

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 III of VIII**

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FILED

MAY 24 2011

MOLLY C. DWYER
CLERK, U.S. COURT OF APPEALS

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.

A handwritten signature in black ink, appearing to read "C. D. Michel", is written over a horizontal line.

C. D. Michel
Attorney for Plaintiffs/Appellants

CHRONOLOGICAL ORDER

TAB NO.	FILING DATE	NAME OF DOCUMENT	VOL.	PAGE NO.
1.	12/10/2010	Order: (1) Denying Plaintiffs' Motion For Partial Summary Judgment, and (2) Granting Defendant's Motion For Summary Judgment	I	ER000001 - ER000017
2.	11/15/2010	Transcripts of Motion For Summary Judgment Hearing	I	ER000018 - ER000080
3.	1/14/2010	Order Denying Defendant's Motion to Dismiss	I	ER000081 - ER000098

CHRONOLOGICAL ORDER

TAB NO.	FILING DATE	NAME OF DOCUMENT	VOL.	PAGE NO.
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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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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
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16.	10/18/2010	Plaintiffs' ExParte 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 Under Seal	II	ER000194 - ER000199
17.	10/18/2010	Plaintiffs' Objections to Evidence Offered In Support of Defendant's Motion For Summary Judgment	II	ER000200 - ER000209
18.	10/18/2010	Consolidated Opposition to Defendant's Motion for Summary Judgment And; Reply to Defendant's Opposition to Plaintiffs' Motion for Partial Summary Judgment	II	ER000210 - ER000238

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20.	10/18/2010	Declaration of Edward Peruta In Support of Plaintiffs' Opposition To Defendant's Motion for Summary Judgment And; Reply to Defendant's Opposition to Plaintiffs' Motion for Partial Summary Judgment	II	ER000243 - ER000246
21.	10/18/2010	Declaration of Carlisle E. Moody In Support of Plaintiffs' Opposition To Defendant's Motion for Summary Judgment	II	ER000247 - ER000253
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TAB NO.	FILING DATE	NAME OF DOCUMENT	VOL.	PAGE NO.
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
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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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48.	6/25/2010	Order Granting Motion For Leave to Amend Complaint	IV	ER001126 - ER001131
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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
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58.	10/23/2009	Complaint For Damages	V	ER001248 - ER001257
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 21 AND LAW ENFORCEMENT ALLIANCE OF AMERICA

12
 13 IN THE UNITED STATES DISTRICT COURT
 14 SOUTHERN DISTRICT OF CALIFORNIA

15	EDWARD PERUTA, MICHELLE LAXSON,)	CASE NO: 09-CV-2371 IEG (BGS)
16	JAMES DODD, DR. LESLIE BUNCHER,)	
17	MARK CLEARY, and CALIFORNIA RIFLE)	APPLICATION FOR LEAVE TO FILE
18	AND PISTOL ASSOCIATION)	AMICUS BRIEF IN SUPPORT OF
19	FOUNDATION)	PLAINTIFFS' MOTION FOR
20	Plaintiffs,)	SUMMARY JUDGMENT
21	v.)	
22	COUNTY OF SAN DIEGO, WILLIAM D.)	Date: November 15, 2010
23	GORE, INDIVIDUALLY AND IN HIS)	Time: 10:30 a.m.
24	CAPACITY AS SHERIFF,)	Location: Courtroom 1
25	Defendants.)	Judge: Hon. Irma E. Gonzalez
26		Date Action Filed: October 23, 2009
27		
28		

1 Through the undersigned counsel, the Independence Institute, the Center for Constitutional
2 Jurisprudence, Doctors for Responsible Gun Ownership, and the Law Enforcement Alliance of
3 America apply to this Court for leave to file a brief *amicus curiae* in this case. The brief is
4 attached to this motion. .

5 The brief complies will rules of this Court, including page limit. Plaintiffs have consented
6 to the filing of this brief. As of the time of filing this application we had been unable to reach
7 counsel for the County to request consent to file this brief. So defendants have not consented to
8 the filing of this brief.

9 The Independence Institute is one of the oldest of our nation's state level think tanks. The
10 Institute has filed many *amicus curiae* briefs in federal and state cases. The Institute's briefs were
11 cited in the U.S. Supreme Court opinions in *District of Columbia v. Heller* and *McDonald v.*
12 *Chicago* (under the name of lead amicus the International Law Enforcement Educators & Trainers
13 Association, ILEETA).

14 The Institute's scholarship has been cited by the Ninth Circuit and by California state
15 courts. *Silveira v. Lockyer*, 328 F.3d 567, 585 n. 92 (9th Cir. 2003) (Kleinfeld, J., dissenting from
16 denial of petition for rehearing en banc); *Kasler v. Lockyer*, 23 Cal.4th 472, 510, 97 Cal.Rptr.2d
17 334, 360 (Cal. 2000) (Brown, J., concurring); *Kasler v. Lungren*, 72 Cal.Rptr.2d 260, 265 (Cal.
18 App. 1998).

19 The Center for Constitutional Jurisprudence, headed by Professor John Eastman, has also
20 participated as *amicus curiae* briefs in many federal and state cases.

21 The instant brief seeks to provide this Court with a broader perspective on the relevant
22 constitutional issues. In particular, while the parties have squabbled over standard of review, the
23 *amicus* brief explains how the case can be easily resolved without need to pick a standard of
24 review.

25 Further, the brief explains how defendants have misunderstood and misapplied the
26 "reasonableness" standard which they seek to have applied.

27 The brief also carefully analyzes the implications from *Heller* of the state law cases which
28 the *Heller* Court described as providing the correct interpretation of the right to bear arms, and the

1 implications from *McDonald* of the Court's examination of the anti-constitutional abuses in the
2 South which the Fourteenth Amendment was intended to remedy.

3 The Law Enforcement Alliance of America is a civic organization consisting law
4 enforcement officers, crime victims, and concerned citizens. Doctors for Responsible Gun
5 Ownership (which like the Center for Constitutional Justice is a project of the Claremont Institute,
6 a think tank in the neighboring Central District) is a nationwide network of physicians, allied
7 health professionals, and others who support the safe and lawful use of firearms.

8 The Law Enforcement Alliance of America and Doctors for Responsible Gun Ownership
9 seek to briefly provide this Court, via their brief, with concise information refuting the
10 fear-mongering and misleading information which has been presented about the supposed dangers
11 of lawful firearms carrying by citizens who have been granted permits after passing thorough
12 background checks and safety training.

13 In conclusion, the aforesaid *amici* respectfully request this Court with leave to file their
14 brief *amici curiae*.

15 Respectfully submitted,

16

17 /s/ John C. Eastman

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1 IN THE UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF CALIFORNIA

3
4 EDWARD PERUTA, MICHELLE LAXSON,) CASE NO: 09-CV-2371 IEG (BGS)
5 JAMES DODD, DR. LESLIE BUNCHER,)
6 MARK CLEARY, and CALIFORNIA RIFLE) **CERTIFICATE OF SERVICE**
7 AND PISTOL ASSOCIATION)
8 FOUNDATION)

9 Plaintiffs,
10 v.

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

14 Defendants.)
15

16 IT IS HEREBY CERTIFIED THAT:

17 I, the undersigned, am a citizen of the United States and am at least eighteen years of age.
18 My business address is One University Drive, Orange, California, 92866.

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

20 **MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF**
21 **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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

24 **SEE SERVICE LIST ATTACHED**

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

27 /s/ John C. Eastman
28 John C. Eastman, Declarant

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 19 AND LAW ENFORCEMENT ALLIANCE OF AMERICA

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 IN THE UNITED STATES DISTRICT COURT
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EDWARD PERUTA, MICHELLE LAXSON,) CASE NO: 09-CV-2371 IEG (BGS)
 JAMES DODD, DR. LESLIE BUNCHER,)
 MARK CLEARY, and CALIFORNIA RIFLE) **AMICUS BRIEF IN SUPPORT OF**
 AND PISTOL ASSOCIATION) **PLAINTIFFS' MOTION FOR**
 FOUNDATION) **SUMMARY JUDGMENT**
) **[PROPOSED]**

Plaintiffs,

v.

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

Defendants

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

Law Enforcement Alliance of America (Virginia) and Independence Institute (Colorado) each state that they are non-profit corporations, incorporated in the states listed after their respective names. The Center for Constitutional Jurisprudence is the public interest legal arm, and Doctors for Responsible Gun Ownership is a research arm, of The Claremont Institute, a California non-profit corporation.

The aforesaid amici have no parent corporations, nor is there any publicly held corporation that owns more than 10% of the stock of any of them.

Respectfully submitted,

/s/ John C. Eastman

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INTERESTS OF AMICUS CURIAE**Independence Institute**

Founded in 1985, the Independence Institute is a nonpartisan, nonprofit public policy research organization dedicated to the principles of the Declaration of Independence. Its interest in the case is protection of the human rights with which we are endowed by our Creator.

Independence Institute staff have written or co-authored scores of law review and other scholarly articles on the gun issue, and several books, including the only university textbook on the subject: ANDREW MCCLURG, DAVID B. KOPEL & BRANNON P. DENNING, *GUN CONTROL AND GUN RIGHTS* (NYU Press, 2002). Currently in preparation is the first law school textbook on the Second Amendment. NICHOLAS J. JOHNSON, DAVID B. KOPEL, MICHAEL P. O'SHEA, AND GEORGE MOSCARY, *FIREARMS REGULATION, RIGHTS, AND RESPONSIBILITIES* (Aspen Publishers, 2011). The Institute's amicus brief in *McDonald* was cited by Justice Alito's majority opinion and by Justice Stevens' dissent. The Institute's amicus brief in *Heller* was cited by Justice Breyer's dissent.

Center for Constitutional Jurisprudence, and**Doctors for Responsible Gun Ownership**

The Center for Constitutional Jurisprudence was founded in 1999 as the public interest legal arm of The Claremont Institute, a public policy think tank devoted to restoring the principles of the American founding to their rightful and preeminent authority in our national life. The Center advances this mission by representing clients or appearing as *amicus curiae* in cases of constitutional significance, including *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010).

Doctors for Responsible Gun Ownership ("DRGO") is also a project of The Claremont Institute, launched in 1994. Headed by Dr. Timothy Wheeler, a southern California surgeon, DRGO is now a nationwide network of physicians, allied health professionals, and others who support the safe and lawful use of firearms.

Law Enforcement Alliance of America

Founded in 1991, the Law Enforcement Alliance of America's 75,000 members and supporters are comprised of law enforcements officers, crime victims, and concerned citizens.

1 LEAA's interest in the case is the advancement of public safety, based on the experience of
2 the large majority of states, where law-abiding, trained adults are allowed to carry firearms for
3 lawful protection.

4 SUMMARY OF ARGUMENT

5 No standard of review analysis is needed. A government action which forbids almost the
6 entire population from exercising a constitutional right is *per se* unconstitutional. Banning almost
7 everyone from exercising the right to bear arms is as facially unconstitutional as forbidding almost
8 everyone from speaking out loud in public places. As *Heller* and *McDonald* make clear,
9 self-defense is by definition a "good cause" for exercising the right to keep and bear arms; indeed
10 it is the best possible cause, the core of the right.

11 While defendants and their amicus argue at length for "reasonableness," that standard
12 forbids obliteration of a right, such as by forbidding almost everyone to bear arms.

13 Further, in the context of a fundamental right, precedent teaches that reasonable laws must
14 be narrowly tailored, serve a significant government interest, and leave ample alternatives.
15 Defendants' ban fails all three tests.

16 The state court decisions which *Heller* quoted and cited as authoritative and accurate
17 descriptions of the right to keep and bear arms directly show that public bearing of arms may not
18 be effectively banned. *Heller* expressly rejects defendants' theory that the Second Amendment
19 applies only to the home.

20 The comprehensive ban which defendants have created by misuse of the "good cause"
21 statute is precisely the kind of ban which the Fourteenth Amendment was designed to prevent, and
22 which *McDonald* specifically denounced.

23 ARGUMENT

24 **I. The case can be decided without a standard of review, because near-total prohibition**
25 **of a constitutional right is never constitutional.**

26 This is an easy case. There is no need for a standard of review. It is certainly true that a
27 legislature may, subject to strict scrutiny in many cases, or intermediate scrutiny in some others,
28 impose limited restrictions on the exercise of a constitutional right. For example, a legislature may

1 impose reasonable time, place, and manner controls speech in public places. Some narrow
2 categories of speech, such as revealing the movement of troops during wartime, may be
3 prohibited. However, a legislature cannot prohibit almost all persons from speaking out loud in
4 public.

5 Similarly, a legislature could, if meeting the appropriate standards of scrutiny, impose
6 some regulations on exercise of the right of assembly. But no legislature could forbid almost all
7 persons from assembling in public.

8 The same is true for the Second Amendment. *Heller* declares the obvious: The right to
9 "keep and bear arms" is "the individual right to possess and carry weapons in case of
10 confrontation." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008).

11 Further, *Heller* states that the right to bear arms does not bar "laws forbidding the carrying
12 of firearms in sensitive places such as schools and government buildings." *Id.* at 2817. The
13 obvious and inescapable implication is that there is a right to carry firearms in places which are
14 not "sensitive."

15 Defendants assert that they have the power to prohibit entirely the defensive carrying of
16 arms by almost the entire public—that is, everyone who cannot point to an imminent and
17 identifiable particular threat.

18 Under *Heller*, this is plainly wrong. Nothing in the *Heller* decision asserted that Richard
19 *Heller* would have Second Amendment rights only if he could point out a specific threat. Nothing
20 in *Heller* asserted that the right to "bear" arms by carrying them for purposes of confrontation, in
21 places which are not "sensitive," was contingent on a specific threat.

22 As defendants admit, their licensing policy prohibits nearly all people from carrying
23 firearms in public places for lawful self-defense. The comprehensive prohibition of a
24 constitutional right is necessarily unconstitutional.

25 Standard of review analysis *would* be appropriate for various aspects of California's
26 licensing system, such as the training requirement, the application fee, and so on. However, none
27 of these controls are being challenged, only defendants' prohibition.

28 Further, California could prohibit concealed carry entirely (or impose the near-prohibitive

1 licensing system as currently administered by defendants) if California had open carry laws which
2 allowed (perhaps under a fair licensing system), law-abiding California adults to carry firearms
3 openly for protection. However, because defensive open carry is generally forbidden in California,
4 then the only way for California's overall system for carry controls to be constitutional is for
5 concealed carry to be available to the law-abiding adult population.

6 The California statute authorizes issuance of concealed carry permits to qualified persons
7 who have "good cause." According to *Heller*, lawful self-defense is by definition "good cause" for
8 exercising the right to keep and bear arms. Indeed, it is the very best cause, being "the core lawful
9 purpose of self-defense." *Id.* at 2818.

10 **II. A "reasonable" regulation is one that does not eliminate the exercise of a right, but**
11 **instead is narrowly tailored, is based on a significant government interest, and leaves**
ample alternatives.

12 As with the right to keep and bear arms, the right to freedom of speech has sometimes
13 been analyzed in terms of "reasonable" regulation. For example, many public events for exercise
14 of First Amendment rights may be subject to "reasonable" time, place, and manner regulations. So
15 the "government may impose reasonable restrictions," which means that the restrictions must be
16 "narrowly tailored to serve a significant governmental interest, and that they leave open ample
17 alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491
18 U.S. 781, 791 (1989).¹

19 In the instant case, defendants' whim to deny permits to almost everyone is a broad
20 prohibition, the opposite of narrow tailoring. Nor does the prohibition leave any practical
21 "alternative." Almost everyone is forbidden from possessing or carrying defensive firearms almost
22 everywhere outside the home.

23 For these reasons alone, defendants' actions fail a reasonableness standard. They also fail
24 because they do not advance a significant government interest. Mere fretting about the dangers of
25 carrying guns in general does not address the reasonableness of carrying by adults who have
26 passed a rigorous background check, and taken safety classes, and whose carrying has been

27
28 ¹ Narrow tailoring is also an element of strict scrutiny. Strict scrutiny, however, requires
a "compelling state interest," whereas "reasonableness" merely asks for "a significant government
interest."

1 determined to be for the constitutionally supreme good cause of lawful self-defense.

2 Indeed, years of statewide data gathered from Minnesota, Michigan, Ohio, Louisiana,
3 Texas, and Florida-all of which treat self-defense to be a good cause for concealed carry
4 permits-shows that people with such permits are *much more law-abiding* than the general
5 population. David B. Kopel, Pretend "Gun-Free" School Zones, 42 CONN. L. REV. 515, 564-69
6 (2009).

7 Defendants and their amicus point to "studies" purporting to list crimes committed by
8 carry licensees. On closer examination, these studies, which amount to write-ups of Google
9 searches, omit crucial details-such as the fact that the licensee was determined to have acted in
10 lawful self-defense, or (in the rare case of licensee misconduct) the misconduct had nothing to do
11 with the carry permit, but took place in the home. *Id.* at 569-72; John Pierce, *Brady Center Joins*
12 *VPC in Deception*, THE EXAMINER (Minneapolis), July 23, 2009,
13 [http://www.examiner.com/gun-rights-](http://www.examiner.com/gun-rights-in-minneapolis/brady-campaign-joins-the-vpc-deception)
14 [in-minneapolis/brady-](http://www.examiner.com/gun-rights-in-minneapolis/brady-campaign-joins-the-vpc-deception) campaign-joins-the-vpc-deception (Violence Policy Center and the Brady
15 Center asserted that "court records" showed that a murderer had a carry permit, although the court
16 records specifically stated that he had no carry permit).

17 Rather than following the U.S. Supreme Court's standard of "reasonableness" in the
18 context of a fundamental right, defendants and their amicus proffer a crabbed and unreasonable
19 characterization. Their briefs amounts to a condensed version of Adam Winkler's article
20 *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683 (2007). The article was written
21 before *Heller* and *McDonald*, and under those cases, Winkler's thesis is simply invalid. As an
22 example of what Winkler considered to be in accordance with his version of a "reasonable" gun
23 control law, Winkler pointed to an Illinois case which upheld a suburb's handgun ban despite the
24 state constitution's right to keep and bear arms. Winkler at 718-79, discussing *Kalodimos v. Vill.*
25 *of Morton Grove*, 470 N.E.2d 266 (Ill. 1984).

26 Winkler's feeble version of "reasonableness" is not applicable to the Second Amendment,
27 because nearly identical handgun bans by two cities in the Morton Grove area were found
28 unconstitutional under *McDonald v. Chicago*, 130 S.Ct. 3020 (2010).

1 Further, it is worth noting that Winkler co-authored an amicus brief in *Heller*, in which he
2 argued that the Court should adopt his version of "reasonableness" and uphold the District of
3 Columbia handgun ban. Brief of Law Professors Erwin Chemerinsky and Adam Winkler, as
4 Amici Curiae in Support of Petitioner, *District of Columbia v. Heller*, 2008 WL 157186.
5 Obviously the Court did just the opposite.

6 We agree with Winkler, defendants, and their amicus that the word "reasonable" has often
7 appeared in state court decisions on state right to arms protections. We simply disagree that
8 Winkler's extremely weak formulation of what is "reasonable" can possibly be the proper standard
9 of review for the Second Amendment. *Heller* and *McDonald* are directly to the contrary.

10 Nor is the weak Winkler theory really a fair description of how modern courts have
11 applied reasonableness. See David B. Kopel & Clayton Cramer, *State Court Standards of Review*
12 *for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113 (2010). The use of the
13 term "reasonable" by some courts is a far cry from defendants' concept that it is "reasonable" to
14 ban a constitutional right altogether. For example, *Bleiler v. Chief, Dover Police Dep't.*, 155 N.H.
15 693, 699, 927 A.2d 1216, 1222 (2007), upheld the requirement of a license to carry a concealed
16 weapon as "reasonable" because it "does not prohibit carrying weapons; it merely regulates the
17 manner of carrying them. . . . Even without a license, individuals retain the ability...to carry
18 weapons in plain view." The same could not be said here.

19 Similarly, *Mosby v. Devine*, 851 A.2d 1031, 1044 (R.I. 2004), used "reasonableness" to
20 examine the licensing systems for carrying handguns in public, and ruled: "Because the Firearms
21 Act provides for both discretionary and mandatory licensing to qualified applicants, the
22 constitutional guarantee to keep and bear arms is fulfilled." *Id.* at 1047 (also noting that the
23 plaintiff "was entitled to a carrying permit from the licensing authority"). By contrast, the policy
24 here generally prohibits the carrying of arms.

25 Even Winkler agrees that a government may not "effectively eliminate the core right to
26 bear arms." Winkler at 725. In the instant case, defendants' microscopically tiny standard of
27 "good cause" effectively eliminates the right to bear arms.

28 It is no use for defendants to point out that while destroying the right to bear arms, they

1 have not destroyed the right to keep arms. A government could not justify destruction of the
2 freedom of the press (e.g., preventing most people from reading newspapers) by pointing out that
3 the government had not destroyed the freedom of speech (since people could still speak out loud
4 as much as they wanted).

5 Destruction of a constitutional right is never reasonable. *Heller's* rule about carrying guns
6 in "sensitive places" is an example of a reasonable regulation. Defendant's preventing the
7 defensive carrying of guns anywhere in public is not reasonable.

8 **III. The state court cases approvingly cited in *Heller* expressly affirm the right to carry**

9 Directly on point is *State v. Reid*, 1 Ala. 612, 616-17 (1840), which upheld a ban on
10 carrying a weapon concealed, but added: "A statute which, under the pretence of regulating,
11 amounts to a destruction of the right, or which requires arms to be so borne as to render them
12 wholly useless for the purpose of defence, would be clearly unconstitutional." This sentence is
13 quoted in *Heller* as an accurate expression of the right to bear arms. *Heller*, 128 S. Ct. at 2818.

14 Likewise cited by the Supreme Court as an accurate reading of the Second Amendment
15 was *Nunn v. State*, 1 Ga. 243 (1846). That case, relying on the Second Amendment struck down a
16 general ban on carrying handguns for protection. *Nunn* upheld a ban on concealed carry, because
17 open carry was allowed. *Nunn* too is approvingly cited in *Heller* for having "perfectly captured" a
18 correct understanding of the Second Amendment. *Heller*, 128 S. Ct. at 2809.

19 *Heller* also relies on *State v. Chandler*, 5 La. Ann. 489 (1850) for correctly expressing that
20 the Second Amendment guarantees a right to carry, but the legislature may determine whether the
21 carry is to be open or concealed. *Heller*, at 2809.

22 To the exact same effect is *Andrews v. State*, 50 Tenn. 165 (1871), where the Tennessee
23 Supreme Court equated the state constitutional provision to the Second Amendment, and struck
24 down a law against carrying handguns "publicly or privately, without regard to time or place, or
25 circumstances." Again, the legislature had the power to determine the mode of carry, but no
26 legislature (let alone a sheriff misapplying a statute) could ban public carry. *Andrews* too is cited
27 as authoritative by *Heller*. *Heller*, 128 S. Ct. at 2806, 2809.

28 *Heller* also discussed one case which adopted the Second Amendment reading that

1 defendants and their amicus prefer: that everyone has a Second Amendment right to "keep" arms
2 in the home, but there is no general right to "bear" arms in public. *Aymette v. State*, 21 Tenn. 154
3 (1840). *Heller* described this theory as an "odd reading of the right" and "not the one we adopt."
4 *Heller*, 128 S. Ct. at 2809.

5 *Reid, Nunn, Chandler, and Andrews*, all cited as correct Second Amendment precedents by
6 *Heller*, provide the controlling guidance in the instant case. They trump any contrary conclusion
7 from cases which are not cited approvingly by the Supreme Court, but instead are merely cited
8 approvingly by defendants and their amicus. Even more helpfully, for the instant case, the
9 Supreme Court has already announced that defendants' home-only version of the Second
10 Amendment is not the law of the land.

11 Just as a lower court does not need to worry about the standard of review when a
12 government official effectively prohibits the exercise of a textual right, a lower court does not
13 need to delve into the standard of review when the controlling Supreme Court precedent, issued
14 two years earlier, directly shows a defendant's smothering of a right to be unconstitutional. This is
15 a very easy case.

16 **IV. Twentieth century state courts decisions affirm the general right to carry for lawful**
17 **self-defense**

18 Invalidating an ordinance which prohibited firearms from being transported or possessed
19 in a vehicle or place of business for self defense, *City of Lakewood v. Pillow*, 180 Colo. 20, 501
20 P.2d 744 (1972), reasoned:

21 A governmental purpose to control or prevent certain activities, which may be
22 constitutionally subject to state or municipal regulation under the police power,
23 may not be achieved by means which sweep unnecessarily broadly and thereby
24 invade the area of protected freedoms. . . . Even though the governmental purpose
may be legitimate and substantial, that purpose cannot be pursued by means that
broadly stifle fundamental personal liberties when the end can be more narrowly
achieved.

25 *Id.* at Colo. 23, citing and quoting from *Aptheker v. Secretary of State*, 378 U.S. 500 (1963) (First
26 and Fifth Amendments, and right to travel); *NAACP v. Alabama*, 377 U.S. 288 (1958) (First
Amendment rights of assembly and association).

27 Defendants and their amicus prefer a different case from the Colorado Supreme Court,
28 which upheld a ban on some firearms, affirmed its adherence to *Lakewood v. Pillow*, but said that

1 "this case does not require us to determine whether that right is fundamental." *Robertson v. City &*
 2 *County of Denver*, 874 P.2d 325, 328 (Colo. 1994). Such deliberate ignorance is precluded here by
 3 *McDonald's* holding that the right is fundamental.² *Robertson* upheld the gun law simply because
 4 it was based on the police power. The *Robertson* approach is plainly invalid for the Second
 5 Amendment, because the D.C. handgun ban was also based on the police power, but was ruled
 6 unconstitutional in *Heller*.

7 *State ex rel. City of Princeton v. Buckner*, 180 W.Va. 457, 462, 377 S.E.2d 139 (1988),
 8 invalidated a statute which prohibited carrying a handgun without a license, in that it "operates to
 9 impermissibly infringe upon this constitutionally protected right to bear arms for defensive
 10 purposes." Following and citing *Pillow*, the court explained that "the legitimate governmental
 11 purpose in regulating the right to bear arms cannot be pursued by means that broadly stifle the
 12 exercise of this right where the governmental purpose can be more narrowly achieved." *Id.* at 464.
 13 Carrying concealed weapons may be regulated, but not "by means which sweep unnecessarily
 14 broadly" *Id.* at 467. The West Virginia legislature remedied the constitutional problem by
 15 enacting a statute for the issuance of concealed carry permits to law-abiding qualified citizens,
 16 thereby eliminating the risks of wholesale denial, such as those manifest in the instant case. *Kopel*
 17 *& Cramer*, 50 SANTA CLARA L. REV. at 1207-08.

18 *Rabbitt v. Leonard*, 36 Conn. Supp. 108, 112, 413 A.2d 489 (1979), held in a case
 19 involving a license to carry a handgun: "It appears that a Connecticut citizen, under the language
 20 of the Connecticut constitution, has a fundamental right to bear arms in self-defense, a liberty
 21 interest which must be protected by procedural due process."³

22 *State v. Kerner*, 181 N.C. 574, 107 S.E. 222, 225 (1921), invalidated a requirement of a
 23

24 ² Similarly, *Arnold v. City of Cleveland*, 616 N.E.2d 163 (Ohio 1993), invented a
 25 "reasonableness test" for the admittedly "fundamental right" to have arms, but that Court applies
 26 strict scrutiny for other fundamental rights. *E.g.*, *Harrold v. Collier*, 107 Ohio St.3d 44, 836
 N.E.2d 1165 (2005). *McDonald* rejects this "second-class right" approach. 130 S.Ct. at 3044.

27 ³ The existence of a later decision which ignored that principle does not help defendants.
 28 *Benjamin v. Bailey*, 662 A.2d 1226, 1232 (Conn. 1995), adopted the very reasoning *Heller*
 rejected: if "some types of weapons" are available, "other weapons" may be banned. More
 importantly, the effect of defendants' policy here is not to narrow the types of firearms which may
 be carried for lawful self-defense; it is to prohibit defensive carry by almost everyone.

1 license to carry a handgun, because "the right to bear such arms unconcealed cannot be infringed."
2 The court held: "As a regulation, even, this is void because an unreasonable regulation, and,
3 besides, it would be void because for all practical purposes it is a prohibition of the constitutional
4 right to bear arms. There would be no time or opportunity to get such permit . . . on an
5 emergency." *Id.* at 225.

6 Again, the constitutional problem of a permit system can be remedied with a
7 fairly-administered permit system that respects the good cause of self-defense. As for situations of
8 emergency, plaintiffs in the instant case have not raised the issue, such as by requesting expedited
9 licensing, or permission to carry during an emergency while an application is pending.

10 Also on point for the instant case are *City of Las Vegas v. Moberg*, 82 N.M. 626, 485 P.2d
11 737 (Ct. App. 1971) ("an ordinance may not deny the people the constitutionally guaranteed right
12 to bear arms" by generally banning the carrying of arms); and *State v. Rosenthal*, 75 Vt. 295, 55 A.
13 610, 611 (1903) (invalidating prohibition on carrying weapon without written permission of
14 mayor or chief of police).

15 This court does not have to go as far as the North Carolina and Vermont Supreme Courts
16 did in interpreting their state constitutions. This court must go as far as the U.S. Supreme Court
17 has mandated for the United States Constitution: protecting the right to bear arms (while allowing
18 legislative choice about open or concealed), and enforcing the requirements that restrictions on the
19 right to carry be narrowly tailored.

20 **V. *McDonald* specifically addresses and prohibits mass deprivation of the right to bear**
21 **arms.**

22 Right at the beginning of the discussion of the constitutional violations that the Fourteenth
23 Amendment was designed to remedy, *McDonald* points to a firearm carry license law with
24 excessive discretion. The Fourteenth Amendment, according to *McDonald*, was aimed at laws
25 such as the Mississippi statute providing that "no freedman, free negro or mulatto, not in the
26 military service of the United States government, and not licensed so to do by the board of police
27 of his or her county, shall keep or carry fire-arms of any kind" *McDonald*, 130 S.Ct. at 3038.

28

1 *McDonald* then stated, "see also Regulations for Freedmen in Louisiana, in *id.*⁴ at 279-280,"
 2 which included the following: "No negro who is not in the military service shall be allowed to
 3 carry firearms, or any kind of weapons, within the parish, without the written special permission
 4 of his employers, approved and indorsed by the nearest and most convenient chief of patrol."

5 *McDonald* described a convention of black citizens in South Carolina who petitioned
 6 Congress, stating their petition that the Constitution "explicitly declares that the right to keep and
 7 bear arms shall not be infringed" and urging that "the late efforts of the Legislature of this State to
 8 pass an act to deprive us [of] arms be forbidden, as a plain violation of the Constitution." 130
 9 S.Ct. at 3038 n.18, quoting STEPHEN HALBROOK, FREEDMEN, THE FOURTEENTH
 10 AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876, at 9 (1998). Rep. George W.
 11 Julian described that law and another in urging adoption of the Fourteenth Amendment:

12 Although the civil rights bill is now the law, . . . [it] is pronounced void by the
 13 jurists and courts of the South. Florida makes it a misdemeanor for colored men to
 14 carry weapons without a license to do so from a probate judge, and the punishment
 15 of the offense is whipping and the pillory. South Carolina has the same enactments;
 and a black man convicted of an offense who fails immediately to pay his fine is
 whipped. . . . Cunning legislative devices are being invented in most of the States
 to restore slavery in fact.

16 CONG. GLOBE, 39th Cong., 1st Sess., 3210 (June 17, 1866).

17 "The most explicit evidence of Congress' aim" regarding the Fourteenth Amendment,
 18 *McDonald* continued, appeared in the recognition in the Freedmen's Bureau Act of 1866 of "the
 19 right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty,
 20 personal security, and the acquisition, enjoyment, and disposition of estate, real and personal,
 21 including the constitutional right to bear arms" 130 S.Ct. at 3040 (emphasis added by Justice
 22 Thomas).

23 *McDonald* rejected the argument that the above Act and the Fourteenth Amendment
 24 sought only to provide a non-discrimination rule. The Act referred to the "full and equal benefit,"
 25 not just "equal benefit." The equality-only theory would imply that "the First Amendment, as
 26 applied to the States, would not prohibit nondiscriminatory abridgments of the rights to freedom
 27 of speech or freedom of religion" *Id.* at 3043.

28

⁴ 1 DOCUMENTARY HISTORY OF RECONSTRUCTION 289 (W. Fleming ed.1950).

1 Justice Thomas's concurrence referred to states that "enacted legislation prohibiting blacks
2 from carrying firearms without a license," *Id.* at 3082, and quoted Frederick Douglass as stating
3 that "the black man has never had the right either to keep or bear arms," a problem which would
4 be remedied by adoption of the Fourteenth Amendment. *Id.* at 3083.

5 Selectively allowing only privileged persons to exercise the right to bear arms persisted
6 well after adoption of the Fourteenth Amendment. See *Watson v. Stone*, 148 Fla. 516, 524, 4
7 So.2d 700 (1941) (Buford, J., concurring) ("the Act [requiring a carry license] was passed for the
8 purpose of disarming the negro laborers The statute was never intended to be applied to the
9 white population").

10 Selective favoritism for the right to bear arms persists today in San Diego County. But
11 *McDonald*, affirms that "the Second Amendment right protects the rights of minorities and other
12 residents of high-crime areas whose needs are not being met by elected public officials." 130 S.Ct.
13 at 3049.

14 The effect of defendants' misuse of the "good cause" standard is to place almost all the
15 law-abiding citizens of San Diego County in the same position as southern blacks under the heel
16 of the Black Codes and Jim Crow: forbidden to exercise their Second Amendment right to bear
17 firearms for lawful self-defense.

18 Accordingly, this court should grant summary judgment for plaintiffs, and require
19 defendants to issue carry permits to all qualified applicants who wish to bear arms for the
20 eminently good cause of lawful self-defense.

21 Respectfully submitted,

22 /s/ John C. Eastman
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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

EDWARD PERUTA, MICHELLE LAXSON,)	CASE NO: 09-CV-2371 IEG (BGS)
JAMES DODD, DR. LESLIE BUNCHER,)	
MARK CLEARY, and CALIFORNIA RIFLE)	CERTIFICATE OF SERVICE
AND PISTOL ASSOCIATION)	
FOUNDATION)	
Plaintiffs,)	
v.)	
COUNTY OF SAN DIEGO, WILLIAM D.)	
GORE, INDIVIDUALLY AND IN HIS)	
CAPACITY AS SHERIFF,)	
Defendants.)	

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 One University Drive, Orange, California, 92866.

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

**AMICUS BRIEF IN SUPPORT OF PLAINTIFFS'
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.

SEE SERVICE LIST ATTACHED

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

/s/ John C. Eastman
John C. Eastman, Declarant

SERVICE LIST

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TAB 26

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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)

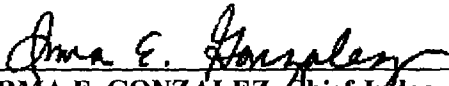
ORDER GRANTING DEFENDANT
WILLIAM GORE'S EX PARTE MOTION
TO FILE EXHIBITS IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT
UNDER SEAL

[Doc. No. 39]

Having considered Defendant William Gore's Ex Parte Motion to File Exhibits in Support of Motion for Summary Judgment under Seal, and finding good cause therefore, **IT IS HEREBY ORDERED** that Defendant Gore shall be allowed to file Exhibits 2 through 15 under seal in support of his Motion for Summary Judgment in accordance with this Court's Protective Order of July 14, 2010.

IT IS SO ORDERED.

DATED: October 6, 2010


IRMA E. GONZALEZ, Chief Judge
United States District Court

ER000350

TAB 27

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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.

USSD No. 09-CV-2371 IEG (BLM)

**DEFENDANT WILLIAM D. GORE'S
EX PARTE MOTION TO FILE
EXHIBITS NOS. 2 THROUGH 15 IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT UNDER
SEAL**

Hearing Date: November 1, 2010
Time: 10:30 a.m.
Courtroom: 1
The Honorable Irma E. Gonzalez

Defendant William Gore hereby applies to the Court for an Order allowing Defendant to file the following exhibits under seal in support of his motion for summary judgment as provided in the Court's Protective Order dated July 14, 2010. The reason for sealing the exhibits is that Defendant's Exhibits 2 through 15 are confidential documents subject to the Protective Order that were provided to Defendant by applicants for concealed weapons licenses, and the documents contain personal information relating to individual applicants which Defendant is bound to keep confidential.

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Case 3:09-cv-02371-IEG -BGS Document 39 Filed 10/04/10 Page 2 of 2

1 It is therefore requested that an Order be entered sealing the exhibits for all
2 purposes in this action.

3 DATED: October 4, 2010

JOHN J. SANSONE, County Counsel

4 By: s/ James M. Chapin
5 JAMES M. CHAPIN, Senior Deputy
6 Attorneys for Defendant William D. Gore
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JOHN J. SANSONE, County Counsel
County of San Diego
By JAMES M. CHAPIN, Senior Deputy (SBN 118530)
1600 Pacific Highway, Room 355
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Attorneys for Defendant William D. Gore

**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.

USSD No. 09-CV-2371 IEG (BLM)

**DECLARATION OF JAMES M.
CHAPIN IN SUPPORT OF EX PARTE
MOTION TO FILE EXHIBITS IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT UNDER
SEAL**

Hearing Date; November 1, 2010
Time: 10:30 a.m.
Courtroom: 1
The Honorable Irma E. Gonzalez

I, JAMES M. CHAPIN, declare:

1. I am attorney of record for Defendant in this action.

2. Defendant's Exhibits 2 through 15 are confidential documents provided to Defendant by applicants for concealed weapons permits and are specifically the subject of the Protective Order entered by the Court. The documents contain personal information which the applicants expect will remain confidential and which Defendant is bound to protect. The release of such information would invade the privacy rights of

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Case 3:09-cv-02371-IEG -BGS Document 39-1 Filed 10/04/10 Page 2 of 2

1 the applicants. It is therefore requested that Exhibits 2 through 15 be sealed for all
2 purposes in this action and that an appropriate Order be entered in that regard.

3 I declare under penalty of perjury that the foregoing is true and correct. I further
4 declare that this declaration is executed this 4th day of October 2010 at San Diego,
5 California.

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8 JAMES M. CHAPIN
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Declaration of Service

I, the undersigned, declare:

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years and not a party to the case; I am employed in, or am a resident of, the County of San Diego, California, where the service occurred; and my business address is: 1600 Pacific Highway, Room 355, San Diego, California.

On October 4, 2010, I served the following documents: 1. DEFENDANT WILLIAM D. GORE'S EX PARTE MOTION TO FILE EXHIBITS NOS. 2 THROUGH 15 IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT UNDER SEAL; 2. DECLARATION OF CHAPIN IN SUPPORT OF EX PARTE MOTION TO FILE EXHIBIT NOS. 2 THROUGH 15 UNDER SEAL in the following manner:

☐ By placing a copy in a separate envelope, with postage fully prepaid, for each addressee named below and depositing each in the U. S. Mail at San Diego, California.

☒ By electronic filing, I served each of the above referenced documents by E-filing, in accordance with the rules governing the electronic filing of documents in the United States District Court for the Southern District of California, as to the following parties:

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(co-counsel for Plaintiff)

I declare under penalty of perjury that the foregoing is true and correct.
Executed on October 4, 2010, at San Diego, California.

By: s/ James M. Chapin
JAMES M. CHAPIN, Senior Deputy
E-mail: james.chapin@sdcounty.ca.gov

TAB 28

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

EDWARD PERUTA, MICHELLE LAXSON,)
JAMES DODD, DR. LESLIE BUNCHE, 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.

USSD No. 09-CV-2371 IEG (BLM)

Hearing Date: November 1, 2010

Time: 10:30 a.m.

Courtroom: 1

Honorable Irma E. Gonzales

**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**

1 Pursuant to Fed. R. Civ. P. 56(b), Defendant William D. Gore hereby moves this Court for
2 summary judgment on all claims in this matter, and opposes Plaintiffs' Motion for Partial Summary
3 Judgment. The grounds and the reasons are set forth in this Memorandum of Points and Authorities.
4 The Memorandum also serves as Defendant's Opposition to Plaintiffs' Motion for Partial Summary
5 Judgment. A Separate Statement of Undisputed Facts has been provided, as has Defendant's Opposition
6 to Plaintiffs' Separate Statement of Undisputed Facts. The Court should grant summary judgment to
7 Defendant because the policies and practices of Defendant in implementing California Penal Code
8 section 12050 do not violate Plaintiffs' constitutional rights and are otherwise lawful.

9 I

10 INTRODUCTION

11 Plaintiffs challenge the San Diego County Sheriff's implementation of the California statutes
12 governing the licensing of persons to carry loaded, concealed weapons in public. (Penal Code §§
13 12050-12054.) California law makes it a misdemeanor to carry a loaded, concealed weapon in public
14 places (Penal Code §§ 12025 and 12031), although numerous exceptions are contained in the relevant
15 Penal Code provisions. Plaintiffs Peruta and Buncher allege that they were denied concealed carry
16 permits because they failed to establish "good cause" as defined by Defendant; Plaintiff Cleary alleges
17 that he was initially denied a permit, but appealed the decision and the permit was granted; Plaintiffs
18 Dodd and Laxson allege they did not apply for permits because they were told they would not meet the
19 "good cause" requirement and decided not to pursue the permit. Plaintiff Peruta further alleges that he
20 was denied because he did not meet the residency requirement of the statute as interpreted by Defendant.
21 The Plaintiff Association alleges that it has members who are County residents who have been denied
22 permits for lack of good cause or have been told that they would not meet the good cause requirement.

23 The First Amended Complaint challenges California Penal Code section 12050 facially and as
24 applied by Defendant on grounds pursuant to the Second Amendment, the Equal Protection Clause, the
25 Privileges and Immunities Clause, Procedural Due Process and the constitutional right to travel. The
26 allegations are focused on the "good cause" and "residency" requirements of Penal Code section 12050.

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II

FACTUAL BACKGROUND

A. California Law.

Penal Code section 12050(a)(1) provides in relevant part:

(A) The sheriff of a county, upon proof that the person applying is of good moral character, that good cause exists for the issuance, and that the person applying satisfies any one of the conditions specified in subparagraph (D) and has completed a course of training as described in subparagraph (E), may issue to that person a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person in either one of the following formats:

(i) A license to carry concealed a pistol, revolver, or other firearm capable of being concealed upon the person.

....

(D) For the purpose of subparagraph (A), the applicant shall satisfy any one of the following:

(i) Is a resident of the county or a city within the county.

(ii) Spends a substantial period of time in the applicant's principal place of employment or business in the county or a city within the county.

The licensing statute authorizes a procedure for a limited number of persons who meet the statutory criteria to be excepted from California's prohibition on the concealed carry of firearms.¹ "Section 12050 gives 'extremely broad discretion' to the sheriff concerning the issuance of concealed weapons licenses." *Gifford v. City of Los Angeles*, 88 Cal. App. 4th 801, 805 (2001) quoting *Nichols v. County of Santa Clara*, 223 Cal. App. 3d 1236, 1241 (1990), and "explicitly grants discretion to the issuing officer to issue or not issue a license to applicants meeting the minimum statutory requirements." *Erdelyi v. O'Brien*, 680 F.2d 61, 63 (9th Cir. 1982.) This discretion must be exercised in each individual case. "It is the duty of the sheriff to make such an investigation and determination, on an individual basis, on every application under section 12050." *Salute v. Pitchess*, 61 Cal. App. 3d 557, 560-561 (1976).

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¹ Penal Code section 12025(a) states "A person is guilty of carrying a concealed firearm when he or she does any of the following: (1) Carries concealed within any vehicle which is under his or her control or direction any pistol, revolver, or other firearm capable of being concealed upon the person. (2) Carries concealed upon his or her person any pistol, revolver, or other firearm capable of being concealed upon the person. (3) Causes to be carried concealed within any vehicle in which he or she is an occupant any pistol, revolver, or other firearm capable of being concealed upon the person."

B. San Diego County Licensing Program.

Under the statutory framework, the San Diego County Sheriff administers the licensing program for all of San Diego County with the concurrence of all police chiefs in the County as members of the Police Chiefs and Sheriffs Association. (Pelowitz Decl. ¶¶ 2, 6.) The Sheriff has delegated to the License Division, under the Law Enforcement Service Bureau, the sole responsibility for all regulatory licensing, including the processing of all carry concealed weapon (CCW) licenses in the County of San Diego. Blanca Pelowitz, as the Manager of the License Division, has been the Sheriff's authorized representative for reviewing CCW applications and making the final determination for the issuance of all CCW licenses since 2002. (Pelowitz Decl. ¶¶ 1-2.)

California is a "may issue" state, meaning that law enforcement officials are given discretion to grant or deny a permit based on a number of statutory factors. "Shall issue" states, in contrast, require the issuance of a permit to anyone who meets certain minimum requirements (e.g., that the applicant is eligible to possess firearms). Penal Code §§12050-12054 set forth the general criteria that applicants for concealed weapons licenses must meet in this state. Applicants must be of good moral character, be a resident of or spend substantial time in the County in which they apply, demonstrate good cause and take a firearms course. The long-standing policy of this Sheriff is generally to approve applications unless the applicant does not meet residency requirements, has had numerous negative law enforcement contacts or is on probation of any sort, or cannot demonstrate good cause. There are currently 1,223 active CCW licenses in San Diego County. (Pelowitz Decl. ¶ 6.)

1. The Application Process.

In 1999, AB2022 standardized the CCW license application process statewide. In 2006, as a courtesy to applicants, the Department initiated an interview process to assist applicants and staff in determining pre-eligibility and to avoid applicants having to pay application fees and firearms safety course fees when they would not qualify for the license. The interview is voluntary and any person can submit an application without the assistance offered by the interview. Based on what the applicant outlines during the interview, the information will assist staff in determining what documentation may be required. Counter clerks are permitted to offer an educated guess based on the scenarios described by applicants. After the interview, applicants will typically gather their documentation, attend the firearms

1 course and return to submit the written application, fees, and documentation. Applicants are then
2 fingerprinted, photographed and instructed to go to the Sheriff's range to have their weapons safety
3 checked and to complete a final qualify-shoot. The file and all documents are forwarded to the
4 Background Unit for the comprehensive background and verification process. Investigators prepare
5 notifications to other law enforcement agencies throughout the County or State for input, clear weapons
6 through AFS (automated firearms systems), conduct a local criminal history check, DMV check, wait
7 for fingerprint results and DOJ firearms eligibility, conduct residence verifications, verify character
8 reference letters and verify documents. (Pelowitz Decl. ¶ 11.)

9 Once everything has been received and verified, the investigator will provide a recommendation
10 to issue or recommend disapproval and forward to the Manager for final review. During the final
11 review, the Manager will review the entire application packet, supporting documents, reasons, and
12 results of the background investigation, and will make the decision to issue or deny and will include any
13 reasonable restrictions and/or instructions to staff. The applicant will be contacted to complete the
14 process and receive the license. (Pelowitz Decl. ¶ 11.)

15 All renewals must also comply with the 4-hour firearms course and must to go to the Sheriff's
16 range for a qualify-shoot and firearm safety inspection. Renewals are issued absent any negative law
17 enforcement contacts, crime cases, arrests and if there no
18 changes from the initial application as to the reasons and if supporting documentation is provided.
19 (Pelowitz Decl. ¶ 12.)

20 There are no provisions in the Penal Code for an appeal process involving administrative action
21 from the issuing agency. The Sheriff's Department in 1998-99 implemented the
22 administrative/reconsideration process for CCW applicants. When taking administrative action to deny,
23 suspend or revoke a CCW license, an upper command concurrence through the Law Enforcement
24 Service Bureau is required before taking action. The individual is given the opportunity to request an
25 appeal of the decision by writing to the Assistant Sheriff of the Law Enforcement Service Bureau. The
26 appeal is heard by the Assistant Sheriff of the Bureau who will make the determination to overturn or
27 uphold the decision. (Pelowitz Decl. ¶¶ 11-14.)

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1 **2. The Good Cause Requirement.**

2 “Good cause” under Penal Code section 12050 is defined by this County to be a set of
3 circumstances that distinguish the applicant from other members of the general public and causes him or
4 her to be placed in harm’s way. Generalized fear for one’s personal safety is not, standing alone,
5 considered good cause. Good cause is evaluated on an individual basis and applicants will generally fall
6 into one of the four categories originally set by Judge Huffman in 1987: (1) protected law enforcement
7 personnel which includes active and retired reserves, federal agents, police department evidence
8 technicians, Deputy District Attorneys, etc.; (2) personal protection which includes persons with
9 documented threats, restraining orders, and other related situations where an applicant can demonstrate
10 that he or she is a specific target presently at risk of harm; (3) security/investigative personnel which
11 includes plain clothes security, private investigators, private patrol operators, bail bondsmen, etc.; (4)
12 business owners/employees which includes any high risk business or occupation which places an
13 individual at risk of harm. All new applicants must provide supporting documentation. If applying for
14 business purposes, proof they are a legitimate and fully credentialed business is required as well as
15 having to demonstrate and elaborate good cause for carrying a firearm; if for specific personal
16 protection, the required documentation may include restraining orders or letters from law enforcement
17 agencies or other persons in order to document the specific threat. (Pelowitz Decl. ¶¶ 3, 7.)

18 **3. The Residency Requirement.**

19 Residency under Penal Code section 12050 is generally defined by this County to include a
20 person who maintains a permanent residence in the County, or spends more than six months of the
21 taxable year within the County if the applicant claims dual residency. San Diego County uses the term
22 “resident” as set forth in Penal Code section 12050(D), not “domicile.” Part-time residents who spend
23 less than six months in the County or otherwise fall within section 12050(D)(ii) are considered on a
24 case-by-case basis and CCW licenses have been issued to part-time residents. (Pelowitz Decl. ¶ 8.)

25 **C. Plaintiffs’ Claims.**

26 **1. Edward Peruta.**

27 Edward Peruta alleges that he was denied a license to carry a concealed weapon by the Sheriff’s
28 Department because he was not a resident of San Diego County and because he did not demonstrate

1 good cause. In his declaration submitted in support of Plaintiffs' Motion for Partial Summary Judgment,
2 he states that his need for a CCW license is not different from anyone else's need for a CCW license.
3 (Peruta Decl. ¶ 6.) He states that he provided as good cause "the protection of myself and my wife from
4 criminal attack, because we spend substantial amounts of time in our motor home, often in remote areas,
5 and we often carry large sums of cash and valuables in the motor-home." He also states that his work
6 "gathering breaking news and conducting legal investigations often requires me to enter dangerous
7 locations." (Peruta Decl. ¶ 9.) He does not state that he provided any documentation supporting his
8 "good cause" statement.

9 Peruta's CCW license application was denied solely because he provided no documentation
10 supporting his statement of "good cause." Residency was not a factor in the denial. In addition, his
11 alleged "business" is not licensed to do business in the State of California. (Plaintiffs' Exhibit G;
12 Pelowitz Decl. ¶17.) Peruta made no effort to provide supporting documentation, the only document he
13 provided was a photograph of a sign from a mobile home park. (Defendant's Exhibit 1.)

14 **2. Michelle Laxson.**

15 Michelle Laxson did not apply for a CCW license. She was interviewed by line staff, but after a
16 discussion, she stated that she probably wouldn't qualify for license. She did not return.

17 **3. James Dodd.**

18 James Dodd applied for a license and the application is pending.

19 **4. Mark Cleary.**

20 Mark Cleary's license was renewed after the appeal of his denial, when the hearing officer was
21 able to verify his employment. He had not previously provided verification of employment to the staff.

22 **5. Leslie Buncher.**

23 Leslie Buncher's application was denied because he is retired.

24 **III**

25 **THE SECOND AMENDMENT DOES NOT ENCOMPASS A**
26 **RIGHT TO CARRY A LOADED CONCEALED WEAPON IN PUBLIC**

27 Plaintiffs' primary challenge is based on a claim that the Sheriff's policies and procedures violate
28 the Second Amendment. In *District of Columbia v. Heller*, 554 U.S. 570 (128 S. Ct. 2783, 2788; 171

1 L.Ed.2d 637) (2008), the United States Supreme Court held that the Second Amendment protects an
 2 individual's right to possess firearms in the home for self-defense and that the city's total ban on
 3 handguns, as well as its requirement that firearms in the home be kept nonfunctional even when
 4 necessary for self-defense, violated that right. However, the *Heller* decision does not affect the
 5 constitutionality of Penal Code sections 12025(a) or 12050. Plaintiffs challenge the concealed carry
 6 permit statute without challenging the Penal Code sections regulating the carrying of concealed and
 7 loaded firearms. Penal Code sections 12025(a) and 12031(a) have been upheld in California against a
 8 Second Amendment challenge after *Heller*. *People v. Flores*, 169 Cal. App. 4th 568, 575-576 (2008);
 9 *People v. Yarbrough*, 169 Cal. App. 4th 303, 312-314. (2008).

10 In *People v. Yarbrough*, the defendant was convicted of violating Penal Code section
 11 12025(a)(2), for carrying a concealed weapon on residential property that was fully accessible to the
 12 public. Noting *Heller* had "specifically expressed constitutional approval of the accepted statutory
 13 proscriptions against carrying concealed weapons," (*People v. Yarbrough* at p. 314), *Yarbrough* held:

14 we find nothing in Penal Code section 12025, subdivision (a), that violates the limited
 15 right of the individual established in *Heller* to possess and carry weapons in case of
 16 confrontation. Section 12025, subdivision (a), does not broadly prohibit or even
 17 regulate the possession of a gun in the home for lawful purposes of confrontation or
 18 self-defense, as did the law declared constitutionally infirmed in *Heller*. Rather,
 19 section 12025, subdivision (a), in much more limited fashion, specifically defines as
 20 unlawful carrying concealed within a vehicle or "concealed upon his or her person any
 21 pistol, revolver, or other firearm capable of being concealed upon the person."
 22 Further, carrying a firearm concealed on the person or in a vehicle in violation of
 23 section 12025, subdivision (a), is not in the nature of a common use of a gun for
 24 lawful purposes which the court declared to be protected by the Second Amendment in
 25 *Heller*. (See *People v. Wasley* (1966) 245 Cal.App.2d 383, 386.) Unlike possession
 26 of a gun for protection within a residence, carrying a concealed firearm presents a
 27 recognized "threat to public order," and is "'prohibited as a means of preventing
 28 physical harm to persons other than the offender.' [Citation.]" (*People v. Hale* (1974)
 43 Cal.App.3d 353, 356.) A person who carries a concealed firearm on his person or
 in a vehicle, "which permits him immediate access to the firearm but impedes others
 from detecting its presence, poses an 'imminent threat to public safety ...'
 [Citation.]" (*People v. Hodges, supra*, 70 Cal.App.4th 1348, 1357.)

Id. at 313-314.

People v. Flores affirmed convictions under sections 12025 and 12031 in the face of a *Heller*
 challenge. With regard to the section 12031 conviction, the Court in *Flores* reasoned:

Section 12031 prohibits a person from "carr[ying] a loaded firearm on his or her
 person . . . while in any public place or on any public street." [Citation.]. The statute
 contains numerous exceptions. There are exceptions for security guards (*id.*, subd.

(d)), police officers and retired police officers (*id.*, subd. (b)(1) & (2)), private investigators (*id.*, subd. (d)(3)), members of the military (*id.*, subd. (b)(4)), hunters (*id.*, subd. (i)), target shooters (*id.*, subd. (b)(5)), persons engaged in ‘lawful business’ who possess a loaded firearm on business premises and persons who possess a loaded firearm on their own private property (*id.*, subd. (h)). A person otherwise authorized to carry a firearm is also permitted to carry a loaded firearm in a public place if the person ‘reasonably believes that the person or property of himself or herself or of another is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property.’ (*Id.*, subd. (j)(1).) Another exception is made for a person who ‘reasonably believes that he or she is in grave danger because of circumstances forming the basis of a current restraining order issued by a court against another person or persons who has or have been found to pose a threat to his or her life or safety.’ (*Id.*, subd. (j)(2).) Finally, the statute makes clear that ‘[n]othing in this section shall prevent any person from having a loaded weapon, if it is otherwise lawful, at his or her place of residence, including any temporary residence or campsite.’ (*Id.*, subd. (l).)

People v. Flores, 169 Cal. App. 4th at p 576.

“This wealth of exceptions creates a stark contrast between section 12031 and the District of Columbia statutes at issue in *Heller*. In particular, given the exceptions for self-defense (both inside and outside the home), there can be no claim that section 12031 in any way precludes the use ‘of handguns held and used for self-defense in the home.’ [Citation.] Instead, 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. [Citation.] Consequently, section 12031 does not burden the core Second Amendment right announced in *Heller* – the right of law-abiding, responsible citizens to use arms in defense of hearth and home – to any significant degree.” *People v. Flores*, 169 Cal. App. 4th at pp. 576-577, fn. omitted; accord *People v. Villa*, 178 Cal. App. 4th 443, 450 (2009).

Rather than challenge sections 12025 and 12031, Plaintiffs instead press their challenge to the concealed weapons “licensing” statute by claiming that the Sheriff must accept as “good cause” for the purpose of Penal Code section 12050 the constitutional “right to keep and bear arms” under the Second Amendment. In essence, Plaintiffs are asking this Court to strike the “good cause” language from the statute on the theory that *Heller* provides that everyone has a constitutional right to carry a concealed weapon in public. There is no such constitutional right. *Heller* does not support Plaintiffs’ position nor has any court so held since *Heller*. See e.g., *Dorr v. Weber*, 2010 U.S. Dist. LEXIS 48950 (N. D. Iowa, 2010).

1 In *Heller*, the Supreme Court considered “whether a District of Columbia prohibition on the
2 possession of usable handguns *in the home* violates the Second Amendment to the Constitution.” *Id.* at
3 2787-88. A majority of the court held “that the District’s ban on handgun possession *in the home*
4 violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the
5 home operable for the purpose of immediate self-defense.” *Heller*, 554 U.S. at ____; 171 L.Ed.2d at 683
6 (italics added).

7 The court emphasized that “the right secured by the Second Amendment is not unlimited. From
8 Blackstone through the 19th-century cases, commentators and courts routinely explained that the right
9 [to keep and bear arms] was not a right to keep and carry any weapon whatsoever in any manner
10 whatsoever and for whatever purpose.” *Id.* at ____; 171 L.Ed.2d at 678. Thus, the Court has specifically
11 stated that “core right” embodied in the Second Amendment *does not include the right to keep and carry*
12 *in any manner*.

13 Although the Court declined to adopt a level of scrutiny to be imposed upon laws regulating the
14 “core” Second Amendment right it identified or specify the limitations the government may place on an
15 individual’s right to possess firearms in public, a nonexclusive list of the many “presumptively lawful
16 regulatory measures” was enumerated. *Heller* at 171 L.Ed.2d at 678, n. 26 (“We identify these
17 presumptively lawful regulatory measures only as example; our list does not purport to be exhaustive.”)
18 The court declared:

19 [T]he majority of the 19th-century courts to consider the question held that
20 *prohibitions on carrying concealed weapons were lawful* under the Second
21 Amendment or state analogues. [Citations.] Although we do not undertake an
22 exhaustive historical analysis today of the full scope of the Second Amendment,
23 nothing in our opinion should be taken to cast doubt on longstanding prohibitions on
24 the possession of firearms by felons and the mentally ill, or laws forbidding the
25 carrying of firearms in sensitive places such as schools and government buildings, or
26 laws imposing conditions and qualifications on the commercial sale of arms. [¶] We
27 also recognize another important limitation on the right to keep and carry arms. *Miller*
28 said, as we have explained, that the sorts of weapons protected were those “in
common use at the time.” [(*United States v. Miller* (1939) 307 U.S. 174, 179 [83 L.
Ed. 1206, 59 S. Ct. 816].)] We think that limitation is fairly supported by the
historical tradition of prohibiting the carrying of “dangerous and unusual weapons.”
[Citations.]

Heller, at 554 U.S. at ____; 171 L.Ed.2d at 678–679 (fn. omitted, italics added).

///

1 Penal Code section 12050 does not regulate the possession of a gun in the home for lawful
2 purposes of confrontation or self-defense, as did the law declared unconstitutional in *Heller*. Rather, it
3 involves the licensing of persons in the context of the regulation of the carrying of concealed weapons in
4 public places. Further, carrying a firearm concealed on the person or in a vehicle is not in the nature of a
5 common use of a gun for lawful purposes which the court declared to be protected by the Second
6 Amendment in *Heller*. Unlike possession of a gun for protection within a residence, carrying a
7 concealed firearm presents a recognized “threat to public order,” and is “prohibited as a means of
8 preventing physical harm to persons other than the offender.” [Citation.]” *People v. Hale*, 43 Cal. App.
9 3d 353, 356 (1974). A person who carries a concealed firearm on his person or in a vehicle, “which
10 permits him immediate access to the firearm but impedes others from detecting its presence, poses an
11 ‘imminent threat to public safety’ [Citation.]” *People v. Hodges*, 70 Cal. App. 4th 1348, 1357
12 (1999). (See also Declaration of Franklin Zimring.)

13 Rather than cast any doubt upon the continued constitutional validity of concealed weapons bans,
14 the *Heller* opinion expressed apparent constitutional approval of the historically accepted statutory
15 proscriptions against carrying concealed weapons. *Heller*, 554 U.S. ____; 171 L.Ed.2d at 678. Thus, in
16 the aftermath of *Heller*, the prohibition “on the carrying of a concealed weapon without a permit,
17 continues to be a lawful exercise by the state of its regulatory authority notwithstanding the Second
18 Amendment.” *United States v. Hall* (S.D.W.Va., Aug. 4, 2008, No. 2:08-00006) 2008 U.S. Dist. Lexis
19 59641, *3; *People v. Yarbrough*, 169 Cal. App. 4th at 309.

20 The Court’s recognition in *Heller* that prohibitions on carrying concealed weapons were lawful
21 was in full accord with long-standing Supreme Court precedent. Over a century ago, in *Robertson v.*
22 *Baldwin*, the Supreme Court recognized that “the right of the people to keep and bear arms (article 2) is
23 not infringed by laws prohibiting the carrying of concealed weapons” *Robertson v. Baldwin*, 165 U.S.
24 275, 281-82 (1897). The Ninth Circuit in the now-vacated *Nordyke* panel opinion, *Nordyke v. King*, 563
25 F.3d 439, 460 (9th Cir. 2009), rejected a challenge to a county ordinance prohibiting possession of
26 firearms on county property, finding that the law “does not meaningfully impede the ability of
27 individuals to defend themselves in their homes with usable firearms, the core of the right as *Heller*
28 analyzed it.” *Cf. United States v. Masciandaro*, 684 F.Supp. 2d 779, (E.D. Va. 2009) (“[H]eller’s

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1 narrow holding is explicitly limited to vindicating the Second Amendment ‘right of law-abiding,
2 responsible citizens to use arms in defense of *hearth and home*.’”) (emphasis in original).

3 Here, California law does not impede the ability of individuals to defend themselves with
4 firearms in their homes. Accordingly, a right to carry a concealed weapon in public under the Second
5 Amendment has not been recognized and California’s regulation of both concealed carry of firearms and
6 carry of loaded firearms in public do not infringe on the Second Amendment “core right” that has been
7 held to be fundamental by the Supreme Court. The Sheriff’s policies and practices in limiting concealed
8 carry *licensing* to individuals with specifically identifiable and documented needs for concealed carry
9 have no impact on the Second Amendment’s core right of self-defense.

10 IV

11 THE SHERIFF’S LICENSING PRACTICES 12 MEET ANY STANDARD OF SCRUTINY

13 Even if this Court finds that the core right to keep and bear arms under the Second Amendment
14 is infringed and that *Heller*’s narrow holding does not reach or decide the issue in this case, the Sheriff’s
15 implementation of the licensing statute withstands any level constitutional scrutiny -- strict scrutiny,
16 intermediate scrutiny, or “undue burden.” In this respect, strict scrutiny requires that a statute or
17 regulation “be narrowly tailored to serve a compelling governmental interest” in order to survive a
18 constitutional challenge. *Abrams v. Johnson*, 521 U.S. 74, 91 (1997). Intermediate scrutiny requires
19 that the challenged statute or regulation “be substantially related to an important governmental
20 objective.” *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Finally, a statute or regulation survives an “undue
21 burden” analysis where it does not have the “‘purpose or effect [of] plac[ing] a substantial obstacle in
22 the path’” of the individual seeking to engage in constitutionally protected conduct. *Gonzales v.*
23 *Carhart*, 550 U.S. 124, 146 (2007) (quoting *Planned Parenthood of Southeastern Penn. v. Casey*, 505
24 U.S. 833, 878 (1992)).

25 Regardless of the level of constitutional scrutiny, Plaintiffs’ as-applied challenge fails. The
26 governmental interest furthered by Penal Code sections 12025, 12031 and 12050 as administered by
27 Defendant -- the safety of the public from unknown persons carrying concealed, loaded firearms -- is
28 both important and compelling. (Zimring Declaration.) In addition, the Penal Code provisions are

1 narrowly tailored and substantially related to furthering public safety. The reach of the statutes, which
2 encompass only public carry, along with the numerous enumerated exceptions which allow for keeping
3 and bearing arms for self-defense in a host of circumstances, do not interfere with any conception of
4 Second Amendment rights as announced in *Heller*, “to use arms in defense of hearth and home.” *Heller*,
5 128 S. Ct. at 2821.

6 **A. Strict Scrutiny is not the Appropriate Standard.**

7 Plaintiffs argue that the Second Amendment guarantees a “fundamental right,” hence “strict
8 scrutiny” should apply. While the Supreme Court in *McDonald v. City of Chicago*, __ U.S. __, 130
9 S.Ct. 3020 (2010), has now held that the Second Amendment right to keep and bear arms is a
10 fundamental right that is applicable to the States, that decision did not extend the Court’s interpretation
11 of the core right set forth in *Heller*.

12 The Supreme Court expressly declined to establish what standard of review was appropriate in
13 Second Amendment cases, only ruling out “rational basis” review. *Heller*, 128 S. Ct. at 2817–18 &
14 n.27; *See also, e.g., United States v. Miller*, 604 F.Supp.2d 1162, 1170 (W.D. Tenn. 2009). The
15 Supreme Court found that many traditional types of firearm regulation would pass muster but did not
16 establish the standard to be used. *Heller*, 128 S. Ct. at 2816-17 & n. 26. As Justice Breyer noted in
17 dissent, strict scrutiny apparently was rejected by the majority:

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

23 *Heller*, 128 S. Ct. at 2851 (Breyer, J., dissenting) (citations omitted).

24 Justice Breyer comments further on the strict scrutiny standard:

25 Indeed, adoption of a true strict-scrutiny standard for evaluating gun regulations would
26 be impossible. That is because almost every gun-control regulation will seek to
27 advance (as the one here does) a “primary concern of every government--a concern for
the safety and indeed the lives of its citizens.” [citation.] The Court has deemed that
28 interest, as well as “the Government’s general interest in preventing crime,” to be
“compelling,” [citation.], and the Court has in a wide” variety of constitutional
contexts found such public-safety concerns sufficiently forceful to justify restrictions

on individual liberties, see *e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam*) (First Amendment free speech rights); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (First Amendment religious rights); *Brigham City v. Stuart*, 547 U.S. 398, 403-404 (2006) (Fourth Amendment protection of the home); *New York v. Quarles*, 467 U.S. 649, 655 (1984) (Fifth Amendment rights under *Miranda v. Arizona*, 384 U.S. 436 (1966)); *Salerno, supra*, at 755 (Eighth Amendment bail rights). Thus, any attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.

Heller, 128 S. Ct. at 2851-2852 (Breyer, J., dissenting) (extended citations omitted).

In addition, *Heller's* list of “presumptively lawful regulatory measures” points persuasively to rejection of strict scrutiny. *Id.* at 2817 n.26. Unlike a home or other private property, where the “need for defense of self, family, and property is most acute,” the need to carry a concealed firearm in public places is not nearly so dire. “Even in jurisdictions that have declared the right to keep and bear arms to be a fundamental constitutional right, a strict scrutiny analysis has been rejected in favor of a reasonableness test” *Mosby v. Devine*, 851 A.2d 1031, 1044 (R.I. 2004) (citing cases).

All incorporated rights may be fundamental, but not all incorporated rights trigger strict scrutiny. See generally, Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 Const. Comment 227 (2006). For instance, strict scrutiny is not always applied to restrictions on free speech and the free exercise of religion. *Id.* It thus would not necessarily follow that strict scrutiny is always (or even usually) proper under the Second Amendment, even if the right it protects is fundamental. As one court has explained, the constitutional text is subject to a rule of reason because the common law right to self-defense is subject to that rule. *Benjamin v. Bailey*, 662 A.2d 1226, 1232-35 (Conn. 1995).

State courts interpreting right-to-bear-arms provisions in state constitutions have uniformly applied a deferential reasonableness standard, in decisions going back decades. It does not appear that any state’s courts apply strict scrutiny or another type of heightened review to firearms laws. Winkler, *Scrutinizing the Second Amendment*, 105 Mich.L.Rev. 683, 686-87 (2007) (fn. 7: “hundreds of opinions” by state supreme courts with “surprisingly little variation” that have adopted the “reasonableness” standard of review for right-to-bear-arms cases); See, *e.g.*, *Bleiler v. Chief, Dover Police Dep’t.*, 927 A.2d 1216, 1222 (N.H. 2007) (“We agree with every other state court that has considered the issue: strict scrutiny is not the proper test to apply” and “the New Hampshire state

1 constitutional right to bear arms ‘is not absolute and may be subject to restriction and regulation.’”)
 2 (quoting *State v. Smith*, 571 A.2d 279, 281 (N.H. 1990)); *Mosby*, 851 A.2d at 1044 (strict scrutiny not
 3 appropriate; “the right to possess a handgun, whether a fundamental liberty interest or not, is not
 4 absolute and subject to reasonable regulation.”); *State v. Cole*, 665 N.W.2d 328, 337 (Wis. 2003)
 5 (applying reasonableness test) (“If this court were to utilize a strict scrutiny standard, Wisconsin would
 6 be the only state to do so.”); *Robertson v. City & County of Denver*, 874 P.2d 325, 331 (Colo. 1994) (*en*
 7 *banc*) (strict scrutiny not appropriate; “The right to bear arms may be regulated by the state under its
 8 police power in a reasonable manner.”); *Cf. McIntosh v. Washington*, 395 A.2d 744, 756 (D.C. 1978)
 9 (“The Supreme Court has indicated that dangerous or deleterious devices or products are the proper
 10 subject of regulatory measures adopted in the exercise of a state’s ‘police powers.’”) (citations omitted).

11 It appears that only one federal or state decision reached after *Heller* has applied strict scrutiny --
 12 where the Defendant was in possession of a firearm in his own home -- but it still upheld the challenged
 13 regulation. See *United States v. Engstrum*, 609 F.Supp.2d 1227, 1231 (D.Utah 2009) (applying strict
 14 scrutiny, but rejecting challenge to federal statute prohibiting possession of firearms by those with
 15 domestic violence convictions). The Sheriff’s practices here have no regulatory effect on guns in the
 16 home and do not rise to the level of burdening fundamental rights that would require strict scrutiny.

17 **B. The Sheriff’s Interpretation of Good Cause is Most Appropriately Subject to**
 18 **“Reasonableness” Review.**

19 Under a “reasonable regulation” standard of review, a firearm regulation should be upheld where
 20 the regulation or law does not interfere with the “core right” the Second Amendment protects by
 21 depriving the people of reasonable means to defend themselves in their homes. Even where a
 22 fundamental right is involved, the correct test is “whether or not the restriction upon the carrying of
 23 concealed weapons is a reasonable exercise of the State’s inherent police powers. Such a test should not
 24 be mistaken for a rational basis test. The explicit grant of a fundamental right to bear arms clearly
 25 requires something more, because the right must not be allowed to become illusory.” *State v. Cole*, 665
 26 N.W.2d at 338; see also, *State v. Reid*, 1 Ala. 612 (1840); *Benjamin v. Bailey*, 662 A.2d at 1234; *State v.*
 27 *Ricehill*, 415 N.W.2d 481, 483 (N.D. 1987); *State v. McAdams*, 714 P.2d 1236, 1237 (Wyo. 1986).

28 ///

1 “The protections of the Second Amendment are subject to the same sort of *reasonable*
2 *restrictions* that have been recognized as limiting, for instance, the First Amendment.” *Parker v.*
3 *District of Columbia*, 478 F.3d 370, 399 (D.C. Cir. 2007) (emphasis added) (citing *Ward v. Rock*
4 *Against Racism*, 491 U.S. 781, 791 (1989)). “[R]easonable regulations” of firearms “promote the
5 government’s interest in public safety consistent with our common law tradition. Just as importantly,
6 however, they do not impair the core conduct upon which the right was premised.” *Id.* The rights
7 protected by the Bill of Rights have “from time immemorial been subject to certain well-recognized
8 exceptions arising from the necessities of the case.” *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897).
9 There can be little question that preventing crime and promoting public safety are important government
10 goals. *See, e.g., Salerno*, 481 U.S. at 750; *Schall v. Martin*, 467 U.S. 252, 264 (1984).

11 State courts interpreting right-to-bear-arms provisions in state constitutions have uniformly
12 applied a deferential reasonableness standard. Winkler, *Scrutinizing the Second Amendment*, 105
13 Mich.L.Rev. 683, 686–87 (2007). The deference due to legislative judgments inherent in reasonableness
14 review is particularly appropriate given the intensity of views about gun control. As one court explained:

15 [M]ost legislation will assert broad safety concerns and broad gun control
16 measures to match, covering both ‘good’ and ‘bad’ gun possessors and ‘good’ and
17 ‘bad’ guns. Such legislation cannot be narrowly tailored to reach only the bad people
18 who kill with their innocent guns. [D]ue to the intensity of public opinion on guns,
19 legislation is inevitably the result of hard-fought compromise in the political branches.
20 To expect such legislation to reflect a tight fit between ends and means is unrealistic.

21 *United States v. Miller*, 604 F.Supp.2d at 1172 n.13 (quotation marks and citations omitted).

22 The Second Amendment must leave the judgment of whether and how to regulate firearms to the
23 legislature, not the judiciary. *Heller* at 128 S. Ct at 2817. In reviewing the constitutionality of a statute,
24 “courts must accord substantial deference to the predictive judgments” of the legislature. *Turner*
25 *Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (quoting *Turner Broadcasting Sys., Inc. v.*
26 *FCC*, 512 U.S. 622, 665 (1994)). Such deference is due because the legislature “‘is far better equipped
27 than the judiciary to ‘amass and evaluate the vast amounts of data’ bearing upon’ legislative questions.”
28 *Id.* (quoting *Walters v. National Ass’n of Radiation Survivors*, 473 U.S. 305, 331, n.12 (1985)); *see also*
Gonzalez v. Carhart, 550 U.S. 124, 163–64 (2007) (legislature should receive deference in absence of
expert consensus). “Even in the realm of First Amendment questions . . . deference must be accorded to

1 [the legislature's] findings as to the harm to be avoided and to the remedial measures adopted for that
2 end" *Turner*, 520 U.S. at 665. "Local officials, by virtue of their proximity to, and their expertise
3 with, local affairs, are exceptionally well qualified to make determinations of public good 'within their
4 respective spheres of authority.'" *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 544 (1989) (quoting
5 *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 244 (1984)).

6 Moreover, *Heller's* apparent approval of traditional concealed weapons bans and the Court's
7 earlier pronouncement in *Robertson* in 1897 provide further support for rejecting more heightened
8 scrutiny standards, as carrying a concealed, loaded weapon presents the sort of compelling safety risk
9 more adequately resolved by legislation than judicial *ipse dixit*. (See Zimring Declaration.)

10 California's regulation of public carry of concealed firearms embodies a strong and long-held
11 legislative interest in protecting public safety and reducing crime, and the efforts of the Sheriff in
12 limiting concealed carry to those persons with unique and specific needs consist of reasonable regulation
13 of firearms that have little impact on the "right to keep and bear arms" as so far articulated by the
14 Supreme Court.

15 **C. Intermediate Scrutiny.**

16 At most, intermediate scrutiny would be appropriate. To survive intermediate scrutiny, the
17 challenged provision must be substantially related to the achievement of important government interests.
18 *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724
19 (1982); *See also Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("To withstand intermediate scrutiny, a
20 statutory classification must be substantially related to an important government objective.").

21 Some courts have applied intermediate scrutiny in cases after *Heller*. In *Heller v. D.C.*, 698 F.
22 Supp 2d 179 D.C. Cir 2010) (*Heller II*), it was applied because the firearms registration required the
23 registration of guns for possession *in the home* which clearly touched upon the core right identified by
24 *Heller*. In *U.S. v. Miller* 604 F. Supp. 2d 1162 (W.D. Tenn 2009), the defendant challenged a penal
25 statute relating to possession of a firearm *in the home* by a felon. *See also, U.S. v. Schultz*, 2009 U.S.
26 Dist. LEXIS 234 (N.D. Ind. Jan 5 2009); *U.S. v. Radencich*, 2009 WL 12648 (N.D. Ind. Jan 20, 2009).
27 In *U.S. v. Marzzarella*, 595 F. Supp. 2d 596 (W.D. Pa. 2009) the defendant challenged an indictment for
28 possessing a firearm with an obliterated serial number *in his home*. In *U.S. v. Walker*, 2010 WL

1 1640340 (E.D. Va 2010) and *U.S. v. Tooley*, 2010 WL 2842915 (S.D.W.Va. May 4, 2010), defendants
2 challenged charges for possessing a firearm *in the home* after having been previously convicted of
3 domestic violence. In all cases, the regulations were upheld.

4 Thus, the cases which have adopted intermediate scrutiny have been those where the “core right”
5 of possession in the home is in some way infringed. That is not the case here where there is no effect on
6 possession in the home.

7 In any event, maintaining public safety and preventing crime are clearly important (if not
8 paramount) government interests and the regulation of concealed firearms is a critical factor in
9 accomplishing that interest. (Zimring Declaration; Argument IV D below.) *See, e.g., Salerno*, 481 U.S.
10 at 750; *Schall v. Martin*, 467 U.S. 253, 264 (1984); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (“The
11 promotion of safety of persons and property is unquestionably at the core of the State’s police power
12”); *People v. Yarbrough*, 169 Cal. App. 4th 303, 312-314. (2008).

13 **D. The Sheriff’s Licensing Practices Survive Any Standard of Review.**

14 The governmental interest furthered by limiting the licensing of concealed carry of firearms is
15 both important and compelling. (Zimring Declaration.) The relevant Penal Code provisions are
16 narrowly tailored and substantially related to furthering public safety and reducing crime. Concealed
17 handguns are the priority of law enforcement everywhere because of the use of the concealed handgun
18 in vast numbers of criminal offenses. (Zimring Declaration.) Concealed carry of handguns allows for
19 stealth and surprise. Limiting the number of loaded and concealed firearms in public places helps to
20 keep the balance in favor of law enforcement and avoids the necessity for every place that is open to the
21 public – restaurants, malls, theaters, parks, etc.-- to be equipped with metal detectors, fencing and other
22 forms of security, in order to protect patrons from the fear of widespread and unchecked concealed
23 firearms.

24 Numerous courts have discussed the need for firearm regulation and the need for imposing
25 restrictions on their use:

26 [A]ccidents with loaded guns on public streets or the escalation of minor public
27 altercations into gun battles or, as the legislature pointed out, the danger of a police
28 officer stopping a car with a loaded weapon on the passenger seat. [T]hus, otherwise
“innocent” motivations may transform into culpable conduct because of the
accessibility of weapons as an outlet for subsequently kindled aggression. [T]he

underlying activity of possessing or transporting an accessible and loaded weapon is itself dangerous and undesirable, regardless of the intent of the bearer since it may lead to the endangerment of public safety. [A]ccess to a loaded weapon on a public street creates a volatile situation vulnerable to spontaneous lethal aggression in the event of road rage or any other disagreement or dispute. The prevention of the potential metamorphosis of such “innocent” behavior into criminal conduct is rationally related to the purpose of the statute, which is to enhance public safety. Because the legislature has a compelling interest in preventing the possession of guns in public under any such circumstances, the statute is reasonably related to the legislature’s purpose of “mak[ing] communities in this state safer and more secure for their inhabitants.”

People v. Marin, 795 N.E.2d 953, 958–59 (Ill. App. 2003)(citations omitted); *See also Marshall v. Walker*, 958 F.Supp. 359, 365 (N.D. Ill. 1997) (individuals should be able to walk in public “without apprehension of or danger from violence which develops from unauthorized carrying of firearms and the policy of the statute to conserve and maintain public peace on sidewalks and streets within the cities . . .”) (quoting *People v. West*, 422 N.E.2d 943, 945 (Ill.App. 1981)).

The concept of protection of the public peace is a fundamental competing right that appears consistently in all similar firearm regulation. “The possession and use of weapons inherently dangerous to human life constitutes a sufficient hazard to society to call for prohibition unless there appears appropriate justification created by special circumstances.” *People v. Price*, 873 N.E.2d 453, 460 (Ill. App. 2007) (quoting 720 ILL. COMP. STAT. ANN. 5/24, Committee Comments—1961, at 7 (2003); *People v. Smythe*, 817 N.E.2d 1100, 1103–1104 (2004) (“this statute was designed to prevent the situation where one has a loaded weapon that is immediately accessible, and thus can use it at a moment’s notice and place other unsuspecting citizens in harm’s way.”)

In *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009)(now vacated for reconsideration), a Ninth Circuit panel rejected a Second Amendment *Heller* challenge to a county ordinance broader than the regulation at issue in this case. *Nordyke* upheld an ordinance banning all possession of weapons or ammunition on county property because county property includes many “gathering places where high numbers of people might congregate” and, like government building and schools, “possessing firearms in such places risks harm to great numbers of defenseless people (e.g., children).” *Id.* at 460, 459. The ordinance upheld in *Nordyke* did “not meaningfully impede the ability of individuals to defend themselves in their homes with usable firearms, the core of the right as *Heller* analyzed it.” *Id.* at 460.

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V

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VI

EQUAL PROTECTION

Plaintiff's second claim asserts a violation of equal protection by application of the "residency" and "good cause" requirements. Under the Equal Protection Clause of the Fourteenth Amendment, no state shall "deny to any person within its jurisdiction the equal protection of the laws." The Equal Protection Clause "is essentially a directive that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). When a government's action does not involve a suspect classification or implicate a fundamental right, even intentional discrimination will survive constitutional scrutiny for an equal protection violation as long as it bears a rational relation to a legitimate state interest. *New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976); *Cleburne*, 473 U.S. at 439; *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990).

Plaintiff argues three theories for an equal protection violation. First, Plaintiffs assert that Plaintiff Peruta was treated differently than similarly situated residents of San Diego County because he resides in San Diego only part of the year. (FAC ¶ 116.) Second, Plaintiff alleges that Sheriff Gore discriminates against responsible, law-abiding citizens who cannot provide evidence documenting a specific threat proving their "need" to exercise the right to bear Arms. (FAC ¶ 118; Pl. MSJ at 18-20.) Third, Plaintiff contends that Sheriff Gore made an impermissible classification and gave preferential treatment to applicants who were "politically-connected, wealthy, contributors of the Sheriff's campaign," or members of the Honorary Deputy Sheriff's Association. (FAC ¶ 117; Pl. MSJ at 20-22.) All three of Plaintiffs allegations fail to demonstrate a violation of the Equal Protection Clause.

A. The Sheriff Does Not Discriminate in Application of the Statutory Residency Requirement.

Peruta is the only Plaintiff who alleges he was denied equal protection of the law because he is not considered a "resident" under California Penal Code 12050 as applied by the Sheriff's Department. (FAC ¶ 117.) However, Plaintiff's allegations are simply not true as his application was not denied on "residency" grounds; therefore, he was not "treated differently" than similarly situated San Diego County "residents." (Pelowitz Decl. ¶ 17.)

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1 In the context of CCW licenses, “resident” is generally defined by the County to be “any person
2 who maintains a permanent residence or spends more than six months of a taxable year within the
3 County if the applicant claims dual residency.” (Pelowitz Decl. ¶ 8.) Part-time residents who spend
4 less than six months in the County, such as Peruta, are considered on a case-by-case basis. *Id.* As such,
5 CCW licenses have been issued in these circumstances. *Id.* Peruta claims that his application was
6 denied based upon residency when in fact, as Plaintiff’s Declaration and letter of denial by the Sheriff’s
7 Department explicitly states, it was denied because “the reasons and documentation [Plaintiff has]
8 provided do not substantiate that *good cause* exists.” (Peruta Decl. ¶ 10; Pelowitz Decl. ¶ 17; Plaintiffs’
9 Ex. G.) If it were not for Peruta’s lack of “good cause,” he would have been approved for a CCW
10 license. *Id.* Residency was not a factor in his denial. *Id.* Thus, Plaintiff’s allegation is facially false as
11 he was not treated differently from similarly situated residents of San Diego County.

12 Even if Peruta’s application was denied based upon “residency” and the County did not review
13 “temporary residencies” on a case-by-case basis, application of the provision would not violate the
14 Equal Protection Clause. Statutory provisions restricting licenses to nonresidents have consistently been
15 held constitutional by state and federal courts against challenges that they violated equal protection.
16 *See, e.g., Application of Ware*, 474 A.2d 131 (Del. 1984); *Bach v. Pataki*, 546 U.S. 1174 (2006) (New
17 York’s interest in monitoring gun licensees was substantial and New York’s restriction of licenses to
18 residents and persons working primarily within the state was sufficiently related to that interest and did
19 not violate the Equal Protection Clause.) In *Application of Ware*, the Supreme Court of Delaware found
20 the residency requirement of Delaware’s CCW laws to be constitutional as the State’s purpose of
21 protecting the public from the danger caused by the unrestricted flow of dangerous weapons into and
22 through Delaware was a “compelling state interest.” *Application of Ware*, 474 A.2d at 132.
23 California Penal Code section 12050’s residency requirement is no different than other states’
24 restriction. If anything, section 12050 is broader since it considers “temporary residents” on a case-by-
25 case basis. Limiting CCW licenses to “residents” of the County, as defined by the Sheriff’s Department,
26 is necessarily related to the compelling interest of protecting the public from the unrestricted flow of
27 dangerous weapons and allows the County to more readily monitor gun licensees.

28 ///

1 In sum, Peruta was not treated different than similarly situated residents as he was denied a CCW
2 license for lack of “good cause” and not his “residency.” Even if Plaintiff was “treated differently”
3 based upon “residency,” the restriction would be held constitutional and, accordingly, the policy would
4 not violate the Equal Protection Clause.

5 **B. The Sheriff Does Not Provide Preferential Treatment.**

6 Plaintiffs also contend that Sheriff Gore made an impermissible classification between applicants
7 who were “politically-connected, wealthy, contributors of the Sheriff’s campaign,” or members of the
8 Honorary Deputy Sheriff’s Association (HDSA), and those who were not. (FAC ¶ 117; Pl. MSJ at 20-
9 22.) A concealed weapons licensing program that is administered arbitrarily so as to unjustly
10 discriminate between similarly situated people may deny equal protection. *March v. Ruff*, 2001 WL
11 1112110 (N.D.Cal. 2001), citing *Guillory v. County of Orange*, 731 F.2d 1379, 1383 (9th Cir. 1984). To
12 sustain their burden at summary judgment, plaintiffs must show actual evidence that would allow a
13 reasonable jury to conclude first, that others similarly situated generally have not been treated in a like
14 manner; and second, that the denials of concealed weapons licenses to them were based on
15 impermissible grounds. See *Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1349 (9th Cir. 1983)
16 (applying this test to a claim of “selective prosecution” in zoning-decision context).

17 Sheriff Gore does not offer special treatment to anyone and membership in the Honorary Deputy
18 Sheriff’s Association has no bearing on the ability to obtain a CCW license. Plaintiffs’ evidence
19 presented in their motion as to HDSA member renewal applications is erroneous and misleading.
20 Supporting documentation has been provided in nearly all cases by these applicants. (Pl. Exh. “W”-
21 “PP;” Cleary Decl.; Pelowitz Decl. ¶ 22; Defendant’s Exhibits 2-15.) There is no special treatment
22 whatsoever. The one applicant that is identified as a “public figure” is Peter Q. Davis, a prominent San
23 Diegan who recently ran for mayor. He did not need to document that status. Plaintiffs’ final claim in
24 their Separate Statement that “not one single HDSA member . . . has been denied, while 18 non-
25 members have been denied” is not supported whatsoever by the evidence referenced (Exhibit WW)
26 which is simply a list of all denials since 2006. Plaintiffs have not presented evidence sufficient for a
27 reasonable jury to draw inferences on their behalf on these points. Plaintiffs’ supporting documentation
28 is even less than that presented in *March* which was declared to be incomplete and did “not establish

1 that those who received licenses were in fact similarly situated to plaintiffs.” *March*, 2001 WL 1112110
2 at *5. Plaintiffs’ produce no evidence that politically-connected, wealthy, contributors to the Sheriff’s
3 campaign have obtained licenses and in fact, that is not the case. (Pelowitz Decl. ¶ 22.)

4 In fact, Plaintiffs have only presented renewal applications. Of the five Plaintiffs, only one,
5 Cleary, is claiming to be denied a renewal, yet it was granted after appeal. Under California law, as
6 applied by the Sheriff’s Department, renewal applications go through less scrutiny than the initial
7 application process because they have already met the statutory requirements. Absent any negative law
8 enforcement contacts, crime cases, arrests and changes from the initial application as to the reasons,
9 renewal applications are generally issued on the spot. (Pelowitz Decl. ¶ 12.) Review by a supervisor or
10 manager is not needed for the renewal process unless there has been a change to the reason. *Id.* And,
11 while documentation to support the applicant’s continued need must still be provided, it is not held to
12 the same scrutiny of the initial application process. *Id.* Plaintiffs Peruta and Buncher claim a disparity
13 in treatment based upon their initial applications. Plaintiffs Dodd and Laxson state that they did not
14 even apply for a license for potential lack of “good cause.” Plaintiffs do not present any evidence to
15 prove these select applicants by HDSA members were more favorably treated during their initial
16 application. In addition, Sheriff Gore was elected in 2009. Each of the renewal applications Plaintiffs
17 present were originally approved by a different administration. Therefore, Plaintiffs Peruta, Buncher,
18 Dodd and Laxson who are claiming disparate treatment based solely on their initial application are not
19 similarly situated.

20 Plaintiff Cleary is the only plaintiff who apparently claims to have had his renewal application
21 denied because he was no longer a part of the HDSA. (Cleary Decl.) However, Plaintiff Cleary cannot
22 be classified as “similarly situated, treated differently” because he was in fact issued a CCW permit after
23 appeal. During his initial application, Cleary was awarded his license after an appeal with then
24 Undersheriff Gore. Then, Plaintiff Cleary’s renewal application was approved after his appeal, when he
25 was no longer a member of the HDSA. (Cleary Decl. ¶ 18-19.) Therefore, Plaintiff Cleary cannot prove
26 he was treated differently as an HDSA member.

27 Plaintiffs infer a connection of preferential treatment to HDSA members due to notations on the
28 applications provided. At no time, whether in the initial or renewal process, does the Sheriff’s

1 Department consider HDSA membership. (Pelowitz Decl. ¶ 11.) While many HDSA members provide
2 such information in their application, it is never required, insisted upon or considered by the Sheriff's
3 Department. *Id.* Line staff are merely trained to note everything that is said by the applicant during the
4 interview process. (Pelowitz Decl ¶¶ 11, 22.) Even with these select applications, plaintiffs have not
5 introduced facts sufficient for a reasonable juror to conclude that the Sheriff's Department's concealed
6 weapons license program has injured them in its purported discrimination among multiple "classes" of
7 similarly-situated individuals. In *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1186 (9th Cir. 1995), the
8 Ninth Circuit held that plaintiff's denial for a dance permit at her bar was, as applied to her, authorized
9 under the city ordinance. The Court held that the "selective enforcement of valid laws, without more,
10 does not make the defendants' actions irrational." *Id.* at 1188.

11 Similarly, Plaintiffs are attacking what they believe to be unequal application of a policy, even
12 though, when their applications are viewed in isolation, the policy was acceptably applied as to them.
13 However "without evidence of anything more than vagaries in its administration, their equal protection
14 claim cannot survive summary judgment." *March*, 2001 WL 1112110 at *5, referring to *Accord, Falls*
15 *v. Town of Dyer, Indiana*, 875 F.2d 146, 149 (7th Cir. 1989). The Ninth Circuit has found this to be
16 "especially true in light of the 'extremely broad discretion' that the California Penal Code awards
17 sheriffs and police departments in issuing concealed weapons license." *March*, 2001 WL 1112110 at
18 *5, citing *Gifford v. City of Los Angeles*, 88 Cal. App. 4th 801, 805 (2001). Thus, while Plaintiffs
19 without evidentiary support claim that all CCW applications by HDSA members were approved and 18
20 non-members were denied along with an unknown number of others who decided not to apply, Plaintiffs
21 offer no evidence as to why the HDSA member applications were approved and the 18 applications were
22 denied. Plaintiffs do not even take into account that hundreds of other non-member applications were
23 approved. Plaintiffs fail to show a causal connection and have proven nothing more than "vagaries" in
24 the Sheriff's Department's administration of section 12050.

25 Lastly, Plaintiffs provide no evidence of preferred treatment to "politically-connected, wealthy,
26 contributors of the Sheriff's campaign." As a result, Plaintiffs claim of being denied equal protection of
27 the law against "politically-connected, wealthy, contributors of the Sheriff's campaign" or HDSA
28 members has no merit.

C. The Sheriff's Department Does Not Deny Equal Protection of the Law by Requiring Evidence of "Good Cause"

Plaintiffs allege that Sheriff Gore discriminates against responsible, law-abiding citizens who cannot provide evidence documenting a specific threat proving their "need" to exercise the right to bear Arms. (FAC ¶118; Pl. MSJ at 18-20.) To identify the proper classification, both groups must be comprised of similarly situated persons so that the factor motivating the alleged discrimination can be identified. *Thornton v. City of Helens*, 425 F.3d 1158, 1166 (9th Cir. 2005). "The goal of identifying a similarly situated class . . . is to isolate the factor allegedly subject to impermissible discrimination." *United States v. Aguilar*, 883 F.2d 662, 706 (9th Cir. 1989); *See also Freeman*, 68 F.3d at 1187.

In the present case, Plaintiffs' allegation of the class of similarly situated individuals would have been properly defined as all persons who applied to the Sheriff's Department for a concealed weapons permit, regardless of whether they were approved or denied. As it stands now, Plaintiffs attempt to identify the class by implying that all who submitted evidence were in a different class from Plaintiffs, and then claims that they were all approved. As the Ninth Circuit noted, however, "[a]n equal protection claim will not lie by 'conflating all persons not injured into a preferred class receiving better treatment' than the plaintiff." *Thornton*, 425 F.3d at 1166 (quoting *Joyce v. Mavromatis*, 783 F.2d 56, 57 (6th Cir. 1986)). Plaintiffs fail to provide any evidence to make such an inference. Similarly, Plaintiffs offer no 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.

Even if Plaintiffs are seen as similarly situated and treated differently, requiring documentation proving a need for self-defense would not violate the Equal Protection Clause under any form of scrutiny. Regardless of the level of constitutional scrutiny, Plaintiffs' as-applied challenge fails. The governmental interest furthered by Penal Code sections 12025, 12031 and the permit process set forth in 12050 as administered by Defendant -- the safety of the public from unknown persons carrying concealed, loaded firearms -- is both important and compelling. (Zimring Declaration.) In addition, the Penal Code provisions are both narrowly tailored and substantially related to furthering public safety. (See generally Argument IV above.)

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1 **I. Compelling Interest.**

2 The Court has deemed the interest behind almost every gun-control regulation - advancing safety
 3 and the lives of its citizens as well as “the government’s general interest in preventing crime,” - to be
 4 “compelling.” *Heller*, 128 S. Ct. at 2851 (Breyer, J., dissenting); *See U.S. v. Salerno*, 481 U.S. at 750,
 5 754 (1987). Specifically, the purpose of concealed-weapon statutes is “that of protecting *the public* by
 6 preventing an individual from having on hand a weapon of which the public is unaware, and which
 7 might be used by that individual in a *fit of passion*.” *Dano v. Collins*, 166 Ariz. 322 (Ct. App. Div. I
 8 1990); *See State v. Reid*, 1 Ala. 612, 616 (1840) (“the question recurs, does the act, ‘to suppress the evil
 9 practice of carrying weapons secretly,’ trench upon the constitutional rights of the citizen? We think
 10 not.”); *Nunn v. State*, 1 Ga. 243 (1846); *Andrews v. State*, 50 Tenn. 165 (1871); *State v. Smith*, 11 La.
 11 Ann 633 (1856). Many scholars have declared that “[t]he requirement of a compelling government
 12 interest – is likely to be found to be satisfied in nearly every case because the interest in public safety (or
 13 some variant of that goal, such as “preventing violence” or “reducing crime”) is so obviously important.
 14 *Winkler*, 105 Mich. L. Rev. at 727.

15 Use of concealed weapons in streets and public places pose a greater threat to public safety. (*See*
 16 *generally* Zimring Declaration.) (the problem of gun robbery in American cities is almost exclusively a
 17 problem of concealable handguns). The Sheriff’s Department’s central reason to require a good reason
 18 for needing a gun is to reduce the number of secretly armed citizens on the streets and sidewalks of one
 19 of the biggest urban areas in the United States. *Id.* As previously noted, limiting the number of loaded
 20 and concealed firearms in public places helps to keep the balance in favor of law enforcement and
 21 avoids the necessity for every place open to the public – restaurants, malls, theaters, parks, etc.-- to be
 22 equipped with metal detectors, fencing and other forms of security, in order to protect patrons from the
 23 fear of widespread and unchecked concealed firearms.

24 The Sheriff’s Department’s purpose in requiring proof of “need” for a CCW license is no less
 25 compelling as that which has been held constitutional throughout our nation’s history – protecting *the*
 26 *public* from “the evil practice of carrying weapons secretly” and “preventing harm to person other than
 27 the offender.” *Reid*, 1 Ala. at 616; *Hale*, 43 Cal. App. 3d at 356. Moreover, the Sheriff’s practices in
 28 limiting CCW licenses to those with specific and documented needs is consistent with the compelling

1 and significant legislative goals underlying sections 12025 and 12031, i.e. the protection of the general
2 public from widespread and unchecked public carry of concealed and loaded firearms. Thus, “the
3 legislature has a compelling interest in preventing the possession of guns in public under any such
4 circumstances.” *Marin*, 795 N.E.2d at 958–59.

5 **2. Necessarily Related.**

6 California law has consistently found concealed weapons restrictions to be necessarily related to
7 this compelling government interest of advancing public safety. In *Hodges*, the Court stated that “[a]
8 person who carries a concealed firearm on his person . . . ‘which permits him immediate access to the
9 firearm but impedes others from detecting its presence, poses an ‘imminent threat to public safety’”
10 *Hodges*, 70 Cal. App. 4th at 1357. California courts have found that “the habit of carrying concealed
11 weapons was one of the most fruitful sources of crime” *Ex part Luening*, 3 Cal. App. 76 (1906). Thus,
12 limiting CCW licenses to only those with verifiable good reason reduces “one of the most fruitful
13 sources of crime” in society.

14 Handguns are common concealed weapons for similar reasons the Court explains in *Heller* for
15 self-defense in the home – they are small and easy to hide under clothing, easy to use, cannot easily be
16 wrestled away in self-defense, and pose a significant threat. *Heller*, 128 S. Ct. at 2818. They are used in
17 more than 75% of all killings and in even larger portions of robberies. (Zimring Decl. ¶ 3.) A concealed
18 handgun is the dominant weapon of choice for gun criminals and a special danger to government efforts
19 to keep public spaces safe and secure. (Zimring Decl. ¶¶ 6-7.) By requiring evidence, the government
20 is able to limit the amount of concealed weapons in public to only actual anticipated needs. It also acts
21 as a backup to those who seek a CCW license for criminal purposes but do not yet have a criminal
22 record. As the Court stated in *Miller*, “[s]uch legislation cannot be narrowly tailored to reach only the
23 bad people who kill with their innocent guns. . . To expect such legislation to reflect a tight fit between
24 ends and means is unrealistic.” *Miller*, 604 F.Supp.2d at 1172 n.13 (quotation marks and citations
25 omitted); *See generally* Zimring Declaration.

26 In addition, requiring applicants to prove his or her need for self-protection prevents the carrying
27 of “arms for any sort of confrontation.” *Heller*, 128 S. Ct. at 2799 (“the Court does not read the Second
28 Amendment to protect the right of citizens to carry arms for any sort of confrontation.”). In *Heller*, the

1 Court noted that “from Blackstone through the 19th-century cases, commentators and courts routinely
2 explained that the right was not a right to keep and carry any weapon whatsoever in any manner
3 whatsoever and for whatever purpose.” *Id.* at 2816. In order to protect its citizens, the Sheriff’s
4 Department must ensure that weapons are not used for whatever purpose. As supported by *Heller*,
5 requiring evidence of a specific threat, the Sheriff’s Department meets the scope of the Second
6 Amendment without infringing upon the “core” of this right.

7 Therefore, requiring applicants to prove their need for a CCW license limits the number of
8 concealed guns on the street for “whatever purpose.” By reducing the number of concealed firearms in
9 public, the government is able to advance its compelling interest of protecting the lives of its citizens
10 and, in doing so, the government is meeting its interest using narrowly tailored means.

11 **3. Narrowly Tailored.**

12 “There is no constitutional right to bear concealed weapons.” *Klein v. Leis*, 99 Ohio St. 3d 537
13 (2003). Many courts have allowed complete bans on concealed weapons, inasmuch as it did not deprive
14 a citizen of the natural right of self-defense, i.e. additional gun laws enacted. *Nunn*, 1 Ga. 243; *Andrews*,
15 50 Tenn. 165; *Reid*, 1 Ala. 612. As a result, Plaintiffs argument that requiring evidence to show good
16 cause is a violation of equal protection must be read in unison with all of California’s gun regulation
17 laws as a concealed, loaded weapon is not the only means to which someone can defend him or herself.
18 In *Flores*, the Court held that Cal. Pen Code “section 12031 *is narrowly tailored* to reduce the incidence
19 of unlawful public shootings, while at the same time respecting the need for persons to have access to
20 firearms for lawful purposes, including self-defense. *Flores*, 169 Cal. App. 4th at 576-577 (italics
21 added).

22 Moreover, Plaintiffs’ claim that “limiting the amount of CCWs issued in an attempt to affect
23 public safety would be to engage in the type of interest-balancing test *Heller* expressly rejected.” Pl.
24 MSJ at 19. However, requiring evidence to strategically limit the amount of concealed weapons in
25 public does just the opposite. If the Sheriff’s Department allowed anyone to claim self-defense as his or
26 her good reason, the Sheriff would be left to interest-balancing with little to guide his decision. Now, if
27 one cannot prove their need for self-protection, there is no interest balanced – the application is denied

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1 for lack of good cause. If one does provide evidence, it is not interests that are balanced but rather facts
2 as to the truth of the matter asserted by the applicant.

3 Furthermore, the Sheriff's Department requests nothing more than is required by the judicial
4 system for other avenues of protection, i.e. restraining orders. In protecting the lives of its citizens and
5 law enforcement officers, this is a small burden to place upon applicants.

6 Accordingly, requiring evidence of "good cause" to carry a concealed weapon in public under
7 the Second Amendment does not infringe on the Second Amendment "core right" that has been held to
8 be fundamental by the Supreme Court.

9 In conclusion, Plaintiffs fail to assert an Equal Protection violation. Plaintiff Peruta's application
10 was denied for good cause and, therefore, was not treated differently based upon his residency.
11 Plaintiffs fail to establish a proper control group as well as a causal connection between "politically-
12 connected, wealthy, contributors of the Sheriff's campaign" or HDSA members and the issuance of
13 CCW licenses and their claims fail factually. Plaintiffs allegations of discrimination based upon the
14 ability to prove "good cause" also fail to show that they are similarly situated and treated differently or
15 that their core right under the Second Amendment is denied because of this standard.

16 VII

17 THE RIGHT TO TRAVEL AND 18 PRIVILEGES AND IMMUNITIES CLAIMS

19 Plaintiffs allege that the residency policy of the Defendant violates the constitutional "right to
20 travel" and the Privileges and Immunities Clause. These claims are identical. Plaintiffs generally, and
21 Peruta specifically, allege that they are being penalized because the Sheriff requires more than part-time
22 residency in order to obtain a permit. Plaintiffs' allegations are not true. Part-time residency is
23 sufficient to obtain a permit under the Sheriff's policy and practice. (Pelowitz Decl, ¶ 8.) Peruta was
24 not denied a permit because of his part-time residency status; it was solely because he failed to
25 document good cause. (Pelowitz Decl, ¶ 17; Plaintiffs' Exhibit G.) There is no other allegation relating
26 to this claim; therefore it fails factually at the outset.

27 In any event, the residency requirement of Penal Code section 12050 would be constitutional
28 even if it was interpreted more strictly than the approach adopted by Defendant. A state law implicates

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1 the right to travel in three situations—when it actually deters travel, when impeding travel is its primary
2 objective, or when it uses a classification that penalizes the exercise of the right. *Attorney General of*
3 *N.Y. v. Soto-Lopez*, 476 U.S. 898, 903 (1986). California’s restrictions on carrying concealed weapons
4 do none of those. “[S]omething more than a negligible or minimal impact on the right to travel is
5 required” *Kansas v. United States*, 16 F.3d 436, 442 (D.C Cir. 1994).

6 The right to travel is usually considered to be one of the rights guaranteed by the Privileges and
7 Immunities Clause of Article IV and the Privileges and Immunities Clause of the Fourteenth
8 Amendment. *See, Soto-Lopez*, 476 U.S. at 902 (citations omitted). But only those activities
9 “sufficiently basic to the livelihood of the Nation” are encompassed in the right. *Supreme Court of*
10 *Virginia v. Friedman*, 487 U.S. 59, 64 (1988) (quoting *Baldwin v. Montana Fish & Game Comm’n*, 436
11 U.S. 371, 388 (1978)). *Cf. Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 221 (1974) (right to
12 travel “must be seen as insuring new residents the same right to vital government benefits and privileges
13 in the States to which they migrate as are enjoyed by other residents.”).

14 A law will survive a “right to travel” challenge if it has a “substantial” interest that is “closely”
15 related to the means employed to differentiate between residents and non-residents. *Bach v. Pataki*, 408
16 F.3d 75, 88 n.27 (2nd Cir. 2005). But non-residents are not guaranteed all the rights enjoyed by *bona*
17 *fide* residents. *Toomer v. Witsell*, 334 U.S. 385, 396 (1948). “A bona fide residence requirement,
18 appropriately defined and uniformly applied, furthers the substantial state interest in assuring that
19 services provided for its residents are enjoyed only by residents. Such a requirement . . . [generally]
20 does not burden or penalize the constitutional right of interstate travel, for any person is free to move to
21 a State and to establish residence there.” *Id.* quoting *Martinez v. Bynum*, 461 U.S. 321, 328–29 (1983).
22 Here, the State’s requirement that only residents are permitted to obtain concealed weapons permits
23 easily fits this test as a *bona fide* residence requirement.

24 In *Bach*, a resident of Virginia who possessed a concealed-weapon permit from that state alleged
25 that New York’s refusal to recognize such permits violated his right to travel. *Bach v. Pataki*, 289
26 F.Supp.2d 217, 222 (N.D.N.Y. 2003), *affirmed*, 408 F.3d 75 (2nd Cir. 2005), *cert. denied*, 546 U.S.
27 1174 (2006). The trial court rejected that claim, finding that “New York’s permit scheme bears a close
28 relationship to substantial and valid reasons for the disparate treatment of nonresident travelers, beyond

1 the mere fact that they are citizens of other states. . . . Thus, the proper processing of permit applications
2 is ‘vitally essential to public order and safety.’” *Bach*, 289 F.Supp.2d at 227 (quoting *Federation of N.Y.*
3 *State Rifle & Pistol Clubs, Inc. v. McGuire*, 420 N.Y.S.2d 602, 603 (1979) (additional citations
4 omitted)). New York’s permit statute mirrors California’s in significant regards.

5 The court in *Bach* agreed with the defendants that

6 [t]he practical implications of requiring New York to accept applications from all
7 nonresidents are apparent. First, the strain on investigatory resources would be
8 significantly increased. More importantly, however, the ability to obtain, and verify,
information would be negatively impacted were New York officials required to make
inquiries in other states.

9 [T]he administrative problems in investigating, monitoring, enforcing and
10 revoking permits where the applicant does not have residency, employment or
business ties with New York and the resultant likelihood of errors, would be inimical
11 to New York’s scheme of licensing firearms as a means of controlling their possession
for the public good. Accordingly, as the state defendants contend, New York acted
12 reasonably in denying the privilege to those with relatively remote contacts to New
York. Likewise, allowing nonresidents with licenses from other states to carry
13 weapons in New York without complying with New York requirements has the
potential to present administrative problems and interfere with the achievement of
New York’s licensing goals.

14
15 *Bach*, 289 F.Supp. 2d at 227–28.

16 The Second Circuit affirmed, holding that “New York’s interest in monitoring gun licensees is
17 substantial and that New York’s restriction of licenses to residents and persons working primarily within
18 the State is sufficiently related to this interest” *Bach*, 408 F.3d at 87.

19 The State can only monitor those activities that actually take place in New York.
20 Thus, New York can best monitor the behavior of those licensees who spend
significant amounts of time in the State. By limiting applications to residents and in-
21 state workers, New York captures this pool of persons. It would be much more
difficult for New York to monitor the behavior of mere visitors like *Bach*, whose lives
22 are spent elsewhere.

23 *Id.* at 92.16

24 Here, California’s interests are the same. The state’s interest in monitoring gun licensees has a
25 substantial public-safety justification amply supporting the differential treatment of nonresidents.
26 Consequently, each Plaintiff’s right to travel is not infringed. *See also Torraco v. Port Authority of N.Y.*
27 *& N.J.*, 539 F.Supp.2d 632, 652 (E.D.N.Y. 2008) (refusal to allow the transport of a firearm is not
28 sufficiently material to infringe upon the right to travel. It does not rise to the level of receiving medical

1 care, or subsistence benefits, or earning a living.); *Pencak v. Concealed Weapon Licensing Bd. of*
 2 *County of St. Clair*, 872 F.Supp. 410, 414 (E.D. Mich. 1994) (“Plaintiff has cited no authority for the
 3 proposition that denial of a concealed weapon permit deters migration, penalizes the right to travel, or
 4 that a concealed weapons permit is a ‘vital government benefit and privilege.’”).

5 Notwithstanding this conclusion, federal law provides protections for individuals who wish to
 6 transport their lawful firearms. Congress enacted the Firearms Owners’ Protection Act, Pub. L. 99-360,
 7 § 1(a), 100 Stat. 766 (July 8, 1986), *codified at* 18 U.S.C. § 926A (“FOPA”), to allow what the plaintiffs
 8 here assert, at least implicitly, the right to do, i.e., to transport their weapons from place to place without
 9 restriction by intervening jurisdictions.

10 Other gun owners have tried, unsuccessfully, to invoke FOPA in claiming that a jurisdiction’s
 11 gun restrictions violate their “right to travel.” *See, e.g., Torracco*, 539 F.Supp.2d at 652; *In re Two Seized*
 12 *Firearms*, 602 A.2d 728, 731 (N.J. 1992) (“Although enacted to assure to gun owners freedom to travel
 13 from state to state with weapons legally possessed in the state of residence, the statute qualifies that
 14 freedom with the sensible accommodation of each state’s right to ensure the safety, health, and welfare
 15 of its own citizens.”). Compliance with FOPA gives plaintiffs all the protections they are entitled to in
 16 travels to and through California and the County of San Diego.

17 VIII

18 DUE PROCESS

19 A. There is No Liberty or Property Interest.

20 Plaintiffs allege a violation of procedural due process under the Fourteenth Amendment in their
 21 Seventh Claim for Relief. The threshold requirement for a due process claim is the existence of a liberty
 22 or property interest. *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). In the absence of any
 23 enforceable contractual right, there is no recognizable property right under the due process clause. “He
 24 must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of
 25 entitlement to it.” *Id.* at 577. The concealed weapons permit statute does not create a contract, nor can
 26 Plaintiffs claim an entitlement to a permit. “Section 12050 explicitly grants discretion to the issuing
 27 officer to issue or not issue a license to applicants meeting the minimum statutory requirements. Where
 28 state law gives the issuing authority broad discretion to grant or deny license applications in a closely

1 regulated field, initial applicants do not have a property right in such licenses protected by the
 2 Fourteenth Amendment.” *Erdelyi v. O’Brien*, 680 F.2d 61, 63 (9th Cir. 1982); *See also, Guillory v.*
 3 *Orange County*, 731 F.2d 1379, 1382-1383 (9th Cir. 1984).

4 Plaintiffs allege in general terms that they “have a right to access and review Defendants’ CCW
 5 policies, to obtain applications to apply for a CCW, to submit applications, and to have those applications
 6 reviewed in a fair, impartial, and constitutional manner and obtain a CCW when they meet the
 7 constitutional and legal prerequisites or standards.” (FAC ¶ 140.) By those very allegations, Plaintiffs
 8 admit that no individual can claim an entitlement to a permit – certain statutory prerequisites must be
 9 met. There is no legally enforceable expectation in a concealed weapons permit and there is no
 10 entitlement created by Penal Code section 12050. Nor does one have a liberty interest in obtaining a
 11 concealed weapons license. *Erdelyi v. O’Brien*, 680 F.2d at 63-64; *Nichols v. County of Santa Clara*,
 12 223 Cal. App. 3d 1236 (1990).

13 **B. The Sheriff’s Permit Procedure Complies with Due Process.**

14 Even if Plaintiffs could somehow show a legitimate claim of entitlement to a concealed weapons
 15 permit, procedural due process is satisfied by the permit procedure. Applications are available on-line
 16 and at the Sheriff’s Department; the Licensing Division offers an initial information interview to assist
 17 applicants in the process; once an application is filed and documentation is received, an investigation is
 18 conducted to verify that the statutory requirements have been met; the applicant is notified in writing of
 19 the decision on the application; the decision is appealable to the Assistant Sheriff who conducts a
 20 hearing. (Pelowitz Decl, ¶ 11-14; Plaintiffs’ Exhibits H, I and J.) The Assistant Sheriff’s decision is
 21 the final administrative decision which is reviewable in Superior Court by writ of mandamus. *See, e.g.,*
 22 *Gifford v. City of Los Angeles*, 88 Cal. App. 4th 801 (2001); *Erdelyi v. O’Brien*, 680 F.2d 61, 64 fn. 2.

23 Due process is the opportunity to be heard at a meaningful time and in a meaningful manner.
 24 *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Unlike some legal rules, due process is not a technical
 25 conception with a fixed content unrelated to time, place and circumstance. Rather, it ““is flexible and
 26 calls for such procedural protections as the particular situation demands.”” *Id.* at 334 (internal citation
 27 omitted). “Determining whether a particular administrative procedure is constitutionally sufficient
 28 requires analysis of the governmental and private interests involved: (1) the private interest that will be

1 affected by the official action; (2) the risk of an erroneous deprivation of such interest through the
2 procedures used and any probable value of additional or substitute procedural safeguards; and (3) the
3 government's interest, including the function involved and the fiscal and administrative burdens that the
4 additional or substitute procedural requirement would entail.” *Id.* at 335.

5 Further, the court observed that “[t]he judicial model of an evidentiary hearing is neither a
6 required, nor even the most effective, method of decisionmaking in all circumstances.” *Mathews v.*
7 *Eldridge*, 424 U.S. at 348. All that is necessary to comport with due process “is that the procedures be
8 tailored, in light of the decision to be made, to ‘the capacities and circumstances of those who are to be
9 heard,’ . . . to insure that they are given a meaningful opportunity to present their case.” *Id.* at 349.

10 Here, the Sheriff’s procedures offer applicants the opportunity to present information regarding
11 their need for a concealed weapons permit, which is subject to investigation and verification,
12 supplemented by an appeal process and superior court writ review. Due process is satisfied by this
13 procedure.

14 IX

15 QUALIFIED IMMUNITY

16 Until January 21, 2009, the Supreme Court mandated a two-part analysis to determine whether
17 qualified immunity protects individual law enforcement officers from liability. *Saucier v. Katz*, 533
18 U.S. 194 (2001). The first part of the test was to determine whether the alleged facts showed that the
19 officer’s conduct violated a constitutional right. *Id.* at 201. Second, if a colorable claim for a
20 constitutional violation appeared from the alleged facts, the court determined whether the constitutional
21 right was clearly established in the particular context of the case. *Id.* at 201-202. [“The relevant,
22 dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a
23 reasonable officer that his conduct was unlawful in the situation he confronted”]. When an officer is
24 alleged to have acted unconstitutionally, it is next determined “whether it would be clear to a reasonable
25 officer that his conduct was unlawful in the specific situation he confronted.” *Saucier*, 533 U.S. at 202.
26 Summary judgment must be entered “if, under the governing law, there can be but one reasonable
27 conclusion as to the verdict.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 at 250-51 (1986). The

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1 Supreme Court then ruled that the first Saucier step may be omitted, focusing only on the second part of
2 the analysis. *Pearson v. Callahan*, 555 U.S. ___, 129 S.Ct. 808 (2009).

3 “‘Clearly established’ for purposes of qualified immunity means that ‘the contours of the right
4 must be sufficiently clear that a reasonable official would understand that what he is doing violates that
5 right.’” *Wilson v. Layne*, 526 U.S. 603, 614-615 (1999) (quoting *Anderson v. Creighton*, 483 U.S. 635,
6 640 (1987)). “This is not to say that an official action is protected by qualified immunity unless the very
7 action in question has previously been held unlawful, but it is to say that in the light of pre-existing law
8 the unlawfulness must be apparent.” *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Anderson*, 483
9 U.S. at 640) (internal quotation marks and citations omitted). The “salient question” is whether the state
10 of the law gave the deputies fair warning that their actions were unconstitutional. *See, Hope*, 536 U.S. at
11 741; *see also Devereaux v. Abbey*, 263 F.3d 1070, 1075 (9th Cir. 2001) (*en banc*) (“What is required is
12 that government officials have ‘fair and clear warning’ that their conduct is unlawful”) (Emphasis
13 added; citation omitted).

14 Given the Supreme Court precedent prior to *Heller* that there was no individual right to bear
15 arms under the Second Amendment, and given that courts nationwide and in this Circuit are in the midst
16 of identifying the scope of the right to bear arms after *Heller*, and since this case is the first of its kind on
17 the issue of concealed carry permits, Defendant Gore is entitled to immunity from suit. It cannot be said
18 that the state of Second Amendment law on concealed weapons permits or the law on residency
19 standards for issuing such permits gave the Sheriff fair warning that his actions were unconstitutional.

20 CONCLUSION

21 Based on the foregoing, Defendant’s motion for summary judgment should be granted and
22 Plaintiffs’ motion denied.

23 DATED: October 4, 2010

JOHN J. SANSONE, County Counsel

24 By: s/ James M. Chapin

25 JAMES M. CHAPIN, Senior Deputy
26 Attorneys for Defendant William D. Gore
27
28

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TAB 29

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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.

USSD No. **09-CV-2371 IEG (BLM)**

**DEFENDANT WILLIAM D. GORE'S
SEPARATE STATEMENT OF
UNDISPUTED MATERIAL FACTS
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

Date: November 1, 2010
Time: 10:30 a.m.
Courtroom: 1
Honorable Irma E. Gonzalez

Defendant submits this separate statement of undisputed material facts and supporting evidence in support of his motion for summary judgment.

Undisputed Facts

Supporting Evidence

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

1. Penal Code section 12050; Declaration of Blanca Pelowitz ("Pelowitz Decl") ¶¶ 1-2.

2. Penal Code section 12050; Pelowitz Decl. ¶ 6.

1 resident of the County they apply in,
2 demonstrate good cause and take a firearms
3 course.

4 3. Blanca Pelowitz has been the licensing
5 manager since 2002, has been delegated the
6 responsibility for CCW licensing by the
7 Sheriff and makes all determinations on
initial applications for CCW licenses

3. Pelowitz Decl. ¶¶ 1, 2, 4, 11.

8 4. The "residency" requirement is
9 generally defined by this County to be
10 any person who maintains a permanent
11 residence or spends more than six months
12 of the taxable year within the County if
13 the applicant claims dual residency. San
14 Diego County uses the term "resident" as
15 outlined in Penal Code section 12050(D),
16 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.

4. Pelowitz Decl. ¶ 8.

17 5. The "good cause" requirement is
18 defined by this County to be a set of
19 circumstances that distinguish the applicant
20 from the mainstream and causes him or her
21 to be placed in harm's way. Simply fearing
22 for one's personal safety alone without
documentation of a specific threat is not
considered good cause.

5. Pelowitz Decl. ¶ 7.

23 6. There is no special treatment for
24 members of the Honorary Deputy Sheriffs
25 Association or for Sheriff's campaign
donors

6. Pelowitz Decl. ¶ 22; see also
Defendant's exhibits 2-18.

26 7. In 2006, as a courtesy for applicants,
27 the Department initiated an interview
28 process to assist both applicants and line
staff in determining pre-eligibility.

7. Pelowitz Decl. ¶ 11.

1 During this phase applicants will discuss
2 reasons and situations with line staff and
3 staff is trained to make notes of all
4 comments made by the applicant during
5 the interview. Staff assists in determining
6 what documentation may be required of
7 the applicant. If the clerk is able to
8 determine that good cause is questionable,
9 clerks are able to give an educated guess
10 based on the scenarios described by
11 applicants. The next phase involves
12 applicants gathering their documentation,
13 attending the 8-hour firearms course and
14 returning to submit the written
15 application, fees, and documentation.
16 During this process applicants will be
17 fingerprinted, photographed, signatures
18 will be obtained and applicants are
19 instructed to go to Sheriff's Range for a
20 weapons safety checked and to complete
21 a final qualify-shoot. Once this phase is
22 complete, the file and all documents are
23 forwarded to the Background Unit for the
24 comprehensive background and
25 verification process. The investigator will
26 provide a recommendation and forward to
27 the Manager who will make the decision
28 to issue or deny and will include any
reasonable restrictions and/or instructions
to staff.

8. 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

8. Pelowitz Decl. ¶ 12.

1 managers is needed for the renewal
2 process unless there have been changes to
3 the reason. Applicants still need to
4 provide some form of documentation to
5 support his or her continued need but not
6 to the extent of the initial application.
7 Applicants sign under penalty of perjury
8 that all prior conditions exist.

9. There is an administrative
10 reconsideration process for CCW
11 applicants. When taking administrative
12 action to deny, suspend or revoke a CCW
13 license, an upper command concurrence
14 through the Law Enforcement Service
15 Bureau is required before taking action.
16 All actions require the Manager to
17 prepare a brief synopsis of the proposed
18 action and recommendation. Command
19 will either concur or request additional
20 information. If concurrence is provided,
21 the denial, suspension or revocation letter
22 is mailed out. The individual is given the
23 opportunity to request an appeal of the
24 decision by writing to the Assistant
25 Sheriff of the Law Enforcement Service
26 Bureau. The appeal is heard by the
27 Assistant Sheriff of the Bureau who will
28 make the determination to overturn or
uphold decision.

9. Pelowitz Decl. ¶ 14.

10. Edward Peruta was denied a license to
22 carry a concealed weapon because he failed
23 to provide any documentation establishing
24 good cause. Residency was not a factor in
25 his denial which was based solely on the
lack of good cause.

10, Pelowitz Decl. ¶ 17.

11. Michelle Laxson did not apply for a
26 CCW license. She was interviewed by staff
27 but declined to complete and application
28 and did not return .

11. Pelowitz Decl. ¶ 18.

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1 12. James Dodd has submitted an
2 application which is still pending at this
3 time.

12. Pelowitz Decl. ¶ 19.

4 13. Mark Cleary's renewal application was
5 denied based on lack of supporting
6 documentation relating to his employment
7 in March of 2010. Cleary requested a
8 reconsideration appeal and the decision to
9 deny the license was overturned by
10 Command after information about his
employment was confirmed. He was
issued a CCW license for a new term in
June of 2010.

13. Pelowitz Decl. ¶ 20; Plaintiffs' Exhibit
"F."

11 14. Leslie Buncher was a physician who
12 held a valid CCW license during the period
13 of 1971 to 2003. In 2008 Dr. Buncher
14 reapplied for a license. It was denied
15 because he was no longer a practicing
16 physician and the reasons he listed related
17 to his former medical practice. Dr.
Buncher declined to go through the
reconsideration appeal process.

14, Pelowitz Decl. ¶ 21.

19 DATED: October 4, 2010

JOHN J. SANSONE, County Counsel

20 By: s/ James M. Chapin
21 JAMES M. CHAPIN, Senior Deputy
22 Attorneys for Defendant William D. Gore
23
24
25
26
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28

TAB 30

Sep. 30. 2010 3:06PM

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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.

USSD No. 09-CV-2371 IEG (BLM)

**DECLARATION OF FRANKLIN E.
ZIMRING IN SUPPORT OF
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Hearing Date: November 1, 2010
Time: 10:30 a.m.
Courtroom: 1
Honorable Irma E. Gonzalez

I, Franklin E. Zimring, declare as follows:

1. My current academic appointment is William G. Simon Professor of Law, Wolfen Distinguished Scholar and Chair of the Criminal Justice Research Program at the University of California, Berkeley. I have been studying the relationship between firearms and violence, strategies of firearms control, and patterns of gun commerce and civilian gun usage since 1967. I have served as director of research of the task force on firearms of the National Commission on the Causes and Prevention of Violence in 1968-1969 and as a firearms and federal criminal law expert for the National Commission on Reform of Federal Criminal Laws. I have published several empirical

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1 studies of firearms and violence and on gun control, and I have co-authored three books
2 with firearms issues at their center, in 1969, 1986 and 1997. I have served as an expert
3 on the relationship between firearms and violence and on the design and evaluation of
4 firearms control. I was elected a Fellow of the American Academy of Criminology in
5 1993 and to the American Academy of Arts and Sciences in 1990. A full curriculum
6 vitae is Appendix A of this declaration.

7 2. This declaration will summarize the empirical evidence and my expert
8 opinions concerning four issues arising out of this litigation.

9 (1) The relationship between firearms and violence and the governmental
10 interest in reducing the rate of gun use in crime.

11 (2) The particular governmental concerns with handguns and other
12 concealable weapons because of their disproportionate involvement in life-
13 threatening crimes of violence, particularly in streets and other public places.

14 (3) The special threat posed by concealed handguns as weapons used by
15 criminals in streets and other public spaces. Persons using the streets cannot
16 avoid and police patrolling the streets cannot detect persons who carry concealed
17 handguns and later will find victims who are at risk when concealed guns are
18 displayed in robberies or assaults and not infrequently discharged. The
19 governmental interest in limiting the number of persons licensed to carry
20 weapons hidden on their persons in public places is substantially related to
21 reducing the volume and deadliness of street robberies and assaults.

22 (4) A robust right to own a handgun in the privacy of one's own home
23 imposes whatever risks the gun poses on the owner and his family and those who
24 choose to visit those premises as long as the gun stays home. But unlimited
25 freedom given to a person to carry a hidden handgun on the streets subjects
26 everybody else on the street to whatever risks that gun may pose, and the others
27 on the public fare have neither notice of the risk nor power to control it. This
28 "externality" of unrestricted street carrying of concealed weapons is probably the

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1 root cause of the longstanding and broadly based history of restricting use of
2 concealed weapons in public places.

3 3. Firearms and the Death Rate from Violence.

4 The overlap between firearms and crime in the United States is a partial but
5 important one. Of all so-called "index" crimes reported to the police nationwide, guns
6 are known to be involved in only about 4%. But gun use is concentrated in violent
7 crime, where about 20% of all offenses involve guns. And when only criminal acts that
8 kill are counted, guns account for almost 70% of all cases. Why are gun cases seven
9 out of every ten lethal crimes, if firearms are used in only one out of five violent
10 criminal acts? Commonsense suggests that the greater dangerousness of guns when
11 compared to other frequently used instruments of attack such as knives and blunt
12 instruments, plays a major role in increasing the death rate from crimes, but there is an
13 alternative hypothesis, that robbers and assaulters who truly want to kill will choose
14 guns more often, and therefore that the greater death rate simply reflects the more lethal
15 intentions of those who use guns. Which theory is better supported by studying patterns
16 of violent assault?

17 A series of studies that were conducted under my supervision addressed this issue
18 from 1967 to 1988. The first study compared knife and gun attacks in Chicago over
19 four police periods in 1967. I found that when one only compared gun and knife
20 assaults to the same part of the body and controlled for the number of wounds inflicted,
21 the gun attacks were five times as likely to kill.¹ Yet knives were the second most
22 deadly instruments used in violent assault. A second study found that guns that fired
23 smaller bullets were much less likely to kill than guns firing larger bullets, again
24 controlling for both the number of and the location of the most life-threatening wound.
25 The central finding was that instrumentality effects – the influences of weapon

26 ///

27
28 ¹ Zimring, Franklin E. "Is Gun Control Likely to Reduce Violent Killings?"
University of Chicago Law Review 35:721 (1968).

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1 dangerousness independent of measurable variations in the attacker's intent was an
2 important influence in the death rate from assault.²

3 A second set of studies generated the same general results for the weapons used
4 in robberies. Since the robber usually doesn't mean to inflict harm if his demands are
5 met, the death rate from all forms of robbery is much lower than from aggravated
6 assault, but robberies with firearms are much more likely to produce a victim's death
7 than robberies using knives or personal force.³ The availability of guns may or may not
8 influence the rate of robberies, but the proportion of robberies that involve guns will
9 have a major impact on the number of victims who die in robberies, and lethal robberies
10 are a major element in the life-threatening violence that sets U.S. cities apart from the
11 major metropolitan areas of other developed nations.

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

17 4. The Special Risks of Handguns.

18 All forms of firearms are very dangerous to life if they are used in assaults and
19 robberies, but the handgun is the major hazard, particularly in big cities, because
20 handguns are much more likely to be used in criminal violence than shotguns and rifles.
21 Handguns are slightly more than one-third of all firearms owned by civilians in the
22 United States, but they are used in more than 75% of all gun killings and in even larger

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24 ///

26 ² Zimring, Franklin E. "The Medium is the Message: Firearms Caliber as a
27 Determinant of the Death Rate from Assault," *Journal of Legal Studies* 1:97 (1972). See
Philip J. Cook, "The Technology of Personal Violence," *Crime and Justice* 14:1 (1991).

28 ³ Zimring, Franklin E. and James Zuehl. "Victim Injury and Death in Urban
Robbery: A Chicago Study," *Journal of Legal Studies* 15:1 (1986).

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1 portions of robberies. The handgun is small, easy to carry and conceal, and deadly at
2 short range. Handguns are the priority concern of law enforcement everywhere.⁴

3 The special dangers of handgun use in violence have produced a wide variety of
4 different legal strategies to minimize the rate of handgun misuse. Many nations attempt
5 to restrict both the number of such firearms owned by citizens and reasons why citizens
6 might be permitted to own them. But California, like most U.S. states, allows
7 competent adults to own handguns if they have no major record of criminal conviction.

8 Because California does not restrict eligibility of most citizens to own handguns
9 or the volume of guns owned, the state's first line of defense against the use of such
10 weapons in street crime is a series of restrictions on the time, place and manner of
11 handgun use. California law prohibits the carrying of concealed deadly weapons
12 without a special permit. The state law delegates the authority to establish standards
13 and make individual decisions to county law enforcement. The goal here is to
14 distinguish uses of handguns that do not pose a special threat to the public (such as
15 storage and use in the owner's home) from uses that pose greater threats to public safety
16 (such as the carrying of concealed weapons in streets and public places). The special
17 danger of a hidden handgun is that it can be used against persons in public robbery and
18 assault. The concealment of a handgun means that other citizens and police don't know
19 it is in their shared space until it is brandished.

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

26 ///

27 _____
28 ⁴ Zimring, Franklin E. and Gordon Hawkins. *Crime Is Not the Problem: Lethal
Violence in America*, New York: Oxford University Press (1997), Chapters 1, 3 and 7.
See also Zimring, Franklin E. and Gordon Hawkins, *The Citizen's Guide to Gun Control*,
New York: McMillan (1986), at Chapter 5, p. 38.

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1 control. And no public law regulation of firearms is as old or as pervasive as
2 restrictions on public space use of firearms.

3 "The earliest and most numerous state and local laws relate to the carrying
4 or use of firearms. In the 1600s, Massachusetts prohibited the carrying of
5 defensive firearms in public places. Kentucky in 1813, Indiana in 1819,
6 Arkansas and Georgia in 1837 passed laws prohibiting the carrying of
concealed weapons. Many states and most cities today have laws
attempting to regulate what has been called the place and manner in which
firearms may be carried or used."⁵

7 Almost all places make special rules for concealed handguns in public places.

8 "Most often, state law prohibits the carrying of concealable firearms
9 without a special permit and the discharge of guns within city
10 limits...Forty-nine states now impose some sort of restrictions on carrying
a concealed gun."⁶

11 5. The Public Danger of Concealed Firearms.

12 The previous section of this declaration documented the statistical dominance of
13 handguns in life-threatening violence but did not explain it. Why are handguns, a
14 minority of all firearms, responsible for three-quarters of all firearms deaths? Why are
15 handguns the overwhelmingly predominant firearm used in armed robbery?

16 This is a matter of simple criminal logistics. Most firearms assaults and almost all
17 firearms robberies take place outside the offender's home, so that using a firearm in
18 crime requires transporting it to a non-home location. But carrying a loaded shotgun to a
19 commercial location for a robbery or to somebody else's home or on the street while
20 looking for a target is a warning to potential victims and a red flag to passersby and to
21 any law enforcement personnel that the armed pedestrian is not on an ordinary errand.
22 Other pedestrians and motorists can avoid the visibly armed person and police can ask
23 questions and subject the visibly armed person to identity checks and surveillance.

24
25 ⁵ Newton, George and Franklin E. Zimring, *Firearms and Violence in American*
26 *Life*, staff report submitted to the National Commission on Causes and Prevention of
Violence, Washington D.C.: Government Printing Office (1969) at p. 87 (citations in
27 original omitted).

28 ⁶ Zimring, Franklin E. and Gordon Hawkins, *The Citizen's Guide to Gun Control*
(1986) at p. 123. A more recent compendium lists 47 states with special permits, see
www.lcav.org.

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1 But the person with a concealed handgun in his pocket generates no special notice
2 until the weapon appears at his criminal destination. The robber or assaulter looks no
3 different from any other user of common public spaces. And this ability to escape special
4 scrutiny is the advantage that makes the concealed handgun into the dominant weapon of
5 choice for gun criminals and a special danger to government efforts to keep public spaces
6 safe and secure.

7 The necessity of carrying guns to crime sites without detection is one reason why
8 the National Violence Commission research reported that 86% of all the firearms used in
9 all assaults were handguns and an astonishing 96% of all firearms robberies were
10 committed with handguns in the ten large cities the task force surveyed.⁷ What that
11 robbery percentage means is that the problem of gun robbery in American cities is almost
12 exclusively a problem of concealable handguns.

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

18 Figure 1 shows the current control of the volume of California concealed weapons.
19 (CCW) permits and the huge stakes of shifting to the standards asserted as rights by the
20 plaintiffs in this litigation. There are over two million adults and 1,223 permits in
21 San Diego County at present, a ratio of one permit for every 1,892 adults—carrying a
22 concealed weapon is far less than a one in one thousand proposition. Under the system
23 urged in this litigation, over 90% of these adults could have licenses if they wanted them,
24 and most citizens would face a difficult choice because they would have to decide
25 between being armed when so many other people might be secretly carrying guns and
26 staying unarmed. This is the dilemma that the high standards for and rarity of CCW
27 permits in San Diego avoids.

28
⁷ Newton, George and Franklin E. Zimring (1969), *Firearms and Violence in American Life*, at Figure 8-1, p. 49.

1 Making the carrying of hidden deadly weapons into a very rare privilege enables
2 citizens not to worry that they must choose between carrying a gun themselves or being
3 unarmed in public spaces where many strangers are secretly armed. Restricting the
4 publicly entitled carriers of concealed handguns to a tiny number also reinforces the
5 practical monopoly of armed force by the police. And the police are one of the primary
6 groups protected by small rates of carrying concealed guns since more than 90% of
7 killings of police are with guns.⁸

8 The second strategic aim of a permit-to-carry requirement is to screen those
9 persons who do have special needs for concealed guns to make sure they will not misuse
10 the guns they carry. This kind of risk screening explains the good character, minimum
11 age and lack of criminal record requirements. But the central reason to require a good
12 reason for needing a gun is to reduce the number of secretly armed citizens on the streets
13 and sidewalks of one of the biggest urban areas in the United States.

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

18 Is this public choice consistent with *D.C. v. Heller's* conferral of a right to handgun
19 ownership under the Second Amendment? San Diego has never tried to restrict home
20 possession, so it obviously believes that public places call for different presumptive
21 policies, and history is on San Diego's side. Special restrictions on carrying concealed
22 weapons are venerable and almost universal. Even the plaintiffs in this suit do not
23 question the legitimacy of a special license for carrying weapons. The central question is
24 whether public concealed weapons can be restricted even if possession in the home is
25 protected by *Heller*.

26 ///

27 ///

28

⁸U.S. Department of Justice, Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted* (2008), Table 27.

23 I declare under penalty of perjury that the forgoing is true and correct. Executed at
24 NEW YORK, NY., this 30th of September 2010.

Franklin E. Zimring
FRANKLINE E. ZIMRING

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v.
County of San Diego, et al.
USDC 09cv2371-IEG(BLM)

**Declaration of
Franklin E. Zimring**

ATTACHMENT A

FRANKLIN E. ZIMRING

14 September 2010

PERSONAL Born 1942, Los Angeles, California; married; two adult children.

EDUCATION Los Angeles Public Schools; B.A. with Distinction, Wayne State University (1963); J.D. *cum laude*, University of Chicago (1967).

PRESENT POSITION **WILLIAM G. SIMON PROFESSOR OF LAW; WOLFEN DISTINGUISHED SCHOLAR** and **CHAIR**, Criminal Justice Research Program, Institute for Legal Research (formerly the Earl Warren Legal Institute), Boalt Hall School of Law, University of California, Berkeley.

OTHER WORK **Principal Investigator**, Center on Culture, Immigration and Youth Violence Prevention (2005-).

DIRECTOR, Earl Warren Legal Institute (1983-2002).

FACULTY OF LAW, University of Chicago (1967-85): **KARL N. LLEWELLYN PROFESSOR OF JURISPRUDENCE** (1982-85) and **DIRECTOR**, Center for Studies in Criminal Justice (1975-85).

MEMBER, MacArthur Foundation Research Program on Adolescent Development and Juvenile Justice (1997-2007).

FELLOW, Center for Advanced Studies in the Behavioral Sciences, Stanford, California (1979-80).

RAPPORTEUR, Task Force on Sentencing Policy for Young Offenders, Twentieth Century Fund (1978).

VISITING PROFESSOR OF LAW, University of California, Irvine (2004), University of South Africa (1993), University of California, Berkeley (1983-85), Yale University (1973), and University of Pennsylvania (1972).

DIRECTOR OF RESEARCH, Task Force on Firearms, National Commission on the Causes and Prevention of Violence (1968-69).

CONSULTANT: American Bar Foundation, Police Foundation, National Commission on Reform of Federal Criminal Laws, Institute for Defense Analysis, Department of Justice, Rand Corporation, Abt Associates, Federal Parole Commission, Federal Bureau of Prisons, Federal Bureau of Investigation, General Accounting Office, Canadian Institute for Advanced Studies, States of Alaska, California, Nebraska, Illinois, Virginia, and Washington, Cities of Chicago, New York and San Francisco.

ADVISORY POSTS **CURRENT**: Campaign for Youth Justice (2007-); California Attorney General's Office (2001-); National Policy Committee, American Society of Criminology (1989-91 and 1993-); Board of Directors, Illinois Youth Services Association (Honorary) (1977-); Advisory Committee, National Pre-Trial Services Association (1975-).

PAST: Asian Pacific Violence Prevention Center, National Council on Crime and Delinquency (2001-2005); Advisory Committee, Sentencing Project, American Law Institute (2001-2003); Criminal Justice Policy Group, Advisory Board, National Campaign Against Youth Violence (2000-2002); Expert Panel Member, U.S. Department of Transportation, National Highway Traffic Safety Administration Panel on Crash Risk of Alcohol-Involved Driving (1994-2002); Expert Panel Member, U.S. Department of Education Panel on Safe, Disciplined, and Drug-Free Schools (1998-2001); National Research Council Panel on Juvenile Crime: Prevention, Intervention, and Control (1998-2001); Advisory Board, Center on Crime, Communities, and Culture, Open Society Institute (1998-2000); Affiliated Expert, Center for Gun Policy and Research, Johns Hopkins University (1995-98); Gun Violence Advisory Group, American College of Physicians (1995-98); Advisory Committee, Violent and Serious

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Juvenile Offender Project, National Council on Crime and Delinquency (1994-1997); Panel on NIH Research on Anti-Social, Aggressive, and Violence-Related Behaviors and their Consequences (1997-); Task Force on Future Directions for the National Archive of Criminal Justice Data, Bureau of Justice Statistics, Department of Justice (1995); Panel on Antisocial, Aggressive, and Violence-Related Behaviors and Their Consequences, National Institute of Health (1993-94); Panel on Understanding and Control of Violent Behavior, National Research Council, National Academy of Sciences (1989-91); Research Advisory Committee, California Attorney General (1983-1990); Law Enforcement Committee, California Governor's Policy Council on Drug and Alcohol Abuse (1989-91); National Research Council, Working Group Crime and Violence (1985-88); Internal Revenue Service, Advisory Group Taxpayer Compliance Research (1983-87); Board of Directors, Eisenhower Foundation for the Prevention of Violence (1981-84); U.S. Secret Service Advisory Committee on Protection of the President (1981-82); Assembly of Behavioral and Social Sciences, National Academy of Sciences (1977-80); Executive Committee, Illinois Academy of Criminology (1968-71, 1977-78); Advisory Committee, Assessment Center for Alternatives to Juvenile Courts (1977-78) (chairman); Advisory Committee, Law and Social Science Program, National Science Foundation (1976-77); Advisory Committee, Vera Institute of Justice, Court Employment Project Evaluation (1976-77) (chairman); Panel on Deterrence and Incapacitation, National Academy of Sciences (1975-77); Legal Committee, American Civil Liberties Union, Illinois Branch (1967-70).

**EDITORIAL
BOARDS**

CURRENT: Punishment and Society (1998-); Crime and Justice: An Annual Review of Research (1979-90, 1998-); Western Criminology Review (1997-); Buffalo Criminal Law Review (1996-); Homicide Studies (1996-); The Prison Journal (1992-); Journal of Research in Crime and Delinquency (1976-84, 1990-); Federal Sentencing Reporter (1988-); Studies in Crime and Justice (1980-); Journal of Criminal Justice (1978-).

PAST: Law and Society Review (1988-1998); British Journal of Criminology (1988-1996); Journal of Quantitative Criminology (1984-1989); Ethics, (1985-87); Encyclopedia of Crime and Justice (1979-83); Evaluation Quarterly (1976-84); Law and Behavior (1976-85).

HONORS

Edwin H. Sutherland Award, American Society of Criminology (2007); August Vollmer Award, American Society of Criminology (2006); Notable Book of the Year, *The Economist* (2003); Society of Research on Adolescence, Biannual Book Award (2002); Pass Award, National Council on Crime and Delinquency (1999); Donald Cressey Award, National Council on Crime and Delinquency (1995); Choice, Outstanding Academic Book Citation (1995 and 1982); Paul Tappan Award, Western Society of Criminology (1994); Fellow, American Society of Criminology (1993); Distinguished Alumni Award, Wayne State University (1989); Bustin Prize for Legal Research, University of Chicago (1981); Cooley Lecturer, University of Michigan Law School (1980); National Distinguished Alumnus Award, Delta-Sigma-Rho (1977); Ten Law Professors Who Shape the Future, *Time Magazine* (1977); Civilian Award of Merit for 1975, Chicago Crime Commission; Gavel Award Certificate of Merit, American Bar Association (1973).

MEMBER

American Academy of Arts and Sciences (1990-); California Bar Association (1968-); Order of the Coif (1967-); Phi Beta Kappa (1964-).

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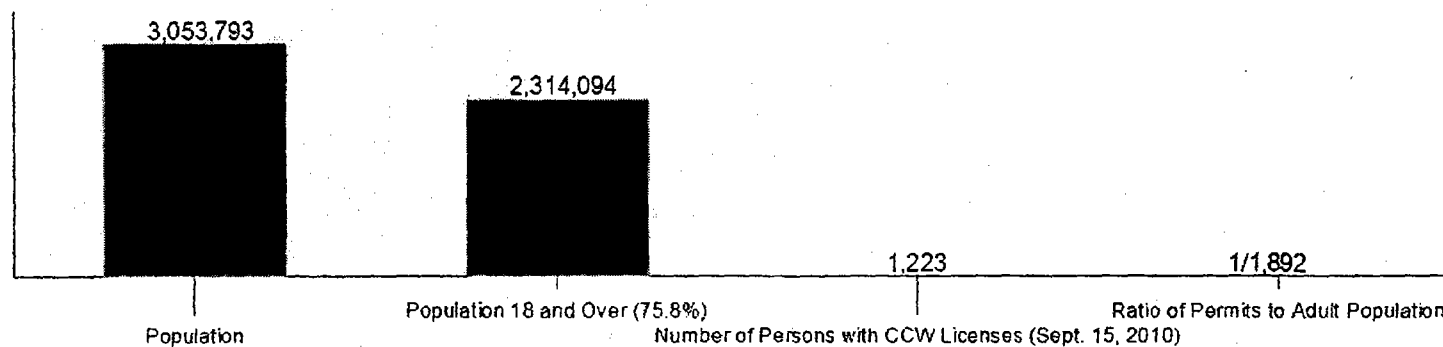
Edward Peruta, et al.
v.
County of San Diego, et al.
USDC 09cv2371-IEG(BLM)

**Declaration of
Franklin E. Zimring**

ATTACHMENT B

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ER000435

Figure 1. Population and California Concealed Weapon (CCW) Permits, San Diego County 2009.



Sources: Population, U.S. Census Quick Facts about San Diego County 2009 (available at <http://quickfacts.census.gov/qfd/states/06/06073.html>); CCW permits, Communication from Sheriff of San Diego County, September 15, 2010.

TAB 31

Case 3:09-cv-02371-IEG -BGS Document 38-6 Filed 10/04/10 Page 1 of 11

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7

8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

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

14 Plaintiffs,

15 v.

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

18 Defendants.

USSD No. 09-CV-2371 IEG (BLM)

**DECLARATION OF BLANCA
PELOWITZ IN SUPPORT OF
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Hearing Date: November 1, 2010
Time: 10:30 a.m.
Courtroom: 1
Honorable Irma E. Gonzalez

19 I, BLANCA PELOWITZ, declare as follows:

20 1. I am the Manager of the San Diego County Sheriff's Department License
21 Division which is responsible for administering the concealed weapons permit program
22 for the County of San Diego ("County"). I am a 31 year employee of the Sheriff's
23 Department ("Department") assigned to the Sheriff's License & Criminal Registration
24 Division ("Division"). I originally started my career with the Sheriff's Department in
25 December of 1978. I was promoted to Staff Supervisor in 1987 and then to Manager of
26 the License Division, under the Law Enforcement Service Bureau, in November of
27 2002.

28 ///

1 2. The License Division is responsible for all the regulatory licensing,
2 criminal registrations and State mandated licenses which include the processing of all
3 carry concealed weapon (CCW) licenses in the County. In my capacity, I have been
4 designated to act as the Sheriff's sole authorized representative for reviewing CCW
5 applications and making the final determination for the issuance of CCW licenses
6 through the Law Enforcement Service Bureau.

7 3. In 1987, the Copley Press filed a suit in Superior Court against Sheriff
8 John F. Duffy relating to a public records request stemming from the Los Angeles –
9 CBS, Inc. vs. Block case which involved allegations of abuses by Los Angeles officials
10 in exercising the statutorily delegated discretion to issue licenses for carrying concealed
11 weapons. In the Copley lawsuit, hundreds of files were copied for the Court, and
12 although the Court requested certain information be released as public records, it did
13 not find that the Sheriff in San Diego County was abusing his discretion in issuing
14 licenses. Instead, the Court determined that there are four appropriate categories in
15 which the Sheriff's Department processes and issues CCW licenses. Those categories
16 per Judge Huffman are:

17 Category 1 = Protected Law Enforcement Personnel which includes: active and
18 retired reserves, federal agents, Police Department Evidence Technicians, Deputy
19 District Attorneys, etc.

20 Category 2 = Personal Protection Only includes: documented threats, restraining
21 orders and other related situations where an applicant can demonstrate they are a
22 specific target at risk.

23 Category 3 = Security/Investigative Personnel includes: plain clothes security,
24 private investigators and private patrol operators, bail bondsman, etc.

25 Category 4 = Business owners/employees includes a diversity of businesses &
26 occupations, such as doctors, attorneys, CEO's, managers, employees and volunteers,
27 whose occupation or business places them at high risk of harm.

28 ///

1 4. The Department's history during the years involving CCW licenses is
2 extensive. Throughout the different administrations there have been different
3 philosophies and practices. However, the policy and criteria for issuing concealed
4 weapon licenses has remained consistent throughout the years. In 1999, the State of
5 California standardized the application process and required additional mandates. As a
6 result, the Department updated its policies and procedures. For the issuing agency,
7 these changes created additional scrutiny and more responsibility in processing CCW
8 applications.

9 5. The current Sheriff's Department's Policy Statement since 1999 is
10 available on the Sheriff's internet website. The site provides adequate information to
11 potential applicants on what the process consists of and states the following: "*The*
12 *Sheriff may issue a concealed weapon license to law-abiding residents of San Diego*
13 *County who comply with the provisions of Penal Code Section 12050. In accordance to*
14 *PC 12050 and subject to department procedure, any resident of San Diego County may*
15 *submit an application to the Sheriff's License Division.*" Furthermore, the information
16 continues to outline the application process, initial and renewal application fee and
17 documentation required.

18 6. California is not a "Shall Issue" or "Right to Carry" State. California
19 Penal Code §12050-12054 sets forth the general criteria that applicants for concealed
20 weapon licenses must meet. This requires applicants to be of good moral character, a
21 resident of the County they apply in, demonstrate good cause and take a firearms
22 course. Of these four requirements, only the one pertaining to "good cause" affords
23 Sheriff's broad discretion. In San Diego County, the definition of good cause has been
24 unanimously adopted by the members of the Police Chiefs and Sheriff Association and
25 every police chief in this county has authorized the Sheriff's Department to manage the
26 issuance of CCW licenses accordingly. The long-standing policy of this Department is
27 generally to approve applications unless the applicant does not have a primary residence
28 in San Diego County, if he/she has had numerous negative law enforcement contacts or

1 is on probation of any sort, or if he/she cannot demonstrate good cause. There are
2 currently 1,223 active CCW licenses issued in San Diego County.

3 7. Good Cause in this context is defined by this County to be a set of
4 circumstances that distinguish the applicant from the mainstream and causes him or her
5 to be placed in harm's way. Simply fearing for one's personal safety alone is not
6 considered good cause. This criterion can be applied to situations related to personal
7 protection as well as those related to individual businesses or occupations.

8 Good cause is also evaluated on an individual basis. Reasons applicants request a
9 license will fall into one of the four general categories originally set by Judge Huffman
10 in 1987. Since the 1999 State mandates, the scrutiny in accepting applications and
11 supporting documentation became more prevalent in the initial processing. For
12 instance, all new applicants must provide supporting documentation. If applying for
13 business purposes, proof it is a legitimate and fully credentialed business is required as
14 well as having to demonstrate and elaborate good cause for carrying a firearm. The
15 same requirement of documentation applies to those applying strictly for personal
16 protection (i.e., self-defense). In addition, the required documentation, such as
17 restraining orders, letters from law enforcement agencies or the DA familiar with the
18 case, is discussed with each applicant.

19 8. Resident in this context is generally defined by this County to be any
20 person who maintains a permanent residence or spends more than six months of the
21 taxable year within the County if the applicant claims dual residency. San Diego
22 County uses the term "resident" as outlined in Penal Code section 12050(D), and not
23 "domicile." Documentation for residency includes, but is not limited to, two proofs of
24 documentation such as unpaid utility bills that lists applicant's name, lease agreements,
25 property tax bills, etc. Residency site verification is also conducted by staff on all
26 initial applicants. Part-time residents who spend less than six months in the County are
27 considered on a case-by-case basis, and CCW licenses have been issued in such
28 circumstances.

1 9. Good Moral Character in this context is defined to be the applicant's
2 overall background, e.g. arrests, convictions, negative law enforcement contacts, field
3 interviews, citations, crime cases, DOJ/FBI fingerprint & firearms eligibility clearance
4 as well as input from other law enforcement agencies throughout the County. This
5 requirement also includes a written application for investigation into the truth-of-the-
6 matter. Letters of references from personal friends or associates who can attest to the
7 applicant's good moral character are requested in support of the applicant. In some
8 instances, those who are within the criminal justice systems, e.g. judges, Deputy District
9 Attorneys, Criminalists, and are seeking licenses at the request of the employer, are
10 waived from the reference letter request.

11 10. Firearms Safety Course. In 1999, the State of California enacted a
12 mandatory firearms safety course for new license applicants. The course of training for
13 new applicants may be any course acceptable to the licensing authority, shall not exceed
14 16 hours, and shall include instruction on at least firearm safety and the law regarding
15 permissible use of a firearm. For renewal applicants, the course of training may be any
16 course acceptable to the licensing authority, shall be no less than four hours, and shall
17 include instruction on at least firearm safety and the law regarding permissible use of a
18 firearm. The Sheriff's Weapons Training Unit assisted the License Division in
19 outlining the current curriculum, as adopted by the Department, for the CCW firearms
20 instructors to use.. The CCW firearms instructors list is updated every two years
21 requesting 16-hrs of additional training from each instructor. The Sheriff's Department
22 through the Honorary Deputy Sheriff's Association, an association made up of business
23 and community leaders committed to supporting law enforcement through the County,
24 and the Weapon Trainings Unit, have put together a firearms course and qualifications
25 for members of this association and also made it available to Department employees
26 and their families.

27 In addition to the state mandated required firearms course, all applicants, new,
28 renewal and any weapon changes, must attend a qualify-shoot and firearms safety

1 inspection at our weapons training unit prior to having weapons approved on the
2 license.

3 11. Initial Application Process/Investigative Background/Review. In 1998,
4 AB2022 was introduced, standardizing the CCW application process statewide, and
5 became effective in 1999. As a result, the Sheriff's department conducted a revamp and
6 adopted the process that is currently in place, as outlined above. In San Diego County,
7 prior to 2006, all applicants would submit applications and pay a fee but often would
8 not qualify because he/she did not understand the criteria. In 2006, as a courtesy for
9 applicants, the Department initiated an interview process to assist both applicants and
10 line staff in determining pre-eligibility (included as part of job classification of line staff
11 that conduct interviews). During this phase applicants will discuss reasons and
12 situations with line staff who will question applicants to draw more information. Tools
13 are provided to staff in conducting interviews, such as tips, memos, reminders, and staff
14 is trained to make notes of all comments made by the applicant during the interview.

15 Based on what the applicant outlines during the interview, the information will
16 assist staff in determining what documentation may be required of the applicant. If the
17 clerk is able to determine that good cause is questionable, clerks are able to give an
18 educated guess based on the scenarios described by applicants. The next phase involves
19 applicants gathering their documentation, attending the 8-hour firearms course and
20 returning to submit the written application, fees, and documentation. During this
21 process applicants will be fingerprinted, photographed, signatures will be obtained and
22 applicants are instructed to go to Sheriff's Range for a weapons safety checked and to
23 complete a final qualify-shoot. Once this phase is complete, the file and all documents
24 are forwarded to the Background Unit for the comprehensive background and
25 verification process. During this phase, investigators prepare notifications to other law
26 enforcement agencies throughout the County or State for input, clear weapons through
27 AFS (automated firearms systems), conduct a local criminal history check, DMV check,
28 ///

1 Lexis Nexis, wait for fingerprint results and DOJ firearms eligibility, conduct residence
2 verifications, verify character reference letters and verify documents.

3 Once everything has been received and verified, the investigator will provide a
4 recommendation to issue or recommend disapproval and forward to me (the Manager)
5 for final review. During the final review, I will review the entire application packet,
6 supporting documents, reasons, and results of the background investigation. I will then
7 make the decision to issue or deny and will include any reasonable restrictions and/or
8 instructions to staff. Membership in the Honorary Deputy Sheriff's Association has no
9 bearing on the license process and is not considered. (Many HDSA members insist on
10 having the membership card copied for their application file.) The CCW license file is
11 then referred back out to staff who will complete the process by calling in the applicant
12 to collect the remainder of the local processing fee, obtain necessary signatures and
13 thumb prints, and to deliver the license to applicant. There are three different types of
14 licenses: the most common is the 2-year standard; 3-year judicial for judges and 4-year
15 law enforcement reserve.

16 12. CCW Renewal Process. CCW license holders can renew licenses up to 30
17 days prior to the expiration date. All renewals must comply with the 4-hour firearms
18 course requirement from the list of approved instructors. All renewals also need to go
19 to the Sheriff's range for a qualify-shoot and firearm safety inspection. Renewals are
20 issued on the spot if absent any negative law enforcement contacts, crime cases, arrests
21 and there no changes from the initial application as to the reasons. No review by
22 supervisor or managers is needed for the renewal process unless there have been
23 changes to the reason. Applicants still need to provide some form of documentation to
24 support his or her continued need but not to the extent of the initial application.
25 Applicants sign under penalty of perjury that all prior conditions exist. A local criminal
26 history check is conducted, fees are collected, and new photograph/thumbprint is
27 obtained. Once the process is complete, the applicant is given his or her new license
28 valid for another term.

1 In the past, some renewals were issued without supporting documentation based
2 on the affirmation that conditions still existed. Sheriff Gore, who was first formally
3 elected in November 2009, has directed the Division to require supporting
4 documentation for all renewals.

5 All applicants are informed that should any changes occur during the term of the
6 license, he or she must notify the Division within 10 days of the change otherwise he or
7 she may be in violation of the terms and conditions under which the license was issued.
8 Administrative action may be considered.

9 13. Review Process. The review process consists of an administrative review
10 either during the initial determination process, or, during the renewal if information is
11 received that the individual was arrested during the term, had negative contact with law
12 enforcement or the reason for which it was originally issued has changed. During this
13 process, the file is referred to a supervisor who will outline what the background unit
14 will investigate. Background will conduct the investigation, order arrest/crime case
15 reports, follow-up with court cases, conduct interviews if necessary and provide
16 recommendations and forward to the manager.

17 14. Administrative Process. The new 19 page State Standard CCW
18 Application, available on the Sheriff's and DOJ's websites, provides informational
19 inserts about the application and the process. There are no provisions in the Penal Code
20 for an appeal process involving administrative action from the issuing agency. The
21 Sheriff's Department in 1998-99 implemented the administrative/reconsideration
22 process for CCW applicants. When taking administrative action to deny, suspend or
23 revoke a CCW license, an upper command concurrence through the Law Enforcement
24 Service Bureau is required before taking action. All actions require the Manager to
25 prepare a brief synopsis of the proposed action and recommendation. Command will
26 either concur or request additional information. If concurrence is provided, the denial,
27 suspension or revocation letter is mailed out. Notifications are forwarded to the State
28 and the file is inactivated and information is entered in ONS (Officer's Notification

1 System). The individual is given the opportunity to request an appeal of the decision by
2 writing to the Assistant Sheriff of the Law Enforcement Service Bureau. The appeal is
3 heard by the Assistant Sheriff of the Bureau who will make the determination to
4 overturn or uphold decision.

5 15. Many Californians and San Diegans for years have opposed the State's
6 stance regarding concealed weapon laws. The State of California is still one of the
7 strictest gun law states in the nation and the Sheriff is bound by what the laws dictate.
8 Although several bills have been introduced trying to change the State criteria, there has
9 been no success in moving California to a "shall-issue state." Until the State of
10 California is willing to consider this, the Sheriff of San Diego County will continue to
11 accept and process applications as it has since the new legislative changes in 1999.

12 16. Prior administrations have had the same if not similar challenges with the
13 application process and criteria but applied different practices. During Sheriff
14 Kolender's Administration and now Sheriff Gore, there has been more consistency in
15 accepting, processing and determining the eligibility of applicants. It was in Kolender's
16 Administration that the Assistant Sheriff of the Law Enforcement Support Bureau was
17 designated to oversee the CCW process and all licenses are issued solely through the
18 License Division as outlined in this declaration.

19 17. Edward Peruta's CCW license application was denied solely because he
20 provided no documentation supporting his statement of "good cause." Residency was not
21 a factor in the denial. In addition, his alleged "business" is not licensed to do business in
22 the State of California. Peruta made no effort to provide supporting documentation; the
23 only document he provided was a photograph of a sign from a mobile home park.
24 (Defendant's Exhibit 1.)

25 18. Michelle Laxson did not apply for a CCW license. She was interviewed by
26 staff but declined to complete and application and did not return to submit.

27 19. James Dodd has submitted an application which is still pending at this time.

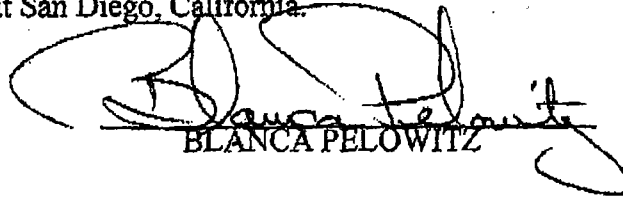
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1 20. Mark Cleary's renewal application was denied based on lack of supporting
2 documentation relating to his employment in March of 2010. Cleary requested a
3 reconsideration appeal and the decision to deny the license was overturned by Command
4 after information about his employment was confirmed. See Letter at Plaintiffs' Exhibit
5 "S." He was issued a CCW license for a new term in June of 2010

6 21. Leslie Buncher was a physician who held a valid CCW license during the
7 period of 1971 to 2003. During this time frame, Dr. Buncher never requested or
8 mentioned reasons related to anti-abortion protestors or any specific threats. In 2008 Dr.
9 Buncher reapplied for a license. He was no longer a practicing physician and the reasons
10 he listed related to his former medical practice. Dr. Buncher declined to go through the
11 reconsideration appeal process.

12 22. I have reviewed the allegations of the First Amended Complaint and the
13 documents submitted by Plaintiffs in support of their motion. I have been in this
14 position since 2002 and there has never been any special treatment for any group
15 including the Honorary Deputy Sheriff's Association or for any persons who have
16 donated to Sheriff's election campaigns. Plaintiffs have provided documents where line
17 staff have made notes which Plaintiffs suggest is evidence that HDSA members have
18 received special treatment. Line staff are trained to document whatever is communicated
19 at an interview. Some of the notes in the files are referencing that the applicant has taken
20 the HDSA firearms training course which they offer. In addition, I have provided true
21 and accurate copies of documents from our files in response to Plaintiffs' statement that
22 certain HDSA members did not provide documentation in support of renewal
23 applications, when in fact, they did. Those documents are lodged as Defendant's
24 Exhibits 2 through 18.

1 I declare under penalty of perjury that the foregoing is true and correct. Executed
2 this 1st day of October 2010 at San Diego, California.

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4 
5 BLANCA PELOWITZ
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TAB 32

FILED UNDER SEAL

EDWARD PERUTA, et al.

v.

COUNTY OF SAN DIEGO, et al.

Appellant Excerpts of Record

Volume VI - VII

Tab No. 32

Bates No. ER000447 - ER000779

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 III of VIII**

on the interested parties in this action by placing

☐ the original

☒ 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)