No. 10-56971 [DC# CV 09-02371-IEG]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD PERUTA, et. al.,

Plaintiffs-Appellants,

v.

COUNTY OF SAN DIEGO, et. al.,

Defendants-Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

APPELLANTS' EXCERPTS OF RECORD
VOLUME I of VIII

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Pursuant to Federal Rules of Appellate Procedure for the Ninth Circuit 30-1, Appellants, EDWARD PERUTA et al., by and through their attorney of record, C. D. Michel of Michel & Associates, P. C. hereby confirm to the contents and form of Appellants' Excerpts of Record on appeal.

Date: May 23, 2011

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CHRONOLOGICAL ORDER

CHRONOLOGICAL ORDER

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TAB 1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

EDWARD PERUTA, MICHELLE LAXSON, JAMES DODD, DR. LESLIE BUNCHER, MARK CLEARY, and CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION,

Plaintiffs,

vs.

COUNTY OF SAN DIEGO, WILLIAM GORE, individually and in his capacity as sheriff,

Defendants.

CASE NO. 09CV2371-IEG (BGS)

ORDER:

(1) DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, and

(2) GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

[Doc. Nos. 34, 38]

This is an action brought pursuant to 42 U.S.C. § 1983 in which Plaintiffs seek injunctive and declaratory relief from Defendant's policies for obtaining a license to carry a concealed weapon pursuant to California Penal Code § 12050. At the heart of the parties' dispute is whether the right recognized by the Supreme Court's rulings in District of Columbia v. Heller, 128 S. Ct. 2783 (2008) and McDonald v. City of Chicago, 130 S. Ct. 3020 (2010)—the right to possess handguns in the home for self-defense—extends to the right asserted here: the right to carry a loaded handgun in public, either openly or in a concealed manner. The matter is presently before the Court is a motion for partial summary judgment brought by Plaintiffs and a motion for summary judgment brought by Defendant William Gore. For the reasons set forth below, the Court **DENIES** Plaintiff's motion for partial

summary judgment and **GRANTS** Defendant's motion for summary judgment.

BACKGROUND

The Plaintiffs

Each individual Plaintiff is a resident of San Diego County. Pls.' Statement of Undisputed Facts ("SUF") at 6. None of the Plaintiffs is disqualified under federal or California law from purchasing or possessing firearms. Id. Each individual Plaintiff applied to the San Diego Sheriff's Department for a license to carry a concealed weapon ("CCW") or a renewal, and each was denied for lack of "good cause" or told by the Sheriff's Department that he or she would be ill-advised to apply due to lack of "good cause."[1] Id. at 7. In addition to being denied due to lack of "good cause," Plaintiff Edward Peruta alleges he was denied a CCW license based on his residency. See Pls.' Consolidated SUF ¶ 15. Defendant maintains the residency requirement was not a factor in the denial. Id. Plaintiff California Rifle and Pistol Association Foundation ("CRPAF") is an organization dedicated to educating the public about firearms and protecting the rights thereto. See Pls.' SUF at 6.

Concealed Carry Licensing Scheme

California Penal Code sections 12050-12054 set forth the criteria that applicants for CCW licenses must meet: Applicants must be of good moral character, be a resident of or spend substantial time in the County in which they apply, demonstrate good cause and take a firearms course. In San Diego County, all license applications go to Defendant Sheriff William Gore are handled by his authorized representatives. See Def.'s SUF ¶ 1. The "good cause" provision of Penal Code section 12050 is at issue in this case.

Defendant defines "good cause" under Penal Code section 12050 as a set of circumstances that distinguishes the applicant from other members of the general public and causes him or her to be

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[1] In 2006, the Sheriff's Department initiated an interview process to assist applicants and staff in determining pre-eligibility and to avoid applicants having to pay application fees and firearms safety course fees when they would not qualify for the license. The interview is voluntary and any person can submit an application without the assistance offered by the interview. Based on what the applicant outlines during the interview, counter clerks are permitted to offer an educated guess as to whether an applicant is eligible for a license based on the scenarios described by applicants. See Def.'s SUF ¶ 7. Plaintiffs contend that the counter clerks sometimes discourage applicants from applying for a license, and in doing so, they serve Defendants' purpose of minimizing the number of applicants and the documentation of denials.

placed in harm's way. See Def.'s SUF ¶ 5. Generalized fear for one's personal safety is not, standing alone, considered "good cause." Id. To demonstrate "good cause," new applicants must provide supporting documentation. See Pls.' SUF ¶ 9.

License holders may renew licenses up to 30 days prior to the expiration date. Def.'s SUF ¶ 8. Renewals are issued on the spot absent any negative law enforcement contacts, crime cases, arrests, etc. See id. Applicants still need to provide some form of documentation to support a continued need but not to the extent of the initial application. Id. Plaintiffs maintain that Plaintiff Cleary was required to produce documentation for his renewal, but that the County granted several renewal applications of Honorary Deputy Sheriffs' Association ("HDSA") members without requiring supporting documentation. Pls.' Consolidated SUF ¶ 10.

Defendant defines residency under Penal Code section 12050 to include any person who maintains a permanent residence in the County or spends more than six months of the taxable year within the County if the individual claims dual residency. See id. ¶ 16. Part-time residents who spend less than six months in the County are considered on a case-by-case basis and CCW licenses have been issued to part-time residents. Id.

Procedural Background

Plaintiff Edward Peruta filed his original complaint on October 23, 2009, asserting that Penal Code section 12050 violated the right to bear arms under the Second Amendment, the right to equal protection under the Fourteenth Amendment, and the right to travel under the Fourteenth Amendment. (Doc. No. 1.) Defendant moved to dismiss Plaintiff's complaint on November 13, 2009. (Doc. No. 3.) The Court denied Defendant's motion to dismiss on January 14, 2010, and Defendant filed an answer soon thereafter. (Doc. Nos. 7, 8.) On April 22, 2010, Plaintiff filed a motion for leave to file a First Amended Complaint to add additional Plaintiffs and claims. (Doc. No. 16.) The Court granted Plaintiffs' motion on June 25, 2010, and Defendant filed an answer to Plaintiffs' First Amended Complaint on July 9, 2010. (Doc. Nos. 24, 28.)

Presently before the Court is a motion for summary judgment by Defendant and a motion for partial summary judgment by Plaintiffs. (Doc. Nos. 34, 38.) Defendant has moved for summary judgment on all claims, whereas Plaintiffs have moved for summary judgment only on the right to bear

arms and certain equal protection claims. For purposes of their motions, and with the Court's approval, the parties adopted (and later modified) a stipulated briefing schedule and completed briefing by November 10, 2010. The Court held oral argument on the parties' motions on November 15, 2010. (Doc. No. 60.)

LEGAL STANDARD

Summary judgment is proper where the pleadings and materials demonstrate "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A material issue of fact is a question a trier of fact must answer to determine the rights of the parties under the applicable substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

The moving party bears "the initial responsibility of informing the district court of the basis for its motion." Celotex, 477 U.S. at 323. To satisfy this burden, the movant must demonstrate that no genuine issue of material fact exists for trial. Id. at 322. Where the moving party does not have the ultimate burden of persuasion at trial, it may carry its initial burden of production in one of two ways: "The moving party may produce evidence negating an essential element of the nonmoving party's case, or, after suitable discovery, the moving party may show that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial." Nissan Fire & Marine Ins. Co., v. Fritz Cos., 210 F.3d 1099, 1106 (9th Cir. 2000). To withstand a motion for summary judgment, the non-movant must then show that there are genuine factual issues which can only be resolved by the trier of fact. Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 738 (9th Cir. 2000). The non-moving party may not rely on the pleadings alone, but must present specific facts creating a genuine issue of material fact through affidavits, depositions, or answers to interrogatories. Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324.

The court must review the record as a whole and draw all reasonable inferences in favor of the non-moving party. Hernandez v. Spacelabs Med. Inc., 343 F.3d 1107, 1112 (9th Cir. 2003). However, unsupported conjecture or conclusory statements are insufficient to defeat summary judgment. Id.; Surrell v. Cal. Water Serv. Co., 518 F.3d 1097, 1103 (9th Cir. 2008). Moreover, the court is not

required "'to scour the record in search of a genuine issue of triable fact,'" Keenan v. Allan, 91 F.3d 1275, 1279 (9th Cir.1996) (citations omitted), but rather "may limit its review to the documents submitted for purposes of summary judgment and those parts of the record specifically referenced therein." Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1030 (9th Cir. 2001).

DISCUSSION

I. Right to Bear Arms

A. The Scope of the Right: Heller and McDonald

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." In District of Columbia v. Heller, 128 S. Ct. 2783, 2799 (2008), the Supreme Court recognized that the Second Amendment protects the individual right to keep and bear arms for self-defense. Two years later in McDonald v. City of Chicago, 130 S. Ct. 3020, 3026, 3044 (2010), the Court evaluated restrictions "similar to the District of Columbia's" in Heller and held that the Due Process Clause of the Fourteenth Amendment "incorporates the Second Amendment right recognized in Heller."

The Heller Court focused on two restrictions, both of which are relevant to the right asserted in this case: (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. 128 S. Ct. at 2817-18. The Court's analysis of these restrictions is important because it provides guidance on the scope of the Second Amendment right in terms of both "place" and "manner."

Place. After evaluating the prefatory and operative clauses of the amendment, the Court turned to the District of Columbia's total ban on handgun possession in the home. 128 S. Ct. at 2817. In doing so, the Court singled out the home as a place "where the need for defense of self, family, and property is most acute." Id. Likewise, while declining to expound fully on the scope of the Second Amendment, the Court observed that "whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." Id. at 2821. Accordingly, the Court held that "the District's ban on handgun possession in the home violates the Second Amendment." Id.

Manner. The Heller Court also addressed the District's requirement that firearms in the home be rendered and kept inoperable at all times, and without exception.[2] Id. at 2818. The Court held that the District's restriction "makes it impossible for citizens to use [firearms] for the core lawful purpose of self-defense and is hence unconstitutional." Id. In dicta, the Heller Court explained that the Second Amendment right is "not unlimited" and not a "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 128 S. Ct. at 2816 (citations omitted). For example, the Court noted 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. Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. at 2816-17 (internal citations omitted). In a footnote immediately following, the Court explained: "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." Id. at 2817 n.26.

The Court's recitation of lawful regulatory measures does not provide a blueprint for the validity of future restrictions; it should be interpreted as "precautionary language" that "warns readers not to treat Heller as containing broader holdings than the Court set out to establish: that the Second Amendment creates individual rights, one of which is keeping operable handguns at home for self-defense." United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (Easterbrook, J.).

B. Plaintiffs' Challenge in the Context of California's Statutory Framework

Plaintiffs maintain that the right recognized in Heller includes a right to carry a loaded handgun in public, either openly or in a concealed manner. See generally Pls.' Mem. In accordance with such a right, Plaintiffs maintain that under California law, there is a single outlet for carrying a handgun for self-defense: concealed carry with a license pursuant Penal Code section 12050. See id. at 1-2. Because Penal Code section 12050 allows sheriffs to grant concealed carry licenses, Plaintiffs argue that Defendant's policy—under which an assertion of self-defense is insufficient to demonstrate "good

[2] Against the District's urging, the Court declined to construe the statute as containing an exception for self-defense. Id. at 2818.

cause"—is unconstitutional both on its face and as applied. See generally id.

Defendant disputes each aspect of Plaintiffs' position and argues against extending Heller beyond its express holding. See generally Def.'s Mem. According to Defendant, the right recognized in Heller does not extend beyond the home, and the right to self-defense does not entail the right to loaded carry in the absence of an immediate threat. Id. Accordingly, Defendant argues that concealed carry pursuant to Penal Code section 12050 is not the sole outlet for carrying a handgun for self-defense. Defendant highlights other California provisions that permit unloaded open carry and loaded open carry if the individual is in immediate grave danger.[3] Id. In light of the foregoing, and based on the Supreme Court's approval of cases upholding concealed weapons bans, Defendant maintains that the restrictions at issue here are "presumptively lawful." See id. at 9.

Before turning to the burden imposed by Defendant's policy, the Court evaluates Plaintiffs' contention that, under California's statutory framework, concealed carry with a license pursuant Penal Code section 12050 contains the sole outlet for carrying a handgun for self-defense. See Pls.' Mem. at 1-2. Plaintiff's contention is based on the assumption that Penal Code section 12031 unlawfully burdens the right to self-defense.[4]

California Penal Code section 12031 generally restricts the open carry of loaded firearms in public. The statute contains several exceptions, however, including specific exceptions for self-defense and defense of the home.[5] See Cal. Penal Code §§ 12031(j)(1)-(3). Section 12031(j)(1) permits loaded open carry by "a person who reasonably believes that the person or property of himself or herself or of another is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property." The term immediate refers to the "brief interval before

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[3] Defendant also contends that Plaintiffs' challenge amounts to a backdoor attack on the constitutionality of section 12050, rather than mere challenge to its policy. See Def.'s Mem. at 8. The Court addresses this contention below.

[4] In its order denying Defendant's motion to dismiss, based on the posture of the case and the briefing of the parties, the Court abided the assumption that section 12031 unlawfully burdens the right to self-defense. At this stage, however, the Court scrutinizes the assumption more carefully.

[5] There are also exceptions for individuals such as security guards, police officers and retired police officers, private investigators, members of the military, hunters, target shooters, persons engaged in "lawful business" who possess a loaded firearm on business premises and persons who possess a loaded firearm on their own private property. See Cal. Penal Code §§ 12031(b)-(d) and (h).

and after the local law enforcement agency, when reasonably possible, has been notified of the danger and before the arrival of its assistance." Id. Section 12031(j)(2) permits loaded open carry by a person who "reasonably believes that he or she is in grave danger because of circumstances forming the basis of a current restraining order issued by a court against another person or persons who has or have been found to pose a threat to his or her life or safety." And Section 12031(l) expressly ensures the right of self-defense in the home: "Nothing in this section shall prevent any person from having a loaded weapon, if it is otherwise lawful, at his or her place of residence, including any temporary residence or campsite." As a practical matter, should the need for self-defense arise, nothing in section 12031 restricts the open carry of unloaded firearms and ammunition ready for instant loading. See Cal. Penal Code § 12031(g).

In their Sur-Reply, Plaintiffs argue that despite its self-defense exception, section 12031 does not preserve the right to self-defense because such a need can arise "in a split second." See Pls.' Sur-Reply at 1-2. Like the District of Columbia requirement that firearms be "unloaded and dissembled or bound by a trigger lock or similar device," Plaintiffs maintain that a general requirement that handguns be kept unloaded is foreclosed by Heller. See id.

The Court disagrees. There is an important distinction between section 12031 and the District of Columbia law at issue in Heller, which required that firearms in the home be rendered and kept inoperable *at all times*. See Heller, 128 S. Ct. at 2818. Unlike section 12031, the District of Columbia law did not contain, and the Supreme Court declined to infer, an exception for self-defense. Id. The Heller Court did not reach the question of whether the law would have been constitutional had there been an exception for self-defense. See id. As a consequence, the Court declines to assume that section 12031 places an unlawful burden on the right to carry a firearm for self-defense, and Plaintiffs have elected not to challenge section 12031.[6]

Although Plaintiffs have elected not to challenge section 12031, focusing instead on concealed carry pursuant to section 12050, the validity and open carry restrictions of section 12031 are relevant

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[6] The Court notes that section 12031 has been challenged and upheld following Heller. See People v. Flores, 169 Cal. App. 4th 568, 576-77 (Cal. Ct. App. 2008) (holding "section 12031 does not burden the core Second Amendment right announced in Heller – the right of law-abiding, responsible citizens to use arms in defense of hearth and home – to any significant degree").

and important here. The Heller Court relied on 19th-century cases upholding concealed weapons bans, but in each case, the court upheld the ban because alternative forms of carrying arms were available. See State v. Chandler, 5 La. Ann. 489, 490 (1850) (holding concealed weapons ban "interfered with no man's right to carry arms . . . in full open view"); Nunn v. State, 1 Ga. 243, 251 (1846) (holding concealed weapons ban valid so long as it does not impair the right to bear arms "altogether"). See also Andrews v. State, 50 Tenn. 165, 178 (1871) (holding that a statute that forbade openly carrying a pistol "publicly or privately, without regard to time or place, or circumstances," violated the state right to keep and bear arms); State v. Reid, 1 Ala. 612, 616-17 (1840) (observing that a regulation that amounts to a total ban would be "clearly unconstitutional")). For that reason, in its order denying Defendant's motion to dismiss, this Court emphasized that not *all* concealed weapons bans are presumptively lawful. See Order Denying William D. Gore's Motion to Dismiss (Doc. No. 7) at 7-10. Heller and the 19th-century cases it relied upon instruct that concealed weapons restrictions cannot be viewed in isolation; they must be viewed in the context of the government's overall scheme. Here, to the extent that Penal Code sections 12025 and 12050 and Defendant's policy burden conduct falling within the scope of the Second Amendment, if at all, the burden is mitigated by the provisions of section 12031 that expressly permit loaded open carry for immediate self-defense. With the foregoing in mind, the Court proceeds to the question of whether Defendant's policy satisfies the appropriate level of judicial scrutiny.[7] Because Defendant's policy for issuing concealed carry licenses under

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[7] Plaintiffs maintain they are not challenging the constitutionality of any of the California Penal Code sections. Pls.' Reply at 1-3. Instead, Plaintiffs contend they are challenging only the Defendant's policy of issuing concealed weapons licenses, both as applied and on its face. Id. In doing so, Plaintiffs urge the Court to hold that section 12050's "good cause" provision is satisfied whenever applicants of good moral character assert self-defense as their basis. See Pls.' Reply at 1 ("This means holding section 12050's 'good cause' criterion to be satisfied where CCW applicants of good moral character assert 'self-defense as their basis'"). Defendant, however, maintains Plaintiffs are asserting a back door attack on the constitutionality of section 12050. See Def.'s Mem. at 8 ("Plaintiffs are asking the Court to strike the 'good cause' language from the statute"); Def.'s Reply at 1 (Plaintiffs are "asking the court to mandate that the State of California become a 'shall issue' state by forbidding Sheriffs from requiring a showing of 'good cause' for concealed carry licensure").

Section 12050 provides that when applicants meet certain requirements, and the sheriff finds that "good cause" exists, the sheriff "may issue" a license to carry a concealed firearm. Cal. Penal Code § 12050(a). "Section 12050 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); see also Gifford v. City of Los Angeles, 88 Cal. App. 4th 801, 805 (Cal. Ct. App. 2001) (observing that "Section 12050 gives "extremely broad discretion" to the sheriff concerning the issuance of concealed weapons licenses"); Nichols v. County of Santa Clara, 223 Cal. App. 3d 1236, 1241 (Cal. Ct. App. 1990) (same). Holding that sheriffs must issue concealed carry

section 12050 would pass constitutional muster even if it burdens protected conduct, the Court does not need to decide whether the Second Amendment encompasses Plaintiffs' asserted right to carry a loaded handgun in public.

C. Whether Defendant's Policy Satisfies the Appropriate Level of Scrutiny

Plaintiffs acknowledge that the Heller Court expressly declined to prescribe the appropriate level of judicial scrutiny for firearms regulations, but they nevertheless argue that "Heller points clearly to strict scrutiny." See Pls.' Mem. at 9-15. Noting that the Heller Court ruled out a rational basis inquiry and the "interest-balancing" approach suggested by Justice Breyer, Plaintiffs contend that when a law interferes with "fundamental constitutional rights," it must be subject to strict scrutiny. Pls.' Mem. at 9. Plaintiffs also maintain that "the trend after McDonald is toward adopting strict scrutiny." See Pls.' Reply at 11. Defendant argues that, since Heller, heightened scrutiny has been reserved for instances in which the "core right" of possession of a firearm in the home is infringed. See Def.'s Mem. at 17. Defendant contends the appropriate standard is "reasonableness review," or in the alternative, intermediate judicial scrutiny. See id. at 11-17.

The Court is unpersuaded that strict scrutiny is warranted here. Contrary to Plaintiffs' suggestion, fundamental constitutional rights are not invariably subject to strict scrutiny. In the First Amendment context, for example, content-neutral restrictions on the time, place and manner of speech are subject to a form of intermediate scrutiny. See United States v. O'Brien, 391 U.S. 367, 377 (1968). Other restrictions on speech may be held to an even lower standard of review. See Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678-79 (1992) (noting that limitations on expressive activity conducted in a nonpublic forum need only be reasonable, as long as they are viewpoint neutral); Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 806 (1985) (same). Drawing on First Amendment jurisprudence, several courts have applied intermediate scrutiny in the Second Amendment context. See, e.g., United States v. Smith, 2010 WL 3743842, at *8 (S.D. W. Va. Sept. 20, 2010); United States v. Walker, 709 F. Supp.2d 460, 466 (E.D. Va. 2010); United States v. Marzzarella, 595 F. Supp. 2d 596 (W.D. Pa. 2009). Accordingly, Plaintiffs are wrong in suggesting

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licenses all individuals who meet the minimum statutory requirements and assert self-defense as their basis would eliminate the discretion afforded sheriffs under section 12050. Accordingly, Plaintiffs' challenge cannot be properly construed as a mere challenge to Defendant's policy.

that the Court must apply strict scrutiny.

Plaintiffs are also wrong in suggesting there a trend after McDonald toward adopting strict scrutiny. In support of such a trend, Plaintiffs cite two cases.[8] The first case is United States v. Engstrum, 609 F. Supp. 2d 1227, 1231-32 (D. Utah 2009). Engstrum predated McDonald and therefore cannot demonstrate a post-McDonald trend. The second case is State of Wisconsin v. Schultz, No. 10-CM-138, slip. op. (Wis. Ct. App. Oct. 12, 2010). There, the state appellate court appears to have relied on Justice Thomas' concurrence in McDonald, rather than the majority, in deciding the appropriate level of scrutiny. At best, Engstrum and Schultz reveal that a post-McDonald trend toward strict scrutiny may emerge but is thus far indiscernible. To date, a majority of cases citing to McDonald and employing some form of heightened scrutiny—most of which are challenges to criminal convictions—have employed intermediate scrutiny. E.g., United States v. Skoien, 614 F.3d 638 (7th Cir. 2010); United States v. Marzzarella, 614 F.3d 85, 97 (3rd Cir. 2010). The trend prior to McDonald was intermediate scrutiny. See Heller v. District of Columbia, 698 F. Supp.2d 179, 188 (D.D.C. 2010) (Heller II) (surveying the landscape of post-Heller decisions and joining "the majority of courts" in holding that "intermediate scrutiny is the most appropriate standard").

Neither party has cited, and 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.[9] 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. See Heller, 128 S. Ct. at 2717 (focusing on the home as the place "where the need for defense of self, family, and property is most acute"); McDonald, 130 S. Ct. at 3036 (quoting same). If anything, the opposite is true; unlike possession in the home, carrying a concealed firearm in public presents a

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[8] Following submission of the case, Plaintiffs filed a Notice of Lodgment of Recent Authority in Support of Plaintiffs' Motion for Partial Summary Judgment. (Doc. No. 62.) The Lodgment contains two cases as exhibits: United States v. Ligon, 2010 U.S. Dist. Lexis 116272 (D. Nev. Oct. 20, 2010) and United States v. Huet, 2010 U.S. Dist. Lexis 123597 (Nov. 22, 2010). Neither of the cases changes the Court's analysis in a meaningful way: The court in Ligon employed strict scrutiny for the sake of argument, and the court in Huet did not employ a levels of scrutiny analysis at all, instead focusing on the restriction's impact on the "core right" of possession in the home.

[9] In fact, the Court is not aware of a case in which a court has employed *any* form of heightened scrutiny of regulations that do not affect the "core right."

"recognized threat to public order" and "poses an imminent threat to public safety." People v. Yarbrough, 169 Cal. App. 4th 303, 313-14 (Cal. Ct. App. 2010) (quotation marks and citations omitted); see also McDonald, 130 S. Ct. at 3105 (Stevens, J., dissenting) ("firearms kept inside the home generally pose a lesser threat to public welfare as compared to firearms taken outside . . ."). At most, Defendant's policy is subject to intermediate scrutiny.

In contrast with strict scrutiny, intermediate scrutiny, "by definition, allows [the government] to paint with a broader brush." United States v. Miller, 604 F. Supp.2d 1162, 1172 (W.D. Tenn. 2009). In United States v. Marzzarella, 614 F.3d 85, 98 (3rd Cir. 2010), the Third Circuit crafted an intermediate scrutiny standard for the Second Amendment based on the various intermediate scrutiny standards utilized in the First Amendment context. Pursuant to that standard, intermediate scrutiny requires the asserted governmental end to be more than just legitimate; it must be either "significant," "substantial," or "important," and it requires the "fit between the challenged regulation and the asserted objective be reasonable, not perfect." Id. (citations omitted); United States v. Huet, 2010 U.S. Dist. Lexis 123597, at *28 (W.D. Pa. Nov. 22, 2010).

In this case, Defendant has an 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. See Zimring Decl. 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. Id. Defendant's policy relates reasonably to those interests. Requiring documentation enables Defendant to effectively differentiate between individuals who have a bona fide need to carry a concealed handgun for self-defense and individuals who do not.

The Court acknowledges Plaintiffs' argument that many violent gun crimes, even a majority, are committed by people who cannot legally have guns, and the ongoing dispute over the effectiveness of concealed weapons laws. See Moody Decl. But under intermediate scrutiny, Defendant's policy need not be perfect, only reasonably related to a "significant," "substantial," or "important" governmental interest. Marzzarella, 614 F.3d at 98. Defendant's policy satisfies that standard.

Accordingly, the Court **DENIES** Plaintiffs' motion for summary judgment and **GRANTS** Defendant's motion for summary judgment on Plaintiffs' right to bear arms claim.

II. Equal Protection

The "Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985); Shaw v. Reno, 509 U.S. 630 (1993). When a government's action does not involve a suspect classification or implicate a fundamental right, even intentional discrimination will survive constitutional scrutiny for an equal protection violation as long as it bears a rational relation to a legitimate state interest. New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976); Cleburne, 473 U.S. at 439; Lockary v. Kayfetz, 917 F.2d 1150, 1155 (9th Cir. 1990). However, "[w]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized." Hussey v. City of Portland, 64 F.3d 1260, 1265 (9th Cir. 1995) (quoting Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966)).

A. Defendant's "Good Cause" Policy

For the reasons stated in above, the Court concludes that Defendant's "good cause" policy is valid. Accordingly, the 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.

B. Defendant's Treatment of Honorary Deputy Sheriffs

The Honorary Deputy Sheriffs' Association ("HDSA") is a civilian organization whose primary purpose is to finance projects for the San Diego Sheriff's Department. Plaintiffs allege that Defendant engages in preferential treatment of HDSA members. Pls.' Mem. at 20-22. Defendant denies such allegation and maintains that "Sheriff Gore does not offer special treatment to anyone and membership in the [HDSA] has no bearing on the ability to obtain a CCW license." Def.'s Mem. at 22. Plaintiffs do not contest or attempt to refute the premise that Defendant's policy is facially even-handed, instead

asserting arguments consistent with a purely as-applied challenge. See generally Pls.' Mem.; Pls.' Reply.

A concealed weapons licensing program administered so as to unjustly discriminate between persons in similar circumstances may deny equal protection. Guillory v. County of Orange, 731 F.2d 1379, 1383 (9th Cir. 1984); see also Kuzinich v. County of Santa Clara, 689 F.2d 1345, 1349 (9th Cir. 1983) (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)). At this stage, the Court evaluates whether there is actual evidence that would allow a reasonable jury to conclude first, that others similarly situated to Plaintiffs generally have not been treated in a like manner; and second, that the denials of concealed weapons licenses to them were based on impermissible grounds. See March v. Rupf, 2001 WL 1112110, at *5 (N.D.Cal. 2001) (citing Kuzinich v. County of Santa Clara, 689 F.2d 1345, 1349 (9th Cir. 1983) (applying this test to a claim of "selective prosecution" in zoning decision context)).

In March v. Rupf, plaintiffs asserted claims similar to those at issue here, that in granting concealed weapons licenses, sheriffs favored a "privileged class" of individuals. 2001 WL 1112110, at *5 (N.D.Cal. 2001). Plaintiffs submitted more than 700 pages of applications and renewals. Id. The court observed that "some applicants were granted concealed weapons licenses after stating on paper basically the same grounds for issuance upon which plaintiffs' applications were denied." Id. Nonetheless, the court held there was no genuine issue of material fact because the records did not establish those who received licenses were similarly situated to plaintiffs. Id. The records were incomplete—they did not reveal information compiled in background checks, oral interviews and the like—and the records did not establish a causal connection between factors suggesting "privileged class" and the issuance of a concealed weapons license. Id. The court concluded that, "without evidence of anything more than vagaries in [] administration," plaintiffs equal protection claim could not survive summary judgment. Id.

Like the plaintiffs in March, Plaintiffs here cannot demonstrate they were treated differently than similarly situated others. To show disparate treatment, Plaintiffs have offered a number of HDSA renewal applications as a contrast to Plaintiffs initial applications. See Exs. U-PP. But the two types of applications are not comparable; renewal applications are generally issued on the spot and subject to less rigorous documentation requirements than initial applications. See Pelowitz Decl. ¶ 12. Just

one of the Plaintiffs contends his renewal was denied, and in that case, the renewal was granted following an appeal. See Exs. K-S. Accordingly, the evidence introduced by Plaintiffs does not establish or create a genuine issue of material fact regarding whether similarly situated individuals were treated differently. At most, it demonstrates "vagaries in [] administration." See March, 2001 WL 1112110, at *5 (N.D.Cal. 2001). Moreover, for the reasons stated above, Plaintiffs have not demonstrated the denials of concealed weapons licenses to them were based on impermissible grounds. Defendant's policy does not favor HDSA members in violation of the equal protection clause of the Fourteenth Amendment.

Accordingly, the Court **DENIES** Plaintiffs' motion for summary judgment and **GRANTS** Defendant's motion for summary judgment on Plaintiffs' equal protection claims as they relate to Defendant's "good cause" policy and treatment of HDSA members.

C. Defendant's Residency Requirement[10]

For the reasons stated below, in differentiating between residents (and part-time residents who spend more than six months of the taxable year within the County) and non-residents, Defendant utilizes means that are substantially related to a substantial governmental interest. Because residents and non-residents are situated differently, the residency requirement of Defendant's policy does not violate equal protection. Therefore, the Court **GRANTS** Defendant's motion for summary judgment on Plaintiffs' equal protection claim as it relates to Defendant's residency requirement.

III. Right to Travel

The right to travel is usually considered to be one of the rights guaranteed by the Privileges and Immunities Clause of Article IV and the Privileges and Immunities Clause of the Fourteenth Amendment. See Attorney General of N.Y. v. Soto-Lopez, 476 U.S. 898, 902 (1986) (plurality) (citations omitted). The right to travel embraces at least three different components: (1) the right of a citizen of one State to enter and to leave another State; (2) the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and (3) for those travelers

[10] The only Plaintiff who alleges the residency requirement impacted his application is Edward Peruta, and the parties agree that Peruta's application was denied for lack of "good cause." See Pls.' Consolidated SUF ¶ 15. In addition to challenging the residency requirement as applied to Peruta, Plaintiffs challenge facial validity of the residence requirement.

who elect to become permanent residents, the right to be treated like other citizens of that State. Saenz v. Roe, 526 U.S. 489, 500 (1999). However, not all regulations that merely have an effect on travel raise an issue of constitutional dimension. Rather, "[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." Soto-Lopez, 476 U.S. at 903 (plurality) (internal quotation marks and citations omitted). A law embracing means that are "substantially" related to a "substantial" government interest will survive a right to travel analysis. Bach v. Pataki, 408 F.3d 75, 88 n.27 (2nd Cir. 2005). Plaintiffs allege Defendant's residency requirement "penalizes applicants for traveling and spending time outside of San Diego," FAC ¶ 122, and accordingly, Plaintiffs allege the policy burdens the right to travel. Relying on Bach, Defendant contends that its policy passes muster as a bona fide residence requirement. See Def.'s Mem. at 30.

Like the restrictions at issue here, the Second Circuit in Bach evaluated restrictions that inhibited non-residents from applying for a permit to carry a concealed weapon. Assuming, without deciding, that entitlement to a New York carry license was a privilege under Article IV of the Privileges and Immunities Clause, the Second Circuit concluded that New York had a substantial interest in monitoring gun licensees and that limiting licenses to residents and those working primarily within the state was sufficiently related to that interest. Bach, 408 F.3d at 91-94. The Court is unable to discern a meaningful distinction between the issues facing the Second Circuit in Bach and those at issue here. Adopting the rationale set forth in that decision, the Court concludes there is no genuine issue of material fact as to whether Defendant's policy violates the right to travel. Accordingly, the Court **GRANTS** Defendant's motion for summary judgment on Plaintiffs' right to travel claim.[11]

IV. Due Process

A threshold requirement for asserting a due process claim is the existence of a property or liberty interest. Board of Regents v. Roth, 408 U.S. 564, 569 (1972). Plaintiffs' due process claim

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[11] In addition to their right to travel claim, which arises under the Privileges and Immunities Clause of Article IV and the Privileges and Immunities Clause of the Fourteenth Amendment, Plaintiffs have asserted a separate claim for relief under the Privileges and Immunities Clause of Article IV. In its motion for summary judgment, Defendant suggests the claims are identical, see Def.'s Mem. at 29, and Plaintiffs have not disputed Defendant's contention, see generally Pls.' Mem; Pls.' Reply. The Court agrees that separate analyses of the claims would be duplicative and dismisses Plaintiffs' Privileges and Immunities claim along with their right to travel claim.

is governed by Erdelyi v. O'Brien, 680 F.2d 61, 63 (9th Cir. 1982), which held that by virtue its discretionary language, Section 12050 does not create a property interest. Morever, the Court held that the Plaintiff in that case "did not have a liberty interest in obtaining a concealed weapons license." Id. at 64. Pursuant to Erdelyi, the Court concludes that because Plaintiffs do not have "property or liberty interest in a concealed weapons license, the Due Process Clause did not require [Defendant] to provide [them] with due process before denying [their] initial [license] application[s]." Id. In any event, there is nothing to suggest that Defendant's licensing procedures deprive Plaintiffs of the opportunity to be heard at a meaningful time in a meaningful manner. See Mathews v. Eldridge, 424 U.S. 319, 333 (1976). The Court **GRANTS** Defendant's motion for summary judgment on Plaintiffs' due process claim.

CONCLUSION

For the foregoing reasons, the Court concludes that Defendant's policy does not infringe on Plaintiffs' right to bear arms or violate equal protection, the right to travel, the Privileges and Immunities Clause of Article IV, or due process.[12] Accordingly, the Court **DENIES** Plaintiffs' Motion for Summary Judgment and **GRANTS** Defendant's Motion for Summary Judgment.

IT IS SO ORDERED.

DATED: December 10, 2010

IRMA E. GONZALEZ, Chief Judge
United States District Court

[12] Plaintiffs have also asserted a claim for relief under 42 U.S.C. § 1983 for Defendant's alleged violation of California Penal Code section 12050. Because there is no cause of action under section 1983 for violation of a state statute, see Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336, 1349 (7th Cir.1985), the Court dismisses the claim.

TAB 2

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

EDWARD PERUTA, *ET AL.*, PLAINTIFFS,	)	09CV2371-IEG
VS.	)	SAN DIEGO, CA
	)	NOVEMBER 15, 2010
COUNTY OF SAN DIEGO, *ET AL.*, DEFENDANTS.	)	10:30 A.M.

TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE IRMA E. GONZALEZ

UNITED STATES DISTRICT CHIEF JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: MICHEL & ASSOCIATES, P.C.
BY: C. D. MICHEL, ESQ.
CLINT B. MONFORT, ESQ.
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AND
PAUL H. NEUHARTH, JR., APC
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FOR THE DEFENDANTS: COUNTY OF SAN DIEGO
OFFICE OF COUNTY COUNSEL
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(APPEARANCES CONTINUED)

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PROCEEDINGS RECORDED BY ELECTRONIC STENOGRAPHY; TRANSCRIPT PRODUCED BY COMPUTER.

I N D E X

THE DEPUTY CLERK: NUMBER FIVE ON CALENDAR, CASE 09CV2371, PERUTA VS. COUNTY OF SAN DIEGO, *ET AL.*, FOR A MOTION HEARING.

THE COURT: YOUR APPEARANCES, PLEASE.

MR. MICHEL: GOOD MORNING, YOUR HONOR.

CHUCK MICHEL APPEARING FOR PLAINTIFFS.

WITH ME IS SEAN BRADY AND PAUL NEUHARTH.

THE COURT: I'M SORRY. I DIDN'T HEAR THE LAST THING. WHO'S WITH YOU?

MR. MICHEL: SEAN BRADY AND PAUL NEUHARTH.

THE COURT: LET ME JUST MAKE SURE I HAVE THAT DOWN HERE.

OKAY, THANK YOU.

MR. CHAPIN: GOOD MORNING, YOUR HONOR.

JAMES CHAPIN FOR DEFENDANT SHERIFF WILLIAM GORE.

THE COURT: GOOD MORNING, GENTLEMEN.

OKAY, THIS IS THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON TWO OF THE CLAIMS, AND THEN THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON ALL CLAIMS.

CORRECT, MR. CHAPIN?

MR. CHAPIN: YES, YOUR HONOR.

THE COURT: OKAY. I DON'T KNOW WHO -- I THINK I SHOULD HAVE THE PLAINTIFFS FIRST ARGUE AT THIS TIME.

AND SO, MR. MICHEL, ARE YOU GOING TO ARGUE THE CASE FOR YOUR CLIENTS?

MR. MICHEL: YES, YOUR HONOR.

THANK YOU.

THE COURT: AND I AM GOING TO ALLOT A SUBSTANTIAL AMOUNT OF TIME TO BOTH SIDES TO ARGUE THE CASE. THERE ARE A LOT OF ISSUES THAT WE NEED TO ATTEMPT TO RESOLVE, IF WE CAN. I'M NOT GOING TO RULE FROM THE BENCH. I'M GOING TO ISSUE A WRITTEN ORDER AFTER ARGUMENT, OBVIOUSLY, AND BASED ON YOUR PAPERS. I BELIEVE I'M FAMILIAR WITH ALL THE ISSUES, BUT THE ISSUES ARE FAIRLY COMPLICATED, AND CERTAINLY SOME ARE ISSUES OF FIRST IMPRESSION.

I'LL LET YOU START, MR. MICHEL. I HAVE QUESTIONS. I'LL PROBABLY INTERRUPT YOU, BUT YOU CAN START.

MR. MICHEL: OBVIOUSLY, THE COURT'S QUESTIONS ARE WELCOME, YOUR HONOR.

I THINK, FROM MY PERSPECTIVE, I'D JUST LIKE TO SORT OF PUT THE CASE IN ITS PROPER CONTEXT PROCEDURALLY AND SUBSTANTIVELY WHERE IT IS RIGHT NOW. THE COURT RULED, IN DENYING THE COUNTY'S MOTION TO DISMISS BACK IN JANUARY, ON A NUMBER OF THE ISSUES WHICH HAVE BEEN, TO SOME EXTENT, REBRIEFED IN THE MOTIONS AND THE BRIEFS GOING BACK AND FORTH ON THE CROSS-MOTIONS.

THE COURT HAS PREVIOUSLY SAID THAT THE SECOND AMENDMENT DOES APPLY OUTSIDE THE HOME AND THAT BEARING ARMS MEANS CARRYING ARMS OUTSIDE THE HOME. THE COURT HAS RULED THAT YOU CAN'T BAN ALL FORMS OF CARRY CONSTITUTIONALLY, YOU

CAN'T BAN ALL FORMS OF CARRYING FIREARMS. IT DID THE NUNN, CHANDLER, ANDREWS, AND REID ANALYSIS IN ITS MOTION TO DISMISS AND RECOGNIZED THAT, WHILE A GOVERNMENT HAS A CERTAIN AMOUNT OF DISCRETION, LEEWAY, IN CHOOSING A WAY TO REGULATE FIREARMS IN PUBLIC, IT CAN'T OUTRIGHT BAN THEM, AND IN CALIFORNIA THE CHOICE IS, ESSENTIALLY, CONCEALED CARRY WITH A LICENSE.

IT ALSO RECOGNIZED IN ITS RULING THAT CERTAIN, THAT THERE ARE INFRINGEMENTS, AND THAT THOSE TYPES OF INFRINGEMENTS WOULD BE SUBJECT TO SOME KIND OF HEIGHTENED SCRUTINY, EITHER INTERMEDIATE OR STRICT, AT THAT POINT IN TIME, AND THAT RULING CAME DOWN BEFORE McDONALD, BEFORE THE McDONALD DECISION.

IT ALSO RECOGNIZED THAT THE SPECIAL-NEEDS POLICY THE COUNTY HAS IN PLACE -- IN OTHER WORDS, BASICALLY, IT'S A SHALL NOT ISSUE UNLESS YOU DEMONSTRATE A SPECIAL NEED -- INFRINGES ON THE SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS, AND THROUGH THE FOURTEENTH AMENDMENT, AND THAT THE COUNTY HAD THE BURDEN TO JUSTIFY THAT INFRINGEMENT. THE COURT STOPPED SHORT OF RULING WHETHER OR NOT THAT INFRINGEMENT WAS UNCONSTITUTIONAL OR NOT IN THE CONTEXT OF THAT MOTION.

AFTER THAT, WE AMENDED THE COMPLAINT BECAUSE WE DECIDED THAT THE APPROPRIATE APPROACH HERE WAS NOT REALLY TO CHALLENGE PENAL CODE SECTION 12050, THE LICENSING STATUTE, ON ITS FACE, BECAUSE THAT STATUTE ALLOWS A LICENSE TO BE ISSUED IF A SHERIFF DECIDES THAT THERE IS GOOD CAUSE.

THE COURT: BUT LET ME STOP YOU THERE.

I MEAN, I KNOW YOU SAY THAT YOU'RE NOT ATTACKING THE CONSTITUTIONALITY OF THE CALIFORNIA STATUTE, BUT AREN'T YOU REALLY ATTACKING IT? I MEAN, AREN'T YOU GOING AROUND ABOUT IT THROUGH THE BACK DOOR, BASICALLY?

MR. MICHEL: WELL --

THE COURT: IN THE WAY THAT IT'S ENFORCED.

MR. MICHEL: WELL, I THINK, AND I UNDERSTAND THE COURT'S CONCERN, BECAUSE IT CONFUSED ME FOR A WHILE, TOO, AND WE'VE GONE AROUND AND AROUND ON THIS. I THINK, REALLY, IF THE COURT'S OBLIGATION IS TO INTERPRET A STATUTE CONSTITUTIONALLY, YOU KNOW, UNDER THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE, YOU HAVE TO TRY AND CONSTRUE A STATUTE CONSTITUTIONALLY. WELL, GOOD CAUSE CAN BE CONSTRUED CONSTITUTIONALLY IF GOOD CAUSE INCLUDES A RECOGNITION OF THE FUNDAMENTAL RIGHT TO SELF-DEFENSE.

THE COURT: ISN'T GOOD CAUSE THE ROOT OF THE ISSUE THAT THE, THE ISSUES THAT THE PLAINTIFF IS ARGUING IN THIS CASE, WHAT CONSTITUTES GOOD CAUSE AND WHAT KIND OF (PAUSE), WHAT LEVEL OF SCRUTINY DO WE USE IN DETERMINING WHAT GOOD CAUSE IS, FOR GOOD CAUSE IS?

MR. MICHEL: ESSENTIALLY, YES, AND WHAT WE'RE SAYING IS THAT THERE IS A STATE STATUTE THAT IS BEING APPLIED TO ARTICULATE GOOD CAUSE AS REQUIRING A SPECIAL NEED, AND IT'S BEING APPLIED THROUGH A POLICY THAT THE COUNTY HAS THAT'S UNCONSTITUTIONAL ON ITS FACE BECAUSE IT EXCLUDES SELF-DEFENSE.

IT REQUIRES A DEMONSTRATION OF A SPECIAL NEED.

SO, INSTEAD OF A SHALL ISSUE, UNLESS THERE'S A REASON NOT TO ISSUE, IT'S A SHALL NOT ISSUE UNLESS YOU AS AN INDIVIDUAL PROVE SOME SPECIAL NEED BEYOND THE GENERAL POPULACE AND BEYOND JUST SELF-DEFENSE, WHICH HELLER RECOGNIZES A FUNDAMENTAL RIGHT. SO WE AMENDED THE COMPLAINT JUST TO TRY TO CLARIFY THAT. I THINK IT CAUSED SOME CONFUSION IN THE COUNTY'S BRIEFS, AND WE TRIED TO ADDRESS THAT IN OUR PAPERS. BUT THE LAW OF THE CASE, IT SEEMS TO ME, IS IT GETS UP TO WHETHER OR NOT THE COUNTY HAD JUSTIFIED, HAD CARRIED ITS BURDEN OF JUSTIFICATION, ITS *SHALL NOT ISSUE UNLESS* POLICY, ITS SPECIAL-NEEDS POLICY, WHERE SOMEONE, IN ORDER TO EXERCISE THEIR FUNDAMENTAL RIGHT TO SELF DEFENSE IN PUBLIC, HAS TO ESTABLISH SOMETHING BEYOND SELF-DEFENSE, SOME ARTICULABLE THREAT.

THE COURT: OKAY, THERE'S THE CALIFORNIA PENAL CODE SECTION 12031.

MR. MICHEL: YES.

THE COURT: IT PROHIBITS THE OPEN CARRY OF A LOADED FIREARM, BUT NOT UNLOADED. I MEAN, YOU CAN CARRY AN UNLOADED FIREARM UNDER THAT STATUTE.

MR. MICHEL: AS LONG AS IT'S ALSO UNCONCEALED.

THE COURT: AS LONG AS IT'S UNCONCEALED, AND IT ALLOWS A PERSON TO CARRY THE CLIP NEXT TO THE UNLOADED FIREARM.

MR. MICHEL: THE TERM OF ART IS MAGAZINE.

THE COURT: MAGAZINE.

MR. MICHEL: AND YES, IT ALLOWS YOU TO CARRY A MAGAZINE, OR, DEPENDING ON WHAT TYPE OF FIREARM, YOU CAN CARRY THE AMMUNITION, BUT THAT OPENS A WHOLE SORT OF A QUAGMIRE ABOUT WHETHER THAT'S A PRACTICAL MATTER OF CARRYING FOR IMMEDIATE SELF-DEFENSE, WHICH IS WHAT HELLER PROTECTS.

THE COURT: I UNDERSTAND THAT, AND WE'LL GET TO THAT.

SO, THEN, 12025, THE STATUTE YOU JUST REFERRED TO, IS THE STATUTE THAT PROHIBITS THE CARRYING OF CONCEALED FIREARMS, BUT THERE ARE THESE EXCEPTIONS --

MR. MICHEL: RIGHT.

THE COURT: -- AND ONE OF THEM IS GOOD CAUSE.

MR. MICHEL: ONE OF THEM IS HAVING A LICENSE.

THE COURT: YES, THE EXCEPTION IS HAVING A LICENSE. CORRECT?

MR. MICHEL: FOR BOTH THE CONCEALED AND THE LOADED-CARRY BAN. 12025 BANS CONCEALED; THE OTHER BANS LOADED. FOR BOTH OF THOSE STATUTES, THERE'S AN EXCEPTION IF YOU HAVE A CCW, IF YOU HAVE A PERMIT TO CARRY A CONCEALED AND LOADED FIREARM.

NOW, 12031 ALSO CARRIES SORT OF AN EXTREME-EMERGENCY EXCEPTION WHERE, IF YOU'RE IN IMMEDIATE GRAVE DANGER AND YOU'VE CALLED THE POLICE, YOU CAN ACTUALLY CARRY A LOADED FIREARM WITHOUT A PERMIT IN THAT SHORT PERIOD OF TIME, AND

THEN THERE ARE STATUTORY EXCEPTIONS TO 12031. THERE'S THE PEOPLE VS. KING CASE WHICH SAYS EVEN IF YOU'RE A FELON, IF YOU ARE, IF YOU NEED TO POSSESS A FIREARM FOR SELF-DEFENSE, EVEN IF YOU'RE PROHIBITED, YOU CAN POSSESS THE FIREARM LOADED DURING THE PERIOD OF TIME THAT YOU NEED IT TO DEFEND YOURSELF.

SO THOSE STATUTES SORT OF SET UP THE DEFAULT POSITION. IF YOU GO OUT ACROSS THE THRESHOLD OF YOUR HOME IN PUBLIC, YOU CAN'T CARRY A GUN CONCEALED, YOU CAN'T CARRY A GUN LOADED UNLESS HAVE YOU A PERMIT OR UNLESS ONE OF THE OTHER EXCEPTIONS APPLIES, AND MOST OF THOSE EXCEPTIONS ARE DESIGNED TO GET YOU FROM YOUR HOUSE TO A RANGE, OR YOUR HOUSE TO A BUSINESS, OR SOMEPLACE ELSE WHILE YOU TRANSPORT THE FIREARM.

THE COURT: GO AHEAD.

MR. MICHEL: THERE'S A HELPFUL LITTLE BOOK, BY THE WAY, WHICH I'M SORT OF EMBARRASSED TO CITE, BUT I USE IT ALL THE TIME. IT'S CALLED *HOW TO OWN A GUN & STAY OUT OF JAIL*, BY JOHN MACHTINGER. IT LAYS OUT ALL THE EXCEPTIONS TO 12025 AND 12031, AND IT GETS VERY, IT'S VERY CONVOLUTED, BECAUSE IT'S SO HARD TO UNDERSTAND WHAT THOSE STATUTES DO AND DO NOT DO.

BUT IN ANY EVENT, IT COMES DOWN TO, WE'RE NOT CHALLENGING THOSE STATUTES. YOU CAN HAVE A BAN ON CONCEALED CARRY, YOU CAN HAVE A BAN ON LOADED CARRY, AS LONG AS YOU HAVE A PERMITTING SYSTEM, A LICENSING SYSTEM, IN PLACE THAT IS ITSELF CONSTITUTIONAL. SO THE CASES THAT DEAL WITH THOSE, IN FACT NOT JUST 12025 OR 12031, BUT ANY OF THE CONCEALED OR

LOADED-CARRY BANS ACROSS THE COUNTRY REALLY DON'T MEAN ANYTHING UNLESS THERE WAS NO LICENSING SYSTEM IN PLACE OR NO ALTERNATIVE METHOD OF CARRYING, ALTHOUGH THOSE CASES DON'T REALLY, ARE INSIGNIFICANT IN TERMS OF THE ANALYSIS THAT WE NEED TO DO HERE, AND THE ANALYSIS THAT WE --

THE COURT: OKAY, LET ME STOP YOU THERE.

NOW, THERE'S 12031(j). THAT PERMITS OPEN CARRY FOR SELF-DEFENSE PURPOSES. CORRECT?

MR. MICHEL: WITH SOME VERY LIMITED REQUIREMENTS ON TOP OF THAT, YES. GENERALLY, IT ALLOWS IT FOR SELF-DEFENSE. BUT IF I'M NOT MISTAKEN, AND I DON'T REMEMBER THE (j) SUBSECTION, BUT IT'S IMMEDIATE GRAVE DANGER BETWEEN THE TIME THAT YOU CALL THE POLICE AND THE POLICE ARRIVE, I THINK, ARE THE RESTRICTIONS ON THAT. SO IT'S DESIGNED FOR THAT IMMINENT-CRISIS TYPE OF A SITUATION, WHICH I THINK IS ENTIRELY CONSISTENT WITH A LICENSING SCHEME. WE'RE NOT TALKING ABOUT --

THE COURT: DOES THAT UNDERMINE YOUR ARGUMENT AT ALL, THEN, YOUR GENERAL ARGUMENT?

MR. MICHEL: I DON'T THINK SO, BECAUSE WE'RE NOT TALKING ABOUT SELF-DEFENSE IN THE FACE OF AN UPHELD KNIFE OR A BURGLAR IN YOUR FACE SAYING, GIVE ME YOUR WALLET, A ROBBER IN YOUR FACE SAYING, GIVE ME YOUR WALLET. WE'RE TALKING ABOUT THE ANTICIPATION OF A POSSIBLE NEED FOR SELF-DEFENSE. HELLER NEVER SAID YOUR RIGHT TO SELF-DEFENSE OR McDONALD NEVER SAID

YOUR RIGHT TO SELF-DEFENSE OR CARRY ARMS ONLY SPRING INTO BEING WHEN YOU'RE ABOUT TO BE ATTACKED. YOUR RIGHT TO SELF-DEFENSE IS, IN MANY RESPECTS, A DETERRENT TO FOLKS THINKING THAT YOU'RE GOING TO, THAT YOU, THAT THEY MIGHT BE ABLE TO ATTACK YOU.

SO, BUT I THINK 12031 ACTUALLY COMPLEMENTS THE CONSTITUTIONAL LICENSING SCHEME, PROVIDED THE LICENSING SCHEME IS CONSTITUTIONAL BY ALSO RECOGNIZING THAT EVEN IF YOU CHOOSE NOT TO GO GET THAT PERMIT BECAUSE YOU WANT TO BE EQUIPPED IN THE EVENT YOU NEED TO EXERCISE YOUR RIGHT TO SELF-DEFENSE, IT SAYS, EVEN WITHOUT THAT PERMIT, IF YOU FIND YOURSELF IN THE UNENVIABLE POSITION OF HAVING TO IMMEDIATELY EXERCISE YOUR RIGHT TO SELF-DEFENSE, YOU CAN DO IT WITHOUT A PERMIT AND NOT BREAK THE LAW.

THE COURT: IS IT YOUR POSITION THAT SELF-DEFENSE GENERALLY IS GOOD CAUSE? IS THAT WHAT YOU'RE ARGUING?

MR. MICHEL: ESSENTIALLY, YES, SELF-DEFENSE, IN ADDITION TO OTHER THINGS. SO GOOD CAUSE DOESN'T MEAN YOU MIGHT HAVE GOOD CAUSE, BUT NOT GET A PERMIT. THERE ARE OTHER OBJECTIVE FACTORS. THERE'S A NUMBER OF HOOPS THAT YOU'RE GOING TO HAVE TO JUMP THROUGH, AN APPLICANT WILL HAVE TO JUMP THROUGH TO GET A PERMIT. THE ONLY ONES WE'RE REALLY FOCUSING ON ARE THE GOOD CAUSE.

BUT THAT DOESN'T MEAN THAT, JUST BECAUSE YOU HAVE GOOD CAUSE, YOU NECESSARILY GET A PERMIT. BUT, ESSENTIALLY,

IF YOU SAY GOOD CAUSE, THEN THIS IS THE GOVERNMENT'S BURDEN, THE COUNTY'S BURDEN, TO SAY THAT'S NOT GOOD ENOUGH, FOR SOME REASON. THEY'LL HAVE TO DECIDE, ARE YOU TELLING THE TRUTH? IS THIS REALLY FOR GOOD CAUSE, OR IS THIS BECAUSE YOU WANT TO GO COMMIT A CRIME, OR IS THERE SOME OTHER, YOU KNOW, JUSTIFICATION FOR THIS, FOR GETTING GOOD CAUSE, FOR SECURITY PURPOSES, OR BUSINESS PURPOSES, OR SOME KIND OF A CEREMONY, OR A 21-GUN SALUTE, OR SOMETHING?

I MEAN, THERE ARE OTHER POTENTIAL REASONS WHY YOU MIGHT HAVE SO-CALLED GOOD CAUSE, BUT ONE OF THE REASONS THAT WE BELIEVE THE HELLER AND McDONALD CASES DEMAND AND ESTABLISH GOOD CAUSE IS SELF-DEFENSE, THE RIGHT TO POSSESS, THE DESIRE TO EXERCISE YOUR RIGHT TO POSSESS A FIREARM, TO CARRY A FIREARM, TO BEAR ARMS IN PUBLIC FOR, IN THE EVENT OF, IN THE EVENT OF CONFRONTATION. I THINK THOSE WERE THE WORDS OUT OF HELLER.

THE COURT: AND BY *IN PUBLIC*, YOU'RE TALKING ABOUT WALKING DOWN THE STREET, BASICALLY, BECAUSE, I MEAN, THERE ARE CASES THAT TALK ABOUT OTHER KINDS OF PROPERTY THAT ARE OWNED BY GOVERNMENT ENTITIES, BUT YOU'RE TALKING ABOUT -- I MEAN, WE'RE NOT DEALING WITH THAT RIGHT NOW, ARE WE?

MR. MICHEL: THERE ARE VERY DEFINITELY GOING TO BE SOME PLACES WHERE YOU CANNOT CARRY. SO *PUBLIC*, THAT'S ANOTHER TERM OF ART WHICH I DON'T THINK WE -- LEGAL ART -- WHICH I DON'T THINK WE NEED TO DISSECT RIGHT NOW --

THE COURT: RIGHT.

MR. MICHEL: -- BECAUSE I'M NOT ASKING THE COURT TO SAY THAT YOU CAN CARRY IT ON A SCHOOL GROUND, OR IN A COURTHOUSE, OR, YOU KNOW, THOSE TYPES OF SENSITIVE PLACES ARE THINGS THAT HELLER RECOGNIZED AS LEGITIMATE RESTRICTIONS THAT THE GOVERNMENT CAN IMPOSE ON THE RIGHT TO CARRY A GUN IN PUBLIC.

THE COURT: OKAY.

MR. MICHEL: AND THOSE TYPES OF, AND THOSE SENSITIVE PLACES AND ALL THE PRESUMPTIVELY-VALID REGULATIONS THAT HELLER RECOGNIZES, THOSE ARE ALL CONSISTENT WITH FUNDAMENTAL-RIGHT JURISPRUDENCE. IT'S THE EQUIVALENT RIGHT OF OBSCENITY, OR FIGHTING WORDS, OR, YOU KNOW, THE OTHER LESSER-PROTECTED MODES OF SPEECH THAT DON'T NECESSARILY TRIGGER THE SAME LEVEL OF SCRUTINY AND THE SAME LEVEL OF REVIEW IN THE FIRST AMENDMENT CONTEXT.

BUT HERE WHAT WE'RE BEING ASKED TO LOOK AT IS, WHAT'S THE STANDARD? AND THE COURT POSTURED IT AS STRICT OR INTERMEDIATE, BUT I SUBMIT THAT, REALLY, IN THIS CASE THIS IS NOT A REGULATION. THIS IS A BAN. IF YOU WALK INTO THE SHERIFF'S DEPARTMENT AND WANT TO FILL OUT AN APPLICATION TO GET A CONCEALED-WEAPON PERMIT, FIRST OF ALL, THEY DO AN INITIAL, SORT OF AN INFORMAL SCREENING, AND IF YOU SAY, MY REASON IS SELF-DEFENSE, THEY'LL SAY, SAVE YOUR MONEY. BUT IF YOU INSIST ON FILING THAT APPLICATION, YOU NEED TO ESTABLISH A

SPECIAL NEED.

SO IT'S, THE DEFAULT POSITION IS, YOU DO NOT GET THE LICENSE THAT YOU NEED IN ORDER TO EXERCISE YOUR FUNDAMENTAL RIGHT TO SELF-DEFENSE. THAT'S THE PRESUMPTION. THAT'S CONSTITUTIONALLY BACKWARD. IT NEEDS TO BE, WHEN YOU WALK IN, YOU HAVE THE RIGHT TO GET A LICENSE, ASSUMING YOU MEET THE OTHER, JUMP THROUGH THE OTHER HOOPS FOR SELF-DEFENSE, UNLESS THE GOVERNMENT COMES UP WITH A REASON WHY YOU'RE NOT GOING TO BE ALLOWED TO EXERCISE YOUR RIGHT.

BUT IN THIS CASE IT'S NOT EVEN A REGULATION. WE WOULD BE GOING THROUGH, AND NEED TO GO THROUGH, AND THIS WAS, I THINK, PRETTY MUCH ARGUED QUITE ADEQUATELY IN THE *AMICUS* BRIEFS SUBMITTED BY DAVID KOPEL AND JOHN EASTMAN, YOU DON'T NEED TO GET INTO A STANDARD REVIEW AT ALL, BECAUSE THIS IS NOT REALLY A REGULATION. IT'S SPECIAL PERMISSION FROM THE GOVERNMENT TO EXERCISE A FUNDAMENTAL RIGHT THAT THE GOVERNMENT IS NOT ALLOWED TO REQUIRE.

THEY CAN DEPRIVE CERTAIN PEOPLE IN CERTAIN PLACES FROM, PERHAPS, POSSESSING CERTAIN TYPES OF FIREARMS IN CERTAIN CONTEXTS. THEY CAN PUT THOSE TYPES OF REGULATIONS IN PLACE, AND WE'RE NOT, AND ALSO THEY CAN REQUIRE GOOD MORAL CHARACTER SO THAT THE PEOPLE WHO GET THIS LICENSE ARE TRUSTWORTHY, NOT, YOU KNOW, GETTING THEM TO GO COMMIT A CRIME, OR A MEMBER OF A GANG, OR SOMETHING LIKE THAT, BUT THEY CAN'T JUST SAY, AS A MATTER OF POLICY, THAT YOU HAVE TO ARTICULATE A NEED ABOVE AND

BEYOND WHAT THE GENERAL PUBLIC CAN SAY FOR SELF-DEFENSE. THEY CAN'T SAY YOU HAVE TO HAVE A DEATH THREAT, OR YOU HAVE TO BE BEING STALKED, OR YOU HAVE TO BE ABLE TO ARTICULATE A SPECIFIC RISK IN ORDER TO BE ABLE TO EXERCISE YOUR FUNDAMENTAL RIGHT TO SELF-DEFENSE.

THE COURT: AND RIGHT NOW, THE GOOD-CAUSE REQUIREMENT MANDATES DOCUMENTATION. CORRECT? TO PROVE THAT A PERSON IS SUBJECT TO SOME KIND OF THREAT IN ORDER TO ESTABLISH SELF-DEFENSE. CORRECT?

MR. MICHEL: HAS SOME KIND OF A SPECIAL NEED, AND THAT'S EITHER, AND I DON'T WANT TO PUT WORDS IN OPPOSING COUNSEL'S ARGUMENT, BUT IT SEEMS THAT, AND THIS KIND OF GOES INTO OUR EQUAL-PROTECTION POSITION. RIGHT NOW, THE COUNTY WILL DEEM YOU TO HAVE A SPECIAL NEED IF YOU ARE A CERTAIN TYPE OF BUSINESS OWNER. I GUESS THE COUNTY THINKS YOU ARE AT MORE RISK THERE, ALTHOUGH THERE MIGHT NOT BE AN ARTICULABLE THREAT. IN OTHER WORDS, YOU'RE NOT BEING ROBBED OR ABOUT TO BE ROBBED, OR SOMEONE IS NOT CLAIMING TO ROB YOU, OR YOU HAVE A T.R.O. OR SOMETHING THAT DOES PROVE OR ESTABLISH THAT YOU ARE SUBJECT TO SOME TYPE OF PARTICULAR HIGHER RISK THAN OTHERS, OR YOU'RE A MEMBER OF THE SPECIAL RESERVE, WHICH SEEMS TO OPEN SOME DOORS JUST BY VIRTUE OF BEING A MEMBER OF THAT.

THE COURT: HAVEN'T THEY CHANGED THEIR POLICY A LITTLE BIT NOW?

MR. MICHEL: I WOULDN'T BE SURPRISED IF THEY TRY. I

KNOW THAT THAT'S SORT OF TYPICAL, AND I DON'T KNOW THAT THAT'S REALLY THE CRUX OF, I DON'T KNOW -- I'M NOT TRYING TO TAKE ANY PERMITS AWAY FROM THE PEOPLE IN THE SPECIAL RESERVE. THEY SHOULD ALL HAVE THEIR PERMITS. GOD BLESS THEM. BUT THEY'RE NOT ANY MORE ENTITLED THAN THE AVERAGE CITIZEN IS TO EXERCISE THEIR FUNDAMENTAL RIGHT TO SELF-DEFENSE. EVERYONE HAS THAT RIGHT EQUALLY. IF YOU GIVE SOMEONE THAT RIGHT OVER AND ABOVE SOMEONE WHO CAN'T, WHO ISN'T A MEMBER OF THAT CLUB, THEN THAT'S AN EQUAL-PROTECTION VIOLATION.

AND FURTHERMORE, JUST REQUIRING THAT SPECIAL NEED, EVEN IF IT'S NOT RELATED TO THE PARTICULAR SPECIAL RESERVE ORGANIZATION, JUST REQUIRING SOMEONE TO DEMONSTRATE, I'M A BUSINESS OWNER, SO I CARRY MONEY TO THE BANK, OR I JUST, I HAVE, YOU KNOW, MY EX-BOYFRIEND IS STALKING ME, OR WHATEVER THE PARTICULARIZED, SPECIFIC NEED MAY BE, THOSE PEOPLE ARE NOT ENTITLED TO PREFERENTIAL TREATMENT IN EXERCISING THEIR FUNDAMENTAL RIGHT, EITHER. THAT'S AN EQUAL-PROTECTION VIOLATION AS WELL.

THE COURT: WHAT IF DOCUMENTATION WASN'T REQUIRED AND ALL YOU HAD TO DO WAS PRESENT AN AFFIDAVIT THAT YOU WANTED THIS FOR SELF-DEFENSE? WOULD THAT BE CONSTITUTIONAL IN YOUR VIEW?

MR. MICHEL: YES. I HAVEN'T REALLY THOUGHT ABOUT WHETHER OR NOT REQUIRING THAT AFFIDAVIT -- I DON'T SEE WHY THAT WOULD BE A PROBLEM, REQUIRING AN AFFIDAVIT UNDER PENALTY

OF PERJURY THAT YOU WANT THIS LICENSE --

THE COURT: CORRECT.

MR. MICHEL: -- FOR SELF-DEFENSE PURPOSES. I DON'T, OFFHAND, SEE A PROBLEM WITH THAT.

THE COURT: OKAY.

MR. MICHEL: IT'S JUST A WAY OF PROVING IT. SURE, I SUPPOSE THEY CAN REQUIRE PROOF.

THE COURT: RIGHT, OTHER THAN WHAT THEY SAY THEY NEED RIGHT NOW, A RESTRAINING ORDER, OR SOME OTHER DOCUMENTATION. CORRECT?

MR. MICHEL: RIGHT, AND IF THAT PERSON LIES, I MEAN, I CAN'T REALLY IMAGINE THE SCENARIO UNLESS MAYBE (PAUSE) -- I DON'T KNOW WHAT KIND OF A WORLD IT WOULD BE WHERE YOU --

THE COURT: ANYBODY CAN SAY THAT, COULDN'T THEY, AND SAY THIS IS UNDER PENALTY OF PERJURY?

MR. MICHEL: YES, AND BE SUBJECT TO PERJURY, I SUPPOSE. BUT I CAN'T IMAGINE A WORLD WHERE NO ONE WOULD ACTUALLY HAVE A LEGITIMATE NEED FOR SELF-DEFENSE, UNLESS YOU LIVED IN AN IRON BOX, OR SOMETHING, AND PEOPLE COULDN'T GET TO YOU. I MEAN, I CAN'T THINK OF AN ACADEMIC EXAMPLE WHERE SELF-DEFENSE WOULDN'T BE A LEGITIMATE REASON TO GET THE LICENSE, NOT IN AND OF ITSELF, JUST THAT HOOP, YOU GET THROUGH THAT HOOP.

THE COURT: RIGHT, BECAUSE THERE STILL HAS TO BE A CRIMINAL BACKGROUND CHECK DONE AND THESE OTHER HOOPS --

MR. MICHEL: RIGHT.

THE COURT: -- THAT YOU MENTIONED, OR THAT THEY PROBABLY WOULD HAVE TO JUMP THROUGH.

MR. MICHEL: ABSOLUTELY, AND WE'RE NOT CHALLENGING ANY OF THOSE. AND, YOU KNOW, I DON'T HAVE A CRYSTAL BALL, BUT I THINK WE CAN ALL IMAGINE THAT IF THE LAW IS, IN LIGHT OF HELLER AND McDONALD, THE LAW IS NOW SEEN FOR WHAT IT NEEDS TO BE IN ORDER TO BE CONSTITUTIONAL, YOU KNOW, THERE WILL BE SOME NEW HOOPS ENTERTAINED IN SACRAMENTO THIS SESSION IN ORDER TO KIND OF TIGHTEN UP THAT PROCESS, AND THAT'S PART OF THE, THAT'S THE WAY IT WORKS. I WOULDN'T BE SURPRISED AT ALL. I'D EXPECT THAT.

THE COURT: OKAY. GO ON.

MR. MICHEL: WELL, I THINK, ACTUALLY -- WELL, THERE'S ONE THING I DID WANT TO POINT OUT, BECAUSE WE DIDN'T SEE THIS WHEN WE FIRST, WHEN WE LAST SUBMITTED OUR BRIEF. THERE IS A NEW CASE OUT OF NEVADA, DISTRICT COURT, THAT DEALS WITH THE STANDARD OF REVIEW. IT'S U.S. V. LIGON, AND I ONLY HAVE A LEXIS CITE. IT'S 116272, 15-17 -- I GUESS THAT'S THE PAGE PINPOINT CITE -- OCTOBER 20TH, 2010, AND I THINK THAT NEW CASE GIVES SOME MORE GUIDANCE ABOUT --

THE COURT: WHAT DOES THAT SAY? WHAT DOES IT SAY GENERALLY?

MR. MICHEL: IT SAYS A LAW THAT BURDENS THE EXERCISE OF A FUNDAMENTAL RIGHT IS SUBJECT TO STRICT SCRUTINY, WHICH IS

NOT PARTICULARLY SURPRISING, BY THE WAY, IN THIS CASE.

THE COURT: WAS THAT A SECOND AMENDMENT?

MR. MICHEL: OH, YES. THE DEFENDANT WAS ASKING THE COURT TO VACATE HIS JUDGMENT OF CONVICTION FOR FELON IN POSSESSION OF A FIREARM, IN VIOLATION OF 18 U.S.C. 922(g)(1). THE DEFENDANT ASSERTED THE STATUTE WAS UNCONSTITUTIONAL AS APPLIED TO HIM, OR, IN THE ALTERNATIVE, TO DECLARE THE CONTINUING APPLICATION OF THAT SECTION, DISQUALIFICATION, WAS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE SECOND AMENDMENT RIGHT TO BEAR ARMS.

THE COURT: AREN'T THOSE CASES DISTINGUISHABLE? I MEAN, THERE ARE A LOT OF CASES OUT THERE IN THE CRIMINAL CONTEXT THAT HAVE BEEN CITED. IS IT DIFFERENT THAN WHAT WE'RE DEALING WITH HERE?

MR. MICHEL: NOT REALLY. I THINK IT'S FROM THE NINTH CIRCUIT, WHICH IS A LITTLE MORE HELPFUL FOR ANOTHER NINTH CIRCUIT COURT. BUT OTHER THAN THAT, I DON'T THINK IT IS. ALL OF THOSE LINES OF CASES, IF THEY'RE BEFORE McDONALD, THERE'S SORT OF A DISTINCTION BETWEEN THE FUNDAMENTAL RIGHT TO SELF-DEFENSE, WHICH HELLER EXPRESSLY RECOGNIZED, BUT IT DIDN'T GO SO FAR AS RECOGNIZING A FUNDAMENTAL INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS, OR AT LEAST SOME COURTS FOUND THAT IT DIDN'T, AND SO WHEN THE McDONALD DECISION COMES DOWN, THAT CHANGES THAT. THAT WIPES OUT THAT ENTIRE LINE OF CASES THAT DREW THAT DISTINCTION BETWEEN THE FUNDAMENTAL RIGHT TO

SELF-DEFENSE AND THE FUNDAMENTAL RIGHT TO KEEP AND BEAR ARMS.

THE OTHER CASES IN THE CRIMINAL CONTEXT UPHOLDING A STATUTE THAT BANS CONCEALED OR LOADED, THEY DIDN'T GET INTO LICENSING, AND I SUPPOSE IT'S AN INTERESTING KIND OF ACADEMIC QUESTION, WHETHER OR NOT YOU CAN CHALLENGE A 12025 OR 12031 CHARGE BASED ON THE FACT THAT YOU COULDN'T GET A PERMIT AND YOU WERE UNCONSTITUTIONALLY DENIED A PERMIT. THAT WAS NEVER BROUGHT UP IN THOSE CASES. IT WAS A CHALLENGE TO THE STATUTE ITSELF, AND ALL THOSE CASES RECOGNIZED EITHER THAT THERE'S A PERMITTING SYSTEM IN PLACE OR THERE'S AN ALTERNATIVE METHOD OF CARRY. THEY'RE ALL DISTINGUISHABLE ON ONE OF THOSE GROUNDS OR OTHER.

THE COURT: ARE YOU SAYING THAT I DON'T EVEN HAVE TO REACH THE STANDARD THAT HAS TO BE APPLIED IN THIS TYPE OF A CASE, EITHER STRICT SCRUTINY OR INTERMEDIATE SCRUTINY?

MR. MICHEL: I DON'T THINK YOU DO. IF YOU WANT TO GET, TO UNDERSTAND THE -- JUST BEFORE I LEAVE THAT POINT, BRIEFLY, THE SUPREME COURT SAID THAT THE NUNN CASE PERFECTLY CHARACTERIZES THE APPROPRIATE STANDARD FOR THE SECOND AMENDMENT REVIEWS OF CONCEALED CARRY LAWS, CONCEALED OR LOADED CARRY LAWS.

THE COURT: THE SUPREME COURT IN WHICH CASE?

MR. MICHEL: IN HELLER.

THE COURT: IN HELLER.

MR. MICHEL: SO THAT'S NUNN, CHANDLER, ANDREWS, AND

REID, AND THE BLACKSTONE AND HOLMES COMMENTARIES, WHICH THE COURT ACTUALLY ADDRESSED IN ITS DENIAL OF THE MOTION TO DISMISS. SO I THINK THIS COURT GOT IT SPOT-ON AND THAT IT UNDERSTOOD EXACTLY WHAT NUNN WAS AND THE SUPREME COURT WAS SAYING BY ADOPTING NUNN.

SO, I'M SORRY, YOUR HONOR. I LOST MY TRAIN OF THOUGHT.

THE COURT: I'M SORRY.

MR. MICHEL: ON YOUR LAST QUESTION.

THE COURT: THE STANDARD.

MR. MICHEL: OH, YES. I DON'T THINK YOU NEED TO GET TO THE STANDARD, AND AGAIN IT'S FOR THE REASONS LAID OUT IN THE *AMICUS* BRIEF. THIS IS NOT A REGULATION. THE GOVERNMENT HAS THE BURDEN OF PROOF, AND YOU HAVE TO SUPPLY SOME KIND OF A STANDARD OF REVIEW WHEN THERE IS A REGULATION. IN OTHER WORDS, IF SOMEONE WANTED TO CHALLENGE THE GOOD-MORAL-CHARACTER REQUIREMENT, THAT WOULD BE A RESTRICTION. WE'RE SAYING YOU CAN'T EXERCISE YOUR FUNDAMENTAL RIGHT TO SELF-DEFENSE UNLESS YOU ESTABLISH OR UNLESS YOU HAVE GOOD MORAL CHARACTER.

NOW, IS THAT AN INFRINGEMENT ON SORT OF THE CENTRAL RIGHT TO CARRY A FIREARM IN PUBLIC? YES. IS IT UNCONSTITUTIONAL INFRINGEMENT? NOW, YOU'RE JUMPING INTO STANDARD OF REVIEW, AND THERE WAS A CASE THAT SAID YOU, A LAW THAT REQUIRES YOU TO HAVE A SERIAL NUMBER, PROHIBITS YOU FROM SCRATCHING THE SERIAL NUMBERS OFF YOUR GUN. YOU DON'T GET

TO -- IT'S, AGAIN, IT'S LIKE THE FIRST AMENDMENT. THE CLOSER YOU GET TO THAT POLITICAL SPEECH, THAT -- I DON'T WANT TO USE THE WORD *CORE* -- BUT SORT OF THE FUNDAMENTAL PROTECTED, FUNDAMENTAL CONDUCT OR SPEECH, THE HIGHER THE STANDARD GETS.

AT A CERTAIN POINT, THOUGH, THERE'S NO NEED TO IMPOSE THE STANDARD, BECAUSE IT'S LIKE HELLER. THERE WAS A BAN ON FIREARMS IN THE HOME. THE COURT NEVER NEEDED TO GET TO, AND McDONALD AS WELL, NEVER NEEDED TO GET TO A STANDARD OF REVIEW. IT WAS A CATEGORICAL SECOND AMENDMENT VIOLATION BECAUSE, UNLESS YOU JUMPED THROUGH IMPOSSIBLE-TO-JUMP-THROUGH HOOPS THAT ONLY A VERY SMALL SEGMENT OF THE POPULATION -- ACTUALLY, I DON'T THINK ANY COULD GET THROUGH. IT WAS BASICALLY AN ILLUSORY ABILITY TO GET A PERMIT TO HAVE A GUN IN YOUR HOME OR TO HAVE A GUN IN YOUR HOME FOR IMMEDIATE SELF-DEFENSE. YOU DON'T NEED TO DO A STANDARD OF REVIEW. IT'S A COMPLETE BAN ON THE EXERCISE OF A FUNDAMENTAL RIGHT.

THE COURT: WELL, LET'S TALK ABOUT THAT. IF YOUR POSITION IS THAT THE SECOND AMENDMENT ENCOMPASSES THE RIGHT TO CARRY A WEAPON IN PUBLIC FOR SELF-DEFENSE PURPOSES, AND ASSUMING THE GOVERNMENT HAS -- I MEAN, I CAN'T IGNORE THE INTEREST THAT THE GOVERNMENT IS ARGUING THAT IT HAS IN PROTECTING THE PUBLIC FROM UNKNOWN PERSONS CARRYING CONCEALED, LOADED FIREARMS FOR PURPOSES OTHER THAN SELF-DEFENSE. WHY ISN'T SOME KIND OF VERIFICATION, WHY CAN'T SOME KIND OF VERIFICATION BE NARROWLY TAILORED, I MEAN, THAT THE INDIVIDUAL

HAS TO SHOW TO GET THE LICENSE?

MR. MICHEL: WELL, IF THE COURT IS INCLINED -- I MEAN, OBVIOUSLY, THE COURT GETS TO DO THAT IF IT WANTS, IF THE COURT IS INCLINED TO IMPOSE A STANDARD OF REVIEW.

THE COURT: YES. I MEAN, I'VE BEEN WORKING UNDER THAT THEORY, BUT I'LL CERTAINLY TAKE INTO CONSIDERATION WHAT YOU'VE ARGUED HERE TODAY, THAT I DON'T EVEN NEED TO REACH THAT, IF I DO.

BUT GO AHEAD.

MR. MICHEL: IT SHOULD BE, ASSUMING THAT THERE'S NOT THIS CATEGORICAL PROTECTION, THEN THERE HAS, IT'S A FUNDAMENTAL RIGHT. ALL FUNDAMENTAL RIGHTS ARE SUBJECT TO STRICT SCRUTINY, BUT NOT ALL FUNDAMENTAL RIGHTS IN ALL CIRCUMSTANCES ARE SUBJECT TO STRICT SCRUTINY. SO THERE MAY BE LESSER INFRINGEMENTS WHICH DON'T GET THAT SAME KIND OF SCRUTINY. BUT BY THE SAME ARGUMENT THAT THIS IS SUCH A BLANKET PROHIBITION, THAT YOU DON'T EVEN NEED TO GET TO STRICT SCRUTINY, IF THIS IS NOT AN INFRINGEMENT ON A FUNDAMENTAL RIGHT, I MEAN, IT'S THE RIGHT TO KEEP AND BEAR, AND *BEAR* MEANS CARRY IN PUBLIC. SO IF THIS IS NOT AN INFRINGEMENT ON THAT FUNDAMENTAL EXERCISE, ON THAT PRINCIPAL WAY OF EXERCISING YOUR FUNDAMENTAL RIGHT TO SELF-DEFENSE BY CARRYING A FIREARM, THEN WHAT IS?

THIS IS NOT A SERIAL NUMBER. THIS IS NOT A, YOU KNOW, SOME KIND OF INCREMENTAL OR INCIDENTAL REGULATION THAT

MAKES IT HARDER FOR YOU OR MAY DISQUALIFY SOME PEOPLE. THIS IS EVERYBODY WHO GOES IN CAN'T GET A PERMIT UNLESS THEY DEMONSTRATE A PARTICULARIZED NEED. SO THAT'S STRICT SCRUTINY, AND ONCE YOU GET TO STRICT SCRUTINY, NOW YOU'RE AT, WHAT'S THE COMPELLING GOVERNMENTAL INTEREST, AND IS THIS NARROWLY TAILORED?

AND THERE MAY BE -- I MEAN, I COULDN'T REALLY -- I'M NOT SURE I CAN ACCURATELY ARTICULATE WHAT THE COUNTY'S POSITION IS WITH RESPECT TO WHAT THEIR -- I KNOW THEIR COMPELLING GOVERNMENT INTEREST IS PUBLIC SAFETY AND STOPPING PEOPLE FROM SHOOTING EACH OTHER, WHICH I DON'T THINK I HAVE A WHOLE LOT OF QUARREL WITH, EXCEPT WE HAVE TO BE CAREFUL. BUT YOU CAN'T USE PUBLIC SAFETY JUST TO JUSTIFY EVERYBODY, AND THE LICENSING STATUTE IS THE NARROW TAILORING THAT GETS PAST THE CONSTITUTIONAL PROBLEMS. YOU COULD HAVE THE LICENSING SYSTEMS IN PLACE IF THE LEGISLATURE CHOOSES NOT TO GO SOME OTHER ROUTE FOR ALLOWING POSSESSION OF FIREARMS OR THE CARRYING OF FIREARMS IN PUBLIC FOR SELF-DEFENSE, AND THAT'S WHAT CALIFORNIA HAS OPTED TO DO. THEY'VE CHOSEN THEIR LICENSING SYSTEM. SO THEY'VE NARROWLY TAILORED THE APPROACH TO LICENSING THE RIGHT TO KEEP, TO CARRY A FIREARM FOR SELF-DEFENSE BY IMPOSING A CCW REQUIREMENT. THAT IS THEIR NARROW TAILORING.

BUT GOING BEYOND THAT, IN ELIMINATING THE LICENSE, THAT'S NOT NARROWLY TAILORING. THAT'S ELIMINATING THE ABILITY

TO EXERCISE THAT RIGHT. IT WOULD BE, YOU KNOW, IT'S THE EQUIVALENT OF YOU WANT TO GET A PERMIT TO HOLD A PUBLIC GATHERING TO HAVE A POLITICAL DEBATE. YOU CAN'T WITHHOLD THAT LICENSE. IT'S PART OF THE RIGHT. YOU CAN REQUIRE THE LICENSE AND ALL THE JURISPRUDENCE THAT THERE IS AVAILABLE, WHAT TYPE OF FEES CAN BE CHARGED, AND TYPE, PLACE, AND MANNER RESTRICTIONS CAN BE IMPOSED, AND ALL OF THAT STUFF, ALL WIDE OPEN, YOU KNOW.

THOSE ARE ALL ISSUES THAT WILL PROBABLY NEED TO BE DECIDED AT SOME POINT OR ANOTHER IN THE CONTEXT OF A LICENSE TO CARRY A CONCEALED FIREARM IN PUBLIC, BUT, AND WHERE AND WHEN, BUT TO SAY THAT REQUIRING ONE IN ORDER TO GET THAT LICENSE TO PROVE A SPECIAL NEED, AN ARTICULABLE THREAT, RATHER THAN JUST THE RIGHT TO BE PREPARED TO DEFEND YOURSELF, THAT DOESN'T PASS ANY LEVEL OF SCRUTINY.

THE COURT: OKAY. SO, UNDER YOUR SECOND AMENDMENT ARGUMENT, IN THE BEST, YOUR BEST-CASE SCENARIO, WHAT WOULD YOU WANT ME TO DO?

MR. MICHEL: FORGIVE ME, YOUR HONOR.

THE COURT: I KNOW THERE'S AN EQUAL-PROTECTION ARGUMENT, TOO, AN ALTERNATIVE ARGUMENT, BUT WHAT IS YOUR SECOND AMENDMENT, THE BOTTOM LINE?

MR. MICHEL: WE'RE NOT CHALLENGING THE FACIAL APPLICATION OF 12025. IN ORDER TO UPHOLD 12025 AS APPLIED THROUGH THE COUNTY'S POLICY, THE COUNTY'S POLICY MUST ACCEPT,

THROUGH WHATEVER DOCUMENTATION, THAT THE RIGHT TO, THE DESIRE TO EXERCISE THE FUNDAMENTAL RIGHT TO SELF-DEFENSE BY EXERCISING THE FUNDAMENTAL INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS IS GOOD CAUSE. THAT'S THE DECLARATORY RELIEF THAT, BASICALLY, WE'RE SEEKING.

AND THE ONLY OTHER THING THAT I'D REALLY ASK THE COURT TO DO, BECAUSE I REALLY HOPE TO AVOID, FRANKLY, HAVING TO LITIGATE, NOT TO PRESUME THAT WE'RE GOING TO WIN OR ANYTHING ON THE EQUAL-PROTECTION MOTION, BUT I THINK, AT BEST, THERE MAY BE MATERIAL FACTS IN DISPUTE ABOUT SOME OF THE EQUAL-PROTECTION ISSUES. BUT IF THE COURT CLARIFIES THAT THAT EQUAL-PROTECTION CHALLENGE INFRINGES ON A FUNDAMENTAL INDIVIDUAL RIGHT AND SO REQUIRES STRICT-SCRUTINY ANALYSIS AS WELL, AND THAT THE BURDEN IS ON THE GOVERNMENT IN BOTH OF THOSE CONTEXTS TO PROVE THEIR COMPELLING INTEREST OR WHATEVER STANDARD TO PROVE THAT THEIR LAW IS CONSTITUTIONAL, THEIR POLICY, I SHOULD SAY, IS CONSTITUTIONAL, AS OPPOSED TO THE PLAINTIFFS' BURDEN TO PROVE THAT IT'S NOT.

I'LL BE HAPPY --

THE COURT: OKAY. SO, LET'S TALK ABOUT EQUAL PROTECTION. ANYTHING ELSE YOU WANT TO SAY ABOUT EQUAL, THE EQUAL-PROTECTION ARGUMENT?

MR. MICHEL: WELL, NOT REALLY. I MEAN, THE EQUAL-PROTECTION ARGUMENTS, BOTH OF THEM, THE SECOND AMENDMENT THROUGH THE DUE PROCESS AND THE EQUAL-PROTECTION ARGUMENT,

BOTH COME OUT OF THE FOURTEENTH AMENDMENT. BOTH OF THEM, THEY'RE SIMILAR IN SOME RESPECTS BECAUSE THE SPECIAL NEEDS SETS UP A SPECIAL CLASS, AND SO IF THERE'S A SECOND AMENDMENT VIOLATION, THEN THE EQUAL-PROTECTION VIOLATION IMPLICATES A FUNDAMENTAL RIGHT, AND THE STANDARD OF REVIEW IS RAISED ON THAT ONE AS WELL.

THE COURT: LET'S TALK ABOUT THE RIGHT TO TRAVEL. THERE IS THIS SECOND CIRCUIT CASE, BACH VS. PATAKI. I MEAN, ISN'T THAT DISPOSITIVE OF YOUR, I MEAN, DISPOSITIVE OF THE RIGHT TO TRAVEL? IN OTHER WORDS, IN A CASE THAT'S SOMEWHAT SIMILAR TO THIS, THERE WAS A REJECTION OF THE RIGHT-TO-TRAVEL VIOLATION DUE TO THE REQUIREMENTS THAT WERE, THAT HAD TO BE MET IN THAT PARTICULAR CASE.

ARE YOU FAMILIAR WITH THAT CASE?

MR. MICHEL: I'M NOT, YOUR HONOR.

CAN I HAVE A MOMENT?

THE COURT: YES.

I CAN LET YOU REPLY TO THAT AFTER MR. CHAPIN.

MR. MICHEL: THAT MIGHT BE HELPFUL, BUT I'LL PUT THE RIGHT-TO-TRAVEL CLAIM INTO CONTEXT. WE WERE IN DISCUSSIONS WITH OPPOSING COUNSEL ABOUT WHETHER OR NOT THERE WAS, IN FACT, A RESIDENCY REQUIREMENT OR WHETHER OR NOT THEY WOULD ISSUE PERMITS TO PART-TIME RESIDENTS, AND REALLY WHAT THE --

THE COURT: MR. PERUTA IS THE ONLY PERSON -- I'M SORRY TO INTERRUPT -- THE ONLY PLAINTIFF IN THIS CASE THAT

EVEN RAISES THIS ISSUE.

MR. MICHEL: THAT RAISES THIS ISSUE, RIGHT, BECAUSE HIS DECLARATION SAYS THAT HE WAS TOLD THAT HE COULDN'T HAVE A PERMIT BECAUSE HE WASN'T A FULL-TIME RESIDENT, WHICH WOULD, AND THAT'S WHAT RAISES THE RIGHT TO TRAVEL AND THE RESIDENCY, CONSTITUTIONALITY OF THE RESIDENCY REQUIREMENT IN THE FIRST PLACE. BUT NOW THE COUNTY IS SAYING THAT THEY DON'T REQUIRE THAT, AND WE HAD SOME DISCUSSIONS ABOUT WHETHER OR NOT THE COUNTY COULD JUST ARTICULATE THAT, AND WE DROPPED THAT CLAIM. I'M NOT INTERESTED IN FIGHTING OVER SOMETHING THAT'S NOT AN ISSUE --

THE COURT: RIGHT.

MR. MICHEL: -- AND THE COUNTY IS SAYING IN ITS MOTION FOR SUMMARY JUDGMENT THAT THEY'LL ACCEPT PART-TIME RESIDENCY ON A CASE-BY-CASE BASIS. IF THAT'S THE CASE, I HAVE NOTHING TO FIGHT ABOUT.

THE COURT: OKAY. THAT'S FINE.

THANK YOU.

MR. MICHEL: THANK YOU, YOUR HONOR.

THE COURT: MR. CHAPIN.

MR. CHAPIN: THANK YOU, YOUR HONOR.

JAMES CHAPIN FOR DEFENDANT WILLIAM GORE.

YOUR HONOR, WE ARE ON THE CUTTING EDGE OF CONSTITUTIONAL LAW, AND YOU'RE RIGHT. THIS IS A CASE OF FIRST IMPRESSION, BECAUSE THE PLAINTIFFS ARE ASKING FOR AN EXPANSION

OF A CONSTITUTIONAL RIGHT THAT'S BEEN VERY CAREFULLY AND NARROWLY DEFINED BY HELLER, AND IF THE COURT DOESN'T MIND ME GOING BACK TO ISSUES WHICH YOU'VE ALREADY DEALT WITH IN THE MOTION TO DISMISS, AND AS YOU KNOW, I DIDN'T GET A CHANCE TO ARGUE THAT. I'M NOT GOING TO WAIVE THOSE ISSUES, AS YOU MIGHT IMAGINE.

THE HELLER CASE VERY CAREFULLY DEFINES THAT THE CONSTITUTIONAL RIGHT THAT HAS BEEN IDENTIFIED AND THE SCOPE OF IT IS A CONSTITUTIONAL RIGHT TO KEEP AND BEAR ARMS IN THE HOME FOR THE PURPOSE OF SELF-DEFENSE. THE FINAL PARAGRAPH IN THE MAJORITY OPINION IN McDONALD CAPTURES THE HOLDINGS OF BOTH HELLER AND McDONALD, AND IT SAYS THE RIGHT THAT WE HAVE IDENTIFIED IS THE RIGHT TO KEEP AND BEAR ARMS IN THE HOME FOR SELF-DEFENSE, AND THAT IS THE FUNDAMENTAL RIGHT THAT WE ARE IDENTIFYING THAT IS PROTECTED BY THE 14TH AMENDMENT IN McDONALD.

SECTION THREE OF THE HELLER CASE, AFTER JUSTICE SCALIA GOES THROUGH THE PREFATORY CLAUSE AND REACHES HIS ULTIMATE CONCLUSION THERE, SECTION THREE IS NOT *DICTA*. SECTION THREE IS THE PORTION OF THE OPINION THAT IDENTIFIES THIS SCOPE OF THE RIGHT, AND SECTION THREE STARTS OFF WITH A COMMENT THAT THE RIGHT IS NOT UNLIMITED. THAT'S THE VERY BEGINNING, AND IN THE NEXT, TWO LINES LATER, HE SAYS, LET'S LOOK BACK AT THE HISTORY OF CONCEALED-WEAPON REGULATIONS, BECAUSE THOSE ARE PRESUMED TO BE CONSTITUTIONAL.

THAT'S WHAT JUSTICE SCALIA IS TELLING US, AND THAT'S HOW HE GOT FIVE VOTES. THAT'S ONE OF THE WAYS HE GOT FIVE VOTES, WAS MAKING SURE THAT THOSE LAWS ARE PRESERVED, AND HE GOES BACK 150 YEARS TO TALK ABOUT THE TRADITION AND HISTORY OF CONCEALED-WEAPONS REGULATION, WHICH IS SOME OF THE MOST COMMON AND CONSISTENT REGULATION OF FIREARMS IN THE NATION, AND HE CITES (PAUSE) -- IT'S INTERESTING THAT COUNSEL COMMENTS AGAIN ON THE NUNN AND CHANDLER CASES.

IN CHANDLER, THE SUPREME COURT OF LOUISIANA SAYS THIS IS A CONCEALED-WEAPONS LAW THAT WAS ABSOLUTELY NECESSARY TO COUNTERACT A VICIOUS STATE OF SOCIETY GROWING OUT OF THE HABIT OF CARRYING CONCEALED WEAPONS AND TO PREVENT BLOODSHED AND ASSASSINATIONS COMMITTED UPON UNSUSPECTING PERSONS. JUSTICE SCALIA IS TELLING US THAT IT IS UNDISPUTABLE THAT THERE IS A COMPELLING GOVERNMENTAL INTEREST IN CONCEALED-WEAPONS REGULATION, AND THAT'S THE FIRST PART OF SECTION THREE. I DON'T KNOW HOW YOU CAN IGNORE THAT PORTION OF SECTION THREE, AND McDONALD AGAIN MENTIONS SECTION THREE IN ITS OPINION, REITERATING THE REASSURANCES FROM SECTION THREE OF HELLER.

SO I'D LIKE THE COURT TO REVISIT WHAT REALLY IS THE FUNDAMENTAL RIGHT HERE. SHERIFF GORE IS NOT INTERESTED IN VIOLATING ANYONE'S CONSTITUTIONAL RIGHTS. HE IS PROBABLY, TO HIS DISMAY, OBLIGATED BY STATUTE TO ADMINISTER THIS CONCEALED-WEAPONS LICENSING PROGRAM. HE IS BOUND BY STATE STATUTE, BY CASE LAW, BY ATTORNEY GENERAL REGULATIONS, AND

HE'S BOUND BY THE PENAL CODE PROVISIONS THAT HE IS OBLIGATED TO ENFORCE, AND HE'S BOUND BY THE DECISION OF THE UNITED STATES SUPREME COURT THAT HE READS IS LIMITED. WHAT THE PLAINTIFFS WANT THIS COURT TO DO IS TO GO WHERE NO COURT HAS YET GONE, AND --

THE COURT: SO, DO YOU AGREE THAT THEY'RE NOT REALLY ATTACKING THE STATUTE, THAT THEY WANT THE COUNTY'S APPLICATION OF THAT STATUTE REVISITED, OR VISITED, AND TO CERTAINLY DEFINE IT IN A WAY THAT WOULD ALLOW THE PUBLIC TO CARRY FIREARMS?

MR. CHAPIN: THAT'S A NICE WAY TO ARTICULATE A POSITION THAT IS TRULY A FACIAL CHALLENGE TO 12050, BECAUSE THE LEGISLATURE HAS INSERTED A GOOD-CAUSE PROVISION. COUNSEL JUST SAID THE REMEDY HE WANTS IS FOR THE COURT TO FIND GOOD CAUSE MEANS I HAVE A SECOND AMENDMENT RIGHT TO BEAR ARMS. SO IF THAT'S WHAT THEY WANT, THEN THE COURT WOULD HAVE TO STRIKE OUT THE GOOD-CAUSE LANGUAGE OF 12050 THAT THE LEGISLATURE HAS HAD THERE SINCE 1917.

GOOD CAUSE HAS TO MEAN SOMETHING. IT HAS TO MEAN SOMETHING BEYOND JUST A SECOND AMENDMENT RIGHT, A GENERAL NEED FOR SELF-DEFENSE. THE LEGISLATURE REQUIRES IT. THE SHERIFF IS OBLIGATED TO ENFORCE IT, AND STATE CASE LAW HAS CONSISTENTLY, AND EVEN NINTH CIRCUIT CASE LAW, THE ERDELYI CASE, HAS GIVEN THE SHERIFF THE DISCRETION AND OBLIGATED HIM TO MAKE A DETERMINATION ON A CASE-BY-CASE BASIS -- THAT'S WHAT THE STATE CASES SAY -- AS TO WHETHER THERE'S GOOD CAUSE,

SOMETHING JUST BEYOND A GENERAL NEED FOR SELF-DEFENSE. SO HE'S GOT TO DO SOMETHING; HE'S GOT TO HAVE SOMETHING.

THE COURT COMMENTED WHETHER DOCUMENTATION WAS REQUIRED OR MANDATORY. IT'S NOT MANDATORY. IF YOUR HONOR CAME IN AND PRODUCED AN IDENTIFICATION, YOU WOULDN'T NEED TO PRODUCE DOCUMENTATION THAT YOU HAVE A SPECIAL NEED FOR SELF-DEFENSE BECAUSE OF YOUR POSITION. THERE ARE CERTAIN PUBLIC FIGURES THAT IT'S ASSUMED YOU DON'T HAVE TO PRODUCE DOCUMENTATION.

GENERALLY, DOCUMENTATION IS REQUIRED, AND THAT'S WHAT THE STAFF ASKS FOR, BECAUSE WE DON'T KNOW WHO PEOPLE ARE. WE WANT PEOPLE TO IDENTIFY WHAT THEIR NEED IS. SO, GENERALLY, DOCUMENTATION IS REQUIRED. THAT'S THE PROCESS.

BUT YOU'RE RIGHT. SOMEBODY COULD SIGN A DECLARATION SAYING, I HAVE A SPECIAL NEED. IN FACT, MARK CLEARY, ONE OF THE PLAINTIFFS, IS A GOOD EXAMPLE OF THAT. HE COULDN'T PROVIDE DOCUMENTATION TO THE STAFF THAT HE WAS STILL EMPLOYED BY THE HOSPITAL. HE REFUSED TO FOR SOME REASON. HE FOLLOWED THROUGH ON OUR APPEAL PROCESS. THE HEARING OFFICER BELIEVED HIS COMPELLING STORY AND DIRECTED THE STAFF TO GRANT HIM THE PERMIT, THE RENEWAL OF THE PERMIT. SO HE NOT ONLY PROVED THAT OUR APPEAL PROCESS WORKS, BUT THAT A NON-HDSA MEMBER STILL GETS A PERMIT, AND HE DID IT WITHOUT HAVING SPECIAL DOCUMENTATION. SO IT'S NOT MANDATORY.

THE COURT: ARE YOU FAMILIAR WITH THIS PENAL CODE

SECTION 12031(j)?

MR. CHAPIN: YES. THAT'S THE -- I THINK COUNSEL DESCRIBED IT AS THE EMERGENCY EXCEPTION.

THE COURT: RIGHT.

MR. CHAPIN: THAT ALLOWS (PAUSE) --

THE COURT: IS THAT RELEVANT HERE IN THIS CASE?

MR. CHAPIN: YES, IT IS, BECAUSE IT ALLOWS YOU TO LOAD YOUR FIREARM IF YOU'RE CARRYING IT AND BE PREPARED FOR ANY -- IF YOU'RE BEING STALKED IN AN ALLEYWAY AT NIGHT AND YOU FEAR YOU'RE IN DANGER, YOU CAN LOAD YOUR FIREARM AND BE READY. THE IDEA IS THAT IT'S BETTER TO HAVE LAW ENFORCEMENT DEAL WITH THESE ISSUES. SO THE GOAL IS TO CONTACT LAW ENFORCEMENT BEFORE YOU START FIRING AWAY AT SOME UNSUSPECTING PERSON. LAW-ENFORCEMENT OFFICERS ARE TRAINED. THEY HAVE AN ESCALATION OF FORCE THAT I'M SURE YOU'RE FAMILIAR WITH BECAUSE THE CASES ARE LITIGATED IN FRONT OF THE COURT, THEY HAVE TO GO THROUGH AFTER YEARS AND YEARS OF TRAINING TO DO THAT, RATHER THAN HAVING SOME CITIZEN STARTING TO FIRE AWAY AT SOME UNSUSPECTING PERSON WITHOUT HAVING A PARTICULAR MEANS TO DO IT. IT ALLOWS FOR A REASONABLE PERSON UNDER REASONABLE ANTICIPATION OF A DANGER TO LOAD THEIR FIREARM AND BE PREPARED FOR SELF-DEFENSE.

THE COURT: BUT THAT PERSON ALREADY HAS A LICENSE. CORRECT?

MR. CHAPIN: NO. THIS IS A PERSON WHO CAN CARRY THEIR GUN OPENLY.

THE COURT: ANYBODY CAN CARRY (PAUSE) --

MR. CHAPIN: CARRY A GUN.

THE COURT: -- A FIREARM UNLOADED.

MR. CHAPIN: ON YOUR HIP --

THE COURT: ON YOUR HIP.

MR. CHAPIN: -- WITH YOUR MAGAZINE IN YOUR POCKET.

AND IT'S INTERESTING IN THE SURREPLY THAT THE PLAINTIFFS FILED THAT WHAT THIS CASE BOILS DOWN TO IS, ACCORDING TO THE DECLARATION OF THEIR EXPERT, IT TAKES THREE SECONDS TO LOAD YOUR FIREARM. SO, ASSUMING IT TAKES ONE SECOND TO PULL IT OUT OF THE HOLSTER AND PREPARE IT, THIS ENTIRE CASE BOILS DOWN TO THE IMPRACTICAL ABILITY OF HAVING TO TAKE TWO SECONDS TO LOAD YOUR FIREARM FOR SELF-DEFENSE. THAT'S WHAT THIS CASE BOILS DOWN TO. THEY WANT YOU TO THROW OUT CONCEALED-WEAPONS LAWS IN CALIFORNIA BECAUSE THEY CAN'T GET THE LEGISLATURE TO MAKE THIS A *MAY ISSUE* -- A *SHALL ISSUE* STATE. THEY WANT YOU TO GO THERE WHEN THE SUPREME COURT HAS SAID CONCEALED-WEAPONS LAWS HAVE HISTORICALLY BEEN A COMPELLING GOVERNMENTAL INTEREST.

THE COURT: TELL ME, DO YOU BELIEVE THAT -- WELL, LET'S ASSUME I GET OVER YOUR HELLER ARGUMENT AND THE RIGHT THAT'S INVOLVED, BUT THAT I HAVE TO REACH THIS STANDARD. WHAT IS THE COUNTY'S POSITION?

MR. CHAPIN: I WENT THROUGH, IN MY BRIEF, ALL THE CASES I COULD FIND, AND EVERY CASE WHERE THERE WAS A

HEIGHTENED-SCRUTINY STANDARD APPLIED WAS A CASE INVOLVING, I THINK ONE OF THE LAST ONES COUNSEL MENTIONED, HE CAME UP WITH WAS POSSESSION BY A FELON, THAT IMPLICATES A POSITION IN A HOME BECAUSE IT'S POSSESSION ANYWHERE. SO EVERY REGULATION THAT AFFECTS, SOMEHOW AFFECTS A PERSON IN THEIR HOME HAS BEEN GIVEN A HEIGHTENED-SCRUTINY STANDARD.

I COULDN'T FIND A CASE WHERE THERE WAS A REGULATION OUTSIDE THE HOME LIKE CONCEALED CARRY. WE'VE HAD TWO CASES, I BELIEVE, IN CALIFORNIA, YARBROUGH AND FLORES, WHICH HAVE HELD THAT HELLER DOESN'T APPLY TO THAT, AND BOTH OF THOSE CASES GO INTO THE COMPELLING GOVERNMENTAL INTEREST FOR CONCEALED-CARRY REGULATION.

TRULY, WHAT THIS IS IS A CHALLENGE TO 12031. IF PLAINTIFFS' POSITION IS WE HAVE A CONSTITUTIONAL RIGHT TO BEAR LOADED FIREARMS IN PUBLIC, THEY SHOULD BE CHALLENGING 12031. THERE IS NO CASE THAT HOLDS THAT THERE IS, CONCEALED-WEAPONS REGULATIONS ARE CONDITIONAL UPON LOADED OPEN-CARRY LAWS. JUSTICE SCALIA DOESN'T SAY THAT IN HIS OPINION. THERE'S NO CASE THAT I CAN FIND THAT SAYS THAT THEY'RE CONDITIONAL.

CALIFORNIA HAS VERY CAREFULLY REGULATED CONCEALED WEAPONS FOR YEARS. MOST STATES DO. CALIFORNIA GETS TO MAKE A CHOICE AND ITS LEGISLATURE GETS TO MAKE THESE DECISIONS BY CAREFULLY WEIGHING ALL OF THIS EVIDENCE THAT YOUR HONOR HAS THROWN AT YOU IN THE FORM OF DECLARATIONS AND WEBSITES AND LAW REVIEW ARTICLES.

THE PLAINTIFFS WANT YOU TO OVERTURN 12050 BASED UPON, I COUNTED, NINE PAGES OF DECLARATIONS, WITHOUT HAVING THEM, THESE ISSUES WEIGHED AND EVALUATED BY THE LEGISLATURE BASED UPON INDIVIDUAL STATE NEEDS AND NEEDS IN THE CITY OF SAN DIEGO, WHICH IS DIFFERENT FROM MIDDLE WISCONSIN, WHICH IS ONE OF THE CASES THEY CITE FROM THE CIRCUIT COURT IN MIDDLE WISCONSIN. SAN DIEGO NEEDS IS BORDER TOWN. WE NEED TO HAVE CONCEALED-WEAPONS REGULATION.

FRANK ZIMRING'S DECLARATION -- I'M NOT GOING TO READ IT AGAIN -- TALKS ABOUT WHAT A HIGH PRIORITY THIS IS FOR LAW ENFORCEMENT, AND IT'S NOT ABOUT HOMICIDE RATE. IT'S ABOUT THE USE OF A HANDGUN AS A WEAPON OF CHOICE FOR CRIMINALS.

THE COURT: LET ME JUST STOP YOU THERE.

LET'S GO BACK TO THE, WHAT NEEDS TO BE, THE THREATS. IN OTHER WORDS, A PERSON WHO APPLIES FOR A LICENSE AND IT'S FOR SELF-DEFENSE HAS TO DOCUMENT THAT THEY'RE IN, THERE BASICALLY HAS BEEN A THREAT IN THE PAST, AND SO, THEREFORE, AND BECAUSE OF THE TYPE OF THREAT, THERE PERHAPS WILL BE SOME THREATS IN THE FUTURE, BUT THERE'S NOTHING OTHER THAN THE PERSON CARRYING THE UNLOADED FIREARM TO ASSIST A PERSON WHO SPONTANEOUSLY NEEDS TO DEFEND HIMSELF OR HERSELF. CORRECT?

MR. CHAPIN: EXCEPT THE EMERGENCY EXCEPTION AND ALL THE OTHER EXCEPTIONS IN 12031.

THE COURT: IN YOUR HOME.

MR. CHAPIN: IN YOUR HOME, IN YOUR BUSINESS, IN YOUR

CAMPSITE.

THE COURT: I'M TALKING ABOUT THE PUBLIC, IN PUBLIC.

MR. CHAPIN: IN PUBLIC.

THE COURT: THE EMERGENCY EXCEPTION BEING THAT YOU CARRY AN UNLOADED FIREARM.

MR. CHAPIN: AND YOU CAN LOAD IT --

THE COURT: LOAD IT.

MR. CHAPIN: -- ANYTIME YOU REASONABLY BELIEVE YOU'RE IN DANGER.

THE COURT: SO, OTHER THAN THAT, THAT'S WHAT BASICALLY ALLOWS YOU TO DEFEND YOURSELF IN AN INSTANT, OR THREE SECONDS, I GUESS.

MR. CHAPIN: WELL, THERE ARE OTHER MEANS OF DEFENDING YOURSELF OTHER THAN USING A FIREARM.

THE COURT: CORRECT, CORRECT.

MR. CHAPIN: MOST PEOPLE DON'T DO THAT.

THE COURT: BUT ASSUMING A FIREARM IS USED.

MR. CHAPIN: AND I HAVEN'T SEEN ANY EVIDENCE OF WHAT TYPE OF THREAT THAT THE PLAINTIFFS ARE TALKING ABOUT. WHAT KIND OF CIRCUMSTANCES WOULD YOU NEED TO BE ABLE TO DRAW YOUR FIREARM IMMEDIATELY AND FIRE IT? I DON'T HAVE AN EXAMPLE. I GUESS I COULD IMAGINE SOME. BUT IF YOU'RE WEARING A FIREARM OPENLY ON YOUR HIP, I DOUBT THAT A CRIMINAL IS GOING TO COME UP TO YOU AND TAKE YOU ON.

IT'S INTERESTING AND I WANTED TO POINT OUT TO THE

COURT HOW FAR THE PLAINTIFFS WANT TO GO WITH THIS. IN THEIR SURREPLY, AT PAGE THREE, THEY HAPPEN TO MENTION CALIFORNIA PENAL CODE AND FEDERAL LAW WHICH MAKES IT ILLEGAL TO CARRY A FIREARM WITHIN A THOUSAND FEET OF A PUBLIC OR PRIVATE SCHOOL. WITH A CONCEALED-WEAPONS LICENSE, THEY CAN GO WHEREVER THEY WANT. SO THEY CAN GO WITHIN A THOUSAND YARDS OF A SCHOOL. THAT'S WHERE THEY WANT TO GO. SOME STATES REGULATE CARRYING FIREARMS IN PUBLIC PARKS. WITH A CONCEALED-WEAPONS LICENSE, THEY DON'T HAVE TO ABIDE BY THAT. THEY CAN GO CARRY THEIR CONCEALED LOADED FIREARM IN A PUBLIC PARK.

I'M WONDERING ABOUT THE CONSEQUENCES FOR BUSINESSES, BARS IN THE GASLAMP, INSURANCE COVERAGE, IF THE LAW CHANGES. I DON'T KNOW ABOUT THAT, AND THERE'S NO EVIDENCE OF THAT BEFORE THE COURT, BUT I THINK THAT'S SOMETHING THAT YOU HAVE TO THINK ABOUT IF WE'RE GOING TO GO THAT DIRECTION. SAN DIEGO IS A LARGE CITY. IT'S A METROPOLITAN AREA. WE HAVE CRIMINAL GANGS. I DO DEFENSE. I WAS A PROSECUTOR AS WELL, AND GANGS USE THE NEWBY WHO DOESN'T HAVE A GANG IDENTIFICATION AND A CRIMINAL HISTORY TO CARRY THE FIREARM WHEN THEY'RE DRIVING AROUND IN A CAR, LOOKING FOR SOMEBODY TO SHOOT.

THE COURT: BUT AREN'T THEY GOING TO GET FIREARMS ANYWAY WHETHER OR NOT THEY'RE LICENSED?

MR. CHAPIN: THAT'S A GREAT ARGUMENT, AND I'M SURE THEY'RE GOING TO MAKE THAT ARGUMENT. WHY BOTHER TO HAVE TRAFFIC LAWS AND SPEED LIMITS BECAUSE PEOPLE ARE GOING TO

SPEED ANYWAY AND JUST LET THEM ALL GO. PEOPLE DO ABIDE BY THE LAW, AND THAT'S WHY WE DON'T HAVE STATISTICS IN CALIFORNIA THAT HELP US IDENTIFY SPECIFICALLY THE COMPELLING GOVERNMENTAL INTEREST. IT DATES BACK TO THE 1800s. WE KNOW FROM TRADITIONAL AND HISTORICAL CONCEALED-WEAPONS REGULATIONS THAT JUSTICE SCALIA TELLS US ABOUT.

THE COURT: WHAT IF A PERSON WHO'S REALLY HONEST APPLIES FOR A PERMIT, LET'S SAY, AND REALLY FEARS FOR HIS OR HER SAFETY, FOR WHATEVER REASON, BUT DOESN'T HAVE THE DOCUMENTATION TO SHOW IT? THAT PERSON PROBABLY CAN'T SHOW GOOD CAUSE. CORRECT?

MR. CHAPIN: HE WOULD HAVE TO BE ABLE TO ARTICULATE IT, AS MR. CLEARY DID. HE WORKS IN A PSYCHIATRIC WARD AND WAS ABLE TO ARTICULATE, BOTH INITIALLY AND LATER ON WITH THE RENEWAL, THE FEAR HE HAD WORKING IN A PSYCHIATRIC WARD WITH PATIENTS WHO EVENTUALLY GET OUT OR ARE RELEASED AFTER A 72-HOUR HOLD AND KNOW WHO HE IS. SO YOU COULD, UNDER CERTAIN CIRCUMSTANCES, GET A PERMIT WITH BEING ABLE TO ARTICULATE UNDER OATH, OF COURSE, UNDER PAIN AND PENALTY OF PERJURY, THAT THESE ARE ACTUALLY TRUE.

THE COURT: WITHOUT DOCUMENTATION.

MR. CHAPIN: WITHOUT DOCUMENTATION, AND THAT'S WHY WE HAVE A HEARING PROCESS. THE STAFF HAS THEIR MARCHING ORDERS.

THE COURT: RIGHT. THEY SAID NO INITIALLY, YOU DON'T HAVE THE DOCUMENTATION.

MR. CHAPIN: THE HEARING OFFICER, LIKE YOU, WHO'S LOOKING AT IT AND SAYING, WELL, YOU KNOW, I THINK THE STAFF, YOU'VE DONE YOUR JOB, BUT THIS KIND OF PERSON NEEDS IT. AND, YOU KNOW, THE POLICY OF THE DEPARTMENT IS ACTUALLY TO GRANT THE LICENSES, NOT TO DENY THEM. WE DENY VERY FEW, AND THE PLAINTIFFS KNOW THAT, I THINK, IN THE LAST FOUR YEARS WE'VE DENIED 16. MOST PEOPLE WHO COME TO THE DEPARTMENT HAVE A SPECIFIC NEED. THEY HAVE A BUSINESS. THE JEWELRY BUSINESS IS THE CLASSIC EXAMPLE. THEY CARRY LARGE AMOUNTS OF CASH, LARGE NUMBERS OF JEWELRY. THAT'S THE CLASSIC EXAMPLE, AND THERE ARE, TYPICALLY, HOLDUPS IN THE JEWELRY BUSINESS AND THEIR PROPRIETORS AROUND THE NATION REGULARLY. THAT'S JUST THE TYPICAL EXAMPLE.

THE COURT: HAVE ANY, SINCE THIS LAWSUIT WAS FILED, HAVE ANY CHANGES BEEN MADE?

MR. CHAPIN: NO.

THE COURT: IN HOW THE COUNTY IS ENFORCING THIS OR (PAUSE) --

MR. CHAPIN: NO. ONE OF THE ADVANTAGES THAT WE HAVE IS THAT BLANCA PELOWITZ HAS BEEN THE MANAGER OF THE LICENSING DIVISION FOR, SINCE AT LEAST 2002, AND WE HAVE THE ADVANTAGE IN THIS CASE OF HAVING CONSISTENT APPLICATION OF OUR POLICIES SINCE THEN, AND SHE REVIEWS EVERY INITIAL APPLICATION AND MAKES A DETERMINATION AND MAKES THE RECOMMENDATION TO HER SUPERVISOR, WHO THEN EITHER APPROVES IT OR THERE'S A HEARING

INVOLVED.

THE COURT: OKAY.

MR. CHAPIN: HER POLICIES ARE VERY CONSISTENT. IN FACT, IF SHE HAS TO COME IN HERE AND TESTIFY, YOU WILL HEAR SHE'S QUITE FAMILIAR WITH EVERY ONE OF THESE FILES. THERE WERE 1,243 OF THEM, I THINK, AS OF TODAY, AND I COULD PULL TEN OF THEM RANDOMLY AND SHE'D BE ABLE TO TELL YOU EVERYTHING ABOUT EVERY ONE OF THEM, HOW THEY GOT STARTED AND WHERE THEY ARE NOW.

THE COURT: ON THE EQUAL-PROTECTION CLAIM, IS IT YOUR POSITION, YOUR CLIENTS' POSITION, THAT THE SAME LEVEL OF SCRUTINY APPLIES? THAT IS, STRICT SCRUTINY.

MR. CHAPIN: WELL, I WOULDN'T SAY THAT STRICT SCRUTINY APPLIES BECAUSE I DON'T BELIEVE THAT A FUNDAMENTAL RIGHT IS INVOLVED IN A CONCEALED-WEAPONS REGULATION.

THE COURT: I KNOW, BUT ASSUMING A FUNDAMENTAL RIGHT APPLIES.

MR. CHAPIN: IF I'M ASSUMING A FUNDAMENTAL RIGHT APPLIES, THEN, BASED UPON THE CASES I'VE READ, INTERMEDIATE SCRUTINY IS THE MOST COMMONLY APPLIED STANDARD I'VE SEEN, AND I'M NOT GOING TO TRY TO REARGUE ALL THE SCRUTINY STANDARDS BEFORE YOUR HONOR. YOU'VE GOT A LOT OF INFORMATION ABOUT IT --

THE COURT: YES.

MR. CHAPIN: -- AND I CONCEDED, BASICALLY, THAT

INTERMEDIATE SCRUTINY IS THE MOST COMMONLY USED AND BY FAR THE MOST COMMONLY USED STANDARD, AND I THINK THAT WE'VE MET THAT STANDARD WITH ALL OF THE CASES THAT WE'VE CITED HISTORICALLY, INCLUDING NUNN AND CHANDLER, WHICH THE SUPREME COURT CITES TO, A STATE OF CALIFORNIA CASE, I BELIEVE ONE FROM OUR DISTRICT HERE, TALKING ABOUT THE COMPELLING GOVERNMENTAL INTEREST IN CONCEALED-WEAPONS REGULATION.

THE COURT: ANYTHING ELSE THAT YOU WOULD LIKE TO ARGUE? I MEAN, I'LL LET YOU REPLY.

MR. CHAPIN: WELL, I THINK WE'VE DISCUSSED SOME OF THE OTHER ISSUES THAT I RAISED IN MY MOTION.

THE COURT: BASICALLY, YOU WANT ME TO GRANT -- YOU SAY THERE'S NO MATERIAL ISSUES OF FACT THAT ARE IN DISPUTE, AND THEREFORE I SHOULD GRANT THE MOTION OF THE DEFENDANTS. CORRECT?

MR. CHAPIN: YES, AND THE DUE-PROCESS ISSUE, I THINK YOUR HONOR HAS DEALT WITH THOSE. I DON'T THINK THERE'S A DUE-PROCESS ISSUE. I'M WILLING TO STIPULATE RIGHT HERE, AND I'VE TOLD COUNSEL AND MR. PERUTA, AND EVEN BLANCA HAS IT IN HER DECLARATION, THAT MR. PERUTA WAS NOT DENIED BECAUSE OF A LACK OF RESIDENCY. IF YOU CAN ESTABLISH GOOD CAUSE, YOU CAN GET A PERMIT AS A PART-TIME RESIDENT. I'LL STIPULATE TO THAT RIGHT NOW. I DON'T KNOW WHAT MR. PERUTA'S CURRENT RESIDENCY STATUS IS, BUT AT THE TIME OF HIS APPLICATION HE WOULD HAVE GOTTEN IT.

THE RIGHT TO TRAVEL, I THINK YOUR HONOR HAS DEALT WITH THAT.

THE EQUAL PROTECTION IS THE ONLY ONE THAT IS FACTUALLY BASED, AND MISS PELOWITZ'S DECLARATION COVERS IT ALL. THERE ISN'T SPECIAL TREATMENT FOR HDSA MEMBERS. IN FACT, IF SHE WERE HERE TO TESTIFY, SHE WOULD TELL YOU THAT, BECAUSE SHE'S HEARD RUMORS ABOUT THIS, THAT WHEN SHE GETS AN HDSA FILE, SHE PAYS SPECIAL ATTENTION TO IT TO MAKE SURE THAT THEY MEET THE GOOD-CAUSE REQUIREMENT. AND IF ANYBODY COMES IN AND SAYS, HEY, I'M AN HDSA MEMBER, THEY'RE TOLD AT THE COUNTER THAT THAT DOESN'T GET YOU THERE.

THE PLAINTIFFS HAVE HAD ACCESS TO EVERY ONE OF OUR FILES. THEY HAVE PULLED ONLY RENEWAL APPLICATIONS AND A RANDOM HANDFUL OF PAGES FROM RENEWAL APPLICATIONS THAT TELL THIS COURT THAT THERE'S AN EQUAL-PROTECTION VIOLATION. IT ISN'T HAPPENING. IT'S BEEN APPLIED CONSISTENTLY, AND THE DECLARATION STANDS FOR ITSELF. THERE IS NO DECLARATION FROM AN HDSA MEMBER THAT SAYS, I GOT SPECIAL TREATMENT. THE ONLY DECLARATION IS FROM MR. CLEARY, WHO WASN'T AN HDSA MEMBER WHEN HIS APPEAL WAS HEARD.

THE COURT: THANK YOU.

MR. CHAPIN: ANY OTHER QUESTIONS, YOUR HONOR?

THE COURT: THAT'S IT FOR NOW.

MR. CHAPIN: THANK YOU.

THE COURT: OKAY. THE COUNTY SAYS THIS ISN'T EVEN A

RIGHT THAT'S GUARANTEED BY THE SECOND AMENDMENT, TO CARRY FIREARMS IN PUBLIC.

MR. MICHEL: WELL --

THE COURT: I MEAN, AND THERE'S BEEN CITES TO JUSTICE SCALIA'S, I GUESS, STATEMENTS IN HELLER AND THE LAST PARAGRAPH IN HELLER.

MR. MICHEL: THAT SAME ARGUMENT WAS MADE AT THE MOTION TO DISMISS AND REJECTED BY THIS VERY COURT. I MEAN, TO TRY AND CLAIM THAT THE SECOND AMENDMENT, THAT (PAUSE) -- I THINK IT'S WISHFUL THINKING. THE COURT, THE SUPREME COURT CONTEMPLATED, AS WE MENTIONED IN OUR BRIEFS, THE SUPREME COURT CONTEMPLATED MANY SITUATIONS WHERE THE FIREARM WAS OUTSIDE THE HOME. THE RIGHT TO SELF-DEFENSE DOESN'T END AT THE THRESHOLD OF YOUR HOME. THE RIGHT TO SELF-DEFENSE INCLUDES, AND THE RIGHT TO KEEP AND BEAR, BEAR MEANS CARRY, ACCORDING TO THE SUPREME COURT, ARMS, INCLUDES CARRY IN PUBLIC.

SO THERE IS THE FUNDAMENTAL RIGHT. THIS CASE IS THE FIRST CASE THAT'S GOING TO ADDRESS THE RIGHT TO CARRY AS OPPOSED TO THE RIGHT TO KEEP, THE RIGHT TO BEAR AND CARRY AS OPPOSED TO THE RIGHT TO KEEP. THAT'S, THE ONLY REASON THAT THAT'S THE CASE IS BECAUSE CARRY AND BEAR WAS NOT RAISED IN HELLER OR McDONALD, BECAUSE THOSE CASES WERE CHOSEN SO THAT IT WOULDN'T, THEY WOULDN'T HAVE TO ADDRESS THOSE OTHER SECONDARY, YOU KNOW, THE SECOND HALF OF THE AMENDMENT.

THE HELLER CASE WAS, FIRST, WHETHER OR NOT IT WAS A

COLLECTIVE RIGHT OR AN INDIVIDUAL RIGHT AND WHETHER OR NOT THE RIGHT TO SELF-DEFENSE WAS FUNDAMENTAL. THE McDONALD CASE WAS WHETHER OR NOT THE SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS WAS FUNDAMENTAL. BOTH HAVE BEEN ANSWERED IN THE AFFIRMATIVE. BOTH ARE FUNDAMENTAL INDIVIDUAL RIGHTS, AND McDONALD MAKES CLEAR THAT THE SECOND AMENDMENT IS NOT A SECOND-CLASS RIGHT. IT'S ENTITLED TO EVERY BIT OF THE PROTECTIONS THAT THE FIRST AMENDMENT GETS. IT IS A FUNDAMENTAL RIGHT.

MOST OF WHAT WE'RE HEARING FROM THE GOVERNMENT, AND IT'S NOT PARTICULARLY SURPRISING, IS THAT THEY'RE GOING TO LOSE DISCRETION, THEY'RE GOING TO LOSE THE ABILITY TO MAKE CERTAIN POLICY CHOICES, AND THAT WAS ANTICIPATED BY HELLER, AND LET ME CLARIFY. WE'RE NOT CHALLENGING ONE TWO -- 12025 GIVES DISCRETION TO THE SHERIFFS, AND OVER THE YEARS, BEFORE HELLER AND McDONALD CAME DOWN, SHERIFFS HAD WIDE DISCRETION IN DETERMINING WHAT CONSTITUTED GOOD CAUSE. THAT WAS THE STATE OF THE LAW. BUT WHEN -- AND BECAUSE THE SECOND AMENDMENT WAS DEEMED TO BE, OR RIGHT TO CARRY WAS DEEMED TO ESSENTIALLY BE A PRIVILEGE, THAT DISCRETION COULD BE VERY BROAD. YOU COULD DENY FOR PRACTICALLY ANY REASON. THERE WAS NO, NO REAL CONSTRAINTS ON THAT.

THE POINT OF OUR LAWSUIT IS THAT DISCRETION IS NOW MUCH NARROWER. THE SHERIFFS AND THE ISSUING AGENCIES, THE ISSUING ENTITIES THAT APPROVE THESE CCW APPLICATIONS DO NOT

HAVE THAT KIND OF DISCRETION ANYMORE. IF THEY DEPRIVE YOU, FAIL TO, REFUSE TO EXERCISE THEIR DISCRETION BECAUSE ALL YOU SAY IS SELF-DEFENSE AND THEY WANT SOMETHING MORE, THAT IS AN ABUSE OF DISCRETION. OUR LAWSUIT CHALLENGES THE SHERIFF'S EXERCISE OF HIS DISCRETION UNDER 12025 AND CONTENDS THAT THAT IS AN ABUSE OF DISCRETION TO NOT APPLY IT CONSTITUTIONALLY, WHICH I THINK IS FAIRLY SELF-EVIDENT. IF YOU'RE BREAKING, IF YOU'RE VIOLATING THE CONSTITUTION IN NOT ISSUING THE PERMIT, THAT'S AN ABUSE OF DISCRETION.

SO IT'S NOT AN OFFICIAL CHALLENGE TO 12025, ALTHOUGH WE COULD AMEND. I MEAN, IF THAT, IF THE COURT SEES IT DIFFERENT PROCEDURALLY, I'M NOT, YOU KNOW, I'M NOT, I DON'T REALLY WANT TO GET BOGGED DOWN BECAUSE OF THE PROCEDURAL APPROACH WE TOOK. WE COULD CERTAINLY AMEND TO CHALLENGE THAT PARTICULAR STATUTE IN A DIFFERENT WAY IF THE COURT FELT THAT WAS THE MORE APPROPRIATE WAY TO APPROACH IT, AND WE HAD SOME DEBATE ABOUT THAT, BUT THIS SEEMED TO BE THE WAY BECAUSE GOOD CAUSE, IF IT INCLUDES SELF-DEFENSE, THAT'S NOT UNCONSTITUTIONAL. YOU CAN REQUIRE GOOD CAUSE AS LONG AS SELF-DEFENSE IS RECOGNIZED AS A GOOD CAUSE.

AND WE DO NOT HAVE TO PRESENT ANY EVIDENCE. IT'S NOT OUR BURDEN. THE COUNTY AND ZIMRING NEVER CONNECTS CCWs TO CRIME. IT'S NOT ABOUT CONCEALED WEAPONS *PER SE*. IT'S ABOUT CONCEALED-WEAPON PERMITTEES. ARE CONCEALED WEAPON LICENSES CAUSING INCREASED CRIME? ARE CERTAIN PEOPLE CARRYING

CONCEALED FIREARMS WITH NEFARIOUS PURPOSES? YES. CAN THE STATE BAN CONCEALED WEAPONS ENTIRELY IF IT WANTS TO MAKE IT, AS ITS DISCRETION GETS NARROWED, SO THAT IT'S LEGISLATIVE DISCRETION? IT CAN'T WIPE OUT THE RIGHT. THAT'S NUNN. BUT IT CAN CHOOSE HOW TO REGULATE THE RIGHT. SO IT COULD SAY, IT COULD MAKE A POLICY CHOICE WITHIN THAT CONTEXTUAL PARAMETER AND SAY, WE'RE GOING TO ALLOW OPEN LOADED CARRY SO THAT YOUR FIREARM IS EFFECTIVE FOR IMMEDIATE SELF-DEFENSE. IT'S THERE.

BY THE WAY, THAT WHOLE THREE-SECOND THING, THAT'S LIKE IF YOU'RE AN EXPERT. YOU KNOW, I DON'T REALLY THINK (PAUSE) -- HELLER MAKES IT CLEAR, SO THAT WE DON'T NEED TO GO DOWN THE ROAD TO CONFLICTING EXPERTS', COMPETING EXPERTS' DECLARATIONS ABOUT HOW LONG IT TAKES TO LOAD A GUN. IT HAS TO BE IMMEDIATE SELF-DEFENSE. AND I REMEMBER AT THE ORAL ARGUMENT JUSTICE SCALIA AND JUSTICE ROBERTS HAD A CHUCKLE OVER THE NOTION WHEN THE ATTORNEY FOR THE DISTRICT OF COLUMBIA WAS CLAIMING THAT ALL IT TAKES IS A SECOND TO TAKE THE TRIGGER LOCK OFF, YOU KNOW, HE'S LIKE, WHEN I HEAR A NOISE IN THE HOUSE, I'M GOING TO TURN ON THE LIGHT, PUT MY SPECTACLES ON AND TRY TO UNDO THE TRIGGER LOCK, READ THE COMBINATION IN THE MIDDLE OF THE NIGHT? I MEAN, THE IDEA IS YOU NEED TO BE ABLE TO USE IT FOR IMMEDIATE SELF-DEFENSE BECAUSE YOU HAVE JUST BEEN SURPRISED. YOU'RE NOW TRYING TO LOAD A FIREARM UNDER PRESSURE, WHILE YOUR LIFE IS AT STAKE, AND SECONDS MATTER, YOU KNOW, TIME SLOWS DOWN AND SECONDS MATTER MORE THAN AT ANY

OTHER TIME IN YOUR LIFE AND YOU'RE TRYING TO LOAD THE FIREARM? THAT'S NOT AN EFFECTIVE IMMEDIATE EXERCISE OF THE FUNDAMENTAL RIGHT TO SELF-DEFENSE.

BUT AGAIN THE COUNTY AND PROFESSOR ZIMRING HAS NOT PRESENTED ANY EVIDENCE THAT CRIMINALS GO AND GET CCWs. CRIMINALS MAY POSSESS CONCEALED FIREARMS, BUT THEY DON'T GO GET CONCEALED-WEAPONS PERMITS. IF YOU HAVE MORE CONCEALED-WEAPONS PERMITS, THAT DOESN'T MEAN THAT CRIME IS GOING TO GO UP. THE TRIGGER DOES NOT PULL THE FINGER. THE CRIMINAL CHOOSES TO CARRY A FIREARM POSSESSED, AND AGAIN THE LEGISLATURE WITHIN THAT PARAMETER --

THE COURT: A CRIMINAL, I MEAN, A CRIMINAL IS NOT GOING TO TRY TO GET A CONCEALED-WEAPONS LICENSE, BUT ISN'T A CRIMINAL WHO CAN'T GET A LICENSE GOING TO USE SOMEONE WHO, A FIRST-TIMER, I THINK IT IS, OR SOMETHING LIKE THAT, A NEWBY, AS THE COUNTY SAYS, TO CARRY OUT, EFFECTIVELY, A CRIMINAL ACTIVITY?

MR. MICHEL: TO DO WHAT? BE THE, LIKE THE MULE FOR THE GUN --

THE COURT: RIGHT.

MR. MICHEL: -- CARRY THE GUN TO THE CRIME SCENE --

THE COURT: YES.

MR. MICHEL: -- SO THAT THE GUY (PAUSE) -- I MEAN, THINK ABOUT THAT FOR A SECOND. I DON'T MEAN TO BELITTLE THAT QUESTION. THINK ABOUT THAT FOR A SECOND. WHAT THE COUNTY'S

POSITION -- IS IT REALLY THE COUNTY'S POSITION THAT SOME, SOME, I GUESS, 18-YEAR-OLD WHO -- ACTUALLY, 18, BETWEEN 18 AND 21, YOU CAN'T POSSESS A HANDGUN. SO A 21-YEAR-OLD GANG MEMBER IS GOING TO GO DOWN, PASS THE GOOD-CHARACTER EVALUATION, GETS A CONCEALED-WEAPON PERMIT, THEN GO GETS THE LICENSE, GETS THE GUN, AS THEY GO TO DO A DRIVE-BY SHOOTING, HE WILL HAVE HIS CONCEALED-WEAPON PERMIT IN HIS POCKET, TAKES THE GUN, TAGS ALONG WITH THE GUY WHO WON'T, THE GANG MEMBER, YOU KNOW, THE LEADER OF THE GANG WHO WON'T CARRY THE GUN BECAUSE HE'S GOING TO, HE DOESN'T WANT TO POSSESS THAT GUN UNTIL HE'S ACTUALLY READY TO KILL SOMEONE WITH IT, AND THEN HANDS OFF THE GUN AT THE CRIME SCENE SO THAT BETWEEN THE TIME THEY LEFT THEIR HOUSE, OR WHEREVER, AND THE TIME THEY GET TO THE CRIME SCENE, THE CONCEALED-CARRY MISDEMEANOR LAW WAS NOT VIOLATED?

I MEAN, IT'S KIND OF LUDICROUS IF YOU THINK ABOUT THAT. IT'S JUST, IT'S NOT -- WELL, THERE'S CERTAINLY NO EVIDENCE THAT THAT HAPPENS, THAT THAT'S A PRACTICE, AND IF IT'S THE COUNTY'S BURDEN TO TRY AND ESTABLISH, TO JUSTIFY THIS BAN, THEN THEY HAVE TO PROVE THAT, AND THERE'S NOTHING IN THE COUNTY'S DECLARATIONS, OR IN ZIMRING'S, OR NO EVIDENCE THAT THAT'S A PRACTICE, THAT SOMEHOW CRIME INCREASES BECAUSE CCWs ARE ISSUED.

AND THIS IS NOT AN ACADEMIC EXERCISE ANYMORE. ALL THESE ISSUES ABOUT PARKS, BARS, SCHOOLS, THERE ARE 40 STATES NOW THAT HAVE *SHALL ISSUE* SYSTEMS WHERE IF YOU GO IN AND SAY,

I WANT A PERMIT FOR SELF-DEFENSE, YOU GET ONE, UNLESS THERE'S SOME DISABLING FEATURE THAT WOULD STOP YOU FROM BEING ABLE TO DO THAT.

THE COURT: BUT THAT GETS BACK TO THEIR ARGUMENT, LOOK IT, THE STATE LEGISLATURE HAS SPOKEN. THE LEGISLATURE, AFTER, I ASSUME, DEBATING SOME OF THESE ISSUES THAT WE'RE ARGUING ABOUT NOW, HAS SAID THIS IS A *MAY ISSUE* STATE, AND WE DON'T CARE WHAT THE OTHER STATES ARE, THE *SHALL ISSUE*. BUT, I MEAN, HOW MUCH WEIGHT DO I GIVE TO THAT, THAT A LOT OF STATES ARE *SHALL ISSUE*?

MR. MICHEL: WELL, THE LEGISLATURE, CALIFORNIA LEGISLATURE, HAS NOT SAID THAT THIS IS A *MAY ISSUE* STATE. THEY HAVE DEFINITELY NOT SAID THAT. THEY'VE SAID THAT BOTH --

THE COURT: WELL, THE STATUTE SAYS *MAY ISSUE*.

MR. MICHEL: NO.

THE COURT: DOESN'T IT?

MR. MICHEL: WELL, IT SAYS MAY ISSUE IF THERE'S GOOD CAUSE ESTABLISHED, BUT THERE'S A WHOLE LINE OF CASES, WHICH I DON'T HAVE OFF THE TOP OF MY HEAD, WHICH SAY MAY MEANS SHALL IN THAT CONTEXT. SO IF THE COURT WOULD LIKE ADDITIONAL BRIEFING. I DON'T THINK THE COURT --

THE COURT: BUT I THOUGHT YOU WERE CONCEDING THIS IS NOT A *SHALL ISSUE* STATE. AREN'T YOU?

MR. MICHEL: YOUR HONOR, YOU HAVE TO BE, WITH ALL DUE RESPECT, YOU NEED TO BE CAREFUL ABOUT HOW YOU USE THOSE

COLLOQUIALISMS --

THE COURT: OKAY.

MR. MICHEL: -- BECAUSE THEY'RE NOT REALLY TERMS OF ART. *SHALL ISSUE* STATES, SO-CALLED *SHALL ISSUE* STATES, THAT JUST MEANS IF YOU GO IN AND APPLY, YOU'LL GET A PERMIT UNLESS THERE'S A REASON NOT TO GIVE YOU ONE.

THE COURT: AND THAT'S WHAT YOU'RE ARGUING SHOULD BE DONE HERE.

MR. MICHEL: AS A PRACTICAL MATTER, YES. AS A MATTER OF READING WHAT THE LAW SAYS, NO. WHAT THE LAW SAYS IS, THAT IF YOU HAVE GOOD CAUSE, THE SHERIFF HAS THE DISCRETION; HE MAY ISSUE YOU A PERMIT.

NOW, THERE IS, JUST TO MAKE THINGS A LITTLE MORE COMPLICATED, THERE IS A LINE OF CASES THAT SAYS, WHEN IT SAYS YOU MAY ISSUE A PERMIT, IT MEANS YOU SHALL. IF YOU FIND GOOD CAUSE, YOU SHALL ISSUE A PERMIT, BECAUSE THERE WAS SOME CASES THAT DEALT WITH THE CONSTITUTIONALITY OF HAVING THAT MUCH DISCRETION IN *MAY*, AND, UNFORTUNATELY, I DIDN'T ANTICIPATE THIS PARTICULAR LINE OF QUESTIONING, SO I DON'T HAVE THEM ON THE TOP OF MY, ON THE TIP OF MY TONGUE.

BUT THE POINT IS THAT THE CALIFORNIA STATUTE DOES NOT SAY, DOES NOT SAY THERE'S A LEGISLATIVE HISTORY OR A LEGISLATIVE POLICY CHOICE THAT SAYS WE'RE GOING TO BE A *MAY ISSUE* STATE. WHAT IT SAYS IS THE SHERIFF HAS THE DISCRETION, AND SO IN COUNTIES, IN RURAL COUNTIES, WE ARE EFFECTIVELY,

CALIFORNIA IS EFFECTIVELY *SHALL ISSUE*. SHERIFFS ISSUE TO ANYONE WHO ASKS FOR ONE. WHAT THE LEGISLATURE WAS TRYING TO DO, I GUESS, AT THE TIME WAS ALLOW FOR SOME VARIATION BETWEEN ONE COUNTY AND ANOTHER, FRANKLY. IT WASN'T SAYING THAT WE'RE GOING TO BE *MAY ISSUE* AND YOU ONLY GET IT IF THE SHERIFF DECIDES YOU HAVE GOOD CAUSE.

THE COURT: SO YOU'RE SAYING THERE ARE COUNTIES WITHIN THE STATE OF CALIFORNIA THAT APPLY THE GOOD-CAUSE STANDARD DIFFERENTLY.

MR. MICHEL: OH, YES. YES, YES, YES, THERE ARE, BECAUSE THE DISCRETION, BECAUSE OF THE DISCRETION THAT THAT, THAT 12025 GRANTS SHERIFFS. IN FACT, I SAW A MAP ON THE INTERNET YESTERDAY. I CAN'T REMEMBER THE SITE, BUT IT SHOWS THAT -- ESSENTIALLY, IT'S JUST THE STRIP, THE COASTAL STRIP, THAT HAS LIMITED ISSUANCE OF CONCEALED-WEAPON PERMITS. THE VAST MAJORITY --

THE COURT: BUT THAT'S WHERE THE MAJOR CITIES ARE --

MR. MICHEL: CORRECT.

THE COURT: -- ISN'T IT?

MR. MICHEL: CORRECT. THAT'S THE URBAN AREAS, BUT YOU WEREN'T ASKING ABOUT AN URBAN VS. RURAL IN YOUR QUESTION.

THE COURT: RIGHT.

MR. MICHEL: YOU WERE ASKING ABOUT A *MAY ISSUE* VS. *SHALL ISSUE*. THE POINT I'M TRYING TO ILLUSTRATE IS THAT YOU CAN'T JUST SAY CALIFORNIA IS *SHALL ISSUE* OR CALIFORNIA IS *MAY*

ISSUE. CALIFORNIA IS DISCRETIONARY, AND THAT DISCRETION PREVIOUSLY WAS VERY WIDE, AND SO SOME SHERIFFS SAID, I'LL ISSUE IT TO ANYBODY WHO ASKS, AND SOME SHERIFFS SAID, OR POLICE CHIEFS SAID, I'M NOT GIVING A CONCEALED-WEAPON PERMIT TO ANYONE. NOW, USUALLY, THAT WAS ABOUT, MORE ABOUT POLITICS AND POWER, I SUSPECT, THAN REALLY POLICY. BUT OUR POINT NOW IS THAT GOING BEYOND, REQUIRING, IN THE EXERCISE OF YOUR DISCRETION, REQUIRING MORE THAN SELF-DEFENSE IS AN ABUSE OF DISCRETION.

THE COURT: YOU'RE THE ONE THAT MENTIONED SOME STATES ARE *SHALL ISSUE*, AND SO WHAT DO YOU MEAN BY THAT?

MR. MICHEL: IN THOSE STATES, THE LAW SAYS, IF YOU GO IN AND APPLY FOR A PERMIT, YOU'RE GOING TO GET ONE, UNLESS YOU HAVE BAD, AND IT VARIES, YOU HAVE BAD MORAL CHARACTER, OR YOU HAVE, YOU DON'T HAVE THE RIGHT TRAINING, OR (PAUSE) --

THE COURT: RIGHT. YOU DON'T MEET THE QUALIFICATIONS.

MR. MICHEL: THERE ARE A NUMBER OF DIFFERENT, PROBABLY MORE OBJECTIVE TYPES OF STANDARDS. THERE ARE STANDARDS YOU HAVE TO MEET IN ORDER TO GET THAT PERMIT. BUT IF YOU MEET THOSE STANDARDS, IT'S NOT DISCRETIONARY. THE SHERIFF CAN'T SAY, I'M NOT GOING TO GIVE IT TO YOU. IF YOU SAY SELF-DEFENSE AND YOU MEET THE OBJECTIVE CRITERIA, YOU GET ONE. THAT'S *SHALL ISSUE*.

THE COURT: AND HOW MANY STATES ARE THERE THAT DO

THAT?

MR. MICHEL: THIRTY-SEVEN OR 38 AT LAST COUNT.

AND SO IN THOSE STATES WHAT HAPPENS, AND THIS IS WHAT OUR DECLARATIONS ESTABLISH, IN THOSE STATES THE PROPERTY CRIME, THE VIOLENT CRIME RATE GOES DOWN BECAUSE CRIMINALS DON'T KNOW WHO'S ARMED, AND SO ABOUT FIVE PERCENT OF THE PEOPLE TYPICALLY GO OUT AND GET A PERMIT, AND OF THAT FIVE PERCENT A FAR LESSER PERCENTAGE ACTUALLY CARRY THE FIREARM ON THEIR PERSON, BECAUSE IT'S CUMBERSOME. IT'S LIKE CARRYING A BASEBALL AROUND, YOU CAN IMAGINE, ALL DAY LONG. BUT THE CRIMINALS NEVER KNOW WHICH ONES, AND SO AS FAR AS THEY KNOW, FIVE PERCENT OF THE POPULATION MIGHT SHOOT BACK. SO NOBODY GOES DUCK HUNTING WHEN FIVE PERCENT OF THE DUCKS MIGHT SHOOT BACK. SO IN THOSE STATES VIOLENT CRIME GOES DOWN. PROPERTY CRIME SOMETIMES GOES UP BECAUSE THE CRIMINALS STEAL CARS RATHER THAN TRYING TO HOLD SOMEBODY UP, STICK SOMEBODY UP.

SO THIS IS NOT ACADEMIC. THIS IS NOT A HYPOTHETICAL EXERCISE. BUT IT'S ALL IRRELEVANT FOR OUR PURPOSES, I SUBMIT, BECAUSE WE DON'T REALLY NEED TO GET TO THAT BECAUSE, AS THE SUPREME COURT RECOGNIZED IN McDONALD, THE ENSHRINEMENT OF THE CONSTITUIONAL RIGHTS NECESSARILY TAKES CERTAIN POLICY CHOICES OFF THE TABLE. SO WHEN THE COURT IS CONSIDERING THIS, I RESPECTFULLY SUGGEST THE COURT SHOULD REALLY BE VERY CAREFUL ABOUT WHAT DETERMINING IS A POLICY PREFERENCE OR PERHAPS A POLITICAL PREFERENCE ON THE PART OF THE COUNTY AS OPPOSED TO A

CONSTITUTIONAL JUSTIFICATION FOR, EFFECTIVELY, A BAN, OR, TO PUT IT CHARITABLY, SO THAT IT BE SUBJECT TO SOME LEVEL OF SCRUTINY, A SEVERE INFRINGEMENT ON THE RIGHT TO CARRY, BEAR ARMS.

AND A COUPLE OF MISCELLANEOUS POINTS, IF I MIGHT JUST SORT OF RUN THROUGH IT.

THE COURT: YES.

MR. MICHEL: I ALWAYS FIND IT SOMEWHAT HUMOROUS TO HEAR AN ISSUING AGENCY SAY, I ISSUE MOST OF THE APPLICATIONS, I GRANT MOST OF THE APPLICATIONS. THAT'S BECAUSE THE SCREENING MECHANISM IS SET UP SO THAT, WHEN YOU GO IN, YOU DON'T APPLY UNTIL YOU SUBMIT THAT WRITTEN APPLICATION AND WRITE A CHECK; AND BEFORE YOU GET TO DO THAT, THEY WILL INFORMALLY REVIEW YOU AND TELL YOU, YOU DON'T QUALIFY, SO DON'T BOTHER APPLYING. SO YOU CAN'T SAY MOST OF THE APPLICATIONS ARE GRANTED, BECAUSE MOST OF THE PEOPLE WHO GO DOWN TO APPLY NEVER ACTUALLY APPLY BECAUSE THEY'RE TOLD IT'S POINTLESS. SO IT'S KIND OF A MISLEADING CHARACTERIZATION OF THE COUNTY'S POLICY.

A COUPLE OTHER THINGS. I WANT TO MAKE SURE THAT THE COURT UNDERSTANDS. THE SPECIAL RESERVE ARE NOT RESERVE. A RESERVE OFFICER -- I THINK IT'S 859, PENAL CODE SECTION, IS WHAT SETS OUT WHAT A PEACE OFFICER IS UNDER CALIFORNIA LAW, AND IT LAYS OUT THE DIFFERENT CLASSIFICATIONS OF RESERVE PEACE OFFICER AND THE PEACE OFFICER STANDARD TRAINING PROGRAM AND

ALL THE OTHER THINGS YOU HAVE TO DO TO BE CONSIDERED A PEACE OFFICER OR A RESERVE PEACE OFFICER.

THE RESERVE PEACE OFFICER, THE ACTUAL, TECHNICAL RESERVE, STATUTORILY DESIGNATED RESERVE PEACE OFFICERS HAVE A PREFERENTIAL RIGHT TO A PERMIT TO CARRY A FIREARM, A LOADED GUN, IN PUBLIC. THE HONORARY SHERIFF'S DEPUTIES ASSOCIATION ARE NOT RESERVE. I JUST WANT TO MAKE SURE THE COURT UNDERSTANDS THAT. THEY'RE NOT -- IT'S CALLED THE HONORARY RESERVE INFORMALLY, BUT THEY'RE NOT ACTUALLY RESERVE OFFICERS. THEY ARE JUST PRIVATE CITIZENS WHO ARE DOING A VERY GOOD THING FOR THE SHERIFF'S DEPARTMENT, DONATING THEIR TIME AND PROFESSIONAL EXPERTISE AND MONEY, AND GOD BLESS THEM FOR THEIR EFFORTS TO SUPPORT THE SHERIFF'S DEPARTMENT, BUT THEY'RE NOT RESERVE OFFICERS. NONETHELESS, THEY GET (PAUSE) -- WE BELIEVE THAT THERE'S AT LEAST A MATERIAL DISPUTE, DISPUTED MATERIAL FACT ABOUT WHETHER OR NOT THEY GET PREFERENTIAL TREATMENT IN GETTING A PERMIT.

OH, BY THE WAY, ON THE BACH VS. PATAKI CASE, AND I'M NOT SURE THIS IS REALLY RELEVANT BECAUSE OF WHAT THE COUNTY IS SAYING ABOUT ISSUING TO PART-TIME RESIDENTS. IT WAS REALLY ABOUT, OUR CLAIM WAS ABOUT PART-TIME RESIDENTS. NOW, MR. PERUTA HEARD THINGS, PUT A DECLARATION IN ABOUT WHAT HE HEARD. IT SEEMED TO ME (PAUSE) -- WE DON'T KNOW EXACTLY WHEN THE COUNTY'S POLICY ON PART-TIME RESIDENTS WAS ACTUALLY ARTICULATED AND MANIFESTED. IT SHOULD BE PUBLISHED SO THAT

PEOPLE KNOW THAT AND WE CAN AVOID THAT CONFUSION.

BUT JUST SO THE COURT KNOWS, FROM AN ACADEMIC PERSPECTIVE, THE PATAKI CASE DEALT WITH NON-RESIDENTS AND RECIPROCITY BETWEEN STATES AND WHETHER OR NOT A NON-RESIDENT COULD GET A NEW YORK CONCEALED-WEAPON PERMIT EVEN THOUGH HIS RESIDENCY WAS WEST VIRGINIA. IT DIDN'T DEAL WITH PART-TIME RESIDENCY AND WHETHER PART-TIME RESIDENCY WOULD CHARACTERIZE YOU AS A RESIDENT FOR PURPOSES OF APPLYING FOR A PERMIT. SO IT WAS, IT'S DIFFERENT, IT'S A DIFFERENT QUESTION, AND IT DIDN'T IMPLICATE THE RIGHT TO TRAVEL BECAUSE YOU WEREN'T A RESIDENT, SO YOU DIDN'T HAVE THE RIGHT AS A NON-RESIDENT TO APPLY FOR A PERMIT. IN OUR CASE, WE'RE SAYING HE'S A PART-TIME RESIDENT. HE SATISFIES THE RESIDENCY REQUIREMENT. HE CAN APPLY FOR IT AND BE GRANTED A PERMIT. BUT AGAIN, IT MAY BE MOOT.

THE COURT: ANYTHING ELSE?

MR. MICHEL: CAN I HAVE ONE MINUTE, YOUR HONOR --

THE COURT: SURE.

MR. MICHEL: -- TO SEE? OTHERWISE, WHEN I LEAVE, THEY'LL TELL ME ABOUT ALL THE THINGS I FORGOT TO SAY.

THE COURT: OKAY.

MR. MICHEL: YOU KNOW, THERE ARE SOME ISSUES ABOUT WHAT WE WERE AND WEREN'T GIVEN WITH THE HONORARY RESERVE AND THE INITIAL APPLICATIONS VS. THE RENEWALS. I THINK IT'S COVERED IN THE BRIEFS. I JUST DON'T WANT TO (PAUSE) --

THE COURT: THAT'S FINE. I'LL LOOK AT THAT AGAIN.

MR. MICHEL: YES. I DON'T WANT TO BE PERCEIVED AS ADMITTING THAT BY NOT ADDRESSING IT, BUT I THINK IT'S ADDRESSED IN OUR BRIEFS.

AND WITH THAT, UNLESS THE COURT HAS SOME MORE QUESTIONS --

THE COURT: I'M SURE, WHEN I GET OFF THE BENCH, I'LL THINK OF ALL THESE QUESTIONS I COULD HAVE ASKED.

MR. MICHEL: WELL, WE LOVE NOTHING MORE THAN TO DO SUPPLEMENTAL BRIEFING, YOUR HONOR.

THE COURT: I KNOW.

MR. MICHEL: THIS IS AN IMPORTANT CASE. WE'RE NOT IN ANY RUSH, AND IF THAT WOULD BE HELPFUL, WE'RE CERTAINLY WILLING TO DO THAT.

THE COURT: I WILL TAKE THAT INTO CONSIDERATION IF I NEED TO.

MR. MICHEL: THANK YOU, YOUR HONOR.

WITH THAT, WE'LL SUBMIT.

THE COURT: MR. CHAPIN.

MR. CHAPIN: MAY I, YOUR HONOR?

THE COURT: OH, YES.

MR. CHAPIN: JUST A COUPLE THINGS.

IT'S INTERESTING, A COUPLE OF COMMENTS THAT COUNSEL MADE ABOUT WISHFUL THINKING, AND I THINK I STARTED OFF WITH MY ARGUMENT ABOUT THE CONFINES OF HELLER AND HOW LIMITED IT IS,

AND, IF ANYTHING, THE PLAINTIFFS' POSITION IS ENTIRELY WISHFUL THINKING. I'M NOT COMING INTO COURT AND TELLING YOU SOMETHING THAT ISN'T TRUE ABOUT WHAT HELLER SAYS. I AM TELLING THE COURT WHAT HELLER IS LIMITED TO BY WHAT IT SAYS. THE PLAINTIFFS ARE THE ONES WHO ARE ASKING THE COURT TO EXPAND IT BEYOND WHAT IT SAYS.

THE NEXT THING COUNSEL SAYS, THOSE CASES WERE CHOSEN SO THEY WOULDN'T HAVE TO GET THERE. THE PLAINTIFFS WERE CHOSEN FOR VERY SPECIFIC REASONS. THE SUPREME COURT CHOSE THOSE CASES FOR SPECIFIC REASONS, SO THEY WOULDN'T HAVE TO GET TO THOSE OTHER ISSUES THAT THEY HAVEN'T GOTTEN TO YET, AND SCALIA WAS VERY CAREFUL ABOUT THE WAY HE CRAFTED THAT OPINION BECAUSE HE HAD TO GET FIVE VOTES. THAT'S WHY SECTION THREE IS THERE THAT IDENTIFIES THE SCOPE OF THE RIGHT AND LIMITS IT TO THE HEARTH AND THE HOME.

I DON'T THINK ANYBODY IN THIS ROOM THINKS THAT THE SUPREME COURT IS GOING TO HOLD THAT THERE'S A CONSTITUTIONAL, A FUNDAMENTAL CONSTITUTIONAL RIGHT TO CARRY AROUND A LOADED, CONCEALED FIREARM, AND THAT'S WHAT THEY WANT THIS COURT TO DO. IT HAS NOTHING TO DO WITH OPEN-CARRY LAWS. THEY WANT THE RIGHT TO CARRY A CONCEALED, LOADED FIREARM AS A CONSTITUTIONAL RIGHT.

THEY'RE ASKING THE COURT -- THEY JUST TOLD THE COURT IT'S AN ABUSE OF DISCRETION TO REQUIRE A SHOWING OF GOOD CAUSE. THAT MEANS YOU HAVE TO STRIKE THE GOOD-CAUSE LANGUAGE

FROM THE STATUTE AND THE SHERIFF HAS NO DISCRETION, NO DISCRETION, TO MAKE A DETERMINATION OF GOOD CAUSE THAT'S HE OBLIGATED TO DO BY STATUTE AND BY A HUNDRED YEARS OF HISTORY OF 12050.

THE *SHALL ISSUE* AND *MAY ISSUE* ISSUES ARE NOT REALLY RELEVANT. THE STATUTE --

THE COURT: I KNOW.

MR. CHAPIN: -- 12050, CARVES OUT COUNTIES OF LESS THAN 200,000 AND MAKES A DISTINCTION BETWEEN THE TWO OF THEM, AND YOU CAN READ THAT YOURSELF. MOST OF THE STATES THAT HAVE *SHALL ISSUE* LAWS ARE RURAL STATES. SAN DIEGO HAS A VERY, VERY LARGE, COMPACTED POPULATION, AND THE NUMBER, INCREASING THE NUMBER OF CONCEALED, LOADED FIREARMS IN A LARGE METROPOLITAN AREA ON THE BORDER IS NOT WHAT WE WANT TO DO IN SAN DIEGO.

THANK YOU.

THE COURT: ANYTHING ELSE? I'LL LET YOU SAY YOUR LAST WORDS.

MR. MICHEL: I GUESS JUST A MINOR -- WELL, NOT A MINOR POINT, BUT A FAIRLY CRITICAL POINT. THERE IS NO FUNDAMENTAL INDIVIDUAL RIGHT TO CARRY A CONCEALED FIREARM. THERE'S A FUNDAMENTAL INDIVIDUAL RIGHT TO CARRY A FIREARM FOR SELF-DEFENSE. THE LEGISLATURE GETS TO CHOOSE HOW.

IN OUR STATE, THE LEGISLATURE HAS CHOSEN CONCEALED AS THE PREFERRED MECHANISM. CARRYING A LOADED FIREARM IS VERY, VERY LIMITED AND REALLY ONLY ALLOWED IN THOSE LIMITED

CIRCUMSTANCES WITHOUT A PERMIT. THE LEGISLATURE COULD GO BACK AND SAY, WE'RE GOING TO BAN CONCEALED CARRY ENTIRELY AND INSTEAD ALLOW OPEN LOADED CARRY. IT COULD DO THAT, BUT IT HASN'T.

AND THE POLICY CHOICE THERE, YOU KNOW, IS BETWEEN THE UNKNOWN NATURE OF THE CONCEALED CARRY, BUT IN SOME SITUATIONS THEY DEEM THAT PREFERABLE BECAUSE IT'S DISCRETE AND IT DOESN'T ALARM PEOPLE THE WAY OPEN CARRY AT STARBUCKS DOES, AND SO THAT'S THE POLICY CHOICE.

BUT THIS IS BASICALLY THE NUNN CASE. IF THAT CASE IS READ CAREFULLY, WHICH THIS COURT HAS, BECAUSE IT DISCUSSED IT, AND ACCURATELY, IN THE DENIAL OF THE MOTION TO DISMISS, THAT THAT ISSUE IS CLARIFIED THERE.

THE COURT: THANK YOU.

AS I SAID EARLIER, THIS IS A VERY IMPORTANT CASE. I KNOW THAT BOTH SIDES FEEL PASSIONATELY ABOUT THEIR POSITIONS. I WILL VERY CAREFULLY RECONSIDER EVERYTHING YOU'VE SAID HERE, CONSIDER EVERYTHING YOU'VE SAID HERE TODAY, AND ALSO THE PAPERS THAT YOU'VE SUBMITTED.

SO I WILL ISSUE A WRITTEN ORDER HOPEFULLY WITHIN THE NEXT THREE OR FOUR WEEKS, HOPEFULLY WITHIN THE NEXT THREE WEEKS.

OKAY.

MR. MICHEL: THANK YOU, YOUR HONOR.

MR. CHAPIN: THANK YOU, YOUR HONOR.

(PROCEEDINGS ADJOURNED AT 11:55 A.M.)

(END OF TRANSCRIPT)

I, FRANK J. RANGUS, OFFICIAL COURT REPORTER, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT IS A TRUE AND ACCURATE TRANSCRIPTION OF MY STENOGRAPHIC NOTES.

S/FRANK J. RANGUS

FRANK J. RANGUS, OCR

TAB 3

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

EDWARD PERUTA, Plaintiff, vs. COUNTY OF SAN DIEGO; and WILLIAM D. GORE, individually and in his capacity as sheriff, Defendants.	CASE NO. 09-CV-2371 - IEG (BLM) ORDER DENYING DEFENDANT'S MOTION TO DISMISS [Doc. No. 3]

This is a Section 1983 action, challenging the constitutionality of California's law governing the carrying of concealed weapons, both facially and as applied to Plaintiff. Currently before the Court is Defendant William Gore's ("Gore") Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Having considered the parties' arguments, and for the reasons set forth below, the Court DENIES the motion.

BACKGROUND

Plaintiff is a sixty year old United States citizen and a California resident, who "maintains several residences across the United States, including but not limited to a residence in San Diego County." (Compl. ¶ 17.) According to Plaintiff, he maintains a permanent mailing address in San Diego, "where he and his wife have a room in which they keep a wardrobe and other personal items." (Id.) Plaintiff and his wife have made their motor home their "permanent residence," and allegedly stay in San Diego for extended periods of time. (Id. ¶ 18.) For example, Plaintiff claims to have

reserved space at Campland on the Bay, in San Diego, from November 15, 2008 through April 15, 2009. He had also reserved spaces at the same place from February 2007 through April 2007. Plaintiff is a founder, and sole stockholder, of American News and Information Services, Inc., which gathers and provides raw, breaking news video, photographs, and news tips to various mainstream media outlets. According to Plaintiff, both his work and his lifestyle choice often require him to travel to high crime areas as well as remote rural areas, sometimes carrying large sums of cash, valuables, and equipment.

By way of background, Plaintiff is a certified National Rifles Association ("N.R.A.") instructor with the authority to train and certify individuals in the N.R.A. Basic Pistol Safety Course. Plaintiff has a valid pistol permit issued by the State of Connecticut, and is recognized by the Department of Public Safety to teach the pistol course required to obtain a Connecticut Pistol Permit. In 1969, Plaintiff was assigned as a marine small arms instructor (rifle and pistol) at the U.S. Naval Academy. In 1970, Plaintiff successfully completed the Connecticut Municipal Training Course. From 1969 to 1971, Plaintiff was a law enforcement officer in the State of Connecticut.

The present case arises from Plaintiff's attempts to obtain a concealed weapon's permit in San Diego County. Plaintiff alleges that he obtained and provided to the San Diego County Sheriff the required 8 Hour Firearms Safety and Proficiency Certificate in accordance with California Penal Code § 12050(E)(i). He also alleges that the Firearms Licensing and Permits Unit of the State of California Department of Justice found him eligible to possess firearms. On November 17, 2008, Plaintiff requested a license to carry a concealed weapon from the San Diego County Sheriff's License Division ("SD License Division"), at which time he was interviewed by a licensing supervisor to determine whether he satisfied the licensing criteria. On February 3, 2009, Plaintiff submitted an application for a license to carry a concealed weapon. Plaintiff alleges he was denied a license to carry a concealed weapon by Defendant Gore's predecessor because the SD License Division made a finding that Plaintiff did not have good cause and was not a resident of San Diego–both of which are requirements under Section 12050.

Plaintiff filed his complaint on October 9, 2009, alleging three causes of action. First, Plaintiff argues Section 12050's requirements of (1) "good cause" beyond the interests of self-defense and (2)

durational "residency" violate the Second and Fourteenth Amendments to the U.S. Constitution. Second, Plaintiff alleges that Defendants' subjective application of the "good cause" and "residency" requirements results in an unequal treatment of similarly situated individuals, and therefore violates the Eighth Amendment of the U.S. Constitution. Finally, Plaintiff argues the requirement that individuals reside full time in San Diego County before they can apply for a concealed weapon's permit violates Plaintiff's right to travel under the Fourteenth Amendment to the U.S. Constitution.

On November 12, 2009, Defendant Gore filed the current Motion to Dismiss. [Doc. No. 3]. Plaintiff filed a response on December 7, 2009, and Defendant Gore filed a reply on December 14, 2009. [Doc. Nos. 4, 5]. On December 17, 2009, having determined that the Court can proceed without oral argument, the Court vacated the hearing set for December 21, 2009. [Doc. No. 6].

LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the pleadings. A complaint survives a motion to dismiss if it contains "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S.544, 570 (2007). The court may dismiss a complaint as a matter of law for: (1) "lack of cognizable legal theory," or (2) "insufficient facts under a cognizable legal claim." SmileCare Dental Group v. Delta Dental Plan of California, 88 F.3d 780, 783 (9th Cir. 1996) (citation omitted). The court only reviews the contents of the complaint, accepting all factual allegations as true, and drawing all reasonable inferences in favor of the nonmoving party. al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009) (citation omitted).

Despite the deference, the court need not accept "legal conclusions" as true. Ashcroft v. Iqbal, --- U.S. ---, 129 S.Ct. 1937, 1949-50 (2009). It is also improper for the court to assume "the [plaintiff] can prove facts that [he or she] has not alleged." Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526 (1983). On the other hand, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Iqbal, 129 S.Ct. at 1950.

DISCUSSION

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." The Supreme

Court's landmark decision in District of Columbia v. Heller, --- U.S. ---, 128 S. Ct. 2783 (2008), resolved some of the hotly debated issues with regard to the Second Amendment, but left many others lingering for future determination. In Heller, after an exhaustive analysis of the text of the Amendment and the founding-era sources of its original public meaning, the Supreme Court stated unequivocally that the Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation." 128 S. Ct. at 2797. However, like most rights, "the right secured by the Second Amendment is not unlimited." Id. at 2816. Thus, the Supreme Court also made it clear that "the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Id. For example, the Supreme Court noted 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. Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. at 2816-17 (internal citations omitted). In a footnote immediately following, the Supreme Court explained: "We identify these presumptively lawful regulatory measures only as example; our list does not purport to be exhaustive." Id. at 2817 n.26.

In Heller, having concluded that the Second Amendment protects an individual right to "keep and bear arms," and noting that "the inherent right of self-defense has been central to the Second Amendment right," the Supreme Court turned to the challenged law before it.[1] Id. at 2817-18. Without deciding what level of scrutiny should be applied (except stating that it would have to be more than "rational basis"), the Supreme Court concluded that the District of Columbia's "absolute prohibition of handguns held and used for self-defense in the home" clearly violated the Second Amendment. Id. at 2817-22.[2]

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[1] The Supreme Court characterized the challenged law as follows: "the law totally bans handgun possession in the home. It also requires that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable." Heller, 128 S. Ct. at 2817.

[2] Because Heller involved a challenge to a District of Columbia statute, the Supreme Court there did not have to decide whether the Second Amendment also applied to the states. See id. at 2812-13. No party has raised this issue in the present case either. Accordingly, because it appears that both

I. Right to Bear Arms

A. Parties' arguments

Plaintiff's first cause of action alleges that Section 12050's requirements of (1) "good cause" beyond the interests of self-defense and (2) durational residency violate the Second and Fourteenth Amendments.[3] Defendant moves to dismiss this cause of action, arguing that the Supreme Court in Heller, 128 S. Ct. 2816-17, expressly stated that the right secured by the Second Amendment is not unlimited, and that it certainly does not prohibit states from regulating the carrying of concealed weapons. Defendant argues that, unlike possession of a gun for protection within a residence–which

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parties agree that the Second Amendment applies in this case, the Court will proceed on that assumption, without deciding the issue at this time. The Court does note, however, that it is aware of the pre-Heller Ninth Circuit case law on this issue, as well as the post-Heller trend. Compare Fresno Rifle & Pistol Club, Inc., 965 F.2d 723, 731 (9th Cir. 1992) (concluding that until such time as United States v. Cruikshank, 92 U.S. 542 (1876), and Presser v. Illinois, 116 U.S. 252 (1886), are overturned, "the Second Amendment limits only federal action") with Nordyke v. King, 563 F.3d 439, 457 (9th Cir. 2009), reh'g en banc granted, 575 F.3d 890 (concluding that "the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment and applies it against the states and local governments"). It should also be noted that after rehearing Nordyke en banc, the Ninth Circuit vacated its submission of the case pending the Supreme Court's disposition of Maloney v. Rice, 08-1592; McDonald v. City of Chicago, No. 08-1521; and N.R.A. v. City of Chicago, No. 08-1497.

[3] Section 12050(a)(1) provides, in pertinent part:

> (A) The sheriff of a county, upon proof that the person applying is of good moral character, that good cause exists for the issuance, and that the person applying satisfies any one of the conditions specified in subparagraph (D) and has completed a course of training as described in subparagraph (E), may issue to that person a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person in either one of the following formats:
>
> > (i) A license to carry concealed a pistol, revolver, or other firearm capable of being concealed upon the person.
> >
> > (ii) Where the population of the county is less than 200,000 persons according to the most recent federal decennial census, a license to carry loaded and exposed in only that county a pistol, revolver, or other firearm capable of being concealed upon the person.
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> . . . .
>
> (D) For the purpose of subparagraph (A), the applicant shall satisfy any one of the following:
>
> > (i) Is a resident of the county or a city within the county.
> >
> > (ii) Spends a substantial period of time in the applicant's principal place of employment or business in the county or a city within the county.

was the issue in Heller–carrying a concealed firearm presents a recognized "'threat to public order.'" (Def. MTD, at 3 (quoting People v. Hale, 43 Cal. App. 3d 353, 356 (1974).)[4]

Plaintiff agrees that the constitutional right to "keep and bear arms" is not unlimited, and therefore concedes that some regulations are permissible under the Second Amendment. However, also relying on Heller, Plaintiff argues that at the center of the Second Amendment is an individual right "to possess and carry weapons in case of confrontation, self-defense, or other traditionally lawful purposes, unconnected with service in a militia." (Pl. Opp., at 3.) Thus, to be armed and ready in case of confrontation, Plaintiff argues the Second Amendment requires that a person be allowed to carry a weapon "that is immediately capable of being used for its intended purpose." (Id. at 4.) According to Plaintiff, by imposing the "good cause" requirement, Section 12050 violates the Second Amendment. In the alternative, Plaintiff argues the application of Section 12050's "good cause" and "residency" requirements violates the Second Amendment because law abiding citizens who desire to carry concealed firearms solely for self-defense purposes and/or those that are not full-time residents of San Diego County are deemed by the sheriff not to satisfy the statute's requirements.

B. Analysis

The Supreme Court's decision in Heller made it clear–for the first time–that the Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation." 128 S. Ct. at 2797. It also made clear that this right is not unlimited. Id. at 2816-17. Accordingly, while Heller does not preclude Second Amendment challenges to laws regulating firearm possession outside of home, "Heller's *dicta* makes pellucidly clear that the Supreme Court's holding should not

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[4] In addition, Defendant argues there is no constitutionally protected interest in a concealed weapon's permit because, in light of the extremely broad discretion delegated to the sheriff under Section 12050, there is no legitimate claim of entitlement to such a permit. (Def. Reply, at 2.) However, because Defendant raised this issue for the first time in the reply, Plaintiff had no opportunity to respond and the Court has not received the benefit of full briefing. Accordingly, the Court will not consider this in deciding the Motion to Dismiss. See Sogeti USA LLC v. Scariano, 606 F. Supp. 2d 1080, 1086 (D. Ariz. 2009) ("The Court will not grant a motion to dismiss on the basis of argument first raised in a reply."(citing U.S. ex rel. Giles v. Sardie, 191 F. Supp. 2d 1117, 1127 (C.D. Cal. 2000))); see also Sanchez v. City of Santa Ana, 915 F.2d 424, 430 (9th Cir. 1990) ("As a general rule, an appellant may not raise an argument for the first time in a reply brief." (citation omitted)). In any event, the cases relied on by Defendant for the proposition that there is no protected interest in a concealed weapon's permit all predate Heller, which held–for the first time–that the Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation." 128 S. Ct. at 2797. The validity of those cases post-Heller is not clear.

be read by lower courts as an invitation to invalidate the existing universe of public weapons regulations." United States v. Masciandaro, 648 F. Supp. 2d 779, 788 (E.D. Va. 2009).

In the present case, Plaintiff's complaint challenges constitutionality of Section 12050's requirements of "good cause" and "residency" as they relate to his ability to obtain a concealed weapon's permit. This precise issue was not directly addressed by the Supreme Court in Heller, which involved a challenge to District of Columbia's prohibition on the possession of a loaded firearm *in the home*. 128 S. Ct. at 2817-22. Thus, the Court must determine whether Section 12050's application to Plaintiff's request for a permit withstands the appropriate level of constitutional scrutiny.[5]

1. Presumptive constitutionality of concealed weapon bans

As a threshold matter, the Court rejects Defendant's contention that the Supreme Court in Heller *held* that prohibitions on carrying of concealed weapons are presumptively constitutional. First, because this precise question was not before the Supreme Court, any pronouncements to that effect would generally be considered *dicta*, even if persuasive.[6] Moreover, the Supreme Court in Heller expressly stated that it was leaving the determination of the scope of "permissible" Second Amendment restrictions for a later time. Id. at 2816-18, 2821 ("[T]here will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.").

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[5] The level of scrutiny is necessary to determine whether the application of Section 12050 violates the Second Amendment as applied through the Fourteenth Amendment. The Due Process Clause of the Fourteenth Amendment, which appears to be implicated by Plaintiff's first cause of action, provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. The Equal Protection Clause of the Fourteenth Amendment, which is the basis for Plaintiff's second cause of action, provides that: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Id. These two provisions of the Constitution both stem from the "American ideal of fairness" and are "not mutually exclusive." Bolling v. Sharpe, 347 U.S. 497, 499 (1954). However, depending on the circumstances, these clauses serve slightly different purposes. As one court has explained, "Substantive Due Process generally provides a constitutional safeguard against arbitrary laws to all citizens, but Equal Protection[] ensures that a certain class, which might be as small as a single individual, will not be treated differently under the law from people similarly situated." United States v. Miller, 604 F. Supp. 2d 1162, 1168 n.7 (W.D. Tenn. 2009).

[6] "Dictum," the singular form of "dicta," is a remark "by the way" and is a shortened version of "obiter dictum," which is a Latin phrase often translated as "something said in passing." BLACK'S LAW DICTIONARY 519, 1177 (9th ed. 2009). *Black's Law Dictionary* defines "obiter dictum" as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)." Id. at 1177.

Finally, a closer examination of the cases and authorities relied upon by the Supreme Court suggests that it did not intend to make *all* concealed weapon bans presumptively constitutional. The Supreme Court's entire pronouncement on the validity of concealed weapon bans was:

> Like most rights, the right secured by the Second Amendment is not unlimited. . . . 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. See, e.g., State v. Chandler, [5 La. Ann. 489, 489-90 (1850)]; Nunn v. State,[1 Ga. 243, 251 (1846)]; see generally [2 J. KENT, COMMENTARIES ON AMERICAN LAW *340, n. 2 (O. Holmes ed., 12th ed. 1873)]; THE AMERICAN STUDENTS' BLACKSTONE 84, n. 11 (G. Chase ed. 1884).

Id. at 2816. Both Chandler and Nunn, the two cases relied upon by the Supreme Court, concerned prohibitions on carrying of concealed weapons where the affected individuals had alternate ways to exercise their Second Amendment rights–by *openly* carrying those weapons. See Chandler, 5 La. Ann. at 489-90 (noting that the law against carrying of concealed weapons was "absolutely necessary" and that "[i]t interfered with no man's right to carry arms . . . 'in full view,' which places men upon an equality"); Nunn, 1 Ga. at 251 ("We are of the opinion, then, that so far as the act of 1837 seeks to suppress the practice of carrying certain weapons *secretly*, that it is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void* . . . ." (emphases in original)). The applicability of these cases is questionable where, as here, the State expressly *prohibits* individuals such as Plaintiff from openly carrying a loaded firearm in public places. See CAL. PENAL CODE § 12031(a)(1).[7]

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[7] Section 12031(a)(1) provides:

> A person is guilty of carrying a loaded firearm when he or she carries a loaded firearm on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory.

Although this statute contains a number of exceptions, see People v. Flores, 169 Cal. App. 4th 568, 576 (2008), its overall effect cannot be compared to the *unrestricted* right to carry weapons openly as recognized in both Chandler and Nunn. Accordingly, in the present case, the issue is best addressed by determining whether Section 12050's requirements, and their application, meet the appropriate level of constitutional scrutiny, rather than by a categorical approach advocated by Defendant. But see United States v. Hall, No. 2:08-00006, 2008 WL 3097558, at *1 (S.D. W. Va. Aug. 4, 2008) ("The court concludes that the prohibition, as in West Virginia, 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 other authorities cited by the Supreme Court further undermine Defendant's position. Thus, in *Commentaries on American Law*, James Kent states that "[t]here has been a great difference of opinion on the question" of whether a prohibition on carrying of concealed weapons was constitutional. 2 KENT, *supra*, at *340 n.(b). Likewise, in *The American Students' Blackstone*, George Chase first notes that "it is generally held that statutes prohibiting the carrying of *concealed* weapons are not in conflict with [the Second Amendment], since they merely prohibit the carrying of arms in a particular manner." THE AMERICAN STUDENTS' BLACKSTONE, *supra*, at 84, n.11. However, he immediately points out that "[i]n some states . . . a contrary doctrine is maintained." Id. These pronouncements are directly at odds with Defendant's contention that Heller expressed constitutional approval for *all* concealed weapon bans. (See Def. MTD, at 3-4.)

Finally, Defendant's reliance on Hall, 2008 WL 3097558, is misplaced. In that case, the district court for the Southern District of West Virginia denied the defendant's second motion to suppress made after the Supreme Court's decision in Heller. Hall, 2008 WL 3097558, at *2. In reaffirming its prior ruling, the court noted that "the prohibition, as in West Virginia, 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." Id. at *1. However, unlike California, West Virginia is an "open carry" state, and therefore allows individuals to carry weapons openly. See OFFICE OF THE ATT'Y GEN., WEST VIRGINIA FIREARM LAWS 1 (October 2009), attached to Pl. Opp., Ex. B.[8] Thus, just like in Chandler and Nunn, but unlike California, there is a ready alternative available to the affected individuals–the ability to carry weapons openly if they cannot obtain a concealed weapon's permit.

For the foregoing reasons, the Court is convinced the Heller decision cannot stand for the broad proposition that *all* concealed weapon bans are presumptively constitutional. Accordingly, the

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[8] The Court can properly take judicial notice of the documents appearing on a governmental website, such as the Office of the Attorney General handbook attached to Plaintiff's Opposition. See, e.g., Paralyzed Veterans of Am. v. McPherson, No. C 06-4670 SBA, 2008 WL 4183981, at *5 (N.D. Cal. Sept. 9, 2008) (noting that the information on government agency websites has often been treated as a proper subject for judicial notice and citing cases from numerous circuits). Accordingly, because accuracy of the document attached to Plaintiff's Opposition "cannot reasonably be questioned" and because there is no objection to its accuracy by Defendant, the Court will take judicial notice of it. See FED. R. EVID. 201(b).

Court will proceed to determine whether Section 12050's application to Plaintiff's request for a permit withstands the appropriate level of constitutional scrutiny.

2. Level of scrutiny

The Supreme Court in Heller, while not designating any specific level of scrutiny for evaluating Second Amendment restrictions, explicitly rejected the "rational basis" test. According to the Supreme Court, the rational basis test "could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right," such as "the right to keep and bear arms." 128 S. Ct. at 2818 n.27 (citation omitted). "If 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." Id. The Heller majority also rejected an "interest-balancing inquiry" suggested by the dissent that "'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effect upon other important governmental interests." Id. at 2821. According to the Supreme Court, such a "freestanding" approach, which is subject to future judges' assessments of the constitutional guarantee's usefulness, "is no constitutional guarantee at all." Id.

With these standards out, the Court must choose between "strict scrutiny"–typically reserved for laws that restrict certain fundamental rights, see Reno v. Flores, 507 U.S. 292, 301-02 (1993)–and some form of "intermediate scrutiny."[9] Following Heller, courts have not been uniform in the level of scrutiny that should be applied to Second Amendment restrictions. Some courts have applied strict scrutiny,[10] others have used intermediate scrutiny,[11] and still others have either formulated their own

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[9] When a fundamental right is recognized, substantive due process forbids infringement of that right "*at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Flores, 507 U.S. at 301-02 (citations omitted) (emphasis in original). On the other hand, intermediate scrutiny allows the State to regulate the right at issue if necessary to further an important governmental interest. See Sell v. United States, 539 U.S. 166, 178-80 (2003).

[10] See, e.g., United States v. Engstrum, 609 F. Supp. 2d 1227, 1231-35 (D. Utah 2009) (applying strict scrutiny and upholding 18 U.S.C. § 922(g)(9), which prohibits individuals convicted of domestic violence crimes from possessing firearms).

[11] See, e.g., United States v. Skoien, 587 F.3d 803, 810-14 (7th Cir. 2009) (applying intermediate scrutiny and noting that the standard of review would "fluctuate with character and degree of the challenged law's burden on the right and sometimes also with the specific iteration of the right"); United States v. Miller, 604 F. Supp. 2d 1162, 1169-72 (W.D. Tenn. 2009) (applying

tests or have upheld a challenged regulation without specifying a standard of review.[12]

At this stage of the proceedings, the Court need not decide which heightened level of scrutiny applies because the government has failed to meet its burden even if the Court applies the more lenient standard of "intermediate scrutiny." Under both "strict scrutiny" and "intermediate scrutiny" the burden is on the government to show that the challenged law is constitutional, by demonstrating that the law is either "narrowly tailored to serve a compelling state interest," Flores, 507 U.S. at 301-02 (citations omitted), or necessary to further an important governmental interest, Sell, 539 U.S. at 178-80. In the present case, apart from arguing that Section 12050 is within one of the "presumptively lawful" restrictions recognized in Heller and that it passes "rational basis" standard of review, the government has made little effort to defend the statute's constitutionality under either of the heightened levels of scrutiny.

3. Application to Plaintiff's case

Accordingly, taking Plaintiff's allegations as true, his first cause of action for violation of the Second Amendment appears to state a claim upon which relief can be granted. Twombly, 550 U.S. at 570. Plaintiff alleges that he was denied a license to carry a concealed weapon by Defendant Gore's predecessor because the SD License Division made a finding that Plaintiff did not have good cause and was not a resident of San Diego–both of which are requirements under Section 12050. As an initial matter, Plaintiff challenges the "good cause" requirement as violating his Second Amendment right "to possess and carry weapons in case of confrontation." See Heller, 128 S. Ct. at 2797. The Supreme Court has explained that the natural meaning of "bear arms" is to "'wear, bear, or carry ... upon the person or in a pocket, for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another person.'" Id. at 2793 (quoting Muscarello v. United States,

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intermediate scrutiny and upholding 18 U.S.C. § 922(g)(1), which prohibits possession of firearms by felons).

[12] See, e.g., United States v. Marzzarella, 595 F. Supp. 2d 596, 604-06 (W.D. Pa. 2009) (fashioning a standard of review akin to content-neutral "time, place, and manner" test and upholding 18 U.S.C. § 922(k), which prohibits possession of a firearm if the individual has knowledge that the firearm's serial number has been obliterated, removed, or altered); People v. Flores, 169 Cal. App. 4th 568, 573-77 & n.5 (upholding defendant's convictions for possession of a firearm by a person prohibited from possessing a firearm (Cal. Penal Code § 12021(c)(1)), carrying a concealed firearm (Cal. Penal Code § 12025(a)(2)), and carrying a loaded firearm in a public place (Cal. Penal Code § 12031(a)(1)); and suggesting, but not deciding, that a mid-level standard of scrutiny analogous to the "undue burden" standard should apply).

524 U.S. 125, 143 (1998)). Accordingly, by imposing a "good cause" requirement before a concealed weapon's permit can be issued, the State undoubtedly infringes Plaintiff's right to "possess and carry weapons in case of confrontation." See id. at 2797. For such infringement to pass constitutional muster, Defendant must at the very least demonstrate that it is necessary to further an important governmental interest. See Sell, 539 U.S. at 178-80. In the present case, Defendant has made very little effort to either identify an "important governmental interest" or demonstrate the required "fit" between the law and the interest served.[13] Accordingly, Defendant's Motion to Dismiss for failure to state a claim Plaintiff's challenge to the "good cause" requirement of Section 12050 fails. Cf. Skoien, 587 F.3d at 814-15 (vacating and remanding where "the government has made little effort to discharge its burden of demonstrating the relationship between § 922(g)(9)'s means and its end").

Plaintiff's challenge to the requirements of Section 12050 as applied by Defendants also survives the Motion to Dismiss. Plaintiff alleges that he satisfies the "good cause" requirement because he needs to carry a gun for self-defense, seeing as he is sixty years old and travels to high crime areas for his job. (Pl. Opp., at 5-7.) Plaintiff also alleges that he satisfies the "residency" requirement because he resides in San Diego at least four months out of the year, even though he does so in a motor home. (Id. at 8-10.) Taking Plaintiff's allegations as true, Defendants' application of

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[13] The Court does note that California law provides a number of exceptions, some of which significantly undermine portions of Plaintiff's claims. For example, Section 12026(b) of the Penal Code provides that no permit or license is necessary to possess, keep, or carry, "either openly or concealed, a pistol, revolver, or other firearm capable of being concealed upon the person 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." Because this exemption also applies to anyone who is "temporarily within this state," nothing prevents Plaintiff from carrying a gun while inside of his motor home. See CAL. PENAL CODE § 12026(b); accord id. § 12031(l) ("Nothing in this section shall prevent any person from having a loaded weapon, if it is otherwise lawful, at his or her place of residence, including any temporary residence or campsite."). Likewise, Section 12031(j) allows carrying of a loaded firearm "by a person who reasonably believes that the person or property of himself or herself or of another is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property." However, this exemption is limited to the "brief interval" between the notification of the local law enforcement agency and its arrival for assistance. Id. § 12031(j).

Plaintiff's first cause of action is broader than any of these exceptions. What Plaintiff seeks is enforcement of what he believes is the right guaranteed by the Second Amendment, as interpreted in Heller, to carry a weapon that is "immediately capable of being used for its intended purpose," both in his motor home and while on public property. (Pl. Opp., at 4-5.) At least at this stage of the proceedings, even with the above exceptions in mind, the Court cannot say that as a matter of law, Plaintiff's first cause of action either lacks cognizable legal theory, or alleges insufficient facts under a cognizable legal theory. See SmileCare Dental Group, 88 F.3d at 783.

Section 12050's requirements appears to infringe upon Plaintiff's right to "possess and carry weapons in case of confrontation." See Heller, 128 S. Ct. at 2797. As already noted, for such infringement to be in accord with the Second Amendment, Defendant must at the very least demonstrate that it is necessary to further an important governmental interest. See Sell, 539 U.S. at 178-180. Seeing as Defendant has failed to either identify an "important governmental interest" or demonstrate the required "fit" between the law and the interest served, the Motion to Dismiss Plaintiff's challenge to the "good cause" and "residency" requirements as applied by Defendants also fails. Cf. Skoien, 587 F.3d at 814-15.

4. Conclusion

It is important to keep in mind the narrow issue before the Court at this stage of the proceedings. The Court is not asked to, and does not, decide whether Section 12050 is constitutional. Rather, the question is whether Plaintiff's complaint contains "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570. The Court only reviews the contents of the complaint, accepting all factual allegations as true, and drawing all reasonable inferences in favor of the nonmoving party. al-Kidd, 580 F.3d at 956 (citation omitted). In the present case, because Plaintiff's complaint alleges sufficient facts to state a claim for relief and because Defendant's Motion to Dismiss does little to identify an "important governmental interest" or to demonstrate the required "fit" between the law and the interest served, the Court **DENIES** Defendant's Motion to Dismiss as it relates to Plaintiff's first cause of action for violation of the Second Amendment.

II. Equal Protection

A. Parties' arguments

Plaintiff's second cause of action alleges that Defendant Gore's application of Section 12050's "good cause" and "residency" requirements violates the Equal Protection Clause of the Fourteenth Amendment. Defendant argues there is no equal protection violation because the government can legitimately treat differently persons dissimilarly situated. Moreover, because no suspect classification or fundamental right is involved, Defendant argues the Court should apply rational basis to Plaintiff's challenge. According to Defendant, Plaintiff's second cause of action should be dismissed because it is both rational and reasonable to deny a permit to an individual, such as Plaintiff, who only occasionally visits San Diego and who voluntarily places himself in dangerous situations and places.

Plaintiff opposes the application of "rational basis" standard of review as contrary to the Supreme Court's decision in Heller. According to Plaintiff, with heightened level of scrutiny applied, there is no justification for treating Plaintiff differently than other residents of San Diego County. First, Plaintiff argues that, as used in Section 12050, "residency" refers to something temporary in nature, as opposed to the fixed nature of "domicile."[14] Thus, because he resides full-time in his motor home and rents space at Campland on the Bay for at least four months during the year, Plaintiff alleges he satisfies the "residency" requirement of Section 12050. (Pl. Opp., at 11-13.) Second, Plaintiff argues he meets the "good cause" requirement because he needs a gun to protect himself and his wife when he travels on business and when they travel to remote areas in their motor home. (Id. at 13-14.)

B. Analysis

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is "essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (citation omitted). "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." Id. at 440 (citations omitted). This general rule gives way, however, where a statute classifies by race, alienage, or national origin, or impinges on personal rights protected by the Constitution. Id. When that is the case, the challenged law is subjected to strict scrutiny and will be upheld only if it is "suitable tailored to serve a compelling state interest." Id. Moreover, laws that classify based on other characteristics beyond the individual's control, such as gender and illegitimacy, are subject to a somewhat heightened review, and will be upheld only if "substantially related to a sufficiently important governmental interest." Id. at 440-41 (citations omitted).

Contrary to Defendant's arguments, the Supreme Court in Heller explicitly rejected "rational basis" as the applicable standard of review for Second Amendment restrictions. See 128 S. Ct. at 2818 n.27. Accordingly, the Court has to apply one of the heightened levels of scrutiny to Plaintiff's

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[14] Plaintiff urges the Court to adopt the definition of "residency" used in Section 349(c) of the California Election Code, which provides that: "The residence of a person is that place in which the person's habitation is fixed for some period of time, but wherein he or she does not have the intention of remaining. At a given time, a person may have more than one residence." The Court need not decide this issue, however, because as noted below, even if the Court adopts the definition suggested by Defendant, Plaintiff appears to be a "resident" of San Diego County. See infra Part II.B.1.

challenge to Section 12050. In the present case, the Court need not decide which specific standard controls because Defendant's Motion to Dismiss fails even if the Court applies "intermediate scrutiny." As already noted in Part I above, Defendant has made very little effort to either identify an "important governmental interest" or show how the challenged law is "substantially related" to that interest. Cf. Skoien, 587 F.3d at 814-15. Thus, as long as Plaintiff can demonstrate that he is "similarly situated" to other San Diego County residents and was "treated differently" by Defendants, his second cause of action for violation of the Equal Protection Clause would survive the motion to dismiss.

1. Similarly situated

Defendant urges the Court to find that Plaintiff is not "similarly situated" to other San Diego County residents because his residence in San Diego is only temporary. In this regard, Defendant asks the Court to adopt the definition of "residency" used in Section 17014(a) of the Revenue and Taxation Code, which defines a resident as "[e]very individual who is in this state for other than a temporary or transitory purpose." Defendant's argument is undercut, however, by the California Code of Regulations, which clarifies the meaning of "temporary or transitory purpose" as used in Section 17014(a):

> Whether or not the purpose for which an individual is in this State will be considered temporary or transitory in character will depend to a large extent upon the facts and circumstances of each particular case. It can be stated generally, however, that if an individual is simply passing through this State on his way to another state or country, or is here for a brief rest or vacation, or to complete a particular transaction, or perform a particular contract, or fulfill a particular engagement, which will require his presence in this State for but a short period, he is in this State for temporary or transitory purposes, and will not be a resident by virtue of his presence here.
>
> If, however, an individual is in this State to improve his health and his illness is of such a character as to require a relatively long or indefinite period to recuperate, or he is here for business purposes which will require a long or indefinite period to accomplish, or is employed in a position that may last permanently or indefinitely, or has retired from business and moved to California with no definite intention of leaving shortly thereafter, he is in the State for other than temporary or transitory purposes, and, accordingly, is a resident taxable upon his entire net income even though he may retain his domicile in some other state or country.

CAL. CODE REGS. tit. 18, § 17014 (2009). In the present case, Plaintiff alleges that: (1) he and his wife have maintained and had nearly exclusive use of a single room in a residence located at 3151 Driscoll Drive, San Diego for the past 15 years, where they have kept a wardrobe and other personal items; (2) they have resided regularly in San Diego since 2007, including continuously living in San Diego for two months between February 2007 and April 2007, as well as five months between November 15,

2008 and April 15, 2009; and (3) he has a California identification card identifying San Diego as his place of residence. (Compl. ¶¶ 17-22; Pl. Opp., at 8-10, 11-13, Ex. D.) Given these facts, which the Court must accept as true at this stage of the proceedings, Plaintiff's presence in San Diego appears to be more than "temporary or transitory" even under the definition urged by Defendant. Accordingly, Plaintiff alleged sufficient facts to demonstrate he is a "resident" of San Diego County and therefore is "similarly situated" to other San Diego County residents.

2. Treated differently

According to Plaintiff, he was denied a license to carry a concealed weapon by Defendant Gore's predecessor because the SD License Division made a finding that Plaintiff's need for self-defense was not a "good cause" and because his residency in a motor home did not meet the "residency" requirement. Taking these allegations as true, Plaintiff alleges sufficient facts to demonstrate he was treated differently than other similarly situated individuals.

3. Conclusion

For the foregoing reasons, because Plaintiff's complaint alleges sufficient facts to state a claim for relief and because Defendant's Motion to Dismiss does little to identify an "important governmental interest" or to demonstrate the required "fit" between the law and the interest served, the Court **DENIES** Defendant's Motion to Dismiss as it relates to Plaintiff's second cause of action for violation of the Equal Protection Clause.

III. Right to Travel

A. Parties' arguments

Plaintiff's third cause of action alleges that Defendants' requirement of full-time residence violates his right to travel under the Fourteenth Amendment. Defendant moves to dismiss this cause of action, arguing that Section 12050 does not actually deter the right to travel, impeding travel is not one of its primary objectives, and it does not use any classification which serves to penalize the exercise of that right. On the other hand, Plaintiff argues Defendants' application of the statute does actually deter his right to travel because "San Diego residents, such as Plaintiff, must stay fulltime in San Diego in order to have any sort of opportunity to apply and be granted a concealed carrying weapons permit." (Pl. Opp., at 15.)

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B. Analysis

The constitutional "right to travel"[15] embraces at least three different components: (1) it protects the right of a citizen of one State to enter and to leave another State; (2) the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and (3) for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State. Saenz v. Roe, 526 U.S. 489, 500 (1999). However, not all regulations that merely have an effect on travel raise an issue of constitutional dimension. Rather, "[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." Soto-Lopez, 476 U.S. at 903 (plurality) (internal quotation marks and citations omitted).

In all cases, the analysis is informed by the same guiding principle–the right to travel "protects residents of a State from being disadvantaged, or from being treated differently, simply because of the timing of their migration, from other similarly situated residents." Id. at 904 (citations omitted). Whenever a state law burdens the right to travel, the court must apply strict scrutiny and ask whether the challenged law is "necessary to further a compelling state interest." Id. at 904-05 & n.4 (citations omitted); accord Saenz, 526 U.S. at 499 (citing Shapiro v. Thompson, 394 U.S. 618, 634 (1969)). Accordingly, in the present case, the Court must engage in a two-step analysis: (1) determine whether Defendants' alleged requirement of full-time residence penalizes certain individuals, such as Plaintiff, with respect to their right to travel; and (2) if it does, Plaintiff "must prevail" unless Defendant can demonstrate that the requirement is "necessary to accomplish a compelling state interest." See Soto-Lopez, 476 U.S. at 906 (plurality) (citations omitted); Saenz, 526 U.S. at 499 (citation omitted).

1. Does the requirement of full-time residence "penalize" Plaintiff?

Not all waiting periods and residency conditions are impermissible. Soto-Lopez, 476 U.S. at 903-06 (plurality). Rather, it is important to distinguish between "bona fide residence requirements, which seek to differentiate between residents and nonresidents," and "residence requirements, such

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[15] Although the Supreme Court has made it clear that the "right to travel" exists, it has struggled in identifying the precise constitutional source of that right. See, e.g., Att'y Gen. of New York v. Soto-Lopez, 476 U.S. 898, 902-03 (1986) (plurality) (noting that the right has been inferred from federal structure of Government, and found variously in Privileges & Immunities Clause of Article IV, Commerce Clause, and Privileges & Immunities Clause of the Fourteenth Amendment).

as durational, fixed date, and fixed point residence requirements, which treat established residents differently based on the time they migrated into the State." Id. at 903 n.3 (citations omitted).

In the present case, Plaintiff alleges he is being penalized because Defendants' requirement of full-time residence "actually deters" him from traveling and spending time outside of San Diego. (Pl. Opp., at 15.) It is well-established "that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution." Harman v. Forssenius, 380 U.S. 528, 540 (1965) (citation omitted); accord Dunn v. Blumstein, 405 U.S. 330, 340-41 (1972). "Constitutional rights would be of little value if they could be ... indirectly denied, or manipulated out of existence." Harman, 380 U.S. at 540 (internal quotation marks and citations omitted). Taking Plaintiff's allegations as true, it appears the "residency" requirement as applied by Defendants does actually deter individuals such as Plaintiff from exercising their right to travel in that they are being "penalized" for traveling and spending time outside of San Diego by not being able to obtain a concealed weapon's permit.

2. Does the requirement of full-time residence pass "strict scrutiny"?

Whenever a state law burdens the right to travel, the court must apply strict scrutiny and ask whether the challenged law is "necessary to further a compelling state interest." Soto-Lopez, 476 U.S. at 904-05 & n.4 (plurality) (citations omitted); accord Saenz, 526 U.S. at 499 (citing Shapiro, 394 U.S. at 634). The heavy burden of justification is on the State, and the court will closely scrutinize the challenged law in light of its asserted purposes. Dunn, 405 U.S. at 343. In the present case, Defendant has failed either to identify a "compelling state interest" or to demonstrate that the challenged law is "necessary" to further that interest. Accordingly, the Court **DENIES** Defendant's Motion to Dismiss as it relates to Plaintiff's third cause of action for violation of his right to travel.

CONCLUSION

For the foregoing reasons, because Plaintiff's complaint alleges sufficient facts to state claims for relief that are plausible on their face, the Court **DENIES** the Motion to Dismiss in its entirety.

IT IS SO ORDERED.

DATED: January 14, 2010

IRMA E. GONZALEZ, Chief Judge
United States District Court

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

I, Claudia Ayala, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

On May 23, 2011, I served the foregoing document(s) described as

APPELLANTS' EXCERPTS OF RECORD
VOLUME I of VIII

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy
thereof enclosed in sealed envelope(s) addressed as follows:

"See Attached Service List"

X (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.
Executed on May 23, 2011, at Long Beach, California.

X (FEDERAL) I declare that I am employed in the office of the member of the bar of this of this court at whose direction the service was made.

CLAUDIA AYALA

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CERTIFICATE FOR BRIEF IN PAPER FORMAT

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9th Circuit Case Number(s): 10-56971

I, C.D. Michel, certify that this brief is identical to the version submitted electronically on [date] 05/24/2011 .

Date April 3, 2015

Signature s/ C.D. Michel

(either manual signature or "s/" plus typed name is acceptable)