

**FILED**  
LOS ANGELES SUPERIOR COURT

AUG 02 2012

JOHN A. CLARKE, CLERK  
*[Signature]*  
BY DANNIELA SMITH, DEPUTY

1 Jason A. Davis (Calif. Bar No. 224250)  
2 Davis & Associates  
3 30021 Tomas Street, Suite 300  
4 Rancho Santa Margarita, CA 92688  
5 Tel 949.310.0817/Fax 949.288.6894  
6 E-Mail: Jason@CalGunLawyers.com

7 Attorneys for Plaintiffs and Petitioners,  
8 Jennifer Lynn Lu, *et al.*

9  
10 **SUPERIOR COURT OF CALIFORNIA**  
11 **COUNTY OF LOS ANGELES**

12 JENNIFER LYNN LU, SEAN ALLEN LU,  
13 ROY TORIVIO VARGAS, and THE  
14 CALGUNS FOUNDATION, INC.,

15 Plaintiffs and Petitioners,

16 v.

17 COUNTY OF LOS ANGELES, LOS  
18 ANGELES COUNTY SHERIFF'S  
19 DEPARTMENT, LEROY B. BACA, in his  
20 individual capacity and official capacity, and  
21 DOES 1 through 10, inclusive,

22 Defendants and Respondents

Case No.: BC480493

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' DEMURRER TO  
VERIFIED COMPLAINT  
[BY FAX]**

Assigned to the Hon. Deirdre H. Hill

DATE: August 24, 2012  
TIME: 8:30 A.M.  
DEPT: 49

Action Filed: March 9, 2012  
Trial Date: TBD

## INTRODUCTION

When it comes to licenses to carry a handgun (hereinafter "LTC"), California is referred to as a "may issue" state – meaning that law enforcement officials have the statutory authority to grant or deny an applicant a license based on a number of statutory factors – as Defendants admit. (Demurrer p.3, ¶ 18-19.) (Emphasis added.)

California Penal Code §26150 *et seq.*, authorizes a county sheriff to issue a license to carry a handgun upon the existence of good cause and provided that the applicant meets certain criteria provided for in the Penal Code. Penal Code sections 26150-26190 set forth the general criteria that California LTC applicants must meet. Applicants must be of good moral character, be a resident of or spend substantial time in the county in which they apply, demonstrate good cause and, upon the licensing authority's approval of an application, complete a firearms training course. (See Penal Code §§26150-26190.)

The language of sections 26150, 26155, and 26170 is permissive, not mandatory, and gives limited discretion to a sheriff or police chief in issuing LTCs. (*Gifford v. City of Los Angeles* (2001) 88 Cal.App. 4<sup>th</sup> 801, 805, quoting in part, *Nichols v. County of Santa Clara* (1990) 223 Cal.App.3d 1236, 1241; *CBS, Inc. v. Block* (1986) 42 Cal.3d. 646, 655.)

Defendants admit that the Sheriff's Department's LTC policy facially bars Plaintiffs, and similarly situated persons from applying, unless they first apply to the chief of police for their city of residence and have such applications denied. (Demurrer p.4, ¶2-3.) Specifically, that policy provision states:

*If the applicant resides in an incorporated city, which is not policed by our Department, he or she must first apply to the Chief of Police of their city of residence for a CCW license and have the application acted upon. Within 60 days after the denial of the application, the city resident may file a separate application with the Los Angeles County Sheriff's Department, attaching a copy of the application denied by the Chief of Police. The Sheriff will exercise independent discretion in granting or denying or denying licenses to these applicants. Further, the sheriff may review, consider, and give weight to the grounds upon which the previous denial was made. (Emphasis added.)*

(Verified Complaint ¶¶7-11 and Exhibit B: Declaration of Paul Tanaka, p. 3, ¶¶15-24.)

Such a requirement does not relate the "statutory factors" for which Defendant's state that their

1 discretion applies: e.g. good cause, good moral character, and county residency/substantial time. Yet,  
2 this policy, without any statutory authority, is a pre-requisite to applying with the Defendants for a LTC.  
3 In other words, the Sheriff has a policy of *refusing to exercise discretion* for those residents that reside  
4 within an incorporated city not policed by the Los Angeles County Sheriff's Department – unless the  
5 applicants incur the additional time, expense, and suffer the burdens of first applying and being denied  
6 by another law enforcement body.

7 The fundamental issues in this case are: (1) whether the Defendants' de jure ban preventing  
8 Plaintiffs (and anyone that lives within an incorporated city, but whose city does not contract with the  
9 County of Los Angeles Sheriff's Department) from applying for or having their application processed  
10 for a license to carry a firearm constitutes a violation of Defendants' duty to make a written  
11 determination upon each application and exercise discretion in the LTC application process; (2) whether  
12 the Defendants' ban preventing Plaintiffs (and all persons that live within a non-contracting incorporated  
13 city) from applying for or having their application processed for a license to carry a firearm constitutes a  
14 violation of the Fourteenth Amendment to the United States Constitution's Equal Protections Clause,  
15 and (3) whether the Defendants' exception to the ban, which imposes additional fees, expense, burden,  
16 and delay in the application process solely upon residents of non-contract incorporated cities, violates  
17 Penal Codes sections 26175 and 26190(g) and/or the Fourteenth Amendment to the United States  
18 Constitution's Equal Protections Clause.

19 Defendants, however, argue by Demurrer that Plaintiffs' Verified Complaint: 1) fails to state a  
20 cause of action; 2) is not ripe, and 3) fails to state a cause of action against defendants because, they  
21 assert that, their LTC policies are constitutional. As discussed below, Plaintiffs' claims have been stated  
22 clearly and concisely, and are ripe.

### 23 ARGUMENT

#### 24 **A. STANDARD OF REVIEW ON DEMURRER**

25 In considering a demurrer, all material facts properly pleaded are deemed true (*Kasler v. Lockyer*  
26 (2000) 23 Cal. 4th 472, 516) and those facts may be implied or inferred from those expressly alleged.  
27 (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.) Defendants must show that  
28

1 the challenged causes of action in the complaint are defective on their face. (See Code Civ. Proc.  
2 §430.30(a).) Plaintiff need only allege facts “in ordinary and concise language.” (California Code of  
3 Civil Procedure §425.10.) A complaint states facts sufficient to constitute a cause of action if it appears  
4 the plaintiff is entitled to any relief. (*Addiego v. Hill* (1965) 238 Cal.App.2d 842.) It has also been held  
5 that, in the context of a demurrer, complaints must be liberally construed. (*Buss v. J.O. Martin Co.* (1st  
6 Dist. 1966) 241 Cal.App.2d 123, 133-34.) A “plaintiff need not plead facts with specificity where the  
7 facts are within the knowledge and control of the defendant and are unknown to plaintiff.” (*Credit  
8 Managers Association of Southern California v. Superior Court* (1975) 51 Cal.App.3d 352, 361.) If a  
9 complaint contains allegations of the facts essential to state a cause of action, the court must overrule the  
10 demurrer. (*Brousseau v. Jarrett* (1977), 73 Cal. App. 3d 864, 870.)

## 11 B. PLAINTIFFS STATE PROPER CAUSES OF ACTION

### 12 1. A Cause of Action for a Writ of Mandate is Properly Stated

13 A party may seek a writ of mandate “to compel the performance of an act which the law  
14 specially enjoins, as a duty resulting from an office, trust, or station ....” (Code Civ. Proc., §1085, subd.  
15 (a).) In order to obtain writ relief, a party must establish: “(1) A clear, present and usually ministerial  
16 duty on the part of the respondent ... ; and (2) a clear, present and beneficial right in the petitioner to the  
17 performance of that duty ....” (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th  
18 525, 539-540.)

#### 19 a. Clear and Present Duty

20 As the Los Angeles County Sheriff’s Department is fully aware, a writ of mandate may be  
21 brought based upon their policy of refusing to exercise their discretion in accepting and reviewing  
22 applications for licenses to carry handguns – as they are doing here. In *Salute v. Pitchess* (1976) 61  
23 Cal.App.3d 557, the Los Angeles County Sheriff was involved in a similar lawsuit. By petition for a  
24 writ of mandate, two duly admitted attorneys at law, who were also licensed private investigators, sought  
25 relief from the county sheriff’s rejection of their applications<sup>1</sup> for licenses to carry. (*Id.* at 559.) The  
26

27 <sup>1</sup> A review of the Appellate Briefs in *Salute* reveals that there is dispute as to whether the LTC  
28 “applicants” in *Salute* actually filed formal applications for licenses to carry, versus informal letter

1 policy at that time was a post-submission<sup>2</sup> mandate to *not issue* LTCs to “any person, except judges who  
2 express concern for their personal safety...” (*Id.* at 560.) The trial court sustained the sheriff’s  
3 demurrer and the petition was dismissed. (*Id.* at 559.) The Court of Appeal reversed, however, holding  
4 that the sheriff’s policy constituted a refusal to exercise the discretion given to him by the statute. (*Id.* at  
5 560.) It was held that:

6                   Section 12050 imposes only three limits on the grant of an application to carry a  
7                   concealed weapon: the applicant must be of good moral character, show good  
8                   cause and be a resident of the county.

9 (*Id.*) It was admitted that no inquiry into the existence of good cause had ever been made in connection  
10 with the applications in question or of any other application except those of the limited group of public  
11 officials. Specifically, the court held that:

12                   To determine, in advance, as a uniform rule, that only selected public officials can  
13                   show good cause is to refuse to consider the existence of good cause on the part of  
14                   citizens generally, and is an abuse of, not an exercise of, discretion.

15 (*Id.*)

16                   The court held that it was the duty of the sheriff under the statute “to make such an investigation  
17 and determination, on an individual basis, *on every application.*” (*Id.* at 560-561.) (Emphasis added.)

18                   **b. Clear, Present, and Beneficial Right in Petitioner to Perform the Duty**

19                   Plaintiffs allege that they seek a license to carry firearms pursuant to Penal Code sections 26150,  
20 *et seq.* from the Los Angeles County Sheriff’s Department. (Verified Complaint ¶¶3-6.) Plaintiffs also  
21 allege that, as individuals who seek LTCs and as tax payers, they have a clear, present, and substantial  
22 right to ensure that the Defendants have properly exercised their discretion in issuing the licenses.

23 (Verified Complaint ¶¶27-33.)

24                   Here, also, Plaintiffs have plead the duties of the Defendants and have plead that the Defendants’  
25 have abused, not exercised their discretion in their blanket policy of refusal to accept applications from

26 requests. The sheriff in that case alleged that a formal application was filed, while the “applicants”  
27 claim that they submitted letter requests pursuant to instruction from the Sheriff’s personnel.

28 <sup>2</sup> Post-submission herein refers to the stage in the review process after the department has accepted an  
application for a LTC for review.

1 Plaintiffs. (Verified Complaint, ¶¶17-20, 25-34.) This case is nearly identical to *Salute v. Pitchess*, with  
 2 the exception that Plaintiffs have not applied for a LTC— unlike the plaintiffs in *Salute*. However, unlike  
 3 the plaintiffs in *Salute*, Defendants’ published LTC policy has *banned* Plaintiffs from applying.

4 The Sheriff’s policy does have one exception for city residents in Plaintiffs’ position: they must  
 5 complete an additional application process with another law enforcement agency, including the paying  
 6 of all costs, fees, expenses, and burdens that coincide with the LTC application process, and be denied  
 7 such – a requirement which Plaintiffs also contend is unlawful. (Verified Complaint ¶¶21-24, 27-34.)

8 Specifically, Penal Code section 26175 expressly prohibits any requirement that Plaintiffs  
 9 complete another application, stating:

10 *An applicant shall not be required to complete any additional application or*  
 11 *form for a license, or provide any information other than that necessary to*  
 12 *complete the standardized application form described in subdivision (a), except to*  
 13 *clarify or interpret information provided by the applicant on the standard*  
 14 *application form.*

15 (Multiple emphases added.) The Defendants’ prerequisite condition is expressly prohibited.

16 Further, Defendants’ policy mandates that Plaintiffs incur the additional expenses and fees of a  
 17 secondary LTC application, which violates Penal Code section 26190(g):

18 No requirement, charge, assessment, fee, or condition that requires the payment of  
 19 any additional funds by the applicant . . . may be imposed by any licensing  
 20 authority as a condition of the application for a license.

21 Thus, the only exception to the Defendants’ blanket ban on accepting such applications is expressly  
 22 prohibited under the Penal Code. How can Plaintiffs apply for a license to carry when the Defendants’  
 23 own policy prohibits such action? (See *Erdelyi v. O'Brien* (1982) 680 F.2d 61, citing *Salute* (plaintiff “is  
 24 entitled to mandamus from a state court if her claim that O'Brien had a policy of denying all applications  
 25 is true.”).)

26 **2. A Cause of Action for Declaratory Relief is Properly Stated**

27 It is long settled that, to state a cause of action for declaratory relief, appropriate facts should be  
 28 alleged from which the court may determine that an "actual controversy relating to the legal rights and  
 duties of the respective parties" exists. (*Alturas v. Gloster* (1940) 16 Cal. 2d 46.) Defendants allege that  
 the Verified Complaint fails to plead a proper cause of action because the Plaintiffs are seeking relief

1 from "something that has yet to take place" – namely, that Plaintiffs have not applied for a LTC.

2 As discussed above, Defendants have and continue to enforce a blanket prohibition against  
3 accepting applications and refuse to apply their required discretion to determine whether a LTC should  
4 be issued for those applicants from non-contract cities. This prohibition expressly prevents Plaintiffs  
5 from applying – despite their desires to do so. (Verified Complaint ¶27.)

6 The only exception to this blanket ban of Plaintiffs and similarly situated residents of Los  
7 Angeles County exists for those who complete a processes unlawfully mandated by the Defendants in  
8 violation of Penal Codes §§ 26175 and 26190(g). (Verified Complaint ¶¶26-35.) Plaintiffs allege that  
9 they cannot and should not be unlawfully required to perform the futile act of completing applications,  
10 paying fees, and costs, expending the burden of completing an entire interview process, and incur the  
11 significant delay of such procedures for the purposes of being denied prior to applying for an application  
12 with the Defendants. (Verified Complaint ¶30.)

13 Thus, a controversy exists in that Plaintiffs allege and Defendants deny that they are violating  
14 their duty to accept and use discretion upon each application for a LTC as well as to the legality of their  
15 requirement that Plaintiffs first apply and be denied by their local law enforcement agency prior to  
16 applying to the Defendants.

### 17 3. A Cause of Action for an Equal Protection Violation is Stated

18 Defendants' cite two cases in their demurrer which anemically describe the facts of this case and  
19 the law as it applies to the Equal Protections clause. First, in order for an action to trigger equal  
20 protection review at all, that action must treat similarly situated persons disparately. (*Nordlinger v.*  
21 *Hahn* (1992) 505 U.S. 1, 10, 120 L. Ed. 2d 1, 112 S. Ct. 2326 ("The Equal Protection Clause . . . keeps  
22 governmental decision makers from treating differently persons who are in all relevant respects alike.").)  
23 Here, Plaintiffs have alleged that there is disparate treatment between themselves and those who live in  
24 unincorporated Los Angeles County or contracted cities within the county. (Verified Complaint, ¶38.)

25 Second, under rational basis review, an equal protection claim must be rejected as long as "there  
26 is any reasonably conceivable state of facts that could provide a rational basis" for the challenged law.  
27 (*FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, 313.) The government is not required to  
28

1 substantiate its reasoning with facts. "In an equal protection case of this type . . . those challenging the  
2 legislative judgment must convince the court that the legislative facts on which the classification is  
3 apparently based could not reasonably be conceived to be true by the governmental decision maker."  
4 (*Vance v. Bradley* (1979) 440 U.S. 93, 111.) Here, however, it is impossible to make such a presumption  
5 that the policy is rationally related to a state interest in light of the fact that the policy conflicts with the  
6 express provisions of the Penal Code Codes §§ 26175 and 26190(g) and the duty imposed upon the  
7 Sheriff by the State of California – as held in *Salute, supra*. (Verified Complaint, ¶38.) How could a  
8 sheriff, whose duty it is to enforce the laws, reasonably or rationally justify a policy that violates the law  
9 and enables him to outright disregard his duty to accept and process all applications for LTCs?

10 Third, there must exist some rational connection between the state's objective for its legislative  
11 classification and the means by which it classifies its citizens. Although rational-basis review is  
12 undoubtedly deferential – indeed, a "paradigm of judicial restraint," – it is nevertheless the court's duty  
13 to scrutinize the connection, if any, between the goal of a legislative act and the way in which  
14 individuals are classified in order to achieve that goal. (*FCC, supra*, 508 U.S. at 314) "The search for  
15 the link between classification and objective gives substance to the Equal Protection Clause; it provides  
16 guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass . . ."  
17 (*Romer* (1996) 517 U.S. 620, 632; *see also Nordlinger, supra*, 505 U.S. at 31 (Stevens, J., dissenting)  
18 ("Deference is not abdication and "rational-basis scrutiny" is still scrutiny."); *Peoples' Rights Org. v. City*  
19 *of Columbus* (6th Cir. 1998) 152 F.3d 522, 532 ("Rational-basis review, while deferential, is not  
20 'toothless.' " (quoting *Mathews v. Lucas* (1976) 427 U.S. 495, 510).) At this pleading stage, Plaintiffs  
21 have adequately alleged, and it must be presumed to be true, that the "Defendants' policy is arbitrary,  
22 capricious, irrational, and makes unjustifiable distinctions between those individuals in question."  
23 (Verified Complaint ¶38.) Further, Plaintiffs allege that Defendants' policy is both unlawful and  
24 "designed, intended, and has the effect of chilling applicants, including plaintiffs, from applying to the  
25 County pursuant to the statutory framework enacted by the California Legislature." (Verified Complaint  
26 ¶24.) Moreover, the deterrent intent of the unlawful policy is clearly demonstrated by the terms of the  
27 policy itself: "Further, the sheriff may review, consider, and give weight to the grounds upon which the  
28



1 previous denial was made.” In other words, the mere fact that an applicant is able to apply because they  
2 were denied, in compliance with the unlawful policy, will be used against them.

3 The above cited facts and those plead in the Verified Complaint demonstrate that there is no  
4 rational connection for the challenged policy treating residents differentially when it runs contrary to  
5 Penal Codes §§ 26175 and 26190(g) as well as Defendants’ duty under the law.

### 6 C. PLAINTIFFS’ ACTION IS RIPE AS THERE IS A JUSTICIABLE CONTROVERSY

7 The ripeness requirement, a branch of the doctrine of justiciability, prevents courts from issuing  
8 purely advisory opinions. It is rooted in the fundamental concept that the proper role of the judiciary  
9 does not extend to the resolution of abstract differences of legal opinion. ... [T]he ripeness doctrine is  
10 primarily bottomed on the recognition that judicial decision-making is best conducted in the context of  
11 an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to  
12 make a decree finally disposing of the controversy. (*Zubarau v. City of Palmdale* (2011) 192 Cal. App.  
13 4th 289, 300-301.)

14 In, *Zubarau, supra*, the plaintiff owned property in the City and participated in an avocation that  
15 is subject to City Zoning Ordinance section 95.03. He applied for permits in connection with the subject  
16 of the City’s Zoning Ordinance, and he had been subjected to determinations under the ordinance and  
17 subject to those determinations. The court held that the facts were sufficient to satisfy the ripeness  
18 requirement because they presented a definite and concrete controversy touching the legal relations of  
19 parties having adverse legal interests. (*Id.*)

20 Here, Defendants allege that the first and second causes of action are not ripe because Plaintiffs  
21 have yet to apply for a LTC and because Plaintiffs ask the Court to make assumptions as to what might  
22 happen. This is incorrect.

23 As laid out in the Complaint and herein, Plaintiffs have been subjected to predeterminations  
24 under the policy which facially ban Plaintiffs from applying to the Sheriff in their county of residency in  
25 direct violation of Defendants’ duties to accept and review each application. (*Salute, supra.*) Further,  
26 the one exception to the ban placed upon Plaintiffs and similarly situated individuals is in direct  
27 violation of Penal Code sections 26175 and 26190(g).

1 In order for a claim to be ripe, under Defendants' argument, Plaintiffs must accept that they are  
 2 barred and comply with an unlawful policy before them. That, alone, is sufficient justifiable controversy  
 3 to determine the issues presented. Although the general rule requires a plaintiff to exhaust its  
 4 administrative remedies, a plaintiff need not pursue administrative relief when doing so would be futile.  
 5 (*Ogo Associates v. City of Torrance* (1974) 37 Cal.App.3d 830, 834.) Here there are no administrative  
 6 procedures available short of this action for Plaintiffs to contest the Sheriff's unlawful policy to not  
 7 accept their applications.

8 **CONCLUSION**

9 For the forgoing reasons, Plaintiffs ask that this Court deny Defendants' Demurrer on all grounds  
 10 as Plaintiffs have properly plead each cause of action and the actions before this Court are ripe for  
 11 review. To the extent that any portion of Defendants' Demurrer is sustained, however, Plaintiffs request  
 12 leave to amend their Verified Complaint.

13  
 14 Date: August 1, 2012

Respectfully submitted,

15 By: 

16 Jason Davis  
 17 Davis & Associates  
 18 Attorneys for Plaintiffs and Petitioners  
 19  
 20  
 21  
 22  
 23  
 24  
 25  
 26  
 27  
 28