

Plaintiffs acknowledge that the correct standard to be applied in analyzing a motion for preliminary injunction is the four factor test set forth in *Winter*, 555 U.S. at 20. (Op. Br. at 17.) *See also Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). This test requires that plaintiffs seeking a preliminary injunction must establish: (1) a likelihood of success on the merits, (2) a

likelihood of irreparable injury in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) a preliminary injunction is in the public interest. The District Court also acknowledged that the *Winter* factors may be evaluated on a sliding scale, as set forth in *Alliance for the Wild Rockies*, 632 F.3d at 1134-35. (Order, ER Vol. I at 0003.) Applying those factors, the District Court denied Plaintiffs' motion, finding that each of the factors heavily weighed against a preliminary injunction. (Order, ER Vol. I at 003-005.)

Plaintiffs concede both that the District Court applied the correct legal standard regarding issuance of a preliminary injunction and that no facts were at issue. (Op. Br. at 18.) Rather, they contend the Court failed "to apply the proper substantive law to the underlying legal questions that Plaintiffs raised." (*Id*. at 19.) However, Plaintiffs mischaracterize the Court's ruling, alleging the Court was confused as to the extent of the right protected by the Second Amendment. (Op. Br. at 11-13.) The record belies this contention. What the District Court said was that in light of other courts' repeated rejection of constitutional challenges to comparable laws and policies, there was a substantial question as to whether the Plaintiffs had a likelihood of prevailing on the merits. (Opinion, ER Vol. I at 004.) Since other courts have declined to extend *Heller* beyond its core holding regarding the right to possess firearms in the home for self-defense, the District

Court concluded there was no showing of a substantial likelihood of success. (*Id*.) In other words, Plaintiffs failed to meet their burden.

By recognizing these other court rulings, the District Court implicitly adopted the standards and rationale articulated in them, i.e., that CCW licensing requirements did not impinge on a core fundamental right and that they survived intermediate scrutiny. (*Id*.) Plaintiffs take issue with the rulings cited by the District Court and assert that the ability to carry firearms for self-defense is their fundamental right; however, the Supreme Court has yet to agree. In fact, the Supreme Court has specifically invoked the specter of concealed prohibitions without striking down the same. *See Heller*, 544 U.S. at 626. Plaintiffs' position is without merit as their assertions and arguments misstate the law and ignore widely-recognized limits on the individual right to bear arms. Consequently, the District Court's order was proper and should be upheld.

C. The District Court Did Not Abuse Its Discretion in Determining That Plaintiffs Were Not Likely to Succeed on Their Second Amendment Claims

The District Court's ruling was based on the prevailing judicial interpretation of the scope of the Second Amendment, and thus, was not illogical, implausible, or without support. (*See* Op. Br. at 18, citing *United States v. Hinkson*, 585 F.3d 1247, 1262.) In light of the current state of the law, the District

Court did not abuse its discretion in determining that Plaintiffs had not demonstrated a likelihood of success on the merits.

1. Two Part Analysis in Second Amendment Cases

After the decision in *Heller*, most circuit courts have adopted a two-part analysis of Second Amendment challenges to gun control statutes. First, the court determines if the challenged statute impinges on protected conduct. If so, the court must evaluate the law under the appropriate level of means-end scrutiny and ascertain whether it is constitutional or invalid. *United States v. Reese*, 627 F.3d 792, 800-801 (10th Cir. 2010), quoting *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) ("As we read *Heller*, it suggests a two-pronged approach to Second Amendment challenges. First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee.... If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny."); *Ezell v. City of Chicago*, 651 F.3d 684, 701 (7th Cir. 2011) (the threshold inquiry in Second Amendment cases is a "'scope' question: Is the restricted activity protected by the Second Amendment in the first place?"); *GeorgiaCarry.Org, Inc. v. Georgia*, 764 F. Supp. 2d 1306, 1316-1317 (M.D. Ga. 2011) (cataloging various analytical approaches and deciding to initially address whether Second Amendment protection applies to conduct regulated before

addressing means-end scrutiny). *See also People v. Delacy*, 192 Cal. App. 4th 1481, 1491-1492 (2011) (deeming *Heller* to limit the scope of Second Amendment protection and declining to apply means-end scrutiny to such presumptively valid gun restrictions).

As discussed, *infra*, the Policy does not burden conduct falling within the core Second Amendment right because it does not implicate the right to possess and use handguns for self-defense in the home – the scope of the right articulated in *Heller*. Additionally, it survives any level of means-end scrutiny. As such, the District Court did not abuse its discretion in finding that the likelihood of success on the merits did not weigh in favor of granting the preliminary injunction.

2. The "Good Cause" Requirement Does Not Burden the Core Second Amendment Right

a. Prevailing Judicial Interpretation of the Scope of the Second Amendment Does Not Support Plaintiffs' Position

In *Heller*, the Supreme Court considered whether a District of Columbia prohibition on the possession of usable handguns violates the Second Amendment to the Constitution. 554 U.S. at 573-576. A majority of the court held "that the District's ban on handgun possession *in the home* violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Id.* at 635 (emphasis added). The Court in *Heller* did not go beyond the limited facts of that case and beyond the

issue presented to the Court, i.e., whether a complete ban on usable handgun possession violated the Second Amendment insofar as it prohibited the carrying and use of functional firearms in the home.

In fact, the *Heller* Court cautioned that the Second Amendment does not "protect the right of citizens to carry arms for any sort of confrontation," *id*. at 595, and recognized that the Supreme Court had never held that the Second Amendment guarantees a right to carry weapons for self-defense outside the home. On the contrary, it emphasized the limited nature of its ruling:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right [to keep and bear arms] was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose…For example, the majority of the 19th-century courts to consider the question held that *prohibitions on carrying concealed weapons were lawful* under the Second Amendment or state analogues. [Citations.]

Heller, 554 U.S. at 626 (emphasis added). Thus, the "core" Second Amendment "right" articulated by the Supreme Court in *Heller* does not extend to carrying a firearm in public.

In *McDonald v. City of Chicago*, __U.S.__, 130 S.Ct. 3020 (2010), the Supreme Court did not expand the scope of the right articulated in *Heller*; rather, it held that the Second Amendment was incorporated by the Fourteenth Amendment, and therefore, applied to the states. 130 S.Ct. at 3050. The Court specifically

identified its prior holding: "In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense." *Id*. Thus, the Court made clear in both *Heller* and *McDonald* that its holdings only applied to handguns in the home for self-defense, and the Court's language must be read in that light. *Heller*, 554, U.S. at 635. *See also United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc).

The prevailing judicial interpretation of the scope of the Second Amendment right after *Heller* – including that of the Ninth Circuit Court of Appeals – recognizes the limited scope of the Second Amendment right and confirms that *Heller* limits the core Second Amendment right to the right to bear arms for self-defense in the home. *See United States v. Vongxay*, 594 F.3d 1111, 1114-1115 (9th Cir. 2010) (describing the *Heller* right as "the right to register and keep a loaded firearm in [the] home for self-defense" and noting, "[c]ourts often limit the scope of their holdings, and such limitations are integral to those holdings"); *Penuliar v. Mukasky*, 528 F.3d 603, 614 (9th Cir. 2008) (stating Supreme Court decisions are limited to the boundaries of the question before the Court); *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011)(declaring "[o]n the question of Heller's applicability outside the home environment, we think it prudent to await direction from the Court itself"); *Sims v. United States*, 963 A.2nd 147, 150 (D.C. 2008)(rejecting Second Amendment claim under plain error review

because the Supreme Court had not held that the Second Amendment extends outside the home); *People v. Dawson*, 934 N.E.2d 598, 605-607 (Ill. App. Ct. 2010)(declining to extend the Second Amendment outside of the home because the Supreme Court "deliberately and expressly maintained a controlled pace of essentially beginning to define this constitutional right"); *Williams v. State*, 10 A.3d 1167, 1177 (Md. 2011)(stating "[I]f the Supreme Court…mean its holding to extend beyond home possession, it will need to say so more plainly").

Dismissing this prevailing interpretation, Plaintiffs assert the Second Amendment "undoubtedly protects a right to generally bear arms outside the home for self-defense purposes." (Op. Br. at 21.) But, other than their interpretation of *Heller*, Plaintiffs have not cited to any controlling authority to support their claim of the right to public carry. Looking to tradition and history, Plaintiffs cite to a Senator's comments, a Congressional report, and a court ruling – all from 1866 – that were critical of laws that permitted whites to carry guns while black could not. (Op. Br. at 22-23.) But those only provide support for Plaintiffs' assertion that "carrying arms for personal defense was widely understood as a right enjoyed by all free people" (*id.*); it does not mean that the "widely understood" right extended to the carrying of guns *beyond the home*. Plaintiffs also cite to a law review article to support their claim that "numerous state court cases . . . provide compelling evidence that a right to publicly carry arms for self-defense has been historically

recognized" (Op. Br. at 23); however, Plaintiffs provide no actual case citations to support this assertion. (*Id*.)

Plaintiffs do cite three unpublished out-of-state district cases to support their assertions about the scope of the right to carry in self-defense (Op. Br. at 26-27), but none of the cases cited actually go that far. The Court in *Wollard v. Sheridan*, 2012 WL 6975674 (D. Md. Mar. 2, 2012) recognized the "core right" articulated in *Heller*, but then inexplicably and in reliance on the opinion of a Fourth Circuit Judge that they recognized was not in the majority, concluded that the "signposts" contained in *Heller* indicated that the right extends beyond the home. *Id.* at *7 (citing *Masciandaro,* 638 F.3d at 468). This interpretation is simply not supported by the specific reasoning in *Wollard*. Moreover, the Court made clear that it was not considering the constitutional question involved in the instant case, stating, "Nor does the Court speculate as to whether a law that required a 'good and substantial reason' only of law-abiding citizens who wish to carry a *concealed* handgun would be constitutional." *Wollard*, 2012 WL 6975674 at *12.

While the Court in *United States v. Weaver*, 2012 WL 727488 (S.D. W. VA. Mar. 6, 2012) expressed "no such hesitation" in expanding the right to keep and bear arms outside the home, it recognized that the *Heller* Court articulated the "core right" as "'the right of law-abiding, responsible citizens to use arms in the defense of hearth and home.'" *Id.* at * 2. Recognizing that the law at issue – a

prohibition on possessing firearms while being employed by a convicted felon – did not burden the core right, the Court refused to apply strict scrutiny. *Id.* at ** 5-6. Thus, the case did not expand the scope of *Heller* and does not stand for the proposition that there is unlimited right to bear arms in public.

Finally, in *Bateman v. Perdue*, 2012 WL 3068580 (E.D. N.C. Mar. 29, 2012), the Court reasoned that although the statutes at issue "do not *directly* regulate the possession of firearms within the home, they effectively prohibit law-abiding citizens from purchasing and transporting to their homes firearms and ammunition needed for self-defense. As such, these laws burden conduct protected by the Second Amendment." *Id.* at * 4. Hence, the Court was concerned about the statute's impact on the right to possession of firearms *within the home*. While the Court cited *Heller*'s historical review and textual analysis of the right to keep and bear arms as indicative that the Second Amendment right extends beyond the home, it acknowledged that "considerable uncertainty exists regarding the scope of the Second Amendment right to keep and bear arms," *id.* at * 4, and did not hold that there is a right to bear arms in public.

This Court also should not be guided by the Seventh Circuit's recent ruling that struck down Illinois' blanket prohibition on carrying loaded guns in public. *Moore v. Madigan*, Nos. 12-1269, 12-1788, 2012 WL 6156062 (7th Cir. Dec. 11, 2012.) In that case, the Court determined that the law was such a substantial

curtailment of the right of armed self-defense, i.e., a complete ban, that it required a greater showing of justification for enacting it. *Id.* at **8-9. The issue in *Moore* was not whether requiring "good cause" prior to issuance of a license to carry a concealed weapon violated the Second Amendment; rather, the issue was whether banning the carry of an immediately accessible and uncased gun (with some limited exceptions) violated the Second Amendment. In fact, the Court acknowledged in its opinion that the New York law requiring CCW permit applicants to show "proper cause," which was upheld in *Kachalsky v. Cacace*, 817 F. Supp. 2d 235 (S.D. N.Y. 2011), was less restrictive than Illinois' law. *Id.* at *8. While the Seventh Circuit disagreed with the *Kachalsky* Court's suggestion that the Second Amendment should have greater scope inside the home, it declined to criticize the outcome in *Kachalsky*. *Id*. Since the law at issue in that *Moore* differs substantially from the Policy and Section 26150, and the Seventh Circuit did not opine that concealed carry is secured by the Second Amendment, *Moore* should not control.

The three cases cited by the Plaintiffs and the recent Seventh Circuit case all rely on the Supreme Court's textual analysis; however, such reliance has been criticized and should not serve as a basis for reading *Heller* in an expansive manner:

> This textual interpretation does not stand on its own, however, but rather appears within the context of, and is

> provided solely to support, the Court's holding that the Second Amendment gives rise to an individual right, rather than a collective right connected to service in a militia . . . . Nor does this textual interpretation somehow expand the Court's holding, as such a reading overlooks the opinion's pervasive limiting language discussed above. *See, e.g., People v. Dawson*, 403 Ill.App.3d 499, 343 Ill.Dec. 274, 934 N.E.2d 598, 605 (2010) ("The specific limitations in *Heller* and *McDonald* applying only to a ban on handgun possession in a home cannot be overcome by defendant's pointing to the *Heller* majority's discussion of the natural meaning of 'bear arms' including wearing or carrying upon the person or in clothing."), *cert. denied*, __ U.S. __, 131 S.Ct. 2880, 179 L.Ed.2d 1194 (2011). *Kachalsky*, 817 F. Supp. 2d at 262.

For the foregoing reasons, *Wollard*, *Weaver*, *Bateman*, and *Moore* should not be considered as evidence of the "growing consensus that there is a right to armed self-defense in public." (Op. Br. at 27 fn. 11.) The "core right" as articulated by *Heller* has not been widely recognized by subsequent courts as extending beyond the home. Contrary to Plaintiffs' argument that there is a recognized constitutional right to carry firearms in public for the purpose of self-defense, the weight of federal and state authority demonstrates that the scope of the Second Amendment "core" right is limited to handgun possession in the home.

b. Carrying a Concealed Handgun in Public Has Not Been Established as Protected by the Second Amendment

The Court's recognition in *Heller* that prohibitions on concealed weapons were lawful was in full accord with the historical record and long-standing Supreme Court precedent. *Heller*, 544 U.S. at 579-619, 626. If, as *Heller*

confirms, the Framers of the Constitution borrowed their understanding of the Second Amendment right from English law, they would have necessarily accepted England's practice of restricting such rights. *See* Patrick J. Charles, *The Faces of the Second Outside the Home: History versus Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1, 31 (2012) (citing *Heller*, 554 U.S. at 593, 599); Patrick J. Charles, *Scribble Scrabble, The Second Amendment, & Historical Guideposts: A Short Reply to Lawrence Rosenthal & Joyce Lee Malcolm*, 105 Nw. U. L. Rev. Colloquy 227, 237 (2011) (noting that the Statute of Northampton's restrictions on public carry remained the law of Massachusetts, North Carolina, and Virginia even after the ratification of the Constitution). The historical record from England and early America firmly establishes that the Framers did not understand the Second Amendment right to include public carry. This was recognized by the Supreme Court not only in *Heller*, but over a century ago, when the Court noted in dicta that "the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons." *Robertson*, 165 U.S. at 281-82. Thus, even if a scope-based analysis of the Policy was employed, as suggested by Plaintiffs (Op. Br. at 29-31), based on historical prohibitions on the carrying of firearms in public, the Policy is presumptively valid and does not involve an activity that falls within the protections and scope of the Second Amendment.

Since *Heller* was decided, a number of district courts have heard cases involving challenges to state and municipal CCW restrictions, including laws requiring an applicant to prove "good cause" to be granted a concealed permit. Cases within the Ninth Circuit, particularly from California, have involved Second Amendment challenges similar to those presented here. *See Richards v. County of Yolo*, 821 F. Supp. 2d 1169, 1174-1175 (E.D. Cal. 2011)(the sheriff's CCW policy excluded as "good cause" the reason of self-defense "without credible threats of violence"); *Birdt v. Beck*, No. 10-cv-08377-JAK-JEM (S.D. Cal. January 13, 2011 [sic]), *on appeal* No. 12-55115 (9th Cir. Jan. 17, 2012)(the police's CCW policy required "a clear and present danger to life or of great bodily injury"); *Peruta v. County of San Diego*, 758 F. Supp. 2d 1106, 1110 (S.D. Cal. 2010)(the sheriff's policy stated that "good cause" for obtaining a CCW license did not include a "[g]eneralized fear for one's personal safety"). In all three California CCW cases, the courts upheld the validity of Section 26150 (formerly 12050) and the sheriff/police policies implementing that section against Second Amendment challenges. *Richards*, 821 F. Supp. 2d at 1178; *Birdt*, No. 10-cv-08377-JAK-JEM at *9; *Peruta*, 758 F. Supp. 2d at 1117. The *Richards* court stated, "*Heller* cannot be read to invalidate Yolo County's concealed weapon policy, as the Second Amendment does not create a fundamental right to carry a concealed weapon in public." *Richards*, 758 F. Supp. 2d at 1174-1175.

See also Baker v. Kealoha, No. 11-cv-00528-ACK-KSC (D. Haw. April 30, 2012), *on appeal* No. 12-16258 (9th Cir. May 30, 2012) (denying motion for preliminary injunction seeking to enjoin statute authorizing issuance of a concealed-carry license "in an exceptional case" and an open-carry license to those "engaged in the protection of life and property" where "the urgency or the need has been sufficiently indicated"); *Piszczatoski*, 840 F. Supp. 2d at 816, 837 (holding that a New Jersey law requiring permit applicants to demonstrate "justifiable need" to carry a handgun did not burden Second Amendment protected conduct); *Kachalsky*, 817 F. Supp. 2d at 262-265 (holding that that the right articulated by *Heller* does not extend to carrying a concealed and loaded handgun in public).

California state courts have also uniformly reached the same conclusion regarding the scope of the Second Amendment right. *See People v. Mitchell*, 2012 WL 3660270, – Cal.Rptr.3d – (2012) (stating "the *Heller* opinion specifically expressed constitutional approval of the accepted statutory proscriptions against carrying concealed weapons"); *People v. Ellison*, 196 Cal. App. 4th 1342, 1350-1351 (2011); *People v. Flores*, 169 Cal. App. 4th 568, 576-577 (2008) ("[T]he *Heller* opinion emphasizes, with apparent approval, that "'the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues'"); *People*

v. Yarbrough, 169 Cal. App. 4th 303, 312-314. (2008) (stating "in the aftermath of *Heller* the prohibition 'on the carrying of a concealed weapon without a permit, continues to be a lawful exercise by the state of its regulatory authority notwithstanding the Second Amendment'").

The "core right" as articulated by *Heller* has not been extended to carrying concealed firearms, and the Policy does not prevent the possession and use handguns for self-defense in the home. Thus, the Policy falls outside the scope of the "core right" as established by *Heller* and subsequent courts.

3. The Policy and Code Section Survive Any Standard of Scrutiny

Contrary to Plaintiffs' assertion (Op. Br. at 29-30), the Court in *Heller* did suggest that some form of a means-end test is appropriate in analyzing Second Amendment challenges to policies or statutes. *Heller*, 554 U.S. at 628-629. While the Court in *Heller* declined to adopt a standard of scrutiny to be used when evaluating laws regulating the "core" Second Amendment right, numerous federal circuit courts post-*Heller* have determined that only regulations that substantially burden the core right to keep and bear arms trigger heightened scrutiny under the Second Amendment. Even if this Court finds that the Policy and/or Section 26150 impose a burden on conduct falling within the scope of the Second Amendment right so that heightened scrutiny applies, they both withstand any level of constitutional scrutiny under the means-end scrutiny standards. Thus, the District

Court did not abuse its discretion in finding that Plaintiffs' were not likely to succeed on the merits of their Second Amendment claim.

a. Because Neither the Policy Nor Section 26150 Burden the Second Amendment Right Articulated in *Heller*, Rational Basis Review is Appropriate

Because concealed carry outside the home has not been established as a Second Amendment right and the "good cause" requirement of the Policy and Section 26150 does not burden *Heller*'s core right of bearing arms in the home for self-defense, no heightened scrutiny is appropriate in this case. *See Nordyke v. King*, 644 F.3d 776, 786 (9th Cir. 2011), vacated following hearing en banc by 681 F.3d (2012) (holding that only regulations which substantially burden the right to keep and to bear arms trigger heightened scrutiny under the Second Amendment and where no such substantial burden is imposed, rational basis review will apply.) Although the *Nordyke* decision was vacated by the en banc panel, a recent District Court found its holding remains persuasive authority on the issue of the level of scrutiny that should apply. *See Scocca v. Smith*, 2012 WL 2375203 *6 (June 22, 2012) ("Although the *Nordyke* panel decision is no longer binding authority (in light of the en banc decision), the reasoning of the panel decision is still persuasive—*i.e.*, that "'heightened scrutiny does not apply unless a regulation substantially burdens the right to keep and to bear arms for self-defense'"). *See also Richards*, 821 F. Supp. 2d at 1174-1775; *Ellison*, 196

Cal. App. 4th at 1350-1351; *Flores*, 169 Cal. App. 4th at 576-577; *Yarbrough*, 169 Cal. App. 4th at 312-314.

Recently a California district court concluded, in a case challenging a similar CCW "good cause" policy, that rational basis or reasonableness review applies to laws that regulate, but do not significantly burden, fundamental rights. *Richards*, 821 F. Supp. 2d at 1174-1775. Similarly, here neither Section 26150 nor the Policy impedes the ability of individuals to defend themselves with firearms in their homes. The Policy, which limits CCW licenses to individuals with identifiable and documented needs for concealed carry, has no impact on the Second Amendment's core right of self-defense in the home.

Under rational basis review, a statute will be "upheld if [it is] rationally related to a legitimate governmental purpose." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1137 (9th Cir. 2009); *see also United States v. Whitlock*, 639 F.3d 935, 941 (9th Cir. 2011). "To invalidate a law reviewed under this standard, '[t][he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" *Stormans*, 586 F.3d at 1137 (citation omitted).

b. Intermediate Scrutiny Is Appropriate if the Policy and/or Section 26150 Substantially Burden the Second Amendment Right to Possess Firearms in the Home

If this court were to depart from the limited holding of *Heller* and *McDonald* and conclude that the Policy substantially burdens the Second Amendment, then

intermediate scrutiny would be the appropriate level of review. The Policy and Section 26150 clearly meet this standard. Had the District Court determined that the regulation of CCW permits implicated protected Second Amendment activity, then it undertook the appropriate analysis – impliedly applying intermediate scrutiny by adopting the rationale of prior district court rulings it cited – and concluded that Plaintiffs had no likelihood of success.

Even where courts have determined that the regulation at issue substantially burdens the right to bear arms, post-*Heller* courts have applied intermediate scrutiny, not strict scrutiny. *See Kachalsky*, 817 F. Supp. 2d at 268; *Mitchell*, 2012 WL 3660270 at * 4-6 (intermediate scrutiny applied to prohibition on the carrying of concealed dirk or dagger); *Peruta*, 758 F. Supp. 2d at 1116-1117; *Ezell*, 651 F.3d at 707-708 (stating that something less than strict scrutiny was appropriate where a total ban on target ranges conflicted with a firearms training requirements and thus substantially impacted the core home self-defense right articulated in *Heller*); *Chester*, 628 F.3d at 680-683 (intermediate scrutiny applied for statute prohibiting possession of firearm by persons convicted of domestic violence misdemeanors); *Skoien*, 614 F.3d at 641 (intermediate scrutiny applied for statute prohibiting possession of firearm by persons convicted of domestic violence misdemeanors); *Marzzarella*, 614 F.3d at 96, 98-99 (applying intermediate scrutiny to statute prohibiting possession of guns with obliterated serial numbers, reasoning that

"[s]trict scrutiny does not apply automatically any time an enumerated right is involved"); *Ellison*, 196 Cal. App. 4th at 1347 (applying intermediate scrutiny to statutory prohibition against carrying a concealed weapon in a vehicle).

To survive intermediate scrutiny, the challenged provision must be substantially related to the achievement of important government interests. *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). *See also Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("To withstand intermediate scrutiny, a statutory classification must be substantially related to an important government objective."). It requires only that the fit between the challenged regulation and the stated objective must be reasonable, not perfect, and does not require that the regulation be the least restrictive means of serving the interest. *See, e.g. Lorrilard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001).

c. There Is No Legal Support for Applying Strict Scrutiny

Plaintiffs argue that the Second Amendment guarantees a "fundamental right," hence "strict scrutiny" should apply. The *Heller* decision implicitly rejected strict scrutiny by asserting that certain regulations are "presumptively lawful regulatory measures." *Heller*, 554 U.S. at 626-627, n. 26. Strict scrutiny's requirement that a law be narrowly tailored to serve a compelling government interest is also inconsistent with *Heller's* recognition that legislatures be allowed to employ a variety of tools for combating the problem of gun violence. *Heller*, 554

U.S. at 636. As Justice Breyer noted in dissent, strict scrutiny apparently was rejected by the majority:

> Respondent proposes that the Court adopt a "strict scrutiny" test, which would require reviewing with care each gun law to determine whether it is "narrowly tailored to achieve a compelling governmental interest." But the majority implicitly, and appropriately, rejects that suggestion by broadly approving a set of laws—prohibitions on concealed weapons, forfeiture by criminals of the Second Amendment right, prohibitions on firearms in certain locales, and governmental regulation of commercial firearm sales—whose constitutionality under a strict scrutiny standard would be far from clear.

Heller, 554 U.S. at 688 (Breyer, J., dissenting) (citations omitted). Justice Beyer explained further that adoption of a strict scrutiny standard for evaluating gun regulations would be impossible because almost all such regulations will seek to advance a "concern for the safety and lives of its citizens," which, along with the government's general interest in preventing crime, has been deemed by the Supreme Court to be "compelling." *Heller*, 554 U.S. at 689 (Breyer, J., dissenting) (extended citations omitted). In a wide variety of constitutional contexts, the Court has found such public safety concern sufficiently forceful to justify restrictions on individual liberties. *Id*. *citing, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam*) (First Amendment free speech rights); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (First Amendment religious rights); *Brigham City v. Stuart*, 547 U.S. 398, 403-404 (2006) (Fourth Amendment protection of the home); *New*

York v. Quarles, 467 U.S. 649, 655 (1984) (Fifth Amendment rights under *Miranda v. Arizona*, 384 U.S. 436 (1966)); *United States v. Salerno*, 481 U.S. 739, 755 (1987)(Eighth Amendment bail rights). Thus, in practice, any application of strict scrutiny would merely result in an interest-balancing inquiry into whether the regulation at issue impermissibly burdens the Second Amendment in the course of advancing the governmental public safety concerns. *Id*.

In addition, *Heller's* list of "presumptively lawful regulatory measures" points persuasively to rejection of strict scrutiny. *Id*. at 626-627, n. 26. Unlike a home or other private property, where the "need for defense of self, family, and property is most acute," the need to carry a concealed firearm in public places is not nearly so dire. "Even in jurisdictions that have declared the right to keep and bear arms to be a fundamental constitutional right, a strict scrutiny analysis has been rejected in favor of a reasonableness test . . . ." *Mosby v. Devine*, 851 A.2d 1031, 1044 (R.I. 2004) (citations omitted).

It appears that only one federal decision after *Heller* has applied strict scrutiny, but it still upheld the challenged regulation. *See United States v. Engstrum*, 609 F. Supp. 2d 1227, 1231 (D. Utah 2009) (applying strict scrutiny, but rejecting a challenge to a federal statute prohibiting possession of firearms by those with domestic violence convictions). In fact, no district or appellate court case that actually cites to *McDonald* uses strict scrutiny. Virtually every case that does not

use intermediate scrutiny uses the "presumptively lawful" approach mentioned in *Heller*, particularly cases involving felon or mental illness issues. *See, e.g.*, *United States v. Hart*, 2010 U.S. Dist. LEXIS 77160 (D. Mass. July 30, 2010) (concealed weapons restrictions are "presumptively lawful"); *Yohe v. Marshall*, 2010 U.S. Dist. LEXIS 109415 (D. Mass. Oct. 14, 2010); *United States v. Roy*, 2010 U.S. Dist. LEXIS 107620 (D. Me. Oct. 6, 2010); *Dority v. Roy*, 2010 U.S. Dist. LEXIS 84403 (E.D. Tex. Aug. 17, 2010); *United States v. Seay*, 2010 U.S. App. LEXIS 18738 (8th Cir. S.D. Sept. 8, 2010).

d. The Policy and Section 26150 Survive Any Standard of Review, Even Strict Scrutiny

The Sheriff's practice of limiting CCW licenses to those with "good cause" is consistent with the important and compelling legislative goals underlying Section 26150, i.e., the protection of the general public from violent crime and the risks that arise from widespread and unchecked public carry of concealed and loaded firearms. The Policy and Section 26150 are also both necessarily related and narrowly tailored to furthering public safety and reducing crime. Thus, under any standard of review, the Policy and Section 26150 survive constitutional scrutiny.

i. Compelling interest

Maintaining public safety and preventing crime are clearly important, if not paramount, government interests. *See, e.g.*, *Salerno*, 481 U.S. at 750; *Schall v.*

Martin, 467 U.S. 253, 264 (1984); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) ("The promotion of safety of persons and property is unquestionably at the core of the State's police power . . . ."). The Supreme Court has deemed the interest behind almost every gun-control regulation – advancing safety and the lives of its citizens, as well as "the government's general interest in preventing crime," – to be "compelling." *Heller*, 554 U.S. at 689 (Breyer, J., dissenting). *See also Marshall v. Walker*, 958 F. Supp. 359, 365 (N.D. Ill. 1997) (individuals should be able to walk in public "without apprehension of or danger from violence which develops from unauthorized carrying of firearms and the policy of the statute to conserve and maintain public peace on sidewalks and streets within the cities . . .") (quoting *People v. West*, 422 N.E.2d 943, 945 (Ill. App. 1981); *People v. Price*, 873 N.E.2d 453, 460 (Ill. App. 2007) ("The possession and use of weapons inherently dangerous to human life constitutes a sufficient hazard to society to call for prohibition unless there appears appropriate justification created by special circumstances")(quoting 720 ILL. COMP. STAT. ANN. 5/24, Committee Comments—1961, at 7 (2003); *People v. Smythe*, 817 N.E.2d 1100, 1103-1104 (2004) ("this statute was designed to prevent the situation where one has a loaded weapon that is immediately accessible, and thus can use it at a moment's notice and place other unsuspecting citizens in harm's way"); *State v. Cole*, 665 N.W.2d 328, 344 (2003)(noting there is a "compelling state interest in protecting the public

from the hazards involved with certain types of weapons, such as guns").

As stated recently by a district court, reasonable and effective gun regulations are integral to the exercise of the police power, and the government has:

> "[A]n important and substantial interest in public safety and in reducing the rate of gun use in crime. In particular, the government has an important interest in reducing the number of concealed weapons in public in order to reduce the risks to other members of the public who use the streets and go to public accommodations."

Peruta, 758 F. Supp. 2d at 1117. *See also Yarbrough*, 169 Cal. App. 4th at 312-314 (recognizing that "[U]nlike possession of a gun for protection within a residence, carrying a concealed firearm presents a recognized "threat to public order," and is "'prohibited as a means of preventing physical harm to persons other than the offender.' [Citation.]".); *People v. Hodges*, 70 Cal. App. 4th 1348, 1357 (1999) (stating that a person who carries a concealed firearm on his person or in a vehicle "which permits him immediate access to the firearm but impedes other from detecting its presence, poses an 'imminent threat to public safety . . . .' [Citation.]").

Plaintiffs cite to a discredited researcher, John R. Lott, for the proposition that the Policy does not serve any government interest because restricting access to CCW licenses does not further any public safety interest. Lott's 1997 research on use of guns and the effect of "shall issue" licensing laws on violent crimes

(referred to as the "more guns, less crime" hypothesis) has been widely criticized and discredited. *See, e.g.*, Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 Stan. L. Rev. 1193 (2003); Dan A. Black & Daniel S. Nagin, *Do Right-to-Carry Laws Deter Violent Crime?*, 27 J. Legal Stud. 209 (1998) ("John R. Lott and David B. Mustard conclude that right-to-carry laws deter violent crime. Our reanalysis of Lott and Mustard's data provides no basis for drawing confident conclusions about the impact of right-to-carry laws on violent crime"); Jens Ludwig, *Concealed-Gun-Carrying Laws and Violent Crime: Evidence from State Panel Data*, 18 Int'l Rev. L. & Econ. 239, 240, 241 (1998) (finding Lott's 1997 study concluding that "concealed handguns are the most cost-effective method of reducing crime thus far analyzed by economists" was incorrect and that instead, the "results [of reanalysis of Lott's data] suggest that shall-issue laws have resulted, if anything, in an *increase* in adult homicide rates."). In Lott's 2012 article cited by Plaintiffs, Lott cites his own previous discredited research from 1997 in 22 of the article's 60 footnotes. Further calling into question Lott's work, the 2012 article also includes footnotes stating, "[b]ased on conversations with... during 2002-2003," and, "[m]y own extensive research." *See* John R. Lott, *What a Balancing Test Will Show for Right-to-Carry Laws*, 71 Md. L. Rev. 1205, 1210 fn. 25, 1210 fn. 26, 1211 fn. 30.

Contrary to Plaintiffs' assertion and citation to faulty support thereof,

OCSD's interest in requiring proof of "need" for a CCW license is no less compelling as that which has been held constitutional throughout our nation's history – i.e., protecting the public from "the evil practice of carrying weapons secretly" and "preventing harm to persons other than the offender." *State v. Reid*, 1 Ala. 612, 616 (1840); *People v. Hale*, 43 Cal. App. 3d 353, 356 (1974). Because concealed carry allows for stealth and surprise, and CCWs are used in vast numbers of criminal offenses, use of CCWs in streets and public places poses a threat to public safety. (Zimring Decl. ¶¶ 8, 10 15, ER Vol. II at 116-117, 119; Barnes Decl. at ¶¶ 6-13, ER Vol II at 171-173.) Limiting the number of loaded and concealed firearms in public places helps to keep the balance in favor of law enforcement and avoids the necessity for every place that is open to the public – restaurants, malls, theaters, parks – to be equipped with metal detectors, fencing and other forms of security in order to protect patrons from the fear of widespread and unchecked concealed firearms. Thus, protecting the public by limiting the licensing of CCWs is an important and compelling governmental interest. (Zimring Decl. ¶¶ 7, 13-22, 29-31 ER Vol. II at 116, 118-122, 125; Barnes Decl. ¶¶ 6-8, 13-16, ER Vol. II at 171-172, 173-174.)

ii. Necessarily related

California law has consistently found CCW restrictions to be necessarily related to the compelling government interest of advancing public safety.

California courts have found that "the habit of carrying concealed weapons was one of the most fruitful sources of crime." *Ex part Luening*, 3 Cal. App. 76 (1906). Thus, limiting CCW licenses to only those with verifiable good cause reduces "one of the most fruitful sources of crime" in society.

The Court explained in *Heller* that handguns are preferred for self-defense in the home because they are small and easy to hide under clothing, easy to use, cannot easily be wrestled away in self-defense, and pose a significant threat. *Heller*, 554 U.S. at 629. *See also McDonald*, 130 S.Ct. at 3306. They are favored CCWs for similar reasons. (Zimring Decl ¶ 8, ER Vol. I at 116-117.) They are used in more than 75% of all killings and in even larger portions of robberies. (Zimring Decl. ¶8, ER Vol. II at 116-117.) Since concealed handguns are the dominant weapons of choice for gun criminals, they pose a special danger to government efforts to keep public spaces safe and secure. (Zimring Decl. ¶¶ 3, 8, ER Vol. II at 118.) By requiring specific showings of good cause to issue CCW licenses, the Sheriff is able to limit the number of permitted CCWs in public, thereby reducing the numbers of deaths and life-threatening injuries resulting from crime. (Zimring Decl. ¶¶ 3, 6-8, 10, 14-15, ER Vol. II at 114-115, 116-117, 119.)

In addition, requiring an applicant to prove a need for self-protection prevents the carrying of firearms "just in case." As noted previously, the *Heller* Court stated "the Court does not read the Second Amendment to protect the right

of citizens to carry arms for any sort of confrontation," and that "the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 595, 626. Other courts have also recognized a need for imposing firearms restrictions to prevent situations where no criminal intent exists, but criminal conduct results despite the lack of intent:

> [A]ccidents with loaded guns on public streets or the escalation of minor public altercations into gun battles or, as the legislature pointed out, the danger of a police officer stopping a car with a loaded weapon on the passenger seat…[T]hus, otherwise "innocent" motivations may transform into culpable conduct because of the accessibility of weapons as an outlet for subsequently kindled aggression…[T]he underlying activity of possessing or transporting an accessible and loaded weapon is itself dangerous and undesirable, regardless of the intent of the bearer since it may lead to the endangerment of public safety. [A]ccess to a loaded weapon on a public street creates a volatile situation vulnerable to spontaneous lethal aggression in the event of road rage or any other disagreement or dispute. The prevention of the potential metamorphosis of such "innocent" behavior into criminal conduct is rationally related to the purpose of the statute, which is to enhance public safety. Because the legislature has a compelling interest in preventing the possession of guns in public under any such circumstances, the statute is reasonably related to the legislature's purpose of "mak[ing] communities in this state safer and more secure for their inhabitants."

People v. Marin, 795 N.E.2d 953, 958–59 (Ill. App. 2003)(citations omitted).

In order to protect its citizens, OCSD must ensure that weapons are not used for an unlawful purpose, whether that purpose is the result of premeditated

criminal intent, an escalation of an altercation, or an accident. Therefore, as supported by *Heller*, requiring evidence of a need for self-protection is necessarily related to limiting the number of concealed guns on the street for "whatever purpose" or for "any sort of confrontation."

iii. Narrowly tailored

Requiring evidence of "good cause" to carry a concealed weapon is narrowly tailored to serve a compelling government interest, i.e., by reducing the number of CCWs in public, the Sheriff is able to protect the lives of the County's residents. Plaintiffs seek to enjoin the narrowly tailored Policy for want of the *perfect* policy. They argue that the Policy "sweeps far too broadly to be considered 'narrowly tailored' – or tailored at all" and suggest that there are less restrictive means of reducing accidental or unlawful shootings, such as requiring applicants to pass handgun training courses. (Op. Br. at 43-44.)

But Plaintiffs' suggestion is not sensible and ignores reality. A training course would not wholly prevent firearm accidents, nor would it likely prevent someone with criminal intent from using a concealed weapon in an unlawful shooting (and, in fact, may make that person more proficient in carrying out an illicit act). It would not prevent police officers from either being at a disadvantage if a concealed weapon is drawn (because they make no assumptions about people being armed) or being too quick to draw their own gun when unnecessary (because

they assume everyone may be carrying a loaded CCW). (*See* Zimring Decl. ¶ 21, ER Vol. II at 122.) Nor would a training course prevent minor confrontations and otherwise "innocent" behavior from escalating into criminal conduct.

Tailoring a policy to issue licenses to only law-abiding citizens who will only carry firearms in a peaceable manner is impossible without omniscience. (*See* Zimring Decl. ¶ 23, ER Vol. II at 122-123, noting that a majority of criminal homicides and other serious crimes are committed by individuals who have not been convicted of a felony.) As the court stated in *Miller*, "[s]uch legislation cannot be narrowly tailored to reach only the bad people who kill with their innocent guns. . . . To expect such legislation to reflect a tight fit between ends and means is unrealistic." *Miller*, 604 F. Supp. 2d at 1172 n.13 (quotation marks and citations omitted). *See McDonald*, 130 S.Ct at 3050 (assessing the costs and benefits of firearms restrictions requires difficult empirical judgments in an area which judges lack expertise); *Nordyke*, 2011 U.S. App. LEXIS 8906 at *17-18. (*See also* Zimring Declaration, ¶¶ 8-12, 16-19, ER Vol. II at 116-118, 119-121.) While a regulation may not be more extensive than necessary to serve the governmental interest, it need not be the most perfectly narrow. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 784, 791 (1989).

Plaintiffs also contend that a "good cause" requirement violates the Second Amendment because *Heller* approves bans on carrying concealed firearms only

when the law allows for an alternative method of carrying. (Op. Br. at 24-25, 47-48.) They attempt to support this assertion by arguing that the nineteenth century state court cases cited by *Heller* that upheld CCW prohibitions did so only because there was an alternative means to carry firearms. (Op. Br. at 24-25.) However, those cases merely suggested that *open* carry was a protected right under the Second Amendment; the cases do not stand for the proposition that there must be a right to carry in public in *some* manner. In fact, the *Heller* Court did not interpret those courts' holdings in that way. *See Heller*, 554 U.S. at 626-627.

Additionally, the Policy does not constitute a "ban" on concealed firearms since individuals with identifiable and documented needs may obtain a CCW permit. Moreover, even if the Policy could be interpreted this way and an alternative means of carrying were required to validate it – which OCSD asserts is not the applicable test – there are exceptions within the Penal Code that allow concealed carry in certain instances without a license. *See, e.g.* Cal. Penal Code § 25450, § 25505, § 25515, §§ 25525, 25530, 25535, 25550, § 25600, § 25605. Contrary to Plaintiffs' assertions, the fact that one exception, Penal Code section 26045, provides an affirmative defense to criminal charges (Op. Br. at 47-48) does not mean it is not an alternative means of carrying for purposes of self-defense. These exceptions also demonstrate the contrast between the Policy and the unconstitutional statute in *Heller*, which provided no alternative means

whatsoever to possess or use a handgun in the home.

D. The District Court Did Not Abuse Its Discretion in Finding that Plaintiffs' Facial Challenges Were Not Likely to Succeed

Plaintiffs also allege a facial challenge to the "good cause" provision in the Policy and Section 26150.[3] The Supreme Court has recognized that there are generally two types of facial challenges to a law's constitutionality. First, a party ordinarily "can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the [law] would be valid,' i.e., that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *Salerno*, 481 U.S. at 745). The Supreme Court's "cases recognize a second type of facial challenge in the First Amendment context under which a law may be overturned as impermissibly overbroad because a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" *Id*. at 471 n.6 (quoting *New York v. Ferber*, 458 U.S. 747, 769-71 (1982)).

As in *Richards*, 821 F. Supp. 2d at 1176, which involved a similar challenge to a sheriff's "good cause" policy, this Court should not invalidate the "good cause" portions of Section 26150 or the Policy unless Plaintiffs "can demonstrate that there are zero circumstances under which [the Sheriff] could clearly issue a

[3] Again, despite challenging the constitutionality of a state statute, the Plaintiffs have not named the State as a party.

concealed weapons permit to someone who demonstrate plausible good cause under the terms of the policy . . . ." As the Court in *Richards* stated, "[a]ny inquiry into the facial constitutionality . . . is futile, for it is both 'undesirable' and near impossible for the Court to 'consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation.'" *Id.* at 1176 (quoting *Gonzales v. Carhart*, 500 U.S. 124, 168, (2007)).

Plaintiffs have not, and simply cannot, establish that no set of circumstances exists under which the "good cause" requirement of Section 26150 or the Policy would be constitutionally valid. Thus, the District Court did not abuse its discretion in declining to find a likelihood Plaintiffs would prevail on a facial challenge.

E. The District Court Did Not Abuse Its Discretion in Determining That Plaintiffs Were Not Likely to Succeed on Their Equal Protection Claims

Plaintiffs allege that by failing to recognize "the general desire for self-defense as good cause" for issuance of a CCW license under Section 26150, the Policy creates a classification of Orange County residents whose Second Amendment rights are abrogated while other Orange County's residents' rights are not so infringed. Plaintiffs further claim that that the Policy is unconstitutional as applied to Plaintiffs because its implementation puts them in a classification of adults who are precluded from obtaining a CCW license because they cannot demonstrate the special need to carry concealed weapons. (FAC ¶

74, ER Vol. II at 281-282; Op. Br. at 50.)

Plaintiffs also allege that the "good cause" provision in Section 26150 violates the Equal Protection Clause of the Fourteenth Amendment on its face because it "creates a classification of competent and law-abiding adults whose Second Amendment right to bear arms generally in non-sensitive public place is abrogated because they do not have 'good cause' for a Carry License, while those rights of other classes of competent, law-abiding adults are not so infringed." (FAC ¶ 83, ER Vol. II at 283; *see* Op. Br. at 48, 50.) Plaintiffs also allege that the Sheriff's policy of enforcing this good cause requirement also violates the Equal Protection Clause of the Fourteenth Amendment. (*See* FAC ¶¶ 84-86, ER Vol. II at 283-284; Op. Br. at 48, 50.) As explained herein, there is no likelihood of success on the merits on Plaintiffs' claims based upon Equal Protection.

The Equal Protection Clause of the Fourteenth Amendment prohibits states from denying "to any person within its jurisdiction the equal protection of the laws." The Equal Protection Clause "is essentially a directive that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). To identify the proper classification, both groups must be comprised of similarly situated persons so that the factor motivating the alleged discrimination can be identified. *Thornton v. City of Helens*, 425 F.3d 1158, 1166 (9th Cir. 2005). "The goal of identifying a similarly

situated class . . . is to isolate the factor allegedly subject to impermissible discrimination." *United States v. Aguilar*, 883 F.2d 662, 706 (9th Cir. 1989) (overruled by statute on other grounds); *see also Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1996).

In the present case, the class of similarly situated individuals is properly defined as all law abiding persons who applied to OCSD for a CCW license, regardless of whether they were approved or denied. As the Ninth Circuit noted, "[a]n equal protection claim will not lie by 'conflating all persons not injured into a preferred class receiving better treatment' than the plaintiff." *Thornton*, 425 F.3d at 1166 (quoting *Joyce v. Mavromatis*, 783 F.2d 56, 57 (6th Cir. 1986).) This is exactly how Plaintiffs are trying to establish their equal protection claim here. However, because Plaintiffs have not proven that they are similarly situated to those persons that were granted CCW licenses, yet are treated differently, their equal protection claim fails. As noted by the court in *Peruta*, 758 F. Supp. 2d at 1118, where San Diego County had a virtually identical policy to OCSD's Policy:

> [T]he policy does not treat similarly situated individuals differently because not all law-abiding citizens are similarly situated, as Plaintiffs contend. Those who can document circumstances demonstrating "good cause" are situated differently than those who cannot. Therefore, Defendant's "good cause" policy does not violate equal protection.

Hence, Plaintiffs' claim that both Section 26150 and the Policy are facially invalid under the Equal Protection Clause is unfounded.

Even if Plaintiffs were similarly situated and treated differently, requiring documentation showing good cause would not violate the Equal Protection Clause. The Supreme Court has held that because most legislation classifies for one purpose or another, with resulting disadvantage to various groups, the Court will uphold a legislative classification so long as it "neither burdens a fundamental right nor targets a suspect class," and "bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996). As discussed previously, there is no fundamental right to carry a concealed weapon in public. And there is certainly no evidence that a suspect class had been targeted here.

Nevertheless, even assuming *arguendo* that there is a fundamental right to carry a concealed weapon and heightened scrutiny is required, the good cause requirement does not violate the Equal Protection Clause and Plaintiffs' as-applied challenge fails. The governmental interest in protecting the safety of the public from unknown persons carrying concealed, loaded firearms is both important and compelling and is furthered by Penal Code section 25400 (prohibiting CCWs subject to exceptions and licensing) and the licensing process set forth in Section 26150 as administered by the Sheriff via the Policy. (*See* Zimring Decl., ER Vol. II at 113-149; Barnes Decl., ER Vol. II at 170-175.) In addition, Section 26150 and the Policy are both narrowly tailored and substantially related to furthering public safety. *See* Argument VI.C.3.d, *supra*. As such, Plaintiffs' as-applied challenge

fails as well. Thus, the District Court did not abuse its discretion in declining to find a likelihood of success. (Order, Vol. I; ER Vol. III at 294:8-295:5.)

F. The District Court Did Not Abuse Its Discretion in Determining that Plaintiffs Did Not Demonstrate They Would Suffer Irreparable Harm

Plaintiffs contend that irreparable harm should be presumed because the Policy violates their rights under the Second and Fourteenth Amendments. (Op. Br. at 54.) Plaintiffs make no other showing, and as such, have given short shrift to this prong of the preliminary injunction analysis.

As an initial matter, a plaintiff seeking a preliminary injunction must show that "irreparable injury is likely in the absence of an injunction;" the mere possibility of irreparable harm is insufficient. *Winter*, 555 U.S. at 22. Even where a likelihood of success on the merits is established, a mere possibility of irreparable injury is insufficient to warrant preliminary injunctive relief, because "[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief"). *Id*. Moreover, where a federal injunction is sought against a governmental entity, the party requesting relief must show a threat of "great and immediate"—not conjectural or hypothetical—irreparable harm.

City of Los Angeles v. Lyons, 461 I.S. 95, 113 (1983); *see also Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 557 (9th Cit. 1990).

To the extent that irreparable harm is presumed if a plaintiff shows a violation of the Constitution, *see*, *e.g.*, *Goldie's Bookstore, Inc., v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984), the instant case is distinguished from cases wherein a right has been explicitly recognized. As demonstrated *supra*, Plaintiffs have not established that their constitutional rights have been violated. The constitutional right that Plaintiffs contend is compromised in the instant case –carrying a concealed weapon in public – has not been recognized by the Supreme Court or the overwhelming majority of circuit and district courts that have interpreted *Heller's* holding. Nor does the Policy treat similarly situated individuals differently so as to violate their rights to equal protection.

Relying purely on an unsupported conclusory assertion about the nature of the Second Amendment right, Plaintiffs failed to provide evidence that there was a "great and immediate" threat of irreparable harm that is more than mere speculation and conjecture. (Op. Br. at 55-56.) Thus, the District Court did not abuse its discretion in determining that Plaintiffs failed to establish that they will suffer irreparable harm in the absence of a preliminary injunction.

G. The District Court Did Not Abuse Its Discretion in Determining Plaintiffs Did Not Demonstrate the Balance of Equities Favored Them Since the Issuance of a Preliminary Injunction Would Harm the Public Interest

Plaintiffs claim that because their constitutional rights are allegedly violated, "[t]he balance of equities tip sharply in their favor." In support of this proposition, Plaintiffs partially quote a sentence from *Klein v. City of San Clemente*, 584 F.3d 1196 (9th Cir. 2009), taking it out of context and changing the meaning of the Court. The *Klein* Court, in ruling that the balance of equities tipped in favor of enjoining a prohibition on free speech, was not faced with the potentially severe repercussions of unleashing countless firearms onto the open streets of the city. Plaintiffs have also failed to establish that the Policy and Section 26150 infringe upon a fundamental right, such as the one at issue in *Klein*.

Plaintiffs are misguided in concluding that the Sheriff cannot assert that she is harmed in any legally cognizable sense by being enjoined, that "no valid interest is actually furthered by Sheriff Hutchens' policy," and that "little burden is imposed on the Sheriff by the relief Plaintiffs seek." (Op. Br. at 56-57.) Without any support, Plaintiffs assert that there is "no evidence that restricting the issuance of CCW licenses to law-abiding, competent adults actually increases public safety." (*Id*. at 56.)

Plaintiffs apparently ignore the potential severe safety risk that is created in exchange for "protecting and promoting" a right that, as an initial matter, Plaintiffs

cannot establish is fundamental under the Constitution. As OCSD pointed out in its moving papers and supporting declarations, regulating concealed firearms is an essential part of Orange County's efforts to maintain public safety and reduce gun-related crime. There are particular governmental concerns with handguns and other concealable weapons because of their disproportionate involvement in life-threatening crimes of violence. (Zimring Decl. ¶¶ 7, 13-22, 29-31, ER Vol. II at 116, 118-122, 125.)

The courts have repeatedly found that protection of public health and safety, as well as crime prevention, are important government objectives. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996); *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992). In fact, the District Court for the Southern District of California recently considered Section 26150 and stated that the government had an "important interest" in reducing the number of concealed weapons in public due to the risk they pose to members of the public because of their disproportionate use in life-threatening crimes of violence. *Peruta*, 758 F. Supp. 2d at 1117.

Plaintiffs claim that an injunction precluding the Sheriff from denying self-defense as "good cause" for a CCW license would not require her to begin issuing licenses to every applicant regardless of their training, criminal background, or other valid disqualifying factors. (Op. Br. at 57.) But this claim is disingenuous. The requested injunction would permit the carrying of any firearm by any

otherwise qualified person who merely claims self-defense, without regard to that person's intent to use the weapon for crimes of violence or the likelihood that it may be used for an unlawful purpose.

Plaintiffs have failed to demonstrate that their perceived need to carry a weapon in public outweighs the public's interest in safety. The potential harm to Plaintiffs is speculative and far from irreparable given the alternative means to carry firearms that are delineated in the Penal Code, whereas the potential harm to society posed by a preliminary injunction presents a clear and serious risk to public safety and is not in the public's interest. Thus, the District Court was correct in finding that the balance of the equities militates against a grant of a preliminary injunction.

VII. CONCLUSION

For the reasons set forth above, Defendants/Appellees, Sheriff Sandra Hutchens and the Orange County Sheriff-Coroner Department, respectfully request that this Court affirm the District Court's Order denying Plaintiffs'/ Appellants' Motion for Preliminary Injunction.

STATEMENT OF RELATED CASES

Other than the cases cited in Appellant's Opening Brief, Appellees are not aware of other related cases.

DATED: January 17, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLAINCE

Pursuant to Federal Rules of Appellate Procedure, Rule 32(a)(7)(c), I certify this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,996 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii); and, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 14-point Times New Roman font in the word processing program Word.

DATED: January 17, 2013

Respectfully submitted,

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ADDENDUM

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CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

JS-6

Case No.	LA CV10-08377 JAK (JEMx)	Date	January 13, 2011
Title	Jonathan Birdt v. Charlie Beck, et al.		

Present: The Honorable	JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE
Andrea Keifer	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **ORDER RE PLAINTIFF'S AND DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT (Dkt. 20, 54, 56)**

I. Introduction

In California, a person may carry a concealed firearm only if first issued a license by the sheriff of the county in which the licensee resides. Such licenses are to be issued only upon a showing of "good cause." Cal. Penal Code § 12050. Plaintiff Jonathan Birdt applied for a concealed carry weapons ("CCW") license from the Los Angeles Police Department and the Los Angeles County Sheriff's Department. Each denied his application; this action followed.

Plaintiff has named the Los Angeles Police Department ("LAPD"), the Los Angeles County Sherriff's Department ("LACSD"), Los Angeles Chief of Police Charlie Beck, and Los Angeles County Sherriff Lee Baca as defendants in his claims brought pursuant to 42 U.S.C. §§ 1983 and 1988. Relying on *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), Plaintiff argues that, as applied to Plaintiff, the LAPD and LACSD policies under which his CCW license application was denied, violate the Second Amendment to the United States Constitution. Plaintiff also claims that LAPD and LACSD policies violate his rights under the Equal Protection Clause and interfere with his right to interstate travel.

Plaintiff and Defendants have filed cross-motions for summary judgment. The parties stipulated at oral argument on September 19, 2011 that there are no disputed issues of material fact.

II. Background

A. California's Concealed Weapons Law

California Penal Code section 12031 prohibits the open carrying of loaded firearms in public, and section 12025 prohibits the carrying of concealed firearms in public, subject to a licensing process. Section 12050(a)(1)(A) allows "[t]he sheriff of a county, upon proof that the person applying

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is of good moral character, that good cause exists for the issuance, and that the person applying satisfies" other statutory requirements, to "issue to that person a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person." Without a license, a person cannot carry a concealed weapon. "Section 12050 gives extremely broad discretion to the sheriff concerning the issuance of concealed weapons licenses and explicitly grants discretion to the issuing officer to issue or not issue a license to applicants meeting the minimum statutory requirements." *Gifford v. City of Los Angeles*, 88 Cal. App. 4th 801, 805 (2001).

The LAPD and the LACSD each has formulated definitions of "good cause" to evaluate permit applications.

The LAPD defines "good cause" in these terms:

> [G]ood cause exists if there is convincing evidence of a clear and present danger to life or of great bodily injury to the applicant, his (or her) spouse, or dependent child, which cannot be adequately dealt with by existing law enforcement resources, and which danger cannot be reasonably avoided by alternative measures, and which danger would be significantly mitigated by the applicant's carrying of a concealed firearm . . .
>
> Good cause is deemed to exist, and a license will issue in the absence of strong countervailing factors, upon a showing of any of the following circumstances:
> (a) The applicant is able to establish that there is an immediate or continuing threat, express or implied, to the applicant's, or the applicant's family, safety and that no other reasonable means exist which would suffice to neutralize the threat.

Tompkins Decl., Exh. 1, Dkt. 56-4. The LAPD does not consider general fear for one's personal safety good cause. *Id.* at ¶ 4.

The LACSD's definition of "good cause" requires the following showing:

> Convincing evidence of a clear and present danger to life or of great bodily harm to the applicant, his spouse or dependent child, which cannot be adequately dealt with by existing law enforcement resources and which danger cannot be reasonably avoided by alternative measures, and which danger would be significantly mitigated by the applicant's carrying of a concealed firearm.

Waldie Decl., Exh. 1, Dkt. 55. The LACSD does not consider a general desire for self-defense good cause; the applicant must "demonstrate a credible threat of violence." Waldie Decl. ¶ 7, Dkt. 55.

B. Plaintiff's Applications for a License

Plaintiff is a lawyer. He resides in Los Angeles County. Plaintiff applied to the LAPD and the

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LACSD for a CCW license in 2010. Each department denied his application. On his LAPD application, Plaintiff listed his reasons for seeking a CCW license. These included his work as a volunteer bench officer for the Los Angeles Superior Court, his frequent interstate travel with large sums of cash, his representation of clients in high-profile litigation involving violent crime, and unspecified threats against his employees. Tompkins Decl., Exh. 2, Dkt. 56-4. The LAPD rejected his application, concluding that Plaintiff did not establish "a clear and present danger to life or great bodily injury" that could not "be adequately dealt with by existing law enforcement resources, and which danger cannot be reasonably avoided by alternative measures." Tompkins Decl., Exh. 3, Dkt. 56-4. The Citizens Advisory Review Board that reviews denied applications also found that Plaintiff had failed to show good cause for licensure. Tompkins Decl., Exh. 4, Dkt. 56-4.

Plaintiff's LACSD application identified substantially similar reasons in support of licensure. The LACSD denied his application for the same reasons previously advanced by the LAPD. As the LACSD wrote in denying the license:

> Typically, the verbiage "convincing evidence of a clear and present danger . . ." refers to a current situation which involves a specific person(s) who has threatened an individual and who has displayed a pattern of behavior which would suggest that the threat(s) could be carried out. Situations which would suggest only a potential danger to one's safety, (e.g. carrying large amounts of money to the bank, profession/job, working late hours in a high crime rate area, etc.) are not consistent with the criteria for issuance of a concealed weapon license.

Waldie Decl., Exh. 3, Dkt. 55.

III. The Second Amendment Claims

A. Legal Standard

1. The Second Amendment

The Second Amendment protects the "individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). In *Heller*, the Supreme Court held that a total prohibition on handguns within the home precluded citizens from using guns "for the core lawful purpose of self-defense and [was] hence unconstitutional." *Id.* at 630. In *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010), the Court held "that the Second Amendment right is fully applicable to the States." *McDonald* stated that *Heller*'s "central holding" was "that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." *Id.* at 3044.

Heller also explained that "the right secured by the Second Amendment is not unlimited." 554 U.S. at 626. It is "not a right to keep and carry any weapon whatsoever in any manner whatsoever

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and for whatever purpose.” *Id.* The Court listed examples of “presumptively lawful regulatory measures” that would not infringe Second Amendment rights, including “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.” *Id.* at 570. The Court added that, “the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.” *Id.* This observation is significant, because under *Heller*, the scope of the Second Amendment’s protection turns on “the historical background of the Second Amendment.” *Id.* at 592.

2. Case Law with Respect to the Standard of Review

Six of the Circuits have applied a standard of review resembling intermediate scrutiny to claims under the Second Amendment.

In *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011), the Seventh Circuit subjected a Chicago gun-control ordinance to “rigorous” review, “if not quite ‘strict scrutiny.’” The ordinance at issue in that case amounted to a total ban on gun ownership. It conditioned gun ownership -- even within the home -- on the gun owner having completed firing range training. The same ordinance, however, also banned firing ranges within the city. The Seventh Circuit found that this ban impacted too greatly the “core Second Amendment right to possess firearms for self-defense.” *Id.* at 711. Where such a core right is not implicated, the Seventh Circuit has applied intermediate scrutiny. For example, in *United States v. Skoien*, that court applied intermediate scrutiny to a regulation prohibiting those convicted of domestic violence misdemeanor crimes from carrying firearms; in its view, such a regulation did not infringe the core right to self-defense. 614 F.3d 638, 641 (7th Cir. 2010).

Similarly, in *United States v. Marzzarella*, 614 F.3d 85, 97 (3rd Cir. 2010), the Third Circuit applied intermediate scrutiny to a regulation of the sale of firearms because the “burden imposed by the law [did] not severely limit the possession of firearms.” The court reasoned that the *Heller* handgun ban was “an example of a law at the far end of the spectrum of infringement on protected Second Amendment rights” because it prohibited all handgun possession. *Id.* The regulation at issue in *Marzzarella* did not prohibit all handgun possession; as a result, the court found that it was far from the restrictions that *Heller* found improper. *Id.*

Other circuits have applied intermediate scrutiny to restrictions on the use of firearms. *See, e.g.*, *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (requiring “a substantial relationship between the restriction and an important governmental objective”); *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011) (“[w]hile we find the application of strict scrutiny important to protect the core right of the self-defense of a law-abiding citizen in his home . . . we conclude that a lesser showing is necessary with respect to laws that burden the right to keep and bear arms outside of the home.); *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010) (applying intermediate scrutiny); *Heller v. District of Columbia*, No. 10–7036, 2011 WL 4551558, at *8 (D.C. Cir. Oct. 4,

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2011) (same).

Although not binding on this Court , two District Courts in California have considered certain of the issues raised in this action. These decisions are instructive here. In *Richards v. County of Yolo*, the District Court for the Eastern District of California considered a challenge to Yolo County's concealed weapon policy implementing California Penal Code section 12050. No. 09-01235, 2011 WL 1885641 (E.D. Cal. May 16, 2011). The court held that "the Second Amendment does not create a fundamental right to carry a concealed weapon in public." *Id.*, 2011 WL 1885641, at *3. Given the various exceptions to the concealed weapons law, discussed below, the court found that there was adequate opportunity for the plaintiff to use a weapon in self-defense. Therefore, the county's policy did not substantially burden his Second Amendment rights. The court applied rational basis review to find the county policy constitutional.

In *Peruta v. County of San Diego*, the District Court for the Southern District of California considered claims -- like those of the Plaintiff in this action -- brought by a party whose application for a CCW license was denied for lack of good cause pursuant to section 12050. 758 F. Supp. 2d. 1106 (S.D. Cal. 2010). The court applied intermediate scrutiny in assessing the county's policy, noting that

> the Court is not aware of . . . a case in which a court has employed strict scrutiny to regulations that do not touch on the "core" Second Amendment right: possession in the home. If it exists, the right to carry a loaded handgun in public cannot be subject to a more rigorous level of judicial scrutiny than the 'core right' to possess firearms in the home for self-defense.

Id. at 1116.

B. Application

1. Intermediate Scrutiny Is Appropriate

California Penal Code section 12025, prohibiting the carrying of concealed weapons, California Penal Code section 12050, creating the concealed weapon licensure requirements, and the LACSD and LAPD policies do not infringe the "core" Second Amendment right of self-defense within the home. They do not prevent Plaintiff from using "arms in defense of hearth and home." *Heller*, 554 U.S at 635. They do not effect a total ban on gun ownership. Thus, they are not presumptively unconstitutional, as was the handgun ban in *Heller*. For these reasons, strict scrutiny is not appropriate. The Court need not decide whether intermediate scrutiny, or mere rational review, applies to Plaintiff's claims; the regulations at issue, as applied to Plaintiff, satisfy intermediate scrutiny.

2. The Regulations Satisfy Intermediate Scrutiny

"To withstand intermediate scrutiny, a statutory classification must be substantially related to

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an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). The government bears the burden of showing the "substantial relation" to an "important government objective." *See City of Los Angeles v. Alameda Books, Inc*., 535 U.S. 425, 465 (2002).

a) "Important Government Objective"

It is clear that the protection of public health and safety are important government objectives, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996), as is crime prevention, *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992). In considering California's concealed weapons regulations, the *Peruta* court noted:

> In particular, the government has an important interest in reducing the number of concealed weapons in public in order to reduce the risks to other members of the public who use the streets and go to public accommodations. The government also has an important interest in reducing the number of concealed handguns in public because of their disproportionate involvement in life-threatening crimes of violence, particularly in streets and other public places.

758 F. Supp. 2d at 1117.

This Court finds this reasoning persuasive. Thus, the concealed weapons regulations serve an important government objective.

b) "Substantial Relation"

California's concealed weapons regime is substantially related to the important government objective identified above. A licensing regime allows the state to protect the general public from widespread and unchecked public carrying of concealed and loaded firearms. Such widespread carrying of weapons poses the threat of criminal use of firearms by stealth and surprise. Limiting the number of concealed firearms in public places strengthens law enforcement and prevents the need for public places -- such as restaurants, malls, theaters and parks -- to be equipped with metal detectors, fencing, guards, and other forms of security, in order to protect patrons from unchecked concealed firearms. As the *Peruta* court noted, "[r]equiring documentation enables [the state] to effectively differentiate between individuals who have a bona fide need to carry a concealed handgun for self-defense and individuals who do not." 758 F. Supp. 2d at 1117.

It is also significant that the ban on carrying loaded weapons has numerous exceptions. These allow the carrying of weapons by police officers, private investigators, members of the military forces, target shooters, hunters, and others. Cal. Penal Code § 12031(b). The statute also specifically allows the keeping of loaded weapons at one's home. Cal. Penal Code § 12031(*l*). More importantly, a person may carry a loaded firearm in public when he

> reasonably believes that the person or property of himself or herself or of another is in

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> immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property. As used in this subdivision, "immediate" means the brief interval before and after the local law enforcement agency, when reasonably possible, has been notified of the danger and before the arrival of its assistance.

Cal. Penal Code § 12031(j)(1). The section also permits carrying a loaded firearm "while engaged in the act of making or attempting to make a lawful arrest." Cal. Penal Code § 12031(k). These exceptions ensure that California's concealed weapons law is tailored to the safety issues raised by gun violence and does not infringe unnecessarily on the right to use guns in self-defense.

Because of these exceptions, and because the regulatory regime for concealed weapons focuses on the carrying of such weapons in public, the statutory system imposes much more narrow limitations on firearm possession than the sweeping prohibition presented by the statute addressed in *Heller*. Thus, California's concealed weapon laws are substantially related to an important government objective, and survive intermediate scrutiny.

c) The Parties' Expert Declarations

The parties have provided competing expert declarations with respect to the threat of concealed weapons. Defendants have presented evidence that concealed weapons are a particularly serious threat to public safety. As one example, Defendants point out that the

> special danger of a hidden handgun is that it can be used against persons in public robbery and assault. The concealment of a handgun means that other citizens and police don't know it is in their shared space until it is brandished. Concealed handguns are a special problem for police because an armed police officer has no warning that persons carrying concealed handguns are doing so. A police officer will be vulnerable to an element of surprise that will not be present if a person is openly carrying a firearm.

Zimring Decl. ¶ 4, Dkt. 56-5. Defendants also have produced evidence that, during 2010, approximately 39% of those arrested by the LAPD on a charge of homicide had no prior felony convictions. Torrez Decl. ¶¶ 4-15, Dkt. 56-6. This data suggests that eliminating restrictions on permitting the carrying of concealed weapons, or a policy less stringent than that presently in place, could readily increase the number of future felons who may use such weapons while committing a crime. Thus, if the regulations were invalidated, rescinded, or severely restricted, those with no prior felony convictions could more readily obtain CCW licenses and go on to commit homicides. Zimring Decl. ¶ 5, Dkt. 56-5. By contrast, Plaintiff has provided competing expert testimony arguing that CCW permits reduce crime. Mudgett Decl. ¶ 7, Dkt. 69-1.

As noted, the parties have stipulated that there are no genuine issues of material fact presented by the instant motions. As such, these competing expert declarations should not be

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deemed to create disputed questions of fact. Rather, they reflect differing opinions within the law enforcement community regarding the impact of limitations on the carrying of concealed weapons -- something that can be considered in the intermediate scrutiny analysis. Thus, Defendants' policy need not be a perfect empirical fit to the problem of gun violence; it must merely be "substantially related." "In contrast with strict scrutiny, intermediate scrutiny, by definition, allows the government to paint with a broader brush." *Peruta,* 758 F. Supp. 2d at 1117. Because the concealed weapons law focuses on the particular threat posed by concealed weapons, there is a substantial relationship between the state's means and its important objectives. It is also noteworthy that the variations in the declarations are a reflection of the responsibility that lies with the California Legislature to weigh the effectiveness of concealed weapons laws as a tool to combat crime and violence. As the Supreme Court has noted, when applying intermediate scrutiny in the First Amendment context:

> What our decisions require is a "fit" between the legislature's ends and the means chosen to accomplish those ends -- a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 480 (1989). Thus, to prevail on their motion for summary judgment, Defendants need not prove that California's approach to concealed weapons is more empirically sound, that Plaintiff's expert is incorrect, or that California's approach is otherwise the "correct" one. Rather, Defendants need only show a sufficient "fit," which they have done. The Legislature's decision in balancing or addressing competing views will be upheld where, as here, it is substantially related to the important objectives described.

3. The LASD and LACSD Policies

a) The Policies Themselves Do Not Violate the Second Amendment

That the LASD and LACSD policies implementing California's concealed weapons laws define "good cause" as requiring the applicant to show a "clear and present danger to life or of great bodily injury" does not render them unconstitutional. To the contrary, that California allows those facing a clear and present danger to carry concealed weapons provides further support for the conclusion that the CCW regulations are substantially related to an important government objective. Not only can Plaintiff keep loaded guns in his house, but he can carry them in public when he is in immediate grave danger, and can obtain a concealed weapon permit when there is a clear and present danger. The focus of the Second Amendment right is "to possess and carry weapons in case of confrontation," *Heller*, 554 U.S. at 592, and these exceptions to California's gun control laws are in harmony with that right to self-defense. Because the Supreme Court suggested that long-standing prohibitions on carrying concealed weapons would be constitutional, *id*. at 626, a concealed weapons law that allows exceptions tailored to the need for self-defense is certainly constitutionally

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sound.

b) The LASD and LACSD Policies as Applied to Plaintiff

The LASD and LACSD policies have been applied to Plaintiff in a consistent manner. Plaintiff has been unable to point to any direct, physical threats against him or his family as a result of his work as an attorney, as a volunteer bench officer, or otherwise. *See* Lehman Decl., Exh. C, Dkt. 61-3. Plaintiff has produced no evidence that his application was not properly and fairly reviewed. Thus, Plaintiff lacked "good cause" to receive a CCW license under the LASD and LACSD policies.

C. Conclusion

Because the LASD and LACSD policies, as implementing the California concealed weapons regime and as applied to Plaintiff, satisfy intermediate scrutiny, they do not violate the Second Amendment. There has been no violation of Plaintiff's constitutional rights, and no resulting violation of 42 U.S.C. §§ 1983 and 1988.

IV. Equal Protection

Plaintiff argues that the LAPD and LACSD policies violate the Equal Protection Clause to the Fourteenth Amendment because those who have been subjected to a "clear and present danger to life or of great bodily injury" are generally victims of past crimes. Plaintiff argues that, as a result, the policies grant broader Second Amendment rights to crime victims by allowing them CCW licenses. Plaintiff argues that classifications based on whether one has been a crime victim violates the Equal Protection Clause.

This argument is unpersuasive. First, the policies do not classify applicants based on whether or not an applicant for a CCW license has been a victim of a crime. Instead, they classify applicants based on whether a person has a need for a concealed weapon due to the showing of a sufficient, immediate danger to the applicant. Second, even if the policies did classify based on whether the applicant was a crime victim, the policies would pass constitutional muster. Persons who have not been crime victims are not a suspect class under the Constitution. Rather, crime victims are those who rationally may be thought to legitimately fear some future criminal act. A law that classifies based on crime victim status must merely "rationally further a legitimate state interest." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Preventing crime is a legitimate state interest. It is entirely rational for the LAPD and LACSD to believe that those who have been victims of crime once may be victims again, and have a greater need for self-protection by carrying a concealed weapon. Accordingly, it is rational for the LAPD and LACSD to restrict CCW licenses to such applicants.

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V. <u>Interstate Travel</u>

Plaintiff also claims that his right to interstate travel is burdened by the challenged regulations and by his resulting inability to obtain a CCW license. Thus, he claims that he has a permit to carry a concealed weapon in Nevada, but that when he enters California, he must move any weapons carried to a locked container in the trunk of this car, thereby "brandishing" his weapon in violation of the Nevada law authorizing his Nevada CCW license.

This argument is not sufficient to support this claim. "A state law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right." *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986). The right to interstate travel is tied to the Article IV Privileges and Immunities Clause. *See Zobel v. Williams*, 457 U.S. 55, 79 (1982). However, the Article IV Privileges and Immunities Clause protects only those activities "sufficiently basic to the livelihood of the Nation." *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64 (1988). The Supreme Court has found such a right implicated in a waiting period for the right to vote, *Dunn v. Blumstein*, 405 U.S. 330 (1972), a residency period to receive welfare benefits, *Shapiro v. Thompson*, 394 U.S. 618 (1969), and a residency period to receive medical benefits, *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974).

The inconvenience of moving a weapon from the passenger compartment to the trunk of a car does not rise to the level of such activities "sufficiently basic to the livelihood of the Nation." The LAPD and LACSD policies do not deter travel, have impeding travel as their objective, or serve to penalize travel.

VI. <u>Conclusion</u>

California's concealed weapons law, the LAPD and LACSD policies promulgated under that law, and those policies as applied to Plaintiff do not infringe upon Plaintiff's constitutional rights. Consequently, the Court DENIES Plaintiff's motion for summary judgment and GRANTS Defendants' motion for summary judgment.

IT IS SO ORDERED.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CHRISTOPHER BAKER, **Plaintiff,** **vs.** **LOUIS KEALOHA, as an individual and in his official capacity as Honolulu Chief of Police; STATE OF HAWAII; CITY AND COUNTY OF HONOLULU; HONOLULU POLICE DEPARTMENT; NEIL ABERCROMBIE, in his official capacity as Hawaii Governor,** **Defendants.**	**Civ. No. 11-00528 ACK-KSC**

ORDER GRANTING DEFENDANTS STATE OF HAWAII AND GOVERNOR ABERCROMBIE'S MOTION FOR JUDGMENT ON THE PLEADINGS, GRANTING IN PART AND DENYING IN PART DEFENDANTS CITY AND COUNTY OF HONOLULU, HONOLULU POLICE DEPARTMENT AND LOUIS KEALOHA'S MOTION TO DISMISS, AND DENYING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

For the following reasons, the Court: (1) GRANTS Defendants State of Hawaii and Governor Abercrombie's Motion for Judgment on the Pleadings; (2) GRANTS IN PART and DENIES IN PART Defendants City and County of Honolulu, Honolulu Police Department, and Louis Kealoha's Motion to Dismiss; and (3) DENIES

Plaintiff's Motion for a Preliminary Injunction.

I. PROCEDURAL BACKGROUND

This case concerns Hawaii's ban on transporting and bearing firearms. The crux of this case is Plaintiff's contention that the State of Hawaii unlawfully prohibits and unduly restricts Plaintiff's Second Amendment right to bear arms. In his Complaint, Plaintiff Christopher Baker alleges that he applied for a license to carry a firearm and was denied by Chief of Police Louis Kealoha without being provided a meaningful opportunity to be heard, a reason or explanation for the denial, or any opportunity for further review. See Compl. at ¶ 2. Plaintiff names as Defendants the State of Hawaii and Hawaii Governor Neil Abercrombie (together, hereinafter the "State Defendants"), as well as the City and County of Honolulu, the Honolulu Police Department, and Chief of Police Louis Kealoha (together, hereinafter the "City Defendants").

There are three separate motions pending: (1) Defendants State of Hawaii and Governor Abercrombie's Motion for Judgment on the Pleadings;(2) the City and County of Honolulu, Honolulu Police Department, and Louis Kealoha's Motion to Dismiss the Complaint; and (3)Plaintiff's Motion for a Preliminary Injunction.

Plaintiff filed a complaint on August 30, 2011, alleging deprivation of civil rights and seeking declaratory and

injunctive relief, damages, attorney's fees, all applicable statutory damages, fees or awards to which he may be entitled, costs, and also a preliminary injunction (hereinafter, the "Complaint"). (Doc. No. 1.) On the same day, Plaintiff filed a Motion for a Preliminary Injunction against Defendants (Doc. No. 5, hereinafter "Mot. for P.I"), as well as a memorandum in support of the motion (Doc. No. 5-1, hereinafter Mem. in Supp. of Mot. for P.I."). Defendant Abercrombie is the Governor of the State of Hawaii, and was sued solely in his official capacity. (Compl. ¶ 13.) Defendant Kealoha is Honolulu's Chief of Police, and was sued in both his individual and official capacities. (Compl. ¶ 14.)

The State Defendants filed an answer to the Complaint on September 21, 2011. (Doc. No. 14, the "Answer.") On the same day, the City Defendants filed a Motion to Dismiss the Complaint. (Doc. No. 15, hereinafter the "Mot. to Dismiss.") On September 28, 2011, the State Defendants filed a Motion for Judgment on the Pleadings. (Doc. No. 18, hereinafter the "Mot. for Judg. on Pleadings.") The State Defendants also filed a memorandum in support of this motion. (Doc. No. 18-1, hereinafter "State Mem. in Supp. of Judg. on Pleadings.")

Subsequently, on February 16, 2012, Plaintiff submitted a Memorandum in Response to the City Defendants' Motion to Dismiss (Doc. No. 38, hereinafter "P's Resp. to MTD"), as well as

a Response to the State Defendants' Motion for Judgment on the Pleadings(Doc. No. 39, hereinafter "P's Resp. to Judg. on Pleadings.")

The State Defendants filed a Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction on February 27, 2012. (Doc. No. 42, hereinafter "State Opp. to P.I.") The City Defendants filed a separate Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction on February 29, 2012. (Doc. No. 44, hereinafter "City Opp. to P.I.")[1/]

On March 7, 2012, the State Defendants submitted a Reply Memorandum In Support Of Motion For Judgment On The Pleadings. (Doc. No. 46, hereinafter "State Reply to Mot. for Judg. on Pleadings.") On the same day, City Defendants submitted a Reply to Plaintiff's Opposing Memorandum And In Support Of Their Motion To Dismiss Plaintiff's Complaint. (Doc. No. 47, hereinafter "City Reply for MTD.") Also on March 7, 2012, Plaintiff filed a Reply to Defendants' Response To Plaintiff's Motion For Preliminary Injunction. (Doc. No. 48, hereinafter "P's Reply for P.I.")

The Court granted The Brady Center To Prevent Gun Violence's (the "Brady Center") Motion for Leave to File an Amicus Curiae Brief. (See Doc. Nos. 37, 40.) On February 24,

[1/] The City Defendants subsequently submitted an Errata to the Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction. (Doc. No. 45.)

2012, the Brady Center submitted an amicus curiae brief (the "Amicus Brief") in support of Defendants. (Doc. No. 41.)

This Court heard oral argument on these motions on Wednesday, March 21, 2012, and addresses the motions together herein.

II. FACTUAL BACKGROUND[2/]

Plaintiff Christopher Baker is a 27-year-old military service member with no criminal convictions or arrests, no outstanding judgments, and two service awards for honorable conduct. (Compl. ¶ 49.) He is also a licensed process server. Id. at ¶ 42. In the course of doing business, Plaintiff alleges, he was at risk of attack "on a daily basis" by "irate and hostile persons" while he lawfully conducted this business. Id. at ¶ 43. Further, Plaintiff alleges, on several occasions, he was "placed in imminent danger of suffering harm to himself or his property," and "had no means to defend himself in those situations." Id. at ¶ 44. On several occasions, officers from the Honolulu Police Department (hereinafter, "HPD") took "up to ten minutes or more" to respond to the scene, during which time Plaintiff was "terrorized and faced immediate threats of death and/or serious injury to himself, his family and his property." Id. at ¶ 45.

[2/] The facts as recited in this order are for the purpose of disposing of these motions and are not to be construed as findings of fact that the parties may rely on in future proceedings in this case.

Plaintiff wrote the HPD requesting a license to carry a firearm in public pursuant to Hawaii Revised Statute Section 134-9 (hereinafter, "Section 134-9"), and was subsequently contacted by an HPD representative who instructed Plaintiff to complete an application form in person. Id. at ¶¶ 58-59. Plaintiff complied with this request on August 31, 2010, and received a letter denying his application on September 18, 2010. Id. at ¶¶ 60-61. Plaintiff alleges that the letter expressed no concern over Plaintiff's fitness or ability to safely bear firearms and ammunition, but rather "merely" stated: "[w]e do not believe that the reasons you have provided constitute sufficient justification to issue you a permit. Therefore your application has been denied." Id. at ¶ 62. Plaintiff alleges that his sole opportunity to participate in the decision-making process occurred when he completed an in-person application. Id. at ¶ 60.[3/]

Plaintiff contends that he is unable to effectively defend himself because he cannot exercise his constitutional right to bear arms in the State of Hawaii; accordingly, Plaintiff alleges, he is unable to continue performing his job as a process server due to the danger associated with his lawful duties. Id.

[3/] At the March 21, 2012 hearing, counsel for Plaintiff stated that Plaintiff did not re-apply for a license or communicate further with the Defendants to request the reasons for the initial denial.

at ¶¶ 46-47. As a result, Plaintiff asserts, Defendants have wrongfully denied Plaintiff of a property interest. Id. at ¶ 47. Specifically, Defendants' alleged violations of Plaintiff's civil rights have precluded Plaintiff from earning income to support his family; were he afforded a viable means of self-defense, Plaintiff would resume his duties as a process server. Id. Further, even if Plaintiff were not engaged as a process server or another dangerous profession, he "would still wish to exercise his fundamental constitutional rights guaranteed by the Second Amendment." Id. at ¶ 48.

Plaintiff alleges that he is fit to exercise his Second Amendment rights. He has no criminal convictions or arrests, no outstanding judgments against him, and has never had a restraining order issued against him. Id. at ¶ 49-50. Further, Plaintiff has never been adjudged insane, is not mentally deranged, and has not suffered from any psychological, psychiatric, behavioral, emotional or mental disorder or condition that would preclude him from exercising his right to keep and bear arms and ammunition. Id. at ¶ 51.[4/]

[4/] Plaintiff additionally asserts that he is otherwise fit to exercise his Second Amendment rights, stating that he does not abuse or have an addiction to alcohol or drugs, has been trained in the safe and proper use of extendable batons, is qualified to operate and maintain firearms based upon his training by the United States Department of Defense, is a certified pistol instructor for the National Rifle Association of America, holds a service medal for Expert Pistol Marksmanship, and is licensed to

(continued...)

III. STANDARD OF REVIEW

A. Motion for Judgment on the Pleadings

Federal Rule of Civil Procedure 12(c) ("Rule 12(c)") states, "[a]fter the pleadings are closed - but early enough not to delay trial - a party may move for judgment on the pleadings." When Rule 12(c) is used to raise the defense of failure to state a claim upon which relief can be granted, the standard governing the Rule 12(c) motion for judgment on the pleadings is the same as that governing a Rule 12(b)(6) motion. See McGlinchy v. Shell Chemical Co., 845 F.2d 802, 810 (9th Cir. 1988); Luzon v. Atlas Ins. Agency, Inc., 284 F. Supp. 2d 1261, 1262 (D. Haw. 2003). As a result, a motion for judgment on the pleadings for failure to state a claim may be granted " 'only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations.'" McGlinchy, 845 F.2d at 810 (quoting Hishon v. King & Spalding, 467 U.S. 69,(1984)).

Thus, "[a] judgment on the pleadings is properly granted when, taking all allegations in the pleading as true, the moving party is entitled to judgment as a matter of law." Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co., 132 F.3d 526, 528 (9th Cir. 1997) (citing McGann v. Ernst & Young, 102 F.3d 390,

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[4/] (...continued)
carry a concealed firearm in the State of Georgia, among other things. See Compl. ¶¶ 52-57.

392 (9th Cir.1996)). "Not only must the court accept all material allegations in the complaint as true, but the complaint must be construed, and all doubts resolved, in the light most favorable to the plaintiff." McGlinchy, 845 F.2d at 810. "Nonetheless, conclusory allegations without more are insufficient to defeat a [Rule 12(c)] motion to dismiss for failure to state a claim." Id.

B. Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)") permits dismissal of a complaint that fails "to state a claim upon which relief can be granted." Under Rule 12(b)(6), review is generally limited to the contents of the complaint. Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001); Campanelli v. Bockrath, 100 F.3d 1476, 1479 (9th Cir. 1996). Courts may also "consider certain materials — documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice — without converting the motion to dismiss into a motion for summary judgment." United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003). Documents whose contents are alleged in a complaint and whose authenticity is not questioned by any party may also be considered in ruling on a Rule 12(b)(6) motion to dismiss. See Branch v. Tunnell, 14 F.3d 449, 453-54 (9th Cir. 1994), overruled on other grounds by Galbraith v. County of Santa Clara, 307 F.3d

1119 (9th Cir. 2002).

On a Rule 12(b)(6) motion to dismiss, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. Fed'n of African Am. Contractors v. City of Oakland, 96 F.3d 1204, 1207 (9th Cir. 1996). However, conclusory allegations of law, unwarranted deductions of fact, and unreasonable inferences are insufficient to defeat a motion to dismiss. See Sprewell, 266 F.3d at 988; Nat'l Assoc. for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043, 1049 (9th Cir. 2000); In re Syntex Corp. Sec. Litig., 95 F.3d 922, 926 (9th Cir. 1996). Moreover, the court need not accept as true allegations that contradict matters properly subject to judicial notice or allegations contradicting the exhibits attached to the complaint. Sprewell, 266 F.3d at 988.

In summary, to survive a Rule 12(b)(6) motion to dismiss, "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal citations and quotations omitted). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . . a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires

more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. (internal citations and quotations omitted). Dismissal is appropriate under Rule 12(b)(6) if the facts alleged do not state a claim that is "plausible on its face." Id. at 570. "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009) (citation omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" Id. (quoting Fed. R. Civ. P. 8(a)(2)).

"Dismissal without leave to amend is improper unless it is clear that the complaint could not be saved by any amendment." Harris v. Amgen, Inc., 573 F.3d 728, 737 (9th Cir. 2009) (internal quotation marks omitted). "But courts have discretion to deny leave to amend a complaint for futility, and futility includes the inevitability of a claim's defeat on summary judgment." Johnson v. Am. Airlines, Inc., 834 F.2d 721, 724 (9th Cir.1987) (citations and internal quotation marks omitted).

C. Motion For A Preliminary Injunction

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is

likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. Am. Trucking Ass'ns v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008) (explaining that, "[t]o the extent that [the Ninth Circuit's cases have suggested a lesser standard, they are no longer controlling, or even viable" (footnote omitted)); see also Stormans, Inc. v. Selecky, 571 F.3d 960, 978 (9th Cir. 2009) (concluding that this is the "proper legal standard for preliminary injunctive relief"). Pursuant to the standard set forth in Winter, even where a likelihood of success on the merits is established, a mere possibility of irreparable injury is insufficient to warrant preliminary injunctive relief, because "[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief"). 555 U.S. at 22.

The Ninth Circuit also articulated an alternate formulation of the Winter test, pursuant to which "serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that

there is a likelihood of irreparable injury and that the injunction is in the public interest." Farris v. Seabrook, 667 F.3d 1051, 1057 (9th Cir. 2012)(applying the Cottrell factors as espoused in Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011), to hold that the district court erred - although error was harmless - when it applied the first Cottrell factor and last three Winter factors, but failed to find that the balance of the hardships tipped sharply in the plaintiffs' favor, as Cotrell requires, or a likelihood of success on the merits, as Winter requires); see also M.R. v. Dreyfus, 663 F.3d 1100, 1108 (9th Cir. 2011) (recognizing Winter test as well as alternate Cottrell test for the grant of a preliminary injunction).

A district court has "great discretion" in determining whether to grant or to deny a preliminary injunction. See, e.g., Siales v. Hawaii State Judiciary, Dep't of Human Res., Civ. No. 11-00299 DAE-RLP, 2012 WL 220327, at *2 (D. Haw. Jan. 24, 2012) (quoting Wildwest Inst. v. Bull, 472 F.3d 587, 589-90 (9th Cir. 2006)).

IV. DISCUSSION

A. The Motion for Judgment on the Pleadings

The State Defendants made a Motion for Judgment on the Pleadings pursuant to Rules 7 and 12(c) of the Federal Rules of Civil Procedure. (Doc. No. 18.) In their motion, the State

Defendants assert two central arguments: (1) Plaintiff's federal constitutional claims against the State Defendants are barred by Eleventh Amendment immunity; and (2) Plaintiff's claims against Defendant Abercrombie for injunctive relief are also barred. In considering this motion, the Court takes all allegations in the pleadings as true, and construes the Complaint – and resolves all doubts – in the light most favorable to Plaintiff, as the non-moving party. McGlinchy, 845 F.2d at 810.

1. Plaintiff's § 1983 Claims Against The State of Hawaii Are Barred By Sovereign Immunity

The State Defendants contend that Plaintiff's federal constitutional claims against the State Defendants are barred because the State of Hawaii has not waived its sovereign immunity in federal court for civil rights actions. (State Mem. in Supp. of Judg. on Pleadings, at 3.) The State Defendants invoked the doctrine of sovereign immunity in their Answer to the Complaint. (Answer at 14.)

The State Defendants are correct. The doctrine of sovereign immunity applies when civil rights claims are brought against the State of Hawaii. The doctrine of sovereign immunity is set out in the Eleventh Amendment of the United States Constitution:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or

Subjects of any Foreign State.

U.S. Const. amend. XI. The United States Supreme Court has held that Eleventh Amendment immunity extends to lawsuits against a State or its agencies by citizens of that same State. Hans v. Louisiana, 134 U.S. 1 (1890). Generally, the doctrine of sovereign immunity bars the federal courts from entertaining suits brought against a state or its agencies absent a State's consent or Congressional abrogation. Los Angeles County Bar Ass'n v. Eu, 979 F.2d 697, 704 (9th Cir. 1992); Wilbur v. Locke, 423 F.3d 1101, 1111 (9th Cir. 2005), cert. denied, 546 U.S. 1173 (2006).

Absent a waiver or abrogation of immunity, federal statutory and constitutional claims for money damages are barred against state officials sued in their official capacities. See Dittman v. State of California, 191 F.3d 1020, 1025-26 (9th Cir. 1999). Further, in order to waive sovereign immunity, a State must unequivocally express its consent to such waiver. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984). The State of Hawaii has not waived its sovereign immunity from suit in federal court for civil rights actions. In the instant case, the State Defendants explicitly invoked the doctrine of sovereign immunity (See Answer at 4.)

Congress possesses the power to abrogate the sovereign immunity of the States pursuant to Section 5 of the Fourteenth

Amendment of the United States Constitution: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV. In order to do so, Congress must enact a statute which "explicitly and by clear language indicate[s] on its face an intent to sweep away the immunity of the States." Quern v. Jordan, 440 U.S. 332, 332 (1979); Kimel v. Florida Bd. of Regents, 528 U.S. 62, 73 (2000). However, Congress did not abrogate the States' Eleventh Amendment immunity when it enacted 42 U.S. 1983. See Will v. Michigan Dep't of State Police, 491 U.S. 58, 65-66 (1989). Consequently, the State of Hawaii is not a "person" for purposes of liability under Section 1983. Accordingly, Plaintiff may not sue the State of Hawaii for monetary damages under Section 1983.

A state official acting in his official capacity, except where sued for prospective injunctive relief, is also not a "person" for purposes of liability under Section 1983. See Sherez v. State of Hawaii Dep't of Educ., 396 F. Supp. 2d 1138, 1142-43 (D. Haw. 2005)(dismissing claims against the Department of Education and against state official in official capacity on Eleventh Amendment immunity grounds).

The Court notes that Plaintiff conceded – both in his Opposition to the Motion for Judgment on the Pleadings, and at the March 21, 2012 hearing – that he is not entitled to damages against the State Defendants. (See P's Resp. to Judg. on

Pleadings at 2.)

Nevertheless, in his opposition, Plaintiff purports to rely upon Young v. Hawaii, 548 F. Supp. 2d 1151, 1164 (D. Haw. 2008),[5/] for the proposition that the State and State Governor are contemplated in this Court's definition of "persons" under 42 U.S.C. 1983. The provision upon which Plaintiff relies, however, refers to local government units, not the State of Hawaii or State Governor.[6/] Further, Plaintiff apparently attempts to cast doubt upon the effect of ratification of the Fourteenth Amendment on the Eleventh Amendment's grant of sovereign immunity.[7/]

[5/] This Court notes that the opinion in Young v. State of Hawaii was issued prior to McDonald, wherein the Supreme Court explicitly extended the right to bear arms to the States. The court's discussion is nevertheless helpful in providing an interpretation of the scope of the right to carry a firearm, assuming (although it was not the case at the time) that this right were to apply to the States as it now does.

[6/] Plaintiff asserts that "this Court has consistently recognized that the United States Supreme Court has extended the definition of 'persons' to include governmental entities"; however Plaintiff relies upon language stating that "local government units can be sued directly for damages and injunctive or declaratory relief." 548 F. Supp. 2d 1151, 1164 (D. Haw. 2008) (quoting Wong v. City & County of Honolulu, 333 F. Supp. 2d 942, 947 (D. Haw. 2004) (citing Kentucky v. Graham, 473 U.S. 159, 166-67 n. 14 (1985)). The cases cited by Plaintiff refer to local government units, which are not party to the Motion for Judgment on the Pleadings.

[7/] Plaintiff also cites Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) in support of his argument that the enforcement provision of the Fourteenth Amendment limits state immunity. This case is inapposite; Fitzpatrick considered the issue of whether Congress abrogated sovereign immunity as to Title VII claims, not Section 1983 claims. The U.S. District Court for the District of Hawaii

(continued...)

Contrary to Plaintiff's argument, the answer is clear: Congress did not expressly waive sovereign immunity of the States in enacting 42 U.S.C. §1983, and the State Defendants clearly invoked such immunity in this suit.[8/]

Accordingly, this Court lacks jurisdiction over all of Plaintiff's federal constitutional claims against the State of Hawaii, and against Defendant Abercrombie in his official capacity, to the extent that they present claims for money damages. See Young, 548 F. Supp. 2d at 1163-64. For these reasons, the Court GRANTS the State Defendants' Motion for

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[7/] (...continued)
explicitly concluded in Young v. Hawaii – the very case upon which Plaintiff relies – that "Congress, in passing 42 U.S.C. 1983 . . . did not abrogate Eleventh Amendment immunity of state governments. The Court lacks jurisdiction over all of Plaintiff's federal constitutional claims against the State of Hawaii . . . ." 548 F. Supp. 2d at 1163.

[8/] Plaintiff cites selectively to case law that is not on point or controlling, such as an excerpt from Justice Hugo Black's dissent in a case from 1947 advocating for full incorporation of the Bill of Rights to the states. Pl's Response to Mot. for Judg. on Pleadings, at 8 (citing Adamson v. California, 332 U.S. 46, 331-32 (1947) (Black, J., dissenting)). Plaintiff also purports to distinguish the instant case from Young, a Second Amendment case involving Haw. Rev. Stat. 134-9 wherein the United States District Court for the District of Hawaii found in favor of the State, citing sovereign immunity. 548 F. Supp. 2d at 1158. Plaintiff asserts that Young is distinguishable because whereas the question in that case was "whether Congress abrogated the sovereign immunity of the states through passing 42 U.S.C. 1983 . . . . [h]ere, however, Mr. Baker argues that the ratification of the Fourteenth amendment [sic] abrogated the sovereign immunity of the States as to Second Amendment claims." Pl's Response to Mot. for Judg. on Pleadings, at 8. Plaintiff cites no case law, and this Court is aware of none, that supports this contention.

Judgment on the Pleadings on all claims against the State of Hawaii, and against Defendant Abercrombie to the extent the claims seek money damages against him in his official capacity.

2. Non-Monetary Claims Against Governor Abercrombie

The doctrine of sovereign immunity does not bar Plaintiff from bringing claims under Section 1983 for prospective injunctive relief against the Governor of Hawaii in his official capacity. Under the doctrine established in Ex Parte Young, 209 U.S. 123 (1908), the Eleventh Amendment does not bar a suit "for prospective declaratory and injunctive relief against state officers, sued in their official capacities, to enjoin an alleged ongoing violation of federal law." Wilbur v. Locke, 423 F. 3d 1101, 1107 (9th Cir. 2005), abrogated on other grounds by Levin v. Commerce Energy, Inc., __ U.S. __, 130 S.Ct. 2323 (2010). This is because "official capacity actions for prospective relief are not treated as actions against the State." Will, 491 U.S. at 71 n. 10. The parties agree on this point. (See Mot. for Judg. on Pleadings, at 5; Pl's Resp. to Mot. for Judg. on Pleadings, at 10.)

To determine whether the doctrine memorialized in Ex Parte Young avoids an Eleventh Amendment bar to suit, the court "need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." Verizon Md., Inc.

v. Public Serv. Comm'n of Md., et al., 535 U.S. 635, 645 (2002); ACS of Fairbanks, Inc. v. GCI Comm'n Corp., 321 F.3d 1215, 1216-17 (9th Cir. 2003). A plaintiff may not seek a "retroactive award which requires the payment of funds from the state treasury." Foulks v. Ohio Dep't of Rehabilitation and Correction, 713 F.2d 1229, 1323 (6th Cir. 1983) (citing Edelman v. Jordan, 415 U.S. 651 (1974)).

The Court reviews Plaintiff's Complaint to determine the type of relief sought, and in doing so construes the Complaint – and resolves all doubts – in the light most favorable to Plaintiff. Here, Plaintiff's prayer for injunctive relief (to the extent that it is lodged against Defendant Abercrombie in his official capacity) seeks that the Defendants be permanently enjoined from enforcing and maintaining allegedly unconstitutional sections of the Hawaii Revised Statutes. This prayer for relief satisfies our "straightforward inquiry." Verizon Maryland, 535 U.S. at 636. As for Plaintiff's prayer for declaratory relief – namely, declaring certain provisions of Chapter 134 unconstitutional - even though arguably Plaintiff seeks a declaration of past, as well as future, violations (although not entirely clear from Plaintiff's Complaint), construing the Complaint in favor of the Plaintiff this Court concludes that this prayer for relief may proceed under Ex Parte Young. Verizon Maryland, 535 U.S. at 636 (citing Edelman v.

Jordan, 415 U.S. 651, 668 (1974)).

However, the Court's inquiry does not end there. In order to sustain a claim against Governor Abercrombie, the Complaint must adequately allege a "nexus between the violation of federal law and the individual accused of violating that law." Id. (quoting Pennington Seed, Inc. v. Produce Exchange No. 299, 457 F.3d 1334, 1342 (Fed. Cir. 2006)). Without this limitation, "the suit [would] merely make [the defendant] a representative of the state and therefore improperly make the state a party to the suit." Pennington Seed, 457 F.3d at 1342 (quoting Ex Parte Young, 209 U.S. at 157). In order to establish this nexus between the violation of federal law and the individual accused of violating that law, the Plaintiff must demonstrate "more than simply a broad general obligation to prevent a violation." Id. (citing Shell Oil Co. v. Noel, 608 F.2d 208, 211 (1st Cir. 1979) (governor or attorney general of a state are not proper defendants in every action attacking the constitutionality of a state statute merely because they have a general obligation to enforce state laws)).

In his Complaint, Plaintiff asserts that Governor Abercrombie "is responsible for the execution and enforcement of the Hawaii Revised Statutes complained of in this action." Compl. ¶ 13. However, Plaintiff alleges in the next paragraph that Defendant Honolulu Police Chief Louis Kealoha "has sole

discretion in approving or denying the permits which are brought into question within this action." Id. ¶ 14. Throughout the Complaint, Plaintiff repeatedly fails to draw any distinction among the Defendants with respect to his allegations, and does not articulate any facts directly connecting Governor Abercrombie to the alleged constitutional violations.[9/]

Plaintiff urges that this Court "should not be seduced into disregarding the obvious role of the Governor in this action or any similar future actions." (Mot. for Judg. on Pleadings at 3.) He adds that, "Defendant Abercrombie, as Governor, is a state officer who is in direct control of the armed forces of the State . . . . as head of the Executive Branch, [he] is the state official ultimately responsible for enforcing the laws – even the unconstitutional laws at issue in this suit." (Pl's Resp. to Mot. for Judg. on Pleadings at 13.) Plaintiff further argues that Governor Abercrombie's role is akin to that of the California Governor in Los Angeles County Bar Ass'n v. Eu,

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[9/] Plaintiff refers to Defendants collectively in vague and repeated allegations that they "are propagating customs, policies, and practices that violate Mr. Baker's rights" under the United States Constitution. See, e.g., Compl. ¶¶ 83, 89, 97, 103,111, 117, 127, 133, 142, 148, 155, 161. In order for Plaintiff to proceed with this claim, Governor Abercrombie's connection to the enforcement of the statutes at issue "must be fairly direct[;] a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the statutory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." Young, 548 F. Supp. 2d at 1164 (quoting Los Angeles County Bar Ass'n v. Eu, 979 F.2d 697, 704 (9th Cir. 1992)).

wherein the Ninth Circuit Court of Appeals found a sufficient nexus to sustain an action against the governor. 979 F.2d at 704. A close reading of that case, however, reveals that the defendant governor in fact had a "specific connection to the challenged statute." The governor in Eu "ha[d] a duty to appoint judges to any newly-created judicial positions," a role that was directly connected to the state statute at issue involving the number of judges for the superior court in Los Angeles County and related litigation delays. Id.

Plaintiff asserts that Governor Abercrombie's role is analogous to that of the California governor in Eu because Governor Abercrombie is responsible for appointing a new Deputy Director of Law Enforcement for the Department of Public Safety at the beginning of every term, and this Deputy Director has authority over two law enforcement departments and routinely enforced the challenged statutes in conjunction with county police. (P.'s Resp. to Mot. for Judg. on Pleadings at 14.) This causal chain is attenuated, and Plaintiff fails to establish any action on the part of Governor Abercrombie that actually links him to enforcement of the statutes at issue.

Plaintiff's allegations are insufficient to establish a nexus between the alleged violation of federal law and the individual accused of violating that law. See, e.g., Pennington, 457 F.3d at 1342-43 ("A nexus between the violation of federal

law and the individual accused of violating the law requires more than simply a broad general obligation to prevent a violation; it requires an actual violation of federal law by that individual.") The United States District Court for the District of Hawaii has held that an allegation that the Governor of Hawaii is responsible for the oversight of laws enacted in this State is insufficient to subject the governor to suit. Young, 548 F. Supp. 2d. at 1164 (citing Los Angeles County Bar Ass'n, 979 F.2d at 704).[10/] As Defendants argue in their Reply Memorandum, "[r]egardless of whatever merit his claims may have against other defendants in this action, Plaintiff does not allege anywhere that Governor Abercrombie had any involvement in the denial of his firearm application." (State Reply to Mot. for Judg. on Pleadings at 4.)

Accordingly, although Plaintiff may be entitled to injunctive and/or declaratory relief by virtue of a claim properly asserted against other Defendants, the Court concludes that Plaintiff may not obtain injunctive relief from Governor Abercrombie. The Court hereby GRANTS State Defendants' Motion for Judgment on the Pleadings on all claims against the State

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[10/] Since the Court is granting the State's Motion for Judgment on the Pleadings, the Court finds it unnecessary to address the standing issues raised by the State in its Reply in Support of the Motion for Judgment on the Pleadings. Moreover, in any event, if this Court finds any of the State statutes to be unconstitutional as alleged, then such statute(s) could not be enforced by anyone.

Defendants.

B. The Motion to Dismiss

On September 21, 2011, the City Defendants filed a Motion to Dismiss the Complaint. Generally, the City Defendants argue that the Complaint "is exceedingly long, confusing, redundant and full of conclusory statements." (Mot. to Dismiss, at 2.) Moreover, the City Defendants assert, the Complaint "raises improper claims and names improper parties." Id. The City Defendants advance five central arguments in their Motion to Dismiss. This Order addresses each argument in turn. For purposes of the Motion to Dismiss, the Court assumes the facts as alleged in the Complaint to be true.

In its Motion to Dismiss, the City contends that Plaintiff fails to state a claim under 42 U.S.C. § 1983. (City Motion to Dismiss at 11.) Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. In order to establish municipal liability under Section 1983, a plaintiff must demonstrate that he was deprived of a right under the Constitution or federal law, and

that the violation "was the product of a policy, practice, or custom adopted and promulgated by the city's officials." Levine v. City of Alameda, 525 F.3d 903, 907 (9th Cir. 2008) (noting that in order to establish liability, plaintiff must show that the city had a policy, practice, or custom which amounted to "deliberate indifference" to the constitutional or federal right and was the "moving force" behind the constitutional violation); see also Monell v. Dep't of Soc. Servs. of New York, 436 U.S. 658 (1978).

In the past, the Ninth Circuit has not required parties to provide much detail at the pleading stage regarding the "policy or custom" alleged. Citing Monell, courts have long recognized that "[i]n this circuit, a claim of municipal liability under § 1983 is sufficient to withstand a motion to dismiss even if the claim is based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom, or practice." Whitaker v. Garcetti, 486 F.3d 572, 581 (9th Cir. 2007) (quoting Galbraith v. County of Santa Clara, 307 F.3d 1119, 1127 (9th Cir. 2002)).

However, in Starr v. Baca, the Ninth Circuit acknowledged and addressed the conflicts in the Supreme Court's recent jurisprudence on the pleading requirements applicable to civil actions. See 652 F.3d 1202 (9th Cir. 2011) (addressing Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002); Dura Pharm.,

Inc. v. Broudo, 544 U.S. 336 (2005); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Erickson v. Pardus, 551 U.S. 89 (2007) (per curiam); and Ashcroft v. Iqbal, 556 U.S. 662 (2009)). The court held:

> [W]hatever the difference between [Swierkiewicz, Dura Pharmaceuticals, Twombly, Erickson, and Iqbal], we can at least state the following two principles common to all of them. First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.

Starr, 652 F.3d at 1218 (emphasis added). The Ninth Circuit has since held that this standard applies to Monell claims against government officials. AE ex rel. Hernandez v. County of Tulare, 666 F.3d 631, 637 (9th Cir. 2012). In light of this authority, the Court acknowledges that in order to withstand the Motion to Dismiss, Plaintiff's Complaint must present more than simply a recital of the elements of a cause of action for his counts alleging constitutional violations and seeking relief pursuant to Section 1983; the allegations "must plausibly suggest an entitlement to relief, such that it is not unfair to require [Defendants] be subjected to the expense of discovery and continued litigation." Starr, 652 F.3d at 1218.

1. Overview of Plaintiff's Claims

The Complaint purports to assert thirteen causes of action, each of which is alleged against all Defendants. (See Compl. at 23-45.) Although it contains 165 paragraphs, all but one cause of action is brought pursuant to Section 1983 for civil rights violations based upon constitutional rights under the Second, Fifth, or Fourteenth Amendments (or some combination thereof).[11/] Id. In his Prayer for Relief, Plaintiff seeks declaratory and injunctive relief, attorney's fees and costs, and (apparently as a separate prayer) attorney's fees and costs pursuant to 42 U.S.C. § 1988, damages including but not limited to loss of income, research costs, travel fees, and case costs, statutory damages or awards, and costs of suit. Compl. at 45-49.

2. The Contested Provisions from the Hawaii Revised Statutes, Chapter 134

Plaintiff attacks the constitutionality of eight separate provisions of Chapter 134 of the Hawaii Revised Statutes, however his primary contention involves Section 134-9: Licenses to Carry. This statute provides as follows:

[11/] Specifically, the Counts are as follows: (I) Unlawful Prohibition; (II) Unlawful Prohibition; (III) Unreasonable Regulations; (IV) Unreasonable Regulations; (V) Unreasonable Regulation § 134-9; (VI) Unreasonable Regulation § 134-9; (VII) Due Process Violation; (VIII) Due Process Violation; (IX) Mr. Baker's Application; (X) Mr. Baker's Application; (XI) Less-Than-Lethal Weapons; (XII) Less-Than-Lethal Weapons; and (XIII) Preliminary Injunction. Compl. ¶¶ 76-165.

Haw. Rev. Stat. § 134-9: Licenses to carry.

(a) In an exceptional case, when an applicant shows reason to fear injury to the applicant's person or property, the chief of police of the appropriate county may grant a license to an applicant who is a citizen of the United States of the age of twenty-one years or more or to a duly accredited official representative of a foreign nation of the age of twenty-one years or more to carry a pistol or revolver and ammunition therefor concealed on the person within the county where the license is granted. Where the urgency or the need has been sufficiently indicated, the respective chief of police may grant to an applicant of good moral character who is a citizen of the United States of the age of twenty-one years or more, is engaged in the protection of life and property, and is not prohibited under section 134-7 from the ownership or possession of a firearm, a license to carry a pistol or revolver and ammunition therefor unconcealed on the person within the county where the license is granted. The chief of police of the appropriate county, or the chief's designated representative, shall perform an inquiry on an applicant by using the National Instant Criminal Background Check System, to include a check of the Immigration and Customs Enforcement databases where the applicant is not a citizen of the United States, before any determination to grant a license is made. Unless renewed, the license shall expire one year from the date of issue.

(b) The chief of police of each county shall adopt procedures to require that any person granted a license to carry a concealed weapon on the person shall:

(1) Be qualified to use the firearm in a safe manner;

(2) Appear to be a suitable person to be so licensed;

(3) Not be prohibited under section 134-7 from the ownership or possession of a firearm; and

(4) Not have been adjudged insane or not appear to be mentally deranged.

(c) No person shall carry concealed or unconcealed on the person a pistol or revolver without being licensed to do so under this section or in

compliance with sections 134-5(c) or 134-25.

(d) A fee of $10 shall be charged for each license and shall be deposited in the treasury of the county in which the license is granted. [L 1988, c 275, pt of §2; am L 1994, c 204, §8; am L 1997, c 254, §§2, 4; am L 2000, c 96, §1; am L 2002, c 79, §1; am L 2006, c 27,§3 and c 66, §3; am L 2007, c 9, §8]

As the Brady Center aptly summarizes in its Amicus Brief, most of the other statutes at issue are "Place to Keep" statutes requiring firearms to "be confined to the possessor's place of business, residence, or sojourn," but permitting "the transport of firearms between those places and repair shops, target ranges, licensed dealerships, organized firearms shows, firearm training places, and police stations. See Haw. Rev. Stat. § 134-23 (loaded firearms); § 134-24 (unloaded firearms); § 134-25 (pistols and revolvers); § 134-27 (ammunition). Section 134-26 prohibits carrying or possessing loaded firearms on a public highway. Those sections exempt permit-holders from their purview, and Plaintiff's apparent grievance with them is that he is subject to them – and therefore unable to carry his firearm about as he pleases – because his permit request was denied. Section 134-5 permits the use of rifles and shotguns for hunting or target shooting. Plaintiff's complaint with this section is that it does not specifically authorize the use of a handgun for target shooting . . . . Finally, Section 134-51 prohibits the concealed carry of deadly or dangerous weapons." (See Amicus

Brief at 5 n.2.)

Prior to addressing the City Defendants' substantive arguments as to why this Court should dismiss certain counts in the Complaint, the Court considers whether the Complaint complies with the pleading standards set forth in Federal Rule of Civil Procedure 8(a).

3. Failure to Comply with Rule 8(a)

The City Defendants allege that the Complaint fails to comply with Rule 8(a) of the Federal Rules of Civil Procedure in that it is "needlessly long, highly repetitious and confusing." Id. at 3. Rule 8(a) states, in part, that "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Although Plaintiff's complaint is forty-nine (49) pages long and asserts thirteen (13) causes of action, City Defendants allege that "all but one claim is brought under 42 U.S.C. § 1983, and alleges a violation of either his 2nd, 5th or 14th Amendment rights." Id. at 5. Furthermore, although Plaintiff's chief complaint concerns the State of Hawaii's gun laws, "there is no effort made to parse [Plaintiff's] claims between those laws and the particular actions of City Defendants of which he complains." Id. at 6.

Plaintiff responds that his Complaint does, in fact, consist of "clear and concise averments stating which defendants

are liable to [Plaintiff] for which wrongs, based on the evidence." (P's Resp. to MTD at 2) (quoting McHenry v. Renne, 84 F.3d 1172, 1178 (9th Cir. 1996))). In an attempt to bolster this claim, Plaintiff notes that the State Defendants "cogently and timely answered the Complaint," and the City Defendants "were capable of attributing (what they now aver are) infirmities to the Complaint, often with specific paragraph citations." Id. at 2-3. Plaintiff further argues that the "sweeping nature" of the statutory scheme at issue, as well as the number of constitutional rights allegedly implicated, "necessitate" the Complaint's length. Id. A finding that Plaintiff has failed to comply with Rule 8(a) allegedly would "cripple any Plaintiff's ability to challenge unconstitutional statutes or government officials' actions." Id. at 3. Plaintiff characterizes the City Defendants' Rule 8(a) argument as a "thinly-veiled ruse designed to unduly burden Mr. Baker with litigation costs." Id.

Upon careful review, although the Court agrees with the City Defendants that the Complaint is prolix and repetitive, and should have been drafted more clearly, this particular deficiency is not a basis for dismissal. There is no reasonable basis for confusion as to which Defendants are associated with which claims, and the Court can identify Plaintiff's causes of action. In summary, although Plaintiff's Complaint is repetitive and at times unclear, it "plausibly suggest[s] an entitlement to

relief, such that it is not unfair to require [Defendants] be subjected to the expense of discovery and continued litigation." Starr, 652 F.3d at 1218. Accordingly, the Court DENIES the City Defendants' Motion to Dismiss based upon failure to comply with Rule 8(a).[12/]

In their Reply to Plaintiff's Opposing Memorandum and in Support of the Motion to Dismiss, Defendants emphasize that Plaintiff has failed to address – and thereby implicitly concedes – City Defendants' arguments regarding: (i) Plaintiff's Fifth Amendment claims; (ii) the impropriety of HPD as a party; and (iii) the claim for injunctive relief. The City Defendants ask that the Court find in their favor "with no further discussion of these matters," pursuant to the arguments outlined in their Motion to Dismiss. (City Reply to MTD at 2.) The Court now addresses these arguments.

4. Plaintiff's § 1983 Claims for Violation of his Fifth Amendment Rights

The City Defendants correctly assert that Plaintiff's four claims alleging violation of his right to due process under the Fifth Amendment (Counts VII, VIII, IX, and X) must be dismissed. The Fifth Amendment due process clause "applies to the actions of the federal government, not a municipality." Low

[12/] Nevertheless, should Plaintiff choose to file an amended Complaint, Plaintiff should be more concise and consolidate the causes of action and be specific in identifying the Defendants involved with each cause of action.

v. City of Sacramento, No. 2:10-cv-01624 JAM KJN PS, 2010 WL 3714993 (E.D. Cal. Sept. 17, 2010). Indeed, the Ninth Circuit has plainly held that "[t]he Due Process Clause of the Fifth Amendment . . . [applies] only to actions of the federal government – not to those of state or local governments." Lee v. City of Los Angeles, 250 F.3d 668, 687 (9th Cir. 2001); see also Bingue v. Prunchak, 512 F.3d 1169, 1174 (9th Cir. 2008) ("The Fifth Amendment's due process clause only applies to the federal government."); Castillo v. McFadden, 399 F.3d 993, 1002 n. 5 (9th Cir. 2005) ("The Fifth Amendment prohibits the federal government from depriving persons of due process, while the Fourteenth Amendment explicitly prohibits deprivations without due process by the several States . . . .").

Here, Plaintiff has only named the State of Hawaii, City and County of Honolulu, HPD, and a state and local government employee as defendants, and has not alleged that the federal government or a federal actor played a role in the events giving rise to Plaintiff's Fifth Amendment claim. See Low, 2010 WL 3714993, at * 7. Significantly, Plaintiff offers no response to the City Defendants' argument, leaving the resolution of these claims "to the Court's discretion." (Pl's Response to Defs' Mot. to Dismiss, at 2.) Plaintiff's counsel also conceded at the March 21, 2012 hearing that Plaintiff's Fifth Amendment claims are improper.

Accordingly, this Court will dismiss Counts VII, VIII, IX, and X of the Complaint as to the City Defendants, to the extent that they allege a violation of the Due Process Clause of the Fifth Amendment.[13/] This dismissal is with prejudice.

5. Claims Against the Honolulu Police Department

The Court will GRANT the City Defendants' Motion to Dismiss all claims against HPD based upon the argument that HPD is not a proper party to this action. In their Motion to Dismiss, the City Defendants assert that HPD cannot be sued because it does not exist separate and apart from the municipality and does not have its own legal identity. (See Mot. to Dismiss, at 7.)

The City Defendants are correct. Courts in the Ninth Circuit generally have treated police departments as part of a municipality.[14/] Plaintiff's counsel concurred that dismissal of

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[13/] The Court does not consider the Fifth Amendment Due Process claims as they relate to the State Defendants, as all claims against the State Defendants were considered fully supra in connection with the State Defendants' Motion for Judgment on the Pleadings.

[14/] See, e.g., Headwaters Forest Def. v. County of Humboldt, et al., 276 F.3d 1125, 1127 (9th Cir. 2002) (treating police departments as part of their respective county or city); Young, 548 F. Supp. 2d at 1164-65(concluding that defendants HPD and the County of Hawaii should be treated as one party for purposes of municipal liability under § 1983); Hoe III v. City and County of Honolulu, et al., Civ. No. 05-00602 DAE-LEK, 2007 WL 1118288, at *5 (D. Haw. 2007) ("This Court treats claims against municipalities, such as the City and County of Honolulu, and their respective police departments as claims against the

(continued...)

HPD was warranted at the March 21, 2012 hearing. Based upon the foregoing, the Court, in its discretion, GRANTS the City Defendants's Motion to Dismiss all claims against HPD, with prejudice.

6. Plaintiff's Official Capacity Claims Against Defendant Kealoha

Louis Kealoha is named as a defendant both individually and in his official capacity as Chief of Police of HPD. (Compl. ¶ 14.) In their Motion to Dismiss, the City Defendants assert that Plaintiff's allegations against Defendant Kealoha in his official capacity are "duplicitous, unnecessary and should be dismissed." (See Motion to Dismiss, at 9.) The City Defendants cite Supreme Court precedent stating that "a suit against a governmental officer 'in his official capacity' is the same as a suit against the entity of which the officer is an agent." Id. at 8 (citing McMillian v. Monroe County, Ala., 520 U.S. 781, 785 fn. 2 (1997).[15/]

[14/] (...continued)
municipalities."). Additionally, the Hawaii Supreme Court has held that individual departments within the City are not separate entities. City and County of Honolulu v. Toyama, 61 Haw. 156, 598 P.2d 168, 172 (1979) (the city's Building Department and Department of Housing and Community Development were "both departments of the executive branch of appellee" and "both supervised by appellee's managing director," and therefore did not constitute legal entities separate and apart from the City and County of Honolulu).

[15/] The City Defendants also rely upon Satterfield v. Borough of Schuylkill Haven, 12 F. Supp. 2d 423 (E.D. Pa. 1998) (held: (continued...)

Defendants also contend that courts that have specifically dealt with situations wherein a municipality and its police chief, named in his official capacity, are sued under the same cause of action, have found that the chiefs are unnecessary parties and dismissed them. (Mot. to Dismiss, at 8-9.)[16/] Any allegation of an unlawful policy or custom against Kealoha in his official capacity, City Defendants assert, "would necessarily run against the City." Id. at 9.

Plaintiff responds that Defendant Kealoha is "the individual responsible for granting or denying licenses to carry pursuant to HRS §134-9. (P's Resp. to MTD at 10.) He adds, "while [Plaintiff] is entitled to injunctive and declaratory relief against Defendant City and County of Honolulu, it was Chief Kealoha who has directly violated [Plaintiff's] rights." Id. at 10-11.[17/]

[15/] (...continued)
public official sued in his official capacity is "legally indistinct from the municipality for which he serves."). Mot. to Dismiss at 8.

[16/] Defendants cite Beverly v. Casey, 2006 WL 298810 (D. Neb. 2006)("Because suing a municipal official in his official capacity is equivalent to suing the municipality, the police chief is an unnecessary party."); Admiral Theatre v. City of Chicago, 832 F. Supp. 1195, 1200 (N.D. Ill. 1993) ("Where the unit of local government is sued as well, the suit against the officials is redundant and should therefore be dismissed.")

[17/] Plaintiff correctly distinguishes McMillian v. Monroe Cty., 520 U.S. 781 (1997) – cited by Defendants in their Motion to Dismiss. This case is inapposite in that the Sheriff
(continued...)

The Supreme Court noted decades ago, and it is well settled, that "[t]here is no longer a need to bring official-capacity actions against local government officials, for under Monell, . . . local government units can be sued directly for damages and injunctive or declaratory relief." Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985).

As the City Defendants assert, "[a]ny allegation of an unlawful policy or custom against Kealoha in his official capacity would necessarily run against City." (Mot. to Dismiss at 9.) In fact, in a recent opinion addressing alleged violations of a Plaintiff's Second Amendment rights – and alleging that Section 134-9, among others, was unconstitutional – the United States District Court for the District of Hawaii exercised its discretion to dismiss official capacity claims against the Chief of Police because the claims were duplicative of those asserted against the County of Hawaii. See Young, 548 F. Supp. 2d at 1164.

The Court finds that the official-capacity claims duplicate the claims asserted against the City and County of Honolulu, and accordingly DISMISSES Plaintiff's official capacity claims against Defendant Kealoha insofar as Plaintiff seeks monetary damages. See Wong v. City & Cnty. of Honolulu, 333 F.

[17/] (...continued)
Defendant was held to be an actor of the State, not the County. Id. at 793.

Supp. 2d 942, 947 (2004).[18/] This dismissal is with prejudice. However, in the event that Plaintiff ultimately fails to establish municipal liability against the City, at this time the Court in its discretion declines to dismiss the official capacity claims against Kealoha insofar as Plaintiff seeks injunctive relief.

7. Plaintiff's Claim for Injunctive Relief

As the City Defendants argue, it is well-settled that injunctive relief is only a possible remedy if a plaintiff succeeds on one of his independent causes of action; it is not its own cause of action. See Marzan v. Bank of Am., 779 F. Supp. 2d 1140 (D. Haw. 2011) (recognizing the "well-settled rule that a claim for 'injunctive relief' standing alone is not a cause of action); see also Jensen v. Quality Loan Serv. Corp., 702 F. Supp. 2d 1183, 1201 (E.D. Cal. 2010) ("A request for injunctive relief by itself does not state a cause of action . . . .") (quoting Mbaba v. Indymac Federal Bank F.S.B., No. 1:09-CV-01452-0WW-GSA, 2011 WL 424363, at *4 (E.D. Cal. Jan. 27, 2010)).

Although Plaintiff may request injunctive relief in connection with one of the substantive claims asserted in his

[18/] The City Defendants have not moved to dismiss the claims brought against Defendant Kealoha in his individual capacity. Accordingly, the Court does not address the individual capacity claims asserted against Defendant Kealoha in this Order.

Complaint, "a separately pled claim or cause of action for injunctive relief is inappropriate." Jensen, 702 F.Supp. at 1201. Plaintiff does not challenge Defendants' argument in his Reply. (See P's Reply for P.I.) Additionally, at the March 21, 2012 hearing, counsel for Plaintiff conceded that a separate count for injunctive relief is not permissible.

Accordingly, although it notes that Plaintiff may request injunctive relief in his Prayer for Relief in connection with a separate substantive claim, the Court GRANTS the City Defendants' Motion to Dismiss Count XIII as it is improperly pled as an independent cause of action. This claim is DISMISSED with prejudice.

The Court observes that the City Defendants have not addressed Plaintiff's remaining claims under Section 1983 alleging violation of Plaintiff's rights under the Second and Fourteenth Amendments of the United States Constitution. (See Mot. to Dismiss.) Accordingly, the Court will not consider these claims and declines to dismiss them against the remaining Defendants at this time; although the Court does consider them infra in connection with Plaintiff's Motion for a Preliminary Injunction.

C. Motion for Preliminary Injunction

For the reasons described herein, the Court will DENY Plaintiff's Motion for a Preliminary Injunction, and further

declines to consolidate the hearing of this Motion with a trial on the merits pursuant to Rule 65(a)(2).

In his Motion for a Preliminary Injunction, Plaintiff seeks an injunction prohibiting Defendants from enforcing and maintaining Sections 134-5, 134-9(c), 134-16, 134-23 through 27, and 134-51 of the Hawaii Revised Statutes during the pendency of the lawsuit. (Mot. for P.I. at 3.) Plaintiff asserts that such an injunction would permit the citizens of Hawaii who "are not otherwise specifically adjudicated to be so dangerous as to curtail or infringe upon their presumptively intact constitutional rights, such as [Plaintiff], to carry and bear firearms and otherwise freely exercise their Second Amendment Rights," while those who are "unfit" to possess a firearm would still be prohibited from doing so pursuant to 18 U.S.C. § 922.[19/] Id.

In the alternative, Plaintiff seeks an injunction compelling Defendants to issue Plaintiff a license authorizing Plaintiff to bear a concealed or openly displayed firearm, including a pistol or handgun, in public for all "protected" purposes. Id. at 3-4. Plaintiff contends that issuance of this

[19/] This federal statute outlines unlawful acts under the "firearms" chapter of Title 18 ("Crimes and Criminal Procedure") of the United States Code. The Court notes that 18 U.S.C. 922 is by no means identical to the Hawaii Revised Statutes at issue, nor does it have the effect of regulating the type of activity covered by these state statutes.

license is his only means, as a law-abiding citizen of the State of Hawaii, to keep or bear firearms pursuant to his constitutional rights. Id. He further alleges that the statute which governs licensing, Haw. Rev. Stat. 134-9, is "on its face, unduly restrictive, and in practice, never utilized absent some relationship with local law enforcement." (Mem. in Supp. of Mot. for P.I. at 4.)

As described in detail above, in order to prevail on a motion for a preliminary injunction, a plaintiff must establish: (i) that he is likely to succeed on the merits; (ii) that he is likely to suffer irreparable harm in the absence of preliminary relief; (iii) that the balance of equities tips in his favor; and (iv) that an injunction is in the public interest. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008). As the State Defendants correctly note, "injunctive relief is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." (State Opp. to P.I. at 4) (quoting Winter, 555 U.S. at 22). The Ninth Circuit has also recognized an alternate formulation of the Winter test, pursuant to which "serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." Farris v.

Seabrook, 667 F.3d 1051, 1057 (9th Cir. 2012).

The Court will address Plaintiff's motion under each of these tests, as well as the City Defendants' and State Defendants' arguments in their opposition memoranda, in turn.

1. Likelihood of Success on the Merits

Plaintiff contends that he is likely to succeed on the merits in his lawsuit against the Defendants. (Mem. in Supp. of Mot. for P.I. at 7-13.) The Court disagrees. The crux of Plaintiff's case concerns his contention that his Second Amendment right to bear arms was infringed when Defendants denied him a license to carry under HRS § 134-9. Id. For the reasons discussed herein, the Court concludes that Plaintiff is unlikely to succeed on the merits with respect to his Second Amendment claims.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. In District of Columbia v. Heller, the Supreme Court recognized that the Second Amendment protects the individual right to keep and bear arms for self-defense. 554 U.S. 570 (2008). At issue in Heller were two restrictions: (1) a ban on handgun possession in the home, which the Court characterized as among the most restrictive in the "history of our Nation"; and (2) the requirement that firearms be

kept inoperable at all times. Id. at 628. The Supreme Court held that the District of Columbia's prohibition on operable handguns in the home was unconstitutional because the right to self-defense is central to the Second Amendment and the regulation extended to the home, "where the need for defense of self, family, and property is most acute." Id. at 628.

In so holding, the Supreme Court recognized that the right to bear arms is not unlimited, noting that "the majority of 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." Id. at 626. The Court also stated, "we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment," however "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms" by certain classes of persons, such as the mentally ill and convicted felons, and in certain places constituting security concerns. Id. at 626–27 & n. 26. The Supreme Court suggested that the core purpose of the right conferred by the Second Amendment was to permit "law-abiding, responsible citizens to use arms in defense of hearth and home." Id. at 635.[20/] Two years

[20/] The Supreme Court also engaged in a detailed discussion of the meaning of the word "bear." See Heller, 554 U.S. at 584. The Supreme Court noted that "at the time of the founding, as now, 'bear' meant to 'carry.'" Id. However, used in conjunction (continued...)

later, in McDonald v. City of Chicago, the Supreme Court held that the Second Amendment right to keep and bear arms is fully applicable to the States by virtue of the Fourteenth Amendment. 130 S.Ct. 3020 (2010). In McDonald v. City of Chicago, the Supreme Court stated that its "central holding" in Heller was "that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." 130 S.Ct. 3020, 3044 (2010) (emphasis added).[21/]

In the wake of Heller, many courts have observed that although the Supreme Court did not set the outer bounds of the Second Amendment, it did explicitly state that "[l]ike most rights, the right secured by the Second Amendment is not

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[20/] (...continued)
with "arms," the Supreme Court concluded that "bear" had a different meaning, referring to "carrying for a particular purpose - confrontation." Id. In his Motion for a Preliminary Injunction, Plaintiff emphasizes that the Supreme Court dedicated eight pages to analyzing the meaning of the phrase "bear arms," concluding that it "is the right to carry weapons in case of confrontation." (See Mot. for P.I. at 6-7.) Accordingly, Plaintiff contends that the Supreme Court understood the Second Amendment right "to keep and bear Arms" to include a general right to carry guns in public. (Mot. for P.I. at 7-9.) The Court acknowledges Plaintiff's argument, however in light of the uncertainty surrounding Heller, the Court joins other courts in awaiting direction from the Supreme Court with respect to the outer bounds of the Second Amendment. See Masciandaro, 638 F.3d at 475.

[21/] The Court notes that the Supreme Court again left some room for argument as to the operative scope of the Second Amendment in utilizing such words as "central holding" and "most notably." See McDonald, 130 S.Ct. at 3044.

unlimited." See Kachalsky v. Cacace, No. 10-CV-5413 (CS), 2011 WL 3962550 (S.D.N.Y. Sept. 2, 2011)(citing Heller, 554 U.S. at 626)). Courts that have had occasion to consider the outer limits of the Second Amendment rights espoused in Heller have recognized that an "emphasis on the Second Amendment's protection of the right to keep and bear arms for the purpose of 'self-defense in the home' permeates the [Supreme] Court's decision and forms the basis for its holding – which, despite the Court's broad analysis of the Second Amendment's text and historical underpinnings, is actually quite narrow." Kachalsky, 2011 WL 3962550 at *19.[22/]

In Heller, the Supreme Court did not decide the level of constitutional scrutiny to be applied in reviewing restrictions upon a person's Second Amendment right to bear arms.

[22/] Nevertheless, lower courts have widely recognized that the Supreme Court's opinion in Heller did not clearly trace the bounds of an individual's right to bear and carry arms for purposes of self-defense. In fact, as Plaintiff noted in his Reply to Defendants' Response to Plaintiff's Motion for a Preliminary Injunction, a district court in the Fourth Circuit recently extended the Second Amendment right to bear arms beyond the home. See Woollard v. Sheridan, Civ. No. L-10-2068, 2012 WL 69574 (D. Md. Mar. 2, 2012). This recent opinion demonstrates the uncertainty created by Heller, and stands in contrast to the holdings of many other courts to have addressed the scope of the Second Amendment. Further, Woollard must be viewed in light of the Fourth Circuit's admonition in Masciandaro noting that courts should await direction from the Supreme Court to determine the scope of protected Second Amendment activity in light of Heller. See Masciandaro, 638 F.3d at 475. ("On the question of Heller's applicability outside the home environment, we think it prudent to await direction from the Court itself.")

Heller, 554 U.S. at 624.[23/] The Ninth Circuit had occasion to consider this issue in Nordyke v. King, holding that "only regulations which substantially burden the right to keep and to bear arms trigger heightened scrutiny." 644 F.3d 776, 786 (9th Cir. 2011). However, the court decided to rehear Nordyke en banc and declared that its earlier opinion may not be cited as precedent by or to any court in this Circuit. See Nordyke v. King, 664 F.3d 774, (9th Cir. 2011). On March 20, 2012, an en banc panel of the Ninth Circuit Court of Appeals heard arguments and ordered the dispute to mediation. Nordyke v. King, No. 07-15763 (9th Cir. Apr. 4, 2012). Accordingly, the state of Second Amendment case law in this Circuit, and the applicable level of scrutiny, is in flux.

The Court heeds the Third Circuit's admonition in Masciandaro: "On the question of Heller's applicability outside the home environment, we think it prudent to await direction from the Court itself." 638 F.3d at 475. However, in the meantime, the Court turns to other Circuit Courts of Appeal for guidance.

[23/] However, the Court did rule out two types of scrutiny. First, it held that rational basis review was improper, explaining that "[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." 554 U.S. at 629 n.27. Further, the Court rejected Justice Breyer's suggested "interest-balancing approach," concluding that "[w]e know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest balancing approach.' Id. at 634.

Generally, those appellate courts that have addressed the issue have concluded that intermediate scrutiny should be applied to firearms restrictions that implicate protected Second Amendment activity.[24/] Most federal district courts to have addressed the issue have also applied some form of intermediate scrutiny to challenged firearms regulations that are found to implicate

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[24/] See, e.g., United States v. Marzzarella, 614 F.3d 85 (3d Cir. 2010). The Third Circuit Court of Appeals articulated a two-step analysis in which, prior to determining the level of scrutiny to be applied, a court must first determine whether the statute at issue implicates a Second Amendment right as articulated in Heller: "As we read Heller, it suggests a two-pronged approach to Second Amendment challenges. First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid." Id. at 89. The Court formulated the second prong of the applicable test as whether the asserted governmental interest was "significant," "substantial," or "important," and whether the fit between the challenged regulation and the asserted objective is "reasonable, not perfect." Id. at 97-98. See also United States v. Reese, 627 F.3d 792 (10th Cir. 2010) (applying intermediate scrutiny); United States v. Masciandaro, 638 F.3d 458 (4th Cir. 2011)(same); United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010) (same).

Although the Court of Appeals for the Seventh Circuit recently recognized a limited extension of the Second Amendment right to bear arms, the statute at issue in that case was found to operate as a "complete ban on gun ownership within the City limits" and an imposition of "an impossible pre-condition on gun ownership for self-defense in the home" because firing range training was a prerequisite to all lawful carry, including in the home. Ezell v. City of Chicago, 651 F.3d 684, 710-11 (7th Cir. 2011). As the Court explains in this Order, the sections of the Hawaii Revised Statute at issue in this litigation do not contain any language restricting possession of a firearm in the home. See Haw. Rev. Stat. §§ 134-5, 134-9, 134-16, 134-23, 134-24, 134-25, 134-26, 134-27, 134-51.

protected Second Amendment activity.[25/]

Recently, the United States District Court for the District of Hawaii had occasion to consider the very statute at the center of the instant litigation – Section 134-9. In Young v. Hawaii, the court noted that it could not "identify any language [in Heller] that establishes the possession of an unconcealed firearm in public as a fundamental right. Heller held as unconstitutional a law that effectively banned the possession of a useable handgun in one's home." Civ. No. 08-00540 DAE-KSC, 2009 WL 1955749, at *9 (D. Haw. July 2, 2009).[26/]

Plaintiff's principal challenge is to Haw. Rev. Stat. § 134-9, which empowers a county chief of police to grant a concealed-carry license for a pistol or revolver and ammunition

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[25/] See, e.g., Osterweil v. Bartlett, No. 1:09-cv-825, 2011 WL 1983340, at *10 (N.D.N.Y. May 20, 2011) (applying intermediate scrutiny to statute prohibiting nonresidents not employed in New York State from obtaining a firearms license); United States v. Smith, 742 F. Supp. 2d 855, 864-65 (S.D. W. Va. 2010)(applying intermediate scrutiny to statute criminalizing possession of firearm by person convicted of misdemeanor crime of domestic violence); Kuck v. Danaher, Civ. No. 3:07:cv1390(VLB), 2011 WL 4537976 (D. Conn. Sept. 29, 2011) (applying intermediate scrutiny to hold that state officials did not violate plaintiff's Second Amendment right to bear arms by revoking pistol permit based upon determination under statute that he was not "suitable" in light of his arrest for breach of peace); Peruta v. County of San Diego, 758 F. Supp. 2d. 1106 (S.D. Cal. 2010); Kachalsky v. Cacace, No. 10-CV-5413 (CS), 2011 WL 3962550 (S.D.N.Y. Sept. 2, 2011); Piszczatoski v. Filko, Civ. No. 10-006110, 2012 WL 104917 (D.N.J. Jan. 12, 2012).

[26/] The Court observes that this opinion was issued prior to McDonald, 130 S.Ct. 3020. See supra, n.5.

"in an exceptional case," and an open-carry license for a pistol or revolver and ammunition to those "engaged in the protection of life and property" where "the urgency or the need has been sufficiently indicated." Id. Plaintiff, having been denied a license, asserts that Section 134-9 "is unconstitutional as it broadly prohibits the open and concealed bearing of firearms unless, and not until, the applicant satisfies to the Chief of Police that the applicant's circumstances constitute an 'exceptional case' and/or that an 'urgency or need has been sufficiently indicated.'" Compl. ¶ 37. This section is limited to pistols and revolvers. See, e.g., State v. Modica, 58 Haw. 249, 567 P.2d 420 (Haw. 1977).

Significantly, Section 134-9 contains explicit exceptions that provide avenues for the carrying of a concealed weapon in exceptional cases due to a demonstrated fear of injury to person or property, as well as for the carrying of an unconcealed weapon in cases of sufficient urgency or need. See Haw Rev. Stat. § 134-9. Plaintiff applied for a licence, and the Police of Chief determined that Plaintiff did not meet these exceptions. It has long been recognized that the Second Amendment right "was not a right to keep and carry any weapon whatsoever and for whatever purpose." Heller, 554 U.S. at 626.

The case law analyzing Section 134-9 recognizes this exception intended to protect an individual's right to self-

defense within the home, emphasizing that the statute "prohibiting a person from carrying a concealed or unconcealed pistol or revolver on his person without being licensed does not proscribe a person from carrying or possessing an unregistered revolver at his place of residence since the possession or carrying of a firearm is proscribed only outside of the possessor's place of residence, business, or sojourn." See State v. Rabago, 67 Haw. 332, 686 P.3d 824 (1984) (emphasis added).

Further, the United States District Court for the District of Hawaii has previously recognized that the Hawaii Revised Statutes at issue do not implicate the protected activity in Heller: "Chapter 134 pertains only to the carrying of weapons on one's person and does not constitute a complete ban to the carrying of weapons or pertain to possessing weapons in one's home; and it provides for an exception for those who can establish a fear of injury." Young v. Hawaii, Civ. No. 08-00540 DAE-KSC, 2009 WL 874517, at *5 (D. Haw. Apr. 1, 2009).[27/]

Plaintiff also challenges the constitutionality of various "Place to Keep" statutes that require firearms to "be confined to the possessor's place of business, residence, or sojourn," but permit the transport of firearms between those places and repair shops, target ranges, licensed dealerships,

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[27/] The Court observes that this opinion was issued prior to McDonald, 130 S.Ct. 3020. See supra, n.5.

organized firearms shows, firearm training places, and police stations. See Haw Rev. Stat. § 134-23 (loaded firearms), § 134-24 (unloaded firearms), § 134-25 (pistols and revolvers), § 134-26 (prohibition on carrying/possessing loaded firearms on a public highway, § 134-27 (ammunition).[28/] These statutory provisions, Plaintiff contends, are unconstitutional because they impermissibly burden his Second Amendment right to carry firearms in all "non-sensitive" places. (See, e.g., Compl. ¶ 78; Mot. for P.I. at 1.)[29/] Plaintiff argues, without concrete support, that Sections 134-24 and 134-25 actually prohibit Plaintiff from bearing a firearm "within his home," apparently relying upon the

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[28/] Effective May 2, 2006, Haw. Rev. Stat. § 134-6 was repealed in its entirety in Act 66 of 2006. See generally State v. Ancheta, 121 Hawaii 471, 2009 WL 3776408 (Hawaii App. Nov. 9, 2009); see also 2006 Haw. Sess. Laws Act 66, § 6 at 110, § 10 at 110. Haw. Rev. Stat. § 134-6(c) was replaced with Haw. Rev. Stat. § 134-25 (regarding offenses related to places to keep a pistol or revolver); the Legislature also enacted Haw. Rev. Stat. §§ 134-23, 134-24 and 134-27, pertaining to places to keep firearms other than pistols or revolvers, as well as ammunition. See Haw. Sess. Laws Act 66, § 1 at 105-107.

[29/] Plaintiff also challenges Section 134-5 – which permits the use of rifles and shotguns for hunting or target shooting – apparently challenging that the statute does not specifically authorize the use of handguns for target shooting. See Preliminary Injunction Memorandum, at 12; Compl. ¶ 72 ("Because citizens, including Mr. Baker, are guaranteed the right to keep and bear a firearm, those citizens also enjoy a corollary right to train and become proficient in the use of that tool.") Plaintiff fails to recognize that Section 134-25 explicitly permits the transport of pistols and revolvers to and from target ranges and the possessor's place of business, residence, and sojourn, so long as they are unloaded and in an enclosed container. Accordingly, there is no ban on engaging in training and target practice with a handgun.

dictate that a firearm must be "confined" to a possessor's residence or sojourn. Compl. ¶ 26.

As the Brady Center notes in its Amicus Brief, contrary to Plaintiff's interpretation, the Court does not read the "Place to Keep" statutes as prohibiting an individual's carrying of a firearm within the home. Hawaii courts have required that charges brought under these statutes "allege that the firearm at issue was away from [the defendant's] place of business, residence or sojourn." State v. Ancheta, 220 P.3d 1052, 200l WL 3776408, at *7 (Haw. Ct. App. 2009)[30/]; see also Rabago, 686 P.2d at 826. Although the Court understands the basis of Plaintiff's argument with regard to restrictions in "non-sensitive" places, particularly in light of the uncertainty created by Heller, the Court nonetheless declines to extend the reach of the Second Amendment right to bear arms to all "non-sensitive" places without further guidance from the higher courts. As discussed earlier, in McDonald v. City of Chicago, the Supreme Court underscored that Heller's "central holding" was "that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home"; however, as the Court previously noted, the Supreme Court again

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[30/] In Ancheta, the court dismissed a count that alleged only that defendant "did carry or possess" a firearm and "did fail to confine" the firearm because it "did not allege that the firearm at issue was away from [defendant's] place of business, residence or sojourn").

could have been more precise in defining the contours of the Second Amendment. 130 S.Ct. 3020, 3044 (2010).

The Court concludes Plaintiff is unlikely to succeed in demonstrating that any of the Hawaii Revised Statutes at issue in this litigation implicate protected Second Amendment activity. Additionally, the Court concludes that even if the Hawaii Revised Statutes at issue in this litigation were found to implicate protected Second Amendment activity, and therefore were subject to intermediate scrutiny, Plaintiff is not likely to succeed in establishing that the challenged statute fails to be "substantially related to an important government objective." (City Opp. to P.I. at 14.) Courts have long recognized – and continue to recognize today – that the government has a "compelling" "interest in preventing crime." See, e.g., United States v. Salerno, 481 U.S. 739, 754 (1987).

The government has a significant interest in empowering local law enforcement to exercise control over both concealed and open-carry firearm permits. See Kachalsky, 2011 WL 3962550, at *27-29. The laws comprising Chapter 134 of the Hawaii Revised Statutes have been on the books since 1907. Historically, in addressing the provisions of Chapter 134, the State legislature has recognized the need to "amend the existing firearms laws so that they will be more effective in deterring and preventing the proliferation of crimes involving the illegal possession and use

of firearms in the State of Hawaii." (See Haw. House Journal, Standing Comm. Rep. 1102.)

Considering the State of Hawaii's clear and important government objective in the protection of public health and safety (as discussed in greater detail under the "Balancing of the Equities" and "Public Interest" prongs below), the Court concludes that Plaintiff is not likely to establish that the State of Hawaii's restrictions on carrying firearms in public places is unconstitutional pursuant to the Second Amendment.[31/] Accordingly, this factor weighs against the grant of a preliminary injunction.

2. Irreparable Harm

Plaintiff contends that he will suffer "both an irreparable liberty interest and a property interest" if this Court does not grant a preliminary injunction. (Mot. for P.I. at 18.) He argues that deprivation of his liberty, standing alone, merits issuance of the injunction, but also claims he has suffered and continues to suffer irreparable loss of a property

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[31/] In his Motion for a Preliminary Injunction, Plaintiff also asserts that he is likely to succeed on the merits with respect to his Due Process claim under the Fourteenth Amendment. (See Mem. in Supp. of Mot. for P.I. at 13.) Plaintiff's due process argument is based upon his assertion that he has a fundamental Second Amendment right to a gun license under Section 134-9. Id. at 17. For the reasons described above, the Court concludes that Plaintiff is not likely to establish that he has a fundamental Second Amendment right to carry a gun in public. Accordingly, the Court concludes that Plaintiff is unlikely to succeed on the merits with respect to his due process claim.

interest, namely, his inability to earn income as a licensed process server due to his inability to adequately defend himself. Id. at 18.

The Court finds that Plaintiff has given short shrift to this prong, and in fact, comes up short. As an initial matter, a plaintiff seeking a preliminary injunction must show that "irreparable injury is likely in the absence of an injunction"; the mere possibility of irreparable harm is insufficient. Winter, 555 U.S. at 22.

Moreover, contrary to Plaintiff's assertion that he was "forced" to stop earning an income as a process server due to his inability to defend himself, the City Defendants assert that Plaintiff in fact stopped earning this income voluntarily and any harm suffered was self-inflicted. (City Opp. P.I. at 18) (citing Decl. of Thomas Nitta, pp. 2-4 (noting that of approximately 75 process servers in the City and County of Honolulu, Plaintiff is the only process server to have applied for a concealed carry license)). Although Plaintiff stated in his application for a license that he was threatened while performing his job as a process server, Major Thomas Nitta declared under penalty of perjury that the documented "incident" involved a confrontation between Plaintiff and a 63-year-old man, and it was that man – not Plaintiff – who called 911. (See Decl. of Thomas Nitta at 3.) Major Nitta also declared that he is aware of no law that

would prevent Plaintiff from carrying pepper spray to defend himself. (See Decl. of Thomas Nitta at 4.)

The City Defendants also distinguish the instant case from Ezell v. City of Chicago, wherein the Court of Appeals for the Seventh Circuit reversed a district court's denial of a preliminary injunction. 651 F.3d 684 (7th Cir. 2011). Ezell involved an ordinance that had the effect of restricting the right to possess firearms in defense of the home – a right explicitly recognized in Heller. Id. Unlike the right at issue in Ezell, the constitutional right that Plaintiff contends is compromised in the instant case – to carry a concealed weapon in public – has not been recognized by the Supreme Court or the overwhelming majority of circuit and district courts that have interpreted its holding. Plaintiff claims that he may be attacked in the future and require a firearm to protect himself. (See City Opp. to P.I. at 19.) The City Defendants respond that Plaintiff's claimed harm is speculative and cannot form the basis of a claim for irreparable harm. Id.

The Court agrees. Plaintiff has failed to establish that he will suffer irreparable harm in the absence of a preliminary injunction. He has not shown that any of the alleged harm is likely to be anything more than mere speculation, which is inadequate to establish irreparable harm. See Winter, 555 U.S. at 8; see also Goldie's Bookstore, Inc. v. Superior Court of the

State of Cal., 739 F.2d 466, 472 (9th Cir.1984) ("speculative injury does not constitute irreparable injury" (citing Wright, Miller and Kane 11 Fed. Practice and Procedure § 2948 at 436 (1973))).

Moreover, Plaintiff has failed to show that he will continue to suffer loss of income by not working as a process server for some other reason aside from his apparently voluntary decision to resign (particularly in light of the Declaration noting that only Plaintiff, of some 75 process servers in the City and County of Honolulu, applied for a concealed carry license, and that nothing prevents Plaintiff from carrying pepper spray).

Accordingly, Plaintiff has failed to establish irreparable harm and this factor weighs against granting the preliminary injunction.

3. Balancing of the Equities

Plaintiff's argument that the balance of equities mandates relief is unavailing. (Mem. in Supp. of Mot. for P.I. at 19-21.) Plaintiff attempts to draw an analogy to Klein v. City of San Clemente, a case addressing a challenge to a prohibition on free speech. 584 F.3d 1196 (9th Cir. 2009). The Klein court, in ruling that the balance of equities tipped "sharply in favor of enjoining the ordinance," was not faced with the potentially severe repercussions of unleashing countless

firearms onto the open streets of the city. Plaintiff has also failed to establish that the statutes at issue infringe upon a fundamental right such as the one at issue in Klein.

Plaintiff is misguided in concluding that "the State of Hawaii suffers no harm by enjoining the aforementioned statutes and issuing a permit." (Mem. in Supp. of Mot. for P.I. at 20.) Without any support, Plaintiff asserts that he and other "similarly situated" persons are "low risk" because "they are law abiding and mentally sound citizens." Id. at 21. Plaintiff contends that granting the injunction "imposes no burden" on the Defendants because it "would promote the Hawaiian government's goal of protecting and promoting the fundamental rights of its citizens." Id. Plaintiff apparently ignores the potential severe safety risk that is created in exchange for "protecting and promoting" a right that Plaintiff likely cannot establish is fundamental under the Constitution as an initial matter. For these reasons, it is abundantly clear that the balance of the equities militates against a grant of a preliminary injunction.

4. The Public Interest

Plaintiff asserts that granting the preliminary injunction would serve the public interest because "[e]very law abiding citizen in the State of Hawaii currently suffers deprivation of their Second Amendment rights because of these unconstitutional firearms regulations." (Mem. in Supp. of Mot.

for P.I. at 22.) The "only" argument Plaintiff anticipates on this prong is the possibility that the preliminary injunction "might increase crime." Id. at 23 (emphasis in the original). This possibility, Plaintiff asserts, does not create a real threat because "unsuitable" applicants are already prohibited from carrying firearms under 18 U.S.C. § 922. Id. Additionally, Plaintiff alleges, citizens are more likely to encounter danger and harm while venturing in public than in the home. Id. at 24. It follows, Plaintiff asserts, that "[o]bviously if the Second Amendment protects the use of firearms for confrontational purposes and confrontation is more likely to occur beyond the threshold of a citizen's front door, the Second Amendment permits the carrying and bearing of firearms in public. Id. at 24-25.

Plaintiff fails to provide any concrete evidence that the federal criminal prohibitions on firearm possession are an adequate substitute for the prohibitions contained in the Hawaii Revised Statutes. Moreover, as the Court has explained, the central statute at issue – Section 134-9 – provides for exceptions in cases where an individual demonstrates an urgency or need for protection in public places. See Haw. Rev. Stat. §134-9. Accordingly, individuals who demonstrate such urgency or need for public protection may be permitted to bear arms in case of confrontation.

The protection of public health and safety, as well as

crime prevention, obviously are "important government objectives." (State Opp. to P.I. at 11) (citing Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996), Foucha v. Louisiana, 504 U.S. 71, 81 (1992).) The State Defendants also direct the Court's attention to a recent case before the District Court for the Southern District of California, wherein the court – considering California's concealed weapons regulations – stated that the government had an "important interest" in reducing the number of concealed weapons in public to reduce risk to other members of the public, and reducing the number of concealed handguns in public due to their disproportionate use in life-threatening crimes of violence. Peruta v. County of San Diego, 758 F. Supp. 2d 1106, 1117 (S.D. Cal. 2010). Additionally, the District Court for the District of Hawaii recently held that the State of Hawaii has a legitimate governmental interest in public welfare and safety in the context of regulating firearms. Young, 2009 WL 1955749, at *9.

The City Defendants bolster these arguments in their separate opposition memorandum, aptly noting that "Plaintiff's requested injunction would permit the carrying of any firearm by any person without regard to their training or intent to use the weapon for crimes of violence, without regard to whether the person was intoxicated, and without limitation as to the nature of the public place. Thus, the State would be compelled to allow

weapons to be carried into courthouses; government offices; churches; schools; and public businesses, including bars and banks." (City Opp. to P.I. at 20.)

The City Defendants also call into question Plaintiff's argument that Hawaii has experienced an eleven percent decrease in crime over the past five years while gun ownership has increased for four consecutive years. In fact, the City Defendants argue, the relevant offenses have actually risen (albeit slightly) over the past three years. Id. at 22. The Court observes that a rise in gun ownership is not synonymous with a rise in the number of licenses to carry firearms in public - the right at issue in this litigation. Plaintiff offers no statistics indicating a benefit to public safety or decrease in crime in relation to an increase in the number of licenses granted for the open or concealed carrying of a firearm.

The City Defendants underscore a central concern for the Court: the possibility that "some unspeakably tragic act of mayhem [could occur] because in the peace of our judicial chambers we miscalculated as to Second Amendment Rights." Masciandaro, 638 F.3d at 475 (concluding that "danger would rise exponentially" if the right to carry weapons was extended from the home to the public square).

The State Defendants contend that Plaintiff's alternative request for an order compelling that Defendants issue

him a license under Haw. Rev. Stat. 134-9 should be denied because Plaintiff has failed to demonstrate that his "perceived need to carry a weapon in public outweighs the public's interest in safety." (State Opp. to P.I. at 12.) The Court agrees.

The potential harm to Plaintiff is speculative and far from irreparable, whereas the potential harm to society posed by a preliminary injunction presents a clear and serious risk to public safety.

For these reasons, the Court concludes that granting either of Plaintiff's requests for a preliminary injunction would not be in the public interest.

The Court concludes that Plaintiff has failed to establish: (i) the likelihood of success on the merits; (ii) irreparable harm; (iii) that granting the injunction would be in the public interest; or (iv) that the balance of the equities favors a grant of the preliminary injunction. Consequently, Plaintiff has failed to establish any of the enumerated Winter elements for a preliminary injunction. Plaintiff also fails to satisfy the Cottrell factors, because he has demonstrated neither serious questions going to the merits nor a balance of hardships that tips sharply toward his favor. See Cottrell, 632 F.3d at 1135. For these reasons, Plaintiff's Motion for a Preliminary Injunction is DENIED.

V. CONCLUSION

For the foregoing reasons, the Court: (1) GRANTS the State Defendants' Motion for Judgment on the Pleadings; (2) GRANTS in part and DENIES in part the City Defendants' Motion to Dismiss the Complaint; and (3) DENIES Plaintiff's Motion for a Preliminary Injunction.

With respect to the Motion to Dismiss, the following claims are dismissed with prejudice: (i) all claims against HPD; (ii) Counts VII, VIII, IX, and X, insofar as they allege violations of Plaintiff's Fifth Amendment rights; (iii) Count XIII (for injunctive relief); and (4) all official capacity claims against Defendant Kealoha, insofar as they seek money damages.

IT IS SO ORDERED.

DATED: Honolulu, Hawai'i, April 30, 2012.

Alan C. Kay
Sr. United States District Judge

Baker v. Kealoha, et al., Civ. No. 11-00528 ACK-KSC: Order Granting Defendants State of Hawaii and Governor Abercrombie's Motion for Judgment on the Pleadings, Granting in Part and Denying in Part Defendants City and County of Honolulu, Honolulu Police Department and Louis Kealoha's Motion to Dismiss, and Denying Plaintiff's Motion for a Preliminary Injunction.

9th Circuit Case Number: 12-57049

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Appellees' Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 17, 2013.

The following participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

Anna Barvir, Esq.
Sean Anthony Bardy, Esq.
Glenn McRoberts, Esq.
Carl D. Michel, Esq.
Matt Bower, Esq.
Sean Anthony Brady, Esq.
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Stephen Porter Halbrook, Esq.
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I further certified that I mailed a copy of Appellees' Brief via United States Postal Service to the following:

Kamala D. Harris, California Attorney General
Office of the Attorney General
1300 "I" Street
Sacramento, CA 95814

Executed this 17th day of January, 2013, in Santa Ana, California.

____/s/ Marzette L. Lair___
Marzette L. Lair

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOROTHY McKAY, DIANA KILGORE, PHILLIP WILLMS, FRED KOGEN, DAVID WEISS, and THE CRPA FOUNDATION, Plaintiffs-Appellant, v. SHERIFF SANDRA HUTCHENS, individually and in her official capacity as Sheriff of Orange County; ORANGE COUNTY SHERIFF-CORONER DEPARTMENT; COUNTY OF ORANGE; and DOES 1-10, Defendants-Appellees.	Case No. 12-57049 DC No. 8:12-cv-01458 JVS-JPR

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA HONORABLE JAMES V. SELNA, JUDGE PRESIDING

APPELLEES' SUPPLEMENTAL EXCERPT OF RECORD VOLUME III

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Pursuant to Ninth Circuit Rule 30−1.8, Appellees Sheriff Sandra Hutchens and Orange County Sheriff-Coroner Department, by and through their counsel of record, hereby confirm to the contents and form of Appellees' Supplemental Excerpts of Record, Volume III on appeal.

DATED: January 17, 2013 Respectfully submitted,

NICHOLAS S. CHRISOS, COUNTY COUNSEL
MARIANNE VAN RIPER, SUPERVISING DEPUTY
and ELIZABETH A. PEJEAU, DEPUTY

By _____
ELIZABETH A. PEJEAU, Deputy

Attorneys for Respondents, Sheriff Sandra Hutchens, and Orange County Sheriff-Coroner Department

INDEX TO APPELLEES' SUPPLEMENTAL

EXCERPTS OF RECORD

VOLUME III

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

- - -

THE HONORABLE JAMES V. SELNA, JUDGE PRESIDING

DOROTHY MCKAY, et al.,
Plaintiffs,

SACV-12-01458-JVS

SHERIFF SANDRA HUTCHENS, etc., et al.,
Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Santa Ana, California

October 29, 2012

SHARON A. SEFFENS, RPR
United States District Courthouse
411 West 4th Street, Suite 1-1053
Santa Ana, CA
(714) 543-0870

SHARON SEFFENS, U.S. DISTRICT COURT REPORTER

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SANTA ANA, CALIFORNIA; MONDAY, OCTOBER 29, 2012: 1:30 P.M.

THE CLERK: Item No. 24, SACV-12-1458-JVS, Dorothy McKay, et al., versus Sheriff Sandra Hutchens, etc., et al.

Counsel, please step forward and state your appearances.

MS. VAN RIPER: Good afternoon, Your Honor. Marianne Van Riper on behalf of the O.C. Sheriff's Department and Sandra Hutchens.

MS. WALSH: Good afternoon, Your Honor. Nicole Walsh, Deputy County Counsel, on behalf of O.C. Sheriff Sandra Hutchens and the Orange County Sheriff's Department.

MR. MICHEL: Good afternoon, Your Honor. Chuck Michel on behalf of plaintiffs.

MR. BRADY: Good afternoon, Your Honor. Sean Brady on behalf of plaintiffs.

THE COURT: Good afternoon.

I trust you have all seen the tentative.

MS. VAN RIPER: Yes, Your Honor.

MR. MICHEL: Yes, Your Honor.

THE COURT: Mr. Michel.

MR. MICHEL: Just a couple of things. I don't think that I am frankly going to change the Court's mind, but I think that I do get from the Court's tentative sort of an acknowledgment that there are some issues here that need

to be resolved probably by a higher court. I think that's sort of the consensus -- I don't want to speak for my colleagues, but I think that's sort of the consensus among the litigants as well. So what I would simply ask is that -- I will call your attention to a couple of things in the tentative which maybe the Court might like to put a little finer point on perhaps.

First of all, I think I need to preserve -- make sure I am preserving my equal protection argument. I want to make clear that that's not waived.

THE COURT: Well, I am simply denying the injunction. I am not ruling as a matter of law that any of the claims aren't sufficiently pled.

MR. MICHEL: But if our equal protection argument is correct, if the Court accepted it, then the Court would have to -- for that matter, this other argument this afternoon -- I understand the Court would be granting the injunction, right?

THE COURT: I'm simply holding -- you know, the preliminary injunction standard is the likelihood of prevailing. Simply because I hold there is no likelihood to prevail, I haven't ruled as a matter of law that the claim is invalid.

MR. MICHEL: Right, but you didn't rule that there is no likelihood -- the tentative doesn't address whether or

not there is a likelihood of prevailing on any of the equal protection claims, which could also be grounds for an injunction. So I just need to make sure that there is not some kind of an implied waiver or something --

THE COURT: No, there isn't.

MR. MICHEL: Okay. The other thing is I guess sort of getting to that substantial question -- well, first let me just clarify one thing in the last paragraph of the Court's tentative. It says, "Neither California or the Orange County Sheriff's Department categorically ban the public carrying of a handgun." I think the Court probably understands this, but I want to make sure that that -- that phrase is a bit -- could be construed as a bit confusing.

The reason that this case is different from Richards and Peruta is -- and the Richards and Peruta decisions both sort of relied on the ability to carry an unloaded, unconcealed handgun in public pretty much at any time, not just in those specific instances listed in the opposition where you go from one place to another. You are taking it to a gun store to be repaired or sold or taking it to a campsite or something like that. There was an ability to carry an unloaded, unconcealed handgun in public anywhere essentially other than sensitive places, a courthouse or whatever. And because of that ability, the Richards court

and the Peruta court said the Second Amendment was not infringed because you could have this unloaded, unconcealed gun for self-defense. That was one of the reasons for their -- part of their rationale.

The reason this case is different is because as of January 1 of this year the law changed so that you can no longer carry an unloaded, unconcealed handgun in public. You only have those specific limited exceptions where you can take it to or from a specific place or whatever the Penal Code lays out. So that takes away one of the bases for the Richards and Peruta holdings, which is why this case became more important to litigate.

So to the extent that -- while the Court uses the phrase "categorically," it's mischaracterizing that distinction. I just think the Court may want to take a look at whether or not it wants to say it a little bit differently.

THE COURT: I'm not sure I do.

MR. MICHEL: The point is that it is not -- there is no -- the State does now categorically ban the public carrying of a handgun unless you are going to or from a specific place in a locked container, so you can't carry it unloaded, unconcealed in a holster for self-defense for what it's worth.

THE COURT: Well, it seems to me that this is an

issue that for a lot of reasons really needs to be decided on a full record. Whether that can be made on cross-motions for summary judgment or whether we actually have to have a trial -- I would be very reluctant to make a substantive ruling without a full record, and it seems to me -- I deny the motion for other reasons, but it seems to me that this type of a motion -- this issue requires a full hearing given the ramifications of the relief sought, and before I would grant that relief either on an interim basis or on a full basis, I really think we need to have a full evidentiary hearing.

MR. MICHEL: May I ask -- with all due respect, from our perspective, this is a purely legal question. What factual issues would there be to explore? I mean, the Second Amendment protects the fundamental individual right to bear arms in public, and there is a policy that says unless you have a special need -- I don't think there is any disagreement with those facts.

THE COURT: I can't parse out the case today as I sit here. But that's my sense, that before I decide this issue, I want a full record. You suggest there is nothing more to present. Perhaps so, but I suspect there is more to present.

Okay, the tentative will be the order of the Court. Thank you, and thank you for your patience this

afternoon.

(Whereupon, the proceedings were concluded.)

* * *

CERTIFICATE

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Date: November 28, 2012

/S/ Sharon A. Seffens 11/28/12

SHARON A. SEFFENS, U.S. COURT REPORTER

9th Circuit Case Number: 12-57049

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Appellees' Supplemental Excerpt of Record, Volume III with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 17, 2013.

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David Kopel, Esq.

I further certified that I mailed a copy of Appellees' Supplemental Excerpt of Record, Volume III via United States Postal Service to the following:

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Executed this 17th day of January, 2013, in Santa Ana, California.

Marzette L. Lair

CERTIFICATE OF SERVICE RE:

APPELLEES' SUPPLEMENTAL EXCERPT OF RECORD, VOLUME III

I, Marzette L. Lair, pursuant to Ninth Circuit Rule 30-1.7, I certify that I mailed 4 copies of Appellees' Supplemental Excerpt of Record, Volume III via United States Postal Service to the United States Court of Appeals For The Ninth Circuit as follows: Office of the Clerk, James R. Browning Courthouse, U.S. Court of Appeals, P.O. Box 193939, San Francisco, CA 94119-3939.

I further certify that Appellees' Supplemental Excerpt Of Record, Volume III is identical to the version submitted electronically on January 17, 2013.

Executed this 17th day of January, 2013, in Santa Ana, California.

Marzette L. Lair