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 II of VIII

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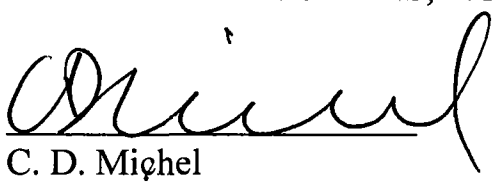
Pursuant to Federal Rules of Appellate Procedure for the Ninth Circuit 30-1, Appellants, EDWARD PERUTA et al., by and through their attorney of record, C. D. Michel of Michel & Associates, P. C. hereby confirm to the contents and form of Appellants' Excerpts of Record on appeal.

Date: May 23, 2011

MICHEL & ASSOCIATES, P.C.



C. D. Michel
Attorney for Plaintiffs/Appellants

CHRONOLOGICAL ORDER

CHRONOLOGICAL ORDER

TAB NO.	FILING DATE	NAME OF DOCUMENT	VOL.	PAGE NO.
4.	12/14/2010	Notice of Appeal To The United States Court of Appeals For The Ninth Circuit	II	ER000099 - ER000101
5.	12/10/2010	Judgment In A Civil Case	II	ER000102
6.	11/30/2010	Notice of Lodgment of Recent Authority In Support of Plaintiffs' Motion for Partial Summary Judgment	II	ER000103 - ER000123
7.	11/10/2010	Order Granting Plaintiffs' ExParte Motion For Leave To File Sur-Reply	II	ER000124
8.	11/9/2010	Defendant William D. Gore's Opposition to Plaintiffs' Motion For Leave to File A Sur-Reply and Objection to Plaintiffs' New Separate Statement	II	ER000125 - ER000126
9.	11/8/2010	Plaintiffs' Consolidated Separate Statement of Undisputed and Disputed Facts	II	ER000127 - ER000144
10.	11/8/2010	Plaintiffs' Ex Parte Motion for Leave to File Sur-Reply In Response to Defendant's Motion for Summary Judgment, Exhibit "A" (Proposed Sur-Reply)	II	ER000145 - ER000157

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11.	11/8/2010	Declaration of Sean Brady In Support of Plaintiffs' Ex Parte Motion for Leave to File Sur Reply in Response to Defendant's Reply In Support of Defendant's Motion For Summary Judgment	II	ER000158 - ER000161
12.	11/8/2010	Declaration of Stephen Helsley In Support of Plaintiffs' Sur Reply To Defendants' Reply To Plaintiffs' Consolidated Opposition To Defendant's Motion For Summary Judgment & Reply To Defendants' Opposition To Plaintiffs' Motion for Partial Summary Judgment	II	ER000162 - ER000168
13.	11/1/2010	Defendant William D. Gore's Reply Points and Authorities In Support of Motion For Summary Judgment	II	ER000169 - ER000188
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24.	10/18/2010	Exhibits "A" Through "P" In Support of Plaintiffs' Consolidated Opposition To Defendant's Motion For Summary Judgment And; Reply to Defendant's Opposition to Plaintiffs' Motion For Partial Summary Judgment	II & VI	ER000262 - ER000325
25.	10/18/2010	Application for Leave to File Amicus Brief In Support of Plaintiffs' Motion For Summary Judgment; Amicus Brief In Support of Plaintiffs' Motion For Summary Judgment [Proposed]	III	ER000326 - ER000349
26.	10/6/2010	Order Granting Defendants William Gore's Ex Parte Motion To File Exhibits In Support of Motion For Summary Judgment Under Seal	III	ER000350
27.	10/4/2010	Defendant William D. Gore's Ex Parte Motion to File Exhibits Nos. 2 Through 15 In Support of Motion For Summary Judgment Under Seal	III	ER000351 - ER000355
28.	10/4/2010	Defendant William D. Gore's Memorandum of Points And Authorities In Support of Motion For Summary Judgment And In Opposition To Plaintiffs' Motion For Partial Summary Judgment	III	ER000356 - ER000398

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29.	10/4/2010	Defendant William D. Gore's Separate Statement of Undisputed Material Facts In Support of Motion For Summary Judgment	III	ER000399 - ER000403
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31.	10/4/2010	Declaration of Blanca Pelowitz In Support of Defendant's Motion For Summary Judgment	III	ER000436 - ER000446
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33.	10/4/2010	Application of Brady Center to Prevent Gun Violence to File Brief As Amicus Brief; Brief of Amicus Curiae Brady Center To Prevent Gun Violence	IV	ER000780 - ER000811
34.	9/8/2010	Order Granting Plaintiffs' ExParte Application To File Documents In Support of Plaintiffs' Motion For Partial Summary Judgment Under Seal	IV	ER000812
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39.	9/3/2010	Declaration of Edward Peruta In Support of Plaintiffs' Motion For Summary Judgment	IV	ER001067 - ER001072
40.	9/3/2010	Declaration of Michelle Laxson In Support of Plaintiffs' Motion for Summary Judgment	IV	ER001073 - ER001076
41.	9/3/2010	Declaration of Mark Cleary In Support of Plaintiffs' Motion For Summary Judgment	IV	ER001077 - ER001082
42.	9/3/2010	Declaration of Silvio Montanarella on Behalf of California Rifle and Pistol Association Foundation In Support of Plaintiffs' Motion For Summary Judgment	IV	ER001083 - ER001086
43.	9/3/2010	Declaration of James Dodd In Support of Plaintiffs' Motion For Summary Judgment	IV	ER001087 - ER001089
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TAB NO.	FILING DATE	NAME OF DOCUMENT	VOL.	PAGE NO.
45.	9/3/2010	Declaration of Sean Brady In Support of Plaintiffs' Ex Parte Application to File Documents In Support of Plaintiffs' Motion For Partial Summary Judgment Under Seal	IV	ER001094 - ER001097
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49.	5/24/2010	Plaintiffs' Reply to Opposition to Motion for Leave to Amend Complaint	V	ER001132 - ER001144
50.	5/18/2010	County of San Diego And William D. Gore's Opposition To Plaintiff's Motion to Amend	V	ER001145 - ER001148
51.	4/22/2010	Notice of Motion and Motion For Leave to Amend Complaint; Exhibit "A" (Proposed First Amended Complaint); Memorandum of Points and Authorities In Support of Plaintiffs' Motion For Leave to Amend Complaint; Declaration of C. D. Michel	V	ER001149 - ER001185
52.	1/20/2010	Defendant William D. Gore's Answer to Complaint	V	ER001186 - ER001191

TAB NO.	FILING DATE	NAME OF DOCUMENT	VOL.	PAGE NO.
53.	12/14/2009	Defendant William D. Gore's Reply Points and Authorities In Support of Motion to Dismiss Complaint	V	ER001192 - ER001195
54.	12/7/2009	Plaintiff's Memorandum of Points And Authorities In Opposition To Defendant William Gore's Motion to Dismiss	V	ER001196 - ER001231
55.	11/12/2009	Defendant William D. Gore's Notice of Motion and Motion to Dismiss Complaint	V	ER001232 - ER001233
56.	11/12/2009	Defendant William D. Gore's Points and Authorities In Support of Motion to Dismiss Complaint	V	ER001234 - ER001238
57.	11/12/2009	Defendant William D. Gore's Notice of Lodgment In Support of Motion to Dismiss Complaint	V	ER001239 - ER001247
58.	10/23/2009	Complaint For Damages	V	ER001248 - ER001257
	5/23/2011	United States District Court - Southern District Docket Sheet	--	--

TAB 4

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IN THE 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,

v.

COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF,

Defendants.

CASE NO: 09-CV-2371 IEG (BGS)

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOTICE IS HEREBY GIVEN that Edward Peruta, Michelle Laxson, James Dodd, Leslie Buncher, Mark Cleary, and California Rifle and Pistol Association Foundation, Plaintiffs in the above-named case, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment of the district court, entered in this case on December 10, 2010 (attached hereto as Exhibit "A"); the district court's order denying Plaintiffs' Motion for Partial Summary Judgment and granting Defendant's Motion for Summary Judgment, also entered on December 10, 2010 (attached hereto as Exhibit "B"), and all interlocutory orders that gave rise to the district court's judgment.

Date: December 14, 2010

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IN THE 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, v. COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF, Defendants.	**CASE NO. 09-CV-2371 IEG (BGS)** **CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 E. Ocean Blvd., Suite 200, Long Beach, California, 90802.

I am not a party to the above-entitled action. I have caused service of:

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on December 14, 2010.

/s/ C. D. Michel
C. D. Michel
Attorney for Plaintiffs

TAB 5

AO 450 Judgment in a Civil Case

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

V.

County of San Diego, William Gore, individually and in his capacity as sheriff

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 09cv2371-IEG (BGS)

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a de cision has been rendered.

IT IS ORDERED AND ADJUDGED

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. Accordingly, the Court denies Plaintiffs' Motion for Summary Judgment and grants Defendant's Motion for Summary Judgment.....

December 10, 2010
Date

W. Samuel Hamrick, Jr.
Clerk

S/ L. Toma
(By) Deputy Clerk

ENTERED ON December 10, 2010

TAB 6

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IN THE 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,

v.

COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF,

Defendants.

CASE NO: 09-CV-2371 IEG (BGS)

NOTICE OF LODGEMENT OF RECENT AUTHORITY IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Location: Courtroom 1
Judge: Hon. Irma E. Gonzalez
Date Action Filed: October 23, 2009

PLEASE TAKE NOTICE THAT Plaintiffs Edward Peruta, Michelle Laxson, James Dodd, Leslie Buncher, Mark Cleary, and California Rifle and Pistol Association ("CRPA") hereby lodge copies of the following exhibits in support of their Motion for Partial Summary Judgment and Consolidated Opposition/Reply to Defendant's Motion for Summary Judgment:

1. *United States v. Ligon*, 2010 U.S. Dist. LEXIS 116272 (D. Nev. Oct. 20, 2010) (Exhibit "A")
2. *United States v. Huet*, 2010 U.S. Dist. LEXIS 123597 (W.D. Pa. Nov. 22, 2010) (Exhibit "B")

Date: November 30, 2010

MICHEL & ASSOCIATES, P.C.

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C. D. Michel
E-mail:cmichel@michellawyers.com
Attorneys for Plaintiffs

PAUL NEUHARTH, JR., A.P.C.

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IN THE 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, v. COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF, Defendants.	**CASE NO. 09-CV-2371 IEG (BGS)** **CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 E. Ocean Blvd., Suite 200, Long Beach, California, 90802.

I am not a party to the above-entitled action. I have caused service of:

NOTICE OF LODGEMENT OF RECENT AUTHORITY IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on November 30, 2010.

/s/ C. D. Michel
C. D. Michel
Attorney for Plaintiffs

EXHIBIT A

LEXSEE 2010 U.S. DIST. LEXIS 116272

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN LIGON, Defendant.

3:04-cr-00185-HDM

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

2010 U.S. Dist. LEXIS 116272

October 20, 2010, Decided
October 20, 2010, Filed

PRIOR HISTORY: *United States v. Ligon, 440 F.3d 1182, 2006 U.S. App. LEXIS 6904 (9th Cir. Nev., 2006)*

COUNSEL: [*1] For John Ligon, Defendant (1): Scott N. Freeman, LEAD ATTORNEY, Law Offices of Freeman & Routsis; A.P.L.C., Reno, NV; Alan G. Ellis, Mill Valley, PA; James H. Feldman, Jr., Ardmore, PA.

For USA, Plaintiff: Elizabeth A. Olson, LEAD ATTORNEY, United States Attorneys Office -- District of Nevada, Reno, NV.

JUDGES: Howard D. McKibben, UNITED STATES DISTRICT JUDGE.

OPINION BY: Howard D. McKibben

OPINION

ORDER

Defendant moves for a writ of error coram nobis, 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)*. Defendant asserts the statute is unconstitutional as applied to him. In the alternative, defendant asks the court to declare that continuing application of the *§ 922(g)(1)* disqualification to him is unconstitutional because it violates his *Second Amendment* right to bear arms and his *Fifth Amendment* right to procedural due process.

On April 11, 2005, the defendant pleaded guilty to one count of felon in possession of a firearm. [1] Defendant's only felony conviction at the time of the indictment was that for stealing government property valued at more than $1,000. The theft conviction was overturned by the Court of Appeals on March 21, 2006, because [*2] the government had failed to introduce evidence that the property had a face, par, or market value of more than $1,000. The government had introduced evidence of archaeological value.

1 The indictment had charged thirty counts of felon in possession, and one count of forfeiture. The charges arose from a search of a home owned by defendant in September 2004, after defendant was sentenced and judgment entered on a charge of theft of government property.

Defendant was sentenced on the felon in possession charge on June 13, 2005, and judgment was entered on June 14, 2005. He received probation and a fine, and forfeited a number of firearms. By court order, defendant's probation terminated as of December 1, 2006. Defendant did not file a direct appeal or any other collateral attack on this conviction until the present motion seeking coram nobis relief.

I. Waiver

The government argues that defendant waived his right to collaterally attack his conviction. The plea agreement pursuant to which defendant pleaded guilty to the *§ 922(g)* charge states that defendant Ligon

> knowingly and expressly waives his right to appeal [his sentence] . . . *and further waives any right to collaterally attack any matter* [*3] *in connection with this prosecution* and his right to appeal any other aspect of his conviction or sentence. The defendant reserves only the right to appeal any sentence imposed to the extent, but only to the extent, that the sentence is an upward departure and outside the range established by the applicable sentencing guidelines.

(Def. Plea Agmt. 2-3) (emphasis added).

A petition for a writ of error coram nobis is a collateral attack on a criminal conviction. *Telink, Inc. v. United States, 24 F.3d 42, 45 (9th Cir. 1994)*; *see also United States v. Chavez-Salais, 337 F.3d 1170, 1172 (10th Cir. 2003)*; *United States v. Allen, 2009 U.S. Dist. LEXIS 35093, 2009 WL 961468, at *3 (N.D. Cal. 2009)*. Courts will enforce a waiver if "(1) the language of the waiver encompasses the defendant's right to appeal on the grounds claimed on appeal . . . and (2) the waiver is 'knowingly and voluntarily made.'" *United States v. Martinez, 143 F.3d 1266, 1270-71 (9th Cir. 1998)*.

Defendant does not contest that the language of the waiver encompasses his petition for a writ of error coram nobis. Defendant argues only that (1) the waiver was not knowingly and voluntarily made, and (2) enforcement of the waiver would result in a miscarriage [*4] of justice.

Defendant argues that his waiver was not knowing and voluntary because he believed that if his underlying felony were reversed that his right to carry arms would automatically be restored. He argues that had he been advised this would not be the case, he would not have agreed to the waiver. This misunderstanding of the consequences, defendant argues, renders his waiver unenforceable.

First, defendant cites a First Circuit case, *United States v. Padilla, 578 F.3d 23, 30 (1st Cir. 2009)* for this last proposition. *Padilla*, however, is distinguishable from this case. In *Padilla*, the written waiver of appellate rights was straightforward. The judge, however, made misleading statements during the plea colloquy that resulted in confusion as to the effects of the defendant's waiver. Similar facts are not alleged in this case.

In fact, defendant's own declaration confirms that his attorney told him when he pleaded guilty that he was giving up his right to appeal and that the only avenue for reversing his conviction would be through a presidential pardon. (Ligon Decl. P2). Defendant's assumptions about other ways to secure a reversal of his conviction do not render the waiver unknowing [*5] and involuntary.

Second, defendant argues that even if he has waived his right to appeal, the court may consider his contentions where doing so would prevent a miscarriage of justice. *United States v. Gwinnett, 483 F.3d 200, 201 (3d Cir. 2007), cited with approval by United States v. Jacobo Castillo, 496 F.3d 947, 957 (9th Cir. 2007)*. [2] While the defendant argues that continuing application of his *§ 922(g)* conviction is resulting in a loss of a fundamental right -- his right to bear arms -- and that therefore enforcement of his waiver would result in a miscarriage of justice, the court is not persuaded. At the time of his arrest, defendant was on release and awaiting self-surrender for his prison term on the theft conviction. He was found in possession of more than thirty firearms, and according to the government at the hearing on defendant's motion, five of those firearms were stolen. He admittedly used the firearms for hunting or as part of a collection. At the time, there was no indication the defendant was using any of the firearms for protection. At the hearing on defendant's motion, the government also asserted that in addition to the firearms, drugs and drug paraphernalia were [*6] found in the house. The defendant received substantial benefits by signing the plea agreement in exchange for waiving his right to file postconviction writs such as the one before the court. In exchange for his waiver the government dismissed twenty-nine felon in possession counts. Under the facts of this case, the court concludes that the defendant's waiver was freely and voluntarily given and that denial of relief will not result in a miscarriage of justice. [3]

> 2 Although the Ninth Circuit in *Jacbo-Castillo* cited *Gwinnet*'s holding with approval, the issue in *Jacobo-Castillo* was whether the circuit court had jurisdiction to hear the defendant's appeal despite his waiver of appellate rights, not under

what standard the waiver might be disregarded. Recently, an unpublished opinion stated that the Ninth Circuit has not adopted a "miscarriage of justice" exception to enforcement of valid appeal waivers. *See United States v. Ayala, 316 Fed. App'x 636, at *1 (9th Cir. 2009).*

3 Avenues of relief available to the defendant include an application for presidential pardon and a petition under *18 U.S.C. § 925(c)* to the extent Congress provides funding for its implementation.

The defendant does not [*7] argue that his petition for relief falls outside the scope of his waiver. A defendant's waiver does not encompass assertions that the statute under which he was convicted is unconstitutional, as such arguments are jurisdictional in nature, *see United States v. Bell, 70 F.3d 495, 497 (7th Cir. 1995)* (citing *United States v. Montilla, 870 F.2d 549 (9th Cir. 1989)* and *Marzano v. Kincheloe, 915 F.2d 549 (9th Cir. 1990))*; *see also United States v. Perlaza, 439 F.3d 1149, 1167 n.21 (9th Cir. 2006)*, although at least one circuit has suggested that as-applied challenges are not jurisdictional, *see United States v. Seay, F.3d , 2010 U.S. App. LEXIS 18738, 2010 WL 3489042, at *2 (8th Cir. Sept. 8, 2010)*. Moreover, a defendant waives only that which is "clearly contemplated by, and subject to, his plea agreement waiver." *United States v. Abarca, 985 F.2d 1012, 1014 (9th Cir. 1993)*. It is at least arguable that because the right defendant asserts (the individual right to bear arms) did not exist at the time he entered his plea, such right was not subject to his plea agreement waiver. However, the defendant has not raised this issue and the court finds that on the grounds for relief raised by defendant, defendant waived [*8] his right to appeal and is therefore barred from seeking coram nobis relief.

Nevertheless, in order to address all the issues raised in the defendant's motion, the court will consider whether such relief would be available to defendant if he had not waived that right.

II. Coram Nobis Relief

"Coram nobis is an extraordinary writ, used only to review errors of the most fundamental character." *Matus-Leva v. United States, 287 F.3d 758, 760 (9th Cir. 2002)*. It may be used to challenge an unlawful or unconstitutional conviction where the defendant is no longer in custody, and may be issued "under circumstances compelling such action to achieve justice." *United States v. Morgan, 346 U.S. 502, 511, 74 S. Ct. 247, 98 L. Ed. 248 (1954)*; *Hirabayashi v. United States, 828 F.2d 591, 604 (9th Cir. 1987)*. The court has the power to issue a writ of error coram nobis pursuant to the All Writs Act, *28 U.S.C. § 1651(a)*. *Matus-Leva, 287 F.3d at 760.*

A defendant seeking coram nobis relief must establish four elements: (1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of [*9] Article III; and (4) the error is of a fundamental character. *Hirabayashi, 828 F.2d at 604*; *Matus-Leva, 287 F.3d at 760*. Failure to establish any one of the elements is fatal. *Matus-Leva, 287 F.3d at 760.*

The government concedes that defendant can show the first and third elements but argues that he cannot prove the second and fourth because: (1) the conviction is valid and lawful, both as to the *Second Amendment* claim as well as the *Fifth Amendment* procedural due process claim; and (2) defendant unjustifiably delayed in bringing his motion.

A. Timeliness of Motion

Defendant waited more than four years after his conviction to seek relief -- nearly four years after his underlying predicate conviction was overturned. Defendant asserts he had no basis for an attack until *District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008)* was decided in 2008.

A change in the law that is made retroactive is a valid reason for waiting to file a coram nobis petition. *United States v. Riedl, 496 F.3d 1003, 1007 (9th Cir. 2007)*. The government does not argue that *Heller* is not retroactive, but instead argues that (1) *Heller* did not change the law, and (2) defendant at any rate waited too long to file his petition [*10] after *Heller* was decided.

Before *Heller*, the Ninth Circuit rejected as-applied challenges on the grounds that the *Second Amendment* provided only a collective right. *See Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2002)*; *see also United States v. Stewart, 348 F.3d 1132, 1142 (9th Cir . 2003), cert. granted and judgment vacated by 545 U.S. 1112, 125 S. Ct. 2899, 162 L. Ed. 2d 291 (2005), opinion aff'd in relevant part by 451 F.3d 1071 (9th Cir. 2006)*. *Heller* changed the applicable law in that it held the *Second Amendment* provides an individual right. Whether or not

Heller is to be applied retroactively, it is clear that defendant could not have legitimately raised the current claim before *Heller* was decided. However, the court need not decide whether defendant's delay of more than a year and a half after *Heller* was issued was a valid reason for not attacking the conviction earlier, as even on the merits, defendant's coram nobis claim must fail.

B. Error of Fundamental Character

I. Reversal of Underlying Felony

Reversal of the felony underlying a felon in possession conviction does not render the felon in possession conviction invalid. *See Lewis v. United States, 445 U.S. 55, 64-65, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980)* ("[T]o limit the scope of *§§ 922(g)(1)* [*11] and *(h)(1)* to a validly convicted felon would be at odds with the statutory scheme as a whole. Those sections impose a disability not only on a convicted felon but also on a person under a felony indictment, even if that person subsequently is acquitted of the felony charge. . . . It seems fully apparent to us . . . that Congress clearly intended that a defendant clear his status *before* obtaining a firearm.") (emphasis original); *United States v. Marks, 379 F.3d 1114, 1116, 1118-19 (9th Cir. 2004)* ("The focus of the inquiry under *§§ 921(a)(20)* and *922(g)(1)* is whether someone has been convicted of a felony under state law, not whether that conviction is constitutionally valid, nor whether it may be used as a predicate conviction for subsequent state prosecutions.").

While both *Lewis* and *Marks* involved underlying felonies that were subject to collateral attack but had not yet been reversed, the courts have further held that a felon in possession conviction is no less valid where the predicate conviction has been subsequently reversed than it is where the conviction is simply subject to collateral attack. *United States v. McCroskey, 681 F.2d 1152, 1153 (9th Cir. 1982)* (holding that where [*12] defendant succeeded in getting predicate conviction expunged *nunc pro tunc* to a time before he was found in possession of a firearm, his felon in possession conviction remained valid because he had not cleared his status before obtaining the firearm); *Bonfiglio v. Hodden, 770 F.2d 301, 304-05 (2d Cir. 1985)* (same).

Accordingly, the court concludes that the fact that defendant's underlying conviction was reversed did not render the defendant's felon in possession conviction invalid.

ii. *Second Amendment*

The *Second Amendment* provides that "the right of the people to keep and bear arms shall not be infringed." *Section 922(g)(1)* limits that right, by making it unlawful for any person convicted of a felony to possess a gun.

Defendant argues that *§ 922(g)(1)* is unconstitutional as applied, and therefore asks the court to either vacate the judgment or declare the continuing application of the *§ 922(g)(1)* disqualification to him to be unconstitutional. Defendant bases his argument on the Supreme Court's recent holding that the *Second Amendment* provides for an individual right to bear arms. He argues his *§ 922(g)(1)* conviction violates that right.

In 2008, the Supreme Court held that the *Second Amendment* [*13] right to bear arms is an individual right. *Heller, 128 S. Ct. at 2797*. That right, however, is "not unlimited." *Id. at 2799*. The Court cautioned that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons," which are "presumptively lawful." *Id. at 2816-17 & n.26*. Since *Heller*, the Ninth Circuit has reaffirmed the constitutionality of the federal felon in possession statute, stating that "[n]othing in *Heller* can be read legitimately to cast doubt on the constitutionality of *§ 922(g)(1)*." *United States v. Vongxay, 594 F.3d 1111, 1114, 1118 (9th Cir. 2010)*.

The Ninth Circuit has clearly held that *§ 922(g)(1)* is facially valid. Therefore, the court turns to the defendant's argument that the statute is unconstitutional as applied to him.

An "as-applied" challenge contends the law is unconstitutional as applied to the litigant's particular circumstance, even though the law may be capable of valid application to others. *Foti v. City of Menlo Park, 146 F.3d 629, 635 (9th Cir. 1998)*.

In the wake of *Heller*, virtually all of the federal courts addressing the issue have denied as-applied attacks on the constitutionality of *§ 922(g)(1)* [*14] -- some simply by invoking the presumed lawfulness of felon in possession statutes noted in *Heller*, others by engaging briefly in the as-applied analysis. *See, e.g., United States v. Khami, 362 Fed. App'x 501, 507-08 (6th Cir. 2010)*; *United States v. Gieswein, 346 Fed. App'x 293, 295-96 (10th Cir. 2009)*; *United States v. Radencich, 2009 U.S. Dist. LEXIS 3692, 2009 WL 127648, at *2 (N.D. Ind.*

2009); United States v. Jones, 673 F. Supp. 2d 1347, 1351-52 (N.D. Ga. 2009) (rejecting as applied challenge to *§ 922(g)(1)* where defendant had argued that his underlying felony was remote in time (14 years prior) and he was not alleged to have used the gun in an unlawful manner); *United States v. Abner, 2009 U.S. Dist. LEXIS 2494, 2009 WL 103172, at *1 (M.D. Ala. 2009); United States v. Henry, 2008 U.S. Dist. LEXIS 60780, 2008 WL 3285842, at *1 (E.D. Mich. 2008); United States v. Robinson, 2008 U.S. Dist. LEXIS 60070, 2008 WL 2937742, at *2-3 (E.D. Wis. 2008).*

The only federal case defendant cites in support of his claim was vacated and reheard *en banc* by the Seventh Circuit. *See United States v. Skoien, 587 F.3d 803, 808 (7th Cir. 2009), opinion vacated & reh'g en banc granted by 2010 U.S. App. LEXIS 6584, 2010 WL 1267262 (7th Cir. Feb. 22, 2010).* While the original panel decision had found the challenged statute, *§ 922(g)(9)*, unconstitutional, [*15] the *en banc* panel held that the statute did not violate the defendant's *Second Amendment* rights. *United States v. Skoien, 614 F.3d 638, 2010 WL 2735747 (7th Cir. 2010).*

The only other case cited by defendant in which a court found a felon in possession statute to be unconstitutional as applied is from the North Carolina Supreme Court. There, the court held that "[b]ased on the facts of plaintiff's crime, his long post-conviction history of respect for the law, the absence of any evidence of violence by plaintiff, and the lack of any exception or possible relief from the statute's operation, as applied to plaintiff, [the analogous state felon in possession statute] is an unreasonable regulation, not fairly related to the preservation of public peace and safety." *Britt v. State, 363 N.C. 546, 681 S.E.2d 320, 323 (N.C. 2009).*

The court is unable to find any case where it was held that *§ 922(g)(1)* -- or any other subsection of *§ 922(g)* -- was unconstitutional as applied. Even so, because as-applied arguments are factually dependent, the court addresses defendant's argument.

As a threshold matter, the court must determine what level of scrutiny should apply to its analysis. The answer to that question is not clear. [*16] *Heller* did not identify the appropriate level of scrutiny for *Second Amendment* challenges, holding only that rational basis does not apply. As a result, the courts have not agreed on a standard, with some applying strict scrutiny and others intermediate scrutiny. *See, e.g., United States Pettengill, 682 F. Supp. 2d 49, 55-57 (D. Maine 2010)* (intermediate scrutiny); *United States v. Engstrum, 609 F. Supp. 2d 1227 (D. Utah 2009)* (strict scrutiny).

A law that burdens the exercise of a fundamental right is subject to strict scrutiny. *San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16-17, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973); United States v. Hancock, 231 F.3d 557, 565 (9th Cir. 2000).* On June 28, 2010, the Supreme Court held that the right to bear arms in self defense is a fundamental right. *McDonald v. City of Chicago, 561 U.S. , 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010)* (slip op. at 44). However, "the right to keep and bear arms is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *McDonald, 561 U.S. , 130 S. Ct. at 3047, 177 L. Ed. 2d 894 (2010).* Thus, the fundamental right as announced by the Supreme Court relates to the right to keep and bear arms for the purpose of self defense. Courts have held that where [*17] the stated purpose for the firearm is hunting, and not self defense, strict scrutiny does not apply. *See United States v. Walker, 2010 U.S. Dist. LEXIS 39473, 2010 WL 1640340 (E.D. Va. 2010).*

Here, although defendant mentions bearing arms for the purpose of self-defense, the overwhelming evidence is that the defendant possessed the guns for hunting or as part of a collection. Even if the court applies the doctrine of strict scrutiny, however, defendant's argument fails.

To satisfy the strict scrutiny test, a law must be "narrowly tailored to achieve a compelling governmental interest." *Abrams v. Johnson, 521 U.S. 74, 82, 117 S. Ct. 1925, 138 L. Ed. 2d 285 (1997).* Defendant concedes that *§ 922(g)* serves a compelling government interest, but asserts that it does not do so in the least restrictive manner possible. He offers five arguments in favor of his position.

First, his predicate felony conviction was reversed. Second, neither of his crimes involved violence or the use of guns. Third, nothing in defendant's history suggests he is a danger to others; he has never used a firearm to threaten or harm another person. Fourth, guns are important to defendant's life, as he has always been a hunter and gun collector, and now cannot attend family gatherings [*18] that involve hunting. And fifth, at the time defendant was found with the firearms he was in the process of giving his gun collection away.

As discussed, the reversal of defendant's underlying

felony does not invalidate his felon in possession conviction. He was under a disability when he was found with firearms. Accordingly, this fact does not call into question the constitutionality of defendant's conviction.

Defendant argues that many felonies are not violent and do not involve the use of guns, and that many people guilty of felonies are not prone to violence, including him. The courts that have addressed this issue have been aware that many felonies are not violent. Yet, they continue to uphold the facial constitutionality of *§ 922(g)(1)*. Accordingly, the fact that neither defendant's history nor his felonies were violent does not render *§ 922(g)(1)* unconstitutional as applied to him.

Defendant's possession of guns for hunting or as a collection does not render his conviction constitutionally infirm. Possession for these reasons has not been recognized as a fundamental right, and defendant cites no authority for finding that a law that burdens such possession violates the *Second Amendment*.

Finally, [*19] the fact that defendant was giving away the guns when he was found in possession of them does not compel a finding that his conviction violates his *Second Amendment* rights. Defendant had ample time before sentencing on the theft charge in which to properly dispose of his firearms.

Defendant also argues that *§ 922(g)(1)* is overly restrictive because the only way to invalidate a conviction under it is through presidential pardon. An alternate avenue exists in *18 U.S.C. § 925(c)*, which allows application to the Attorney General for relief from a firearms disability. Defendant argues that Congress recognized that barring every felon from possessing guns is overly restrictive, and that was the purpose for its enactment of *§ 925(c)*. While it appears that Congress has not provided funding for the implementation of *§ 925(c)* since 1992, this does not mean that it will not do so in the future. This court could find no decision of a court that has considered the constitutionality of *§ 922(g)(1)* that has found that section unconstitutional because of the unavailability of *§ 925(c)*. [4]

4 The court believes that this is a case that should be considered under *§ 925(c)*.

Accordingly, the court is not persuaded [*20] by the defendant's as-applied argument, both as to the conviction itself as well as to its continuing application. As the defendant was under disability when he possessed the weapons, his *§ 922(g)(1)* conviction is lawful and constitutional. Therefore, there is no fundamental error that may be corrected by awarding coram nobis relief even if the court had found defendant had not waived his right to make that claim.

ii. *Fifth Amendment*

The *Due Process Clause of the Fifth Amendment* provides that "no person shall be deprived of life, liberty, or property without due process of law." The government argues that defendant received notice at his arraignment on the *§ 922(g)(1)* charge and an opportunity to be heard at his change of plea and sentencing hearings. Defendant argues that he was never given due process with regard to the continuing impairment caused by his *§ 922(g)(1)* conviction. He cites no authority supporting his contentions that individuals are entitled to due process protections for continuing deprivations.

Defendant did receive notice and an opportunity to be heard during the criminal proceedings for his *§ 922(g)(1)* conviction, and he points to no procedural irregularities in that [*21] process. His own alleged misapprehension about the effect of his guilty plea is not enough to call into question the validity of his plea. His attorney explicitly told him that the only way to overturn his *§ 922(g)(1)* conviction was through a presidential pardon.

For the reasons set forth above, the defendant's motion for a writ of error coram nobis is hereby **DENIED** (#36).

DATED: This 20th day of October, 2010.

/s/ Howard D. McKibben

UNITED STATES DISTRICT JUDGE

EXHIBIT B

1 of 1 DOCUMENT

UNITED STATES OF AMERICA, Plaintiff, v. MELISSA A. HUET, Defendant.

Criminal No. 08-0215

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

2010 U.S. Dist. LEXIS 123597

November 22, 2010, Filed

COUNSEL: [*1] For MARVIN E. HALL, Defendant: Elisa A. Long, LEAD ATTORNEY, Federal Public Defender's Office, Pittsburgh, PA.

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For USA, Plaintiff: Margaret E. Picking, LEAD ATTORNEY, United States Attorney's Office, Pittsburgh, PA.

JUDGES: ARTHUR J. SCHWAB, UNITED STATES DISTRICT JUDGE.

OPINION BY: ARTHUR J. SCHWAB

OPINION

Memorandum Opinion

I. Introduction

Pending before this Court are numerous pre-trial motions, including defendant Melissa A. Huet's (hereinafter "Huet" or "defendant Huet") Motion to Dismiss Count Three of a Three-Count Indictment charging her with aiding and abetting possession of a firearm by a convicted felon, from on or about August 10, 2007 to on or about January 11, 2008, in violation of Title *18, United States Code, Sections 922(g)(1)* and *2(a)*.

Huet's co-defendant and paramour, Marvin E. Hall (hereinafter "Hall" or "defendant Hall"), was charged at Count One of the Indictment, with possession of a firearm by a convicted felon on or about January 11, 2008, in violation of Title *18, United States Code, Section 922(g)(1)*. Count Two charged Hall with transfer of unregistered firearms, on or about January 11, 2009, in violation [*2] of Title *26, United States Code, Section 5861(e)*. On February 1, 2010, defendant Hall pled guilty to Count One of the Indictment, and on June 25, 2010, Hall was sentenced by this Court to time served. [1] Defendant Hall already had served twenty four (24) months imprisonment in pretrial detention, and actually served more time than was called for under the advisory sentencing guideline range of fifteen (15) to twenty-one (21) months imprisonment. See the *Vue* case, 09-cr-48, doc. no. 120.

1 The government moved to dismiss Count Two, and the Court granted that motion. Doc. No. 133.

Defendant Huet moves to dismiss Count Three of the Indictment pursuant to *Fed.R.Crim.P. 12(b)(3)(B)* on the basis that: (1) it fails to state an offense under the aiding and abetting statute, *18 U.S.C. § 2*, and/or *(2)* if it does state an offense under *section 2*, on the grounds that said offense violates the *Second Amendment to the United States Constitution*, as it has been construed *in District of Columbia v. Heller, 554 U.S. , 128 S.Ct. 2783 (2008)*.

II. Legal Standard

Rule 12(b)(3)(B) permits a Court "at any time while the case is pending . . . [to] hear a claim that the indictment or information fails to . . [*3] . state an offense." When ruling on a motion to dismiss for failure to state an offense under *Fed.R.Crim.P. 12(b)(3)(B)*, the Court is generally limited to reviewing the face of the Indictment, and the allegations of the Indictment are to be accepted as true for purposes of the motion to dismiss. *United States v. Besmajian, 910 F.2d 1153, 1154 (3d Cir. 1990)*. A motion under *Fed.R.Crim.P. 12(b)(3)* is appropriate when it raises questions of law rather than fact. *See United States v. Levin, 973 F.2d 463, 469 (6th Cir. 1992)* (affirming the district court's dismissal of an Indictment when "undisputed extrinsic evidence" demonstrated that "the government was, as a matter of law, incapable of proving" an element of the offense). As the United States Court of Appeals for the Sixth Circuit explained in *United States v. Levin*:

> *Rule 12 of the Federal Rules of Criminal Procedure* and its component parts encourage district courts to entertain and dispose of pretrial criminal motions before trial if they are capable of determination without trial of the general issues. Moreover, district courts may make preliminary findings of fact necessary to decide questions of law presented by pretrial motions [*4] so long as the trial court's conclusions do not invade the province of the ultimate finder of fact.

973 F.2d 463, 469.

A pretrial motion raising factual issues may be ruled upon where there is no right to jury resolution of a factual dispute. *United States v. MacDougall, 790 F.2d 1135 (4th Cir. 1986)*. Where, as here, the factual information underpinning the indictment is not in dispute and the only question is a legal one, motions to dismiss an Indictment may be ruled upon as a matter of law. See *United States v. Ali, 557 F.3d 715, 719-29 (6th Cir. 2009)*(court may rule on a motion to dismiss where defendant's motion pleads that undisputed facts did not give rise to the offense charged in the Indictment, or whether the Indictment, based on such undisputed facts failed to state an offense). *United States v. Todd, 404 F.3d 1062, 1067 (10th Cir. 2006)*; *United States v. Flores, 404 F.3d 320 (5th Cir. 2005)*.

The Indictment must include all of the elements of the crime alleged, *United States v. Spinner, 180 F.3d 514 (3d. Cir. 1999)*, as well as specific facts that satisfy all those elements; a recitation "in general terms the essential elements of the offense" is not sufficient. *United States v. Panarella, 277 F.3d 678, 684-85 (3d Cir. 2002)*. [*5] The dismissal of an Indictment is authorized only if its allegations are not sufficient to charge an offense, but such dismissals may not be based upon arguments related to the insufficiency of the evidence that will be offered to prove the charges in the Indictment. *United States v. DeLaurentis, 230 F.3d 659, 660-661 (3d Cir. 2000)*.

This pretrial motion to dismiss is properly addressed and resolved by this Court because defendant Huet's argument that the Indictment fails to state an offense is based upon facts which are, for purposes of this Motion, either undisputed or resolved in the government's favor, and involve a constitutional claim involving her *Second Amendment* right to keep and bear arms.

III. Background Factual Information[2]

2 This Court, being mindful of, and adhering to the standard of review on a motion to dismiss the Indictment under *Fed. R. Crim. P. 12(b)(3)(B)*, provides the following factual information mostly as background, and the Court has not relied upon facts outside of the four corners of the Indictment as a basis to dismiss this Indictment. However, the facts as set forth in the underlying guilty plea and other proceedings of co-defendant Hall are a matter of public [*6] record and therefore have been relied upon by this Court in fashioning this decision.

A. Investigation of Defendant Huet

Defendant Huet is 35 years old, has never been convicted of any crime, and is not disabled or otherwise prohibited from possessing a firearm under *18 U.S.C. § 922(g)(1)*, or its Pennsylvania counterpart, *18 Pa.C.S.A. § 6105*.

Count Three (3) of the Indictment charges Huet with aiding and abetting the possession by her paramour, defendant Hall, of a firearm identified as an SKS rifle, [3] from August 10, 2007 to January 18, 2008. During discovery, materials provided to defendant pursuant to *Fed. R. Crim. P. 16* describe the rifle as an Interordnance M59/66 Rifle, Serial Number F151932 (hereinafter

referred to as "the SKS rifle"), which as described more fully later in this Opinion is not an "assault" rifle (like an AK-47) but a "curio" or collectors' rifle. Defendant Hall's guilty plea and sentencing at Count One of the Indictment confirm that he had been convicted in March, 1999, of possessing an unregistered firearm in violation of Title *26, United States Code, Section 5861(d).*

> 3 The Indictment had originally referred to the SKS rifle as an "assault rifle," but in its "Omnibus [*7] Brief and Responses to Pre-Trial Motions of Defendant," the government stated that it has "no objection to referring to the rifle merely as an SKS rifle, as the 'assault' designation has no bearing whatsoever on either the elements of the offense or the penalties Ms. Huet faces upon conviction." Doc. No. 134, at 14.

The genesis of the investigation by federal agents claims that they worked undercover "to penetrate a cell of militia extremists," and during their investigation, they met defendants Hall and Huet, while the agents pretended to have an interest in the activities of Morgan Jones, of Lucinda, Clarion County, including Jones' collection of guns and his hosting of an annual "flame-throwing" party in 2005. [4] See *United States v. Hall*, Doc. No. 44, Detention Hearing Transcript, June 11, 2008, p. 13-14.

> 4 According to testimony at the detention hearing of Hall, FBI Special Agent Yocca testified that according to "some of the defendants in this case" (although Huet is not mentioned), a flame-throwing party is one that certain militia members, as well as neighbors and other Pennsylvania gun owners attend, and it is held at Jones' property. Doc. No. 44 at 25-26. The government has not [*8] alleged that Huet took part in any of these alleged activities.

Under authority of a search warrant, federal agents seized the SKS rifle from an upstairs bedroom at the Hall/Huet home at Lawsonham Road in Clarion County, during a raid conducted on June 6, 2008. The raid occurred approximately nine (9) months to a year after the agent first met the couple, and nearly five (5) months from the end date of defendant Huet's "aiding and abetting" possession by a convicted felon charge pleaded in the Indictment. Doc. No. 120-1.

According to the *Rule 16* discovery materials, at no time during the undercover investigation did agents observe either Huet or Hall actually handle the SKS rifle. They did not observe Huet handle or otherwise deliver the rifle to Hall or direct him to handle it. Importantly, at no time over the five (5) months period covered by the Indictment did agents observe Huet in the same room as the rifle. There is no allegation that it had been discharged, either legally or illegally, by either Hall or Huet, and in particular, there is no allegation that Huet directed Hall to discharge the rifle, or possess the rifle, nor that Huet was a "straw" [*9] purchaser of the rifle for Hall.

As set forth in the affidavit of probable cause, Huet indicated to one or more of the agents on August 10, 2007 the following:

> That she was angry that HALL had been showing off an SKS assault rifle. HUET said that if it happened again, she would take it back to MORGAN. HUET further elaborated that she was worried that if HALL 'gets in trouble with that, I get in trouble, too. Cause it's in my name and he's got it.' HALL invited [the undercover agent] into his residence, where the [undercover agent] observed an SKS rifle assault in HALL's computer room. Referring to the SKS rifle HALL said, 'That's her SKS rifle, I'm not allowed to have a gun.'

Doc. No. 120-1, ¶ 19.

According to the Agent's summary of Huet's June 8, 2009 (FBI Form 302) statement, government agents reported that after they told Huet that they raided her house, arrested Hall and had a warrant to search her truck, she told them that "the guns in her home belong to her and that it is not illegal for her to purchase weapons." Doc. No. 120-2.

While the affidavit is filled with labels of "assault" rifle and "militia" language, there are no allegations that SKS rifle is a "true" assault weapon (at [*10] least for the last 50 to 60 years), or that Huet was personally involved in any militia activities, legal or illegal. The attempt to "label" Huet should not deter a thorough analysis in this case - - is the government, through the framework of "aiding and abetting," attempting to convert a lawful rifle owner into a criminal?

Importantly, absent from the Indictment are *any* facts supporting an inference that Huet did anything to aid and abet defendant Hall in "possessing" her firearm, the SKS rifle, or that Huet purchased or possessed the rifle as a means to assist Hall to avoid his restrictions. In other words, the government has set forth no facts addressing any specifics as to how defendant Huet aided and abetted Hall. The government simply charges *its conclusion* that Huet "knowingly and unlawfully aided and abetted the possession of a firearm, that is an SKS rifle assault rifle, in and affecting interstate commerce, by Marvin E. Hall." Doc. No. 1. The facts as gleaned from the underlying proceedings of defendant Hall, which are a matter of public record, also do not address how defendant Huet aided and abetted Hall.

B. The Firearm - - Not An Automatic "Assault" Weapon

The following [*11] brief historical review will be of assistance:

The SKS (or M59/66) is a legal, common semi-automatic rifle that is used as a hunting rifle and, like many hunting rifles, does not accept a magazine and cannot hold more than ten (10) rounds. The Interordance M59/66 is a semiautomatic carbine manufactured in the former Yugoslavia based upon the Russian SKS (Samorzaryadnyi Karabin Simonova) design of the 1940s. It carries a 7.62 x 39 mm cartridge in a *fixed* magazine holding up to ten (10) cartridges, and it has a barrel length of approximately 21 inches. This is important because, unlike an AK-47 or M-16, the SKS rifle cannot accept magazines and has a limited ammunition capacity of ten (10) rounds.

"Carbine" is derived from the French "carabine," the type of soldier who originally carried them. The "carbine" was designed as early as the 17th or 18th century as a lighter, shorter shoulder weapon for French and English cavalrymen. See Russell, Carl P., *Guns on the Early Frontier*, University of California Press, 1957), pp. 167-175. The term also referred to the inside diameter of the barrel, which was narrower than that of a musket. See Neumann, George C, *The History of Weapons of the American* [*12] *Revolution*, (Crown Publishers, Inc. 1967), pp. 36-39, 114-122. American carbines were manufactured and used for military purposes from approximately 1833.

Carbines were used by unmounted officers and others who sought a lighter, more compact weapon, and later were used as a sporting arm for hunting in heavy brush. The Russian SKS rifle is an example of this historical trend. The Russian SKS rifle was first used in the 1940s as a military weapon and was displaced in the late 1940s by the more deadly AK-47. The Russians shared the design of the SKS rifle with its post-World War II allies, and retained it largely for military ceremonial use. At least in the 1950s the Russian SKS rifle became the "standard hunting rifle for the majority of Russian hunters" for antelope, moose, boar, and brown bear. Doc. No. 120-4, S.P. Fjestad, *Blue Book of Gun Values*, 30th ed. (Blue Book Publications, Inc., 2009), p. 1559-61.

Ultimately, large military surpluses of Russian SKS rifles or rifles built upon the SKS design became widely available, including the M59/66 (manufactured in the former Yugoslavia), and were *lawfully* imported into the United States as sporting rifles. According to the *Blue Book of* [*13] *Gun Values*, it rapidly became one of the favorites for American hunters and shooters, based upon its affordability and durability. *Id.* Nothing indicates that the SKS rifle is a "weapon of choice" among criminals or gangs - - only of hunters and collectors.

The parties do not dispute for purposes of this Motion that the Interordnance M59/66, while a carbine by design, meets the definitions of "semiautomatic rifle" in *18 U.S.C. §§ 921(a)(7), (28)*. It is a firearm which is "intended to be fired from the shoulder," "which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge." *Id.* In contrast to semi-automatics, automatic weapons, also called machine guns, shoot multiple cartridges in response to a single trigger pull. *26 U.S.C. § 5845(b)*.

In 1994, Congress enacted a ten-year prospective ban on the manufacture, transfer or possession of a particular subset of semiautomatic rifles, which it characterized as "semiautomatic assault weapons." The ban *exempted* a large number of specifically-identified firearms, including any "semiautomatic rifles . . . that [*14] cannot accept a detachable magazine that holds more than 5 rounds of ammunition," and any semiautomatic shotgun "that cannot hold more than five rounds of ammunition in a fixed or detachable magazine." See former *18 U.S.C. § 922(v)(3)*. The M59/66 was *not* included in the ban. [5]

Further, as early as 2001 (and certainly no later than 2005), the Yugoslavian M59/66 had been designated a "curio" by the Bureau of Alcohol, Tobacco and Firearms' under *27 CFR § 478.11*.

> 5 There is nothing in the record to indicate that the rifle at issue was modified to accept a removable high capacity magazine.

Although the semiautomatic assault weapons ban ended in 2004, Congress's determination of which weapons were, and which weapons were not, dangerous, bears upon the constitutional inquiry regarding whether defendant Huet's rifle was "dangerous" or "unusual," especially since the SKS rifle was *not* within the ban (see *District of Columbia v. Heller, infra*), coupled with its "curio" or collectors' status.

IV. Analysis

A. Aiding and Abetting

As stated above, notably absent from the Indictment in this case are any facts setting forth *how* defendant Huet aided and abetted defendant Hall in his unlawful possession of [*15] the SKS rifle. The government's theory, disclosed on the record as set forth in defendant Hall's proceedings, appears to be that defendant Huet passively aided and abetted Hall in his possession of the curio firearm which *she* owned and kept in their shared residence. Supported by the June 8, 2008 statement made by Huet claiming ownership of this collectors' rifle, the government's theory in support of the aiding and abetting charge is that Huet owned the firearm and kept it unsecured in the home. At defendant Hall's guilty plea hearing, which is a matter of public record, government counsel stated that:

> Mr. Hall lived with . . . Melissa Huet, (who) had no prior record of which we are aware, but . . . bought firearms in her name for (sic) Morgan Jones, who on the side sold firearms. . . Miss Huet would allow Mr. Hall to have access to those firearms. In essence, that's the very basis of the charge against Mr. Hall to which he is pleading guilty today.

See *United States v. Hall*, Cr. No. 08-215, Change of Plea Hearing, 1/29/2010, Doc. No. 113 at 18.

Section 2 of Title 18 of the United States Code states that anyone who "directly commits an act or aid, abets, counsels, commands, induces or [*16] procures its commission, is punishable as a principal." In 1951, the aiding and abetting statute was amended to include the language "punishable as" in order to "eliminate all doubt that in the case of offense whose prohibition is directed at members of specified class (e.g. federal employees) a person who is not himself a member of that class may nonetheless be punished as a principal if he induces a person in that class to violate the prohibition." See S.Rep. 1020, 82d. Cong. 1st Sess., 7-8 (1951); See also, *Standefer v. United States, 447 U.S. 10, 19, n. 11 (1980)*.

In *United States v. Nolan, 718 F.2d 589, 591 (3d Cir. 1983)*, quoting *Nye & Nissan v. United States, 336 U.S. 613 (1949)*(other citations omitted), the United States Court of Appeals for the Third Circuit held that in order to "aid and abet" another person to commit a crime it is required "that a defendant 'in some sort associate himself with the venture, that he participate in it as something that he wished to bring about, that he seek by his action to make it succeed."

In *United States v. Xavier*, the United States Court of Appeals for the Third Circuit held that one may be an aider and abetter to possession by a convicted [*17] felon charge under *18 U.S.C. §§ 2(a)*, and *922(g)*, upon proof that the aider and abetter knew or had cause to know of the possessor's status as a felon.

The United States Supreme Court's recent unanimous decision in *Abuelhawa v. United States, 566 U.S. , 129 S.Ct. 2102 (2009)*, limits the government's practice of invoking accomplice liability. In that case, the Supreme Court rejected a loose construction of *21 U.S.C. § 843(b)*, which makes it a felony to use a telephone to facilitate a drug transaction, to punish the buyer of small drug quantities who merely arranges the purchases over the telephone. The Supreme Court likened the word "facilitate" in *section 843(b)* with "aid", "abet" and "assist" in other criminal statutes, and relied upon its decision in *Gebardi v. United States, 287 U.S. 112 (1932)*, which was a Mann Act decision which "refused to infer that the mere acquiescence of the woman transported [across state lines] was intended to be condemned by the general language punishing those who aid and assist the transporter, any more than it has inferred that the purchaser of liquor was to be regarded as an abettor of the illegal sale." *Id. at 2106*.

Defendant argues, and this Court [*18] agrees, that based upon the government's undercover investigation, the government cannot successfully establish that Huet "participat[ed] in the venture as something that [she] wished to bring about," and application of the Supreme Court's unanimous decision in *Abuelhawa* changes the government's case from weak to legally deficient.

The facts in the Indictment fail to set forth *any* allegations to support the conclusion that defendant Huet aided and abetted defendant Hall in his unlawful possession of the SKS rifle. Here, as stated above, there are no allegations in the Indictment (nor any information at the proceedings produced in the proceeding of co-defendant Hall) that Huet was a straw purchaser of the SKS rifle, or that she ever witnessed defendant Hall handling or firing the weapon. The most the government proffers is that Huet stated that if defendant Hall got in trouble with the gun, she would get in trouble also because she was the owner of the rifle. This statement, which the Court accepts as undisputed, does nothing to advance the cause that defendant Huet knew, or had reason to know that defendant Hall was a felon in possession *and* that her owning a weapon somehow aided or [*19] abetted him in his unlawful possession of the SKS rifle. The Court therefore finds that Count Three (3) of the Indictment against defendant Huet must be dismissed for failure to state an offense under the aiding and abetting statute, *18 U.S.C. § 2.*

B. *Second Amendment*

(1) The Nature of Defendant Huet's *Second Amendment* Challenge

At the outset, the Court must first determine whether the defendant is launching her attack on the constitutionality of the statutes at issue on their face, or on an as-applied basis. While a facial attack tests a law's constitutionality based on its text alone and does not address the facts or circumstances of the particular case, an as-applied attack does not allege that a law is unconstitutional as written, but that the application of the law to a particular person under particular circumstances deprives that person of his or her constitutional rights. *United States v. Marcavage, 609 F.3d 264 (3d Cir. 2010).*

Although defendant Huet does not specify whether the constitutional challenge is facial or as-applied, it appears to this Court that defendant attacks these statutes on an as-applied basis and under the facts of this case. Accordingly, the Court confines [*20] its analysis of the constitutionality of the laws as-applied to the factual scenario of this case. As previously noted, these facts have been gleaned primarily from the public judicial record of co-defendant Hall's proceedings.

(2) Summary of Conclusion

For the reasons set forth below, this Court finds that under the facts of this case, to punish Huet, who has not been convicted of a felony under *18 U.S.C. § 922(g)(1)*, as a principal, violates the core of the *Second Amendment* right to keep arms, at least, where, as here, the conduct said to have aided or abetted the substantive firearm possession is itself purely possessory.

(3) History of *Second Amendment* as Construed Through Recent Case Precedent

The language of the *Second Amendment* provides that: "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."

(a) District of Columbia v. Heller

In the landmark case of *District of Columbia v. Heller, 554 U.S. , 128 S.Ct. 2783 (2008)*, the United States Supreme Court, for the first time, addressed the scope of the individual right to bear arms and interpreted the meaning of the *Second Amendment* within the [*21] context of deciding whether a District of Columbia prohibition on the possession of usable handguns in the home violates the *Second Amendment*. The Supreme Court in *Heller* set forth an exhaustive analysis on the meaning and purpose of the *Second Amendment*, which, like the *First* and *Fourth Amendments*, codified a *pre-existing* right, and examined the meaning of the operative clause, "right of the people" to "keep and bear Arms", and the prefatory clause, "A well regulated Militia, being necessary to the security of a free State . . . ". *Id. at 2789.* Further, the Court evaluated the relationship between the operative clause and the prefatory clause of the *Second Amendment*, as well as the post-ratification commentaries, pre-civil war case law, post-civil war legislation and commentaries, and ultimately struck down as unconstitutional two District of Columbia statutes which totally banned handgun possession in the home, and required all other firearms to be inoperable at all times.

Of note, the Court in *Heller* held that, "the *Second Amendment* extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of founding." *128 S.Ct. at 2791-92.* [*22] The Court characterized as "bordering on the frivolous" the argument that "only those arms in existence in the 18th Century are protected by the *Second Amendment*." *Id.* The Supreme Court wholesale rejected the argument based upon the language from *United States v. Miller, 307 U.S. 174 (1939)* that "only those weapons useful in warfare are protected." *Id. at 2815.* [6] The Court, however, noted that the right is not unlimited as the *Second Amendment* does not protect an individual's right to possess "dangerous and unusual weapons." *Id. at 2817* (citations omitted).

> 6 In *United States v. Miller, 307 U.S. 174 (1939)*, the United States Supreme Court upheld a section of the National Firearms Act making it unlawful to possess an unregistered sawed-off shotgun. The Court emphasized that "[i]n the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the *Second Amendment* guarantees the right to keep and bear such an instrument." *Id. at 178.* The Court further stated that "it is not within judicial notice that this weapon is any part [*23] of the ordinary military equipment or that its use could contribute to the common defense." *Id.*

While the majority in *Heller* held that the *Second Amendment* provides an individual the right to possess a firearm unconnected with service in a militia and to use that arm for traditionally lawful purposes, especially the right of self defense within the home, the dissent (and petitioners) believed that it protects only the right to possess and carry a firearm in connection with militia service. *Id. at 2789.*

Although *Heller* did not settle on a standard of scrutiny, it unmistakably ruled out the deferential rational basis test that was applied in *Miller*. The Court in discussing the standard of scrutiny applicable to the hand gun prohibition, stated:

> [T]he inherent right of self-defense has been central to the *Second Amendment* right. The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning [*24] from the home 'the most preferred firearm in the nation to 'keep' and use for protection of one's home and family' would fail constitutional muster.

Id. at 2817-18. (Internal citations omitted).

While not recognizing an unalienable right of every citizen to possess any type of firearm and to brandish it wherever they wish, the majority in *Heller* held that the *Second Amendment* established a core right that protects a citizen's ability to possess firearms used by militia members in his or her home for personal protection, provided that the possessor is not disqualified by virtue of being a felon or insane.

(b) McDonald v. City of Chicago[7]

> 7 This Court required additional briefing from the parties on the effect of the decisions in *United States v. Marzzarella* (3d Cir. July 29, 2010), *and McDonald v. City of Chicago, 130 S.Ct. 3040 (U.S. June 28, 2010)*. See Text Orders of July 14, 2010 and August 12, 2010.

In the recent case *of McDonald v. City of Chicago, U.S. , 130 S.Ct. 3020, 3047 (U.S. June 28, 2010)*, a four member plurality nearly identical to the majority in *Heller*, held that the *Fourteenth Amendment's Due Process Clause*, includes the right to bear arms as affirmed in *Heller*. Thus, [*25] the opinion at least arguably subjects numerous state and local firearms regulations to constitutional evaluation. The plurality in *McDonald* reasoned that the *Second Amendment's* right to bear arms, though only recently illuminated in *Heller*, is nonetheless both "deeply rooted in this Nation's history and tradition," and "fundamental to our scheme of ordered liberty and system of justice." *Id. at 3023. (Citations omitted).*

The five opinions in *McDonald* are splintered in

different directions on core approaches to American constitutional analysis as well as the right to bear arms. Nonetheless, the Justices share common ground, expressed by Justice Stevens' dissent, which acknowledges that, "a rule limiting the federal constitutional right to keep and bear arms to the home would be less intrusive on state prerogatives and easier to administer." *Id. at 3105.*

(c) United States v. Marzzarella

Most recently, in *United States v. Marzzarella, 614 F.3d 85 (3d Cir. July 29, 2010)*, the United States Court of Appeals for the Third Circuit took its first run at the precedent established by the Supreme Court in the *Heller* case. In *Marzzarella*, defendant argued that his conviction under *18 U.S.C. § 922(k)* [*26] for possession of a handgun with an obliterated serial number violated his *Second Amendment* right to keep and bear arms under the *Heller* decision.

The factual scenario and the offense charged are quite different and distinct from the facts in this case, and therefore, the holding of the Court of Appeals for the Third Circuit in *Marzzarella*, that the *Second Amendment* does not protect defendant's right to possess a handgun in his home with an obliterated serial number which places it in the category of "dangerous" or "unusual," is not directly applicable to this case.

However, the Court of Appeals interpreted the pronouncements of the Supreme Court to be garnered from *Heller*, and those pronouncements are most relevant to the instant case. According to the Court in *Marzzarella*, a central principle to be gleaned from *Heller* is that the *Second Amendment* "confer[s] an individual right to keep and bear arms . . . at least for the *core purpose* of allowing law-abiding citizens to use arms in defense of hearth and home." *Id. at 92* (emphasis added). The Court of Appeals, also citing the discussion in *Heller* of the importance of hunting to the pre-ratification of the right to bear arms, noted, that [*27] "to some degree, it must protect the right of law-abiding citizens to possess firearms for other yet-undefined lawful purposes." *Id.* The Court of Appeals reiterated the Supreme Court's holding that "[t]he right is not unlimited, however, as the *Second Amendment* affords no protection for the possession of dangerous and unusual weapons, possession by felons, and the mentally ill, and the carrying of weapons in certain sensitive places." *Id.*, citing *Heller, at 2816-17.*

The Court of Appeals in *Marzzarella* highlighted the two-pronged approach to *Second Amendment* challenges as set forth in *Heller*. The Court must first ask whether the challenged law imposes a burden on conduct falling within the scope of the *Second Amendment's* guarantee. If it does not, the Court's inquiry is complete. If it does, the Court must evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid. *Id. at 89.*

The Court, while ultimately adopting an intermediate, rather than strict level of scrutiny, seemed to acknowledge that the *Second Amendment* could impose more than one particular standard of scrutiny. Borrowing from the *First Amendment* [*28] speech context which employs the intermediate level of scrutiny, the Court stated that the asserted governmental end must be more than just legitimate, rather, it requires the end to be either "significant," "substantial," or "important." In other words, the fit between the challenged regulation and the asserted objective must be reasonable, not perfect. *Id. at 79.*

In *Marzzarella*, the Court found that the burden imposed by the statutory provision did not severely limit the possession of firearms, and the legislative intent behind the provision was not to limit the ability of persons to possess any class of firearms. The Court also contrasted the District of Columbia's handgun ban as an example of a law at the far end of the spectrum of infringement on *Second Amendment* rights. *Id. at 97.* ("It did not just regulate possession handguns; it prohibited it, even for the stated fundamental interest protect by the right -- the defense of hearth and home.")

(d) Application of Case Precedent

Applying the guiding principles set forth in *Heller*, and the above standard elucidated by the panel in *Marzzarella*, and evaluating the facts in the light most favorable to the government, defendant Huet's possession [*29] of the gun - - which is the crux of the government's case against her - - at all times occurred within the home, where her right to possess is undoubtedly most sacrosanct. As Justice Stevens concluded in *McDonald*, "firearms kept inside the home generally pose a lesser threat to public welfare as compared to firearms taken outside . . . " *McDonald, 130 S.Ct. at 3105.*

At the time of the offense charged in this case,

defendant Huet, who was charged with aiding and abetting, was neither a felon, nor insane. *Heller at 2816*; *McDonald at 3047* (plurality opinion of Alito, J.)("We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill . . ."). Rather, Huet allegedly aided and abetted another who was not permitted to lawfully possess a firearm, thus compounding an inchoate offense upon another inchoate offense.

The SKS rifle was owned by and kept in defendant Huet's home. Applying the aiding and abetting statute at *section 2*, together with the alleged violation of *section 922(g)(1)*, under the facts of this case, implicates the protections of the *Second Amendment*. Were this [*30] Court to permit this Indictment to go forward, the Court would be countenancing the total elimination of the right of a sane, non-felonious citizen to possess a firearm, in her home, simply because her paramour is a felon, and not because of some affirmative act taken by the citizen. Under any level of scrutiny, said Indictment as to Huet is a substantial, if not unfettered, infringement on her *Second Amendment* right to keep arms.

Further, the SKS rifle owned by defendant Huet is a type of firearm that was *not* banned by the 1994 assault weapons ban and thus was *not* a "dangerous" or "unusual" weapon, such as a firearm with an obliterated serial number in *Marzzarella*. Instead, the Court takes judicial notice that as early as 2001 (and certainly no later than 2005), the Yugoslavian M59/66 had been designated a "curio" by the Bureau of Alcohol, Tobacco and Firearms' under *27 CFR § 478.11*. The SKS rifle was commonly used as a sporting rifle, and was mass produced and is owned by American gun owners in the hundreds of thousands. Doc. Nos. 120-3, 120-5, 120-6.

Having determined that the prosecution of Huet, a non-felon, for possession of a firearm which she owns, in her own home, infringes [*31] on her "core" *Second Amendment* protections as set forth in *Heller*, the Court must next balance her rights against the government's interest.

As stated above, under *18 U.S.C. § 922(g)(1)*, certain classes of persons, most notably those convicted of felonies, are prohibited from possessing firearms. As *Marzzarella* and other cases have illuminated, by passing *section 922(g)(1)*, "Congress sought to rule broadly - - to keep guns out of the hand of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society," *614 F.3d at 93* (citations omitted); *United States v. Walls, 225 F.3d 858 (7th Cir. 2000)*("Congress enacted *section 922(g)(1)* 'in order to keep firearms out of hands of those persons whose prior conduct indicated a heightened proclivity for using firearms to threaten community peace and the continued operation of the Government of the United States.'")

Broadening the scope of *section 922(g)(1)*, by expanding the class to whom it applies to include non-felons, punishes a non-felon as a principal under a statute which, by its express terms, is applicable only to felons. Especially where, as here, the non-felon's allegedly culpable activity [*32] is inchoate - - in this case mere possessory - - the non-felon has not earned the title of "felon," and has done nothing to "demonstrate that [she] may not be trusted to possess a firearm without becoming a threat to society." *Id. at 93*.

Additionally, as defendant Huet highlights, and this Court agrees, persons convicted of felony antitrust violations are not included within the prohibition of *section 922(g)(1)*, which is to say that Congress is capable of, and has, exempted persons outside the class to whom a penal statute is directed from accomplice liability. *Abuelahawa*, supra; see also *United States v. Shear, 951 F.2d 488, 490-95 (5th Cir. 1992)*(employee not culpable for aiding and abetting an employer's criminal offense under Occupational Safety and Health Act). Therefore, to attempt to punish defendant Huet, who has a guiltless past (or at least one free from any felonies or misdemeanors), and has done nothing to establish that she may not be trusted with a firearm without becoming a threat to society, *Marzzarella, supra*, places her in a more perilous position than other felons who are certainly less guiltless.

V. Conclusion

The Court finds that the Indictment fails to set forth [*33] an offense under *18 U.S.C. § 2*. Furthermore, under *Heller*, and its progeny, the *Second Amendment* protects defendant Huet's right to possess the firearm the government seeks to criminalize through the use of *sections 2* and *922(g)(1)*. To hold otherwise would be to ignore *Heller*: defendant Huet, not being a felon, insane, or otherwise disabled from possessing a gun, is entitled to possess a lawful firearm in her home, a place which is recognized as sacrosanct for purposes of *Second*

Amendment analysis.

In conclusion, this Court echoes the words of the United States Supreme Court *in Heller*, when it stated:

> The *First Amendment* contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The *Second Amendment* is no different. Like the First, it is the very *product* of an interest-balancing by the people. . . And 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.

Heller, at 2821.

Defendant Huet, is one such law [*34] abiding citizen, and she is entitled to at least keep arms (if not to bear arms) within the confines of her home. For these reasons, defendant's motion to dismiss (doc. no. 120) will be GRANTED, the other Pretrial Motions (doc. nos. 115, 116, 117, 118 and 119) will be DENIED AS MOOT, and the Indictment shall be DISMISSED. An appropriate Order follows.

/s/ Arthur Schwab

ARTHUR J. SCHWAB

UNITED STATES DISTRICT JUDGE

TAB 7

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, v. COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF, Defendants.	CASE NO: 09-CV-2371 IEG (BGS) **ORDER GRANTING PLAINTIFFS' EX PARTE MOTION FOR LEAVE TO FILE SUR-REPLY** [Doc. No. 55]

Having considered Plaintiffs' Motion for Leave to File a Sur-Reply, (Doc. No. 55), and finding good cause therefore:

The Court **GRANTS** Plaintiffs' motion. Plaintiffs' sur-reply shall not exceed five pages.

IT IS SO ORDERED.

DATED: November 10, 2010

Irma E. Gonzalez

IRMA E. GONZALEZ, Chief Judge
United States District Court

TAB 8

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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,

v.

COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF,,

Defendants.

No. 09-CV-2371 IEG (BLM)

DEFENDANT WILLIAM D. GORE'S OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE A SUR-REPLY AND OBJECTION TO PLAINTIFFS' NEW SEPARATE STATEMENT

Date: November 15, 2010
Time: 10:30 a.m.
Dept: 1 – Courtroom of the
Hon. Irma E. Gonzalez

I

THE ADDITIONAL FILINGS ARE UNTIMELY AND INAPPROPRIATE

A. Sur-Reply.

Plaintiffs at the eleventh hour seek additional briefing offering new "expert" evidence. There were no new issues raised in the Reply filed by Defendant and no new evidence was submitted. Plaintiffs' effort to produce new evidence at this late stage is untimely and prejudicial to Defendant.

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B. New Separate Statement.

Plaintiffs also offer a new "Separate Statement" after the briefing on the motions has been completed. This new document is not offered to assist the court, but serves no purpose other than Plaintiffs re-arguing the issues and evidence in the case without an opportunity for Defendant to respond.

CONCLUSION

Both proposed filings are untimely, inappropriate and prejudicial after the briefing has been completed in this matter. The motion leave to file a sur-reply should be denied and the "supplemental separate statement" should be rejected as inappropriate and untimely under this Court's Order setting the briefing schedule.

DATED: November 9, 2010

JOHN J. SANSONE, County Counsel

By: s/ James M. Chapin
JAMES M. CHAPIN, Senior Deputy
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IN THE 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, v. COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF, Defendants.	**PLAINTIFFS' CONSOLIDATED SEPARATE STATEMENT OF UNDISPUTED AND DISPUTED FACTS** Date: November 15, 2010 Time: 10:30 a.m. Location: Courtroom 1 Judge: Hon. Irma E. Gonzalez Date Action Filed: October 23, 2009

INTRODUCTION

Though a separate statement of facts at issue is not required in the Southern District for a motion for summary judgment or an opposition thereto, Plaintiffs submit this consolidated separate statement of facts as a courtesy to this Court, in recognition of the intricacy of some of the factual disputes between the parties. This statement combines the previous separate

statements and oppositions, isolates facts from Plaintiffs' Opposition/Reply and Defendants' Opposition, clarifies which facts neither party disputes, and, for the facts that are in dispute, it lays out Defendants' position in one column with their proffered evidence, alongside Plaintiffs' position on the same fact with their proffered evidence.

This submission is intended soley as a reference for this Court. Plaintiffs sought the input of Defendants in preparing this statement of facts, but Defendants declined to participate and do not consent to this filing. Thus, while Plaintiffs have added clarifying material in their column of facts and evidence, the Defendants' column is merely a verbatim recitation of what appeared in their previous Separate Statement of Facts and Opposition to Plaintiffs' Separate Statement of Facts. The only exception is the section relating to the experts' positions, where Plaintiffs quoted verbatim statements from Defendants' Motion/ Opposition that sum up its position alongside Plaintiffs' position.

UNDISPUTED FACTS
1. Sheriff William Gore is responsible for administering the program for the licensing of persons to carry concealed weapons in San Diego County. ("CCW license")
2. State law sets forth the general criteria that applicants for concealed weapon licenses must meet. This requires that applicants be of good moral character, a resident of the County they apply in, demonstrate good cause and take a firearms course.
3. The "good cause" requirement is defined by Defendant County to be a set of circumstances that distinguish the applicant from the mainstream and causes him or her to be placed in harm's way. Simply fearing for one's personal safety alone without documentation of a specific threat is not considered good cause.
4. James Dodd has submitted an application [for a CCW], which is still pending at this time.
5. Leslie Buncher was a physician who held a valid CCW license during the period of 1971 to 2003. In 2008 Dr. Buncher reapplied for a license. It was denied because he was no longer a practicing physician and the reasons he listed related to his former medical practice. Dr. Buncher declined to go through the reconsideration appeal process.

DISPUTED FACTS	
DEFENDANT'S POSITION	**PLAINTIFFS' POSITION**
HONORARY DEPUTY SHERIFF'S ASSOCIATION	
1. There is no special treatment for members of the Honorary Deputy Sheriffs Association ("HDSA") or for Sheriff's campaign donors Declaration of Blanca Pelowitz, ("Pelowitz Decl.") ¶ 22; see also Defendant's exhibits 2-18. These are renewal applications for which supporting documentation was provided. Pelowitz Decl. ¶ 22; Defendant's Exhibits 2-11.	There is evidence that Ms. Pelowitz was being instructed to give preferential treatment to at least some HDSA members because notes with her initials were found in CCW files stating: "Comma[nder] for HDSA (SDSO) considered VIP @ sheriff level – okay to renew standard personal protection." (Ex. "M" Supp. Pls.' Consolidated Opp./Reply) HDSA members were issued renewal CCWs for self-defense without providing documentation that the threat still existed. *See* Pls.' Exs. Supp. Mot. Partial Summ. J. "U" at 2; "V" at 2; "W" at 5; and "X" at 2. Plaintiffs assert this shows some renewal CCWs were subjected to a lesser "good cause" requirement, not just a lesser documentation standard. One HDSA member provided as his "good cause" that he drives in desolate areas with his wife and wants "self-defense against anyone that might come" upon them. (*See* Ex. "N" Supp. Pls.' Consolidated Opp./Reply.) This is *almost identical* to Plaintiff Peruta's reason. In a letter addressed to Sheriff Gore from an HDSA member who had been denied a renewal CCW, dated October 13, 2009, the author mentions his 19 year HDSA membership, and states: "I ask you [Sheriff Gore] intercede in the process and direct the Licensing division to reissue my CCW." On October 22, 2009, that HDSA member reapplied asserting "self-protection, a desire to be able to protect myself and my family from criminal activity, in case response to request to law enforcement is delayed" as his "good cause." He provided *no documentation* of a specific threat, but was issued a CCW nonetheless. (*See* Ex. "L" Supp. Pls.' Consolidated Opp./Reply.)

DISPUTED FACTS	
DEFENDANT'S POSITION	**PLAINTIFFS' POSITION**
	Some HDSA members CCW state "retired," but Dr. Buncher was denied, as the County admits, because he was retired. (Opp. 6:22-23); *see also* Pls.' Exs. Supp. Mot. Partial Summ. J. "W" at 3 and "MM" at 4.
2. The applications are renewal applications for which supporting documentation was provided with the initial application See Pelowitz Decl. ¶¶ 11, 22;	Certain HDSA members were granted CCWs by the County despite failing to provide supporting documentation. For example, in the "good cause" section of their applications, some HDSA members merely stated "personal protection" or "protection" without further explanation or supporting documentation. Exhibits "U"at 2; "V"at 2; "W" at 5; and "X" at 2 Supp. Pls. Mot. Partial Summ. J. Plaintiffs lack knowledge as to whether supporting documentation was provided in the initial applications for those HDSA members because Defendants never supplied any, despite such documentation being responsive to Plaintiffs' discovery requests.

DISPUTED FACTS	
DEFENDANT'S POSITION	**PLAINTIFFS' POSITION**
3. Disputed. Pelowitz Decl. ¶¶ 11, 22; Defendant's Exhibits 2-15. These are renewal applications for which supporting documentation was provided. Pelowitz Decl. ¶ 22; Defendant's Exhibits 2-11.	Plaintiffs assert that notes made by employees of the County who processed applications for certain HDSA members support Plaintiffs' contention that HDSA members are favored by the County in receiving CCWs. Exs. "W" at 2,6; "NN" at 1-2; "OO" at 1-2; and "PP" at 1 Supp. Pls.'s Mot. Partial Summ. J. Exs. "L" through "O" Supp. Pls.' Consolidated Opp./Reply. Multiple HDSA members were issued a CCW by the County for "business reasons" who failed to provide any supporting documentation. Exs. "AA", "BB", "CC", "DD", "EE". "FF", "GG". "HH", "II", "JJ", & "KK" Supp. Pls.' Mot. Partial Summ. J. Plaintiffs lack knowledge as to whether supporting documentation was provided in the initial applications for those HDSA members because though Defendants provided Exhibits 2-11, Plaintiffs are unclear how those documents support those applicants' claims of "good cause."
4. The applications are renewal applications for which supporting documentation was provided with the initial application See Pelowitz Decl. ¶¶ 11, 22; And new documentation was provided with "LL." Defendant's Exhibit 12.	One renewal application simply stated "personal safety, carry large sums of money," and another said he is retired but he needs to accompany his employees to the bank; again, neither providing any supportive documentation. Exhibits "LL" and "MM" Supp. Pls.' Mot. Partial Summ. J. Plaintiffs lack knowledge as to whether supporting documentation was provided in the initial applications for those HDSA members because though Defendants provided Exhibits 2-11, Plaintiffs are unclear how those documents support those applicants' claims of "good cause."

DISPUTED FACTS	
DEFENDANT'S POSITION	**PLAINTIFFS' POSITION**
5. The referenced exhibits do not support the facts stated. The applications in "U" – "PP" are renewal applications for which supporting documentation was provided with the initial application See, Pelowitz Decl. ¶¶ 4, 7, 11, 16, 22; In any event, most renewal applicants did provide documentation. Defendant's Exhibits 2-15.	Despite the County's strict CCW issuance policy, it does not apply it evenly to all applicants, demanding less of some. Exhibits "F" and "PP". Exs. "L" through "O" Supp. Pls.' Consolidated Opp./Reply.
6. Exhibit WW does not support the factual statement made. See also, Pelowitz Decl. ¶¶ 11, 22; Defendant's Exhibits 2-15.	Not one single HDSA member who, while in good standing, has sought a CCW from the County from 2006 to the present has been denied, while 18 non-members have been denied and an unknown number of others decided not to formally apply based on their initial interview or failure to satisfy the County's strict "good cause" requirement applicable to the general public. Exhibit "WW" Supp. Pls.' Mot. Partial Summ. J.
7. The application is a renewal application for which supporting documentation was provided with the initial application. Peter Q. Davis is a well-known public figure in San Diego who ran for mayor. See Pelowitz Decl. ¶¶ 11, 22;	One HDSA member simply stated "personal protection – public figure," without providing any supportive documentation. Exhibit "Y" at 2. Plaintiffs lack knowledge as to whether supporting documentation was provided in the initial application for Mr. Davis because Defendants never disclosed it to Plaintiffs, despite it being responsive to Plaintiffs'

DISPUTED FACTS	
DEFENDANT'S POSITION	**PLAINTIFFS' POSITION**
	discovery requests.
8. Plaintiffs have agreed to withdraw this allegation.	And, in perhaps the most egregious case, one member did not even provide a statement of "good cause" in his application. Exhibit "Z" at 2. Defendants provided the "good cause" statement. Plaintiffs thus withdraw this allegation.
POLICY	
9. In 2006, as a courtesy for applicants, the Department initiated an interview process to assist both applicants and line staff in determining pre-eligibility. During this phase applicants will discuss reasons and situations with line staff and staff is trained to make notes of all comments made by the applicant during the interview. Staff assists in determining what documentation may be required of the applicant. If the clerk is able to determine that good cause is questionable, clerks are able to give an educated guess based on the scenarios described by applicants. The next phase involves applicants gathering their documentation, attending the 8-hour firearms course and returning to submit the written application, fees, and documentation. During this process applicants will be fingerprinted, photographed, signatures will be obtained and applicants are instructed to go to Sheriff's Range for a weapons safety checked and to complete a final qualify-shoot. Once this phase is complete, the file and all documents are forwarded to the Background Unit for the comprehensive background and verification process. The investigator will provide a recommendation and forward to the Manager who will make the decision to issue or deny and will include any reasonable restrictions and/or instructions to staff.	Plaintiffs contend that Defendants' description of the initial interview process as a "courtesy for applicants"is misleading because Defendants sometimes discourage applicants from formally applying for a CCW by telling them they have no chance of obtaining one and will be wasting their time and money if they try. Plaintiffs contend this serves Defendants' purpose of minimizing the number of applicants, and the documentation of denials. Declaration of Michelle Laxson Supp. Pls.' Mot. Partial Summ. J. ¶¶ 6-7 (hereafter "Laxson Decl."). Ex. "K" Supp. Pls.' Consolidated Opp./Reply. Beyond that, Plaintiffs lack knowledge.

DISPUTED FACTS	
DEFENDANT'S POSITION	**PLAINTIFFS' POSITION**
10. CCW license holders can renew licenses up to 30 days prior to the expiration date. All renewals must complete a firearms course, a qualify-shoot and firearm safety inspection. Renewals are issued on the spot if absent any negative law enforcement contacts, crime cases, arrests and there no changes from the initial application as to the reasons. No review by supervisor or managers is needed for the renewal process unless there have been changes to the reason. Applicants still need to provide some form of documentation to support his or her continued need but not to the extent of the initial application. Applicants sign under penalty of perjury that all prior conditions exist. Pelowitz Decl. ¶ 12.	Though Plaintiffs lack knowledge regarding the first two sentences, as to the remaining claims, Plaintiffs assert Plaintiff Cleary was required to produce documentation confirming his continued employment in the psych ward for his renewal CCW application, that his refusal to do so was the basis of his denial, and that the County granted several renewal applications for members of the HDSA CCWs without requiring any supporting documentation. Exhibit "M" Supp. Pls.' Mot. Partial Summ. J. Declaration of Mark Cleary Supp. Pls.' Mot. Partial. Summ. J. (hereafter "Cleary Decl.") 4:9-20. Exs. "U" through "MM" Supp. Pls.' Mot. Partial. Summ. J.
11. There is an administrative reconsideration process for CCW applicants. When taking administrative action to deny, suspend or revoke a CCW license, an upper command concurrence through the Law Enforcement Service Bureau is required before taking action. All actions require the Manager to prepare a brief synopsis of the proposed action and recommendation. Command will either concur or request additional information. If concurrence is provided, the denial, suspension or revocation letter is mailed out. The individual is given the opportunity to request an appeal of the decision by writing to the Assistant Sheriff of the Law Enforcement Service Bureau. The appeal is heard by the Assistant Sheriff of the Bureau who will make the determination to overturn or uphold decision. Pelowitz Decl. ¶ 14.	Though Plaintiffs do not dispute there is such an appeals process available, Plaintiffs allege that in some cases, the Manager has not prepared a brief synopsis of the proposed action and recommendation, but rather Defendant Sheriff Gore himself made the decision to overturn an applicant's denial based on personal appeals directed to him. *See generally* Cleary Decl. Opp. 23:23-24 "("During his initial application, Cleary was awarded his license after an appeal *with then Undersheriff Gore.*") (emphasis added) Plaintiff Cleary provided no further documentation at his appeal hearing (*See* Cleary Decl.) In a letter addressed to Sheriff Gore from an HDSA member who had been denied a

DISPUTED FACTS	
DEFENDANT'S POSITION	**PLAINTIFFS' POSITION**
	renewal CCW, dated October 13, 2009, the author mentions his 19 year HDSA membership, and states: "I ask you [Sheriff Gore] intercede in the process and direct the Licensing division to reissue my CCW." On October 22, 2009, that HDSA member reapplied asserting "self-protection, a desire to be able to protect myself and my family from criminal activity, in case response to request to law enforcement is delayed" as his "good cause." He provided *no documentation* of a specific threat, but was issued a CCW nonetheless. (*See* Ex. "L" Supp. Pls.' Consolidated Opp./Reply.)
12. The standard is the same. The nature of the documentation is typically different. Pelowitz Decl. ¶ 7.	The County has a separate standard for those seeking a CCW for business purposes (*i.e.*, to protect themselves during business activity). Exs. "A" and "C" Supp. Pls.' Mot. Partial Summ. J. Plaintiffs assert business applicants need not show a specific threat as self-defense applicants must.
13. Blanca Pelowitz has been the licensing manager since 2002, has been delegated the responsibility for CCW licensing by the Sheriff and makes all determinations on initial applications for CCW licenses Pelowitz Decl. ¶¶ 1, 2, 4, 11.	Plaintiffs lack knowledge. Discovery is ongoing.
14. Michelle Laxson did not apply for a CCW license. She was interviewed by staff but declined to complete and application and did not return . Pelowitz Decl. ¶ 18.	Though Plaintiffs do not dispute that Plaintiff Laxson did not apply for a CCW, Plaintiff Laxson claims she was dissuaded from completing and filing a formal CCW application, and never "declined" to do so. Laxson Decl. ¶¶ 4-7.
RESIDENCY	
15. Edward Peruta was denied a license to carry a concealed weapon because he failed to	Plaintiff Peruta asserts there are facts that support he was denied a CCW by Defendants

DISPUTED FACTS	
DEFENDANT'S POSITION	**PLAINTIFFS' POSITION**
provide any documentation establishing good cause. Residency was not a factor in his denial which was based solely on the lack of good cause. Pelowitz Decl. ¶ 17.	for lack of residency. In trying to dismiss Plaintiff Peruta's original complaint, the County argued: "*Most significantly*, since the statute requires Plaintiff to meet all *three* requirements of [California Penal Code §] 12050 to be eligible for a permit, *the failure to meet the residency provision alone ends his constitutional claim*." (Def.'s Reply 3:19-21) (emphasis added) See also Exs. "K" and "O" Supp. Pls.' Consolidated Opp./Reply. As to Mr. Peruta being denied for lack of "good cause," undisputed.
16. The "residency" requirement is generally defined by this County to be any person who maintains a permanent residence or spends more than six months of the taxable year within the County if the applicant claims dual residency. San Diego County uses the term "resident" as outlined in Penal Code section 12050(D), and not "domicile." 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 in such circumstances. Pelowitz Decl. ¶ 8.	Despite repeated requests, Defendants never provided Plaintiff Peruta its stated policy for determining residency, nor when it was promulgated.(*See* Exs. "A" through "J" Supp. Pls.' Consolidated Opp./Reply). And, Plaintiff Peruta was expressly informed that his temporary residency was a basis for his denial of a CCW. *See generally* Declaration of Edward Peruta Supp. Pls.' Consolidated Opp./Reply. Plaintiffs contend this policy appears to be a post hoc creation prompted by this lawsuit. Exs. "A" through "J" Supp. Pls.' Consolidated Opp./Reply.
PLAINTIFF CLEARY	

DISPUTED FACTS	
DEFENDANT'S POSITION	**PLAINTIFFS' POSITION**
17. Mark Cleary's renewal application was denied based on lack of supporting documentation relating to his employment in March of 2010. Cleary requested a reconsideration appeal and the decision to deny the license was overturned by Command after information about his employment was confirmed. He was issued a CCW license for a new term in June of 2010. Pelowitz Decl. ¶ 20; Plaintiffs' Exhibit "F."	Though Plaintiffs do not dispute that Plaintiff Cleary's most recent renewal application was denied for lack of supporting documentation, Plaintiff Cleary never provided any additional "information about his employment" to Defendants for Defendants to "confirm" his appeal. Cleary Decl. at 3-4.
18. Cleary was not an HDSA member when he successfully obtained a renewal of his license. Declaration of Cleary; Pelowitz Decl. ¶¶ 11, 20, 22; Defendant's Exhibits 2-15.	Plaintiffs assert the account of events related by Plaintiff Cleary as to his process of obtaining a CCW leaves no doubt that the County treats HDSA members differently than the members of the general public. Plaintiff Cleary received two renewal licenses from Defendants while a member of HDSA, and obtained a third one while not a member, but only after being denied, appealing, and becoming a plaintiff in this lawsuit. *See generally* Cleary Decl.
19. Laxson did not apply. Dodd did apply. Undisputed that Peruta did not provide supporting documentation. Pelowitz Decl. ¶¶ 17, 18, 19.	All Plaintiffs sought a CCW from the County for self-defense purposes, but were denied or, in the cases of Plaintiffs Laxson and Dodd decided not to apply, because they were dissuaded at their initial interview and/or could not satisfy the requirements of County's unlawful policy. Peruta Decl., ¶¶ 8-13; Declaration of Plaintiff Michelle Laxson, ¶¶ 4-8; Exhibits "F", "G" and "T" Supp. Pls. Mot. Partial Summ. J. Plaintiff Laxson asserts she was dissuaded from applying for a CCW. Laxson Decl. ¶¶ 6-7.
EXPERTS' POSITIONS	

DISPUTED FACTS	
DEFENDANT'S POSITION	**PLAINTIFFS' POSITION**
20. 12050 as administered by Defendant -- the safety of the public from unknown persons carrying concealed, loaded firearms -- is both important and compelling. (Zimring Declaration.) The Sheriff's Department's central reason to require a good reason for needing a gun is to reduce the number of secretly armed citizens on the streets and sidewalks of one of the biggest urban areas in the United States. Id.	The County does not, nor can it, demonstrate how keeping CCWs from people of good moral character is either necessarily related or narrowly tailored to achieve those particular interests. It must be both to pass constitutional muster. The County offers no data or evidence establishing its policy of limiting CCW issuance reduces or is likely to reduce crime. See generally Moody Decl.; Declaration of Brian Patrick (hereafter "Patrick Decl."); and Declaration of Gary Mauser (hereafter "Mauser Decl.") Evidence from states where CCW permits are commonly issued suggests this as well. Exs. "D" and "E" Supp. Pls.' Consolidated Opp./Reply.
21. Use of concealed weapons in streets and public places pose a greater threat to public safety. (See generally Zimring Declaration.) (the problem of gun robbery in American cities is almost exclusively a problem of concealable handguns).	Shall-issue laws seem to deter violent crime. Areas with widespread gun ownership among law abiding, responsible people consistently had significantly lower rates of murder and other violent crime than areas which severely restricted gun ownership (or for other reasons had much less ownership); murder and other violent crimes declined in areas which adopted policies of widely licensing law abiding, responsible adults to carry handguns. Declaration of Carlisle Moody (hereafter "Moody Decl.") ¶ 5. The minority of individuals who carry concealed weapons pursuant to a valid CCW license help protect the majority because criminals are unable to distinguished unarmed victims from those who are armed. See Moody Decl. ¶¶ 4, 8, 14. See generally Patrick Decl.

DISPUTED FACTS	
DEFENDANT'S POSITION	**PLAINTIFFS' POSITION**
22. Handguns are common concealed weapons for similar reasons the Court explains in *Heller* for self-defense in the home – they are small and easy to hide under clothing, easy to use, cannot easily be wrestled away in self-defense, and pose a significant threat. *Heller*, 128 S. Ct. at 2818. They are used in more than 75% of all killings and in even larger portions of robberies. (Zimring Decl. ¶ 3.) A concealed handgun is the dominant weapon of choice for gun criminals and a special danger to government efforts to keep public spaces safe and secure. (Zimring Decl. ¶¶ 6-7.)	Plaintiffs assert the County cannot connect increased public danger or crime to increased numbers of people who carry guns (whether discretely concealed or not) *pursuant to valid licenses*.
23. By requiring evidence, the government is able to limit the amount of concealed weapons in public to only actual anticipated needs. It also acts as a backup to those who seek a CCW license for criminal purposes but do not yet have a criminal record. As the Court stated in *Miller*, "[s]uch legislation cannot be narrowly tailored to reach only the bad people who kill with their innocent guns. . .To expect such legislation to reflect a tight fit between ends and means is unrealistic." Miller, 604 F.Supp.2d at 1172 n.13 (quotation marks and citations omitted); See generally Zimring Declaration.	Plaintiffs contend that Defendants proffer no evidence that people planning to commit crimes with guns will forego doing so for lack of a CCW. *See* Pls.' Mem. Supp. Opp./Reply 13:2-13
24. There is a very active controversy about the impact of CCW laws on crime and violence as Moody well knows. (See also, Donahue and Ayres, *Shooting Down the More Guns, Less Crime Hypothesis*, 55 Stan. L. Rev. 1193 (2003); Duggar, *More Guns, More Crime*, 109 Journal of Political Economy 1086-1114 (2001)). States and cities with restrictive gun policies did especially well in crime declines in the 1990's and have done so since (see Zimring , 2007 at Ch. 6), but major urban centers with concentrations of crime and violence were under-represented in the	Shall-issue laws seem to deter violent crime. Areas with widespread gun ownership among law abiding, responsible people consistently had significantly lower rates of murder and other violent crime than areas which severely restricted gun ownership (or for other reasons had much less ownership); murder and other violent crimes declined in areas which adopted policies of widely licensing law abiding, responsible adults to carry handguns. Declaration of Carlisle Moody (hereafter "Moody Decl.") ¶ 5.

DISPUTED FACTS	
DEFENDANT'S POSITION	**PLAINTIFFS' POSITION**
right-to-carry states.	
25. Patrick does not indicate his field of expertise and makes sweeping assertions -- "Licensure processes of the various states have been shown to effectively filter out the violent and the impulsive" -- with no reference to any supportive research data. Patrick grossly overstates the efficiency of permissive licensing screening and never supports his passionate views with any data citations.	Brian Patrick is a tenured associate professor at the University of Toledo and holds a PhD from University of Michigan. His focus for the past decade or so has been studies regarding the law giving law-abiding, responsible applicants a right to concealed carry licensure. Patrick also has relevant publications, the most recent of which is a book published by academic press Lexington Book, entitled *Rise of the Anti-Media, Informing America's Concealed Weapons Movement* (2009). Patrick Decl. ¶ 1.
26. Mauser says that "Professor Zimring's assertions are generally correct, but omit a critical fact: serious criminal violence with firearms is almost exclusively committed by people (criminals) with histories of previous crime, or, occasionally by people who are seriously mentally disturbed." Mauser then asserts that "this omission is critical because it makes Professor Zimring's views irrelevant in a case like the present. "I am informed that neither juveniles nor people with crime records or mental deviancy records are eligible for concealed weapons licenses - - - they are ineligible for such licenses in any event." (Mauser, p. 2.) Mauser presents no authority for the proposition that permissible licensing laws exclude all persons at risk of committing firearms robberies and assaults. He states that he is "informed" but provides no reference to the source of that information. This assertion is repeated by Dr. Moody: "these provisions are important because they exclude virtually all people who are likely to commit gun crimes from receiving carrying permits." (Moody, p. 6.) Moody also provides no reference for this statement.	Mauser cites to Delbert S. Elliot, "Life Threatening Violence is Primarily a Crime Problem: A Focus on Prevention," 69 COLO. L. REV. 1081, 1081-1098. Mauser Decl. ¶¶ 4-5. Plaintiffs contend that the paragraph prior to the one that Defendants take issue with in Moody's declaration gives the basis for which Moody makes the statement: "Federal law bars firearms acquisition or possession by people convicted of any felony or certain misdemeanors. It is my understanding that so does California law, and that California requires criminal records be checked before permitting anyone to even buy a gun; and that such a record check is also required before a permit to carry a gun is issued." Moody Decl. ¶¶ 16-18. See also Exs. "B" through "E" Supp. Pls.' Consolidated Opp./Reply.
27. The empirical and legal data on this question do not support the theory that state	Law enforcement has access to information concerning an individual's conviction record

DISPUTED FACTS	
DEFENDANT'S POSITION	**PLAINTIFFS' POSITION**
laws exclude "virtually all people" who are potential gun criminals. The data on high concentration of violence among persons with criminal records usually uses juvenile and adult arrest records. (See Wolfgang Marvin, Robert Figlio and Thorsten Sellin, Delinquency in a Birth Cohort (1972) University of Chicago Press Chicago.) Many people involved in crime have some record of juvenile or criminal arrest. But state permissive licensing provisions only bar persons with felony convictions or sometimes convictions for very specific high violence misdemeanors such as domestic violence. Excluding non-conviction arrests, juvenile records and reductions by plea bargaining to non-covered misdemeanors creates huge gaps between disqualified and at-risk populations for gun crime. The mental health criteria used by most permissive statutes also are restricted to persons with previous histories of adjudication, probably a tiny minority of the seriously disturbed at any given time. With loopholes that large, the average California citizen could quite rationally prefer to walk streets where very few of the people on the street carry hidden weapons than to trust systems which allow the vast majority of adults to carry hidden and loaded weapons until felony conviction or adjudication for insanity has happened. It is simply not true that California effectively screens the mentally ill from possession of firearms. The screening is limited to patients admitted to a treatment facility, and to other very specific circumstances. Welfare and Institutions Code section 8100.	and can access information concerning a person's arrests, charges, modification of charges, convictions, sentence terms (also probation and/or jail sentence), and post-conviction relief (reduction, expungement, certificate of rehabilitation and/or pardon). (*See Penal Code § 11105*). California laws that restrict firearm and ammunition ownership, Penal Code §§ 12021 and 12021.1, cover certain juvenile convictions, non-violent felony convictions, and 10 year restrictions for a myriad of misdemeanor offenses. A person is prohibited in California from possessing firearms as a result of firearm prohibiting probation terms, certain temporary and permanent restraining orders, and mental health restrictions. (*Cal Pen 12021*). The firearm restrictions as a result of a mental illness pursuant to Welfare & Institutions Code §§ 8100 and 8103 prohibit a wide range of persons with mental and developmental disabilities, including when there is probable cause to believe a person is a danger to themselves or others or gravely disabled, that person may be taken into custody by law enforcement and placed under 72-hour evaluation. *W&I Code § 5150*. Once a person is taken in pursuant to W&I Code § 5150 that person is prohibited from owning and possessing firearms for five years. W&I 8103(f)(1). W&I Code § 8103 restricts those suffering from mental illness access to a firearm, including: those adjudicated to have a mental disorder, illness or mentally disordered sex offenders; those found not guilty by reason of insanity; individuals incompetent to stand trial; those placed under conservator-ship; those taken into custody pursuant to W&I Code § 5150; and those certified for intensive treatment. *Cal W&I. 8103.*
28. Among the many factual mistakes in the Moody declaration, Moody states that Zimring "is not a criminologist." In fact, Zimring was	Both Lott and Mustard were professors at University of Chicago.

DISPUTED FACTS	
DEFENDANT'S POSITION	**PLAINTIFFS' POSITION**
elected a life fellow of the American Society of Criminology in 1992 and received that organization's two most important research awards in 2006 and 2007. (Zimring Declaration, CV attached, p. 1.) This is why he is especially qualified to render opinions in this area. Moody then mentions "two University of Chicago criminologists, John Lott and David Mustard." Neither Lott nor Mustard is a criminologist or ever was on the University of Chicago faculty. There is also an assertion that Zimring "incessantly predicted ---[increasing] murder rates" (Moody par. 7) which is both undocumented and untrue.	John Lott was a visiting professor and fellow at the University of Chicago. See James L. Meriner, *The Shootout*, CHICAGO MAGAZINE, August 2006, available at ("That was John R. Lott, then a *visiting professor of economics at the University of Chicago*") (emphasis added) (article available at http://www.chicagomag.com/Chicago-Magazine/August-2006/The-Shootout/). David Mustard was also an economics lecturer at the University of Chicago. See Terry College of Business: Profile for David Mustard, University of Georgia, http://www.terry.uga.edu/profiles/?person_id=466 (last visited November 5, 2010) (listing that Mustard was an economics lecturer at the University of Chicago from 1995 to 1997 under Mustard's prior professional positions).
29. But by far, the most problematic assertion by Moody is headlined "No Controversy As To CCW Issuance." Moody alleges that the crime decline in the United States since 1990 is evidence that handgun possession and CCW levels are not related to violence. In fact, there has not been a steady crime decline between 1991 and 2010 (there was no such pattern between 2000 and 2007, see Zimring The Great American Crime Decline 2007), and alleges with no support that handgun ownership rates increased in the late 1990's and since 2000. Published research using data from Professor Moody shows the opposite of what Moody's declaration insinuates about the import of "shall issue" laws.2 There is a very active controversy about the impact of CCW laws on crime and violence as Moody well knows. (See also, Donahue and Ayres, Shooting Down the More Guns, Less Crime Hypothesis, 55 Stan. L. Rev. 1193 (2003); Duggar, More Guns, More Crime, 109 Journal of Political Economy 1086-1114	Areas with widespread gun ownership among law abiding, responsible people consistently had significantly lower rates of murder and other violent crime than areas which severely restricted gun ownership (or for other reasons had much less ownership); murder and other violent crimes declined in areas which adopted policies of widely licensing law abiding, responsible adults to carry handguns. Declaration of Carlisle Moody (hereafter "Moody Decl.") ¶ 5. See Exs. "B" through "E" Supp. Pls.' Consolidated Opp./Reply. See generally, Lott, MORE GUNS, LESS CRIME (U. of Chicago Press, 3d edition 2010).

DISPUTED FACTS	
DEFENDANT'S POSITION	**PLAINTIFFS' POSITION**
(2001)). States and cities with restrictive gun policies did especially well in crime declines in the 1990's and have done so since (see Zimring , 2007 at Ch. 6), but major urban centers with concentrations of crime and violence were under-represented in the right-to-carry states. Of course, Professor Moody doesn't refer to this work in his declaration. Ayers and Donahue shred every claim by Moody in a thorough analysis of his work.	
MISC.	
30. Plaintiff Cleary obtained a permit, Declaration of Cleary, par 19; Plaintiff Laxson never applied so it is unknown whether she could qualify, Declaration of Laxson. Plaintiff's Ex. F; Pelowitz Decl. ¶¶ 18, 20.	Plaintiffs cannot obtain the permits that state law requires for concealed carry from the County, nor can they generally carry loaded handguns openly under state law. Declaration of Plaintiff Edward Peruta (hereafter, "Peruta Decl."), ¶¶ 3, 7-8, 10, 13; Laxson Decl., ¶¶ 6-7; Exs. "F", "G", "J" & "T". Supp. Pls. Mot. Partial Summ. J.
31. There is no competent evidentiary support for this. The subject declaration is based on hearsay and speculation.	Plaintiff California Rifle and Pistol Association Foundation ("CRPAF"), an organization dedicated to educating the public about firearms and protecting the rights thereto, its thousands of supporters and CRPA members in San Diego County are likewise injured by the County's issuance policy and practices for these same reasons. *See generally* Declaration of Silvio Montanarella Supp. Pls.' Mot. Partial Summ. J. (hereafter "Montanarella Decl.").

Dated: November 8, 2010

MICHEL & ASSOCIATES, PC

/s/ C.D. Michel
C.D. Michel
Attorney for Plaintiffs

IN THE 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, v. COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF, Defendants.	**CASE NO. 09-CV-2371 IEG (BGS)** **CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 E. Ocean Blvd., Suite 200, Long Beach, California, 90802.

I am not a party to the above-entitled action. I have caused service of:

PLAINTIFFS' CONSOLIDATED SEPARATE STATEMENT OF UNDISPUTED AND DISPUTED FACTS

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on November 8, 2010.

/s/ C.D. Michel
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TAB 10

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IN THE 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 Plaintiff, v. COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF, Defendants.	CASE NO. 09-CV-2371 IEG (BGS) **PLAINTIFFS' EX PARTE MOTION FOR LEAVE TO FILE SUR-REPLY IN RESPONSE TO DEFENDANT'S REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, EXHIBIT "A" (PROPOSED SUR-REPLY)** Hon. Irma E. Gonzalez Date Action Filed: October 23, 2009

Plaintiffs hereby move this Court to allow Plaintiffs to file a five (5) page Sur-Reply in opposition to Defendant William Gore's Reply in Support of Defendant's Motion for Summary Judgment ("Defendant's Reply").

INTRODUCTION

The negotiated Stipulated briefing Schedule on these cross-motions was specifically designed to provide both parties an equal amount of pages (45) to make their respective arguments. With the Defendants' 5-page extension, they have now been given 50 pages.

Defendants, in violation of the Stipulated Briefing Schedule and contrary to Ninth Circuit case law, raised new legal arguments in its Reply. Plaintiffs should be permitted to address these.

The filing of a brief sur-reply will not delay these proceedings. Per Local Rule 83.3.h.2, counsel for the parties conferred prior to the filing of this motion. Counsel for Defendants stated that they are unwilling to stipulate to allow Plaintiffs to file a sur-reply.

ARGUMENT

I. Allowing Defendants to Exceed the Page Limits, but Denying Plaintiffs Leave to File a Sur-Reply would Defeat the Purpose of the Stipulated Briefing Schedule and Prejudice Plaintiffs

In accordance with the stipulated briefing schedule stipulated to by the parties and granted by this Court on September 8, 2010, the following events occurred:

On September 3, 2010, Plaintiffs filed a Motion for Partial Summary Judgment, the supporting Points and Authorities which were not to, and did not, exceed 25 pages.

On October 4, 2010, Defendants filed their Opposition to Plaintiffs' Motion, and simultaneously Defendants' Cross-Motion for Summary Judgment, the supporting Points and Authorities for which were not to, and did not exceed 35 pages total.

On October 5, 2010, due to the fact that the Brady Campaign also submitted a lengthy and substantial amicus curiae brief in support of Defendant's Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Partial Summary Judgment, and the fact that Defendants included a lengthy declaration by Mr. Franklin Zimring in support of their Cross-Motion and Opposition to Plaintiffs' Motion for Partial Summary Judgment, the parties filed a joint motion to amend the briefing schedule in order to allow Plaintiffs an additional week to file their response. Plaintiffs also agreed to grant Defendants an extra week to file their Reply.

On October 18, 2010, Plaintiffs filed their Consolidated Reply to Defendant's Opposition and Plaintiffs' Opposition to Defendants' Cross-Motion, the supporting Points and Authorities for

which were not to, and did not, exceed 20 pages total, as had been agreed.

On November 1, 2010, Defendants filed their Reply to Plaintiffs' Opposition, the supporting Points and Authorities for which were not exceed 10 pages. *The issues addressed in this Reply were to be limited to responding only to the issues raised in Plaintiffs' Opposition to Defendants' Cross-Motion.* Defendants sought leave to exceed the 10 page limitation by five pages. The Court granted that request.

Defendants' reason for seeking a five (5) page extension on their Reply is to address the expert declarations and the additional documents Plaintiffs submitted in support of their Opposition. *See* Defendant's Motion to Exceed Page Limit for Reply 1:21-23 ("Because Plaintiffs have offered new evidence in the form of three expert declarations as well as additional documents with their Opposition, Defendant requires additional pages for the Reply."). But despite Plaintiffs being faced with an extensive declaration, new evidence, and an amicus brief in preparing their Opposition/Reply, in accordance with the stipulation and court order Plaintiffs did not seek a page-limit extension.

II. Plaintiffs Should be Allowed to Address Defendants' New Arguments

Under the recitals set forth in both joint motions to amend the briefing schedule, the most recent of which was granted by the Court on October 8, 2010, the issues in Defendant's Reply were to be limited exclusively to those raised in Plaintiffs' Opposition to Defendant's Motion for Summary Judgment. *See* Joint Motion to Adopt Stipulated Briefing Schedule (October 5, 2010) at 3:13-15 ("The issues addressed in this Reply shall be limited to responding to the issues raised in Plaintiffs' Opposition to Defendants' Cross-Motion."). That Joint Motion was granted because the Court found good cause for amending the briefing schedule of this case "*in accordance with the parties' request.*" (Order Granting Joint Motion of the Parties to Adopt Stipulated Briefing Schedule, October 8, 2010) (emphasis added).

Despite this limitation, Defendants last brief raised new arguments as to why their CCW issuance policy is constitutional, as well as arguments regarding their position on the applicable standard of review in this case. Defendants are now arguing that unloaded, open carry of a firearm with ammunition nearby is a method of carrying a firearm that satisfies the requirements of the

Second Amendment. And, Defendants reveal new cases involving the question of bearing arms pending before the Ninth Circuit, neither of which Plaintiffs have had an opportunity to address.

Defendants had ample opportunity to raise the arguments in their Opposition to Plaintiffs' Motion, but failed to. "Parties should not raise new issues for the first time in their reply briefs." *Pac. Rollforming, LLC v. Trakloc N. Am.*, LLC, 2010 U.S. Dist. LEXIS 60756 (S.D. Cal. June 17, 2010). *See also Ass'n of Irritated Residents v. C & R Vanderham Dairy*, 435 F. Supp. 2d 1078, 1089 (E.D. Cal. 2006) ("It is inappropriate to consider arguments raised for the first time in a reply brief."); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1066 n.5 (9th Cir. 2003) ("[W]e decline to consider new issues raised for the first time in a reply brief."); *Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996) ("Issues raised for the first time in the reply brief are waived."); *United States ex rel. Giles v. Sardie*, 191 F. Supp. 2d 1117, 1127 (C.D. Cal. 2000) ("It is improper for a moving party to introduce new facts or different legal arguments in the reply brief than those presented in the moving papers.").

When a court does exercise its discretion and chooses to rely on materials raised for the first time in a reply brief, the opposing party *must* be afforded a reasonable opportunity to respond. *See Beaird v Seagate Tech, Inc.*, 145 F.3d 1159, 1164-1165 (10th Cir. 1998).

Because Defendants raised new issues in their Reply brief in direct violation of the recitals of the Joint Stipulated Briefing Schedule, and Ninth Circuit precedent, thereby placing Plaintiffs in a precarious and prejudicial position, Plaintiffs seek to file the proposed sur-reply attached hereto as Exhibit "A."

CONCLUSION

For the aforementioned reasons, Plaintiffs respectfully request leave to file their proposed five (5) page Sur-Reply in Opposition to Defendant's Reply.

MICHEL & ASSOCIATES, PC

By: /s/ C. D. Michel
(as approved on 11/8/10)
C. D. Michel
Attorney for Plaintiffs

PAUL NEUHARTH, JR., APC

By: /s/ Paul Neuharth, Jr.
(as approved on 11/8/10)
Paul Neuharth, Jr.
Attorney for Plaintiff

IN THE 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 Plaintiff, v. COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF, Defendants.	**CASE NO. 09-CV-2371 IEG (BGS)** **CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 E. Ocean Blvd., Suite 200, Long Beach, California, 90802.

I am not a party to the above-entitled action. I have caused service of:

PLAINTIFFS' EX PARTE MOTION FOR LEAVE TO FILE SUR-REPLY IN RESPONSE TO DEFENDANT'S REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, EXHIBIT "A" (PROPOSED SUR-REPLY)

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on November 8, 2010.

/s/ C.D. Michel
C. D. Michel
Attorney for Plaintiffs

EXHIBIT A

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Attorney for Plaintiffs / Petitioners

IN THE 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,

v.

COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF,

Defendants.

CASE NO: 09-CV-2371 IEG (BGS)

PLAINTIFFS' SUR-REPLY IN OPPOSITION TO DEFENDANT'S REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [PROPOSED]

Date: November 15, 2010
Time: 10:30 a.m.
Location: Courtroom 1
Judge: Hon. Irma E. Gonzalez

Date Action Filed: October 23, 2009

ARGUMENT

I. UNLOADED AND OPEN CARRY IS *NOT* A CONSTITUTIONAL METHOD OF CARRY UNDER THE SECOND AMENDMENT, NOR IS IT VIABLE FOR SELF-DEFENSE PURPOSES

In their Motion for Partial Summary Judgment, Plaintiffs explained that they: "do not claim a right to publicly carry handguns in a concealed manner *per se*, only a right to carry handguns in a manner specified by the Legislature, which, in California, is licensed, concealed carry." Pls.' Mot. Partial Summ. J. at 23:5-8. Despite this clear statement, the County repeatedly argued why bans on *concealed* carry of firearms are constitutional. The County now apparently realizes that those arguments are irrelevant, and that its claim that *Heller* limits Second Amendment rights to the home is unpersuasive. So now the County argues that carrying a firearm *unloaded* and openly ("UOC") with the ammunition nearby – which California allows in *some* places under *some* conditions[1] – is a method of carrying that satisfies the Second Amendment requirement that people be allowed to carry a firearm for self-defense in *some* manner. The County contends that Plaintiffs should have explained why UOC "combined with the exceptions in [Penal Code §] 12031" is inadequate for self-defense. *See* Defendant's Reply in Support of Defendant's Motion for Summary Judgment at 2:4-6. But, the County never raised this argument in its Opposition/Cross-Motion, and this is the County's burden to establish that this method satisfies the Second Amendment. Nonetheless, the argument is easily dismissed.

A. *Heller* Makes Clear that Requiring UOC for Bearing Arms Is Inadequate for *Immediate* Self-Defense

The ordinance struck down in *Heller* required firearms in the home to be "unloaded and dissembled or bound by a trigger lock or similar device." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (U.S. 2008). The Supreme Court ruled that requirement as violative of the Second Amendment because it renders a firearm inoperable "for the purpose of *immediate* self-defense" (emphasis added). *Id.* at 2821-2822. A requirement that firearms be carried unloaded – even if

---

[1] Penal Code § 12025 prohibits the possession of concealed weapons in public, and Penal Code § 12031 prohibits the possession of loaded weapons in public. So unloaded, completely unconcealed firearms, or firearms carried in an exposed belt holster, are legal to carry in certain public places in limited circumstances.

ammunition is accessible to the carrier – would likewise render those firearms inoperable "for the purpose of *immediate* self-defense."

It takes nearly the same amount of time and effort, and in some cases more, to remove a handgun from a holster, remove either a magazine (for a semi-automatic handgun) or a speed-loader (for a revolver), open the action, load the firearm, close the action and engage the target, as it does to remove a trigger lock and engage a target. (*See generally* Declaration of Stephen Helsley). Even without expert opinion, this is common sense. A need to exercise the fundamental right to self-defense can arise in a split second. Loading a firearm under life and death pressure is difficult and - even for the trained and well-practiced - time-consuming; taking precious seconds when they count most. Would police or private security submit to such a restriction? An unloaded firearm is essentially useless for self-defense, except perhaps as a club.

The County provides no testimony, reference material, or legal authority to support its proposition that carrying a firearm unloaded with ammunition nearby is a constitutionally sufficient alternative to carrying a loaded firearm as a means of self-defense. But *Heller* itself cites several state court cases which upheld prohibitions on carrying firearms *concealed*, as long as carrying firearms *openly* was permitted. *Heller* at 2794, n.9. None of those cases even suggest that *unloaded*, open carry fulfills the requirement that law-abiding persons be allowed to carry arms for self-defense. (*See State v. Chandler*, 5 La. Ann. 489 (1850); *Nunn v. State*, 1Ga. 243 (1846); *Andrews*, 50 Tenn. 165 (1871); and *State v. Reid*, 1 Ala. 612 (1840). In fact, *Reid* suggests the exact opposite, stating: "A statute which, under the pretence of regulating, amounts to a destruction of the right, *or which requires arms to be so borne as to render them wholly useless for the purpose of defence*, would be clearly unconstitutional." *Id. at* 616-17 (emphasis added).

B. UOC Has Many Statutory Limitations That Make it Impractical

1. Those Who UOC Are Statutorily Subject to Suspicionless Search

Penal Code § 12031(e) expressly authorizes law enforcement to stop any person an officer sees in possession of a firearm in a public place[2] and to inspect the firearm to determine whether it is loaded. If an officer has reasonable cause to believe a firearm carried in a public place is loaded, the officer can

[2] *See* Penal Code § 12031(f) and *People v. Vega* (1971) 18 Cal. App.3d 954, 958, for the definition of "public place."

arrest the person carrying the firearm, even if no crimes is actually committed. (Penal Code § 12031(a)(5)(A)(ii).)[3] Those carrying firearms pursuant to a CCW are not subject to such statutory searches.

2. There Are Many Places Where UOC is Not Allowed

Both California (Penal Code § 626.9) and federal (18 U.S.C. §§ 921(a)(25); 922(q) & 924(a)) law make it generally illegal to possess a firearm, that is not in a locked container and unloaded, in any place the person knows, or reasonably should know, is within 1,000 feet of the grounds of any public or private school that teaches any grade between kindergarten through 12. Violation of either the state or the federal version of this law can be charged as a felony. (*See* Penal Code § 626.9(f); 18 U.S.C. § 924(a)(4).) Those carrying a firearm pursuant to a valid CCW are exempted from these laws. (*See* Penal Code § 626.9(l); 18 U.S.C. §§ 921(a)(25); 922(q).)

Also, many cities and counties have ordinances prohibiting firearms in certain areas, most commonly in public parks. Alameda County has banned firearms on all county owned property. *See* Ex. "A" Supp. Pls.' Consolidated Opp/Reply. Those carrying a firearm pursuant to a valid CCW are typically exempted from these local restrictions. (*e.g., Id.*).

3. UOC is Impractical

Those who UOC must either possess the firearm *completely* unconcealed, or carry it in a belt holster, lest they violate Penal Code § 12025. And under Penal Code § 12031(e), they must submit to an inspection of their firearm by every law enforcement officer they come into contact with who requests one. They must also research the location of every school zone, and plan routes of travel around them (which in metropolitan areas is virtually impossible) or risk felony prosecution (and thus a loss of *all* firearms rights); they must research and comply with the local ordinances relating to carrying firearms for every city and county they visit or risk prosecution thereunder; then they have to take the precious time to load their firearm (no easy task if involved in a life and death confrontation, provided it is possible at all). Contrary to the County's assertion, UOC is an unwieldy practice hardly befitting of a fundamental, enumerated right the *Heller* Court referred to as "the true palladium of liberty," (See *Heller.* at 2805 (quoting St. George Tucker's version of Blackstone's Commentaries), and is not an

---

[3] Probable cause exists if the person carrying the firearm refuses to allow a requesting officer to inspect it. (Penal Code § 12031(e) .)

adequate substitute for CCW under the Second Amendment.

II. THE CCW CASES PENDING BEFORE THE NINTH CIRCUIT ARE NOT INSTRUCTIVE

The County cites to unpublished district court decisions and mischaracterizes them as: "*two recent* California federal cases" (emphasis added) that have rejected challenges to "concealed weapons regulations" at the trial level: *Mehl v. Blanas*, 2008 U.S. Dist. LEXIS 8349 (E.D. Cal. 2008) and *Rothery v. Blanas*, U.S. District Court for the Eastern District of California, No. CIV. S 08-02064. *See* Def.'s Reply Supp. Mot. Summ. J. at 3:18-24. But, only *one* of those cases, *Rothery*, addressed a Second Amendment question. Both case were pre-*McDonald*, *Mehl* was even pre-*Heller*. These are not "recent" cases. Nor are they particularly instructive.

The plaintiffs' Second Amendment claim in *Mehl* was never decided by that court because the plaintiffs in that case, it being pre-*Heller* (February of 2008), conceded that Ninth Circuit precedent barred any Second Amendment claim prior to Sacramento County's motion to dismiss being ruled on.[4] Thus, *Mehl* did not address any Second Amendment question, and even if it had, it would have been of little value, being decided pre-*Heller*.

Rothery involved an almost identical challenge to that in *Mehl*, even the defendants and the attorneys were the same.[5] Also, like *Mehl*, Sacramento County's motion to dismiss was granted. But unlike *Mehl*, the court did decide the Second Amendment issue, opining that no such claim is available. But the ruling on the Second Amendment claim was pre-*McDonald*, and the judge relied almost exclusively on *Nordyke v. King*[6] in concluding "there is no constitutional right to carry a concealed weapon."[7] But, the *Nordyke* case has been vacated, and is no longer good law. See Pls.' Consolidated Opp./Reply 5:15-22 & n.9.

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[4] *See* Memorandum and Order Granting Defendant's Motion for Summary Judgment, *Mehl v. Blanas*, (No. 03-2682) (E.D. Cal. Feb. 5, 2008).

[5] *See* Transcript of Court's Rulings on Motions to Dismiss, *Rothery v. Blanas*, at 1:9-16 (No. 08-2064) (July 15, 2009).

[6] *See* Mem. and Order Granting Def.'s Mot. Summ. J., at 2:15-19 and 6:10-14 and 11:15-23, *Mehl v. Blanas*, (No. 03-2682) (E.D. Cal. Feb. 5, 2008)

[7] *See* Tr. Ct.'s Rulings on Mots. to Dismiss, *Rothery v. Blanas*, at 8:17-21 (No. 08-2064) (July 15, 2009).

Further, in granting Sacramento's motion to dismiss, the judge repeatedly said there is no constitutional right to carry a "concealed" weapon, basing his decision on the language from *Heller* that most 19th-Century courts held prohibitions on carrying concealed weapons to be lawful, and taking the position that the right to arms is limited to the home.[8] This Court has already correctly rejected both of those propositions, appropriately so in light of *McDonald.*. *See* Order Denying Defendant's Motion to Dismiss, *Peruta v. County of San Diego*, 678 F. Supp. 2d 1046, at 1051 (No. 09-2371) ("*Heller* does not preclude Second Amendment challenges to laws regulating firearm possession outside of home.") and 1053-1054 (where this Court recognized *Heller's* distinction between presumptively lawful restrictions, like concealed carry bans when alternative methods of carry are allowed, and unconstitutional total bans on carrying firearms outside the home for self-defense.).

III. FOR SUMMARY JUDGMENT PURPOSES THERE ARE AT BEST DISPUTED MATERIAL FACTS STILL UNRESOLVED

Discovery in this case has not concluded. No depositions have been taken. Plaintiffs believe there are minimal factual issues involved in establishing the Second Amendment violation alleged. By this motion they sought to avoid protracted and expensive litigation and discovery on factual issues that may have less significance depending on the Court's ruling on the Second Amendment claim. But the Court may disagree, or find that there are factual issues left to be resolved relating to the other claims. In which case, and considering the minimal discovery completed so far, if the court is inclined to deny Plaintiffs' motion it should do so wholly, or in part, *without* prejudice.

Date: November 8, 2010

MICHEL & ASSOCIATES, P.C.	**PAUL NEUHARTH, JR., A.P.C.**
/s/ C. D. Michel	/s/ Paul Neuharth, Jr.*as authorized on 10/8/10*
C. D. Michel E-mail:cmichel@michellawyers.com Attorneys for Plaintiffs	Paul Neuharth, Jr. A.P.C. E-mail: pneuharth@sbcglobal.net Attorneys for Plaintiffs

[8] *See* Tr. Ct.'s Rulings on Mots. to Dismiss, *Rothery v. Blanas*, at 12 (No. 08-2064) (July 15, 2009).

IN THE 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, v. COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF, Defendants.	**CASE NO. 09-CV-2371 IEG (BGS)** **CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 E. Ocean Blvd., Suite 200, Long Beach, California, 90802.

I am not a party to the above-entitled action. I have caused service of:

PLAINTIFFS' SUR-REPLY IN OPPOSITION TO DEFENDANT'S REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [PROPOSED]

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

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pneuharth@sbcglobal.net

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 8, 2010.

/s/ C.D. Michel
C. D. Michel
Attorney for Plaintiffs

TAB 11

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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,

v.

COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF,

Defendants.

CASE NO: 09-CV-2371 IEG (BGS)

DECLARATION OF SEAN BRADY IN SUPPORT OF PLAINTIFFS' EX PARTE MOTION FOR LEAVE TO FILE SUR REPLY IN RESPONSE TO DEFENDANT'S REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Hon. Irma E. Gonzalez

Date Action Filed: October 23, 2009

DECLARATION OF SEAN BRADY

I, Sean Brady, am competent to state, and testify to the following based on my personal knowledge:

1. I am counsel for the Plaintiffs in the above-captioned matter.

2. In accordance with the stipulated briefing schedule stipulated to by the parties and granted by this Court on September 8, 2010, the following events occurred:

3. On September 3, 2010, Plaintiffs filed a Motion for Partial Summary Judgment, the supporting Points and Authorities which were not to, and did not, exceed 25 pages.

4. On October 4, 2010, Defendants filed their Opposition to Plaintiffs' Motion, and simultaneously Defendants' Cross-Motion for Summary Judgment, the supporting Points and Authorities for which were not to, and did not exceed 35 pages total.

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6. On October 18, 2010, Plaintiffs filed their Consolidated Reply to Defendant's Opposition and Plaintiffs' Opposition to Defendants' Cross-Motion, the supporting Points and Authorities for which were not to, and did not, exceed 20 pages total.

7. On November 1, 2010, Defendants filed their Reply to Plaintiffs' Opposition, the supporting Points and Authorities for which were not exceed 10 pages. The issues addressed in this Reply were to be limited to responding only to the issues raised in Plaintiffs' Opposition to Defendants' Cross-Motion. Defendants sought leave to exceed the 10 page limitation by five pages. The Court granted that request.

8. Defendants have filed 50 pages of briefing on this matter, while Plaintiffs have only filed 45 pages. Plaintiffs seek an additional five (5) pages to address new arguments raised by

Defendants, and to have an equal amount of briefing, as originally agreed to.

9. On November 5, 2010, I attempted to contact Defendants' counsel, James Chapin, via e-mail in order to determine whether Defendants would be willing to stipulate to allowing Plaintiffs to file a five (5) page sur-reply.

10. Having not heard back from Defendants's counsel, I again sent an email to Mr. Chapin on November 8, 2010.

11. Mr. Chapin responded to that communication, indicating that Defendants are unwilling to stipulate to allow Plaintiffs to file a sur-reply.

I declare under penalty of perjury, that the foregoing is true and correct.

Executed in the United States on November 8, 2010.

Sean A. Brady
Attorney for Plaintiffs

IN THE 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 Plaintiff, v. COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF, Defendants.	**CASE NO. 09-CV-2371 IEG (BGS)** **CERTIFICATE OF SERVICE**

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I am not a party to the above-entitled action. I have caused service of:

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on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

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/s/ C.D. Michel
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Attorney for Plaintiffs

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IN THE 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,

v.

COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF,

Defendants.

CASE NO: 09-CV-2371 IEG (BGS)

DECLARATION OF STEPHEN HELSLEY IN SUPPORT OF PLAINTIFFS' SUR REPLY TO DEFENDANTS' REPLY TO PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT & REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: November 15, 2010
Time: 10:30 a.m.
Location: Courtroom 1
Judge: Hon. Irma E. Gonzalez
Date Action Filed: October 23, 2009

DECLARATION OF STEPHEN HELSLEY

I, Stephen Helsley, declare as follows:

1. I make this declaration of my own personal knowledge and, if called as a witness, I could and would testify competently to the truth of the matters set forth herein.

Firearms Expert Qualifications

2. My expertise regarding firearms is an outgrowth of fifty years of studying and collecting firearms. Throughout my life I have owned approximately four hundred firearms, of which I currently own approximately two hundred and twenty. I have been an avid collector and student of firearms-related literature, and my collection contains approximately three thousand volumes.

3. In 1964, as a Criminology major at Fresno State College, I completed my first collegiate firearms course, which focused on Smith & Wesson revolvers and the .38 Special cartridge.

4. In 1967, I began my employment with the California Department of Justice (DOJ). By 1970, I was the departmental firearms instructor, a duty I was assigned until I was appointed Bureau Chief by Attorney General Deukmejian in 1979. During the years that I was the departments' firearms instructor, agents could carry any caliber cartridge they preferred. Thus, I routinely dealt with firearms and ammunition ranging from .22lr to .44 Remington Magnum.

5. In the early 1970s, I began competing in both rifle and pistol matches. By 1973 my expertise was recognized by Guns & Ammo magazine when they asked me to co-author a "Mini Manual" on *Custom .45 Automatics*. Since then I have authored at least 50 articles for thirteen other journals. The subject matter ranged from sniper rifles to tactical shotguns to civil war era cartridge conversion revolvers. I have also acted as a researcher for other authors. One example is an article by Silvio Calabi that ran in the November/December 2006 issue of *Shooting Sportsman* magazine. The article "Less is More" is the definitive work on the origin and development of the 28-g shotshell. Additionally, I recently co-authored a book, *Hemingway's Guns,* which was published by Shooting Sportsman Books.

6. During the 1970s, while employed as a DOJ Field Supervisor in San Diego, I was first

qualified in court as a "firearms expert". In 1973, I took the required training to become an NRA Certified Police Firearms Instructor and a California Commission on Peace Officers Standards and Training certified firearms instructor.

7. In 1975, I attended the FBI National Academy in Quantico, VA. Included in the required course work was one of firearms. In later years I took other firearms training that ranged from use of the Heckler & Koch 9mm MP5 submachine gun to concealed weapons training for a Nevada "carry permit." In addition to being certified as a firearms expert, I am a member of the American Academy of Forensic Sciences and a Technical Adviser to the Association of Firearm and Tool Mark Examiners.

8. When I became DOJ Chief of the Bureau of Narcotic Enforcement, I had the overall responsibility of reviewing agent-involved shootings, as well as purchasing their ammunition and firearms, which included handguns and rifles.

9. In 1985, I became Chief of the DOJ Bureau of Forensic Services (BFS).As BFS Chief, I was involved in setting standards for the casework of those doing firearm and tool mark examinations. On a larger scale, I was instrumental in establishing the California Criminalistics Institute ("CCI") – which at that time was one of only two formal forensic training/research institutes in the United States. CCI established a number of firearms courses that are still being offered.

10. In 1989, I was promoted to Assistant Director of the DOJ's Investigation and Enforcement Branch, a position I held until I retired. As Assistant Director, I was deeply involved in firearm issues, including the drafting of assault weapon related legislation. During this period, I was able to participate in ammunition testing at the U.S. Army Wound Ballistic Laboratory at Letterman Institute in San Francisco.

11. From 1993 until 2000, I was the State Liaison for the National Rifle Association ("NRA") in Sacramento. In that position I responded to requests from legislators and staff regarding firearms and ammunition related matters. After leaving the NRA, my expertise in firearms and ammunition continued to expand as I logged countless hours hunting and shooting competitively, as well as reloading ammunition. New competitive disciplines that I engaged in

included Long Range Tactical Rifle, Black Powder Rifle Cartridge Silhouette, and Military Rifle Silhouette. I also became involved in shotgun and double rifle competition. I hunted Bison in North Dakota with a Sharps rifle made in 1863 and grouse in Maine with a French pinfire shotgun c.1860. For all of these activities, I reloaded my own cartridges. In 2003, I visited the Yuma Proving Grounds with a group of forensic scientists. I was there to have my ammunition tested using Doppler radar and high-speed photography.

12. At various times in the past I have conducted seminars on sniper rifles and in 2007 and 2008, I co-taught a workshop on dangerous game rifles and the ammunition for them.

13. In 2003, I toured the principal gun making firms in Brecia and Gardone, Italy. In 2008, I did the same in Suhl, Germany. For the past seven years, I have consulted with California-based gun makers B. Searcy & Co. and John Rigby & Co. Between 2004 and 2007, I consulted with GaugeMate, Inc. on the design of sub-gauge adapters for shotguns.

14. My consulting efforts also involve civil and criminal matters. Most recently, I have been reconstructing the discharge of a pistol in a Central California training school that seriously injured one of the students. During the last decade I have done fine gun photography and acted as a judge in the Gold Medal Concours d'Elegance of Fine Guns. My photographs of firearms and cartridges have been used for magazine ads and to support articles. Additionally, I inventory firearms collections and provide valuations if requested. The most recent was a 77-gun collection in Montana that I did in June. I went to Moscow, Russia on September 10, 2010. While there, I toured arms manufacturers, gun shops, and museums, and shot at a local shooting range. I am currently working on an article that examines shotguns and rifles made on the Needham patent of 1852. These firearms use "needle-fire" cartridges – a design that was used by both armies in the Franco-Prussian War of 1870.

15. Knowledge acquired during the course of my studies and personal and professional experiences described herein form the basis for my testimony in this matter.

Proper Protocol for Carrying A Firearm for Self-Defense

16. In my extensive experience with tactical weapons training as a law enforcement officer, and as a firearm/self-defense instructor and afficionado, I have never been trained to keep

my firearm unloaded while carrying it for self-defense purposes. Speed, accuracy, and mental preparedness are the critical elements when engaging a threat with a firearm. Thus, each second spent engaging the threat can make the critical difference between the successful defense or the death or injury of the person carrying the firearm. Any tactical firearms trainer would teach that this means *always* keeping the firearm loaded while carrying it.

17. Most tactical firearms training courses instruct people how to load a magazine into a semi-automatic handgun, or a speed-loader (a device designed to hold cartridges in a formation to quickly insert into the cylinder of a revolver) for a revolver, while engaging a threat. However, the scenario is generally when *reloading* the firearm after firing all the rounds that were already in the firearm while being carried. This means the firearm has already been drawn from the holster and has engaged the threat. Thus, the time it takes to reload a firearm is slightly less (maybe a difference of about one (1) second or two (2) for a person competent, but not an expert, with the particular firearm) than the time it would take to load a firearm that is drawn from a holster unloaded and has to engage a target.

18. Based on my experience with firearms, I believe the entire process of drawing an unloaded semiautomatic pistol from a holster, removing a magazine attached to the person's belt, inserting the magazine into the magazine well of the firearm, closing the action and engaging a threat would take the average person with some, but not a lot of, tactical weapons training about three (3) seconds. As for revolvers, I believe the entire process of drawing an unloaded revolver, removing a speed-loader attached to the person's belt, opening the cylinder, inserting the cartridges with the speed-loader, closing the cylinder, and engaging the threat would take the average person with some, but not a lot of tactical weapons training a little bit longer at about four (4) - five (5) seconds.

Trigger Locks

19. Trigger locks are generally circular metal locks that can be affixed to the trigger guard of a firearm to prevent access to the trigger – similar to a boot law enforcement or repossession companies place on the wheel of an automobile to prevent the owner from moving the vehicle – which can be disengaged by inserting and turning a key.

20. Based on my experience with firearms and trigger locks, I believe a person with a prepared plan for disengaging a trigger lock and engaging a threat (e.g., has the handgun in a certain position near their person, along with a key in an easily accessible place, such as tied to their wrist) could do so in about the same time it would take a person with some, but not a lot of, tactical weapons training to draw an unloaded semiautomatic pistol from a holster, remove a magazine attached to the opposite side of a belt, insert the magazine into the magazine well of the firearm, close the action and engage a threat. The difference would likely be a second or two either way, more likely the quicker being the loading of the firearm. And, for the reasons explained, I believe it would take longer, although not much, maybe a second or two, for a person with some, but not a lot of, tactical weapons training to draw an unloaded revolver, remove a speed-loader attached to the person's belt, open the cylinder, insert the cartridges with the speed-loader, close the cylinder, and engage the threat.

I declare under penalty of perjury that the foregoing is true and correct.

Executed within the United States this 1 day of November, 2010

Stephen Helsley

IN THE 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 Plaintiff, v. COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF, Defendants.	**CASE NO. 09-CV-2371 IEG (BGS)** **CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 E. Ocean Blvd., Suite 200, Long Beach, California, 90802.

I am not a party to the above-entitled action. I have caused service of:

DECLARATION OF STEPHEN HELSLEY IN SUPPORT OF PLAINTIFFS' SUR REPLY TO DEFENDANTS' REPLY TO PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT & REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on November 8, 2010.

/s/ C.D. Michel
C. D. Michel
Attorney for Plaintiffs

TAB 13

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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, v. COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF,, Defendants.	No. 09-CV-2371 IEG (BLM) Date: November 15, 2010 Time: 10:30 a.m. Dept: 1 – Courtroom of the Hon. Irma E. Gonzalez

DEFENDANT WILLIAM D. GORE'S REPLY POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I

THE SECOND AMENDMENT

A. What Plaintiffs Are Seeking.

Plaintiffs begin their opposition with a confusing argument about the remedy that they seek. The argument is an effort to distance themselves from the obvious – that they 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. Their underlying premise is that the "right to bear arms for self-defense" entitles them to bypass the statutory "good cause" requirement.

Plaintiffs admit that "*Heller* approves bans on carrying concealed firearms when the law allows for an alternative method of carrying." (Opposition, pp. 2-3.) Plaintiffs now assert that the Second Amendment protects a fundamental right to carry a loaded firearm "in some manner" for self defense in public places, and that the *only* means of exercising that right in San Diego County is by concealed carry. There is no evidentiary support for such a claim in this proceeding nor is there any support for this notion legally or factually. The concealed carry licensing statute is a corollary to the relevant Penal Code sections that govern firearm carry. Sections 12025 and 12031 prohibit only the concealed carry of loaded firearms; they do not eliminate the carry of firearms. This case is not about a "blanket ban" on carrying firearms outside the home as Plaintiffs declare. (Pl. Opp. p. 7.)

Open carry of unloaded firearms is permitted and the ammunition may be carried in a clip ready for instant loading. (*See* § 12031(g).) This allows for the "bearing" of arms for self-defense and offers an adequate "alternative method of carrying." But section 12031 goes even further than that and offers a host of exceptions that allow for carrying a loaded firearm: at one's place of business (subdivision h), while hunting (subdivision i), at any temporary residence or campsite (subdivision l), and, significantly, "by a person who reasonably believes that the person or property of himself or herself or

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of another is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property." (Subdivision j.)

In the end, describing California's statutory scheme as a "blanket ban" on carrying firearms is melodramatic and dishonest. Plaintiffs offer no explanation as to why open carry with readily available ammunition, combined with the exceptions in 12031, is inadequate for self–defense. Nor do they offer any legal support whatsoever in the aftermath of *Heller* for the claim that the Second Amendment protects a fundamental right to carry a loaded firearm in public or that an "alternative method of carrying" means that the carry of a loaded firearm is a constitutional requirement in "may issue" concealed carry states.

B. Plaintiffs' Conception of *Heller* Has Yet to Survive Judicial Review.

Plaintiffs do not effectively address the recent California decisions post-*Heller*: *People v. Flores*, 169 Cal. App. 4th 568 (2008) and *People v. Yarbrough*, 169 Cal. App. 4th 303 (2008). They are both decisions which have evaluated the scope of the Second Amendment as defined by *Heller* and have rendered opinions that counter Plaintiffs' arguments. *Yarbrough* notes that *Heller* had "specifically expressed constitutional approval of the accepted statutory proscriptions against carrying concealed weapons," and that carrying a concealed firearm "is not in the nature of a common use of a gun for lawful purposes which the court declared to be protected by the Second Amendment in *Heller*," that unlike possession of a gun for protection within a residence, carrying a concealed firearm presents a recognized "threat to public order," and poses an "imminent threat to public safety." *People v. Yarbrough*, 169 Cal. App. 4th at 314.

Flores concludes that with the wealth of exceptions in section 12031, in particular the exceptions for self-defense, there can be no claim that section 12031 in any way burdens the core Second Amendment right announced in *Heller* to any significant degree. "Instead, section 12031 is narrowly tailored to reduce the incidence of unlawful *public*

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shootings, while at the same time respecting the need for persons to have access to firearms for lawful purposes, including self-defense." *People v. Flores*, 169 Cal .App. 4th at pp. 576-577.

Contrary to Plaintiffs' argument, the Court in *Heller* did not define the right to "bear" as anything more than the right to defend "hearth and home." The Second Amendment does not say the right is "to bear a concealed firearm in public places." *Yarbrough* and *Flores* reflect the prevailing judicial interpretation of the scope of the Second Amendment after *Heller*. The Seventh Circuit comments that the language of *Heller* "warns readers not to treat *Heller* as containing broader holdings than the Court set out to establish . . . . The opinion is not a comprehensive code; it is just an explanation of the Court's disposition. Judicial opinions must not be confused with statutes, and general expressions must be read in light of the subject under consideration." *United States v. Skoien*, 614 F.2d 638, 640 (7th Cir. 2010). The Court in *Heller* did not go beyond the limited facts of the case for a very good reason – *there were not five votes to do anything else*. Plaintiffs' efforts to construe anything more from *Heller* is purely wishful thinking.

There has been no case nationwide which has struck down a concealed weapons regulation since *Heller*. Two recent California federal cases have decided the issue at the trial level – both rejecting the challenge: *David K. Mehl et al. v. Lou Blanas et al.*, 2008 U.S. Dist. LEXIS 8349 (E.D. Cal. 2008); *James Rothery, et al. v. Lou Blanas, et al.*, U.S. District Court for the Eastern District of California, No. CIV. S 08-02064. The Court in *Rothery* concluded that the Second Amendment as interpreted by the United States Supreme Court and the Ninth Circuit does not provide a right to carry loaded concealed weapons outside the home and does not affect the operation of CCW statutes. Both cases are currently before the Ninth Circuit (*Mehl* #08-15773; *Rothery* #09-16852).

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II

STANDARDS OF JUDICIAL REVIEW

A. There is no Strict Scrutiny Trend.

Plaintiffs state that the trend after *McDonald v. City of Chicago*, ___ U.S. ___, 130 S.Ct. 3020 (2010) is toward adopting strict scrutiny review. Yet they cite only two trial court cases in support of that assertion. One case was decided before *McDonald* – where the Defendant was in possession of a firearm in his own home -- but it still upheld the challenged regulation. *United States v. Engstrum*, 609 F.Supp.2d 1227 (D.Utah 2009). The other, *State of Wisconsin v. Schultz*, is a Wisconsin Circuit Court case that is not published anywhere nor is even citable under Wisconsin rules as either precedent or persuasive authority. Wis. Stat. (Rule) § 809.23(3). It is noteworthy that the opinion comes from rural Clark County, with a County seat populated by 2700. What makes Plaintiffs' bold "trend" claim more disingenuous is their failure to even mention *United States v. Skoien*, 614 F.2d 638, a Wisconsin case decided after *McDonald*, which employs intermediate scrutiny to a statute affecting the possession of firearms in the home. Nor do Plaintiffs mention any of the cases which have employed intermediate scrutiny -- most of which had assumed the right to be fundamental before *McDonald* was decided. (See Defendant's Motion, Argument IV C.)

B. The Actual Trend.

In fact, no district or appellate court case that actually cites to *McDonald* uses strict scrutiny. Every case uses either the "presumptively lawful" categorical approach from *Heller* or intermediate scrutiny. *United States v. Hart*, 2010 U.S. Dist. LEXIS 77160 (D. Mass. July 30, 2010) puts concealed weapons restrictions into the *Heller* "presumptively lawful" category. Other cases using the categorical approach are either felon or mental illness cases. *Yohe v. Marshall*, 2010 U.S. Dist. LEXIS 109415 (D. Mass. Oct. 14, 2010); *United States v. Roy*, 2010 U.S. Dist. LEXIS 107620 (D. Me. Oct. 6, 2010); *Dority v. Roy*, 2010 U.S. Dist. LEXIS 84403 (E.D. Tex. Aug. 17, 2010); *United States v. Seay*, 2010 U.S. App. LEXIS 18738 (8th Cir. S.D. Sept. 8, 2010).

A majority of the intermediate scrutiny cases are within the Seventh Circuit following *Skoien*. The case of *Ezell v. City of Chicago*, 2010 U.S. Dist. LEXIS 108341, 17-18 (N.D. Ill. Oct. 12, 2010) tells the real story:

> The Seventh Circuit has applied intermediate scrutiny to laws categorically prohibiting possession of a firearm by different classes of individuals. *See Skoien*, 614 F.3d 638, (*Constitution permits Congress to bar those convicted of domestic violence crimes from possessing firearms); Yancey, 2010 U.S. App. LEXIS 18442, 2010 WL 3447736, (barring unlawful users of or addicts to any controlled substance from firearm possession is constitutional); U.S. v. Williams, 616 F.3d 685, 2010 U.S. App. LEXIS 16194, 2010 WL 3035483 (7th Cir. 2010) (barring felons from firearm possession is constitutional*). However, the Court "reserved the question of whether a different kind of firearm regulation might require a different approach." *Yancey*, 2010 U.S. App. LEXIS 18442, 2010 WL 3447736 at *2. Although Plaintiffs urge this Court to apply either strict scrutiny or intermediate scrutiny to the requirement that residents obtain firing range training outside of the City in order to obtain their CFPs, this Court notes that the Seventh Circuit has only applied intermediate scrutiny to laws that absolutely prohibit possession of a firearm by an individual."

The only identifiable trend is toward the use of a categorical approach based on the factors set out in *Heller*, or intermediate scrutiny in those cases involving regulations that in some way affect the possession of firearms in the home. Where regulations do not affect the possession of firearms in the home, such as the subject licensing procedures, there is no trend toward any heightened level of scrutiny.

III

EVIDENCE OF GOVERNMENTAL INTEREST

Plaintiffs attack Professor Zimring's declaration in numerous ways that are false and misleading. A careful review of the declarations submitted by Plaintiffs shows that there remains a substantial unresolved conflict about facts not yet in evidence in this litigation and that the declarations do nothing to undermine any of the governmental interests detailed in the Zimring declaration.

Patrick does not indicate his field of expertise and makes sweeping assertions -- "Licensure processes of the various states have been shown to effectively filter out the violent and the impulsive" -- with no reference to any supportive research data. Patrick

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grossly overstates the efficiency of permissive licensing screening and never supports his passionate views with any data citations.

Mauser says that "Professor Zimring's assertions are generally correct, but omit a critical fact: serious criminal violence with firearms is almost exclusively committed by people (criminals) with histories of previous crime, or, occasionally by people who are seriously mentally disturbed." Mauser then asserts that "this omission is critical because it makes Professor Zimring's views irrelevant in a case like the present. I am informed that neither juveniles nor people with crime records or mental deviancy records are eligible for concealed weapons licenses - - - they are ineligible for such licenses in any event." (Mauser, p. 2.) Mauser presents no authority for the proposition that permissible licensing laws exclude all persons at risk of committing firearms robberies and assaults. He states that he is "informed" but provides no reference to the source of that information. This assertion is repeated by Dr. Moody: "these provisions are important because they exclude virtually all people who are likely to commit gun crimes from receiving carrying permits." (Moody, p. 6.) Moody also provides no reference for this statement.

The empirical and legal data on this question do not support the theory that state laws exclude "virtually all people" who are potential gun criminals. The data on high concentration of violence among persons with criminal records usually uses juvenile and adult arrest records. (*See* Wolfgang Marvin, Robert Figlio and Thorsten Sellin, *Delinquency in a Birth Cohort* (1972) University of Chicago Press Chicago.)[1] Many people involved in crime have some record of juvenile or criminal arrest. But state permissive licensing provisions only bar persons with felony convictions or sometimes convictions for very specific high violence misdemeanors such as domestic violence. Excluding non-conviction arrests, juvenile records and reductions by plea bargaining to non-covered misdemeanors creates huge gaps between disqualified and at-risk

[1] This is the most frequently cited of a whole series of such studies that use police contacts as the measure of criminality.

populations for gun crime. The mental health criteria used by most permissive statutes also are restricted to persons with previous histories of adjudication, probably a tiny minority of the seriously disturbed at any given time. With loopholes that large, the average California citizen could quite rationally prefer to walk streets where very few of the people on the street carry hidden weapons than to trust systems which allow the vast majority of adults to carry hidden and loaded weapons until felony conviction or adjudication for insanity has happened. It is simply not true that California effectively screens the mentally ill from possession of firearms. The screening is limited to patients *admitted* to a treatment facility, and to other very specific circumstances. Welfare and Institutions Code section 8100.

Among the many factual mistakes in the Moody declaration, Moody states that Zimring "is not a criminologist." In fact, Zimring was elected a life fellow of the American Society of Criminology in 1992 and received that organization's two most important research awards in 2006 and 2007. (Zimring Declaration, CV attached, p. 1.) This is why he is especially qualified to render opinions in this area. Moody then mentions "two University of Chicago criminologists, John Lott and David Mustard." Neither Lott nor Mustard is a criminologist or ever was on the University of Chicago faculty. There is also an assertion that Zimring "incessantly predicted ---[increasing] murder rates" (Moody par. 7) which is both undocumented and untrue.

But by far, the most problematic assertion by Moody is headlined "*No Controversy As To CCW Issuance*." Moody alleges that the crime decline in the United States since 1990 is evidence that handgun possession and CCW levels are not related to violence. In fact, there has not been a steady crime decline between 1991 and 2010 (there was no such pattern between 2000 and 2007, see Zimring *The Great American Crime Decline* 2007), and alleges with no support that handgun ownership rates increased in the late 1990's and since 2000. Published research using data *from* Professor Moody shows the opposite of

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what Moody's declaration insinuates about the import of "shall issue" laws.[2] Of course, Professor Moody doesn't refer to this work in his declaration. Ayers and Donahue shred every claim by Moody in a thorough analysis of his work.

There is a very active controversy about the impact of CCW laws on crime and violence as Moody well knows. (See also, Donahue and Ayres, *Shooting Down the More Guns, Less Crime Hypothesis*, 55 Stan. L. Rev. 1193 (2003); Duggar, *More Guns, More Crime*, 109 Journal of Political Economy 1086-1114 (2001)). States and cities with restrictive gun policies did especially well in crime declines in the 1990's and have done so since (see Zimring , 2007 at Ch. 6), but major urban centers with concentrations of crime and violence were under-represented in the right-to-carry states.

The theories that animate San Diego's restriction of hidden guns in public places are the special lethality of concealed handguns in assault and robbery and the contagious nature of concealed weapons in shared public space. Plaintiffs' only response to this is the unsupported allegation that permissive screening criteria – usually only felony criminal convictions or recorded and court certified histories of insanity -- would remove all persons at risk of crime and violence from eligibility for carry permits. There is no empirical evidence of this anywhere in this litigation, and the actual impact of permissive carry legislation is a hotly contested factual question. The Plaintiffs in this case present two wildly different versions of state gun law effectiveness. They allege that efforts to disqualify tiny categories of certified risks work miraculously well, but that any more selective criteria for limiting hidden handguns cannot promote public safety.

IV

THERE IS NO CONSTITUTIONALLY PROTECTED INTEREST IN A CONCEALED WEAPONS PERMIT

Plaintiffs cannot state a constitutional claim because they have no protected property interest which triggers 42 U.S.C. section 1983. *Erdelyi v. O'Brien*, 680 F.2d 61

[2] Ian Ayres and John Donahue, "*Yet Another Refutation of the More Guns Less Crime Hypothesis* – with some help from Moody and Marvel," 6 Econ Journal Watch 35 (2009).

(9th Cir. 1982). Plaintiffs completely dismiss *Erdelyi* because it was decided before *Heller* and *McDonald*. However, *Erdelyi* remains binding Ninth Circuit precedent. Hypocritically, Plaintiffs insist that they are not challenging the constitutionality of Penal Code section 12050 – that "the Court should uphold section 12050's licensing scheme." (Pl. Opp. at p. 1.) At the same time, the relief they are demanding is that the Court take away the Sheriff's issuing discretion which is specifically authorized by statute and confirmed by case law. If the Court is to uphold the licensing scheme, then *Erdelyi* applies. And since the licensing scheme does not affect in any way the right to possession of firearms in the home, there is no basis for the overruling of *Erdelyi*. No matter how the Sheriff exercises his statutorily authorized discretion, it will have no impact on the exercise of Second Amendment rights as set forth in *Heller*. The statute leaves the issuance of CCW licenses to the unfettered discretion of the sheriff, in the interest of controlling dangerous weapons. *CBS, Inc. v. Block*, 42 Cal.3d 646, 655 (1986). And the Sheriff, who is a locally elected public official, is accountable to the local electorate and will act based on local concerns. San Diego's concerns regarding the carrying of concealed weapons, in a large metropolitan area close to the border, are dramatically different from those of most other cities and states.

V

EQUAL PROTECTION

A. Requiring Evidence of "Good Cause" Does Not Violate Equal Protection.

Plaintiffs erroneously imply that the County's requirement of proving "good cause" violates the equal protection clause simply because "the Constitution protects a right to carry firearms for self-defense." (Pl. Opp. 15:6-11). If this were true, the government would never be able to regulate fundamental rights.

> The crux of the constitutional promise of equal protection is that persons similarly situated shall be treated equally by the laws. However, neither clause prohibits legislative bodies from making classifications; they simply require that laws or other governmental regulations be justified by sufficient reasons. The necessary quantum of such reasons varies, depending on the nature of the classification.

In re Evans, 49 Cal. App. 4th 1263, 1270 (Cal. App. 4th Dist. 1996) *citing*, *In re Eric J.*, 25 Cal.3d 522, 530 (1979).).

Plaintiffs never present evidence that shows they are similarly situated or treated differently. Plaintiffs attempt to identify the class by implying that all who submitted evidence were in a preferred class from Plaintiffs, and then claim that they were all approved. Plaintiffs, therefore, are not similarly situated. Plaintiffs also do not offer any evidence that they were treated any differently than those who submitted evidence, as self-defense-based applications may be denied for lack of "good cause" even with documentation. The standard used is that applicants must establish "good cause." Documentation is not necessarily even required. Documentation is simply the most common and convenient means of meeting that burden.

Moreover, Plaintiffs claim that the County cannot justify its classification under strict scrutiny review. Strict scrutiny is not the standard, and, in any event, the County has met this burden. (*See generally* Def. MSJ Sect. VI(C).) The governmental interest – advancing safety and the lives of its citizens as well as the government's general interest in preventing crime – is furthered by the Sheriff's policy with regard to the "good cause" requirement and has consistently been deemed "compelling." *Heller*, 128 S. Ct. at 2851 (Bryer, J., dissenting); *See also United States v. Salerno*, 481 U.S. 739 at 750 (1987); *Dano v. Collins*, 166 Ariz. 322 (Ct. App. Div. 1 1990); *See State v. Reid*, 1 Ala. 612, 616 (1840) ["the question recurs, does the act, 'to suppress the evil practice of carrying weapons secretly,' trench upon the constitutional rights of the citizen? We think not."]; *Nunn v. State*, 1 Ga. 243 (1846); *Andrews v. State*, 50 Tenn. 165 (1871); *State v. Smith*, 11 La. Ann 633 (1856); Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 727 (2007). Federal and California law also recognize restrictions on concealed weapons to be necessarily related to this compelling interest of public safety.[3] Lastly, the

[3] *See generally* Zimring, Francis E., *The Great American Crime Decline* 2007. New York: Oxford Univ Press (2007).; Ian Ayres and John J. Donohue III, *Yet Another Refutation of the More Guns, Less Crime Hypothesis – With Some Help From Moody and Marvell*, 6 Econ Journal Watch 1, 35-59 (Jan. 2009): Donohue, *The Final Bullet In The*

Sheriff's policy is narrowly tailored to promote public safety while at the same time respecting the need for persons to have access to firearms for lawful purposes, including self-defense. *Flores*, 169 Cal. App. 4th at 576-577.

Therefore, Plaintiffs allegations of discrimination based upon the ability to prove "good cause" fail to show that they are similarly situated, treated differently or that their core right under the Second Amendment is denied.

B. Plaintiffs Cannot Prove Preferential Treatment to HDSA Members.

Plaintiffs continue to allege preferential treatment to HDSA members by misleading this court with speculative "evidence" and misinterpretations of the Sheriff's policies. To sustain their burden at summary judgment, plaintiffs must show *actual evidence* that would allow a reasonable jury to conclude first, that others similarly situated 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 Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1349 (9th Cir. 1983)(emphasis added). Furthermore, "although an inference can serve as substantial evidence for a finding, the inference must be a reasonable conclusion from the evidence and cannot be based upon suspicion, imagination, speculation, surmise, conjecture or guesswork." *Shandralina G. v. Homonchuk*, 147 Cal. App. 4th 395, 411 (2007). Here, Plaintiffs offer mere speculation and cannot prove that they are similarly situated or treated differently.

First, Plaintiffs still fail to show that they are similarly situated. Plaintiffs' only evidence of HDSA members allegedly being given preferential treatment are renewal applications.[4] Plaintiffs Peruta, Buncher, Dodd, and Laxson are claiming disparate

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Body Of The More Guns, Less Crime Hypothesis, 2 Stan. L. Rev. 3, 397-410 (2003); Ayres and Donohue, *The Latest Misfires in Support of the 'More Guns, Less Crime' Hypothesis*. 55 Stan. L. Rev. 1371 (2003); Ayres and Donohue, *Shooting Down the "More Guns, Less Crime" Hypothesis*. 55 Stan. L. Rev. 1193 (2003); Ayres and Donohue, *More Guns, Less Crime Fails Again: The Latest Evidence from 1977-2006*. 6 Econ Journal Watch 2, 218-238 (May 2009); Mark Duggan, *More Guns, More Crime*, 109 Journal of Political Economy 1086-1114 (Oct. 5, 2001).

[4] Plaintiffs presented two new application to prove preferential treatment to HDSA members. Pl. Opp. Ex "N" and "L." Both are renewal applications.

treatment based upon their initial interview or initial application, and therefore are not similarly situated as those applying for renewals. As previously explained, it is not that renewal applicants are given "less scrutiny," in the terms Plaintiffs imply, it is that renewal applicants have already completed a process not yet fulfilled by initial applicants. Renewal applicants have already met the same burden initial applicants must prove. Generally, the standard for a renewal application is that nothing has changed – no law enforcement contacts, crime cases, arrests, changes in employment, mental health, etc. Because so much of the evidence for moral character, good cause and residency has already been proven, review by a supervisor or manger is not needed for the renewal process unless there has been a change. As a result, renewal applications can be issued on the spot with the affirmation that there have been no changes. Plaintiffs again have failed to produce any evidence of similarly situated initial applicants receiving preferred treatment due to their HDSA membership. Therefore, these four Plaintiffs are not similarly situated.

Plaintiffs state that they are "skeptical" regarding Cleary's approval because it occurred after he became a plaintiff in this lawsuit. Yet, Cleary pursued an appeal and his story is quite compelling. There is no evidence whatsoever that the hearing officer knew that Cleary was a plaintiff. In any event, "skepticism" and "suspicion" do not rise to the dignity of an inference. *See e.g., Juchert v. California Water Service Co.*, 16 Cal.2d 500, 506 (Cal. 1940).

Even if Plaintiffs are similarly situated, they cannot prove that they were treated differently than HDSA members. To prove this allegation, Plaintiffs still try to argue that the application of Peter Q. Davis, former San Diego City mayoral candidate, is evidence of preferential treatment. (Pl. Opp 16, n. 32.) Peter Q. Davis is a politician and public figure whose identity and need for self-protection needs no documentation. The fact that he is a well-known public figure is proof of "good cause" for self-protection, not favoritism.

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Additionally, Plaintiffs allude to preferential treatment by providing pieces of information and then asking the court to speculate as to its final product. Plaintiffs point to a notation made by Blanca Pelowitz stating: "Comma[nder] for HDSA (SDSO) considered VIP @ sheriff level – okay to renew standard personal protection." (Pl. Opp. 16:18-20.) However, Plaintiffs leave out the full notation which also says "Mr. Davis is a public figure – former CEO for Bank of Commerce . . . no restrictions as long as no negative contacts." (Pl. Opp. Ex. "M") When read in full, Pelowitz's notations are just that; several notations about the application. Moreover, when read in unison, one can only infer that Mr. Davis was granted a CCW permit for self-protection because he is a public figure. Whether or not Davis was a member of HDSA had no bearing on the decision.

Again, Plaintiffs present the application and appeal letter of Thomas Baglio, DDS, and point only to his statement of being an HDSA member, leaving out key other information. (Pl. Opp. 16:1-7.) In his letter, Mr. Baglio states that the reason he was told his application would not be renewed was because he sold his business. (Pl. Opp. Ex. "L") Mr. Baglio explains that he still carries large sums of money and that he still has his dental license. (*Id.*) As with Cleary, Mr. Baglio took advantage of the appeal process, presented his case and met his burden of proof. Here, Plaintiffs are asking the court to guess and speculate that Mr. Baglio was granted his renewal permit because of being a member of the HDSA, foregoing all other evidence. If anything Mr. Baglio's situation proves that the Sheriffs do not use favoritism. If preferential treatment was given based upon the fact that Mr. Baglio was an HDSA member, he would not have been denied the renewal permit in the first place.

In sum, Plaintiffs fail to prove with actual evidence that they are similarly situated and any difference in treatment between non-HDSA members and HDSA members was based upon impermissible grounds. And since Plaintiffs do not present any evidence of preferential treatment towards "politically-connected, wealthy, contributors of the Sheriff's campaign," this claim fails.

C. No Factual Dispute Exists as to Peruta's Denial.

Plaintiff Peruta claims that a factual dispute exists as to whether Peruta was denied a CCW for lack of residency. However, all the evidence presented by Plaintiff concludes that Peruta's application was denied for lack of "good cause." (Pl. Opp. 18:3-18.) First, Peruta merely speculates that because the Sheriff did not respond in writing to his requests for its policy in determining residency that his application must have been denied for this reason. (*Id.* at 18:5-9.) Peruta falsely states that the County never provided him with its policy for determining residency. (*Id.*) In fact, the documentation Peruta presents shows that the staff met personally with Mr. Peruta on December 31, 2008, January 26, 2009 and again on February 2, 2009, where both Blanca Pelowitz and Donna Burns explained the County's residency policy, pursuant to California Penal Code section 12050, to him. (Pl. Opp. Ex. "K.") Moreover, it was not practical for the Sheriff Department to respond to Peruta's specific request. As Sheriff Legal Advisor Sanford A. Toyen stated, Peruta was merely seeking assurance that he would meet the residency requirement and the Sheriff was in no position to prejudge the merits of any particular hypothetical situation. (Pl. Opp. Ex. "I".) Furthermore, Plaintiff fails to provide any link between failing to respond to his letter and Peruta being denied a CCW permit.

Second, Plaintiffs point to Defendant's Reply for the purpose of the motion to dismiss the original complaint. (Pl. Opp. 18:9-12.) Defendant was seeking dismissal on the pleadings. The facts were not presented to the Court.

Plaintiffs' final "evidence" is referenced in a footnote (Pl. Opp. 18, n. 36), but those are matters relating to the investigation of Mr. Peruta's various residency claims. At his first interview, he told staff he was a resident of Los Angeles. Investigation showed that he was at least a resident of Connecticut. (Pl. Opp. Ex. "K".) But dual residency is acceptable and the denial ultimately was not based on residency status. (See Pl. Opp. Exs. "I" and "K".) As the investigation report into Peruta's application and letter of denial conclude, Peruta was denied a CCW permit solely on the basis of failing to prove "good cause." (Pl. MSJ Ex. "G;" Pl. Opp. Ex "K")

CONCLUSION

Based on the foregoing, Defendant's motion for summary judgment should be granted.

DATED: November 1, 2010

JOHN J. SANSONE, County Counsel

By: s/ James M. Chapin
JAMES M. CHAPIN, Senior Deputy
Attorneys for Defendant William D. Gore

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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,

v.

COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF,,

Defendants.

No. 09-CV-2371 IEG (BLM)

DEFENDANT WILLIAM D. GORE'S OBJECTIONS TO EVIDENCE OFFERED WITH PLAINTIFFS' OPPOSITION

Date: November 15, 2010
Time: 10:30 a.m.
Dept: 1 – Courtroom of the
Hon. Irma E. Gonzalez

Defendant objects to the evidence offered by Plaintiffs in their Opposition/Reply filed herein on October 18, 2010 as follows:

1. Exhibits B, C, D, E, and P.

Exhibits B-E are all newspaper articles which have no foundation for the information or opinions stated therein and contain numerous hearsay statements. Exhibit P is a website post from an unknown individual which lacks any foundation for its information or conclusions.

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2. Declarations of Patrick, Mauser and Moody.

The conclusions of these experts do not meet the requirements of Rule 56(e)(1). "Expert opinion is admissible and may defeat summary judgment if it appears the affiant is competent to give an expert opinion and the factual basis for the opinion is stated in the affidavit, even though the underlying factual details and reasoning upon which it is based are not." *Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1318 (9th Cir. 1985).

Patrick states that "Murder and other serious violent crime is committed by people who are deranged and/or are long time criminals." He further states that "background checks and licensure processes by various states have been shown to effectively filter out the violent and impulsive." (Patrick ¶ 3.) He offers no support or citation to any facts or studies to back up these statements.

Mauser does the same thing: "Serious criminal violence with firearms is almost exclusively committed by people (criminals) with histories of previous crime or, occasionally, by people who are seriously mentally disturbed." He then states that he is "informed that neither juveniles nor people with crime records or mental deviancy records are eligible for concealed weapons licenses." (Mauser, ¶¶ 3, 5.) Neither statement is offered with any factual support or reference to supporting studies. Neither Patrick or Mauser explains how these people become people with "histories of previous crime" or mention that juveniles inevitably become adults. Both are in error in screening of the mentally ill or "impulsive" and offer no support for that claim.

Moody repeats the same unsupported statement as the others (Moody ¶18) and makes broad generalizations about crime and gun statistics without carving out anything relating to large metropolitan areas or highly populated states or cities. Most of his conclusions contain no supporting facts or references whatsoever.

DATED: November 1, 2010

JOHN J. SANSONE, County Counsel

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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,

v.

COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF,,

Defendants.

No. 09-CV-2371 IEG (BLM)

DEFENDANT WILLIAM D. GORE'S MOTION TO EXCEED PAGE LIMIT FOR REPLY

Date: November 15, 2010
Time: 10:30 a.m.
Dept: 1 – Courtroom of the
Hon. Irma E. Gonzalez

The briefing schedule for the cross-motions in this action limits Defendant's Reply Point and Authorities to ten pages. Because Plaintiffs have offered new evidence in the form of three expert declarations as well as additional documents with their Opposition, Defendant requires additional pages for the Reply.

Defendant therefore moves the court for an Order permitting a Reply not to exceed fifteen pages.

DATED: November 1, 2010

JOHN J. SANSONE, County Counsel

By: s/ James M. Chapin
JAMES M. CHAPIN, Senior Deputy
Attorneys for Defendant William D. Gore

TAB 15

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, v. COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF, Defendants.	**CASE NO: 09-CV-2371 IEG (BGS)** **ORDER GRANTING PLAINTIFFS' EX PARTE APPLICATION TO FILE DOCUMENTS IN SUPPORT OF PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Having considered Plaintiffs' Ex Parte Application to File Documents in Support of Plaintiffs' Consolidated Opposition to Defendant's Motion for Summary Judgment and Reply to Defendant's Opposition to Plaintiffs' Motion for Partial Summary Judgment, and finding good cause therefore,

IT IS HEREBY ORDERED that Plaintiffs shall be allowed to file Exhibits "L" through "O" under seal in support of their Consolidated Opposition/Reply in accordance with the Court's Protective Order of July 14, 2010.

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IT IS SO ORDERED.

DATED: October 19, 2010

IRMA E. GONZALEZ, Chief Judge
United States District Court

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IN THE 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

Plaintiff,

v.

COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF,

Defendants.

CASE NO. 09-CV-2371 IEG (BGS)

PLAINTIFFS' EX PARTE APPLICATION TO FILE DOCUMENTS IN SUPPORT OF PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND;

REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Hon. Irma E. Gonzalez

Date Action Filed: October 23, 2009

Plaintiffs Edward Peruta, Michelle Laxson, James Dodd, Dr. Leslie Buncher, Mark Cleary, and California Rifle and Pistol Association Foundation (collectively "Plaintiffs") hereby apply to the Court and respectfully request, pursuant to Local Civil Rule 79.2.c, that this Court issue an Order allowing Plaintiffs to file the

following documents under seal as attachments in support of their Consolidated Opposition to Defendant's Motion for Summary Judgment and Reply to Defendant's Opposition to Plaintiffs' Motion for Partial Summary Judgment ("Plaintiffs' Motion") as provided for and allowed in the Court's Protective Order dated July 14, 2010: Exhibits "L" through "O."

The exhibits Plaintiffs seek to file under seal are documents that contain confidential personal information regarding persons who have applied for concealed weapons licenses and are therefore covered under the Protective Order.

For these reasons, Plaintiffs respectfully request that the Court issue an Order permitting the filing under seal of the indicated documents supplementing Plaintiffs' Motion.

DATED: October 18, 2010

MICHEL & ASSOCIATES, PC

By: / s /C.D. Michel
C.D. Michel
Attorney for Plaintiffs

DATED: October 18, 2010

PAUL NEUHARTH, JR., APC

By: /s/ Paul Neuharth, Jr.(as approved on 10/18/10)
Paul Neuharth, Jr.
Attorney for Plaintiff

IN THE 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 Plaintiff, v. COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF, Defendants.	**CASE NO. 09-CV-2371 IEG (BGS)** **CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 E. Ocean Blvd., Suite 200, Long Beach, California, 90802.

I am not a party to the above-entitled action. I have caused service of: **PLAINTIFFS' EX PARTE APPLICATION TO FILE DOCUMENTS IN SUPPORT OF PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND;**

REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on October 18, 2010.

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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,

v.

COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF,

Defendants.

CASE NO: 09-CV-2371 IEG (BGS)

DECLARATION OF SEAN BRADY IN SUPPORT OF PLAINTIFFS' EX PARTE APPLICATION TO FILE DOCUMENTS IN SUPPORT OF CONSOLIDATED OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND;

REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Hon. Irma E. Gonzalez

Date Action Filed: October 23, 2009

DECLARATION OF SEAN BRADY

I, Sean Brady, am competent to state, and testify to the following based on my personal knowledge:

1. I am over the age of eighteen and not a party to this action. I am an attorney licensed to practice law before the courts of the State of California and am admitted to practice before the United States District Court for the Southern District of California. I am an associate of the law firm Michel & Associates, P.C., attorneys of record for Plaintiffs in this action.

2. I have personal knowledge of the facts stated in this declaration and, if called to testify, could and would testify competently and under oath to these facts.

3. The documents that Plaintiffs seek to file as Exhibits "L" through "O" under seal in support of Plaintiffs' Consolidated Opposition to Defendant's Motion for Summary Judgment and Reply to Defendant's Opposition to Plaintiffs' Motion for Partial Summary Judgment were received by my office on September 30, 2010. Plaintiffs filed their Motion for .Partial Summary Judgment on September 3, 2010.

4. Counsel for Defendants, James Chapin, though not in accordance with Paragraph I.5 and Paragraph III of this Court's Protective Order, requested that these documents be designated "Confidential" and thus subject to that Protective Order.

I declare under penalty of perjury, under the laws of the state of California, that the foregoing is true and correct.

Executed in the United States on October 18, 2010.

Sean A. Brady
Attorney for Plaintiffs

IN THE 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 Plaintiff, v. COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF, Defendants.	**CASE NO. 09-CV-2371 IEG (BGS)** **CERTIFICATE OF SERVICE**

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REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT
on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

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I declare under penalty of perjury that the foregoing is true and correct.
Executed on October 18, 2010

/s/ C.D. Michel
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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,

v.

COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF,

Defendants.

CASE NO: 09-CV-2371 IEG (BGS)

PLAINTIFFS' OBJECTION TO EVIDENCE OFFERED IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Date: November 15, 2010
Time: 10:30 a.m.
Location: Courtroom 1
Judge: Hon. Irma E. Gonzalez

Date Action Filed: October 23, 2009

Plaintiffs Edward Peruta, Michelle Laxson, James Dodd, Dr. Leslie Buncher, Mark Cleary, and California Rifle and Pistol Association Foundation (collectively "Plaintiffs") hereby object to the following evidence presented by Defendant William Gore in connection with his motion for summary judgment set for hearing on November 15, 2010 before this court:

Declaration of Franklin E. Zimring in support of Defendant's Motion for Summary Judgment dated September 30, 2010 ("Zimring Declaration"),

Objection 1: page 4, lines 12-16;

Objection 2: page 5, lines 8-16

Objection 3: page 5, lines 20-25;

Objection 3: page 6, line 1;

Objection 4: page 7, lines 13-20;

Objection 5: page 8, lines 14-17;

Objection 6: page 8, lines 20-21;

Objection 7: page 8, lines 23-25;

Objection 8: page 9, lines 2-6; and

Objection 9: page 9, lines 6-22.

This evidence is objected to on the grounds that is inadmissible legal opinion under the Federal Rules of Evidence ("FRE").

ARGUMENT

I. The Court May Only Consider Admissible Evidence in Ruling on a Motion for Summary Judgment

When ruling on a motion for summary judgment, the court may consider "the pleadings, the discovery and disclosure materials on file, and any affidavits"[1] in the case, but when ruling on a motion for summary judgment, the court may only consider admissible evidence. *See Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. Cal. 2002) ("A trial court can only consider *admissible* evidence in ruling on a motion for summary judgment.") (emphasis added) *See also* Fed. R. Civ. P. 56(e); *Beyene v. Coleman*

[1] Fed. R. Civ. Pro. 56(c)(2).

Sec. Servs., Inc., 854 F.2d 1179, 1181 (9th Cir. 1988)). "At the summary judgment stage, the trial court does not focus on the admissibility of the *form* in which the evidence is offered. Instead, the court focuses on the admissibility of its *contents*." *Fraser v. Goodale* (9th Cir. 2003) 342 F3d 1032, 1036 , *cert. denied sub nom. United States Bancorp v. Fraser*, 541 US 937 (2004) (emphasis added).

Plaintiffs issues lie not with the *form* of the Zimring Declaration, but with its *contents*, which are inadmissible.

Affidavits and declarations in connection with a motion for summary judgment are only admissible if the affiant or declarant would be permitted to testify as to the content of the affidavit as trial. *See Hughes v. United States*, 953 F.2d 531, 543 (9th Cir. 1992). Since the aforementioned portions of the Zimring Declaration are merely inadmissible legal opinions and/or matters that Mr. Zimring lacks personal knowledge of, under the FRE, Mr. Zimring would not be allowed to testify to these matters at trial.

II. Expert Testimony Containing or Constituting Legal Opinion or Conclusion is Inadmissible under the Federal Rules of Evidence

The standards governing admissibility are those set forth in the FRE. See *Orr*, *supra* p. 2. Testimony that constitutes a legal conclusion, or the legal implications of evidence is inadmissible under FRE 704. *See United States v, Boulware*, 558 F.3d 971, 975 (9th Cir. 2009); *United States v. School*, 166 F.3d 964, 973 (9th Cir. 1999).

"A witness cannot be allowed to give an opinion on a question of law. . . . In order to justify having courts resolve disputes between litigants, it must be posited as an a priori assumption that *there is one, but only one, legal answer for every cognizable dispute. There being only one applicable legal rule for each dispute or issue, it requires only one spokesman of the law, who of course is the judge. . . .* To allow anyone other than the judge to state the law would violate the basic concept." *Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir. Colo. 1988) (quoting Stoebuck, *Opinions on Ultimate Facts: Status, Trends, and a Note of Caution*, 41 Den. L. Cent. J. 226, 237 (1964)) (emphasis added).

The Ninth Circuit has also excluded legal expert testimony concerning both what the law is and how it should be applied to the facts of a case as well as barring expert testimony that serves as nothing more than general opining about legal conclusions. *See, Aguilar v. International Longshoreman's Union*

Local # 10, 966 F.2d 443 (9th Cir. 1992); *see also Scholl*, *supra* p.3.

It is for the court to state the applicable law for the jury, and allowing expert legal opinion on questions of law interferes with the judge's role as the "sole arbiter of the law." *See, Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1043 (D. Ariz. 2005). Additionally, courts have prohibited expert opinion that applies the law to the facts, as this usurps the role of the jury. *See Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 508-11 (2d Cir. 1977). *McDevitt v. Guenther*, 522 F. Supp. 2d 1272, 1292-1293 (D. Haw. 2007). *See also Pinal Creek Group* at 1043-1044 ("In addition to prohibiting legal expert testimony which defines the governing law, courts have also prohibited legal expert opinion which applies the law to the facts. .... although Fed. R. Evid. 702 allows for expert testimony if "scientific, technical, or other specialized knowledge will assist the trier of fact," this rule does not permit expert opinion concerning legal matters.").

In fact, expert reports of law professors like Mr. Zimring have been excluded where those reports "offer[ed] nothing other than a discussion of the law and an application of the law, [and] [t]he report reads more like a legal brief than an expert report." *Id.* at 1044.

III. Witnesses May Only Testify As To Matters They Have Personal Knowledge Of

Affidavits and declarations submitted in connection with a motion for summary judgment must be prepared by an individual with knowledge of the facts. *See Richardson v. Oldham*, 12 F.3d 1373, 1378 (5th Cir. 1994). Under FRE 602, witnesses are prohibited from testifying as to matters that they lack personal knowledge of. The personal knowledge standard of FRE 602 is also applicable to affidavits and declarations submitted in connection with motions for summary judgment. (*See* FRCP 56(e) which requires, in part, that: "A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." See also, *FDIC v. New Hampshire Ins. Co.*, 953 F.2d 478 (9th Cir. 1991) "Declarations and other evidence of the moving party that would not be admissible are subject to a timely objection and may be stricken.")

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Based on the foregoing, Plaintiffs' objections are as follows:

OBJECTION NO. 1: Zimring Declaration, page 4, lines 12-16

Text Objected to:

"The governmental interest in restricting the use of guns in violent crime is in reducing the number of deaths and life-threatening injuries that are produced when guns rather than less deadly weapons became instruments of robbery and assault. This interest is clear, appropriate and important for both the State of California and the County of San Diego."

Grounds for Objection:

Improper legal opinion. No foundation. Speculation.

Mr. Zimring is not and would not be able to testify as to what the "governmental interest" is and whether or not that interest is "clear, appropriate, and important." This text constitutes a legal opinion and conclusion.

OBJECTION NO. 2: Zimring Declaration, page 5, lines 8-16

Text Objected to:

"But California, like most U.S. states, allows competent adults to own handguns if they have no major record of criminal conviction.

Because California does not restrict eligibility of most citizens to own handguns or the volume of guns owned, the state's first line of defense against the use of such weapons in street crime is a series of restrictions on the time, place and manner of handgun use. California law prohibits the carrying of concealed deadly weapons without a special permit. The state law delegates the authority to establish standards and make individual decisions to county law enforcement. The goal here is to distinguish uses of handguns that do not pose a special threat to the public (such as storage and use in the owner's home) from uses that pose greater threats to public safety (such as the carrying of concealed weapons in streets and public places)."

Grounds for Objection:

Improper legal opinion. No foundation. Speculation.

Mr. Zimring is not and would not be able to testify as to what the goal of state law or what the "governmental interest" is in terms of handgun regulations. This text constitutes a legal opinion and

conclusion.

OBJECTION NO. 3: Zimring Declaration, page 5, lines 20-25; page 6, line 1

Text Objected to:

"Of course not all of those carrying concealed handguns intend to use them as instruments of public harm. But the existence of a loaded weapon is a hidden danger. California's emphasis on controlling this risky use of guns rather than restricting ownership itself is exactly opposite to the policy formerly pursued by Washington, D.C. and disapproved in the *Heller* decision in 2008. The distinction between restricting ownership and restricting dangerous uses is fundamental in the design of firearms control.

Grounds for Objection:

Improper legal opinion. No foundation. Speculation.

Mr. Zimring is not and would not be able to testify as to whether the state of California's firearms policies are in line with the *Heller* decision or make an interpretation of the law as laid out by *Heller*. This text constitutes a legal opinion and conclusion.

OBJECTION NO. 4: Zimring Declaration, page 7, lines 13-20

Text Objected to:

"The stringent requirements that California and San Diego County impose on persons wishing to have permits to carry loaded and concealed guns have two strategic objectives. The first and most important is to restrict drastically the number of persons secretly armed on the streets of San Diego County-to just over a thousand in a county of over three million population in 2009, as shown in Figure 1 (attached as Appendix B).

Figure 1 shows the current control of the volume of California concealed weapons (CCW) permits and the huge stakes of shifting to the standards asserted as rights by the plaintiffs in this litigation."

Grounds for Objection:

Improper legal opinion. No foundation. Speculation.

Mr. Zimring is not and would not be able to testify as to what the "strategic objectives" of the State of California and the Defendants' requirements for issuance of concealed carry weapons permits

are. This text regarding the "governmental interest" constitutes a legal opinion and conclusion.

OBJECTION NO. 5: Zimring Declaration, page 8, lines 14-17

Text Objected to:

"The State of California and the County of San Diego believe that it would threaten the public health and safety to have hundreds of thousands of people in San Diego carrying loaded handguns that the people who share the streets and stores and parks of San Diego cannot see."

Grounds for Objection:

Improper legal opinion. No foundation. Speculation.

Mr. Zimring is not and would not be able to testify as to what the "governmental interest" of the State of California and Defendant San Diego County as to the health and safety of their citizens are. This text constitutes a legal opinion and conclusion. Additionally, Mr. Zimring is not a member of the legislature, a state government official, or an employee of the County of San Diego, therefore he is not and would not be competent to testify as to what the State of California and Defendant County of San Diego believe. This text constitutes a matter outside both the personal knowledge and legal purview of Mr. Zimring.

OBJECTION NO. 6: Zimring Declaration, page 8, lines 20-21

Text Objected to:

"San Diego has never tried to restrict home possession, so it obviously believes that public places call for different presumptive policies ...."

Grounds for Objection:

No foundation. Speculation.

Mr. Zimring is not an employee of the County of San Diego, therefore he is not and would not be competent to testify as to what Defendant County of San Diego believes. This text constitutes a matter outside the personal knowledge of Mr. Zimring.

OBJECTION NO. 7: Zimring Declaration, page 8, lines 23-25

Text Objected to:

"The central question is whether public concealed weapons can be restricted even if possession in the home is protected by *Heller*."

Grounds for Objection:

Improper legal opinion. No foundation. Speculation.

Mr. Zimring is a judge, and therefore he is not and would not be competent or qualified to testify as to what the central questions and/or issues of this case are, which is a matter for the court to decide. This text constitutes a legal opinion and conclusion.

OBJECTION NO. 8: Zimring Declaration, page 9, lines 2-6

Text Objected to:

"The right of home possession announced in the *Heller* case does not require citizens to purchase and own handguns in their houses but rather confers on individuals the right to decide for themselves if the benefits of gun possession in the home outweigh the risks. So the Second Amendment liberty announced in *Heller* puts the homeowner in a position of power to determine what risks to take."

Grounds for Objection:

Improper legal opinion. No foundation. Speculation.

Mr. Zimring is not a judge, therefore he is not and would not be competent or qualified to testify as to what provisions *Heller* confers on individuals with regard to their Second Amendment rights, which is a matter for the court to decide. This text constitutes a legal opinion and conclusion.

OBJECTION NO. 9: Zimring Declaration, page 9, lines 16-22

Text Objected to:

"So government must be involved in public space regulation in a way that is not necessary in the privacy of individual homes. This is why concealed weapons laws are the oldest form of legal regulation of gun use and the most common. There is a public choice that must be made to reduce the number of persons carrying concealed weapons by limiting licenses. But without a general rule on the standard for licenses, there is no way that individual preferences for or against high rates of permits can be translated into a regulatory framework."

Grounds for Objection:

Improper legal opinion. No foundation. Speculation.

Mr. Zimring is not a judge, therefore he is not and would not be competent or qualified to testify as to what the standard for issuance of CCW permits should be, which is a matter for the court to

decide. This text constitutes a legal opinion and conclusion.

IV. CONCLUSION

Plaintiffs will respectfully request the court at the hearing on the motion to sustain the above objection(s) and to strike the evidence above.

Dated: October 18, 2010

MICHEL & ASSOCIATES, PC

/s/C.D. Michel
C. D. MICHEL
Attorney for Plaintiffs

IN THE 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, v. COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF, Defendants.	**CASE NO. 09-CV-2371 IEG (BGS)** **CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 E. Ocean Blvd., Suite 200, Long Beach, California, 90802.

I am not a party to the above-entitled action. I have caused service of:

PLAINTIFFS' OBJECTION TO EVIDENCE OFFERED IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on October 18, 2010.

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IN THE 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,

v.

COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF,

Defendants.

CASE NO: 09-CV-2371 IEG (BGS)

CONSOLIDATED OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND;

REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: November 15, 2010
Time: 10:30 a.m.
Location: Courtroom 1
Judge: Hon. Irma E. Gonzalez
Date Action Filed: October 23, 2009

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ARGUMENT

I. PLAINTIFFS SEEK TO HAVE THIS COURT CONSTRUE PENAL CODE § 12050 IN A CONSTITUTIONAL MANNER, *NOT* TO HAVE IT OVERTURNED

Defendants William Gore and County of San Diego (collectively "the County") misstate Plaintiffs' claim as a request "to strike the 'good cause' language" from California Penal Code § 12050 and to advocate "the theory that *Heller* provides that everyone has a constitutional right to carry a concealed weapon in public." (Defs.' Mem. Opp. to Mot. Partial Summ. J. 8:24-26). The County builds its case on this flawed foundation, suggesting Plaintiffs should challenge Cal. Pen. Code §§ 12025(a) and 12031(a) instead of, or concurrently with, challenging the County's policy of requiring proof of a special need for issuance of a license issued pursuant to Cal. Pen. Code §§ 12050 *et seq.* (a "CCW").

But Plaintiffs are only challenging the *County's policy* in implementing section 12050's "good cause" requirement. This approach is consistent with the doctrine of constitutional avoidance,[1] under which the Court should *uphold* section 12050's licensing scheme, as well as sections 12025 and 12031 (to the extent these need to be considered at all), by construing the existing state statutes in a constitutional manner. 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."

This is the approach taken in *Schubert v. DeBard*, 398 N.E.2d 1339, 1341 (Ind. Ct. App.1980), which construed the "proper reason" requirement (virtually identical to "good cause") in Indiana's provision for licensing concealed handguns consistent with the right to bear arms as follows:

> [T]he superintendent decided the application on the basis that the statutory reference to "a proper reason" vested in him the power and duty to subjectively evaluate an assignment of "self-defense" as a reason for desiring a license and the ability to grant or deny the license upon the basis of whether the applicant "needed" to defend himself.
>
> Such an approach contravenes the essential nature of the constitutional guarantee. It would supplant a right with a mere administrative privilege which might be withheld simply on the basis that such matters as the use of firearms are better left to the organized military and police forces even where defense of the individual citizen is involved.

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[1] The canon of constitutional avoidance provides "when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is [the court's] plain duty to adopt that construction which will save the statute from constitutional infirmity." *United States ex rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 407 (1909);

Further, Plaintiffs have never claimed that *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), "provides that everyone has a constitutional right to carry a *concealed* weapon in public." (8:25-26) (emphasis added).) Nor do Plaintiffs assert that there is necessarily a right to carry a firearm *in any manner*. (Opp. 9:11-12.) Rather, Plaintiffs assert that the Second Amendment protects a fundamental right to carry a firearm ready to use for self-defense *in some manner*. To a degree, the legislature can constitutionally dictate that manner. In California, the legislative preference is for licensed, discrete concealed carry instead of open carry. (Pls.' Mem. Supp. Mot. Partial Summ. J. 23:6-8). Licenses can constitutionally be required, but a license or permit cannot be denied to individuals of "good moral character" (as required by section 12050) who seek a CCW permit for self-defense but cannot prove a special need beyond self-defense.[2]

In light of the Second Amendment's protections, Penal Code § 12050 cannot grant local Sheriffs unbridled discretion to decide, as a matter of policy, that the fundamental right to self-defense does not constitute "good cause," nor to impose a heightened "special needs" test for CCW issuance. But that is what the County's policy does. The question in this case is under what circumstances *must* a CCW permit be issued under California's existing statutory scheme, *not* whether the state can choose to structure a regulatory scheme that prohibits people from bearing an arm without one.

When considered in that proper context, the County's arguments are misdirected. The County's efforts to establish that because sections 12025(a) and 12031(a) are constitutional there thus is no right to carry arms, are irrelevant because Plaintiffs do not question their constitutionality. The two California Court of Appeal cases the County cites for this proposition, *People v. Yarbrough*, 169 Cal. App. 4th 303 (Ct. App. 2008), and *People v. Flores*, 169 Cal. App. 4th 568 (Ct. App. 2008), do not address the issue presented here: whether the Second Amendment protects a fundamental right to carry a firearm ready to use for self-defense *in some manner*.

Plaintiffs' challenge is not inconsistent with *Yarbrough*'s holding. *Heller* approves of bans on

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[2] An illustrative analogy is the state's scheme for issuing driver's licenses. Requiring a license to operate a vehicle is not an unconstitutional infringement on the right to travel. *See Miller v. Reed*, 176 F.3d 1202, 1205-1206 (9th Cir. 1999) (quoting *Monarch Travel Servs., Inc. v. Associated Cultural Clubs, Inc.*, 466 F.2d 552, 554 (9th Cir. 1972) ("We have previously held that burdens on a single mode of transportation do not implicate the right to interstate travel. Whereas requiring people to prove they have a *need* to drive somewhere, which *need* separates them from the general public, likely would be unconstitutional and certainly would be if the "right to drive cars" was enshrined in the Bill of Rights.

carrying *concealed* firearms *when the law allows for an alternative method of carrying*. And carrying a firearm pursuant to a valid CCW is *not* a violation of either section 12025(a) or section 12031(a). *See* Cal. Penal Code § 12050.[3]

The same goes for *Flores*, in which, as the County acknowledges (Opp. 7:18-20), the court explains that the "wealth of exceptions" provided in California Penal Code § 12031 – one of which is carrying pursuant to a valid CCW – distinguishes it from the holding in *Heller*.[4] *Flores*, 169 Cal. App. 4th at 576. This hardly articulates the proposition that there is no right to carry a firearm at all. There is no legal authority nor logical nexus for making that argumentative leap.

II. THE RIGHT TO BEAR ARMS DOES NOT END AT ONE'S THRESHOLD

McDonald held that the Second Amendment right to keep and to bear arms is fundamental, not merely that some subset of that right is fundamental. *McDonald v. Chicago*, 130 S. Ct. 3020, 3049-50 (2010). There is no basis to subdivide the right to keep arms from the right to bear arms, nor to designate bearing arms as a "non-core" part of the Second Amendment right having second-class status. *McDonald* expressly and emphatically rejected the notion that the Second Amendment right, or any part of it, is somehow second-class. *Id.* at 3044. There is no support for the proposition that bearing arms outside the home is any less fundamental than keeping arms in the home.

A. "Bear Arms" Means Carry, Including in Public

The County ignores the inevitable ramifications of *Heller*'s definition of "bear" as adopted from *Muscarello v. United States*, 524 U.S. 125 (1998), which, as already recognized by this Court, is controlling, and *not* mere dicta.[5] *See* Order Denying Defendant's Motion to Dismiss, *Peruta v. County of San Diego*, 678 F. Supp. 2d 1046, 1055 (S.D. Cal. 2010) (No. 09-2371) (citing *Heller*, 128 S. Ct. at 2793). Nor does the County distinguish *Heller*'s repeated references to the right to "carry" firearms.

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[3] Two other cases cited by the County, *People v. Hale*, 43 Cal. App. 3d 353, 356 (Ct. App. 1974), and *People v. Hodges*, 70 Cal. App. 4th 1348, 1357 (Ct. App. 1999), are irrelevant for the same reasons, and additionally because they pre-date both the *Heller* and *McDonald* decisions.

[4] The *Flores* court even states "section 12031 is narrowly tailored to reduce the incidence of unlawful public shootings, while at the same time respecting the need for persons to have access to firearms for lawful purposes, *including self-defense* . . . .(emphasis added)." *Flores*, 169 Cal. App. 4th at 576

[5] In deciding *Heller*, the Supreme Court had to decide whether, as the government argued, "bear arms" meant militia-use. In doing so, the Court had to define "bear," which it did. Thus, that definition is not dicta, but was *required* to support the Court's decision to reject the government's argument.

See Heller, 128 S. Ct. at 2793 ("At the time of the founding, as now, to 'bear' meant to 'carry' "); 128 S. Ct. at 2804 ("the Second Amendment right, protecting only individuals' liberty to keep *and carry* arms . . ."); 128 S. Ct. at 2817 ("the right to keep *and carry* arms") (emphasis added); and 128 S. Ct. at 2796 ("bear arms means . . . simply the carrying of arms . . . .").

This very Court has already explained "*Heller* does not preclude Second Amendment challenges to laws regulating firearm possession outside of home." Order Denying Defendant's Motion to Dismiss, *Peruta*, 678 F. Supp. 2d at 1051 (No. 09-2371). Nonetheless, both the County and Amicus desperately attempt to support their position by pointing to the Supreme Court's holding that "the District's ban on handgun possession *in the home* violates the Second Amendment, as does its prohibition against rendering any lawful firearm *in the home* operable for the purpose of immediate self-defense." (Opp. 9:1-6; Brady Center Amicus Br. 5:19-6:5 (citing *Heller*, 128 S. Ct. at 2821-22 (emphasis added).) Amicus insists that "Plaintiffs cannot explain why Justice Scalia would be so explicit about the fact that the Second Amendment was 'not unlimited' and that a (non-exhaustive) host of gun laws remained 'presumptively lawful,' yet leave this supposed ruling that the Second Amendment protected a right to carry guns in public hidden, implicit, leaving courts to expand on its 'confrontation' reference, if they wished."[6] (Brady Center Amicus Br. 6:7- 11). But Justice Scalia and the majority did not hide anything. *Heller* (and *McDonald)* focused on the scope of the right to keep arms in the home because the ordinances at issue and the specific question that the Supreme Court was answering concerned restrictions on firearms *in the home*. The opinion simply did not address every aspect of the Second Amendment's protections outside the home because it was not called for given that limited context.[7]

Neither the County nor Amicus can explain *Heller's* repeated references to the right to Arms *outside* the home. *See Heller*, 128 S. Ct. at 2801 ("Americans valued the ancient right [to keep and bear

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[6] This argument cuts both ways. Knowing the very foreseeable question of public carry would arise, the Court could have cleared up any confusion by *expressly* declaring that a right to carry does *not* exist. Neither *Heller* nor *McDonald* did so. This is the same reason Amicus's reliance on *People v. Dawson*, 223 Ill. 2d 645 (2007) (Opp. 7:5-16), is inappropriate.

[7] Further, this Court has already rejected the County's argument that banning the public carry of firearms is sanctioned by *Heller*'s "presumptively valid" language. Order Denying Defendant's Motion to Dismiss, *Peruta*, 678 F. Supp. 2d at 1052, 1054 (No. 09-2371).

arms] . . . for self-defense *and hunting*." (emphasis added)); 128 S. Ct. at 2812 (" 'No doubt, a citizen who keeps a gun or pistol under judicious precautions, *practices in safe places the use of it*, and in due time teaches his sons to do the same, *exercises his individual right*.' " (citation omitted) (emphasis added). Hunting and practicing firearm use are hardly indoor activities. Even *Heller*'s dissenters acknowledge the decision protected the *public* carrying of arms:

> Given the presumption that most citizens are law abiding, and the reality that the need to defend oneself may suddenly arise in a host of locations outside the home, I fear that the District's policy choice may well be just the first of an unknown number of dominoes to be knocked off the table.

Id. at 2846 (Stevens, J., dissenting).

Heller describes the right to arms as "most acute" when defending hearth and home. *Id.* at 2817. *McDonald* holds that the Second Amendment applies "*most notably* for self-defense within the home." *McDonald*, 130 S. Ct. at 3044 (plurality op.) (emphasis added). The Supreme Court's word choice shows that the Second Amendment applies to places outside one's home (albeit perhaps less *"notably"* or less "*acutely*"). Construing the language in *Heller* otherwise is simply wishful thinking.

B. The County Confuses Cases That Ban *All* Forms of Carry with Cases That Ban *Some* Form of Carry

Rather than cite cases upholding bans on *both* open *and* concealed carry,[8] the County cites unhelpful, pre-*Heller* cases that uphold limited restrictions on some manner of *concealed* carry. *Nordyke v. King*, 563 F.3d 439, 460 (9th Cir. 2009), is both unhelpful and unciteable.[9] And in any event, the ordinance at issue in *Nordyke* exempts from its ban (of firearms on county-controlled property) carrying concealed pursuant to a valid CCW. (*See* Ex. "A.") *Nordyke* does not address whether a government can outright ban bearing arms by withholding the permits required to do so absent proof of some special need.

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[8] This is why the County's and Amicus's reliance on *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897) ("the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of *concealed* weapons (emphasis added)"), *U.S. v. Hall*, No. 2:08-00006, 2008 U.S. Dist. LEXIS 59641 (S.D.W. Va., Aug. 4, 2008) (Prohibitions "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"), and *People v. Dykes*, 46 Cal. 4th 731 (2009), is *not* instructive. The relief Plaintiffs seek is *not inconsistent* with any of those cases.

[9] The panel opinion was vacated. *"The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court."* Ninth Cir. Adv. Comm. Notes to Circuit Rules 35-3. (Rev. 1/1/00)

Almost all the cases Amicus cites as upholding bans on carrying firearms (*see* Brady Center Amicus Br. 7:5-9:11) are equally irrelevant. The cases either expressly leave open some form of carry[10] and/or involve a criminal defendant challenging a conviction for *unlicensed* carry.[11] *One* post-*Heller*, but pre-*McDonald* decision from a state trial court in New York, *In re Bastiani*, 881 N.Y.S.2d 591 (N.Y. Supp. 2008), upheld New York's "special need" requirement for firearm carry permits. *Id.* at 593. But *Bastiani* did not discuss the authorities cited in *Heller*,[12] was decided before *McDonald* confirmed the right to keep and bear arms is itself a fundamental individual right, and failed to grasp the distinction between banning concealed *or* open carry, and banning concealed *and* open carry. This Court, unlike the Court in *Bastiani*, has already recognized *Heller*'s distinction between presumptively lawful restrictions, like *concealed* carry bans when alternative methods of carry are allowed, and unconstitutional *total bans* on carrying firearms outside the home for self-defense. Order Denying Defendant's Motion to Dismiss, *Peruta*, 678 F. Supp. 2d at 1053-54 (No. 09-2371).[13] The County and Amicus simply ignore this distinction. The County also ignores the multitude of state constitutional right to arms provisions that have likewise been interpreted as securing the right to carry firearms for defense in public.[14]

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[10] *See, e.g., State v. Buzzard*, 4 Ark. 18 (1842) (wherein concealed carry of pistols was restricted, but the open carry of rifles, muskets, etc. was left as an option); *State v. Jumel*, 13 La. Ann. 399 (1858) (same); *Aymette v. State*, 21 Tenn. (2 Hum.)154 (1840) (same); *State v. Workman*, 35 W. Va. 367 (1891) (same). These cases were overruled by *Heller*. *See, e.g., Fife v. State*, 31 Ark. 455 (1876) (where the court found the Second Amendment was a restraint on federal *not state* legislation).

[11] *See, e.g., Riddick v. United States*, 995 A.2d 212 (D.C. App. 2010); *see also Sims v. United States*, 963 A.2d 147, 148 (D.C. App. 2008).

[12] *State v. Chandler*, 5 La. Ann. 489, 489-90 (1850); *Nunn v. State*, 1 Ga. 243, 251 (1846); James Kent, Commentaries on American Law 340 n. 2 (Oliver Wendell Holmes ed., 1873);William Blackstone, The American Students' Blackstone: Commentaries on the Laws of England, in Four Books 84 n. 11 (George Chase ed., 1884).

[13] Unlike this Court, the court in *Bastiani* performed no analysis of *State v. Chandler*, 5 La. Ann. at 489-90 (1850), *Nunn v. State*, 1 Ga. at 251 (1846), Kent, *supra* n. 11, 340 n. 2, or Blackstone, *supra* n. 11, 84 n. 11. *Bastiani*'s lack of precedential value is underscored by the fact a Second Amendment challenge to that *same statute* is currently being litigated in New York in *Kachalsky v. Cacace*, No. 10-05143 (S.D.N.Y. filed July 15, 2010).

[14] *See, e.g., Wilson v. State*, 33 Ark. 557 (1878) (struck down pistol carrying statute as too restrictive); *City of Lakewood v. Pillow*, 501 P.2d 744 (Colo. 1972) (struck down law on sale, possession, and carrying of guns as too broad); *Junction City v. Mevis*, 601 P.2d 1145 (Kan. 1979) (struck down gun

To be sure, there may be cases where a law burdens the keeping and bearing of arms only tangentially, or where the restriction targets conduct that has never been thought protected by the Second Amendment. In those cases, courts may have to grapple with questions about the exact contours of the Second Amendment right. But this is not one of those cases. This case is about a blanket ban on the majority of law-abiding adults from carrying firearms outside the home by denying them a CCW absent a demonstration of a special need.

III. STRICT SCRUTINY IS THE APPROPRIATE STANDARD OF JUDICIAL REVIEW

Because self-defense is the "central component" of the Second Amendment right, *McDonald*, 130 S. Ct. at 3036 (quoting *Heller*, 128 S. Ct. at 2783), the County's policy of denying permits to Plaintiffs and others seeking to exercise the right to bear arms for that very purpose must be reviewed under a strict scrutiny standard. As Plaintiffs' motion explains, *Heller* and *McDonald* together make clear that strict scrutiny judicial review applies. (Pls.' Mem. Supp. Mot. Partial Summ. J. 8:23-14:23.) *McDonald* also emphatically rejected the argument that Second Amendment rights are somehow less fundamental than other enumerated individual rights and can be given second-class treatment. *See* 130 S. Ct. at 3042. There is no legitimate basis to depart from the rule that restrictions on fundamental rights require strict scrutiny.

A. The "Presumptively Lawful" Language in *Heller* Does Not Preclude Strict Scrutiny Judicial Review

While ignoring the points raised in Plaintiffs' Motion, the County argues that *Heller's* categorical approach of listing "presumptively lawful" regulatory measures' is inconsistent with strict scrutiny review. (Opp. 13:8-9.) But the Supreme Court's "presumptively lawful" language suggested only that some fact patterns were likely to survive strict scrutiny.

The "presumptively lawful" phrase seems best read as a predictive judgment about which regulations are subject to but likely to survive strict scrutiny. In its recent Second Amendment cases,

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carrying ordinance as too broad); *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822) (struck down concealed carrying statute as infringement on right to arms; the constitution was later amended to allow regulation of concealed carrying of arms); *State v. Kerner*, 107 S.E. 222 (N.C. 1921)(struck down pistol carrying license and bond requirement law as too restrictive); *Glasscock v. City of Chattanooga*, 157 Tenn. 518 (1928) (struck down gun carrying ordinance as too restrictive); *Kellogg* v. *City of Gary*, 562 N.E.2d 685 (Ind. 1990); *State v. Rosenthal*, 55 A. 610 (Vt. 1903) (struck down pistol carrying ordinance as too restrictive); *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139 (W. Va.1988) (struck down gun carrying law as too restrictive).

the Supreme Court has frequently cited the First Amendment as a helpful analog, and the First Amendment has categorical exclusions. *See Heller*, 128 S. Ct. at 2821; *see also McDonald*, 130 S. Ct. at 3040, 3050. For example, the freedom of speech protected by the First Amendment has never been understood to include things like obscenity. The Supreme Court may eventually interpret the Second Amendment in that fashion as well. If that is the case, though, then it is even more important to insist on narrowly tailored, thoroughly justified, carefully drawn distinctions to limit prohibitions on carrying firearms. A State likely has a compelling interest in prohibiting firearm possession by violent felons and the insane, as it may in keeping private firearms out of certain *truly* "sensitive" places. Thus, it is of no great significance that the *Heller* Court suggested that in future cases the government might easily prove that laws prohibiting firearm possession by convicted felons, or possession in sensitive places like courthouses or prisons, satisfy strict scrutiny. Because "[t]he fact that strict scrutiny applies 'says nothing about the ultimate validity of any particular law,'" predicting that such restrictions will be upheld is in no way inconsistent with requiring strict scrutiny. *Johnson v. California*, 543 U.S. 499, 515 (2005) (citation omitted); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 n.6 (1992) (stating in First Amendment context that "presumptive invalidity does not mean invariable invalidity"). This Court need not read more into the "presumptively lawful" dictum than that.

B. Intermediate Scrutiny Is Inappropriate, Especially after *McDonald*

Amicus rely on a ruling in a new case brought by Mr. Heller, *Heller v. District of Columbia* (*Heller II*), 698 F. Supp.2d 179 (D.D.C. 2010), to advocate for no more than intermediate scrutiny review. (Brady Center Amicus Br. 15:22-16:6, 15 n. 5.) In adopting that standard, the *Heller II* court assumed that the right to keep and bear arms was *not* fundamental "[i]f the Supreme Court had wanted to declare the Second Amendment right a fundamental right, it would have done so explicitly." *Id.* at 187. Since then, *McDonald has* done so explicitly, putting that issue to rest.[15]

Some other courts, like *Heller II*, also adopted intermediate scrutiny before *McDonald* was decided. They did so based on the misunderstanding that, although self-defense is a fundamental right under *Heller*, Second Amendment rights themselves were not fundamental, or at least are not as fundamental as other enumerated rights. (Pls.' Mem. Supp. Mot. Partial Summ. J. 11:17-27.) But

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[15] Even *Heller II* rejected a "reasonableness" test, as it "subjects firearms laws to only a *marginally* more heightened form of review than rational-basis review." *Id.* at 186 (emphasis added).

McDonald clarifies that the right to keep and bear arms is itself fundamental, and no less so than other rights like the freedom of speech. And it is black-letter law that infringements upon core conduct of fundamental rights receive strict scrutiny.

Even before *McDonald*, *Heller* itself effectively rejected an intermediate scrutiny standard. Justice Breyer's dissenting "interest-balancing inquiry," *Heller*, 128 S. Ct. at 2852 (Breyer, J., dissenting), is effectively intermediate scrutiny by another name, and the Court rejected it, *Id.* at 2821. Justice Breyer based his proposed standard extensively on intermediate scrutiny cases, even invoking *Burdick v. Takushi*, 504 U.S. 428 (1976), the case the United States principally relied on in advocating intermediate scrutiny. *Id.* at 2852 (Breyer, J., dissenting). Since *Heller* rejected Justice Breyer's test —and *McDonald* reaffirmed the rejection— intermediate scrutiny cannot be the appropriate standard.

C. Undue Burden / Reasonable Regulation Review is Also Inappropriate

The County claims that since its policy does not affect firearms in the home (Opp. 14:15-16), it survives the "undue burden" test[16] usually associated with restrictions on abortions. But the Supreme Court, and this Court, have already rejected lesser standards of review such as the County's and Amicus' proposed "reasonable regulation" or "undue burden" tests.

Adopting a reasonable regulation or undue burden standard is simply not a course that is open to this Court after *Heller* and *McDonald*. *Heller* rejected both rational basis and Justice Breyer's "interest-balancing" approach. *Heller*, 128 S. Ct. at 2821. It is not clear that a "reasonableness" test is any different from rational basis,[17] but it is, if anything, a less rigorous standard than the "interest-balancing" approach advocated by Justice Breyer. The Court in *Heller* could not have been clearer that they were rejecting that proposed approach. Reasonableness review is also foreclosed by *McDonald*.

The argument for "reasonableness" review stems from the assertion that the right is not fundamental, an assertion put to rest by *McDonald*. The County nonetheless here adopts the same arguments made by Chicago and Amicus in *McDonald*, even relying on the same law review article.

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[16] A regulation constitutes an "undue burden" where it has the "purpose or effect [of] plac[ing] a substantial obstacle in the path" of the individual seeking to engage in constitutionally protected conduct. *Gonzalez v. Carhart*, 550 U.S. 124, 146 (2007).

[17] The term "reasonable" is a synonym of "rational." *Webster's New World Dictionary* 1118 (3rd College Ed. 1991).

See Brief for Respondents City of Chicago, et al. at 8, *McDonald v. Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) (right to arms not among "fundamental rights included in the Bill of Rights that are 'implicit in the concept of ordered liberty'"); Brief for Respondents City of Chicago, et al., *supra*, at 24 (arguing for a "reasonable regulation" standard and citing Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 686, 716-17 (2007), and the Amicus Brief of the Brady Center). *See also* Brief for Petitioners D.C., et al. at 48, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) ("The District's Gun Regulations Satisfy the Reasonableness Standard").

The County and Amicus cite various cases that either adjudged whether state firearm statutes were "reasonable" regulations, or which made use of the term "reasonable" in their analysis. (Opp. 13:6-15:10; Brady Center Amicus Br.14:6-15:11.) Plaintiffs note, as an initial matter, the mere use of the word "reasonable" by many of these courts did not constitute an adoption of the broad "reasonableness" standard of review.[18] Regardless, reliance on these cases is unpersuasive. *Every* case the County and Amicus cite involving a "reasonableness" approach for determining infringements of states' right to arms guarantees was decided *prior* to *McDonald*'s express statement that the Second Amendment guarantees a *fundamental* right. Moreover, "reasonableness" approaches applied by state courts pre-*Heller* varied widely among jurisdictions. *See* David Kopel, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 Santa Clara L. Rev. 1113, 1215-1218. The only cases cited to by the County and Amicus in the wake of *Heller* and *McDonald* are cases that apply either intermediate or strict scrutiny. (Opp.13:6-15:10; Brady Center Amicus Br. 14:6-15:11.)

Moreover, adoption of a "reasonable regulation" standard would mean First Amendment and other fundamental rights qualify for strict scrutiny while the right to keep and bear arms receives lesser protection. *McDonald* specifically rejected allowing "state and local governments to enact any gun control law that they deem to be reasonable . . . " 130 S.Ct. at 3046. The County's and Amicus's argument is really "that the Second Amendment should be singled out for special - and specially unfavorable - treatment." *Id.* at 3043. But the Supreme Court already rejected that idea. *Id.* at 3044.

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[18] *See, e.g., Parker v. District of Columbia*, 478 F.3d 370, 399 (D.C. Cir. 2007), which *Heller* affirmed, that stated: "The protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment." *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). The court went on to elaborate that restrictions must not "impair the core conduct upon which the right was premised." *Id.*

D. The Trend After *McDonald* Is Toward Adopting Strict Scrutiny Judicial Review

Since *McDonald*, the District Court for the District of Utah in *United States v. Engstrum*, 609 F. Supp. 2d 1227, 1231-32 (D. Utah 2009), adopted strict scrutiny. And on October 12, 2010, a Wisconsin court applied strict scrutiny in striking down a ban on the concealed carry of knives as violative of the Second Amendment. *State of Wisconsin v. Schultz*, No. 10-CM-138, slip op. (Wis. Cir. Oct. 12, 2010).

But *McDonald* came down only recently. Most courts have not yet had a chance to evaluate the appropriate level of scrutiny in light of that ruling. *McDonald*'s clear recognition of the right to keep and bear arms as a *fundamental* right is dispositive. Fundamental rights deserve strict scrutiny review.

IV. THE COUNTY CANNOT MEET ITS BURDEN TO SHOW AN INTEREST IT IS ACTUALLY FURTHERING THAT JUSTIFIES ITS SPECIAL NEEDS "GOOD CAUSE" POLICY[19]

This Court previously held that the County had failed (at that time) to identify a government interest "or demonstrate the required 'fit' between the law and the interest served." Order Denying Defendant's Motion to Dismiss, *Peruta*, 678 F. Supp. 2d at 1055 (No. 09-2371). The County now raises "public safety" and "preventing crime" as the general interests it seeks to further with its special needs "good cause" policy. (Opp. 26:1-4.) The County admits the "central reason" for requiring evidence of a specific threat to establish "good cause" is to reduce the number of individuals with CCWs, allegedly to further these interests. (Opp. 26:17-23.)

The County does not, nor can it, demonstrate that keeping CCWs from people of good moral character is either necessarily related or narrowly tailored to achieve those particular interests. It must be both to pass constitutional muster.

A. The County Provides No Credible Evidence Establishing That Issuing CCWs to Law Abiding Citizens Will Increase Violent Crimes or Otherwise *Adversely* Affect Public Safety

The County offers no data or evidence establishing its policy of limiting CCW issuance reduces or is likely to reduce crime.[20] The County cannot connect increased public danger or crime to increased

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[19] Because the County asserts the same interests in defending its "good cause" policy from both Plaintiffs' Second Amendment and Equal Protection (classification of people who are unable to obtain a CCW for lack of documented "need") claims, this Section applies to arguments for both claims.

[20] Amicus provides *one* study claiming that between May 2007 and April 2009 CCW holders "killed 7 law enforcement officers and 42 private citizens." (Brady Center Amicus Br. 11:3-5.) There are various apparent flaws with the study, mostly the credibility of its creator, the Violence Policy Center,

numbers of people who carry guns (whether discretely concealed or not) *pursuant to valid licenses*. Instead of offering evidence making that connection, the County offers a conjectural connection between its policy and public safety, claiming that public safety is advanced because reducing the number of CCWs reduces the number of "unknown persons carrying concealed, loaded firearms" (Opp. 11:25-28), and "widespread and unchecked public carry of concealed and loaded firearms" (Opp.19:4-7). But, this is not the case here. Rather, based on empirical data, the more likely result will be a small percentage of individuals will choose, or at least to have the ability, to carry, firearms.[21] And those individuals will have had been checked and trained by, and will be known to County officials.

In fact, the Declaration of Professor Carlisle Moody filed in support of Plaintiffs' Opposition-Reply, establishes that more liberal CCW issuance reduces violent crime. (*See generally* Moody Decl.) And Professor Moody is corroborated by several other professors experienced in the field. *See* Declaration of Professor Patrick and Declaration of Professor Mauser. Actual evidence from states where CCW permits are commonly issued suggests this as well.[22] In describing the proliferation of liberal carry laws in other states, at least one court explained, "there have been no shootouts in town squares, no mass vigilante shootings or other violent outbreaks attributable to allowed concealed carry." *State of Wisconsin v. Schultz*, No. 10-CM-138, slip op. at 5 (Wis. Cir. Oct. 12, 2010).[23]

In the absence of empirical evidence tying the County's special need requirement to advancing a

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which describes itself as "the most aggressive group in the gun control movement." *See About the Violence Policy Center*, http://www.vpc.org/aboutvpc.htm (last visited Oct. 13, 2010). *See also* Ex. "P" for a thorough refutation of the substance of that study by Bob Owens.

[21] *See* Thom Goolsby, *Concealed Weapons Advocates Were Right: Crime Didn't Go Up*, Chapel Hill Herald, May 6, 1997, at 4 (attached hereto as Ex. "B"); *see also* Tad Dickens & Ray Reed, *Pistol-Packing and Proud of It*, Roanoke Times, May 19, 2002, A1 (attached hereto as Ex. "C"). These news articles explain that most people with CCWs are law-abiding citizens.

[22] *See* Enrique Rangel, *Majority of Gun Licensees White Males, Law* Abiding, Lubbock Avalanche J., Aug. 16, 2009, http://lubbockonline.com/stories/081609/loc_482262241/shtml (attached hereto as Ex. "D"); *see also* Terry Flynn, *Gun-Toting Kentuckians Hold Their Fire*, Cincinatti Enquirer, June 16, 1997, http://www.enquirer.com/editions/1997/06/16/loc_kccarry.html (attached hereto as Ex. "E"). These news articles explain that CCW holders are less likely than the average person to commit a crime.

[23] *But see* Eugene Volokh, *The Second Amendment and the Right to Keep and Bear Arms After D.C. v. Heller: Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443 (2009) (explaining that there is no evidence CCW issuance is linked to increases or decreases in crime).

valid interest, the County and Amicus resort to baseless, and in some cases ridiculous hypothetical constructs. The County's suggestion that issuing CCWs only to persons with "actual anticipated needs" is a legitimate means to further public safety (Opp. 27:19-20) is counterintuitive, since criminals typically do not notify their victims in advance. And its claim that requiring evidence of special "need" from CCW applicants "acts as a backup to those who seek a CCW license for criminal purposes but do not yet have a criminal record" (Opp. 27:19-22) is over the top. Is the County actually claiming that the majority of law-abiding people should be denied the exercise of a fundamental right based on the premise that people planning to commit crimes with guns will forego doing so for lack of a CCW? Does the County actually assert that would-be criminals are so concerned about being charged with a *misdemeanor* and fined for carrying a firearm without a CCW that they would agree to have their good character investigated and pay the $200 or so in fees to get a CCW before committing armed robbery? It takes no special expertise to realize that felons do not forego committing crimes with a gun for lack of a CCW, any more than they would forego driving to a bank to rob it for lack of a driver's license.[24]

As pointed out in Plaintiffs' Motion, even under the relatively relaxed scrutiny that applies to indirect impositions on *less protected* speech, the Supreme Court has emphasized that a municipality cannot "get away with shoddy data or reasoning." *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002). "[A] municipality's evidence must fairly support the municipality's rationale for its ordinance." *Id.* (*See also* Pls.' Mem. Supp. Mot. Partial Summ. J. 16:6-14). Here, there is no such evidentiary support.

Certainly, public safety *can* be a compelling state interest, but where constitutional rights are concerned, the government must identify a *specific* interest related to public safety. The interest has to be targeted so as to allow a tailored response. What the government may not do is simply rely on a generic public safety rationale to support the regulation of firearms. That approach would simply resurrect Justice Breyer's rejected interest-balancing test, in which some public safety interest would *always* be important or compelling. That firearms are sometimes misused by criminals does not support

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[24] Amicus also mentions the state's "duty" to protect its populace. (Brady Center Amicus Br. 17:2). There is a practical reason for the right to keep and bear arms: state and law enforcement owe *no* such duty. *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189 (1989). One federal court even boldly proclaimed "there is no constitutional right to be protected by the state against being murdered by criminals or madmen." *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

a *de facto* ban (by withholding licenses) on the lawful carrying of firearms for citizens of good moral character, particularly when there is *no* connection between more CCW holders and increased crime. The County's rationalizations are precisely the type of shoddy reasoning that the Supreme Court in *Alameda Books* warned Courts not to fall for.

B. The Cases Relied on by the County Are Unpersuasive

As support for the validity of its purported compelling interest – to protect the public from the "evil" of *secretly* carried weapons by vetted licensees (Opp. 26:5-11, 24-27) – the County cites to several cases,[25] *all* of which are either irrelevant, or actually support *Plaintiffs*' claim. *Hale*, *Marin*, and *Smith* all involve criminal convictions for violations of *concealed* carry statues, which Plaintiffs, for purposes of this lawsuit concede are constitutional. As for *Andrews*, *Dano*, *Nunn*, and *Reid*, the County omits the crucial details of those cases. For example, as pointed out by Plaintiffs in its Motion (Pls.' Mem. Supp. Mot. Partial Summ. J. 7:14-22), *Heller* said the following about *Andrews* and *Reid*:

> In *Andrews* v. *State*, the Tennessee Supreme Court likewise held that a statute that forbade openly carrying a pistol "publicly or privately, without regard to time or place, or circumstances," violated the state constitutional provision (which the court equated with the *Second Amendment*). That was so even though the statute did not restrict the carrying of long guns. *See also State v. Reid*, ("A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional").

(*Heller*, 128 S. Ct. at 2818 (internal citations omitted).

Dano stands for a similar proposition as *Andrews* and *Reid*; specifically: "The right to bear arms in self-defense is not impaired by requiring individuals to carry weapons openly." *Dano*, 802 P.2d 1021, 1022 (Ariz. 1990).[26] Finally, *Nunn* involved prohibitions where the right to arms was still available by way of "open carry." *See Nunn*, 1 Ga. at 251 ("so far as the act . . . 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,

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[25] *Dano v. Collins*, 166 Ariz. 322 (Ariz. Ct. App. 1990); *State v. Reid*, 1 Ala. 619 (1840); *Nunn v. State*, 1 Ga. 243 (1846); *Andrews v. State*, 50 Tenn. 165 (1871); *State v. Smith*, 571 A.2d 279 (N.H. 1990); *People v. Hale*, 43 Cal. App. 3d 353 (1974); and *People v. Marin*, 795 N.E.2d 953 (Ill. App. 2003).

[26] The County, with no sense of irony, cites an Arizona case, where *unlicensed* open carry was lawful at the time of *Dano*, and is the latest state to adopt *unlicensed concealed* carry.

as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void* . .")

V. PLAINTIFFS HAVE ESTABLISHED THEIR EQUAL PROTECTION CLAIMS

A. County's Special Need Policy Creates a Class of People Ineligible to Obtain a CCW

The County's "good cause" policy, as the County admits (*see* Defs.' Statement of Undisputed Facts 5), creates a class of people, i.e., those in the "mainstream having no "documentation of a specific threat," which includes Plaintiffs, who are unable to lawfully carry firearms for self-defense.[27] The question is whether the classification "impinge[s] on personal rights protected by the Constitution." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (laws creating such classifications violate equal protection and are subject to strict scrutiny);[28] *see also, e.g.*, *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626-28 (1969). The answer is "yes," because the Constitution protects a right to carry firearms for self-defense. The County cannot justify its classification under strict scrutiny review.

B. There Are No Material Factual Disputes Regarding HDSA Member's Unequal Treatment

The County's response to Plaintiffs' allegations of favoritism in issuing CCWs is convoluted. It claims the documentation it requires for *renewal* applications "is not held to the same scrutiny" as that for *initial* applications. (Opp. 23:5-12.) It then argues that the Plaintiffs whose *initial* applications were denied are not similarly situated to HDSA members whose *renewal* application files lack supporting documentation, and it is thus not a fair comparison by Plaintiffs. (Opp. 23:12-19.) However, while the County *may* subject the *evidentiary support* for a renewal to lesser scrutiny – and even that may be improper – it definitely *cannot* subject the *underlying "good cause"* to less scrutiny. Yet, that is what it does. For example, one HDSA member provided as his "good cause" that he drives in desolate areas with his wife and wants "self-defense against anyone that might come" upon them. (*See* Ex. "N".) This

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[27] The County's reliance on *United States v. Aguilar*, 883 F.2d 662, 706 (9th Cir. 1989), and *Freeman v. City of Santa Ana*, 68 F.3d 1180 (9th Cir. 1995), is misplaced as these cases deal with selective prosecution and enforcement of *valid* laws; Plaintiffs claim the County's CCW policy is itself invalid.

[28] The County's reliance on *Thornton v. City of St. Helens*, 425 F.3d 1158, and *Joyce v. Mavromatis*, 783 F.2d 56, 57 (6th Cir. 1986), is also misplaced. Those cases concerned Equal Protection challenges based on discrimination against a *protected class*, whereas Plaintiffs here claim the County puts them in a class of people deprived of a fundamental right (i.e., the right to bear arms). These are two distinct concepts under Equal Protection jurisprudence.

is *almost identical* to Plaintiff Peruta's reason. Another example [29] is a letter addressed to Sheriff Gore from an HDSA member who had been denied a renewal CCW. The letter was dated October 13, 2009. After the author mentions his 19 year HDSA membership, he states: "I ask you [Sheriff Gore] intercede in the process and direct the Licensing division to reissue my CCW." On October 22, 2009, that HDSA member reapplied asserting "self-protection, a desire to be able to protect myself and my family from criminal activity, in case response to request to law enforcement is delayed" as his "good cause." He provided *no documentation* of a specific threat, but was issued a CCW nonetheless. (*See* Ex. "L".)[30]

To counter Plaintiffs' evidence of disparate treatment, the County calls it "misleading" and provides various exhibits purporting to show supporting documentation was provided for the HDSA applications Plaintiffs claim did not have any. (Opp. 22:18-21.) Yet, *entirely* missing from the County's new exhibits is supporting documentation for any of the individuals Plaintiffs indicated as asserting merely "personal protection" or "protection" as their "good cause statements."[31] (*See* Pls.' Exs. Supp. Mot. Partial Summ. J. "U" at 2; "V" at 2; "W" at 5; and "X" at 2.) Once again, this shows some renewal CCWs were subjected to a lesser "good cause" requirement, not just a lesser documentation standard.

The County provides a declaration from Ms. Blanca Pelowitz, Manager of the License Division, stating that HDSA members are not favored in any way by the County in receiving CCWs. (Pelowitz Decl. 7:8-9.) But, the credibility of Ms. Pelowitz is dubious when notes with her initials are found in CCW files stating: "Comma[nder] for HDSA (SDSO) considered VIP @ sheriff level – okay to renew standard personal protection." (*See* Ex. "M".) This note shows Ms. Pelowtiz was being instructed to give preferential treatment to at least some HDSA members.[32]

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[29] Since Plaintiffs' Motion was filed, the County disclosed more and less redacted documents including these examples that Plaintiffs deemed relevant without the previous redactions.

[30] Also, both these HDSA member's CCW state "retired," but Dr. Buncher was denied, as the County admits, because he was retired. (Opp. 6:22-23); *see also* Pls.' Exs. Supp. Mot. Partial Summ. J. "W" at 3 and "MM" at 4.

[31] Further, the County's Exhibits purport to show supporting documentation for the "good cause" statements provided, yet it is not clear how the documents provided do so.

[32] Note that right after proclaiming Sheriff Gore does not favor anyone in issuing CCWs, the County, without any sense of irony, admits it issued Peter Q. Davis a CCW and that Mr. Davis "did not need to

The County also argues that because Mr. Cleary's CCW was renewed after he appealed his denial he cannot prove he was treated differently than HDSA members. (Opp. p. 6:20-21, 22:17-28, 23:1-3.) But the County fails to explain why Mr. Cleary was required to produce documentation confirming his continued employment in the psych ward – his refusal to do so being the basis of his denial – for his *renewal* CCW application, while the County granted several renewal applications for members of the HDSA CCWs without requiring *any* supporting documentation. Also, the County fails to mention that Mr. Cleary's successful appeal of his denial occurred *after* he became a plaintiff in this lawsuit. Plaintiffs are skeptical that this had no bearing on the County overturning his denial.[33]

The County further provides no refutation to Mr. Cleary's declaration regarding his own account of being preferentially treated by the County while a member of HDSA, but instead corroborates his story by saying "During his initial application, Cleary was awarded his license after an appeal *with then Undersheriff Gore*" (Opp. 23:23-24), exactly as Mr. Cleary describes. (Declaration of Mark Cleary 4-5.)

In sum, the evidence taken as a whole, including that provided in Plaintiffs' original Motion, could easily allow a jury to conclude Plaintiffs were similarly situated to HDSA members but treated differently, which is the standard set forth by the County from *March v. Rupf*, No. 00-03360, 2001 U.S. Dist. LEXIS 14708 (N.D. Cal. 2001).[34] Plaintiffs here, unlike those in *March*, provide direct references to HDSA, such as interviewers' notes, not mere tangential facts from which inferences could be drawn.

But, as stated in Plaintiffs' Motion, regardless of whether membership in the HDSA is the basis for the disparate treatment, that the County treats one person differently in issuing CCWs from others is a violation of equal protection. *See Village of Willowbrook v. Olech*, 528 U.S. 562 (2000).

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document [his] status" because he is "a prominent San Diegan who recently ran for mayor." (Opp. 22:21-23.)

[33] Despite its claim that "the hearing officer was able to verify his employment" (Defs.' Opp. 6:20-21), Mr. Cleary provided *no further documentation* at his appeal hearing (*See* Cleary Decl. Supp. Pls.' Mot. Partial Summ. J. (hereafter "Cleary Decl.").

[34] The second part of the test outlined in *March* – that the denials of CCWs be based on impermissible grounds – is met when denied applicants, as is the case here, demonstrate "good moral character" and proficiency with a firearm, and assert self-defense as their "good cause." In fact, the value the *March* decision is dubious post-*McDonald*, since Sheriffs no longer have such wide discretion to determine "good cause."

VI. TRIABLE ISSUES OF MATERIAL FACT EXIST ON THE COUNTY'S OTHER CLAIMS, WHICH SHOULD BE DENIED[35]

A. The Facts Suggest Plaintiff Peruta Was Denied a CCW for Lack of Residency

In its Motion, the County's position is Plaintiff Peruta was not denied a CCW for lack of residency. (Opp. 6:9-10, 22:1-2, 29:9-10, 29:20-25). It also describes its stated policy for determining residency. (Opp. 20:21-22:1-4). Both appear to be recently adopted positions by the County. First, despite his repeated requests, the County never provided Mr. Peruta its stated policy for determining residency. (*See* Exs. "A" through "J" - Correspondence between Peruta and SDSO regarding its residency requirement). Second, in trying to dismiss Plaintiff Peruta's original complaint, the County argued: "*Most significantly*, since the statute requires Plaintiff to meet all *three* requirements of [California Penal Code §] 12050 to be eligible for a permit, *the failure to meet the residency provision alone ends his constitutional claim.*" (Def.'s Reply 3:19-21) (emphasis added). In short, there is ample evidence the County denied Mr. Peruta a CCW for lack of residency. Because a factual dispute exists, Defendants' motion must fail.[36] Each of these documents provide a triable issue of fact as to whether Mr. Peruta was denied a CCW for lack of residency. (*See generally* Declaration of Edward Peruta)

All the authority the County cites concerns the legality of denying CCWs to *nonresidents*. (Opp. 30:6-32:1-16). Plaintiff Peruta contends he *is a resident,* and thus is treated differently than similarly situated persons (i.e., other residents) by being denied a CCW based on his "part-time" residency.

B. Facts Support Peruta's Right to Travel Was Violated

This Court has already made clear "'that a State may not impose a penalty upon those who

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[35] Please note the County brings this motion as to Plaintiffs' claims concerning the County's residency policy and due process violations, despite Plaintiffs voluntarily foregoing discovery on those issues, as a professional courtesy, so as to allow the County to focus on the Second Amendment and other Equal Protection claims. Plaintiffs' reason for doing so was in response to the County claiming it considered Plaintiff Peruta a resident, and discussions about avoiding litigation on this issue, as well as the issue of due process violations, by agreeing on mutually agreeable policies the County could adopt.

[36] *See* Ltr. from Blanca Pelowitz, Manager of License Div., San Diego Sheriff's Dept., (March 17, 2009) ("[T]he result of the investigation reflects doubt and uncertainty as to his 'permanent residency' in San Diego County") (attached hereto as Ex. "K"); *see also* correspondence from Millie Faiai: "it appears Peruta's primary residence and business is in Rock Hill, Connecticut." And Mr. Peruta was repeatedly told in his initial interview he is not a resident of San Diego County. *See also* Ex. "O" an Interview Questionnaire indicating that Plaintiff Peruta was a resident of Los Angeles.

exercise a right guaranteed by the Constitution,' " and that denying *part-time* residents a CCW for lack of residency deters people "from exercising their right to travel in that they are being 'penalized' for traveling and spending time outside of San Diego." Order Denying Defendant's Motion to Dismiss, *Peruta*, 678 F. Supp. 2d at 1060 (No. 09-2371) (citing *Harman v. Forssenius*, 380 U.S. 528, 540 (1965)). Plaintiff Peruta provides a litany of facts showing he was denied a CCW by the County because he is only a part-time resident of San Diego. (*See* Peruta Decl.)[37] Thus, County's request for summary judgment on this claim should be denied.[38]

C. The Facts Support Plaintiffs' Due Process Claims

A violation of Due Process exists where there is a direct and substantial interference with a fundamental right. *See Zablocki v. Redhail*, 434 U.S. 374, 387 n.12 (1978). Plaintiffs allege the County informs people seeking a CCW for self-defense who do not have a special "need" that they will be denied if they submit a formal application (*see* Laxson Decl. Supp. Pls.' Mot. Partial Summ. J.), and, in violation of California Penal Code § 12054, that application fees will be collected beforehand and are not refundable. (*See* Ex. "K" ("Despite the fact that PERUTA was told he did not meet the criteria for a CCW license PERUTA insisted this office accept his application. PERUTA was advised that no monies would be refunded once his application was accepted."). By dissuading applicants who are *entitled* to carry firearms under the Second Amendment, the County substantially interferes with their, and Plaintiffs', access to the fundamental right of self-defense.

The County further burdens the fundamental right to self-defense by denying applicants, including Plaintiffs, a CCW for lack of "good cause" under the County's policy, because such right is both a property and liberty interest for purposes of 42 U.S.C. § 1983. *See Kellogg v. Gary*, 562 N.E.2d 685, 696 (Ind. 1990).[39] When state action burdens a fundamental right, it is subject to strict scrutiny.

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[37] Plaintiffs note that since the County considers Mr. Peruta a resident, he likely has no standing to bring a Privileges & Immunities claim, and he does not oppose that portion of the County's Motion.

[38] Whenever a state law burdens the right to travel, the court must apply strict scrutiny. *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 904-05 & n.4 (1986) (plurality).

[39] The case the County cites to support its position that there is no liberty interest in a CCW, *Erdelyi v. O'Brien*, 680 F.2d 61 (9th Cir. 1982), did not consider the Second Amendment, and it was decided long before *McDonald* clarified that the Second Amendment protects a fundamental, individual right to keep and bear arms.

See Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966). Since the County cannot provide a "compelling interest," for dissuading applicants, it violated Plaintiffs' Due Process rights.

VII. FACIAL CHALLENGE AND QUALIFIED IMMUNITY ISSUES

The County argues Plaintiffs' facial challenge must fail because their statement that the County *may* exercise its discretion under § 12050 in a constitutional manner precludes Plaintiffs from establishing there are " 'no set of circumstances . . . under which' Penal Code § 12050 would be constitutionally valid." (Opp. 19:12-16). Once again, the County fundamentally misunderstands Plaintiffs' claim. Plaintiffs do *not* make a facial challenge *to § 12050*, rather, they challenge *the County's stated "good cause" policy both facially and as applied.* Government policies are subject to facial challenges. *See Santa Fe Indep. Sch. Dist. v Doe*, 530 U.S. 290 (2000).

Finally, County's qualified immunity argument in unpersuasive. This is an action for declaratory relief only. Qualified immunity "is an affirmative defense to *damage liability*; it does *not* bar actions for *declaratory* or *injunctive* relief." *Presbyterian Church (U.S.A.) v. U.S.*, 870 F.2d 518, 527 (9th Cir. 1989) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982) (emphasis added).

VIII. CONCLUSION

Heller and *McDonald* left questions unanswered, but provide sufficient guidance for *this* Court to hold the right to Arms includes a right to carry a firearm in public for self-defense, and that such right may be subjected to a licensing requirement such as Cal. Pen. Code § 12050, but not a "good cause" requirement that allows a local Sheriff the discretion to decide who can and who cannot exercise the right to bear Arms. Accordingly, the Court should grant Plaintiffs' Motion for Partial Summary Judgment and deny Defendants' Cross Motion for Summary Judgment.

Date: October 18, 2010

MICHEL & ASSOCIATES, P.C.

/ s /C. D. Michel

C. D. Michel
E-mail:cmichel@michellawyers.com
Attorneys for Plaintiffs

PAUL NEUHARTH, JR., A.P.C.

/ s /Paul Neuharth, Jr.*as authorized on 10/18/10*

Paul Neuharth, Jr. A.P.C.
E-mail: pneuharth@sbcglobal.net
Attorneys for Plaintiffs

IN THE 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, v. COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF, Defendants.	**CASE NO. 09-CV-2371 IEG (BGS)** **CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 E. Ocean Blvd., Suite 200, Long Beach, California, 90802.

I am not a party to the above-entitled action. I have caused service of:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

James M. Chapin
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Telephone: (619) 231-0401
Facsimile: (619) 231-8759
pneuharth@sbcglobal.net

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 18, 2010.

/s/ C.D. Michel
C. D. Michel
Attorney for Plaintiffs

TAB 19

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Clint B. Monfort – SBN 255609
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Attorney for Plaintiffs / Petitioners

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,

v.

COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF,

Defendants.

CASE NO: 09-CV-2371 IEG (BGS)

DECLARATION OF SEAN BRADY IN SUPPORT OF PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND;

REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Hon. Irma E. Gonzalez

Date Action Filed: October 23, 2009

DECLARATION OF SEAN BRADY

I, Sean Brady, am competent to state, and testify to the following based on my personal knowledge:

1. I am over the age of eighteen and not a party to this action. I am an attorney licensed to practice law before the courts of the State of California and am admitted to practice before the United States District Court for the Southern District of California. I am an associate of the law firm Michel & Associates, P.C., attorneys of record for Plaintiffs in this action.

2. I have personal knowledge of the facts stated in this Declaration and, if called to testify, could and would testify competently and under oath to these facts.

3. On or about August 4, 2010, Plaintiffs' counsel, including myself, spoke with Defendants' counsel regarding stipulating to facts in this matter. During this conversation, it came to light that the County claims it considers Mr. Peruta a resident of San Diego. We also discussed the basis of Plaintiffs' Due Process claim, and came to the understanding, or so Plaintiffs' counsel believed, that the issues relating to Mr. Peruta's residency and possible Due Process violation could possibly be resolved informally without litigation.

4. On or about August 25, 2010, based on that understanding by Plaintiffs' counsel, I agreed to temporarily relieve Defendants of the duty to respond to the majority of our discovery requests so that Defendants could focus on responding to the discovery involving the claims at issue in Plaintiffs' Motion for Partial Summary Judgment, for which there is no chance of informal resolution.

5. On or about October 15, 2010, I sent an electronic mail to Counsel for Defendants, James Chapin, requesting that he withdraw the claims relating to residency and Due Process in the Defendants' Cross Motion for Summary Judgment, explaining Plaintiffs' understanding of the status of those claims and that Plaintiffs were unable to finish discovery on the matter, believing all parties to be in negotiations to informally resolve those claims.

6. Mr. Chapin refused my request to withdraw Defendants' claims regarding those claims.

I declare under penalty of perjury, under the laws of the state of California, that the foregoing is true and correct.

Executed in the United States on October 18, 2010.

Sean A. Brady
Attorney for Plaintiffs

IN THE 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 Plaintiff, v. COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF, Defendants.	**CASE NO. 09-CV-2371 IEG (BGS)** **CERTIFICATE OF SERVICE**

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REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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pneuharth@sbcglobal.net

I declare under penalty of perjury that the foregoing is true and correct.
Executed on October 18, 2010

/s/ C.D. Michel
C. D. Michel
Attorney for Plaintiffs

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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,

v.

COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF,

Defendants.

CASE NO: 09-CV-2371 IEG (BGS)

DECLARATION OF EDWARD PERUTA IN SUPPORT OF PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND;

REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: November 15, 2010
Time: 10:30 a.m.
Location: Courtroom 1
Judge: Hon. Irma E. Gonzalez
Date Action Filed: October 23, 2009

DECLARATION OF EDWARD PERUTA

I, Edward Peruta, declare as follows:

1. On or about November 17, 2008, I attended the initial interview portion of the San Diego County Sheriff's application process for a permit to carry a concealed handgun with the Licensing Department. I attended the interview with the intention of obtaining a permit to carry a concealed handgun.

2. At one point during the November 17, 2008 interview, two interviewers, Ms. Donna Burns and Ms. Millie Faiai, both told me I was not a resident of San Diego. Ms. Faiai told me she could not accept my application and Ms. Burns told me that I was a resident of Los Angeles, not San Diego.

3. On December 5, 2008, I sent a request to Sheriff's Department for clarification on the County's definition of residency. A true and accurate copy of this letter is attached as Exhibit "F."

4. I then received a letter from the Sheriff's Department in response to my December 5, 2008 request, stating that I would receive a response within two weeks. A true and accurate copy of this letter is attached as Exhibit "G."

5. On February 2, 2009, I submitted a second request for clarification regarding the County's definition of residency. A true and accurate copy of this letter is attached as Exhibit "H."

6. I then received a letter dated February 3, 2009 from Mr. Sanford A. Toyen, Legal Advisor to the Sheriff's Department, declining to answer my questions regarding residency. A true and accurate copy of this letter is attached as Exhibit "I."

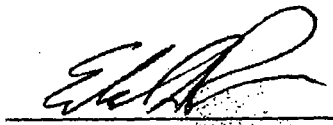
7. I sent another letter, dated February 6, 2009 to Mr. Toyen further explaining the clarification I was seeking regarding the County's definition of residency. A true and accurate copy of this letter is attached as Exhibit "J."

///

///

I declare under penalty of perjury, under the laws of the state of California, that the foregoing is true and correct.

Executed in the United States on October 18, 2010.



Edward Peruta

IN THE 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 Plaintiff, v. COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF, Defendants.	**CASE NO. 09-CV-2371 IEG (BGS)** **CERTIFICATE OF SERVICE**

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on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on October 18, 2010.

/s/ C.D. Michel
C. D. Michel
Attorney for Plaintiffs

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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,

v.

COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF,

Defendants.

CASE NO: 09-CV-2371 IEG (BGS)

DECLARATION OF CARLISLE E. MOODY IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

DECLARATION OF CARLISLE E. MOODY

I, Carlisle E. Moody, declare as follows:

1. I am a Professor of Economics and Public Policy at the College of William & Mary in Virginia where I have taught since 1970. (Before then I taught at the University of Leeds in England.) I have worked extensively in the field of American crime and the statistics thereof. My publications include: "Testing for the Effects of Concealed Weapons Laws: Specification Errors and Robustness," 44 J. LAW & ECON. 799 (2001), Carlisle E. Moody & Thomas B. Marvell; "Guns and Crime," 7 Southern Economic J. 720-736 (2005); "Firearms and Homicide" in B. Benson and P. Zimmerman (eds.), *Handbook on the Economics of Crime*, Edward Elgar, Northampton, MA (forthcoming); "The Debate on Shall-Issue Laws," (with T. B. Marvell), *Econ Journal Watch*, 5 (3) September 2008, 269, 293; and "The Debate on Shall-Issue Laws," Econ J. Watch 269-293 (2008).

2. I have read the declaration of Franklin Zimring presented by the defendants in this case. By way of background, though Prof. Zimring is a law professor and not a criminologist, he has since the late 1960's been a leading advocate for much more stringent gun control. At the same time, as documented hereafter, it must be noted that his predictions as to guns and crime have not been borne out by actual evidence over this period.

HANDGUN CARRY PERMITS AND CRIME -
THE LOTT-MUSTARD CONTROVERSY

3. In approaching this subject, it is necessary to begin with an elementary distinction between the apparent fact that widespread gun permit issuance does no harm and the highly controversial issue of whether it actually does positive good by deterring violent crime.

4. In 1997, two University of Chicago criminologists, John Lott and David Mustard, published a Journal of Legal Studies article based on a comprehensive study of gun and crime data for every American county from

1977-1992. The theory is that a criminal would be deterred from committing a violent crime if he reasonably believed that the potential victim was carrying a concealed weapon. Thus, the minority of individuals who do carry concealed weapons help protect the majority who do not because the criminal cannot distinguish the unarmed victim from those who are armed. Therefore, increasing the number of citizens who carry concealed weapons should reduce violent crime.

5. The Lott-Mustard study showed that, in fact, shall-issue laws seem to deter violent crime. They found that: 1) areas with widespread gun ownership among law abiding, responsible people consistently had significantly lower rates of murder and other violent crime than areas which severely restricted gun ownership (or for other reasons had much less ownership); and, 2) Murder and other violent crimes declined in areas which adopted policies of widely licensing law abiding, responsible adults to carry handguns. Subsequently Prof. Lott has expounded on this concept in published volumes; see generally, Lott, MORE GUNS, LESS CRIME (U. of Chicago Press, 3d edition 2010).

6. Their more-guns-less-crime thesis has been highly controversial, having been assailed by Prof. Zimring and other gun control advocates. Nevertheless, thirty-seven states have enacted laws entitling responsible adults to have gun carry permits. In addition, Mississippi is shall-issue in practice, carrying guns is unregulated in Vermont and Arizona, and Iowa's shall-issue law will take effect January 1, 2011.

7. Gun ban advocates, including Professor Zimring, incessantly predicted that those states would have vastly higher murder rates as a result of these laws. It is unnecessary to examine these predictions beyond noting that they have been proven false by subsequent crime statistics. To date, those statistics have shown that, as Lott-Mustard predicted, homicide has further fallen, not risen, in the states that adopted such laws. The liberalization of gun carrying laws may or may not be the cause for the decline in crime shown by these statistics, but what is certain is it

did not cause widespread or even minor increases in crime.

8. It is noteworthy that critical - but non-politically motivated -- scholars who replicated Lott & Mustard's work reached the same conclusion (more guns, less crime) from different perspectives, albeit with some criticism of the Lott-Mustard methodology. (See the seven articles printed in the Oct. 2001 issue of the Journal of Law and Economics (v 44) including mine cited in paragraph #1 above.

9. As to Prof. Zimring's prediction that widespread concealed carry licensing would cause greatly increased shooting crimes, actual experience has been entirely contrary. This is exemplified by the following articles, several from newspapers which opposed the new laws in vehement editorials: "Gun Law Spurs No Violence: No Problems Arising from Concealed Weapons Permits," TRAVERSE CITY RECORD EAGLE, April 7, 2002; "Records Say Licensed Gun Owners Are Least of Florida's Crime Problem," TALLAHASSEE DEMOCRAT, Nov 4, 1990; "Gun Permits Surge, But Not Violence," DETROIT NEWS, March 21, 2002; "Concealed Weapons Advocates Were Right: Crime Didn't Go Up, "CHAPEL HILL HERALD, May 6, 1997, p. 4; "Concealed Weapons Owners No Trouble," GAINESVILLE SUN, Nov. 4, 1990; "Pistol Packing and Proud of It," ROANOKE TIMES, May 19, 2002; "Handgun Law's First Year Belies Fears of 'Blood in the Streets," TEXAS LAWYER, Dec. § 9, 1996, p. 2.; "Gun-Toting Kentuckians Hold Their Fire," CINCINNATI ENQUIRER, June 16, 1997, A1.

NO CONTROVERSY AS TO CCW ISSUANCE

10. The vehement controversy over the more-gun-less-crime thesis has tended to obscure the lack of controversy over what has followed after the enormous surge in gun carry permits since 1985. Data from every state that increased carry permit issuance has shown that violence did not increase thereafter.

11 In fact, the data shows that - for whatever reason - since 1991, a period in which 39 states allowed law abiding, responsible people to carry concealed

weapons, violent crime has plummeted. In the same period, a huge increase in the number of guns owned has been accompanied by a substantial decrease in homicide rates.

12. Reliable information on both gun ownership and murder rates in the U. S. are available only for the period from the end of WWII on. The general pattern since WWII is that, decade-by-decade, the number of guns owned by civilians has risen steadily and dramatically. Since 1946 civilian gun ownership in America more than quintupled. Yet the 2005 American murder rate was almost identical to that for 1946, 50 years before, when there were far fewer guns in the hands of civilians. *See* Don B. Kates & Daniel D. Polsby, "Long Term Non-Relationship of Firearm Availability to Homicide" 4 JOURNAL OF HOMICIDE STUDIES 185, 190-191 (2000).

13. As of 2010 the pattern continues. American gun ownership is now estimated to exceed 300 million. As of late-2010 the just-released FBI crime analysis for 2009 finds another 5% decline in crime generally, with a 7.3% decline in murder and an 8% decline in robbery.

14. A quintupling of guns since 1946 has been accompanied by both increases and decreases in violent crime. What is clear, however, is that vast increases in gun ownership, and vast increases in carry permit issuance, have not been followed by increased violence or homicide. (*See generally* Don B. Kates, "The Limits of Gun Control: A Criminological Perspective" in Timothy Lytton, ed., SUING THE FIREARMS INDUSTRY: A LEGAL BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS (Ann Arbor, University of Michigan Press, 2005)

15. It is also worth noting that no shall-issue law has ever been repealed.

CRIMINAL BACKGROUNDS OF VIOLENT CRIMINALS

16. Federal law bars firearms acquisition or possession by people convicted of any felony or of certain misdemeanors. It is my understanding that so does California law, and that California requires criminal records be checked

before permitting anyone to even buy a gun; and that such a record check is also required before a permit to carry a gun is issued.

17. These provisions are important because they exclude virtually all people who are likely to commit gun crimes from receiving carry permits.

18. Prof. Zimring is certainly correct about the misuse of handguns in crime. What his declaration omits, however, is that virtually all violent gun crimes, and virtually all murders, are committed by people who cannot legally have guns because they are juveniles or have criminal records. No such people are eligible to receive gun carry permits or to legally have guns at all.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Williamsburg, Virginia, United States on October 13, 2010.

Carlisle E. Moody

IN THE 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, v. COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF, Defendants.	**CASE NO. 09-CV-2371 IEG (BGS)** **CERTIFICATE OF SERVICE**

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I am not a party to the above-entitled action. I have caused service of:

DECLARATION OF CARLISLE E. MOODY IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

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pneuharth@sbcglobal.net

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 18, 2010.

/s/ C.D. Michel
C. D. Michel
Attorney for Plaintiffs

TAB 22

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Attorney for Plaintiffs / Petitioners

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,

v.

COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF,

Defendants.

CASE NO: 09-CV-2371 IEG (BGS)

DECLARATION OF GARY MAUSER IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

DECLARATION OF GARY MAUSER

I, Gary Mauser, declare as follows:

1. I am a Canadian criminologist recently retired after teaching since 1975 at Simon Fraser University in British Columbia. I received my doctorate from the University of California, Irvine (1970). My publications concerning the criminology of firearms include: "A Comparison of Canadian and American Attitudes Toward Firearms," Canadian J. of Criminology, Vol. 32, pp. 573-589 (1990); "Gun Control in the United States,"CRIMINAL LAW FORUM, Vol. 3, No. 1 (1992), pp. 147-159; "The Politics of Gun Control: Comparing Canadian and American Patterns," GOVERNMENT AND POLICY, Vol. 10, pp. 189-209 (1992); "Evaluating the 1977 Canadian Firearms Control Legislation: An Econometric Approach," 16 EVALUATION REVIEW, pp. 603-617 (1993); "Do Canadians Use Firearms in Self-protection?" 37 CANADIAN JOURNAL OF CRIMINOLOGY, October 1995, pp. 556- 61; "Armed Self Defense: the Canadian Case," JOURNAL OF CRIMINAL JUSTICE, Vol. 24, No. 5, 1996, pp. 393-406; "On Defensive Gun Use Statistics," CHANCE, AMERICAN STATISTICAL ASSOCIATION, Vol. 13, No. 1, Winter 2000, pp. 3-4; "An Evaluation of the 1977 Canadian Firearms Legislation: Robbery Involving a Firearm," APPLIED ECONOMICS, Vol. 35, pp. 423-436, (2003); and "Would Banning Firearms Reduce Murder and Suicide: A Review of International Evidence," 30 HARVARD JOURNAL OF LAW & PUBLIC POLICY, pp. 651-694 (2007). I should note that many of these articles were co-authored with other scholars.

2. I have read the respective declarations of Professors Frank Zimring and Carl Moody submitted in this case. I entirely concur in Prof. Moody's observations.

3. Prof. Zimring's observations are generally correct, but omit a crucial fact: Serious criminal violence with firearms is almost exclusively committed by people (criminals) with histories of previous crime or, occasionally, by people who are seriously mentally disturbed.

4. This is a point as to which Prof. Zimring has often been criticized. I can do no better than to quote from a more than ten year old article by Prof. Elliott critiquing prior expressions by Prof. Zimring: "Contrary to the assertions made by Zimring and Hawkins, the use of life-threatening violence in this country is, in fact, largely restricted to a criminal class and embedded in a general pattern of criminal behavior. [citations] ... The view presented [Zimring] that many or most persons involved in life-threatening violence have no prior or current involvement in other forms of crime -- is simply unsupportable.... virtually all individuals who become involved in life-threatening violent crime have prior involvement in many types of minor (and not so minor) offenses. (Delbert S. Elliott, "Life Threatening Violence is Primarily a Crime Problem: A Focus on Prevention," 69 COLO. L. REV. 1081, 1081-1098.

5. This omission is critical because it makes Prof. Zimring's views irrelevant in a case like the present. I am informed that neither juveniles nor people with crime records or mental deviancy records are eligible for concealed weapon licenses. These are the people who commit serious violent crime. And they are irrelevant to the issuance of such licenses because they are ineligible for such licenses in any event.

I declare under penalty of perjury, under the laws of the United States of America, that the foregoing is true and correct.

Executed in Coquitlam, Canada on October 13, 2010.

Gary Mauser

IN THE 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,

v.

COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF,

Defendants.

CASE NO. 09-CV-2371 IEG (BGS)

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

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I am not a party to the above-entitled action. I have caused service of:

DECLARATION OF GARY MAUSER IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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I declare under penalty of perjury that the foregoing is true and correct. Executed on October 18, 2010.

/s/ C.D. Michel
C. D. Michel
Attorney for Plaintiffs

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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,

v.

COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF,

Defendants.

CASE NO: 09-CV-2371 IEG (BGS)

DECLARATION OF BRIAN PATRICK IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

DECLARATION OF BRIAN PATRICK

I, Brian Patrick, declare as follows:

1. I am a tenured associate professor at the University of Toledo, and hold a PhD from University of Michigan. My focus for the past decade or so has been studies regarding the laws giving law abiding, responsible applicants a right to concealed weapon carry licensure. My most recent and relevant publication is a book on the history and social-political movement toward those laws. Published last year by the academic press Lexington Books, my book is titled *Rise of the Anti-Media, Informing America's Concealed Weapons Movement* (2009).

2. The movement for such laws generated enormous controversy due to the predictions of people like Prof. Zimring that those states enacting them would experience a surge in murders and other gun crimes committed by the millions of people who obtained concealed carry permits. In fact, the experience in the states that enacted such laws has been that murder and other violent gun crimes sharply declined - and nowhere increased. This conclusion is empirically supported by the data sets maintained by various state governments for the purpose of tracking and evaluation of the effects of these laws.

3. The predictions that murder and other gun crime would increase contradicted what has become a truism among criminologists: Murder and other serious violent crime is committed by people who are deranged and/or are long time criminals. That is consistently established by homicide studies dating back to the 19th Century. Ordinary people are not the source of violent crime. Further, the background checks and licensure processes of the various states have been shown to effectively filter out the violent and the impulsive.

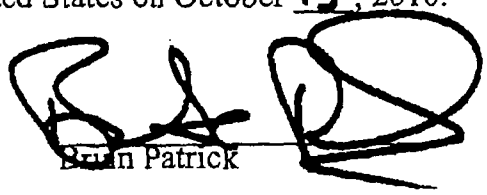
4. If people who are deranged and/or are long time criminals would obey our laws which forbid their having guns, gun crime would virtually cease. But they do not obey those laws, and law enforcement resources seem too meager to enforce the laws upon them. That is the MAJOR cause of murder and other gun crimes in

America.

5. There is not, and never was, any basis for predicting that if given gun permits, ordinary law-abiding adults would commit violent crime. The kind of people who are granted gun permits may be enabled thereby to defend themselves, but virtually never end up committing gun crimes, an empirical fact also verifiable by examining the comprehensive data sets of the many states that issue concealed weapons licenses to law-abiding citizens.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Toledo, Ohio, United States on October 13, 2010.



Brian Patrick

IN THE 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,

v.

COUNTY OF SAN DIEGO, WILLIAM D. GORE, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF,

Defendants.

CASE NO. 09-CV-2371 IEG (BGS)

CERTIFICATE OF SERVICE

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I am not a party to the above-entitled action. I have caused service of:

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

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I declare under penalty of perjury that the foregoing is true and correct.
Executed on 18, 2010

/s/ C.D. Michel
C. D. Michel
Attorney for Plaintiffs

TAB 24

FILED UNDER SEAL

EDWARD PERUTA, et al.
v.
COUNTY OF SAN DIEGO, et al.

Appellant Excerpts of Record

Volume VI
Tab No. 24
Bates No. ER000262 - ER000325

FILED UNDER SEAL

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 II 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

"Service List"
Edward Peruta et al. v. County of San Diego, et. al.
Case No. 10-56971
DC# CV 09-02371-IEG

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CERTIFICATE FOR BRIEF IN PAPER FORMAT

(attach this certificate to the end of each paper copy brief)

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)