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 IV of VIII

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

Date: May 23, 2011

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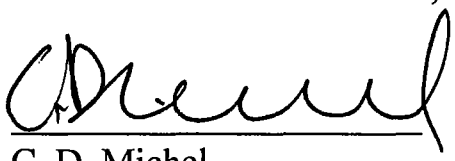

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CHRONOLOGICAL ORDER

CHRONOLOGICAL ORDER

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13.	11/1/2010	Defendant William D. Gore's Reply Points and Authorities In Support of Motion For Summary Judgment	II	ER000169 - ER000188
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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

APPLICATION OF BRADY CENTER TO PREVENT GUN VIOLENCE TO FILE BRIEF AS *AMICUS CURIAE*

Courtroom: 1
Honorable Irma E. Gonzales

Through undersigned counsel, the Brady Center to Prevent Gun Violence applies to the Court for leave to file a brief as *amicus curiae* in this case for the facts and reasons stated below. The proposed brief is attached hereto as Exhibit A for the convenience of the Court and counsel. Defendants consent to the filing of this *amicus* brief. Plaintiffs have indicated that they do not consent to the filing of this *amicus* brief.

The Brady Center to Prevent Gun Violence is the nation's largest non-partisan, non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. Through its Legal Action Project, the Brady Center has filed numerous briefs *amicus curiae* in cases involving both state and federal gun laws.

District courts have inherent power to grant third parties leave to file briefs as *amici curiae*, particularly regarding "legal issues that have potential ramifications beyond the parties directly involved or if the [*amicus* has] unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 335 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005) (internal quotations omitted). Here, *amicus* brings a broad and deep perspective to the issues raised by this case and has a compelling interest in the federal courts' interpretation of Second Amendment issues. *Amicus* thus respectfully submits the attached brief to assist the Court with the constitutional issues in this case, including important matters of first impression under the Second Amendment.

The proposed brief provides an overview of recent and longstanding Supreme Court Second Amendment jurisprudence, the policy implications of recognizing a right to carry firearms in public, and addresses an open question that has resulted from this jurisprudence—namely, what the appropriate standard of review for Second Amendment claims should be, and shows how lower courts have answered that question thus far. The brief also discusses the emerging trend in lower courts towards using a two-pronged approach to Second Amendment claims that asks (1) whether the law or regulation at issue implicates protected Second Amendment activity, and if so, (2) whether it passes the appropriate standard of review. The brief then applies this two-pronged approach to Second Amendment issues in the case at hand, employing case law, sociological data,

and legal commentary to place the permitting process of California Penal Code § 12050 in the larger context of Second Amendment issues. The brief concludes that (1) California's concealed weapons permitting process does not implicate protected Second Amendment because the Supreme Court has only recognized a Second Amendment right to possess and carry guns in the home, and (2) that even if the permitting process did implicate protected Second Amendment activity, it would survive the appropriate level of review – the reasonable regulation test that over forty states have adopted – because it is a valid exercise of the state's police powers to enact legislation designed to protect public safety. *Amicus*, therefore, respectfully submits the attached brief to assist the Court in deciding the complex and significant issues raised in this matter.

CONCLUSION

For the foregoing reasons, amicus *curiae* Brady Center to Prevent Gun Violence respectfully requests that the Court grant leave to file the attached *amicus* brief.

Dated: October 4, 2010

Respectfully submitted,

s/Neil O'Hanlon

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PROOF OF SERVICE

I, Marjorie Sener, declare: I am and was at the time of this service working in the County of Los Angeles, California. I am over the age of 18 years and not a party to the within action. My business address is Hogan Lovells US LLP, 1999 Avenue of the Stars, Suite 1400, Los Angeles, CA 90067.

On October 4, 2010, I served the following document:

Application of Brady Center to Prevent Gun Violence to File Brief as *Amicus Curiae*

Service was effectuated by electronically filing the documents via the CM/ECF system for the United States District Court for the Southern District of California in the above-identified case, and relying upon the ECF emailing to distribute service to all parties.

I declare that the foregoing is true and correct, and that this declaration was executed on October 4, 2010, in Los Angeles, California.

s/Marjorie Sener

Exhibit A

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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,

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

Defendants.

CASE NO: 09-CV-2371 IEG

BRIEF OF *AMICUS CURIAE* BRADY CENTER TO PREVENT GUN VIOLENCE

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

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INTRODUCTION

The right to keep and bear arms recognized in *District of Columbia v. Heller* is unique among constitutional rights in the risks that it presents. 128 S. Ct. 2783 (2008). Guns are designed to kill, and gun possession and use subject others to a serious risk of harm that is all too often deadly. While the Supreme Court has held that the Second Amendment protects a limited right to possess a gun *in the home* for self-defense, the Court has never recognized a far broader right to carry guns in public places, which would subject the public-at-large to those grave risks. On the contrary, *Heller* found that prohibitions on concealed carrying are in line with permissible gun laws, *Heller*, 128 S. Ct. at 2816, and did not disturb the Court's ruling from over a century ago that "the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons." *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897).

Nor has the Court stated that concealed carrying can only be banned (or restricted) if open carrying is allowed. In *Heller* and *McDonald v. City of Chicago*, the Court had ample opportunity to announce a right to carry in public, or to question the continuing validity of *Robertson*. *See McDonald*, 130 S. Ct. 3020 (2010); *Heller*, 128 S. Ct. 2783. After all, the Court did not limit itself to the constitutionality of the D.C. law at issue, but expounded at length on the limited nature of the Second Amendment right. Yet it repeatedly stated its holding as bound to the home. Numerous courts, from the 19th century to post-*Heller* and *McDonald*, have recognized that the Second Amendment does not prevent states from restricting or barring the carrying of handguns – especially concealed handguns – in public. It would be unprecedented and unwise, therefore, to hold that the Constitution bars states and communities from choosing to keep guns out of public places, or – as California has done – from allowing those tasked with protecting public safety to determine whether individuals have "good cause" to bring hidden handguns into public spaces. There is no Constitutional requirement that the general public, when walking to school, driving to work, or otherwise going about their daily activities, be subjected to the risks of gun carrying. And there never has been.

An extension of the Second Amendment to deny law enforcement the authority to determine who has "good cause" to carry guns in public would run counter to *Heller* and *McDonald*'s "assurances" that "reasonable firearms regulations" will remain permissible, as well as the Court's longstanding recognition that the exercise of protected activity must be balanced against legitimate public interests, chief among which is public safety. *McDonald*, 130 S. Ct. at 3047; *Heller*, 128 S. Ct at 2816-17, 2871 & n. 26. California's law governing the carrying of concealed weapons – California Penal Code Section 12050 – is precisely such a reasonable regulation.

The permitting process of Section 12050 does not implicate protected Second Amendment activity and even if it did, requiring a showing of "good cause" as a condition to issuing a concealed weapons is a reasonable, justified, and permissible exercise of the state's police powers. While Plaintiffs may disagree with Section 12050, their recourse is through the legislative process, not the judiciary. This Court is obligated to uphold legislation where there is a reasonable basis to do so; it should not usurp the functions of the Legislature and local law enforcement by declaring a new Second Amendment right that the Supreme Court has not acknowledged and by striking down a law that so plainly satisfies the state's interest in protecting public safety.

INTEREST OF *AMICUS*

Amicus the Brady Center to Prevent Gun Violence is the nation's largest non-partisan, non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. Through its Legal Action Project, the Brady Center has filed numerous briefs *amicus curiae* in cases involving both state and federal gun laws. *Amicus* brings a broad and deep perspective to the issues raised by this case and has a compelling interest in ensuring that the Second Amendment does not impede reasonable governmental action to prevent gun violence.

LEGAL BACKGROUND

Recent Supreme Court Second Amendment Jurisprudence: In *Heller*, the Supreme Court recognized an individual right to keep and bear arms in the home for the purpose of self-defense. 128 S. Ct. at 2818. While the Court could have simply decided whether the District's handgun

ban was unconstitutional, it went out of its way to assure courts that its holding did not "cast doubt" on other gun laws – even approving of the constitutionality of a number of laws and then making clear that "[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 2816-17, 2871 & n. 26. Moreover, in approvingly discussing long-understood limitations on the right to keep and bear arms, the Court specifically noted that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *Id.* at 2816. The Court thus reaffirmed – and certainly did not disturb – its ruling in *Robertson v. Baldwin* that "the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons." 17 S. Ct. at 326.

Nor did the Court in *Heller* state that concealed carry bans could only be permissible if open carrying of guns in public were allowed. Rather, the Court repeatedly referenced the home in its holding. And the Court made clear that "carry" did not imply "outside the home," as the Court ultimately held that "[a]ssuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license *to carry it in the home*." 128 S. Ct. at 2822 (emphasis added).[1]

In *McDonald*, the Court incorporated the Second Amendment to the states, but also "repeat[ed]" the "assurances" it made in *Heller* regarding its limited effect on other gun laws, and agreed that "state and local experimentation with reasonable firearms regulation will continue under the Second Amendment." 130 S. Ct. at 3047 (internal citation omitted). Once again, the Court did not extend the Second Amendment right outside the home.

The Open Question: Standard of Review: Neither *Heller* nor *McDonald* articulated a standard of review for Second Amendment challenges, though the Court in *Heller* explicitly rejected the "rational basis" test and implicitly rejected the "strict scrutiny test." *See Heller v. District of Columbia* ("*Heller II*"), 698 F. Supp. 2d 179, 187 (D.D.C. 2010) (the "strict scrutiny

[1] The narrow scope of the Court's ruling in *Heller* was also apparent in the Court's 2009 opinion in *United States v. Hayes*, 129 S. Ct. 1079 (2009), in which the Court upheld a broad reading of 18 U.S.C. § 922(g)(9) – which prohibits possession of firearms by persons convicted of misdemeanor crimes of domestic violence – without even mentioning the Second Amendment.

standard of review would not square with the [*Heller*] majority's references to 'presumptively lawful regulatory measures' . . . ."). The Court's reasoning also foreclosed any form of heightened scrutiny that would require the government to ensure that firearms legislation has a tight fit between means and ends, as *Heller* recognized that the Constitution provides legislatures with "a variety of tools for combating" the "problem of handgun violence," *Heller*, 130 S. Ct. at 2822, and listed as examples a host of "presumptively lawful" existing firearms regulations without subjecting those laws to any such analysis. *Id.* at 2816-17 & n. 26.

Heller and *McDonald* thus left lower courts with the task of determining an appropriate standard of review for Second Amendment claims: one that is less rigorous than strict scrutiny, "presumes" the lawfulness of a wide gamut of gun laws currently in force, allows for "reasonable firearms regulations," and permits law-abiding, responsible citizens to keep guns in their homes for self-defense. As discussed below, the "reasonable regulation" test, overwhelmingly applied by courts throughout the country construing right to keep and bear arms provisions in the states, is the most appropriate standard of review for the California statute at issue here.

The Two-Pronged Approach: In the wake of *Heller* and its progeny, a number of courts have begun to utilize a two-pronged approach to Second Amendment claims. *See, e.g.*, *United States v. Skoien*, --- F.3d ---, 2010 WL 2735747 (7th Cir. 2010); *Heller II*, 698 F. Supp. 2d at 188; *United States v. Marzzarella*, --- F.3d ---, 2010 WL 2947233 at *2 (3rd Cir. 2010). Under this approach, courts ask: (1) does the law or regulation at issue implicate protected Second Amendment activity, and (2) if so, does it withstand the appropriate level of scrutiny? *See, e.g.*, *Heller II*, 698 F. Supp. 2d at 188; *Marzzarella*, 2010 WL 2947233 at *2. If the challenged law or regulation does not implicate protected Second Amendment activity, then the analysis ends and the law is deemed constitutional. Even if the law implicates protected activity, however, it still will be deemed constitutional if it passes muster under the appropriate level of scrutiny. *Marzzarella*, 2010 WL 2947233 at *2.

This two-pronged approach represents an appropriate manner in which to approach the issues presented by Second Amendment claims. *Amicus* advocates its use by this Court in analyzing the constitutionality of California Penal Code Section 12050.

ARGUMENT

For at least two principal reasons, the firearms regulations in Section 12050 are constitutional. First, the permitting process in Section 12050 does not implicate protected Second Amendment Activity. Second, even if it did, Section 12050 is a reasonable regulation that furthers important governmental interests established by the California Legislature and the law enforcement community.

I. THE PERMITTING PROCESS IN SECTION 12050 DOES NOT IMPLICATE PROTECTED SECOND AMENDMENT ACTIVITY.

While this Court's January 14, 2010 Order denying Defendants' motion to dismiss found that the "good cause" requirement of Section 12050 "undoubtedly infringes Plaintiff's right to 'possess and carry weapons in case of confrontation,'" the decision was limited to determining whether Plaintiffs' claim was "plausible on its face." Order Denying Defs.' Mot. to Dismiss (Jan. 14, 2010) [Dkt. No. 7] ("MTD Order") at 18, 12 (quoting *Heller*, 128 S. Ct. at 2797). *Amicus* respectfully suggests that, at this stage, the Court should use the two-prong approach to Second Amendment claims and hold that the permitting process in Section 12050 does not implicate protected Second Amendment activity because Plaintiffs have no general Second Amendment "right to 'possess and carry weapons in case of confrontation'" in public places.

A. The Concealed Weapons Permitting Process at Issue Here Does Not Implicate Protected Second Amendment Activity Because it Does Not Impact The Right to Possess Firearms in The Home Protected in *Heller* and *McDonald*.

The Supreme Court's decision in *Heller* recognized that the Second Amendment protects "the right of law-abiding, responsible citizens to use arms *in defense of hearth and home*." *Heller*, 128 S. Ct. at 2821 (emphasis added). In the course of its lengthy majority opinion, the Court had ample opportunity to state that Mr. Heller had a right to carry guns in public. However, it did not do so: the Court never recognized a right to carry guns in public. The Court's holding only mentions Heller's right "*to carry* [] *in the home*," *id.* at 2822 (emphasis added), and does not mention the carrying of firearms in public at all. *See id.* The Court's opinion focuses on the historical recognition of the right of individuals "to keep and bear arms to defend their homes, families or themselves," *id.* at 2810, and the continuing need to keep and use firearms "in defense

of hearth and home." *Id.* at 2821. The Court's holding is specifically limited to the right to keep firearms in the home: "[i]n sum, we hold that the District's ban on handgun possession *in the home* violates the Second Amendment, as does its prohibition against rendering any lawful firearm *in the home* operable for the purpose of immediate self-defense." *Id.* at 2821-22 (emphasis added).

Plaintiffs argue, essentially, that the *Heller* Court embraced a Constitutional right to carry guns in public, but for some reason chose not to say so explicitly. Plaintiffs cannot explain why Justice Scalia would be so explicit about the fact that the Second Amendment was "not unlimited" and that a (non-exhaustive) host of gun laws remained "presumptively lawful," yet leave his supposed ruling that the Second Amendment protected a right to carry guns in public hidden, implicit, leaving courts to expand on its "confrontation" reference, if they wished. Nor can Plaintiffs explain why the *Heller* Court expressly approved of decisions upholding concealed carry bans, but chose not to state the flip-side that is crucial to Plaintiffs' argument -- that such bans are (supposedly) only permissible if open carrying is allowed.

This Court should not reach for an interpretation of *Heller* as implicitly overruling *Robertson*'s recognition that the Second Amendment does not protect a right to carry concealed weapons – especially given *Heller*'s explicit embrace of concealed carry bans and its repeated statements limiting its holding to the home. Lower courts "should uphold State regulation whenever possible," *Agricultural Prorate Commission v. Superior Court in and for Los Angeles County*, 55 P.2d 495, 509 (Cal. 1936), not expand a novel Constitutional right to strike down democratically-enacted legislation.

In fact, California courts have refused to read *Heller* and *McDonald* as recognizing a right to carry guns in public. In *People v. Dykes*, for instance, the California Supreme Court noted that:

> The [*Heller*] court did not recognize a "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose," observing that historically, most courts have "held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." The high court's decision in *Heller* does not require us to conclude that possession in a public place of a loaded, cocked, semiautomatic weapon with a chambered round, concealed in a large glove and ready to fire, cannot be defined as a crime under state law.

209 P.3d 1, 44 (2009) (emphasis added) (internal citations omitted). And in *People v. Flores*, 169 Cal.App.4th 568, 575 (2008), the California Supreme Court explicitly stated that, "[g]iven this implicit approval of concealed firearm prohibitions, we cannot read *Heller* to have altered the courts' longstanding understanding that such prohibitions are constitutional."

Other courts have held similarly that the Second Amendment, post-*Heller*, does not protect a right to carry concealed weapons in public. In *People v. Dawson*, the Illinois Court of Appeals rejected arguments strikingly similar to Plaintiffs', and held:

> The specific limitations in *Heller* and *McDonald* applying only to a ban on handgun possession in a home cannot be overcome by defendant's pointing to the *Heller* majority's discussion of the natural meaning of "bear arms" including wearing or carrying upon the person or in clothing. Nor can the *Heller* majority's holding that the operative clause of the second amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation" require heightened review of the AUUW statute's criminalization of the carrying of an uncased and loaded firearm. As addressed above, *Heller specifically limited its ruling to interpreting the amendment's protection of the right to possess handguns in the home*, not the right to possess handguns outside of the home in case of confrontation-a fact the dissent heartily pointed out by noting that "[n]o party or *amicus* urged this interpretation; the Court appears to have fashioned it out of whole cloth." The *McDonald* Court refused to expand on this right, explaining that the holding in *Heller* that the second amendment protects "the right to possess a handgun in the home for the purpose of self-defense" was incorporated.

2010 WL 3290998, *7 (Ill. App. Ct. Aug. 18, 2010) (internal citations omitted) (emphasis added). Recognizing that "when reasonably possible, a court has the duty to uphold the constitutionality of a statute," *id.* at *6, the *Dawson* Court rejected the contention that the Second Amendment protects a broad right to carry that would invalidate Illinois's law.

The Kansas Court of Appeals also recognized that "[i]t is clear that the [*Heller*] Court was drawing a narrow line regarding the violations related solely to use of a handgun in the home for self-defense purposes. [The defendant's] argument, that *Heller* conferred on an individual the right to carry a concealed firearm, is unpersuasive." *State v. Knight*, 218 P.3d 1177, 1189 (Kan. Ct. App. 2009).

Other courts – both state and federal – have similarly held that the right recognized in *Heller* and *McDonald* is confined to the home. *See, e.g., Gonzalez v. Village of West Milwaukee*, 2010 WL 1904977, *4 (E.D. Wis. May 11, 2010) ("The Supreme Court has never held that the Second Amendment protects the carrying of guns outside the home."); *United States v. Hart*,

2010 WL 2990001, *3 (D. Mass. July 30, 2010) ("*Heller* does not hold, nor even suggest, that concealed weapons laws are unconstitutional."); *Dorr v. Weber*, 2010 WL 1976743, *8 (N.D. Iowa May 18, 2010) (*Robertson* remains the law, and "a right to carry a concealed weapon under the Second Amendment has not been recognized to date"); *Teng v. Town of Kensingson*, 2010 WL 596526 (D. N.H. Feb. 17, 2010) ("Given that *Heller* refers to outright prohibition on carrying concealed weapons" as "presumptively lawful". . . far lesser restrictions of the sort imposed here (i.e., requiring that Teng complete a one-page application and meet with the police chief to discuss it) clearly do not violate the Second Amendment.") (internal citation omitted); *Sims v. U.S.*, 963 A.2d 147, 150 (D.C. 2008) (Second Amendment does not "compel the District to license a resident to carry and possess a handgun outside the confines of his home, however broadly defined."); *Riddick v. U.S.*, 995 A.2d 212, 222 (D.C. 2010) (same); *In re Factor*, 2010 WL 1753307, *3 (N.J. Sup. Ct. Apr. 21, 2010) ("[T]he United States Supreme Court has not held or even implied that the Second Amendment prohibits laws that restrict carrying of concealed weapons."); *see also United States v. Tooley*, 2010 WL 2380878, *15 (S.D.W.Va. June 14, 2010) ("Additionally, possession of a firearm outside of the home or for purposes other than self-defense in the home are not within the "core" of the Second Amendment right as defined by *Heller*. "). And *In re Bastiani*, 881 N.Y.S.2d 591, 593 (2008), upheld New York's law that limited carrying to those permitted based on "special need," noting that "[r]easonable regulation of handgun possession survives the *Heller* decision."

Furthermore, this understanding of the Second Amendment (and its state analogues) as not protecting a general right to carry or a more particular right to carry concealed weapons has been recognized for well over a century. *See, e.g.*, 1876 Wyo. Comp. Laws ch. 52, § 1 (1876 Wyoming law prohibiting anyone from "bear[ing] upon his person, concealed or openly, any firearm or other deadly weapon, within the limits of any city, town or village"); Ark. Act of Apr. 1, 1881; Tex. Act of Apr. 12, 1871; *Andrews v. State*, 50 Tenn. 165 (1871) (upholding statute forbidding any person to carry "publicly or privately, any . . . belt or pocket pistol, revolver, or any kind of pistol, except the army or navy pistol, usually used in warfare, which shall be carried openly in the hand" and relying on the state right-to-bear-arms provision, which it read *in pari*

materia with the Second Amendment); *Fife v. State*, 31 Ark. 455 (1876) (upholding carrying prohibition as a lawful "exercise of the police power of the State without any infringement of the constitutional right" to bear arms); *English v. State*, 35 Tex. 473, 473, 478 (1871); *Hill v. State*, 53 Ga. 472, 474 (1874) ("at a loss to follow the line of thought that extends the guarantee"—in the state Constitution of the "right of the people to keep and bear arms"—"to the right to carry pistols, dirks, Bowieknives, and those other weapons of like character, which, as all admit, are the greatest nuisances of our day."); *State v. Workman*, 35 W. Va. 367, 373 (1891); *Ex parte Thomas*, 97 P. 260, 262 (Okla. 1908); *Aymette v. State*, 21 Tenn. 154, 159-61 (1840) ("The Legislature . . . have a right to prohibit the wearing or keeping weapons dangerous to the peace and safety of the citizens, and which are not usual in civilized warfare, or would not contribute to the common defense."); *State v. Buzzard*, 4 Ark. 18, 21 (1842); *State v. Jumel*, 13 La. Ann. 399, 400 (1858).[2]

Noted scholars and commentators have also long recognized that a right to keep and bear arms does not prevent states from restricting or forbidding guns in public places. For example, John Norton Pomeroy's Treatise, which *Heller* cited as representative of "post-Civil War 19th century sources" commenting on the right to bear arms, 128 S. Ct. at 2812, stated that the right to keep and bear arms "is certainly not violated by laws forbidding persons to carry dangerous or concealed weapons . . . ." John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* 152-53 (1868). Similarly, Judge John Dillon explained that even where there is a right to bear arms, "the peace of society and the safety of peaceable citizens plead loudly for protection against the evils which result from permitting other citizens to go armed with dangerous weapons." Hon. John Dillon, *The Right to Keep and Bear Arms for Public and Private Defense (Part 3)*, 1 Cont. L.J. 259, 287 (1874). An authoritative study published in 1904 concluded that the Second Amendment and similar state constitutional provisions had "not prevented the very general enactment of statutes forbidding the carrying of concealed weapons,"

[2] *Bliss v. Commonwealth*, 12 Ky. 90, 91, 93 (1822), in which the Kentucky Supreme Court declared Kentucky's concealed-weapons ban in conflict with its Constitution, is recognized as an exception to this consistent precedent. *See* Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 125, at 75-76 (1868). In fact, the Kentucky legislature later corrected the anomalous decision by amending the state constitution to allow a concealed weapons ban. *See* Ky. Const. of 1850, art. XIII, § 25.

which demonstrated that "constitutional rights must if possible be so interpreted as not to conflict with the requirements of peace, order and security." Ernst Freund, *The Police Power, Public Policy and Constitutional Rights* (1904). Post-*Heller*, scholars continue to recognize the logic behind limiting the right to the home. *See, e.g.*, Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (Oct. 2009); Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225 (2008).

The concealed weapons permitting process at issue in this case does not meaningfully impede on the ability of individuals to keep handguns in defense of their homes. Instead, it only governs the carrying of concealed weapons *in public*, a different issue entirely, and one that neither the Supreme Court nor any other court has recognized as protected under the Second Amendment. As a result, the Court should not find that Plaintiffs are challenging protected Second Amendment activity.

B. The Second Amendment Right Should Not Be Extended to Prevent Communities from Restricting or Prohibiting Carrying Guns in Public.

There are profound public safety rationales for restricting guns in public, as California courts continue to recognize post-*Heller*:

> Unlike possession of a gun for protection within a residence, carrying a concealed firearm presents a recognized threat to public order, and is prohibited as a means of preventing physical harm to persons other than the offender. 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. . . .

People v. Yarbrough, 169 Cal.App.4th 303, 314 (2008) (internal quotations and citations omitted); *see also United States v. Walker*, 380 A.2d 1388, 1390 (D.C. 1977) (there is an "inherent risk of harm to the public of such dangerous instrumentality being carried about the community and away from the residence or business of the possessor"). The carrying of firearms in public – and the carrying of *concealed* weapons especially – pose a number of issues and challenges not presented by the possession of firearms in the home. Three issues, in particular, are worthy of note.

First, when firearms are carried out of the home and into public, the safety of a broader range of individuals is threatened. While firearms kept in the home are primarily a threat to their

owners, family members, friends, and houseguests, firearms carried in public are a threat to strangers, law enforcement officers, random passersby, and other private citizens. One study has shown that "[b]etween May 2007 and April 2009, concealed handgun permit holders shot and killed 7 law enforcement officers and 42 private citizens." Violence Policy Center, *Law Enforcement and Private Citizens Killed by Concealed Handgun Permit Holders*, July 2009. States, therefore, have a stronger need to protect their citizens from individuals carrying guns in public than they do from individuals keeping guns in their homes.

Second, the carrying of firearms in public is not a useful or effective form of self-defense and, in fact, has been shown in a number of studies to *increase* the chances that one will fall victim to violent crime. One study, for instance, found that "gun possession by urban adults was associated with a significantly increased risk of being shot in an assault," and that "guns did not protect those who possessed them from being shot in an assault." Charles C. Branas, *et al.*, *Investigating the Link Between Gun Possession and Gun Assault*, AMER. J. PUB. HEALTH, vol. 99, No. 11 at 1, 4 (Nov. 2009). Likewise, another study found that:

> Two-thirds of prisoners incarcerated for gun offenses reported that the chance of running into an armed victim was very or somewhat important in their own choice to use a gun. Currently, criminals use guns in only about 25 percent of noncommercial robberies and 5 percent of assaults. If increased gun carrying among potential victims causes criminals to carry guns more often themselves, or become quicker to use guns to avert armed self-defense, the end result could be that street crime becomes more lethal.

Philip Cook, *et al.*, *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1081 (2009).

Third, the carrying of firearms in public has other negative implications for a number of social issues and societal ills that are not impacted by the private possession of handguns in the home. When the carrying of guns in public is restricted, "possession of a concealed firearm by an individual in public is sufficient to create a reasonable suspicion that the individual may be dangerous, such that an officer can approach the individual and briefly detain him in order to investigate whether the person is properly licensed." *Commonwealth v. Robinson*, 600 A.2d 957, 959 (1991); *see also Commonwealth v. Romero*, 673 A.2d 374, 377 (1996) ("officer's observance of an individual's possession of a firearm in a public place in Philadelphia is sufficient to create

reasonable suspicion to detain that individual for further investigation"). The California legislature has similarly enacted Section 12031, which generally prohibits the carrying of loaded firearms in public or in vehicles, and states that peace officers may arrest persons who they have probable cause to believe are illegally carrying loaded guns. CAL. PEN. CODE §12031(a)(5). The law was enacted out of "a growing concern over an increase in the carrying of loaded firearms" and the dangers resulting "from either the use of such weapons or from violent incidents arising from the mere presence of such armed individuals in public places." *People v. Zonver*, 132 Cal.App.3d Supp.1, 5 (1982) (quoting Stats. 1967, ch. 960, § 6). Law enforcement's ability to protect the public could be greatly restricted if officers were required to effectively presume that a person carrying a firearm in public was doing so lawfully. Under such a legal regime, it is possible that an officer would not be deemed to have cause to arrest, search, or even engage in a *Terry* stop if she spotted a person carrying a loaded gun, even though far less risky behavior could justify police intervention. Law enforcement should not have to wait for a gun to be fired before protecting the public. Further, if drivers are allowed to carry loaded guns, road rage can become a more serious and even potentially deadly phenomenon. David Hemenway, *Road Rage in Arizona: Armed and Dangerous*, 34 ACCIDENT ANALYSIS AND PREVENTION 807-14 (2002). And an increase in gun prevalence in public may cause an intensification of criminal violence. Philip Cook & Jens Ludwig, *The Social Costs of Gun Ownership*, J. PUB. ECON. 379, 387 (2006).

The concealed weapons permitting process at issue here prevents many of these risks to the public, without implicating the Second Amendment activity protected in *Heller*. Individuals in California who are not otherwise disqualified by operation of law and who can demonstrate that they can possess and use firearms responsibly are allowed to maintain handguns to protect themselves in the home. *See* CAL. PENAL CODE § 12026(b). The law simply provides no basis for expanding that right to the carrying of concealed weapons in public.

II. EVEN IF THE CONCEALED WEAPONS PERMITTING PROCESS IN SECTION 12050 DID IMPLICATE PROTECTED SECOND AMENDMENT ACTIVITY, IT WOULD WITHSTAND THE APPROPRIATE LEVEL OF SCRUTINY.

In choosing a level of scrutiny appropriate for Second Amendment challenges, courts need

not – and should not – limit themselves to the choices utilized in First Amendment jurisprudence: strict scrutiny, intermediate scrutiny, or rational basis review. While these levels of scrutiny may seem to be the easiest and most obvious options in picking a standard of review, key differences between the First and Second Amendments suggest that using one of these three levels of scrutiny is *not*, in fact, an appropriate choice. The exercise of Second Amendment rights creates unique risks that threaten the safety of the community and can be far more lethal than even the most dangerous speech. While "words can never hurt me," guns are designed to inflict grievous injury and death – and often do. To protect the public from the risks of gun violence – unlike the significantly more modest risks posed by free speech – states must be allowed wide latitude in exercising their police power authority. Otherwise, the exercise of Second Amendment rights could infringe on the most fundamental rights of others – the preservation of life.

The Supreme Court, moreover, has not limited itself to these three levels of scrutiny in the past, but has instead fashioned a wide variety of standards of review that are tailored to specific constitutional inquiries.[3] For all these reasons, a standard of review specific to the Second Amendment context is warranted here, particularly given the Supreme Court's recognition that an individual's right to bear arms must be evaluated in light of a state's competing interest in public safety. To that end, *amicus* respectfully suggests that this Court apply the test that state courts throughout the country have crafted and utilized for over a century in construing the right to keep and bear arms under state constitutions: the "reasonable regulation" test.

A. The Reasonable Regulation Test is the Appropriate Standard of Review.

While courts are just beginning to grapple with a private right to arms under the federal Constitution, courts have construed analogous state provisions for over a century. Over forty states have constitutional right-to-keep-and-bear-arms provisions, and despite significant

[3] *See, e.g., Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008) (affirming that the Eighth Amendment's prohibition of cruel and unusual punishment should be measured by an "evolving standards of decency" test); *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992) (applying an "undue burden" test to determine whether a statute jeopardized a woman's right to choose); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (holding that determinations of procedural due process require a balancing of three competing interests); *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (upholding a "stop and frisk" under the Fourth Amendment where an officer had "reasonable grounds" to believe a suspect was armed and dangerous).

differences in the political backdrop, timing, and texts of these provisions, the courts in these states have, with remarkable unanimity, coalesced around a single standard for reviewing limitations on the right to bear arms: the "reasonable regulation" test. *See* Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 686-87, n. 12 (2007) (describing "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). Under the reasonable regulation test, a state "may regulate the exercise of [the] right [to bear arms] under its inherent police power so long as the exercise of that power is reasonable." *Robertson v. City & County of Denver*, 874 P.2d 325, 328, 333 n. 10 (Colo. 1994).[4] More demanding than rational basis review, but more deferential than intermediate scrutiny, this "reasonable regulation" test protects Second Amendment activity without unduly restricting states from protecting the public from gun violence. The test recognizes "the state's right, indeed its duty under its inherent police power, to make reasonable regulations for the purpose of protecting the health, safety, and welfare of the people." *State v. Comeau*, 448 N.W.2d 595, 599 (Neb. 1989). The reasonable regulation test, which was specifically designed for cases construing the right to keep and bear arms and has been adopted by the vast majority of states, remains the standard of review best-suited for Second Amendment cases after *Heller* and for the case at hand.

The reasonable regulation test is a more heightened form of scrutiny than the rational basis test that the majority opinion in *Heller* rejected (and is more demanding than the "interest balancing" test suggested by Justice Breyer in dissent) because it does not permit states to prohibit all firearm ownership. *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA LAW REVIEW 1443, 1458 (2009). Instead, it "focuses on the balance of the interests at stake, rather than merely on whether any conceivable rationale exists under which the legislature may have concluded the law could promote the public welfare." *State v. Cole*, 665 N.W. 2d 328, 338 (Wis.

[4] *See also Bleiler v. Chief, Dover Police Dep't*, 927 A.2d 1216, 1223 (N.H. 2007) (the relevant inquiry is "whether the statute at issue is a 'reasonable' limitation upon the right to bear arms"); *Jackson v. State*, 68 So.2d 850, 852 (Ala. Ct. App. 1953) ("It is uniformly recognized that the constitutional guarantee of the right of a citizen to bear arms, in defense of himself and the State . . . is subject to reasonable regulation by the State under its police power.").

2003). Laws and regulations governing the use and possession of firearms thus must meet a higher threshold under the reasonable regulation test than they would under rational basis review.

Although the reasonable regulation test may be more deferential than intermediate or strict scrutiny, it is not toothless. Under the test, laws that "eviscerate," *State v. Hamdan*, 665 N.W.2d 785, 799 (Wis. 2002), render "nugatory," *Trinen v. City of Denver*, 53 P.3d 754, 757 (Colo. Ct. App. 2002), or result in the effective "destruction" of a Second Amendment right, *State v. Dawson*, 159 S.E.2d 1, 11 (N.C. 1968), must be struck down. Laws that are reasonably designed to further public safety, by contrast, are upheld. *See, e.g., Robertson v. City & County of Denver*, 874 P.2d at 328, 330 n. 10 ("The state may regulate the exercise of [the] right [to bear arms] under its inherent police power so long as the exercise of that power is reasonable."); *Jackson*, 68 So.2d at 852 (same); *Bleiler v. Chief, Dover Police Dep't*, 927 A.2d at 1223 (same).

Nor would adopting the reasonable regulation test here be at odds with district courts that have elected to use intermediate scrutiny following *Heller*. In virtually every post-*Heller* case where a district court has adopted intermediate scrutiny, the court was evaluating a particular provision of 18 U.S.C. § 922, the federal firearms statute that imposes restrictions on broad classes of individuals and types of arms. *See, e.g., Marzzarella*, 2010 WL 2947233 at *1 (evaluating § 922(k) barring possession of a handgun with an obliterated serial number); *United States v. Yanez-Vasquez*, 2010 WL 411112 (D. Kan. Jan. 28, 2010) (evaluating § 922(g)(5) barring illegal aliens from possessing firearms); *United States v. Miller*, 604 F. Supp. 2d 1162, 1164 (W.D. Tenn. 2009) (evaluating § 922(g) barring felons from possessing firearms); *United States v. Bledsoe*, 2008 WL 3538717, *1 (W.D. Tex. 2008) (evaluating § 922(x) barring juveniles from possessing firearms). By contrast, Section 12050 involves a permitting process that relies on *individual* determinations and law enforcement discretion, rather than broad categories.[5] Courts have always looked with a more wary eye on laws that impose restrictions on broad classes of

[5] The only exception appears to be a recent case in the United States District Court for the District of Columbia, *Heller v. District of Columbia* ("*Heller II*"), in which the plaintiffs challenged (1) the District of Columbia's firearm registration procedures, (2) the District's prohibition on assault weapons, and (3) the District's prohibition on large capacity ammunition feeding devices. 698 F. Supp. 2d 179, 181 (D.D.C. 2010). But even in that case, two of the three provisions that the district court was evaluating were broad restrictions on entire classes of firearms. *Id.*

people than laws that require individual determinations. Heightened scrutiny – like intermediate scrutiny – is less appropriate here.

The reasonable regulation test also has two particular strengths that intermediate scrutiny does not: (1) it affords law enforcement officials the discretion they need to adequately enforce handgun laws, and (2) it gives an appropriate amount of deference to legislative directives.

1. Law enforcement officials should be afforded an appropriate amount of discretion in enforcing firearm regulations.

Local law enforcement officials are better situated to make determinations about who in their communities can carry concealed weapons safely and responsibly than either courts or juries. Not only are they extensively trained in the proper and safe use of firearms, they are also more likely to be familiar with the backgrounds and personalities of the members of their communities than courts or juries situated miles (and perhaps even counties) away. They are uniquely situated to know, for instance, whether a man requesting a concealed weapons permit previously has threatened his wife with violence (even if she, say, declined to testify against him so he was not formally charged), or whether for other reasons an individual requesting a permit would pose dangers if carrying weapons in public. These are precisely the types of decisions that need to be made in order to protect communities from firearm violence.[6]

Law enforcement officials also have a particular stake in who has and can carry firearms in their communities. Not only are law enforcement officials often tasked with enforcing state and local firearms regulations, they are also charged with responding to situations involving firearms and thus often suffer from the impacts of the irresponsible and criminal uses of firearms in greater numbers than the general population. Law enforcement officials are thus both uniquely qualified to assess who in their communities possess the proper qualifications and need to carry handguns and uniquely positioned to feel the effects of those decisions. Courts, accordingly, should afford them an appropriate degree of discretion is enforcing firearm regulations. *See, e.g.*, *Harman v. Pollock*, 586 F.3d 1254, 1265 (10th Cir. 2009) ("[Courts] must defer to trained law

[6] States that do *not* afford any discretion to law enforcement officials have issued handgun carry permits to numerous individuals who have gone on to kill innocent civilians and law enforcement members. *See* Violence Policy Center, *Private Citizens Killed by Concealed Handgun Permit Holders: May 2007 to the Present, available at* http:// www.vpc.org/ccwkillers.htm.

enforcement personnel, allowing officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them.").

2. Given the governmental interest in protecting the public from the harms associated with firearms, deference to legislative directives is appropriate.

There is a profound governmental interest in regulating the possession and use of firearms. States have "cardinal civil responsibilities" to protect the health, safety, and welfare of their citizens. *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 342 (2008); *see also Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 83 (1946) ("[T]he legislature may choose not to take the chance that human life will be lost . . . ."). States are thus generally afforded "great latitude" in exercising "police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons . . . ." *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (internal quotations omitted). Regulations on the carrying of firearms are an essential exercise of those powers, for the "promotion of safety of persons and property is unquestionably at the core of the State's police power." *Kelley v. Johnson*, 425 U.S. 238, 247 (1976).

While individuals and organizations may differ on the net risks posed by guns in our society, such disagreement underlines that firearm regulation is best suited for the legislative arena, not the courts. *See Miller*, 604 F. Supp. 2d at 1172 n. 13 ("[D]ue to the intensity of public opinion on guns, legislation is inevitably the result of hard-fought compromise in the political branches."). Indeed, legislatures are designed to make empirical judgments about the need for and efficacy of regulation, even when that regulation affects the exercise of constitutional rights. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (state legislatures are "far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon legislative questions."); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 544 (1989) ("Local officials, by virtue of their proximity to, and their expertise with, local affairs, are exceptionally well qualified to make determinations of public good within their respective spheres of authority.") (internal quotations and citations omitted). State governments "must [thus] be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Young v.*

American Mini Theatres, Inc., 427 U.S 50, 71 (1976).

In fulfilling their responsibility to protect the public, states have enacted laws and permitting regimes – like the one at issue here – to ensure that guns are used responsibly and possessed by responsible, law-abiding persons. These laws have helped reduce the use of guns in crime and saved lives. *See, e.g.*, D.W. Webster, *et al.*, *Effects of State-Level Firearm Seller Accountability Policies on Firearm Trafficking*, 86 J. URBAN HEALTH: BULLETIN OF THE N.Y. ACAD. OF MED. 525 (2009); D.W. Webster, *et al.*, *Relationship Between Licensing, Registration, and Other State Gun Sales Laws and the Source State of Crime Guns*, 7 INJURY PREVENTION 184 (2001); Douglas Weil & Rebecca Knox, *Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms*, 275 J. AM. MED. ASS'N 1759 (1996). The risks posed by invalidating or unduly restricting these legislative judgments on firearms regulations is severe, and courts should review such legislative judgments with an appropriate amount of deference. Here, too, therefore, the reasonable regulation test is better situated than either intermediate or strict scrutiny to defer to legislative judgments. It allows for different permitting and concealed carry regimes depending on the needs of the particular state or locale, and recognizes the strong interest of the state in protecting its citizens rather than being overly focused on a narrow means-end nexus of the challenged regulation.

B. The Concealed Weapons Permitting Process at Issue Is Constitutionally Permissible.

California's concealed weapons permitting process passes the reasonable regulation test and "demonstrate[s] the required 'fit' between the law and the interest served." MTD Order at 12. Courts have repeatedly found that there is a "compelling state interest in protecting the public from the hazards involved with certain types of weapons, such as guns," *Cole*, 665 N.W. 2d at 344, particularly given "the danger [posed by the] widespread presence of weapons in public places and [the need for] police protection against attack in these places." *Id.* (internal quotations omitted).

Indeed, as discussed above, there is strong sociological and statistical evidence which suggests that permitting and registration procedures that make it more difficult for someone to

carry a gun in public reduce both the number of gun deaths and criminal access to firearms. *See, e.g.*, Webster, *et al.*, *Relationship Between Licensing*, at 184. Webster, *et al.*, *Effects of State-Level*, at 525; Weil & Knox, *Effects of Limiting Handgun Purchases*, at 1759. The Second Amendment does not forbid state or local governments from using such protocols to achieve these ends and both state and federal courts have upheld them for decades.

Moreover, California's concealed weapons permitting process is not an outright ban on the possession or carrying of firearms and thus does not even approach the blanket prohibition on handgun ownership that the Supreme Court struck down in *Heller*. *See Heller*, 128 S. Ct. at 2788. Instead, it merely requires individuals who wish to carry concealed firearms outside the home to meet certain basic requirements and to have their request approved by local law enforcement officials. *See* CAL. PENAL CODE § 12050. Those officials, in turn, review applications to ensure that all the statutory requirements have been met. *See id.* This is a perfectly reasonable process designed to ensure that individuals who carry concealed weapons can do so responsibly. The California Legislature and the law enforcement community already have decided that this is a reasonable way to protect public safety. The Court should not second-guess those judgments, particularly for firearms activity that has never been recognized as a Second Amendment right by any other court.

In sum, the California concealed weapons permitting process is both reasonable and not unduly restrictive of an individuals' Second Amendment right to keep guns in their home. It is thus a valid exercise of state's "police powers to legislate as to the protection of the lives, limb, health, comfort, and quiet of all persons" and passes the reasonable regulation test.[7] *Gonzales v.*

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[7] Section 12050 also would survive intermediate (or even strict) scrutiny were the Court to apply that standard of review because it is substantially related to an important government interest. Indeed, a number of courts have found that the protection of the public from firearm violence is an important government interest, *see, e.g.*, *Heller II*, 698 F. Supp. 2d at 186; *Miller*, 604 F.Supp.2d at 1171; *Bledsoe*, 2008 WL 3538717 at *4, and upheld statutes that impose much broader restrictions on an individual's ability to possess and carry firearms. *See, e.g.*, *Marzzarella*, 2010 WL 2947233 at *7; *Heller II*, 698 F. Supp. 2d at 197; *State v. Sieyes*, 225 P.3d 995, 995 (Wash. 2010); *United States v. Engstrum*, 609 F. Supp. 2d 1227, 1233 (D. Utah); *Yanez-Vasquez*, 2010 WL 411112 at *3; *Miller*, 604 F.Supp.2d at 1171-72; *United States v. McCane*, 573 F.3d 1037, 1050 (10th Cir. 2009); *United States v. Masciandaro*, 648 F. Supp. 2d 779, 789-91 (E.D. Va. 2009); *Radenich*, 2009 WL 127648 (N.D. Ind. 2009); *Schultz*, 2009 WL 35225 (N.D. Ind. 2009); *Flores*, 169 Cal. App. 4th at 574-75; *Bledsoe*, 2008 WL 3538717 at *4.

Oregon, 546 U.S. 243, 270 (2006) (internal quotations omitted).

CONCLUSION

For all the foregoing reasons, the Court should find that Section 12050 is constitutional.

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Respectfully submitted,

s/Neil O'Hanlon

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TAB 34

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

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

ORDER GRANTING PLAINTIFFS' EX PARTE APPLICATION TO FILE DOCUMENTS IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT UNDER SEAL

[Doc. No. 33]

ORDER

Having considered Plaintiffs' Ex Parte Application to File Documents in Support of Plaintiffs' Motion for Partial Summary Judgment under Seal, and finding good cause therefore, **IT IS HEREBY ORDERED** that Plaintiffs shall be allowed to file Exhibits "F," "K" through "L," "O" through "S," "U" through "PP," and "VV" under seal in support of their Motion for Partial Summary Judgment in accordance with this Court's Protective Order of July 14, 2010.

IT IS SO ORDERED.

DATED: September 8, 2010

IRMA E. GONZALEZ, Chief Judge
United States District Court

TAB 35

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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)

NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT

(ORAL ARGUMENT REQUESTED)

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

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on November 1, 2010 at 10:30 a.m., or as soon thereafter as counsel can be heard, in the above-listed Court, Plaintiffs Edward Peruta, Michelle Laxson, James Dodd, Dr. Leslie Buncher, Mark Cleary, and California Rifle and Pistol Association Foundation (collectively "Plaintiffs") will, and by simultaneous submission herewith of this motion hereby do, move this

Court for an Order granting Plaintiffs' Motion for Partial Summary Judgment against Defendants pursuant to Federal Rule of Civil Procedure 56, on the grounds that Defendants' policies and procedures challenged in this litigation violate the Second and Fourteenth Amendments of the United States Constitution and unlawfully infringe upon Plaintiffs' rights thereunder.

As Plaintiffs' case presents no genuine issue as to any material fact, with regard to these claims for which Plaintiffs seek relief, summary judgment is warranted as a matter of law.

This Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities and Exhibits in support thereof, the Declarations of Edward Peruta, Michelle Laxson, Mark Cleary, and California Rifle and Pistol Association Foundation President Silvio Montanarella, the pleadings and papers on file herein, the record to date in this matter, and upon such other matters as may be presented to the Court at the time of the hearing.

Dated: September 3, 2010

MICHEL & ASSOCIATES, PC

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

Dated: September 3, 2010

PAUL NEUHARTH, JR., APC

/s/ Paul Neuharth, Jr. (as approved on 9/3/10)
Paul Neuharth, Jr.
Attorney for Plaintiff Edward Peruta

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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

IT IS HEREBY CERTIFIED THAT:

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

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

NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT

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

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I declare under penalty of perjury that the foregoing is true and correct. Executed on September 3, 2010.

/s/ C.D. Michel
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IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

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

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

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

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Plaintiffs Edward Peruta, Michelle Laxson, James Dodd, Dr. Leslie Buncher, Mark Cleary, and California Rifle and Pistol Association Foundation (collectively, "Plaintiffs"), bring this Motion for Partial Summary Judgment on their Complaint for Declaratory and Injunctive Relief, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, and submit this Memorandum of Points and Authorities in Support thereof, against the County of San Diego, Sheriff Gore, and their employees, agents, and successors in office (collectively, "the County").

SUMMARY OF ARGUMENT

In two recent landmark cases, the U. S. Supreme Court held the Second Amendment guarantees the right of citizens to "keep and bear Arms," and protects that right from federal, state, and local infringement.[1] As the plain language of the amendment states – "keep" and "bear" Arms – and as further articulated by the Court, *carrying* handguns for self-defense is protected by this fundamental, enumerated right to Arms. *Heller*, 128 S. Ct. at 2793-94. Thus, while states may regulate the bearing of Arms to *some* degree in the interest of public safety, *i.e.*, in "sensitive places," *id.* at 2816-17, such regulations, because they impact conduct within the scope of the Second Amendment, may not constitutionally amount to a general prohibition of that conduct. *See, e.g.*, *id.* at 2817-18 (the Supreme Court, in explaining the unlawfulness of the handgun ban at issue in that case, compared it to similar "severe restrictions" found invalid under the right to Arms by state supreme courts, including bans on carrying handguns in public).[2]

Here, the County's policy for issuing permits to carry a concealed firearm ("CCW") ultimately denies such permits to responsible, law-abiding citizens seeking to carry handguns for self-defense. This policy, coupled with state law effectively prohibiting "open" carry

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[1] *D.C. v. Heller*, 128 S. Ct. 2783 (2008) and *McDonald v. City of Chi.*, 130 S. Ct. 3020 (2010).

[2] Arguably, a ban on carrying weapons outside the home is a more serious burden on the right to Arms than the ban on handgun possession struck down in *Heller*, for the ban in that case would have at least left open some possibility of self-defense with shotguns or rifles. *See* Eugene Volokh, *The Second Amendment and the Right to Bear Arms after D.C. v. Heller: Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1518 (2009) (hereafter cited as "Volokh").

for self-defense purposes, abrogates those persons' right to "possess and carry weapons in case of confrontation," *id.*, at 2797, core conduct under the Second Amendment right to bear Arms. This infringement on the right to bear Arms conflicts with *Heller*, which indicates that government entities may regulate but not completely prohibit the lawful carrying of firearms. *Heller* rests on the premise that restrictions on carrying concealed firearms are permitted so long as the government allows firearms to be carried openly, or vice versa. *See, e.g.*, *id.* at 2816-2818, (discussing state supreme court cases that permitted restrictions on "concealed carry" where "open carry" was allowed). Thus, prohibitions on carrying handguns for self-defense purposes by responsible, law-abiding persons are unconstitutional. *Id.* at 2818.

And that is the situation here: Because California prohibits the open carry of loaded firearms, and the County refuses to issue CCWs to responsible, law-abiding applicants who seek a CCW for self-defense purposes, but who are unable to provide evidence documenting a specific threat deemed acceptable by the County, Plaintiffs' right to bear Arms is abrogated–and will continue to be so–unless this Court intervenes to protect that right.

It is undisputed that County's CCW issuance policy and practices prevent responsible, law-abiding citizens seeking a CCW for self-defense purposes from obtaining one. The threshold question before this Court is thus one of law: whether County's policy and practices are constitutional. Plaintiffs contend they are not for three reasons.

First, County's policy unjustifiably denied Plaintiffs and other responsible, law-abiding people the ability to carry a handgun for self-defense on account of Plaintiffs' inability to guess at, and offer documentation, of a specific threat of harm acceptable to the County, thereby violating their Second Amendment right to bear Arms.

Second, concomitantly, the County's policy deprives Plaintiffs of equal protection of the laws by allowing persons engaged in certain conduct, such as a business, to receive a CCW for self-defense purposes, while it creates a classification of persons (*i.e.*, those unable to guess at, and offer documentation, of a specific threat of harm acceptable to the County), which includes Plaintiffs, who are deprived of their fundamental right to carry a handgun for self-defense.

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Finally, in apparent breach of its own issuance policy, the County grants CCWs to members of the Honorary Deputy Sheriff's Association ("HDSA") – a private, *civilian* entity, wherein membership is achieved merely by being sponsored by a current member, passing a background check, making a "donation" and paying annual dues – while at the same time the County *denies* other law-abiding, *non*-HDSA-members who are similarly situated. That arbitrary difference in treatment also violates the Equal Protection rights of Plaintiffs.

RELEVANT FACTS

A. California's CCW Regulatory Scheme

With minor exceptions, California law effectively prohibits the unlicensed public carrying of loaded firearms. SUF 1. The only licensed public carrying of loaded firearms allowed is "concealed carry" (*i.e.*, with a CCW), except in a few sparsely populated counties where one may obtain a license to carry a loaded handgun openly. SUF 2. Thus, in a populous county like San Diego, a CCW is, with few and limited exceptions, the only means for an individual to lawfully carry a firearm in public for self-defense.

Depending on the jurisdiction, to obtain a CCW, one must apply to the Chief of Police or Sheriff ("Issuing Authority") for the city or county where the applicant either resides, or spends substantial time conducting business at the applicant's principal place of employment or business located in that county. SUF 3. CCW applicants must also pass a criminal background check (SUF 4), and successfully complete a handgun training course. SUF 5. Even then, the Issuing Authority may deny the CCW permit if it finds the applicant lacks good moral character or "good cause" for carrying a concealed handgun. SUF 6. Issuing Authorities have exercised broad discretion in deciding whether an applicant has "good cause" for a CCW, resulting in some counties, such as San Diego, imposing restrictive standards for issuing CCWs, while other counties issue CCWs to almost all responsible, law-abiding applicants.

B. The County's CCW Issuance Policies and Practices

In San Diego, Defendant Sheriff William Gore is the sole Issuing Authority. SUF 7. Thus, to obtain a CCW in San Diego, one must submit an application to Sheriff Gore. SUF 8. The County's written policy for issuing a CCW states:

> Applicants will be required to submit documentation to support and demonstrate their need. SUF 9.

The County *requires* CCW applicants who seek a CCW for purely self-defense purposes (*i.e.*, unrelated to a business/profession) to provide evidence documenting a specific threat of harm to the applicant (*e.g.*, "Current police reports and/or other documentation supporting need (*i.e.*, such as restraining orders or other verifiable written statements))" in order to satisfy the "good cause" requirement of Cal. Pen. Code § 12050. SUF 10. The County has a separate standard for those seeking a CCW for business purposes (*i.e.*, to protect themselves during business activity). SUF 11.

As evidenced by the County's letters denying Plaintiffs' CCW applications, it is the County's general practice to follow this policy when considering whether to issue a CCW to any particular applicant. (*See*, for example, Plaintiff Buncher's denial letter, stating: "The documentation you have provided does not indicate you are a specific target or that you are currently being threatened in any manner. The Sheriff's Department does not issue CCW's based on fear alone."). SUF 12

However, despite the County's strict CCW issuance policy, it does not apply it evenly to all applicants, demanding less of some. SUF 13.

C. Plaintiffs

All individual Plaintiffs are residents of San Diego County. No Plaintiff is prohibited under federal or California law from purchasing or possessing firearms. All Plaintiffs fear arrest, prosecution, fine, imprisonment, and other penalties if they carry a handgun without a CCW. But for being prevented from lawfully obtaining a CCW, and the fear of prosecution and other penalties, each Plaintiff would carry a handgun in public for self-defense on occasions they deem appropriate. SUF 14.

All Plaintiffs are injured by the County's CCW issuance policy and practices because they either were denied a CCW for supposed lack of "good cause," were unable to meet the County's written policy for determining "good cause," or are citizen taxpayers who are subject to an unconstitutional government policy.

In the case of Plaintiff California Rifle and Pistol Association Foundation ("CRPAF"), an organization dedicated to educating the public about firearms and protecting the rights thereto, its thousands of supporters and CRPA members in San Diego County are likewise injured by the County's issuance policy and practices for these same reasons. (SUF 15). CRPAF is thus an appropriate associational plaintiff because it represents the shared interests of those individuals to whose benefit the remedy sought in this action will inure. *See Int'l Union v. Brock*, 477 U.S. 274, 287-88 (1986).

ARGUMENT

I. THE PEOPLE'S RIGHT TO CARRY HANDGUNS FOR SELF-DEFENSE, IN PRIVATE OR PUBLIC, IS "CORE CONDUCT" PROTECTED BY THE SECOND AMENDMENT

The *Heller* Court left no doubt that "the people's right to keep and bear Arms" under the Second Amendment includes both a right to keep Arms and a right to *bear* Arms. In fact, the Court adopted and quoted Justice Ginsburg's definition as to the latter right from her dissent in *Muscarello v. United States*, 524 U.S. 125, 139-40 (1998), where in the course of analyzing the meaning of "carries a firearm" in a federal criminal statute, she wrote:

> Surely a most familiar meaning is, as the *Constitution's Second Amendment* . . . indicate[s]: "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Id.* at 143, 118 S. Ct. 1911, 141 L. Ed. 2d 111 (dissenting opinion) (quoting Black's Law Dictionary 214 (6th ed. 1998)).

Heller, 128 S. Ct. at 2793.

Moreover, at the end of its detailed parsing of the Second Amendment's operative clause, the Court found that "[p]utting all of these textual elements together, we find that they guarantee the individual right to possess *and carry* weapons in case of confrontation."[3] *Id.* at 2797

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[3] This plain reading of "bear arms" also makes sense upon consideration of other provisions of the Bill of Rights. For example, the Sixth Amendment guarantees the right to a "speedy and public trial." U.S. Const. amend. VI. Just as the Sixth Amendment is not read to permit secret, speedy trials or public trials the prosecutions of which are unjustly delayed, the Second Amendment's reference to "keep and bear" refers to two distinct concepts. In addition, the Court flatly rejected Justice Stevens' suggestion that "keep and bear Arms" was a term of art with a unitary meaning, presumably akin to "cease and desist," stating simply: "[t]here is nothing to this." *Heller*, 128 S. Ct. at 2797.

(emphasis added). The Court's reference to "confrontation," along with Justice Ginsburg's reference to "being armed and ready . . . *in case of* conflict" again raises the recurring theme of armed self-defense, and self-preservation recognized by *Heller* as "core conduct" protected by the Second Amendment. *Id.* at 2793 (emphasis added). The *Heller* Court limited its ruling to address the *keeping* of arms because that was the question of law at issue in the ordinance being challenged. *See id.* at 2821 ("But since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, any more than *Reynolds v. United States*, our first in-depth Free Exercise Clause case, left that area in a state of utter certainty." (internal citation omitted).) But by defining "bearing Arms" in terms of "carrying weapons" or "being armed and ready" in case of confrontation or conflict, *id.* at 2793, the Court implicitly rejects any attempt to limit core conduct associated with the right to Arms to in-home possession and use–as if the right to Arms, self-defense, and self-preservation ends at one's threshold.

The *public* carrying of firearms is thus protected activity–indeed, core conduct–under the right to bear Arms. The Supreme Court reassures us that the right to Arms is not a right to "carry any weapon whatsoever in any manner whatsoever and for whatever purpose," *id.* at 2816 (citations omitted). But even that caveat confirms there *is* a right to carry *some* weapons, in *some* manner, for *some* purposes. Also, by listing a few "presumptively lawful" firearm regulations, the Court likewise indirectly casts doubt on others, *e.g.*, by presuming the lawfulness of restrictions on carrying firearms in "sensitive places," *id.* at 2817, the Court implies it might well invalidate laws restricting carrying firearms in "non-sensitive places."

That courts, including the Supreme Court in *Heller*, have found or indicated that certain local restrictions on carrying *concealed* weapons may be lawful does not alter the basic right to carry, it merely acknowledges the right is not absolute. In commenting on the scope of the right to Arms, the *Heller* Court explained:

> Like most rights, the right secured by the Second Amendment is not unlimited . . . . For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.

Heller, 128 S. Ct. at 2816 (citing *State v. Chandler*, 5 La. Ann. 489, 489-90 (1850); *Nunn v. State*, 1Ga. 243, 251 (1846); citing generally James Kent, Commentaries on American Law 340 n. 2 (Oliver Wendell Holmes ed., 1873); William Blackstone, The American Students' Blackstone: Commentaries on the Laws of England, in Four Books 84 n. 11 (George Chase ed., 1884)).

As the Court itself notes, both state court cases cited as examples of acceptable limits on the right to "concealed carry," *Chandler* and *Nunn*, involved prohibitions where the right to Arms was still available by way of "open carry." *See Chandler*, 5 La.Ann. at 489-90 (noting the prohibition on carrying concealed weapons "interfered with no man's right to carry arms . . . 'in full view,' which places men upon an equality"); *accord*, *Nunn*, 1 Ga. at 251 ("so far as the act . . . seeks to suppress the practice of carrying certain weapons *secretly*, that it is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void* . . ."(emphasis original).)

In addition to *Chandler* and *Nunn*, *Heller* discussed and cited with approval other state supreme court opinions holding bans on open carry invalid, including regulations that, in effect, constitute a ban. *See Heller*, 128 S. Ct. at 2818 (discussing *Andrews*, 50 Tenn. 165; 178 (1871) and *State v. Reid*, 1 Ala. 612, 616-17 (1840)):

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

Id. (internal citations omitted).

The legal treatises cited by *Heller* in support of concealed carry restrictions also support the view that such prohibitions are valid only where open carrying is allowed as an alternative. *See* William Blackstone, The American Students' Blackstone: Commentaries on the Laws of England, in Fall Books 84 n. 11 (G. Chase ed., Banks and Bros. 1884). ("[I]t is generally held that statutes prohibiting the carrying of *concealed* weapons are not in conflict with these constitutional provisions, since they merely forbid the carrying of arms in a particular manner . . .."), cited in

Heller, 128 S. Ct. at 2716).

In sum, *Heller* identifies carrying handguns in public for self-defense purposes as conduct that may not be infringed by federal, state or local governments, including Defendants' here. While the right to engage in that conduct is not unlimited, *Heller*, 128 S. Ct. at 2816, neither is the ability of local government to restrict that right. *Heller* indicates that government may impose some limits on the right, *e.g.*, by prohibiting open carry in urban areas, while allowing for concealed carry by law-abiding citizens (similar in theory to California's law). But this Court need not determine with any precision the degree to which governments may infringe the right to bear Arms. This case does *not* require development of a comprehensive regime setting forth parameters for restrictions on who may carry Arms, what they may carry, how they may carry, where, and for what purpose–because the County's policies are not in dispute, nor is the severe effect of those policies. Here, the County's policies and practices in effect preclude Plaintiffs and other similarly situated persons from lawfully carrying handguns, period.

Plaintiffs cannot obtain the permits that state law requires for concealed carry from the County, nor can they generally carry loaded handguns openly under state law. (SUF 6). In effect, they cannot bear *any* arms in *any* practical manner for the core purpose of self-defense. Little more need be said. The County has violated and continues to violate Plaintiffs' Second Amendment rights, as well as the rights of thousands of similarly situated citizens. And this is true regardless of what type of heightened scrutiny this Court adopts in reviewing the County's policies and practices. Actually, this Court need not adopt any particular standard of review for, as in *Heller*, the severity of the County's restrictive policy and practices renders them void under any level of heightened scrutiny.

II. THE COUNTY'S POLICY AND PRACTICES ARE SUBJECT TO STRICT SCRUTINY BECAUSE THEY BAR PLAINTIFFS FROM ENGAGING IN CORE CONDUCT PROTECTED BY THE SECOND AMENDMENT RIGHT TO BEAR ARMS; AS SUCH, THE COUNTY BEARS THE BURDEN OF PROVING SUCH POLICY AND PRACTICES ARE CONSTITUTIONAL

If this Court finds it necessary to determine the appropriate standard of review, it should hold, after *D.C. v. Heller*, 128 S. Ct. 2783 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), that restrictions on the right to keep and bear arms are subject to strict scrutiny. That

conclusion follows from both *McDonald*'s holding that the right to keep and bear arms is incorporated through the Fourteenth Amendment because of its fundamental nature and from *Heller*'s rejection of rational basis scrutiny and Justice Breyer's "interest-balancing" approach, which was simply intermediate scrutiny by another name.

A. Standard of Review: Under the Traditional Model, Strict Scrutiny Should Apply to Second Amendment Rights; *Heller* and *McDonald* Preclude Lesser Standards of Review

Though the Court's recent rulings in *McDonald* and *Heller* do not expressly establish a level of scrutiny for evaluating Second Amendment restrictions, both rulings provide clear direction on what is and is not appropriate. *Heller* expressly rejects "rational-basis" review, *Heller*, 128 S. Ct. at 2818 n. 27, and all but says "intermediate scrutiny" is insufficient. *McDonald* reaffirms that the right to Arms is "fundamental," thereby requiring the strict scrutiny standard of review.

1. Under the Traditional Model, "Strict Scrutiny" Applies to Laws Regulating Fundamental, Enumerated Rights, and It Applies Equally at the Federal, State, and Local Level

When a law interferes with "fundamental constitutional rights," it is subject to "strict judicial scrutiny." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983) ("strict scrutiny [is] applied when government action impinges upon a fundamental right protected by the Constitution"). *McDonald* laid to rest any doubt about the fundamental nature of the right to keep and bear arms, declaring that "the right to bear arms was fundamental to the newly formed system of government." 130 S. Ct. at 3037; *accord id.* at 3042 ("[T]he Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.")

Indeed, whether the right to keep and bear arms is fundamental was the basic question presented in *McDonald*: To decide "whether the Second Amendment right to keep and bear arms is incorporated in the concept of due process, . . . we must decide whether the right to keep and bear arms is fundamental to our scheme of ordered liberty." *Id.* at 3036 (emphasis omitted). The very first sentence of the Court's analysis of this questions stated that "our decision in *Heller*

points unmistakably to [an affirmative] answer." *Id.* *Heller* explained that "[b]y the time of the founding, the right to have arms had become fundamental for English subjects." 128 S. Ct. at 2798. It was this fundamental "pre-existing right" that the Second Amendment "codified." *Id.* at 2797. Burdens on Second Amendment rights are thus subject to strict scrutiny. *See also U.S. v. Engstrum*, 2009 U.S. Dist. LEXIS 65684 (D. Utah 2009).

2. *Heller* Adopted a *Sui Generis* Historical Approach And Explicitly Rejects Justice Breyer's "Interest-Balancing" Approach, Akin to "Intermediate Scrutiny" Tests that Weigh Burdens and Benefits

Although *Heller* did not explicitly state that "strict scrutiny" is required of laws that restrict the rights protected by the Second Amendment, that is because the *Heller* Court eschewed levels of scrutiny in favor of an approach that focused more directly on history, which provided a clear answer to the ordinance before the Court in *Heller*. As *Heller* explained, "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban." 128 S. Ct. at 2818; *see also id.* at 2821. Nonetheless, *Heller* points clearly to strict scrutiny as the level of scrutiny that would be required within a levels-of-scrutiny framework or when history did not provide a definitive answer, and *McDonald*'s incorporation holding eliminated any potential doubt on that score. *Heller* may leave open a debate between strict scrutiny and the *sui generis* historical approach that it applied, but together *Heller* and *McDonald* leave no room for debate between strict scrutiny and any lesser standard.

The *Heller* Court rejected Justice Breyer's suggested standard of review, which it described as a "judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'" *Id.* at 2821. Such a test would allow "arguments for and against gun control" and the upholding of a handgun ban "because handgun violence is a problem, [and] because the law is limited to an urban area . . . ." *Id.* The Court expressly rejected Justice Breyer's approach, which, putting terminology aside, is essentially "intermediate scrutiny."

Justice Breyer relied on cases such as *Turner Broadcasting Systems, Inc. v. FCC*, 520 U.S. 180 (1997), and *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), which

explicitly apply intermediate scrutiny (*see Heller,* 128 S. Ct. at 2852). Even more revealingly, Justice Breyer invoked *Burdick v. Takushi*, 504 U.S. 428 (1992), the case on which the United States principally relied in advocating that the Court adopt intermediate scrutiny. *See* Brief of U.S. at 8, 24, 28, *Heller*, 128 S. Ct. 2783 (No. 07-290). Even the plain text of his proposed test utilizes the same language as the intermediate scrutiny test: "important governmental interests." *See Heller,* 128 S. Ct. at 2852. Because Justice Breyer's approach essentially amounts to intermediate scrutiny and the Court rejected it (and reaffirmed that rejection in *McDonald*), it would be inappropriate for this Court to adopt intermediate scrutiny as the standard for judging restrictions on the right to keep and bear arms.

The Court's view is in keeping with the characterization of the right to Arms as "the true palladium of liberty," *i.e.*, the single right which secures all others. See *id.* at 2805 (quoting St. George Tucker's version of Blackstone's Commentaries). It further indicates why, of the traditional models for standard of review, "strict scrutiny" must apply in this case. It would be odd indeed if the courts applied a deferential standard when reviewing government regulations restricting a fundamental, enumerated right to Arms intended, in part, to protect citizens from oppressive governments.

Some post-*Heller* courts have applied intermediate scrutiny in Second Amendment cases, justifying their decision to do so on the Supreme Court's alleged failure in *Heller* to "expressly" declare the right to Arms "fundamental." *See, e.g., U.S. v. Yanez-Vasquez*, 2010 U.S. Dist. LEXIS 8166 (D. Kan. Jan. 28, 2010); *Heller v. D.C.*, 698 F. Supp. 2d 179 (D.D.C. Mar. 26, 2010). That justification was never viable in light of *Heller*'s rejection of Justice Breyer's approach, and is now clearly wrong after *McDonald*'s express holding that the right to keep and bear arms is fundamental. *McDonald* at *87 ("[A] provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. See *Duncan* v. *La.*, 391 U. S., 145, 149, 149 n. 14. We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.").

/ / /

3. *Heller*'s Categories Of Historically Acceptable Restrictions On Keeping And Bearing Arms Are Entirely Consistent With Strict Scrutiny.

Contrary to Justice Breyer's rejected suggestion in dissent, *see Heller*, 128 S. Ct. at 2851, *Heller*'s underlying logic – that the right to keep and bear arms is fundamental and that restrictions on the right require strict scrutiny – is entirely consistent with its dictum that certain types of restrictions, such as bans on possession by felons and the mentally ill and "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," are "presumptively lawful." *Id.* at 2817, 2817 n. 26.

First, a State obviously has a compelling interest in prohibiting firearm possession by violent felons and the insane. The interest in keeping private firearms out of certain *truly* sensitive places may well be compelling as well. Thus, it was of no great moment that the *Heller* Court suggested that in future cases the government might easily prove that laws prohibiting firearm possession by convicted felons, or possession in sensitive places like courthouses or prisons, satisfy strict scrutiny. Because "[t]he fact that strict scrutiny applies 'says nothing about the ultimate validity of any particular law,'" predicting that such restrictions will be upheld is in no way inconsistent with requiring strict scrutiny. *Johnson v. California*, 543 U.S. 499, 515 (2005) (citation omitted); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 n. 6 (1992) (stating in First Amendment context that "presumptive invalidity does not mean invariable invalidity"). This Court need not over-read the "presumptively lawful" dictum to mean any more than that.

Second, it is possible that the *Heller* Court may have been stating merely that based on its preliminary understanding of the relevant history, such restrictions appear to fall outside the bounds of the right as understood at the time of the Framing, with future cases available to test that proposition and refine the precise contours of the right. *See* 128 S. Ct. at 2821 ("The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different . . . . [T]here will be time enough to expound upon the historical justifications for the exceptions we

have mentioned if and when those exceptions we have mentioned if and when those exceptions come before us.") Indeed, in his concurring opinion in *McDonald*, Justice Scalia specifically explained that "[t]he traditional restrictions [on the right to keep and bear arms] go to show the scope of the right, not its lack of fundamental character." *McDonald*, 130 S. Ct. at 3056 (Scalia , J., concurring).

The need for strict scrutiny of restrictions on the rights protected by the Second Amendment is hardly undermined by the recognition that there may be categories of conduct relating to keeping and bearing arms that fall outside the scope of the Second Amendment. After all, the fact that there are categories of *un*protected speech is hardly a justification for applying less than strict scrutiny to laws that restrict protected speech. *See, e.g., R.A.V.*, 505 U.S. at 382-83 ("From 1791 to the present . . . . our society . . . . has permitted restrictions upon the content of speech in a few limited areas . . . . We have recognized that 'the freedom of speech' referred to by the First Amendment does not include a freedom to disregard these traditional limitations.") Just as "a limited categorical approach has remained an important part of our First Amendment jurisprudence," *id.* at 383, *Heller*'s suggestion that certain categories of historically supported restrictions are lawful is entirely consistent with recognizing that restrictions on rights that are protected by the Second Amendment must be subjected to strict scrutiny.

In the end, given the general rule that restrictions on fundamental constitutional rights are subject to strict scrutiny, the contention that restrictions on Second Amendment rights should be permitted under a less-demanding standard reduces to the contention that the right to keep and bear arms is a lesser right. Any such contention would have been deeply misguided before *McDonald*, and in light of *McDonald* no such contention is remotely tenable.

First, the Court has reiterated that it is improper to prefer certain enumerated constitutional rights while relegating others to a lower plane: No constitutional right is "less 'fundamental' than" others, and there is "no principled basis on which to create a hierarchy of constitutional values . . . ." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982); *accord Ullmann v. U.S.*, 350 U.S. 422, 428-29 (1956) ("To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted

application of it. This is to disrespect the Constitution.").

Second, the Court has applied this rule against "disrespect[ing] the Constitution" in the specific context of the right to keep and bear arms and has emphatically rejected repeated attempts to deprive that right of the same dignity afforded other fundamental rights. *Heller* admonished that "[t]he very enumeration of the right takes out of the hands of government-even the Third Branch of Government-the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." 128 S. Ct. at 2821. And *Heller* explained that the "Second Amendment is no different" from the First Amendment in that it was the product of interest-balancing by the People themselves. *Id.* at 2816. In *McDonald*, confronted with the argument that the Second Amendment right, even though an individual, enumerated right as held by *Heller*, should be deemed less than fundamental, the Court rejected that argument in the plainest terms: "what [respondents] must mean is that the Second Amendment should be singled out for special-and specially unfavorable-treatment. We reject that suggestion." 130 S. Ct. at 3043 (plurality opinion); *see also id.* at 3044 (rejecting plea to "treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees").

Accordingly, it is too late in the day to argue that the right to keep and bear arms is less fundamental than the other individual rights enumerated in the Constitution. There is consequently no basis to review restrictions on that right under anything less demanding than the strict scrutiny that governs challenges to restrictions on other fundamental rights. *Heller*'s historical approach was no less demanding than ordinary strict scrutiny, and certain types of restrictions may be conducive to that approach. But to the extent that a levels-of-scrutiny analysis is to apply, the scrutiny must be strict.

B. No Matter What Standard of Review This Court Adopts, the Burden Remains on the County

What approach the Supreme Court ultimately approves and how it will affect constitutional challenges to regulations of Arms remains to be seen. But one thing is certain, *Heller* and *McDonald*, in addition to finding the Second Amendment protects an individual right

and applies to the States, have altered the dynamic in litigation over firearm regulations. The burden has shifted to government entities at all levels to prove their regulations do not infringe core conduct protected by the Second Amendment; otherwise, the regulations must further a compelling state interest and be narrowly tailored to serve that interest. This is a far cry from pre-*Heller* litigation where, in many cases, the government needed only show a rational basis for its firearms restrictions. Under that deferential standard, the policies and practices challenged herein might pass constitutional muster. That is no longer the case.

III. THE COUNTY'S POLICY OF REQUIRING A SHOWING BEYOND SELF-DEFENSE TO BE ELIGIBLE FOR A CCW VIOLATES PLAINTIFFS' HISTORICALLY APPROVED SECOND AMENDMENT RIGHT TO BEAR ARMS UNDER ANY HEIGHTENED STANDARD OF REVIEW

The County's refusal to accept Plaintiffs' desire for self-defense as "good cause" under Cal. Penal Code § 12050 conflicts with *Heller*, where the Court specifically found the right to Arms and to self-defense inextricably linked. "[T]he inherent right of self- defense has been central to the Second Amendment right." *Heller*, 128 S. Ct. at 2817. Self-defense "was the *central component* of the right itself." *Id.* at 2801 (emphasis original) (citation omitted). The English right to arms "has long been understood to be the predecessor to our Second Amendment . . . . It was, [Blackstone] said, 'the natural right of resistance and self-preservation,'and 'the right of having and using arms for self- preservation and defence.'" *Id.* at 2798 (citations omitted). "[T]he right secured in 1689 as a result of the Stuarts' abuses was by the time of the founding understood to be an individual right protecting against both public and private violence." *Id.* at 2798-99. And, as explained in detail above, the right to armed self-defense includes the right to carry a handgun in furtherance of that purpose. *See McDonald*, 130 S. Ct. at 3042 (concluding that "citizens must be permitted 'to use [handguns] for the core lawful purpose of self-defense.'").

By not recognizing Plaintiffs' desire for armed self-defense–the "central component" of the right to bear arms defined in *Heller*–as "good cause" for a CCW, the County's policy effectively nullifies Plaintiffs' right as law-abiding citizens to bear Arms, and thereby violates Plaintiffs' Second Amendment rights, as defined in *Heller* and *McDonald*, under any heightened standard of review.

A. The County's CCW Issuance Policy and Practices Do Not Meet Strict Scrutiny

In order to prevail under strict scrutiny, the County must show that its policy of denying responsible, law-abiding CCW applicants who seek a CCW for self-defense purposes lest they "submit documentation to support and demonstrate their need" is "narrowly tailored to serve a compelling state interest." (*See Reno v. Flores*, 507 U.S. 292, 301-02 (1993)). Under this standard, the County is not unbound in its ability to assert a compelling interest. For example, the Court does not generally allow legislative fact-finding to undermine a fundamental right. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Commc'n. v. Va.*, 435 U.S. 829, 843 (1978). Even under the relatively relaxed scrutiny that applies to indirect impositions on *less protected* speech, such as regarding the location of an adult bookstore, the Court has emphasized that a municipality cannot "get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance." *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002). Thus, the County cannot simply assert that the compelling interest of public safety is being furthered by its policy without providing legitimate empirical evidence showing such.

And, even if the County is able to make such a showing, it then must show that there are *no* less restrictive means to achieve that interest; unfortunately for the County, there are. For example, the County can require applicants to pass a safety-oriented handgun training course.

In reality, the County's policy lacks any measure of tailoring. The constitutional default is that all law-abiding citizens have a right to keep and bear arms, and some reasonable restrictions on that right, tailored to a specific governmental interest, are constitutionally acceptable. The ordinance gets things backward, however, by first burdening every citizen's Second Amendment rights but then granting exceptions to certain favored persons, such as persons with business interests or members of HDSA. That is the opposite of tailoring and renders the County's policy unconstitutional.

Furthermore, granting CCWs in only the rarest of cases as a blanket attempt to improve public safety would be to resurrect the type of interest-balancing test that *Heller* expressly rejected. *See Heller,* 128 S. Ct. at 2821. And, the County would have to engage in logical

gymnastics to assert denying law-abiding citizens, like Plaintiffs, on the sole basis they cannot document a specific threat, furthers a compelling interest while the County's policy allows issuance of a CCW to an applicant engaged in a business the County considers under a *general* threat of crime without requiring a showing of such documentation. "[I]t remains certain that the . . . government may not restrain the freedom to bear arms based on mere whimsy or convenience." *U.S. v. Everist*, 368 F.3d 517, 519 n. 1 (5th Cir. 2004).

B. The County's CCW Issuance Policy and Practices Do Not Even Meet Intermediate Scrutiny

"A law will be struck down under intermediate scrutiny unless it can be shown that it is substantially related to achievement of an important governmental purpose." *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1430 n. 7 (9th Cir. 1989). Courts have warned that "intermediate scrutiny is still tough scrutiny, not a judicial rubber stamp." *Cable Vision Sys. Corp. v. FCC*, 597 F.3d 1306, 1323 (D.C. Cir. 2010). In defending content-neutral regulations under the First Amendment, Courts have also noted that the Government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (plurality opinion). In applying this standard, the usual deference afforded legislative or agency findings "does not foreclose our independent judgment of the facts bearing on an issue of constitutional law." *Id.* at 666 (quoting *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989)) (internal quotation marks omitted). The same showing should be required of Second Amendment regulations if this Court decides to apply intermediate scrutiny, because no constitutional right is "less 'fundamental' than" others, and "we know of no principled basis on which to create a hierarchy of constitutional values . . . ." *Valley Forge*, 454 U.S. at 484.

Once again, the County must show evidence that depriving law-abiding, responsible people the right to carry a firearm simply because they are unable to provide documentation of a specific threat furthers an important state interest, such as public safety. The County can make no such showing. Thus, even if this Court applies intermediate scrutiny here, the County cannot meet its burden in legally justifying its policy.

The County's policies and practices effectively nullifying Plaintiffs' right to the carrying of Arms for self-defense are unconstitutional on other grounds, as well.

IV. THE COUNTY'S CCW ISSUANCE POLICIES AND PRACTICES VIOLATE PLAINTIFFS' RIGHT TO EQUAL PROTECTION

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall deny to any person within its jurisdiction the equal protection of the law, which "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citation omitted). Strict scrutiny applies to government classifications that "impinge on personal rights protected by the Constitution." *Id.* at 440 (citations omitted). "Where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized." *Hussey v. City of Portland*, 64 F.3d 1260, 1265 (9th Cir. 1995) (quoting *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966)).

Since Plaintiffs are similarly situated to other persons who the County treated differently by issuing those persons CCWs, the County has violated Plaintiffs' right to Equal Protection.

1. The County's Implementation of its "Good Cause" Policy Unlawfully Discriminates Among Law-Abiding Citizens Who Seek CCWs for Self-Defense Purposes.

a. Similarly Situated; Treated Differently

The Second Amendment right to keep and bear Arms is a "right of the People," not merely the right of a narrow *group of people* comprised of those who can document circumstances that make them "a specific target" of violent attack rather than a "random one." But that is how the County has unilaterally chosen to interpret the right and fashion its policies and practices in issuing CCWs. In other words, unless rebutted, it is presumed that responsible, law-abiding citizens, like Plaintiffs, who seek a CCW for self-defense purposes are similarly situated in their worthiness to exercise this constitutionally protected, fundamental right. *See Heller*, 128 S. Ct. at 2797-98 (describing the right to Arms as a "pre-existing right").

Yet the County denied, and continues to deny, Plaintiffs' self-defense-based CCW applications, while at the same time it issues CCWs to others submitting self-defense-based

applications. The only relevant difference between them is those to whom the County issued a CCW provided evidence documenting a specific threat proving their "need" to exercise their right to bear Arms. But the County has it backward. It is the County that must show a heightened need, *i.*e., a compelling reason to flatly deny Plaintiffs' their right to bear Arms for self-defense.

b. The County Cannot Legally Justify Its Different Treatment of Applicants Based on "Good Cause"

The Second Amendment protects the individual right to carry a gun "for the purpose . . . of being armed and ready for offensive or defensive action in case of conflict with another person." *Heller*, 128 S. Ct. at 2793. This language (*i.e.*, "in case of") denotes an attack without warning. Yet, that is exactly the prerequisite the County's policy demands of applicants in order to establish "good cause" for a CCW.

The only interest furthered by generally denying CCWs to capable, law-abiding citizens, like Plaintiffs, on the sole basis they do not provide the County with evidence documenting a specific threat, is to limit the amount of CCWs issued in San Diego in attempts to advance public safety. "To be a compelling interest, the State must show that the alleged objective was the legislature's 'actual purpose' for the classification, and the legislature must have had a strong basis in evidence to support that justification before it implements the classification." *Shaw v. Hunt*, 517 U.S. 899, 908 n. 4 (1996) (citation omitted) (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1932)). Given that a "strong basis in evidence" is required and the County provided none, and that a constitutional right is not based on "empirical evidence," which can be manipulated to justify anything, reducing the amount of CCWs is not a compelling interest. And, as mentioned above, limiting the amount of CCWs issued in an attempt to affect public safety would be to engage in the type of interest-balancing test that *Heller* expressly rejected. *See Heller*, 128 S. Ct. at 2821. Finally, even if reducing the number of CCWs issued were shown to advance public safety, the general bar to those, like Plaintiffs, without evidence documenting specific threats against them is not narrowly tailored because such is irrelevant as to whether a given individual makes the public more or less safe by having a CCW.

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All responsible, law-abiding persons are equally entitled to bear arms for self-defense on equal terms. Any classification that deprives individuals of the right to bear arms and that goes beyond filtering dangerous or incompetent individuals, as does the County's "good cause" policy, violates the Equal Protection Clause.

2. The County's Preferential Treatment of Honorary Deputy Sheriff's Association Members in Issuing CCWs Violates Plaintiff's Rights to Equal Protection

a. Similarly Situated; Treated Differently

Though all responsible, law-abiding persons are entitled to exercise their rights to bear Arms by carrying a handgun for self-defense, many opt not to. Those who choose to, and thus seek a CCW to do so lawfully, do so for one or more of several different reasons. Some have been victims of crime or know someone who has, others are engaged in activity that makes them an appealing target to criminals, while others live in an unsafe environment or simply do not feel safe without having ready access to a firearm. Though there are many reasons for wanting to carry a handgun for self-defense, some people have very similar reasons. Some even have similar circumstances underlying their desire to do so. This is the case with Plaintiffs and certain members of the HDSA who received CCWs from the County. All Plaintiffs sought a CCW from the County for self-defense purposes, but were denied or, in the cases of Plaintiffs Laxson and Dodd decided not to apply, because they were dissuaded at their initial interview and/or could not satisfy the requirements of County's unlawful policy. (SUF 17). Curiously, certain HDSA members were granted CCWs by the County despite failing to provide such documentation. For example, in the "good cause" section of their applications, some HDSA members merely stated "personal protection" or "protection" *without further explanation or supporting documentation.* SUF 18. One HDSA member simply stated "personal protection– public figure," without providing *any* supportive documentation. SUF 19 And, in perhaps the most egregious case, one member did not even provide a statement of "good cause" in his application. SUF 20. Further, multiple HDSA members were issued a CCW by the County for "business reasons" who failed to provide *any* supporting documentation SUF 21. In fact, one such application simply stated "personal safety, carry large sums of money," and another said he is retired but he needs to

accompany his employees to the bank; again, *neither* providing *any* supportive documentation. SUF 22.

The individual circumstances of these HDSA members who were issued CCWs demonstrates they are treated more favorably by the County than were Plaintiffs as to the issuance of CCWs; and, notes made by employees of the County who process CCW applications as to these particular individuals further support this position. SUF 23. Finally, the account of events related by Plaintiff Mark Cleary as to his process of obtaining a CCW leaves no doubt that the County treats HDSA members differently than the members of the general public. SUF 24.

By these actions, the County has created a classification of persons (*i.e.*, non-members of the HDSA) who, despite having reasons for wanting a CCW similar to others who were issued one by the County, are deprived of a fundamental right *(i.e.*, the right to bear arms) because of their lack of membership in a civilian organization whose primary purpose is to finance projects for the San Diego Sheriff's Department. SUF 25. There is no rational basis for this disparate treatment.

b. The County Cannot Justify Its Different Treatment of HDSA Members from Plaintiffs

Defendants can offer no rational basis to justify their disparate treatment of HDSA members and the general public, let alone an *important or compelling* interest. *See Guillory v. County of Orange*, 731 F.2d 1379, 1383 (9th Cir. 1984) (A case involving a challenge alleging disparate treatment in issuing CCWs where the court explained: "A law that is administered so as to unjustly discriminate between persons similarly situated may deny equal protection," citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

HDSA is a private, *civilian* organization, membership in which does not alone make one more capable or trustworthy with a CCW than non-members, such as Plaintiffs. Membership is achieved by mere sponsorship by a current member or active deputy, providing three letters of reference, passing a background check, making a "donation" and paying annual dues. And, although a background check is required, the California Penal Code already requires one for CCW applicants. SUF 26. Thus, there is nothing inherently or rationally different about HDSA

members versus non-HDSA members that would warrant disparate treatment.

Regardless, the County holds HDSA members to different, much more lenient standards than the general public, including Plaintiffs, when issuing CCWs. In fact, not one single HDSA member who, while in good standing, has sought a CCW from the County from 2006 to the present has been denied, while 18 non-members have been denied and an unknown number of others decided not to formally apply based on their initial interview or failure to satisfy the County's strict "good cause" requirement applicable to the general public. SUF 27.

Not only is there no compelling or important interest furthered by the County's disparate treatment of HDSA members versus the general public, there is no rational basis for such treatment either. Such treatment constitutes the type of unjust discrimination prohibited by the standards set forth in *Guillory* and *Yick Wo*. By depriving Plaintiffs of the same access to a CCW as HDSA members have received, the County unjustly and irrationally discriminated, and continues to discriminate, against Plaintiffs, violating their rights to equal protection under the law. And, even if membership in the HDSA is not the basis for the County's disparate treatment of CCW applicants (despite the overwhelming evidence indicating that it is), the fact remains the same that some people are issued a CCW while similarly situated persons are not. Regardless of County's (apparently highly inappropriate) motives in electing to favor members of the HDSA regarding the issuance of CCWs, the County's disparate treatment of similarly situated individuals nonetheless violates Plaintiffs' rights to equal protection under the law.

CONCLUSION

The County's unilateral and arbitrary policy and practices of rejecting self-defense as sufficient "good cause" to issue a CCW, favoring applicants who can document County-approved circumstances that make them a specific threat, and giving preferential treatment to HDSA members are unconstitutional and have caused injury, and continue to cause injury, to Plaintiffs by depriving them the fundamental right to publicly carry a handgun for self-defense, core conduct protected by the Second Amendment.

Because State law requires Plaintiffs, for all practical purposes, to procure a CCW in order to lawfully carry a handgun in public for self-defense, and because the County has either denied

the individual Plaintiffs a CCW or the County's policies render Plaintiffs, or their supporters, ineligible for a CCW for the purpose of self-defense – the core of the Second Amendment right – Plaintiffs are entitled to permanent injunctive and declaratory relief enjoining the County's policy and practices.

Finally, Plaintiffs would like to clarify the extent of the relief they seek with this Motion. As set forth *supra*, Plaintiffs do not claim a right to publicly carry handguns in a concealed manner *per se*, only a right to carry handguns in a manner specified by the Legislature, which, in California, is licensed, concealed carry.

As well, Plaintiffs' Second Claim for Relief (Equal Protection) seeks relief for three separate types of conduct, but only two of which are at issue in this Motion: 1) Defendant Gore's preferential treatment of politically connected persons in issuing CCWs; and 2) the County's express policy of refusing issuance of CCWs to applicants who cannot document circumstances that make them a specific target. Each of these is a separate violation of the Equal Protection Clause for which Plaintiffs respectfully request relief from this Court.

Because the County cannot justify its infringements on Plaintiffs' Constitutional rights, this Court should grant Plaintiff's Motion for Partial Summary Judgment in its entirety.

Date: September 3, 2010

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Date: September 3, 2010

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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

IT IS HEREBY CERTIFIED THAT:

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

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

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

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

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I declare under penalty of perjury that the foregoing is true and correct. Executed on September 3, 2010.

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IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

SEPARATE STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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

I. INTRODUCTION

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7.1.f.1, Plaintiffs Edward Peruta, et al. hereby submit the following Separate Statement of Undisputed Facts. These undisputed material facts establish Plaintiffs are entitled to summary judgment as to their First and Second Claims for Relief.

II. STATEMENT OF UNDISPUTED FACTS

Plaintiffs contend there is no genuine issue about the following material facts:

UNDISPUTED FACTS	EVIDENCE
1. With minor exceptions, California law effectively prohibits the unlicensed public carrying of loaded firearms.	Cal. Pen. Code §§ 12031, *et seq.* & 12050(a)
2. The only licensed public carrying of loaded firearms allowed is "concealed carry" (i.e., with a CCW), except in a few sparsely populated counties where one may obtain a license to carry a loaded handgun openly.	Cal. Pen. Code §§ 12025, 12050(a)
3. California law allows for only a Sheriff or Chief of Police to issue a permit to carry a concealed, loaded handgun in public to residents of their jurisdiction or to non-residents who spend a substantial period of time in their principal place of employment or business within that jurisdiction.	Cal. Pen. Code § 12050(a)(1)(B) - (C)

UNDISPUTED FACTS	EVIDENCE
4. Applicants for a permit to carry a concealed handgun must pass a criminal background check.	Cal. Pen. Code § 12052
5. Applicants for a permit to carry a concealed handgun must successfully complete a handgun training course.	Defendants Gore's Answer to Amend. Comp. ¶ 2
6. Applicants for a permit to carry a concealed handgun must be found to be of good moral character and to have "good cause" for such a permit by the Sheriff.	Cal. Pen. Code § 12050 (a)(1)(A), (B)
7. In San Diego, Defendant Sheriff William Gore is the sole Issuing Authority.	Cal. Pen. Code §12050(a)(1)(E); Defendants Gore's Answer to Amend. Comp. ¶ 2
8. Thus, to obtain a CCW in San Diego, one must submit an application to Sheriff Gore.	Cal. Pen. Code § 12050(a)
9. The County's written policy for issuing a CCW states: "Applicants will be required to submit documentation to support and demonstrate their need."	Exhibit "A"

UNDISPUTED FACTS	EVIDENCE
10. The County requires CCW applicants who seek a CCW for purely self-defense purposes (i.e., unrelated to a business/profession) to provide evidence documenting a specific threat of harm to the applicant (e.g., "Current police reports and/or other documentation supporting need (i.e., such as restraining orders or other verifiable written statements))" in order to satisfy the "good cause" requirement of Cal. Pen. Code § 12050.	Exhibits "A", "C", "D" and "E"
11. The County has a separate standard for those seeking a CCW for business purposes (i.e., to protect themselves during business activity)	Exhibits "A" and "C"

UNDISPUTED FACTS	EVIDENCE
12. As evidenced by the County's letters denying Plaintiffs' CCW applications, it is the County's general practice to follow this policy when considering whether to issue a CCW to any particular applicant. (See, for example, Plaintiff Buncher's denial letter, stating: "The documentation you have provided does not indicate you are a specific target or that you are currently being threatened in any manner. The Sheriff's Department does not issue CCW's based on fear alone.").	Exhibits "G", "M", and "T" and "VV"
13. Despite the County's strict CCW issuance policy, it does not apply it evenly to all applicants, demanding less of some.	Exhibits "F" - "PP"

UNDISPUTED FACTS	EVIDENCE
14. All individual Plaintiffs are residents of San Diego County. No Plaintiff is prohibited under federal or California law from purchasing or possessing firearms. All Plaintiffs fear arrest, prosecution, fine, imprisonment, and other penalties if they carry a handgun without a CCW. But for being prevented from lawfully obtaining a CCW, and the fear of prosecution and other penalties, each Plaintiff would carry a handgun in public for self-defense on occasions they deem appropriate.	*Declaration of Plaintiff Edward Peruta*, ¶¶ 1-3 *Declaration of Plaintiff Michelle Laxson*, ¶¶ 1-3 *Declaration of Plaintiff James Dodd*, ¶¶ 1-3
15. Plaintiff California Rifle and Pistol Association Foundation ("CRPAF"), an organization dedicated to educating the public about firearms and protecting the rights thereto, its thousands of supporters and CRPA members in San Diego County are likewise injured by the County's issuance policy and practices for these same reasons.	*Declaration of Plaintiff Silvio Montanarella,*
16. Plaintiffs cannot obtain the permits that state law requires for concealed carry from the County, nor can they generally carry loaded handguns openly under state law.	*Declaration of Plaintiff Edward Peruta,* ¶¶ 3, 7-8, 10, 13 *Declaration of Plaintiff Michelle Laxson,* ¶¶ 6-7 Exhibits "F", "G," "J," & "T"

UNDISPUTED FACTS	EVIDENCE
17. All Plaintiffs sought a CCW from the County for self-defense purposes, but were denied or, in the cases of Plaintiffs Laxson and Dodd decided not to apply, because they were dissuaded at their initial interview and/or could not satisfy the requirements of County's unlawful policy.	*Declaration of Plaintiff Edward Peruta,* ¶¶ 8-13 *Declaration of Plaintiff Michelle Laxson,* ¶¶ 4-7 Exhibits "F", "G" & "T"
18. Curiously, certain HDSA members were granted CCWs by the County despite failing to provide such documentation. For example, in the "good cause" section of their applications, some HDSA members merely stated "personal protection" or "protection" without further explanation or supporting documentation.	Exhibits "U" at 2; "V" at 2; "W" at 5; and "X" at 2.
19. One HDSA member simply stated "personal protection– public figure," without providing any supportive documentation.	Exhibit "Y" at 2.

UNDISPUTED FACTS	EVIDENCE
20. And, in perhaps the most egregious case, one member did not even provide a statement of "good cause" in his application.	Exhibit "Z" at 2.
21. Further, multiple HDSA members were issued a CCW by the County for "business reasons" who failed to provide any supporting documentation.	Exhibits "AA", "BB", "CC", "DD", "EE", "FF", "GG", "HH", "II", "JJ" & "KK"
22. In fact, one such application simply stated "personal safety, carry large sums of money," and another said he is retired but he needs to accompany his employees to the bank; again, neither providing any supportive documentation.	Exhibits "LL" & "MM"
23. The individual circumstances of these HDSA members who were issued CCWs demonstrates they are treated more favorably by the County than were Plaintiffs as to the issuance of CCWs; and, notes made by employees of the County who process CCW applications as to these particular individuals further support this position.	Exhibits "NN" at 1-2; "W" at 2&6; "OO" at 1-2; and "PP" at 1.

UNDISPUTED FACTS	EVIDENCE
24. Finally, the account of events related by Plaintiff Mark Cleary as to his process of obtaining a CCW leaves no doubt that the County treats HDSA members differently than the members of the general public.	*Declaration of Plaintiff Mark Cleary*
25. HDSA is a civilian organization whose primary purpose is to finance projects for the San Diego Sheriff's Department.	Exhibit "QQ" & "UU"
26. Membership is achieved by mere sponsorship by a current member or active deputy, providing three letters of reference, passing a background check, making a "donation" and paying annual dues. And, although a background check is required, the California Penal Code already requires one for CCW applicants.	Exhibit "SS"

UNDISPUTED FACTS	EVIDENCE
27. Regardless, the County holds HDSA members to different, much more lenient standards than the general public, including Plaintiffs, when issuing CCWs. In fact, not one single HDSA member who, while in good standing, has sought a CCW from the County from 2006 to the present has been denied, while 18 non-members have been denied and an unknown number of others decided not to formally apply based on their initial interview or failure to satisfy the County's strict "good cause" requirement applicable to the general public.	Exhibit "WW"

Dated: September 3, 2010

MICHEL & ASSOCIATES, PC

/S/
C.D. Michel
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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

IT IS HEREBY CERTIFIED THAT:

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

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

SEPARATE STATEMENT OF UNDISPUTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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

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

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 3, 2010.

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

TAB 38

FILED UNDER SEAL

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

Appellant Excerpts of Record

Volume VIII
Tab No. 38
Bates No. ER000857 - ER001066

FILED UNDER SEAL

TAB 39

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Attorney for Plaintiffs / Petitioners

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

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

DECLARATION OF EDWARD PERUTA IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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

DECLARATION OF EDWARD PERUTA

I, Edward Peruta, declare as follows:

1. I am a resident of San Diego County and a United States Citizen over 21 years of age.

2. I am not prohibited under federal or California law from purchasing or possessing firearms.

3. I would carry a handgun in public for self-defense on occasions I deemed appropriate, but do not do so because I fear prosecution, as I do not possess a valid license to carry a concealed firearm pursuant to California Penal Code section 12050.

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

5. During the November 17, 2008 interview I was asked questions about my reasons for wanting a permit to carry a concealed handgun. The cause I related to the interviewer for desiring a permit to carry a concealed handgun was general self-protection for my wife and me when we are staying in or operating our motor-home, and when I am gathering breaking news or conducting legal investigations per my profession.

6. After I explained to the interviewer, Donna Burns, at the November 17, 2008 interview that I wanted a permit to carry a concealed handgun for "self-protection," she responded to me "really and truly we have no basis for the self-protection, you have not been a threat of any specific target of violence. You have no restraining orders, no police reports, nothing to that effect. Self-protection is a tough one." Ms. Burns continued "we ask you to document why you are at more of a threat than anyone else in your position; what makes you a specific target." At one point during the interview, Ms. Burns asked me why I am different from all the

others who reside in motor-homes as far as my need for a permit to carry a concealed handgun, to which I replied "I am not." I then went on in an attempt to explain to her "but the *Heller* decision" at which point she interrupted me and stated "I don't want to get into that."

7. I am not aware of any other legal means by which I may generally carry a functional firearm while I am operating my motor-home or gathering breaking news on scene besides being issued a permit from the San Diego County Sheriff's Department pursuant to California Penal Code section 12050. Based on this understanding, I decided to formally apply for a permit pursuant to California Penal Code section 12050, despite Ms. Burns informing me at the November 17, 2008 interview that San Diego Sheriff's Department would require me to provide documentation of specific threats to my person, which I did not possess.

8. On or about February 3, 2009, I submitted a completed official Department of Justice application for a permit to carry a concealed handgun to the San Diego County Sheriff's License Division. Exhibit "F" is a true and accurate copy of the relevant pages of the completed application.

9. In my application for a permit to carry a concealed handgun, I provided as my "good cause" the protection of myself and my wife from criminal attack, because we spend substantial amounts of time in our motor-home, often in remote areas, and we often carry large sums of cash and valuables in the motor-home. And, my work, gathering breaking news and conducting legal investigations, often requires me to enter dangerous locations. See Exhibit "F".

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10. On or about March 17, 2009, I received a letter from the San Diego County Sheriff's License Division, signed by Blanca Pelowitz as the Licensing Manager, denying my official Department of Justice application for a permit to carry a concealed handgun. That letter stated: "The reasons and documentation you have provided do not substantiate that good cause exists." Exhibit "G" is a true and accurate copy of that letter I received from the San Diego County Sheriff's License Division.

11. On or about March 20, 2009, I submitted to the San Diego County Sheriff's Department a Notice of Intent to Appeal its denial of my official Department of Justice application for a permit to carry a concealed handgun. Exhibit "H" is a true and accurate copy of the official Notice of Intent to Appeal.

12. On or about March 24, 2009, my counsel, Paul H. Neuharth, Jr., on my behalf and at my request, submitted to Assistant Sheriff Jim Cooke a formal request for review of the San Diego County Sheriff's Department's denial of my official Department of Justice application for a permit to carry a concealed handgun. Exhibit "I" is a true and accurate copy of my official request for review.

13. On or about May 5, 2009, I received a letter from the San Diego County Sheriff's Department, signed by Assistant Sheriff Jim Cooke, upholding the decision to deny my official Department of Justice application for a permit to carry a concealed handgun. That letter stated: "This decision is final and there is no further appeal." Exhibit "J" is a true and accurate copy of that letter I received from Assistant Sheriff Jim Cooke.

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14. On or about October 23, 2009, I filed this lawsuit for declaratory and injunctive relief, challenging the San Diego County Sheriff's Department's denial of my official Department of Justice application for a permit to carry a concealed handgun, and its policy for determining the "good cause" of applicants for a permit to carry a concealed handgun, to be unconstitutional.

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

Executed in the United States on September 3, 2010.

9/3/10

Edward Peruta

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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

IT IS HEREBY CERTIFIED THAT:

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

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

DECLARATION OF EDWARD PERUTA IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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

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pneuharth@sbcglobal.net

I declare under penalty of perjury that the foregoing is true and correct.
Executed on September 3, 2010

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

TAB 40

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Attorney for Plaintiffs / Petitioners

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

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

DECLARATION OF MICHELLE LAXSON IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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

DECLARATION OF MICHELLE LAXSON

I, Michelle Laxson, declare as follows:

1. I am a resident of San Diego County and a United States Citizen over 21 years of age.

2. I am not prohibited under federal or California law from purchasing or possessing firearms.

3. I would carry a handgun in public for self-defense on occasions I deemed appropriate, but do not do so because I fear prosecution, as I do not possess a valid license to carry a concealed firearm pursuant to California Penal Code § 12050.

4. On or about January 25, 2010, I attended the initial interview portion of the San Diego County Sheriff's application process for a permit to carry a concealed handgun with the Licensing Department. I attended the interview with the intention of obtaining a permit to carry a concealed handgun.

5. During the January 25, 2010 interview, I was asked questions about my reasons for wanting a permit to carry a concealed handgun. The cause I related to the interviewer for desiring a permit to carry a concealed handgun was general self-protection; especially, for when I transport large sums of money from my business to my home, and when I have to travel alone, which I do often for both business and personal reasons.

6. After my initial interview, the interviewer from the Licensing Department told me that I failed to establish "good cause" as determined by the San Diego County Sheriff's Department, and would likely not be issued a permit to carry a concealed handgun. She told me that I could still officially apply for the permit, but that I would not be refunded some of the fees associated with submitting an official application.

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7. Based on the San Diego County Sheriff's Department's stated policy as to its requirements for establishing "good cause," and what I was told by the interviewer from the Licensing Department at my initial interview, I decided not to submit a formal Department of Justice application for a permit to carry a concealed handgun, believing I would be denied and it would be a waste of my money and time.

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

Executed in the United States on September 3, 2010.

Michelle Laxson

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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

IT IS HEREBY CERTIFIED THAT:

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

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

DECLARATION OF MICHELLE LAXSON IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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

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

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 3, 2010

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

TAB 41

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Attorneys for Plaintiffs / Petitioners

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San Diego, CA 92101
Telephone: (619) 231-0401
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Attorney for Plaintiffs / Petitioners

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

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

DECLARATION OF MARK CLEARY IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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

DECLARATION OF MARK CLEARY

I, Mark Cleary, declare as follows:

1. I am a resident of San Diego County and a United States Citizen over 21 years of age.

2. I originally submitted a completed official Department of Justice application form for a permit to carry a concealed handgun to the San Diego County Sheriff's License Division on or about February 24, 2005. Exhibit "K" is a true and accurate copy of the relevant pages of that completed application.

3. In my original application, I provided as my "good cause" the fact that I worked as a Registered Nurse on a psychiatric evaluation team for several years, and that during that time I worked with depressed and psychotic, mentally ill patients, some of whom have threatened to harm me and/or assaulted me. I also provided three police reports documenting specific incidents of threats to my person by patients I cared for. *See* Exhibit "K."

4. On or about April 8, 2005, I went to the Sheriff's Department, located at 9621 Ridgehaven Court, San Diego, California, to meet with Jerry Quinlin, Tom Morton, and Edna Jaquez. They asked me about my "need" for a permit to carry a concealed handgun. I explained to them what I had provided in my "good cause" statement. Tom Morton explained to me that the Sheriff's Department is "pretty strict" in issuing permit to carry a concealed handgun. They then told me I could withdraw my application, and if I did not withdraw it, I would have a denial on my record with the Department of Justice. *See* Exhibit "L" (Interdepartmental correspondence from Edna Jaquez explaining the details of this meeting).

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5. My February 24, 2005 application for a permit to carry a concealed handgun was denied on or about July 25, 2005. The letter stated "although you claim you are a target of repeated threats and provide some documentation, they do not rise to the level to establish good cause for issuance." Exhibit "M" is a true and accurate copy of the letter I received from the San Diego County Sheriff's License Division.

6. I became a member of the Honorary Deputy Sheriff's Association ("HDSA") in or around August of 2005. I asked a friend of mine, who is a San Diego County Sheriff's deputy, to nominate me to be a member of the HDSA. I received an application packet from HDSA inquiring into my assets and any characteristics I possess that could be useful to the organization. I submitted the membership application, and received a letter accepting me into the HDSA. I paid the required $175 fee to obtain the rank of Deputy in the HDSA. I attended a meeting where the Sheriff Kolender was present and handed out honorary badges to those HDSA members in attendance.

7. My reason for becoming a member was I had heard rumors that a member is more likely to receive a permit to carry a concealed handgun from the San Diego County Sheriff's License Division than is a non-member. These rumors were confirmed in my conversations with HDSA members and others. Based on these conversations, I discovered it was common knowledge among everyone who had any relation to the San Diego County Sheriff's process for issuing permits to carry a concealed handgun that certain people, including HDSA members, received preferential treatment when applying for a permit to carry a concealed handgun.

8. On or about September 2, 2005, I submitted a formal request for review of the denial of my February 24, 2005 application to the San Diego County Sheriff's License Division. Exhibit "N" is a true and accurate copy of the letter I sent to the San Diego County Sheriff's License Division.

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9. In early November of 2005, I spoke with then Undersheriff William D. Gore in person at his office, located at 9621 Ridgehaven Court, San Diego, California, and explained to him that my application for a permit to carry a concealed handgun had been denied, and asked him to reconsider granting my application. Sheriff Gore (who at the time was Undersheriff) listened to the details of my case and told me he would see what he could do.

10. On or about November 28, 2005, without warning, my first permit to carry a concealed handgun arrived in the mail. That permit was set to expire on November 28, 2007.

11. The San Diego County Sheriff's Department granted my first renewal application for a permit to carry a concealed handgun on or about November 26, 2007. That permit was set to expire on November 25, 2009. Exhibit "O" is a true and accurate copy of that application. At that time, I was working at the same hospital where I am currently employed, with the same duties, and I remained a member of the Honorary Deputy Sheriff's Association.

12. On or about November 23, 2009, I submitted an application for a renewal of my November 26, 2007 permit to carry a concealed handgun. Exhibit "P" is a true and accurate copy of that application.

13. On or about December 14, 2010, I spoke with Jerry Quinlin of the San Diego County Sheriff's Department. He requested additional documentation from me, including a letter from my supervisor at work. When I explained that I feared losing my job by making such a request to my supervisor and that such a letter from my current employer was in my file from my previous application, as well as a similar letter from my previous employer for my original permit. Mr. Quinlin told me that I could withdraw my application for a permit to carry a concealed handgun.

14. I ceased being a member of the Honorary Deputy Sheriff's Association in January of 2010 because I was having financial issues and could not afford to continue paying the $175-$250.00 I paid in annually to be a member.

15. On or about March 17, 2010, I received a letter from the San Diego County Sheriff's License Division, signed by Blanca Pelowitz as the Manager of the License Division, denying my November 23, 2009 application. That letter stated: "your request and lack of supporting documentation does not establish good cause for issuance at this time." Exhibit "Q" is a true and accurate copy of that letter I received from the San Diego County Sheriff's License Division.

16. On or about April 28, 2010, a Motion for Leave to Amend Complaint was filed in this lawsuit adding, among other individuals, me as a plaintiff thereto.

17. On or about May 11, 2010, I submitted to Assistant Sheriff R. Ahern a formal request for review of the San Diego County Sheriff's Department's denial of my renewal application for a permit to carry a concealed handgun. Exhibit "R" is a true and accurate copy of my official request for review.

18. On or about June 10, 2010, I met with Commander Patricia J. Duke, Law Enforcement Services Bureau to discuss my formal request for review of the denial of my renewal application.

19. On or about June 14, 2010, I received a letter from the San Diego County Sheriff's Department, signed by Commander Patricia J. Duke, overturning the decision to deny my renewal application and issuing me a permit to carry a concealed handgun. Exhibit "S" is a true and accurate copy of that letter I received from Commander Patricia J. Duke.

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

Executed in the United States on September 3, 2010.

Mark A. Cleary

Mark Cleary

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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

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

DECLARATION OF MARK CLEARY IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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

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Paul Neuharth, Jr. (State Bar #147073)
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I declare under penalty of perjury that the foregoing is true and correct. Executed on September 3, 2010.

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

TAB 42

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Clint B. Monfort – SBN 255609
Sean A. Brady – SBN 262007
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Attorney for Plaintiffs / Petitioners

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

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

DECLARATION OF SILVIO MONTANARELLA ON BEHALF OF CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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

DECLARATION OF SILVIO MONTANARELLA ON BEHALF OF CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION

I, Silvio Montanarella, declare as follows:

1. I am the President of the California Rifle & Pistol Association Foundation ("CRPA Foundation").

2. CRPA Foundation is a nonprofit entity classified under section 501(c)(3) of the Internal Revenue Code and incorporated under California law, with headquarters in Fullerton, California.

3. CRPA Foundation seeks to: raise awareness about unconstitutional laws, defend and expand the legal recognition of the rights protected by the Second Amendment via litigation and other means, promote firearms and hunting safety, protect hunting rights, enhance marksmanship skills of those participating in shooting sports, and educate the general public about firearms.

4. The CRPA Foundation expends its resources in assisting its supporters in trying to shape or overturn laws, policies, and practices that it considers an infringement on the right to keep and bear arms, including those relating to the issuance (or non-issuance) of permits to carry concealed handguns.

5. The San Diego County Sheriff's Department's policies and practices for issuing permits to carry concealed handguns are of great interest to the supporters of the CRPA Foundation and the members of its related association, the California Rifle & Pistol Association ("CRPA"), as they see those policies and practices as an infringement on rights protected under the Second Amendment.

6. The San Diego County Sheriff's Department's policies and practices for issuing permits to carry concealed handguns bar some CRPA Foundation supporters, including Plaintiffs, from obtaining a permit.

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7. In this suit, the CRPA Foundation represents the interests of its many citizen and taxpayer supporters and members of the CRPA who reside in San Diego and who wish to obtain a permit to carry concealed handgun, but who have been denied such a permit for supposed lack of "good cause," or who have refrained from doing so because they do not meet the San Diego County Sheriff's Department's "good cause" requirements. These individuals are too numerous to conveniently bring this action individually.

8. The CRPA Foundation and the individuals whose interests are represented by the CRPA Foundation are and will continue to be harmed by the San Diego County Sheriff's Department's failure to issue CCW licenses in accordance with constitutional mandates.

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

Executed in the United States on September 3, 2010.

Silvio Montanarella
President, CRPA Foundation

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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

IT IS HEREBY CERTIFIED THAT:

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

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

DECLARATION OF SILVIO MONTANARELLA ON BEHALF OF CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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

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

I declare under penalty of perjury that the foregoing is true and correct.
Executed on September 3, 2010

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

TAB 43

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

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

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

DECLARATION OF JAMES DODD IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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

DECLARATION OF JAMES DODD

I, James Dodd, declare as follows:

1. I am a resident of San Diego County and a United States Citizen over 21 years of age.

2. I am not prohibited under federal or California law from purchasing or possessing firearms.

3. I would carry a handgun in public for self-defense on occasions I deemed appropriate, but do not do so because I fear arrest, prosecution, fine, imprisonment, and other penalties as I do not possess a valid license to carry a concealed firearm pursuant to California Penal Code section 12050.

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

Executed in the United States on September 3, 2010.

James Dodd

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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

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

DECLARATION OF JAMES DODD IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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

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Executed on September 3, 2010

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

TAB 44

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Telephone: (619) 231-0401
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Attorney for Plaintiffs / Petitioners

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

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

Defendants.

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

PLAINTIFFS' EX PARTE APPLICATION TO FILE DOCUMENTS IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT UNDER SEAL

Hon. Irma E. Gonzalez

Date Action Filed: October 23, 2009

Plaintiffs Edward Peruta, Michelle Laxson, James Dodd, Dr. Leslie Buncher, Mark Cleary, and California Rifle and Pistol Association Foundation (collectively "Plaintiffs") hereby apply to the Court and respectfully request, pursuant to Local Civil Rule 79.2.c, that this Court issue an Order allowing Plaintiffs to file the following documents under seal as attachments in support of their Motion for

Partial Summary Judgment as provided for and allowed in the Court's Protective Order dated July 14, 2010: Exhibits "F," "K" through "L," "O" through "S," "U" through "PP," and "VV."

The documents that the Plaintiffs seek to file under seal were received by Plaintiffs' counsel on Monday, August 30, 2010. Plaintiffs' counsel was unable to meet and confer with Defendants' counsel regarding whether the documents are "Confidential" or "Confidential – Attorney's Eyes Only" and thus subject to the Protective Order because Defendants' counsel is on vacation.

However, Defendants' counsel was aware of Plaintiffs' pending Motion for Partial Summary Judgment (filed with this Court on September 3, 2010), as he stipulated to the proposed briefing schedule (*see* Joint Motion of the Parties to Adopt Briefing Schedule, also filed with this court on September 3, 2010), and therefore knew or should have known that these documents would be used as exhibits and potentially be subject to disclosure. Despite this, Defendants' counsel marked the disc containing the documents at issue with the word "Confidential," but failed to include a Legend with any of the documents as required by Paragraphs I.5 and III of this Court's Protective Order. As such, Plaintiffs' counsel were not provided with clear information regarding whether or not Defendants' counsel intended these documents to be "Confidential," "Confidential – Attorney's Eyes Only," or neither.

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

DATED: September 3, 2010 **MICHEL & ASSOCIATES, PC**

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

DATED: September 3, 2010 **PAUL NEUHARTH, JR., APC**

By: /s/ Paul Neuharth, Jr. (as approved on 9/3/10)
Paul Neuharth, Jr.
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

IT IS HEREBY CERTIFIED THAT:

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

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

PLAINTIFFS' EX PARTE APPLICATION TO FILE DOCUMENTS IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT UNDER SEAL

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

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pneuharth@sbcglobal.net

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 3, 2010.

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

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Attorney for Plaintiffs / Petitioners

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

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

DECLARATION OF SEAN BRADY IN SUPPORT OF PLAINTIFFS' EX PARTE APPLICATION TO FILE DOCUMENTS IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT UNDER SEAL

Hon. Irma E. Gonzalez

Date Action Filed: October 23, 2009

DECLARATION OF SEAN BRADY

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

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

2. The documents that Plaintiffs seek to file as Exhibits "F," "K" through "L," "O" through "S," "U" through "PP," and "VV" under seal in support of Plaintiffs' Motion for Partial Summary Judgment were received by my office on Monday, August 30, 2010.

3. I attempted to contact Defendants' counsel in order to determine whether the documents are "Confidential" or "Confidential – Attorney's Eyes Only" and thus subject to the Protective Order. However, due to the fact that Defendants' counsel is on vacation, I was unable to meet and confer with him to address this matter.

4. Defendants' counsel was aware of Plaintiffs' pending Motion for Partial Summary Judgment (filed with this Court on September 3, 2010), as he stipulated to the proposed briefing schedule in the Joint Motion of the Parties to Adopt Briefing Schedule (also filed with this court on September 3, 2010), and therefore knew or should have known that these documents would be used as exhibits and potentially be subject to disclosure.

5. Defendants' counsel marked the disc containing the documents at issue with the word "Confidential," but failed to include a Legend with any of the documents as required by Paragraph I.5 and Paragraph III of this Court's Protective Order.

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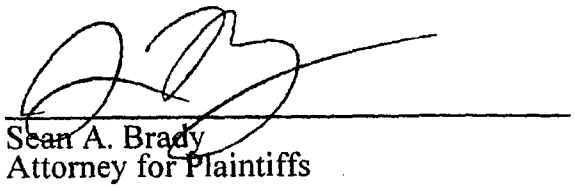
6. Because it is unclear whether Defendants' counsel intended these documents to be designated as "Confidential," "Confidential – Attorney's Eyes Only," or neither, I am compelled to file them under seal in good faith.

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

Executed in the United States on September 3, 2010.



Sean A. Brady
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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

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Facsimile: (619) 231-8759
pneuharth@sbcglobal.net

I declare under penalty of perjury that the foregoing is true and correct.
Executed on September 3, 2010

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

TAB 46

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Answering Defendant of San Diego
By JAMES M. CHAPIN, Senior Deputy (SBN 118530)
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Telephone: (619) 531-5244
james.chapin@sdcounty.ca.gov

Attorneys for Defendant Sheriff 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)**

DEFENDANT WILLIAM D. GORE'S ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT

[Defendant Demands Jury Trial]

Defendant William D. Gore ("Defendant Gore") answers the First Amended Complaint filed herein by admitting, denying and alleging as follows:

1. In response to Paragraphs 6, 7, 8, 9, 10, 11, 14, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 39, 40, 41, 42, 43, 44, 45, 46, 47, 51, 52, 53, 55, 56, 57, 58, 68, 75, 76, 89, 96, 101, 108, 138, 141, 143, 144, 145, 146, and 147 of the First Amended Complaint, Defendant Gore lacks sufficient information and belief to admit or deny the allegations contained in those paragraphs, and on that basis, denies each and every allegation contained therein.

///

2. In response to Paragraphs 13, 16, 18, 38, 50, 59, 61, 62, 64, 65, 66, 67, 72, 74, 92, 100, and 140 of the First Amended Complaint, Defendant Gore admits the allegations contained therein.

3. In response to Paragraphs 1, 2, 3, 4, 5, 12, 15, 16, 17, 23, 31, 36, 37, 48, 54, 60, 63, 69, 70, 71, 73, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 90, 91, 93, 94, 95, 97, 98, 99, 102, 103, 104, 105, 106, 107, 109, 110, 112, 113, 114, 116, 117, 118, 119, 120, 122, 123, 124, 125, 126, 128, 129, 130, 131, 133, 134, 135 and 136 of the First Amended Complaint, Defendant Gore denies the allegations contained therein.

4. In response to Paragraph 49 of the First Amended Complaint, defendant Gore admits the allegation as to granting renewal of Cleary's CCW application in November 2007. Except as expressly admitted, defendant lacks sufficient information and belief to admit or deny the remaining allegations contained said paragraph and on that basis, denies each and every remaining allegation contained therein.

5. In response to paragraphs 111, 115, 121, 127, 132, 137, 139, and 142 of the First Amended Complaint, Defendant Gore hereby incorporates by reference the responses to Paragraphs 1 through 147 of the First Amended Complaint, as though fully set forth herein.

AFFIRMATIVE DEFENSES

1. As a first, separate and distinct affirmative defense, defendant alleges that the First Amended Complaint fails to state facts sufficient to constitute a claim upon which relief can be granted.

2. As a second, separate and distinct affirmative defense, defendant alleges that plaintiffs have failed to sue a proper and indispensable party.

3. As a third, separate and distinct affirmative defense, defendant alleges that the complaint is barred by laches.

4. As a fourth, separate and distinct affirmative defense, defendant alleges that he is entitled to qualified immunity from liability under title 42, United States Code section 1983 and that plaintiffs' claims do not arise out of any clearly established

constitutional right.

5. As a fifth, separate and distinct affirmative defense, defendant alleges that the action is barred by the statute of limitations.

6. As a sixth, separate and distinct affirmative defense, defendant alleges that the action is barred by plaintiffs' failure to exhaust administrative remedies, including but not limited to, internal administrative procedures and/or statutory administrative procedures and, therefore, this Court lacks jurisdiction over plaintiffs' claims.

7. As a seventh, separate and distinct affirmative defense, defendant alleges that plaintiffs lack standing to maintain this action.

8. As an eighth, separate and distinct affirmative defense, defendant alleges that plaintiffs have an adequate remedy at law.

9. As a ninth, separate and distinct affirmative defense, defendant alleges that the action is moot.

10. As a tenth, separate and distinct affirmative defense, defendant alleges that he is a state actor who is immune from liability under 42 U.S.C. Section 1983.

WHEREFORE, said defendant prays as follows:

1. That the action be dismissed with prejudice;

2. That the request for injunctive relief be denied and plaintiffs take nothing by his action;

3. That defendant recover his costs of suit incurred herein, including attorneys' fees; and

4. For such other and further relief as the Court deems proper and just.

DATED: July 9, 2010

JOHN J. SANSONE, County Counsel

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

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 July 9, 2010, I served the following documents: **Defendant William Gore's Answer to Plaintiff's First Amended Complaint [Defendant Demand's Jury Trial]** 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:

Paul H. Neuharth, Jr., Esq.
Law Offices of Paul H Neuharth
1140 Union Street, Suite 102
San Diego, CA 92101
T: (619) 231-0401
F: (619) 231-8759
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(Attorney for Plaintiff)

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Long Beach, California 90802
T: (562) 216-4444
F: (562) 216-4445
E-mail: cmichael@michaellawers.com
(co-counsel for Plaintiff)

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 9, 2010, at San Diego, California.

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

TAB 47

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Attorney for Plaintiff / Petitioner EDWARD PERUTA

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

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

FIRST AMENDED COMPLAINT ~~[PROPOSED]~~

42 U.S.C. sections 1983, 1988

NOW COME Plaintiffs, by and through the above Counsel, and allege against Defendants as follows:

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INTRODUCTION

1. Twenty-five years ago, a committee of the California Assembly found disarray in the issuance of concealed weapons permits ("CCW") by local government entities in California: "permit standards often are nonexistent or unclear; the key standards for issuance are undefined and their interpretation is highly discretionary; and many jurisdictions have no written policies."[1]

2. In June 2008, the United States Supreme Court held that the Second Amendment to the United States Constitution protects a fundamental, individual right to keep, and to bear, arms for self defense. *District of Columbia v. Heller,* 128 S.Ct. 2783 (2008).

3. When considering an application for a CCW, the standards Defendants have set are so high they are illegal and unconstitutional. Defendants do not consider this constitutionally guaranteed right to self-defense to be sufficient to meet the "good cause" required by California law for the issuance of a permit.

4. Further, Defendants deny many CCW applications from those who maintain an address and residence in San Diego on grounds that such applicants do not meet the statutory residency requirement.

5. The fundamental individual right to bear arms for self-defense does not end at the doorstep to one's home. Plaintiffs seek equitable and declaratory relief to that effect, to compel Defendants to articulate and adopt a constitutional policy regarding the issuance of CCW licenses, and to review CCW applications, determine residency, and issue CCW licenses in a manner consistent with California law, and with the United States Constitution.

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[1] Abstract to SMOKING GUN – THE CASE FOR CONCEALED WEAPON PERMIT REFORM, http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=104228.

PARTIES

[Plaintiffs]

6. Plaintiff Edward PERUTA is a natural person, a citizen of the United States and of the State of California, and a resident of San Diego County, California.

7. PERUTA maintains a residence in San Diego County. Plaintiff maintains a permanent mailing address in San Diego, California, and PERUTA and his wife keep a room in San Diego in which they keep a wardrobe and other personal items.

8. PERUTA and his wife reside in San Diego in a motor home for extended periods of time. PERUTA reserved space at Campland on the Bay, in San Diego, California, from November 15, 2008 through April 15, 2009. PERUTA has also previously reserved space at the same place for months at a time.

9. PERUTA is the founder and sole stockholder of *American News and Information Services, Inc.*, a news and information company that operates throughout the United States, and which gathers and provides raw, breaking news video, photographs, and news tips to various mainstream media outlets.

10. As part of PERUTA's media duties and employment, he often enters high crime areas. This puts him at risk of criminal assault and in need of a firearm to defend himself. In pursuing his occupation, PERUTA and his wife travel extensively throughout the United States in their motor home, carrying large sums of cash, valuables and equipment, making them a target for violent crimes.

11. As part of PERUTA's travels, he and his wife often find it necessary to stay in remote rural areas of the United States, including California, where law enforcement personnel are frequently unavailable.

12. In November 2008, PERUTA requested a CCW application form from the San Diego County Sheriff's License Division. At that time he was interviewed by a licensing supervisor to determine whether he satisfied the Defendants' licensing criteria. Basically, he had to first apply to get an official application form

before he could actually apply for a CCW.

13. In February 2009, PERUTA submitted an application for a CCW. PERUTA provided the required eight (8) hour Firearms Safety and Proficiency Certificate (California Penal Code § 12050(E)(I)).

14. PERUTA is eligible to possess firearms.

15. PERUTA was denied a CCW by Defendants upon a finding by the San Diego County Sheriff's licensing division that Plaintiff did not have "good cause" and was not a "resident" of San Diego County.

16. Defendants deemed that PERUTA did not have "good cause" because PERUTA, beyond a desire to exercise his Second Amendment right to bear arms in self-defense, could not document a more specific demonstrable threat of harm as a primary reason for desiring a CCW license.

17. Defendants also found that PERUTA is not a San Diego county resident because his residence is his mobile home.

18. PERUTA appealed this denial as far as possible administratively.

19. Re-submission of an application would be futile.

20. Plaintiff Michelle LAXSON is a 26-year-old natural person, a citizen of the United States and of the State of California, and a resident of San Diego County, California.

21. Plaintiff LAXSON owns her own hairdressing business.

22. LAXSON wishes to have a CCW for self-defense because her work requires her to travel alone and to carry large amounts of cash, sometimes at night, and often through neighborhoods known to have a heightened level of crime.

23. LAXSON applied for a CCW on or about January 25, 2010, but was told that same day that a CCW license would not be issued for failure to establish "good cause" as determined and required by Defendants.

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24. LAXSON is legally qualified to possess a firearm and, other than the supposed inadequacy of her "good cause," can satisfy the legal requirements for issuance of a CCW.

25. LAXSON is involved in the community through various charities to which she devotes time or money, including Mama's Kitchen, the YMCA, Child Help, Friends of Scott, Locks of Love, the Zoological Society, and various local school events and fundraisers. She is an active member in her local church.

26. But for her lack of a CCW, LAXSON would carry a concealed, loaded firearm in public for self-defense.

27. Plaintiff James DODD is a 67-year-old natural person, a citizen of the United States and of the State of California, and a resident of San Diego County, California.

28. Plaintiff DODD is a retired Navy Officer. He served in the Navy for 22 years, and served two combat tours of duty in the Vietnam War.

29. Apart from his military career, Plaintiff DODD has received extensive firearms training from shooting schools such as Gunsite and Front Sight.

30. Plaintiff DODD also took a CCW class in San Diego on or about July 26, 2000, in anticipation of applying for a CCW from Defendant San Diego County.

31. Plaintiff DODD desires a CCW to exercise his Second Amendment right to bear arms in self-defense. At his age, he is less physically capable of defending himself, and his wife, from violent crime without a firearm. Upon requesting an application for a CCW in early August 2000, Plaintiff DODD was told by the Sheriff's Department that he would be wasting $200 by applying because Defendants would not issue Plaintiff DODD a CCW because he did not have "good cause." DODD was informed that filing a formal application and paying the associated fees was a waste of time and money because he did not have "good cause" to obtain a CCW.

32. But for the Defendants instructing him that he did not qualify for and would not be issued a CCW license, Plaintiff DODD would have formally applied for a CCW license.

33. Plaintiff Doctor Leslie BUNCHER is a 71 year old natural person, a citizen of the United States and of the State of California, and a resident of San Diego County, California.

34. Plaintiff Dr. BUNCHER is retired after working as a medical physician for approximately thirty (30) years. Part of Dr. BUNCHER's medical practice involved him performing abortions.

35. Because of the socially controversial nature of Dr. BUNCHER's practice, he was the target of various threats to his well-being. Dr. BUNCHER has had anti-abortion protestors enter his office, and has received threatening electronic mails and letters calling him a murderer and telling him to repent.

36. Dr. BUNCHER obtained a CCW from one of Defendant GORE's predecessors in the early 1970's and maintained it for decades. Dr. BUNCHER failed to timely renew his CCW. Sometime after it expired he went to the Sheriff's station and inquired about reapplying for a new CCW. He was told by defendants' employees that he would not be issued a permit if he applied because he was no longer practicing medicine and thus lacked "good cause."

37. Upon being told he would be rejected, Dr. BUNCHER nonetheless returned days later with evidence of specific threats that continued to be made against him and other doctors. Dr. BUNCHER showed Defendants that his name and address remained available on the internet as a doctor associated with abortions. He then officially applied for a CCW license, but was nonetheless denied on September 28, 2008.

38. Defendants sent the Doctor a Denial Letter stating that the documentation he provided did not support a showing of good cause, and that "fear alone" does not constitute "good cause."

39. Dr. BUNCHER served in the military as a Military Police officer and taught shooting courses at the Military Police Academy.

40. Dr. BUNCHER presently volunteers as a reserve officer for the Humane Society and a reserve officer for the Chula Vista Police Force, Mounted Division. As a reserve officer he is permitted access to areas deemed fire-dangers and closed to the public.

41. Dr. BUNCHER wishes to have a CCW to defend himself and his wife from violent crime in general, and specifically from individuals who have threatened him in the past because he performed pregnancy terminations.

42. But for his lack of a CCW, Dr. BUNCHER would carry a concealed, loaded firearm in public for self-defense on occasions he deemed appropriate.

43. Plaintiff Mark CLEARY is a 58-year-old natural person, a citizen of the United States and of the State of California, and a resident of San Diego County, California.

44. Plaintiff CLEARY is a registered nurse at a hospital in San Diego County. As part of his employment, Plaintiff CLEARY must tend to patients who are deemed legally insane pursuant to the California Welfare and Institutions Code, and who are often dangerous to themselves and others.

45. Plaintiff CLEARY has worked with mentally ill patients since 1994. He worked between 1999 and 2008 throughout Southern California, including San Diego County, conducting mental health evaluations of patients pursuant to California Welfare and Institutions Code section 5150. During his career, Plaintiff CLEARY was subjected to several death threats from patients. He has filed six police reports to Defendants documenting some of these threats.

46. Plaintiff CLEARY continues to work with mentally ill patients in a lock-down facility where he has worked since 2007.

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47. Plaintiff CLEARY wishes to have a CCW for self-defense against his past and present patients, and the ones he will surely tend to in the future, who suffer from mental illness and many of whom have a history of being dangerous to others.

48. Plaintiff CLEARY was originally issued a CCW by Defendants in November of 2005 after being denied previously. The CCW was issued to Plaintiff CLEARY only after he became a member of the Honorary Deputy Sheriff's Association in San Diego County and made a request for reconsideration of his application to Defendant GORE personally.

49. Defendants granted his renewal application for a CCW in November of 2007 while he was working at the same hospital where he is currently employed. At that time, Plaintiff CLEARY remained a member of the Honorary Deputy Sheriff's Association.

50. On or about November 23, 2010, Plaintiff CLEARY submitted an application for a renewal of his CCW.

51. Plaintiff CLEARY ceased being a member of the Honorary Deputy Sheriff's Association in December of 2009 after he stopped paying his membership dues.

52. In January 2010, Plaintiff CLEARY spoke with Jerry Quinlin of Defendant GORE's office, who requested additional documentation from Plaintiff CLEARY, including a letter from CLEARY's supervisor. When Plaintiff CLEARY explained that he feared losing his job by making such a request of his supervisor and that Defendants already had a letter from the same employer for his previous application, Mr. Quinlin told Plaintiff CLEARY that he could withdraw his CCW application.

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53. Plaintiff CLEARY refused to withdraw his CCW application and reminded Defendants of the police reports he had filed involving threats from his past patients and that he still worked at the same hospital from which he already submitted a letter illustrating the type of patients he tends to. Plaintiff CLEARY presented his current hospital identification as evidence of his employment there, and offered to present paycheck stubs.

54. On March 17, 2010, Defendants denied Plaintiff CLEARY's renewal application for failure to establish "good cause."

55. But for his lack of a CCW, Plaintiff CLEARY would carry a concealed, loaded firearm in public for self-defense on appropriate occasions.

56. Plaintiff CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION ("CRPA FOUNDATION") is a non-profit entity classified under section 501(c)(3) of the Internal Revenue Code and incorporated under California law, with headquarters in Fullerton, California.

57. Contributions to the CRPA FOUNDATION are used for the direct benefit of Californians. Funds contributed to and granted by the Foundation benefit a wide variety of constituencies throughout California, including gun collectors, hunters, target shooters, law enforcement, and those who choose to own a firearm to defend themselves and their families. The CRPA FOUNDATION seeks to: raise awareness about unconstitutional laws, defend and expand the legal recognition of the rights protected by the Second Amendment, promote firearms and hunting safety, protect hunting rights, enhance marksmanship skills of those participating in shooting sports, and educate the general public about firearms. The CRPA FOUNDATION supports law enforcement and various charitable, educational, scientific, and other firearms-related public interest activities that support and defend the Second Amendment rights of all law-abiding Americans.

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58. In this suit, the CRPA FOUNDATION represents the interests of its many citizen and taxpayer members and members of its related association the California Rifle and Pistol Association who reside in San Diego and who wish to obtain CCWs, but who have been denied CCWs for supposed lack of residence, or supposed lack of "good cause," or who have been told by the Sheriff's Office not to bother applying for a CCW because of the aforesaid reasons. These members are too numerous to conveniently bring this action individually. The CRPA FOUNDATION and the individuals whose interests are represented by the CRPA FOUNDATION are and will be affected by Defendants' failure to issue CCW licenses according to law.

[Defendants]

59. Defendant William GORE is the Sheriff of San Diego County. As such, he is responsible for formulating, executing and administering the laws, customs and practices that Plaintiffs challenge, and is in fact presently enforcing the challenged laws, customs, and practices against Plaintiffs (and, in the case of the CRPA Foundation, those they represent). Defendant GORE is sued in his individual capacity and in his official capacity as Sheriff.

60. Defendant San Diego County is a municipal entity organized under the Constitution and laws of the State of California.

JURISDICTION AND VENUE

61. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. sections 1331, 1343, 1367, 2201, 2202, and 42 U.S.C. section 1983.

62. Venue lies in this court pursuant to 28 U.S.C. section 1391.

REGULATORY SCHEME

[California Law - Permits to Carry Concealed Firearms]

63. With very few and very limited exceptions, California has banned the unlicensed public carrying of concealed handguns (California Penal Code § 12025), and the unlicensed public carrying of loaded firearms (California Penal

Code § 12031). Because California does not permit the open carriage of loaded firearms, concealed carriage with a CCW permit is the only means by which an individual can bear arms in public places in order to exercise his or her Second Amendment right to armed self-defense.

64. California law allows for the issuance of a license to carry a firearm in public for self-defense. In counties with small populations, an individual may obtain a license to openly carry a loaded handgun. (California Penal Code § 12050(a)).

65. Depending on the jurisdiction, in order to obtain a CCW one must submit an application to either the police chief or the county sheriff ("Issuing Authority") for the city or county in which the applicant either resides or spends a substantial amount of time while conducting business at the applicant's principal place of employment or business located in that county. (California Penal Code § 12050, *et seq*).

66. CCW applicants must pass a criminal background check (California Penal Code § 12052), and successfully complete a handgun training course. (California Penal Code §12050(a)(1)(E)).

67. Even if an applicant successfully completes a background check and the handgun training course, a CCW is issued only if the applicant is additionally found to be of good moral character and, in the discretion of the Issuing Authority, has "good cause" for carrying a concealed firearm. (California Penal Code § l2050 (a)(l)(A), (B)).

68. Because Issuing Authorities have discretion to determine whether an applicant is of good moral character, and whether an applicant has "good cause" for a CCW, there is little consistency among jurisdictions in establishing the criteria for issuing CCWs. That lack of consistency leads to disparate treatment of similarly situated applicants by a particular Issuing Authority, or by the various Issuing Authorities from jurisdiction to jurisdiction.

69. In some counties, such as San Diego, applicants are rarely issued CCWs, but in other counties, CCWs are issued to most law-abiding, responsible adult applicants. Applicants who do receive CCWs in jurisdictions (typically urban) that do not issue CCWs liberally are often wealthy and/or politically important, friends of the Issuing Authority, or individuals who contribute to the Issuing Authority's campaign fund or to the campaign funds of other politicians. Many people lacking those "qualifications" are denied CCWs.

70. This pattern is so pervasive that many people lacking these unofficial "qualifications" or connections generally do not waste their time or money by applying for a CCW.

[Second and Fourteenth Amendments]

71. The Second Amendment to the United States Constitution, by way of its incorporation into the Fourteenth Amendment, prohibits states and localities from depriving law-abiding individuals of their right both to keep and to bear arms.

72. The inherent right of self-defense is central to the Second Amendment.

73. The Second Amendment guarantees the right of law-abiding responsible adults to "possess and carry weapons in case of confrontation." This right includes the ability of law-abiding citizens to obtain a license to carry loaded handguns for self-defense in public.

74. States may not completely ban the carrying of handguns for self-defense, nor impose regulations on the right to carry handguns that are inconsistent with the Second Amendment.

75. Almost all states effectively recognize the Second Amendment right to carry a handgun for self-defense by either not regulating the carrying of handguns by law-abiding citizens (*i.e.*, they do not require a license to carry a firearm in public), or by regulating only to the extent that individuals who pass a background check and complete a gun-safety program are, as a matter of course, issued a license to carry a handgun in public.

76. In some of those states, a person needs a license to legally carry a handgun only if the person carries the handgun concealed.

GENERAL ALLEGATIONS

[Defendants' Issuance Policy]

77. Defendant Sheriff William GORE has formulated and adopted, and is continuing to abuse his discretion and apply San Diego County's unconstitutional policies and standards for establishing "good cause" and "residency" when denying CCWs. Defendants' policy, to the extent it has been articulated and published publicly, is attached as Exhibit A.

78. The Second Amendment right to bear arms, and the fundamental right to self-defense and self-preservation, are not deemed by Defendants to constitute "good cause" for the issuance of a CCW.

79. Defendants do not actually require "residency" in San Diego County *per se* (the statutory standard). Rather, they improperly require a lack of any residency elsewhere.

80. Plaintiffs are informed and believe and thereupon allege that Defendants sometimes issue CCWs to applicants whose "good cause" *is* credible threats of harm to self or family, or a need to transport large sums of money or valuable property, or engaging in a business or occupation that exposes the applicant to attack. Defendants, however, issue a CCW in such circumstances only when the applicant is a personal friend of the Sheriff or of someone with influence over the Sheriff, has contributed money to the Sheriff's campaign or to the campaign of others who have influence over the Sheriff, is wealthy or otherwise politically influential, or is a public official.

81. Plaintiffs are also informed and believe and thereupon allege that Defendants sometimes issue CCWs to applicants who do *not* have "good cause" under Defendants' standard, but who are a personal friend of the sheriff or of someone with influence over the sheriff, is a contributor of money to the sheriff's

campaign or to the campaigns of others who have influence over the sheriff; are wealthy or otherwise politically influential, or is a public official.

82. Defendants have created a screening process whereby would-be CCW applicants are required to, in essence, apply to apply for a CCW permit. Unless applicants are determined to have "good cause," as defined by Defendants, during the initial screening of applicants process, they are told that formally applying for a CCW would be pointless and a waste of money, that they will not be issued a CCW, and that they should not apply because their CCW application will be denied.

[All Plaintiffs]

83. By reason of the Second Amendment, the Fourteenth Amendment's Due Process Clause, the Equal Protection Clause and California Penal Code section 12050, each of the Defendants has "good cause" and meets the "good cause" requirement for a CCW license.

84. Plaintiffs also meet the residency requirements for issuance of a CCW.

85. In the alternative, with respect to Plaintiff PERUTA, he is constitutionally entitled to a CCW permit even if he does not meet the statutory requirement of "residency" in San Diego.

86. Plaintiffs meet all of the statutory criteria in California Penal Code section 12050 for issuance of a CCW insofar as such criteria are constitutionally valid.

87. Defendants' arbitrary, capricious, and subjective interpretation and application of California Penal Code section 12050's "good cause" requirement is an abuse of discretion and has resulted in the illegal and unconstitutional denial of CCW permits to Plaintiffs.

88. There is no valid reason not to consider Plaintiffs' "good cause" and residency adequate to obtain a CCW under California Penal Code § 12050.

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89. But for the lack of a CCW, Plaintiffs would carry concealed weapons for self-defense.

[Right to Bear Arms]

90. Defendants' manner of interpreting and applying California Penal Code section 12050's requirements is an abuse of discretion and infringes upon Plaintiffs' right to keep and bear arms under the Second and Fourteenth Amendments, which includes the right to possess and carry weapons in public for self-defense in case of confrontation.

91. Denial of a CCW is a denial of the right to carry a firearm for self-defense, a purpose guaranteed by the Second Amendment.

[Equal Protection]

92. The Fourteenth Amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

93. Defendants' "good cause" and residency policies are an abuse of discretion, subjective, inherently prone to abuse, and results in the unequal treatment of similarly situated individuals applying for a CCW.

94. Many of those whose CCW applications are granted because they have the "qualifications" or connections described above are otherwise similarly situated to Plaintiffs, in that they too generally have no significant need or "good cause" that is greater than any of Plaintiffs' self-defense needs.

95. Defendants' residency requirement subjects Plaintiff PERUTA and other San Diego residents to unequal treatment.

96. Plaintiff PERUTA is a resident of San Diego County by virtue of the fact that he maintains a permanent mailing address in San Diego, keeps personal belongings there, and resides in San Diego County for extended periods of time.

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97. Plaintiff PERUTA should be deemed to have good cause and his application processed even if he does not meet Defendants' residency requirement because treating a person in his circumstance differently from full-time residents denies him equal protection of the laws.

98. Plaintiff PERUTA was denied a CCW, at least in part, because the San Diego Licensing Division made a finding that Plaintiff's residency in a motor home did not meet Defendants' residency requirement.

99. Plaintiff PERUTA was treated differently than similarly situated residents of San Diego County, at least in part, because he does not reside in San Diego County all of the time.

[Right to Travel]

100. The Fourteenth Amendment and other provisions of the Constitution guarantee individuals the right to interstate travel and to change their residence from state to state.

101. A state may not impose a penalty upon those who exercise a right guaranteed by the Constitution.

102. Defendants reject CCW applicants, including Plaintiff PERUTA, who do not reside in San Diego County full time.

103. Defendants base such rejections on their inconsistent, unconstitutional, and illegal interpretation and mis-application of California Penal Code section 12050's residency requirement.

104. Defendants' policy of requiring full-time residency in San Diego County as a prerequisite to issuing a CCW is an abuse of discretion, is unauthorized by California law, and violates the right to travel guaranteed by the United States Constitution. The policy deters people, including Plaintiff PERUTA, from traveling and spending time outside of San Diego County.

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[Penal Code Section 12050]

105. California Penal Code section 12050 requires Defendants to issue CCWs to all responsible, law-abiding adult residents of San Diego County who have "good cause" to carry a firearm for self-defense.

106. Defendants' policies are an abuse of discretion and unlawfully exceed California Penal Code section 12050's "good cause" requirement by inconsistently, arbitrarily, capriciously, and subjectively refusing to acknowledge that Plaintiffs have "good cause."

107. Defendants' policies unlawfully exceed California Penal Code section 12050's "residency" requirement by refusing to acknowledge that lawful residency, even if not full time, satisfies the statutory residency requirement.

[Privileges and Immunities - Article IV]

108. Article IV, section 2 of the United States Constitution provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." This clause bars discrimination against citizens of other States where no substantial reason for the discrimination exists beyond the mere fact that they are citizens of other states.

109. Defendants deny applicants CCW applications and licenses based on lack of residency if the applicant resides in San Diego only part of the year.

110. Defendants denied Plaintiff PERUTA a CCW based in part on the fact that he spends time in and travels to jurisdictions other than San Diego County.

FIRST CLAIM FOR RELIEF
SECOND AND FOURTEENTH AMENDMENTS - RIGHT TO BEAR ARMS
42 U.S.C. § 1983
AGAINST ALL DEFENDANTS

111. Plaintiffs hereby re-allege and incorporate by reference the allegations set forth in the foregoing paragraphs as if set forth herein in full.

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112. By refusing to issue CCWs to individuals, including Plaintiffs, based on their subjective and unconstitutional standard of "good cause" that requires a showing beyond the need for self-defense, Defendants are abusing their discretion and propagating customs, policies, and practices that infringe on Plaintiffs' right to possess and carry firearms as guaranteed by the Second and Fourteenth Amendments.

113. Defendants cannot satisfy their burden of justifying these customs, policies, and practices that infringe on Plaintiffs' rights.

114. Plaintiffs are entitled to permanent injunctive relief against such customs, policies, and practices.

SECOND CLAIM FOR RELIEF
FOURTEENTH AMENDMENT - EQUAL PROTECTION
42 U.S.C. § 1983
AGAINST ALL DEFENDANTS

115. Plaintiffs hereby re-allege and incorporate by reference the allegations set forth in the foregoing paragraphs as if set forth herein in full.

116. Plaintiff PERUTA was treated differently than other similarly situated residents of San Diego County because he resides in San Diego only part of the year.

117. Plaintiffs were treated differently than other similarly situated CCW applicants because Plaintiffs are not politically-connected, wealthy, or contributors to the Sheriff's campaign, as are those individuals issued a CCW.

118. By maintaining and enforcing a set of customs, practices, and policies that inconsistently and arbitrarily deny Plaintiffs a CCW based on a subjective determination of "good cause" and/or length of one's residency in San Diego, while at the same time issuing CCWs to other similarly situated individuals, Defendants are abusing their discretion and propagating customs, policies, and practices that violate Plaintiffs' rights to equal protection under the Fourteenth Amendment.

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119. Defendants cannot satisfy their burden of justifying these customs, policies, and practices that deprive Plaintiffs equal protection under the law.

120. Plaintiffs are entitled to permanent equitable relief against such customs, policies, and practices.

THIRD CLAIM FOR RELIEF
FOURTEENTH AMENDMENT - RIGHT TO TRAVEL
42 U.S.C. § 1983
AGAINST ALL DEFENDANTS

121. Plaintiffs hereby re-allege and incorporate by reference the allegations set forth in the foregoing paragraphs as if set forth herein in full.

122. The residency requirement, as interpreted and applied by Defendants, deters individuals such as Plaintiff PERUTA from exercising their right to travel because the residency requirement penalizes applicants for traveling and spending time outside of San Diego.

123. San Diego's policy burdens the right to travel.

124. Defendants can neither identify a compelling state interest for demanding that individuals reside more than part time in San Diego County, nor demonstrate that the County's residency requirement is necessary to further that interest.

125. Because Defendants cannot satisfy their burden of justifying the residency requirement they impose for CCW issuance, Defendants are abusing their discretion and propagating customs, policies, and practices that violate Plaintiffs' right to travel under the Fourteenth Amendment to the United States Constitution.

126. Plaintiffs are entitled to permanent injunctive relief against such customs, policies and practices.

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FOURTH CLAIM FOR RELIEF
VIOLATION OF CALIFORNIA PENAL CODE SECTION 12050
42 U.S.C. § 1983
AGAINST ALL DEFENDANTS

127. Plaintiffs hereby re-allege and incorporate by reference the allegations set forth in the foregoing paragraphs as if set forth herein in full.

128. Plaintiffs meet each of the statutory qualifications for licensure under California Penal Code section 12050, but Defendants refuse to examine Plaintiffs' qualifications on their merits because Defendants' "good cause" standard requires a showing of comparatively greater hazard than those faced by other residents of the county.

129. For example, instead of examining Plaintiff PERUTA's individual qualifications on their merits, Defendants denied Plaintiff a CCW license by reason of Defendants' unlawful policies which exclude residents if they also reside elsewhere and for all Plaintiffs require a showing of some specific threat rather than just good cause to fear being attacked in general.

130. Defendants' CCW issuing policies exceed the scope of their discretion and abuse the discretion granted in California Penal Code section 12050, and subject Plaintiffs to irreparable harm.

131. Plaintiffs are entitled to declaratory and equitable relief.

FIFTH CLAIM FOR RELIEF
ARTICLE IV, §2 - PRIVILEGES *AND* IMMUNITIES
42 U.S.C. § 1983
AGAINST ALL DEFENDANTS

132. Plaintiffs hereby re-allege and incorporate by reference the allegations set forth in the foregoing paragraphs as if set forth herein in full.

133. Plaintiff PERUTA was denied a CCW based in whole or in part on his failure to satisfy Defendants' residency requirement.

134. Such conduct by Defendants deprives Plaintiff PERUTA of the privileges and immunities of citizenship in violation of Article IV, Section 2 of the United State Constitution.

135. Defendants' policies regarding the issuance of CCW licenses are unlawful and subject individuals, including Plaintiff PERUTA, to irreparable harm.

136. Plaintiff PERUTA is entitled to declaratory and equitable relief.

SIXTH CLAIM FOR RELIEF
SECOND AMENDMENT,
FOURTEENTH AMENDMENT,
AND CALIFORNIA PENAL CODE SECTION 12050
42 U.S.C. § 1983
AGAINST ALL DEFENDANTS

137. Plaintiffs hereby re-allege and incorporate by reference the allegations set forth in the foregoing paragraphs as if set forth herein in full.

138. Plaintiffs desire a Decree from this Court directing Defendants to consider self-defense to be "good cause" for an otherwise qualified applicant to be issued a CCW.

SEVENTH CLAIM FOR RELIEF
FOURTEENTH AMENDMENT - DUE PROCESS
42 U.S.C. § 1983
AGAINST ALL DEFENDANTS

139. Plaintiffs hereby re-allege and incorporate by reference the allegations set forth in the foregoing paragraphs as if set forth herein in full.

140. Plaintiffs have a right to access and review Defendants' CCW policies, to obtain applications to apply for a CCW, to submit applications, and to have those applications reviewed in a fair, impartial, and constitutional manner and obtain a CCW when they meet the constitutional and legal prerequisites or standards.

141. Plaintiffs desire a Decree from this Court directing Defendants to adopt a constitutional application process for issuing CCW licenses.

DECLARATORY RELIEF ON ALL COUNTS

142. Plaintiffs hereby re-allege and incorporate by reference the allegations set forth in the foregoing paragraphs as if set forth herein in full.

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143. There is an actual and present controversy between the parties in that Plaintiffs contend that Defendants' are illegally and unconstitutionally interpreting, administering, and applying the California CCW licensing statutes arbitrarily, capriciously, and holding applicants to unconstitutional and illegal standards. Defendants deny and dispute this contention. Plaintiffs desire a judicial declaration of their rights and Defendants' duties in this matter.

144. There is an actual and present controversy between the parties hereto in that Plaintiffs contend that Defendants' policies as to "good cause" are an abuse of discretion and are unauthorized by law, and contrary to the Second Amendment. Defendants deny and dispute this contention. Plaintiffs desire a judicial declaration of their rights and Defendants' duties, and that Defendants' policies are contrary to law.

145. There is an actual and present controversy between the parties hereto in that Plaintiffs contend Defendants' practice is to deny CCW licensure unless an applicant is a personal friend of the sheriff or of someone with influence over the sheriff, a contributor of money to the Sheriff or his campaigns or to others who have influence over the Sheriff; is wealthy or otherwise politically influential, or is a public official. Defendants deny and dispute this contention. Plaintiffs desire a judicial declaration of their rights and Defendants' duties, and that Defendants' policies are contrary to law.

146. There is an actual and present controversy between the parties hereto in that Plaintiffs contend that Defendants' policies as to residency requirements are unauthorized by law and contrary to the Second Amendment, the Equal Protection Clause, the right to travel guaranteed by the Fourteenth Amendment, and the Privileges and Immunities Clause of Article IV, Section 2 of the U.S. Constitution. Defendants deny and dispute this contention. Plaintiffs desire a judicial declaration of their rights and Defendants' duties, to wit that Defendants' policies are contrary to law.

147. There is an actual and present controversy between the parties hereto in that Plaintiffs contend that Defendants' "good cause" and residency policies are unauthorized by and violate California Penal Code section 12050. Defendants deny and dispute this contention. Plaintiffs desire a judicial declaration of their rights and Defendants' duties.

PRAYER

WHEREFORE, Plaintiffs request that judgment be entered in their favor and against Defendants as follows:

148. An order permanently enjoining Defendants, their officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of the injunction, from enforcing the "good cause" or other requirement of California Penal Code section 12050 as currently applied against applicants who seek a CCW for self-defense and who are otherwise qualified to obtain a CCW;

149. Declaratory relief that Defendants' interpretation of the "good cause" provisions of California Penal Code § 12050 is unconstitutional either on its face and/or as applied to applicants who are otherwise legally qualified to possess firearms and who assert self-defense as their "good cause" for seeking a license to carry a concealed weapon;

150. An order permanently enjoining Defendants, their officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of the injunction, from requiring any duration of local residence prior to acknowledging satisfaction of the statutory residency requirement and accepting an application under California Penal Code § 12050;

151. Costs of Suit, including attorney fees and costs pursuant to 42 U.S.C. § 1988 and California law;

///

///

152. Any further relief as the Court deems just and proper.

Respectfully Submitted,

Date: April 22, 2010

MICHEL & ASSOCIATES, P.C.

/ s /C.D. Michel
C.D. Michel
E-mail:cmichel@michellawyers.com
Counsel for Plaintiffs

Date: April 22, 2010

PAUL NEUHARTH, JR., APC

/ s /Paul Neuharth
Paul Neuharth, Attorney at Law
Counsel for Plaintiff

TAB 48

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

EDWARD PERUTA, Plaintiff, vs. COUNTY OF SAN DIEGO; and WILLIAM D. GORE, individually and in his capacity as sheriff, Defendants.	CASE NO. 09-CV-2371 - IEG (BLM) ORDER GRANTING MOTION FOR LEAVE TO AMEND COMPLAINT [Doc. No. 16]

Currently before the Court is Plaintiff's Motion for Leave to Amend Complaint. Defendants filed an opposition and Plaintiff replied. Having considered the parties' arguments, and for the reasons set forth below, the Court GRANTS the motion to amend.

BACKGROUND

As relevant to this motion, Plaintiff Edward Peruta ("Peruta") filed this lawsuit on October 9, 2009, alleging three causes of action against Defendants County of San Diego and William D. Gore, individually and in his capacity as sheriff. [Doc. No. 1]. Peruta's complaint arose from his attempts to obtain a concealed weapon's permit ("CCW") in San Diego County. Peruta alleged he was denied a CCW by Defendant Gore's predecessor because the San Diego License Division made a finding that he did not have good cause and was not a resident of San Diego–both of which are requirements under Section 12050 of the California Penal Code ("Section 12050").

Defendant Gore filed a Motion to Dismiss Plaintiff's complaint on November 12, 2009, which the Court denied in its entirety on January 14, 2010. [Doc. No. 7]. Since then, Peruta alleges he discovered additional information and developed new legal theories necessitating the filing of an amended complaint. (Motion to Amend, at 2.) Accordingly, Peruta filed the present motion for leave to file an amended complaint on April 22, 2010. [Doc. No. 16]. Defendant filed an opposition, and Peruta replied. [Doc. Nos. 19, 20]. Subsequently, the Court took the motion under submission pursuant to Civil Local Rule 7.1(d)(1). [Doc. No. 21].

LEGAL STANDARD

Fed. R. Civ. P. 15(a) allows a party to amend its pleading with leave of court after the period for amendment as a matter of course has expired. See FED. R. CIV. P. 15(a)(2). Pursuant to Rule 15(a), "[t]he court should freely give leave when justice so requires." Id. The Ninth Circuit has construed this broadly, requiring that leave to amend be granted with "extreme liberality." Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990) (citation omitted); Poling v. Morgan, 829 F.2d 882, 886 (9th Cir. 1987) (noting "the strong policy permitting amendment" (citation omitted)). This broad discretion "must be guided by the underlying purpose of Rule 15 to facilitate decision on the merits, rather than on the pleadings or technicalities." United States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981) (citing Conley v. Gibson, 355 U.S. 41, 47-48 (1957)).

The Supreme Court has articulated five factors that the court should consider in deciding whether to grant leave to amend: (1) bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility of amendment; and (5) whether the party has previously amended its pleadings. Forman v. Davis, 371 U.S. 178, 182 (1962); see also Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051-52 (9th Cir. 2003). Not all factors merit equal weight, however. Eminence Capital, 316 F.3d at 1052. "Prejudice is the 'touchstone of the inquiry under rule 15(a)'" and "carries the greatest weight." Id. (citations omitted). Nevertheless, "[f]utility of amendment can, by itself, justify the denial of a motion for leave to amend." Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995).

DISCUSSION

In his motion to amend, Peruta alleges that since the filing of the complaint he has learned the identities of other individuals who were unlawfully denied issuance of CCWs by Defendants and who

wish to be included as plaintiffs in this suit. (Michel Decl., ¶¶ 4-5.) Peruta also wishes to add causes of action for violation of Section 12050, the Privileges and Immunities Clause of the United States Constitution, and the requirements of Due Process. (Id.) The amended complaint also seeks a declaration from the Court that the right to self defense constitutes "good cause" for the issuance of a CCW. According to Peruta, none of these amendments would prejudice Defendants.

Defendants oppose the motion to amend on the ground that it "raise[s] issues of fact not raised by the original complaint and which compound and confuse the legal issues previously sought to be addressed by this litigation." (Def. Opp., at 2-3.) Defendants also allege that the California Rifle and Pistol Association Foundation ("CRPAF") lacks standing to be a plaintiff. (Id.)

A. California Rifle and Pistol Association Foundation

Associational standing permits an organization to litigate as a representative of its members if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977). In this case, Defendants argue the CRPAF cannot satisfy the third prong of the associational standing test because Plaintiffs' as-applied claims and the relief they seek, although equitable in nature, both require "individualized proof" specific to each permit application. See Ass'n of Christian Sch. Int'l v. Stearns, 362 Fed. App'x 640 (9th Cir. 2010).

Whether an association satisfies the third prong of the associational standing test depends on the claims it asserts and the relief it requests. See Warth v. Seldin, 422 U.S. 490, 511 (1975). Thus, the Supreme Court has found the third prong to be satisfied where "there is complete identity between the interests of the [association] and those of its [members] with respect to the issues raised in this suit, and the necessary proof could be presented 'in a group context.'" N.Y. State Club Ass'n v. City of N.Y., 487 U.S. 1, 10 n.4 (1988) (quoting Hunt, 432 U.S. at 344).

In the present case, Plaintiffs have sufficiently alleged that the issues raised in the amended complaint can be appropriately adjudicated "in a group context." See id. Specifically, as Plaintiffs note, all of them (including the CRPAF) "claim that Defendants' refusal to accept self-defense as sufficient 'good cause' for a CCW license infringes on the right to bear arms and cannot be

constitutionally justified by the government, and thereby violates the Second Amendment." (Pl. Reply, at 3.) All of Plaintiffs also allege that "the durational residency requirement, adopted as a standard to establish the residency required by the state statute, violates the Second Amendment, Equal Protection, the Right to Travel, and Privileges and Immunities." (Id.) Thus, because Defendants' policy equally affects all applicants and potential applicants, including members of the CRPAF, there appears to be a "complete identity between the interests of the [CRPAF] and those of its [members] with respect to the issues raised in this suit." See N.Y. State Club Ass'n, 487 U.S. at 10 n.4.

Furthermore, contrary to Defendants' arguments, Plaintiffs do not seek a determination of whether any specific permit application was properly granted or denied. Rather, Plaintiffs only seek relief from Defendants' allegedly unconstitutional policy for the public at large. (See Proposed First Amended Complaint, ¶¶ 148-50 [Doc. No. 16-1].) In other words, Plaintiffs' amended complaint raises a "pure question of law," which the CRPAF can litigate without the participation of the individual aggrieved claimants and still ensure that "the remedy, if granted, will insure to the benefit of those members of the association actually injured." See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock, 477 U.S. 274, 287-88 (1986) (finding the union could properly litigate the suit on behalf of aggrieved members, where the suit concerned the Secretary's interpretation of the Trade Act's TRA eligibility provisions, even though the relief requested would leave "any questions regarding the eligibility of individual TRA claimants to the state authorities").

Finally, Defendants' reliance on Ass'n of Christian Sch., 362 Fed. App'x 640, is misplaced. In that case, the Ninth Circuit concluded the association could not satisfy the third prong because "[t]he plaintiffs' as-applied claims and the relief they seek, although equitable in nature, both require 'individualized proof' specific to each rejected course and the school that offered it." Ass'n of Christian Sch., 362 Fed. App'x at 644 (quoting Hunt, 432 U.S. at 343). According to the Ninth Circuit, the district court correctly concluded that "individual course decisions 'are not common to the entire membership.' Relief would not be 'shared by all in equal degree.' Instead, each course decision affects only one ACSI school, and relief would benefit only that school." Ass'n of Christian Sch. Int'l v. Stearns, 678 F. Supp. 2d 980, 985 (C.D. Cal. 2008). By contrast, in the present case, the court's decision on Defendants' application of Section 12050's "good cause" and "residency" requirements

would be "shared by all in equal degree" and would benefit all of the applicants and potential applicants, including the CRPAF members.[1] See Brock, 477 U.S. at 287-88. Accordingly, the CRPAF has associational standing to litigate as a representative of its members.

B. Four new individual plaintiffs

Defendants also allege the amended complaint "contains 36 new paragraphs of factual allegations regarding the four new individual plaintiffs," which would expand this litigation "five-fold from a strictly factual standpoint and significantly from a legal standpoint because of the broad constitutional claims that are made." (Def. Opp., at 3.) This, however, is not sufficient by itself to deny a motion to amend. As previously noted, leave to amend should be granted with "extreme liberality." Morongo Band of Mission Indians, 893 F.2d at 1079. "This liberality in granting leave to amend is not dependent on whether the amendment will add causes of action or parties." DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987). In this case, the Forman factors weigh in favor of allowing the motion to amend. See Forman, 371 U.S. at 182. First, there is no indication the amendment is being sought in bad faith. Second, because the motion was filed within the time allotted for any amendments, [see Doc. No. 12], there has been no "undue delay." Third, there is no indication the amendment will be futile. Fourth, this is Plaintiffs' first amendment of their complaint.

Finally, there is also no indication the amendment will prejudice Defendants. In considering the potential prejudice of the amendment, the Court considers whether the amended complaint would "greatly change the parties' positions in the action, and require the assertion of new defenses." See Phoenix Solutions, Inc. v. Sony Elec., Inc., 637 F. Supp. 2d 683, 690 (N.D. Cal. 2009) (citing Morongo Band of Mission Indians, 893 F.2d at 1079). In the present case, although the amended complaint adds four new individual plaintiffs, the causes of action alleged and the relief requested are virtually identical to the original complaint. Moreover, Defendants fail to elaborate in their opposition on *how* exactly the addition of new parties will "compound and confuse" the issues in this case. For

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[1] To the extent Plaintiffs' proposed second cause of action for violation of the Equal Protection Clause of the Fourteenth Amendment requires a limited amount of "individualized proof" as to Peruta, that by itself does not preclude associational standing. See, e.g., Nat'l Ass'n of College Bookstores, Inc. v. Cambridge Univ. Press, 990 F. Supp. 245, 250 (S.D. N.Y. 1997) ("The fact that a limited amount of individuated proof may be necessary does not in itself preclude associational standing." (citing N.Y. State Nat'l Org. of Women v. Terry, 886 F.2d 1339, 1349 (2d Cir. 1989)).

the foregoing reasons, the addition of four new individual plaintiffs will not cause "undue prejudice" to Defendants. See DCD Programs, 833 F.2d at 186.

CONCLUSION

Accordingly, because the CRPAF has associational standing to litigate as a representative of its members and because the addition of four new individual plaintiffs will not unduly prejudice Defendants, the Court **GRANTS** the motion to amend. The Clerk of Court is directed to file Plaintiffs' First Amended Complaint, which is attached as Exhibit A to Plaintiffs' Motion for Leave to Amend Complaint. [Doc. No. 16-1].

IT IS SO ORDERED.

DATED: June 25, 2010

IRMA E. GONZALEZ, Chief Judge
United States District Court

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

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

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

APPELLANTS' EXCERPTS OF RECORD
VOLUME IV of VIII

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

"See Attached Service List"

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

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

CLAUDIA AYALA

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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 2, 2015

Signature s/ C.D. Michel

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