No. 13-56203

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Charles Nichols

Plaintiff-Appellant,

v.

Edmund Brown, Jr., et al

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(2:11-cv-09916-SJO-SS)

~~APPELLANT'S REPLY BRIEF~~

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In Pro Per

REPLY BRIEF

Appellees' answering brief did not address Plaintiff-Appellant Nichols' issues raised on appeal in his informal opening brief numbered #4, #5, #6, #8, and #9.

SUMMARY OF ARGUMENT

Given the concession of Defendant Harris in her appellees' answering brief that: "...Section 25850 bans the carrying of loaded firearms in public places..." Appellees' Br pg 3 and "...California Penal Code sections 26350 ("Section 26350") and 26400 ("Section 26400"), which together, in essence, ban the carrying of unloaded firearms in public places..." Appellees' Br pg 5, the Court should issue a preliminary and/or permanent injunction or remand with instructions to issue a preliminary and/or permanent injunction against these three state laws.

~~Defendant Harris urges this court to disregard the plain English citations to~~ *Nunn v. State*, 1 Ga. 243 (1846), and *State v. Chandler*, 5 La. Ann.489 (1850) in *District of Columbia v. Heller*, 128 S. Ct. 2783 - Supreme Court (2008) which held that "...that citizens had a right to carry arms openly: "This is the right guaranteed by the Constitution of the United States..." *Heller* at 2809. She argues this despite even the minority in Heller being in agreement with Plaintiff Nichols' and the *Heller* majority reading of the citations. "But the majority implicitly, and appropriately, rejects that suggestion by broadly approving a set of laws—

prohibitions on concealed weapons..." *Heller* dissent at 2851; "I am similarly puzzled by the majority's list, in Part III of its opinion, of provisions that in its view would survive Second Amendment scrutiny. These consist of (1) "prohibitions on carrying concealed weapons"... " *Heller* dissent at 2869.

There are only two ways to carry a firearm, openly or concealed. The nine justices in Heller were in agreement that *Heller's* citation to *Nunn* and *Chandler* meant exactly what they said – Concealed carry could be prohibited and that Open Carry is the right guaranteed by the Constitution.

Plaintiff Nichols has extensively plead in the district court that the California Supreme Court has long read *Nunn* to mean that concealed carry can be prohibited but not Open Carry, including in his motion for a Preliminary Injunction:

> "This is not a concealed carry case, it is an Open Carry case. But even the 1924 California State Supreme Court in *In Re Rameriz* 193 Cal. 633; 226 P. 914; 1924 Cal. LEXIS 351; 34 A.L.R. 51 which has been cited directly or indirectly in upholding convictions for unlicensed concealed carry ever since quoted *Nunn v. State* (cited as *Nunn v. Georgia*) the same as Heller did and remarked that an absolute prohibition on the right might be held to infringe a fundamental right." Dkt #86, pg 14 (Plaintiff Nichols' Motion for a Preliminary Injunction).

Defendant Harris concedes the laws at issue in this appeal are bans and not "regulations." Even if she had argued that they are merely "regulations" that argument fails in light of both *Rameriz* and *Heller* ""State v. Reid, 1 Ala. 612, 616-617 (1840) ("A statute which, under the pretence of regulating, amounts to a

destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional")." *Heller* at 2818.

Concealed carry, with few exceptions such as for travelers while on a journey or at one's home (including the curtilage of one's home), is not a fundamental right under *Heller.* California no longer recognizes the longstanding exemption for travelers to carry concealed firearms. It has already been briefed that California prohibits concealed carry absent a license which is unavailable to Plaintiff and to those persons similarly situated to Plaintiff who reside in counties where it is the policy of the Sheriff not to issue them or who reside in cities which do not have a police chief or have a police chief whose policy is not to issue the licenses. (see California Penal Code section 25400 and PC 25450-25475, 25505-25595, 25600-25655, 25700).

It has already been briefed that: licenses to carry a handgun (openly or concealed, loaded or unloaded) are not available; there are no licenses available to private individuals to openly carry long guns (loaded or unloaded); it is illegal to carry a firearm (openly or concealed) in the curtiledge of one's home absent a tall sturdy fence or other barrier that is tall but not cosmetic or flimsy; and in non-sensitive public places in all incorporated cities and in all unincorporated county

territory where the discharge of a firearm is prohibited.

> "[H]istory showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights." *Heller* at 2801.

Absent a government issued permission slip, California denies the right of the people to bear arms. And who gets those government issued permission slips is left entirely to the whim of those whom the California legislature has designated as issuers.

Plaintiff Nichols raised ten issues on appeal in his informal Opening Brief. Defendant Harris, instead of countering each, filed 38 pages of red herrings.

Where she does reply to an enumerated issue, she dances around it. Case in point, Issue #7. Plaintiff Nichols provided extensive evidence that the sole reason for passage of former Penal Code section 12031 (now PC 25850 in part) was based on race and Defendant Harris has not produced one iota of evidence to prove otherwise. Nor does she produce any evidence that the law is not disproportionately enforced on minorities because her own published reports prove that it is. It has already been briefed that these published reports were mentioned in Plaintiff Nichols SAC, which was filed before his motion for a preliminary injunction, and to which Defendant Harris filed her Answer on 4/16/2013 saying

the "publications speak for themselves." She subsequently filed her opposition to the Preliminary Injunction on 5/28/2013. There was no surprise attack. Plaintiff Nichols has alleged a 14th Amendment violation in each of his three complaints.

Incredibly, Defendant Harris now argues that because the law was amended requiring the reporting of one's race to the Attorney General when one is arrested for violating the laws, *Hunter v. Underwood*, 471 U.S. 222 (1985) and its progeny no longer applies!

ARGUMENT

In reply to appellees' answering brief pgs 1-3 ("INTRODUCTION")

Plaintiff Nichols reading of the Second Amendment is no more broad than the US Supreme Court has interpreted it in *Heller* and the effect of facially invalidating the laws at issue in this appeal would not "massively expand Second Amendment rights." It would affect only a small subset of non-sensitive public places in California. As previously briefed, it would not affect a myriad of existing laws including regulations and prohibitions on the carrying of firearms (loaded or unloaded) in government buildings, schools or even within 1,000 feet of a K-12 public or private school. California had always been an Open Carry state until the two recently enacted bans on unloaded Open Carry. In regards to "public safety" the district court said:

> "As found by California courts, Section 25850 is designed "to reduce the incidence of unlawful public shootings." *People v. Flores*, 169 Cal. App. 4th 568, 576 (2008); see also *People v. Foley*, 149 Cal. App. 3d Supp. 33, 39 (1983) ("The primary purpose of [Section 25850] is to control the threat to public safety in the indiscriminate possession and carrying of concealed and loaded weapons.")." Dkt # 108, pgs 7-8.

Plaintiff Nichols did not seek to enjoin PC 25850 as applied to the carrying of *concealed and loaded* weapons under any circumstances, not even for travelers. Both *Flores* and *Foley* were applications of PC 12031(a)(1) (now PC 25850(a)) to concealed carry, not Open Carry. The preliminary injunction is explicitly limited to Open Carry. Both Defendant Harris and the district court erroneously conflate the presumptively lawful prohibitions on the carrying of concealed weapons with the right guaranteed by the Constitution - Open Carry.

In regards to "public safety" and unloaded Open Carry (PC section 26350 and 26400) the district court blindingly accepted the legislative history submitted by Defendant Harris stating that "Open carry creates a *potentially dangerous* situation." The potentially dangerous situation is not caused by the person openly carrying an unloaded firearm but instead by "[T]he responding officer who may feel compelled to respond in a manner that could be lethal." Dkt #108 pgs 8, 11.

Neither the district court nor Defendant Harris has provided any citation supporting the outrageous proposition that the government can prohibit an activity when the only "danger" to the public (and only a potential danger at that) is caused

by the government itself. Also, simply accepting a legislative finding as the legal basis for upholding a law is "rational basis" at best, which Heller specifically precludes. And even rational review requires a rational relationship to a legitimate governmental purpose which is completely absent from the legislative history provided by Defendant Harris and quoted by the district court on pg 8 of its denial. The last mention of "public safety" by the district court is on pg 9 of its denial where it explicitly, and erroneously, applied "rational basis" to Plaintiff Nichols 14th Amendment equal protection claims saying "Here, the California Legislature could have rationally concluded that the open carrying of firearms presents a great danger to public safety in more densely populated areas."

The prohibitions are not based on population density. If they were, it would be legal to openly carry a firearm and permits to openly carry a firearm would be available in the incorporated city of California City which covers 203.6 square miles but has a population of only 14,120 people. Permits are not available because California City is located in Kern County, the fifth largest county (by population) in the state and contains more than 200,000 residents.

In reply to appellees' answering brief pgs 3-8 ("STATEMENT OF THE CASE")

Penal Code section 12031 was only partially recodified as PC 25850. All of the exemptions contained in former Penal Code section 12031 were removed.

What remains now is a blanket ban on the carrying of loaded firearms in public places. Moreover, Plaintiff Nichols seeks only to enjoin PC 25850(a)&(b) and only as applied to openly carried firearms. The district court's dismissal with prejudice of the Governor and causes of action based on the State Constitution are not at issue in this appeal. Plaintiff Nichols sought to enjoin the City of Redondo Beach Municipal Ordinance banning the possession of all weapons in all public places of the city (without exception) in his initial complaint. The district court was confused by a reference to a municipal code section regarding hunting but regardless published a finding that the city was preempted by state law from enacting regulations concerning the carrying of firearms. The Redondo Beach defendants were never a party to this appeal and have been voluntarily dismissed (without prejudice) by Plaintiff Nichols. Plaintiff has never argued that he has a "right under the Second Amendment to carry firearms openly outside his home anywhere in California" and facially invalidating the laws at issue in this appeal would not enable him to do so. Even his challenges to California's licensing laws are only in the alternative and only as they apply to Open Carry. Plaintiff Nichols 14th Amendment equal protection claims are not limited to the fact that there are certain persons exempt from the Open Carry bans.

Defendant Harris' claim "[T]hat Nichols did not base his motion on any

actual set of facts, events, or occurrences, but rather on just abstract ideas about rights." is farcical and insulting. No plaintiff in a Second Amendment civil case has been required to plead with as much detail the facts, events and occurrences as Plaintiff Nichols has placed into the district court record leading up to, and including, his motion for a preliminary injunction.

Defendant Harris argues that "Nichols did not show that he was actually harmed by the existence of the laws; he argued little more than that the deprivation of his alleged constitutional rights was sufficient harm."

> "It is well established that the deprivation of constitutional rights `unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976))." *Rodriguez v. Robbins*, Court of Appeals, 9th Circuit (2013) slip op at pg., 34.

In addition to the deprivation of Plaintiff Nichols' constitutional rights, it is well plead that Plaintiff Nichols: (1) has a documented death threat against him (Plaintiff Nichols again submits that death constitutes irreparable injury), (2) had PC 25850(b) enforced against him by a Redondo Beach police officer, (3) asked for both an application and a license to openly carry a loaded handgun from the Police Chief for the City of Redondo Beach (which was denied because the law precludes it), and (4) the district court has concluded that Plaintiff Nichols would be in violation of the laws at issue were he to merely to step outside his home and

thereby "effectuate his plan." Dkt #82, pg 5. The Attorney General filed her Answer to the Complaint (SAC) before, not after, she filed her opposition to Plaintiff Nichols motion for a preliminary injunction which was before, not after, the district court denied Plaintiff Nichols' motion.

In reply to appellees' answering brief pgs 8-11 ("STATEMENT OF FACTS")

California Right To Carry has been in existence for only two years which is not "longtime." Plaintiff Nichols is not "[W]aging a legal war to establish a broad constitutional right for people to carry firearms openly in almost all public places in California "for the purpose of self-defense and for other lawful purposes.""

That right already exists and has always existed. Plaintiff Nichols does seek to invalidate three California laws which ban the Open Carry of loaded and unloaded firearms in only those non-sensitive areas of incorporated cities and ~~unincorporated county territory where licensed hunters are exempt from the laws at~~ issue in this appeal. Defendant Harris continues to chant her "hypothetical and theoretical" mantra despite the fact that Plaintiff Nichols has been required to articulate a concrete plan to violate the laws in a level of detail not required in any other Second Amendment civil lawsuit, certainly not in any of the related cases on appeal and definitely not required by the 7th Circuit Court of Appeals which struck down virtually identical bans in Illinois. The district court record is thick with "[H]ow Nichols has openly carried...plans openly to carry, firearms in public

places...law-enforcement response...there has been...to his actions." Nichols motion contained all of the "fact pattern" necessary for the district court to issue the preliminary injunction. This is why the district court converted Plaintiff Nichols motion to a "facial" challenge. Had the district court adhered to the logic of its own decision in the related case of *Thomson v. Torrance Police Department, et al* No. 12-56236, the district court would have been compelled to issue the injunction.

California's licensing laws are not at issue in this appeal and the Attorney General is certainly not obligated to enforce any law she believes to be unconstitutional (reply to appellees' answering brief pg 9, fn 4).

The Redondo Beach municipal ordinance Plaintiff Nichols was prosecuted for violating is not a "park" ban and his Long Gun Open Carry Protest took place entirely in a location of the city exempted from the ban by the city's own municipal ordinance and was held after the district court had published a substantive finding that municipal ordinances regulating the carrying of firearms is preempted by the California Constitution. Plaintiff Nichols demurrer, which was a facial challenge, was denied because the Los Angeles Superior Court judge held that the coastal area of the City of Redondo Beach was a "sensitive place" under Heller due to its proximity to predominantly minority communities east of the city. The judge who

replaced him refused to allow any as-applied challenges. Plaintiff Nichols' public defender stated to the replacement judge that he was not competent to defend Plaintiff Nichols and the public defender refused to defend Plaintiff Nichols. The Superior Court judge denied Nichols' Marsden motion. There was no need for Plaintiff Nichols to make any mention of this in his motion for a preliminary injunction, the district court had long since held that the City of Redondo Beach could not be a defendant in his challenge to the state laws and was therefore not a party to the motion. However, these facts regarding the prosecution by the City of Redondo Beach were in the district court record. Having been prosecuted for openly carrying an unloaded firearm in a time, manner and place legal under Federal & State law and even the city's own municipal ordinances, Plaintiff Nichols is under no obligation to subject himself to further prosecutions to have standing to challenge the laws at issue in this appeal. That was the conclusion of the district court which Defendant Harris did not appeal. She has not promised to not enforce the laws at issue in this appeal. She admits that she does enforce California's Open Carry bans as well as a number of other California gun laws in her Answer to Plaintiff's operative complaint.

In reply to appellees' answering brief pgs 11-12 ("LAW OF MOTIONS FOR PRELIMINARY INJUNCTIONS")

"A plaintiff seeking a preliminary injunction must establish that: (1) he is "likely to succeed on the merits"; (2) he is "likely to suffer irreparable harm

in the absence of preliminary relief"; (3) "the balance of equities tips in his favor"; and (4) "an injunction is in the public interest." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). Under our "sliding scale" approach to evaluating the first and third Winter elements, a preliminary injunction may be granted when there are "serious questions going to the merits and a hardship balance that tips sharply toward the plaintiff," so long as "the other two elements of the Winter test are also met." Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131-32 (9th Cir. 2011) (internal quotation marks and citations omitted)." *ASSOCIATION DES ELEVEURS DE CANARDS ET D'OIES DU QUEBEC v. Harris* Court of Appeals, 9th Circuit (2013) No. 12-56822. Slip Opinion at pg 9.

In reply to appellees' answering brief pgs 12-13 ("STANDARD OF REVIEW")

"We review a district court's grant or denial of a preliminary injunction for abuse of discretion and the underlying legal principles de novo." DISH Network Corp. v. F.C.C., 653 F.3d 771, 776 (9th Cir. 2011). We may reverse the district court "only where [the district court] relied on an erroneous legal premise or abused its discretion." Id. Further, when we agree with the district court that a plaintiff has failed to show the likelihood of success on the merits, we "need not consider the remaining three [Winter elements]." *Id.* at pgs 9-10.

In reply to appellees' answering brief pgs 13 ("ARGUMENT - I (A)")

~~Plaintiff Nichols raised ten issues on appeal, not seven and appellees' brief~~ failed to address five of the ten issues on appeal.

In reply to appellees' answering brief pgs 14-15 ("ARGUMENT - I (A)(1)")

Plaintiff Nichols' "first and foremost" claim of legal error is not the district court's treatment of the motion for a preliminary injunction as "exclusively a facial challenge," that ranks last of the issues raised on appeal. Plaintiff Nichols is more than happy for this court to consider a facial challenge so long as it does not ignore his as-applied challenge. "Courts have a duty to construe pro se pleadings

liberally, including pro se motions..." *Bernhardt v. Los Angeles County*, 339 F. 3d 920 - Court of Appeals, 9th Circuit (2003) at 925.

> "Once again, Harris's arguments appear predicated on the contention that because Plaintiff has not been prosecuted for violating section 25850 specifically, he cannot establish the threat of imminent prosecution. However, as noted above, Plaintiff has been prosecuted for openly carrying a firearm in public. It is simply implausible to contend that had the firearm been loaded, prosecution would be less likely. The Court will not insist that Plaintiff escalate his alleged criminal activity merely to gain standing in this suit. Moreover, absent a promise by Harris not to prosecute, Plaintiff has shown the possibility of prosecution and "even the remotest threat of prosecution" has been deemed sufficient. Peachlum v. City of York, Penn., 333 F.3d 429, 435 (3rd Cir. 2003)."" Dkt #82, pgs 5-6, lines 28, 1-5 (District court denial of Defendant Harris' motion to dismiss First Amended Complaint).
>
> "There can be no serious doubt that Plaintiff is a committed gun enthusiast who has exercised and intends to continue to exercise what he believes is his right to openly carry firearms, both loaded and unloaded, within this state. It is unclear what more the Court could require Plaintiff to allege without demanding that he specifically violate section 25850 in contravention of the holdings of the Supreme Court and Ninth Circuit." Dkt #82, pg 4, lines 4-10 (District court denial of Defendant Harris' motion to dismiss First Amended Complaint).

The district court had a more than ample "fact pattern" developed in the 107 filings entered into the record prior to its denial of Plaintiff's motion for a preliminary injunction Dkt #108 to evaluate his as-applied challenge.

In reply to appellees' answering brief pgs 15-16 ("ARGUMENT - I (A)(2)")

The "facial" motion the district court ruled on was not the narrow, limited, as-applied motion Plaintiff Nichols filed and therefore Plaintiff Nichols was denied

the opportunity to brief, let alone fully brief, and present oral arguments on the merits of his motion for a preliminary injunction. Plaintiff Nichols would not have written a purely facial motion for a preliminary injunction and had he so intended, he would have written a different motion. As such, Plaintiff Nichols did not get the "last word" as Defendant Harris claims. He did not even get the "first" or any "word" for that matter.

In reply to appellees' answering brief pgs 16-21 ("ARGUMENT - I (A)(3)")

The Court should note at the outset that Defendant Harris does not deny that PC 12031(a)(1)/PC 25850(a) is disproportionately enforced or that a substantial or motivating factor behind enactment of the law was racial discrimination. Nor does she present any evidence that absent this factor the law would have been enacted. Defendant Harris' argument boils down to: the legislature passed a law which proves that PC12031(a)(1)/PC 25850(a) is disproportionately enforced and/or because the legislature added a subsection enhancing the penalty for violating PC 12031 (carrying a loaded, unregistered handgun now codified as PC 25850(c)(6)) that somehow makes *Hunter v. Underwood*, 471 U.S. 222 (1985) and its progeny inapplicable. The Court should notice how Defendant Harris throws in PC 26350, PC 26400 as red herrings.

Contrary to Defendant Harris' false claim that a publication by the Attorney General entitled "*Concealable Firearms Charges in California*" is presented for

"for the first time with the present appeal," that publication is explicitly referenced more than a year earlier in ¶ 24 of Plaintiff Nichols FAC (Dkt # 24, filed **May 30, 2012**) and again in ¶ 39 of Plaintiff Nichols' operative Complaint (SAC, Dkt #83, filed March 29, 2013) along with her publication "*Crime In California 2010*". Which was before Plaintiff Nichols filed his motion for a Preliminary Injunction on April 20, 2013 to which Defendant Harris said the "publications speak for themselves" in ¶ 39 of her Answer (Dkt #91, filed April 16, 2013). Defendant Harris' Answer was filed before Plaintiff Nichols motion for a preliminary injunction in district court and before this present appeal. Both the district court and Defendant Harris are aware of what has been placed on the record in the district court filings and racial discrimination has been argued extensively in the district court and has always been asserted from Plaintiff Nichols initial filing of November 30, 2011 and onwards.

Nor is disproportionate felony enforcement of PC 12031, which oddly enough seems to be a central theme in Defendant Harris' argument, limited to felony arrests. Addendum Table N-9 labeled "Race/Ethnic Group of Person Charged By Level of Charged Offense, 2000-2003" - http://ag.ca.gov/cjsc/publications/misc/CWSS03/rpt03.pdf last visited 9/10/2013) of "*Concealable Firearms Charges in California*" also shows that of the 760

misdemeanor arrests for violations of PC 12031 in 2003, minorities accounted for all but 298 of those arrests. Be it a misdemeanor or felony charge, minorities are disproportionately charged with violating California's ban on carrying a loaded firearm in public.

In reply to appellees' answering brief pg 21 ("ARGUMENT - I (A)(4)")

Plaintiff Nichols' "view of the Second Amendment" as argued to date is no more "expansive" than the view of the majority in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and the effect of granting his motion for a preliminary injunction would be far narrower than that clearly articulated in *Heller*. Indeed, if Plaintiff Nichols prevails in all counts of his operative Complaint (SAC) and is fully granted all relief requested in the Complaint, the effect would still be far narrower than the right clearly articulated in Heller as there would still be many non-sensitive public places in the State of California where Plaintiff Nichols would be subject to arrest, prosecution, fine and imprisonment for openly carry a loaded, or unloaded, firearm in public.

In reply to appellees' answering brief pgs 21-23 ("ARGUMENT - I (A)(4)(a)")

The term "bear arms" appears 201 times in the *Heller* decision, 110 of those in the majority opinion. Defendant Harris does not, and cannot, point to a single line of *Heller (majority or minority opinion)* which limits the right to bear arms to the interior of one's home. "The "operative clause" of the Second Amendment is

"[T]he right of the people to keep and bear Arms shall not be infringed." Heller itself says at 2809 that this right was "perfectly" captured by *Nunn v. State*, 1 Ga. 243, 251 (1846) and *State v. Chandler*, 5 La. Ann. 489, 490 (1850). Even the California Supreme Court in *Rameriz* (1924) interpreted *Nunn* the same as did *Heller* to which *Heller* left no doubt that Open Carry is the right guaranteed by the Constitution by citing *Chandler*:

> "Likewise, in *State v. Chandler*, 5 La. Ann. 489, 490 (1850), the Louisiana Supreme Court held that citizens had a right to carry arms openly: "This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations.""
> "The right to "bear" as distinct from the right to "keep" arms is unlikely to refer to the home. To speak of "bearing" arms within one's home would at all times have been an awkward usage. A right to bear arms thus implies a right to carry a loaded gun outside the home." *Moore v. Madigan*, 702 F. 3d 933 - Court of Appeals, 7th Circuit (2012) at 936.

Defendant Harris' citation to *Kachalsky* fails. The Plaintiffs in that case did not challenge New York's ban on openly carrying handguns and New York does not prohibit the Open Carry of long guns, loaded or unloaded. The appellate court in *Kachalsky* at 83 explicitly stated "This appeal presents a single issue: Does New York's handgun licensing scheme violate the Second Amendment by requiring an applicant to demonstrate "proper cause" to obtain a license to carry a concealed handgun in public?."

More to the point, *Kachalsky* at fn 13 unequivocally states:

> "Notably, Chandler and Reid conflict with Plaintiffs' position, at least in part. Plaintiffs contend that a state may choose to ban open carrying so long as concealed carrying is permitted. But both Chandler and Reid suggest that open carrying must be permitted. The Reid court explained: Under the provision of our constitution, we incline to the opinion that the Legislature cannot inhibit the citizen from bearing arms openly, because it authorizes him to bear them for the purposes of defending himself and the State, and it is only when carried openly, that they can be efficiently used for defence."

Concealed carry, not Open Carry was at issue in the petition for writ of certiorari in *Kachalsky* which Defendant Harris very well knows.

Defendant Harris' citation to *McDonald v. City of Chicago*, ___ U.S. ___, 130 S. Ct. 3020, 3044 (2010) cannot reasonably be read to limit the Second Amendment to the interior of one's home and no Federal appellate court has interpreted it as such. *McDonald*, in the very first line of the decision at 3026 states:

> "Two years ago, in District of Columbia v. Heller, 554 U.S. ___, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, **and** we struck down a District of Columbia law that banned the possession of handguns in the home." (emphasis added)

In reply to appellees' answering brief pgs 23-28 ("ARGUMENT - I (A)(4)(b)")

Defendant Harris makes the same argument here as was unsuccessfully made in *US v. Vongxay*, 594 F. 3d 1111 - Court of Appeals, 9th Circuit (2010) that the scope of the Heller decision was limited to the home. "Vongxay nevertheless

contends that the Court's language about certain long-standing restrictions on gun possession is dicta, and therefore not binding. We disagree." *Vongxay* at 1115.

Mr. Vongxay was not arrested in his home. "Vongxay was arrested outside the After Dark Nightclub..." *Vongxay* at 1113. In reaching its decision in *Vongxay*, the court held that Heller, 128 S.Ct. At 2816-2817 was not dicta. This is what Heller says at 2816-2817:

> "Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. See, e.g., Sheldon, in 5 Blume 346; Rawle 123; Pomeroy 152-153; Abbott 333. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. See, e.g., State v. Chandler, 5 La. Ann., at 489-490; Nunn v. State, 1 Ga., at 251; see generally 2 Kent *340, n. 2; The American Students' Blackstone 84, n. 11 (G. Chase ed. 1884). Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."

State v. Chandler, 5 La. Ann., at 489-490 and *Nunn v. State*, 1 Ga., at 251 cannot be ignored. In addition to *Vongxay*, this circuit has relied on this section of *Heller* in: *Montana Shooting Sports Association v. Holder*, Court of Appeals, 9th Circuit (2013); *US v. Henry*, 688 F. 3d 637 - Court of Appeals, 9th Circuit (2012);

US v. Dugan, 657 F. 3d 998 - Court of Appeals, 9th Circuit (2011); *US v. Potter*, 630 F. 3d 1260 - Court of Appeals, 9th Circuit (2011) as well as a number of unpublished decisions. By what logic can the prohibitions and restrictions on the Second Amendment right be upheld but not the right to bear arms itself?

Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013) (Petition for a writ of certiorari filed July 9, 2013) involved a facial and as-applied challenge solely to Maryland's "good and substantial" reason to be issued a license to carry a loaded handgun (openly or concealed). The Plaintiffs did not seek to openly carry a handgun and did not challenge the requirement that one have a permit to carry a handgun. Neither did the Plaintiffs seek to carry a concealed handgun while travelling, they sought unrestricted licenses to carry a handgun concealed. Nor does Maryland prohibit the Open Carry of long guns, unlike California which

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Defendant Harris concedes bans the Open Carry of handguns and long guns, loaded and unloaded. To the extent the court applied intermediate scrutiny to an unrestricted license to carry a concealed handgun it was correct. To the extent the court applied intermediate scrutiny to openly carrying a handgun it was wrong. Regulations of Open Carry by non-felons in non-sensitive public places are subject to strict scrutiny. In the case of bans, and Defendant Harris concedes the laws at issue are bans, the level of scrutiny is irrelevant – Baning a fundamental right, in

this case a fundamental enumerated right, is unconstitutional.

Defendant Harris' citation of *United States v. Black*, 707 25 F.3d 531 is bewildering as the Second Amendment was not at issue in that case. *Black* was a Fourth Amendment case which supports Plaintiff Nichols appeal saying:

> "Being a felon in possession of a firearm is not the default status. More importantly, where a state permits individuals to openly carry firearms, the exercise of this right, without more, cannot justify an investigatory detention. Permitting such a justification would eviscerate Fourth Amendment protections for lawfully armed individuals in those states." Black at 540.

Kachalsky factored in New York's "duty to retreat" in public in making its decision. California does not, and never has, required a duty to retreat in public (previously briefed). *Drake v. Filko*, __ F.3d __, __, 2013 is a New Jersey case which, like *Woollard*, was limited to licenses to carry handguns and which would have enabled the Plaintiffs in that case to carry a handgun concealed had they prevailed. Beyond a firearms purchaser identification card, New Jersey, unlike California, does not prohibit the unloaded open carry of long guns in that state (see TITLE 2C THE NEW JERSEY CODE OF CRIMINAL JUSTICE 2C:39-5c Unlawful possession of weapons). New Jersey, like New York, imposes a "duty to retreat" in public. Both *Kachalsky* and *Drake* concluded that there is a lesser right to self-defense in public than in the home based on state law. By the flawed logic of the courts in *Kachalsky* and *Drake,* were New York or New Jersey to impose a

duty to retreat in one's home, the state could prohibit, under *Heller*, anyone without a good and substantial reason from possessing a firearm in one's home. There is no lesser right to self-defense in public in California than in the home. See *People v. Newcomer*, (1897) 118 Cal. 263, 273 & *People v. Gonzales*, (1887) 71 Cal. 569, 577. All the courts assumed the Second Amendment applies in public.

Defendant Harris' reliance on *Hightower v. City of Boston*, 693 F. 3d 61 - Court of Appeals, 1st Circuit (2012) fails. *Hightower* supports Plaintiff Nichols' Open Carry case which was briefed in the district court.

> "Class B licenses "shall not entitle the holder thereof to carry or possess a loaded firearm in a *concealed manner* in any public way or place,"..." *Hightower* at 66. (italics added).
>
> "Hightower's as-applied claim extends only to the characteristics of the license that was revoked — a Class A unrestricted license that allows for carrying of concealed, large capacity weapons outside the home. Hightower ~~lacks standing to raise a claim as to a Class B license; she has never applied~~ for such a license, been denied one, or had such a license revoked. Such a license would allow her to carry a non-concealed, non-large capacity weapon in public." (footnotes omitted) *Hightower* at 70.
>
> "Under current Supreme Court precedent, Hightower cannot make out her Second Amendment claim as to the concealed weapon aspect of her revoked license, as she must for her as-applied challenge to succeed. Under our analysis of Heller, as follows, the government may regulate ***the carrying of concealed weapons outside of the home.***" *Hightower* at 73 (emphasis added).

There is no Open Carry license available to Plaintiff Nichols, he asked for an application and license and was denied both. Open Carry licenses are not available

to the 94% of the state's population who live in counties with 200,000 or more persons and even in those limited places where available, they are only theoretically available to those whom the state deems suitable. There is no licensing available to any private citizen in this state to openly carry a loaded or unloaded long gun.

GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244 (11th Cir. 2012) likewise fails to support Defendant Harris' case. The Second Amendment does indeed apply to one's private property, an exception to the laws at issue which the California courts have substantially invalidated (previously briefed). Defendant Harris cites no authority that a "place of worship" is a "public place" where the laws at issue are applicable. To the extent that she does make that argument, she cites no authority where Plaintiff Nichols (or anyone else) is immune from California's criminal and civil trespass laws in places of worship regardless of whether or not they are bearing arms.

United States v. Mahin, 668 F.3d 119, 123-24 (4th Cir. 2012) assumed that 18 U.S.C. § 922(g)(8) implicated the Second Amendment.

US v. Booker, 644 F. 3d 12 - Court of Appeals, 1st Circuit 2011 involved a facial challenge to a conviction for violating 18 U.S.C. § 922(g)(9). Central to the decision (at 23) was ¶ 1 of Section III of Heller (2816-2817) which explicitly lists

Nunn and *Chandler.*

US v. Masciandaro, 638 F. 3d 458 - Court of Appeals, 4th Circuit (2011) involved a concealed, loaded handgun in an automobile inside of a National Park.

Masciandaro at 470 cited *Nunn* and the court noted that the law applied only to the inside of a motor vehicle and did not prohibit unloaded handguns inside of motor vehicles "By permitting park patrons to carry unloaded firearms within their vehicles, § 2.4(b) leaves largely intact the right to "possess and carry weapons in case of confrontation." *Heller*, 128 S.Ct. at 2797." *Masciandaro* at 474.

Plaintiff Nichols has not challenged any of California's laws concerning the carrying, transportation or possession of firearms (loaded or unloaded) in California's state parks.

Williams v. State, 10 A.3d 1167 (Md. 2011) involved an appeal of a criminal conviction for carrying a loaded, concealed handgun in public without a permit and Maryland does not prohibit the Open Carry of long guns. Maryland's reading of *Heller* is not California's reading of *Heller* (e.g., *People v. Mitchell*, 209 Cal. App. 4th 1364 - Cal: Court of Appeal, 4th Appellate Dist., 1st Div. (2012)) and in any event, it is the Federal Courts which have the final say on the Second Amendment.

Naturally, Defendant Harris shows nothing but contempt for the 7th Circuit decision in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) which struck down

Illinois laws which are virtually a mirror image of the California laws at issue in this appeal. The Illinois State Supreme Court unanimously struck down the Illinois law which is the virtual mirror image of PC 25850(a) (ILCS 24-1.6) on September 12, 2013 and in doing so, cited the decision in *Moore* fifteen times (see *People v. AGUILAR* No. 112116 http://www.state.il.us/court/Opinions/SupremeCourt/2013/112116.pdf last visited September 12, 2013). Addendum

The Illinois laws struck down in *Moore* (720 ILCS 5/24-1 and 720 ILCS 5/24-1.6) like California's (PC 25850, PC 26350 and PC 26400) did not contain exceptions for self-defense or for hunting because those were found in other Illinois code sections and judicial constructions.

Defendant Harris would have this Court step through the looking glass and conclude that the reason these Illinois laws were overturned is because Illinois did not have a provision for permits to carry concealed handguns. If that were so, the 7th Circuit in Moore would not have said "**[A] state may be able to require "open carry" — that is, require persons who carry a gun in public to carry it in plain view rather than concealed**. See *District of Columbia v. Heller*, supra, 554 U.S. at 626, 128 S.Ct. 2783." *Moore* at 938 (emphasis added).

Is Defendant Harris now arguing that Heller confers a right to carry a loaded,

concealed handgun in public? Is she arguing that because Plaintiff Nichols has not challenged PC 25400 which criminalizes the carrying of a concealed firearm (loaded or unloaded and without exception) that *Moore* is inapposite?

This Court is provided with an opportunity not presented in *Moore*, to strike down California's ban on openly carrying firearms in non-sensitive public places while preserving California's regulations on the carrying of weapons concealed.

The 7th Circuit in *Moore* did not require Illinois to enact any law but the National Rifle Association and the Second Amendment Foundation, both opponents of Open Carry, (see the related cases of *Richards v. Prieto* and *Peruta v. San Diego*) lobbied aggressively for a "shall-issue" carry law which is by no means a "pro-open-carry" law but skirts the *Moore* Open Carry decision with a vague clause stating that a person with an Illinois license can "carry a loaded or unloaded concealed firearm, fully concealed or ***partially concealed***" (emphasis added) (Public Act 098-0063, pg 2, last visited September 11, 2013 http://www.ilga.gov/legislation/publicacts/98/PDF/098-0063.pdf).

Not all of the Plaintiffs in Moore were happy with the new Illinois law. Mary E. Shepard and the Illinois State Rifle Association filed an "Emergency Motion For Injunction Pending Appeal" in the 7th Circuit Court of Appeals NO. 13-2661. Oral arguments on that motion are scheduled for October 3, 2013.

Let's compare California's present laws to Illinois' former laws:

> "...Illinois law forbids a person, with exceptions mainly for police and other security personnel, hunters, and members of target shooting clubs, 720 ILCS 5/24-2, to carry a gun ready to use (loaded, immediately accessible — that is, easy to reach — and uncased). There are exceptions for a person on his own property (owned or rented), or in his home (but if it's an apartment, only there and not in the apartment building's common areas), or in his fixed place of business, or on the property of someone who has permitted him to be there with a ready-to-use gun. 720 ILCS 5/24-1(a)(4), (10), -1.6(a); ... Even carrying an unloaded gun in public, if it's uncased and immediately accessible, is prohibited, other than to police and other excepted persons, unless carried openly outside a vehicle in an unincorporated area and ammunition for the gun is not immediately accessible. 720 ILCS 5/24-1(a)(4)(iii), (10)(iii), -1.6(a)(3)(B)." *Moore* at 934 (internal citations omitted).

Does California provide for exceptions for a person on his own property? Not unless his property is completely surrounded by a sufficiently tall, sturdy, non-cosmetic barrier (*People v. Strider*, 177 Cal. App. 4th 1393 (2009)). In his home? Yes, but as in Illinois if it's an apartment, only there and not in the apartment building's common areas. In his fixed place of business? Yes. On the property of someone who has permitted him to be there with a ready-to-use gun? With few exceptions, No! Are there exceptions for police and other security personnel, hunters, and members of target shooting clubs? Yes. Excluding these exceptions, was it legal to carry a gun ready to use (loaded, immediately accessible — that is, easy to reach — and uncased) in Illinois? No! In California? No!

As was the case in Illinois: Even carrying an unloaded gun in public, if it's

uncased and immediately accessible, is prohibited, other than to police and other excepted persons, unless carried openly outside a vehicle in an unincorporated area and ammunition for the gun is not immediately accessible, to which California has added a ban in unincorporated county territory where the discharge of a firearm is prohibited. In several important respects, especially the threshold for arming oneself for self-defense, California law is more restrictive than was Illinois law.

Not challenging Denver's Open Carry ban but instead seeking to obtain a license that would have enabled Gray Peterson in *Peterson v. Martinez*, 707 F. 3d 1197 - Court of Appeals, 10th Circuit (2013) to carry a concealed handgun was fatal in that case. "[H]ad Peterson challenged the Denver ordinance, he may have obtained a ruling that allows him to carry a firearm openly while maintaining the state's restrictions on concealed carry." *Peterson* at 1209. Neither this appeal, nor

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Plaintiff Nichols' operative Complaint (SAC) "[C]hallenge any state or Federal prohibition on the carrying of weapons concealed or in the licensing of the carrying of a weapon concealed in a public place or any of the other presumptively lawful prohibitions stated in the Heller decision" SAC at ¶ 8. Defendant Harris does not explain how not challenging concealed-carry in public, which she argues falls outside the scope of the Second Amendment, somehow invalidates Plaintiff Nichols' case which seeks to carry openly, not concealed, loaded and unloaded

firearms in non-sensitive public places.

In reply to appellees' answering brief pgs 28-29 ("ARGUMENT - I (A)(5)")

First of all, PC 26400 was not approved by the Governor until September 28, 2012 and did not go into effect until January 1st of this year. By nobody's calendar is that a year and a half delay. The error the district court made was in concluding, as a matter of law that ""Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm." *Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985)."""" The documented death threat against Plaintiff Nichols was brushed aside by the district court and Defendant. Defendant Harris was not prejudiced by any delay.

> "The government also contends that Appellees delayed in bringing their motion for a preliminary injunction. See *Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm."). But the government identifies no prejudice that it has suffered as a result of this delay..." *Rodriguez v. Robbins*, Court of Appeals, 9th Circuit (2013) fn 12 No. 12-56734.

> "The USFS argues that the district court applied the appropriate legal standard as set forth in our decision in Oakland Tribune, Inc. v. Chronicle Publ'g Co., 762 F.2d 1374 (9th Cir.1985), because the words "significant threat of irreparable injury" are not the equivalent of the "concrete probability of irreparable harm" standard we held to be erroneous in Earth Island. While it is true that "significant threat" and "concrete probability" are different words, what matters is that both standards impose a higher burden of proof on Earth Island by going beyond the "mere possibility of irreparable harm" standard. In Oakland Tribune, we first determined that the plaintiff had shown a very low likelihood on the success of the merits of its claim, thereby justifying the higher standard of harm. Here, the district court

> applied the higher standard from the outset without first determining the probability of Earth Island's success on the merits." *Earth Island Inst. v. US Forest Service*, 442 F. 3d 1147 - Court of Appeals, 9th Circuit (2006) at 1159.

The district court did not evaluate the merits of Plaintiff Nichols as-applied motion and compounded its error by applying the wrong test, *Salerno*, to it's facial interpretation of Plaintiff's motion. The US Supreme Court rejected *Salerno* in both *Heller* and *McDonald* as did the 7th Circuit in *Moore*.

> "It is well established that the deprivation of constitutional rights `unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976))." *Rodriguez v. Robbins*, Court of Appeals, 9th Circuit (2013) slip op at pg., 34.

Of all the enumerated rights in the Bill of Rights, the Second Amendment is the most fundamental. Without the means to defend one's life all other rights are meaningless, and self-defense is "the central component of the right itself" *Heller* at 2801. A person murdered because he was denied the means to defend himself has no rights.

In reply to appellees' answering brief pgs 29-30 ("ARGUMENT - I (A)(6)")

The district court could not have taken into account the sliding scale as-applied to Plaintiff Nichols, implicitly or otherwise, because it converted the limited, as-applied motion into a facial challenge. Obviously, Plaintiff Nichols disagrees that the district court correctly applied the preliminary injunction factors

or he would not have filed this appeal.

In reply to appellees' answering brief pgs 30-31 ("ARGUMENT - I (A)(7)")
California's Open Carry bans are not longstanding but its prohibitions on concealed carry certainly are. As was briefed in the district court, California had always been an Open Carry state since the first Legislative Acts of 1853. California has always had a common law right to openly carry firearms.

As evidenced by the exhibits to Plaintiff's motion for a preliminary injunction Dkt #88, Exhibits 26-1 to 26-76, the California legislature in enacting PC 12031(a)(1)/PC 25850(a) believed that there was a Constitutional right to bear arms in public and provided an exception for one who *reasonably* believed that he was in danger. The California legislature raised that self-defense threshold to "grave, immediate danger" in 1981 but still did not ban Open Carry. It was not until January 1st of 2012 and 2013 that California completely banned the Open Carry of handguns and long guns, respectively.

Any "delay" (which was not the fault of Plaintiff Nichols) in challenging PC 25850(a) & PC 26350 and the four month "delay" (at worst) in challenging PC 26400 may be longstanding to a mayfly, but Defendant Harris cites no authority in support of her claim that California's Open Carry bans are longstanding are that her case was in any way prejudiced by the delay.

Defendant Harris does not mention the loaded Open Carry ban in this

section. Assuming it was an error on her part, the Attorney General has not "established a substantial government interest in public safety that justifies the open-carry laws." Even the legislative record the district court accepted in regards to the unloaded Open Carry bans states that unloaded Open Carry is merely "*potentially dangerous*." Crossing the street is also potentially dangerous but potential danger has never justified a ban on anything, let alone a ban on an enumerated, fundamental right.

More to the point, Defendant Harris has not cited any authority that supports the district court's conclusion that something can be banned not because the person who participates in the activity poses a danger to the public but it can be banned because it is the government's response to that activity which is the danger.

Even under intermediate scrutiny, the burden of proof lies with the government and the government has provided no proof. The government merely speculates that there is a "potential" danger.

In reply to appellees' answering brief pg 32 ("ARGUMENT - I (B)")

Defendant Harris does not point to any "finding of fact" in the district court decision denying Plaintiff Nichols' motion for a preliminary injunction and Plaintiff Nichols cannot find any findings of fact in the denial Dkt #108. For that matter, Plaintiff Nichols is unaware of any "finding of fact" in any of the documents published by either the magistrate or the district court judge to date.

In reply to appellees' answering brief pg 32-34 ("ARGUMENT – II (A)")

Heck v. Humphreys, 512 U.S. 477, 486-87 (1994) does not and cannot foreclose Plaintiff Nichols's Fourth Amendment challenge to PC 25850(b) against Defendant Harris. None of the Redondo Beach defendants were a party to the "FIRST CLAIM FOR RELIEF" in Plaintiff Nichols' operative Complaint (SAC) or to his motion for a preliminary injunction.

As Defendant Harris clearly states in her answering brief on pg 15 "Nichols has never been threatened with being prosecuted under, much less charged with or convicted of violating, any of the California public-safety statutes in question..."

Plaintiff Nichols pleaded no contest to mere possession of a firearm in a public place (not a park) in violation of Redondo Beach Municipal Code section 4-35.20 even though his protest was held in a location of the city in which RBMC 4-35.01 and RBMC 5-8.01(a)(1) provide an exception to 4-35.20 and even states the area is not a park. His protest was also held after the district court published a substantive finding that the California Constitution preempts local regulations concerning the carrying of firearms in public. There will be much for this court to consider when Plaintiff Nichols' lawsuit against the Redondo Beach defendants comes up on appeal but now is not that time, *Heck* is another red herring.

This Court should note that Defendant Harris does not and cannot argue anywhere in her answering brief that PC 25850(b) is constitutional either facially

or as-applied. *Heck* was her "Ava Maria" and she fumbled the ball.

Neither Defendant Harris nor the district court could cite any authority which has held that mere refusal to a search in and of itself constitutes probable cause for an arrest and *Black*, which Defendant Harris cites, supports Defendant Nichols Fourth Amendment claim that PC 25850(b) is unconstitutional.

Defendant Harris concedes that the district court applied rational review to Nichols 14th Amendment claims including his 14th Amendment claims under the Second Amendment and suspect classification.

> "We have held that a "likelihood" of success per se is not an absolute requirement. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011)." DRAKES BAY OYSTER COMPANY v. Jewell, Court of Appeals, 9th Circuit (2013) No. 13-15227, slip op at pg 21.
> Plaintiff Nichols has demonstrated far more than a "likelihood of success"

both facially and as-applied.

In reply to appellees' answering brief pg 35 ("ARGUMENT – II (B)")

> "It is well established that the deprivation of constitutional rights `unquestionably constitutes irreparable injury.'" Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)). Thus, it follows from our conclusion that the government's reading of Sections 1226(c) and 1225(b) raises serious constitutional concerns "that irreparable harm is likely, not just possible" in the absence of preliminary injunctive relief. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011). - *Rodriguez v. Robbins*, Court of Appeals, 9th Circuit 2013 No. 12-56734 slip op at pg., 34.

In reply to appellees' answering brief pg 35-36 ("ARGUMENT – II (C)")

> "Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the

> Constitution." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). It stands to reason that the public interest also benefits from a preliminary injunction that ensures that federal statutes are construed and implemented in a manner that avoids serious constitutional questions." *Rodriguez v. Robbins,* Court of Appeals, 9th Circuit 2013 No. 12-56734 slip op at pg 37.

It also stands to reason that the public interest also benefits from a preliminary injunction that ensures that state statutes are construed and implemented in a manner that avoids serious constitutional questions. In addition to the deprivation of Plaintiff Nichols' constitutional rights, the district court failed to consider the documented death threat made against Plaintiff Nichols.

CONCLUSION

The plain text of the laws at issue in this appeal are bans which do not contain any exceptions, even for self-defense. This, in part, resulted in the facial invalidation of the laws at issue in *Heller, McDonald* and *Moore*. Defendant Harris makes no argument that these laws apply to "sensitive" places nor can she because separate Penal Code sections exempt licensed hunters from the laws at issue in this appeal.

Defendant Harris makes no argument that the laws at issue in this appeal are constitutional either facially or as-applied to the curtiledge of one's home (issues #4 and #6). Defendant Harris makes no argument that the laws are not unconstitutionally vague (issue #8). Defendant Harris makes no argument

defending California State court constructions that felons and persons who fall outside of the scope of the Second Amendment are entitled to arm themselves with firearms for the purpose of self-defense at a lower threshold than those who fall within the scope of the Second Amendment who must wait until they are in "grave, immediate" danger before arming themselves (issue #9).

Even if this Court concludes the district court did not err in construing the motion into a purely facial challenge, that facial challenge is still limited "[T]o the extent of that reach" *John Doe No. 1* at 2817 and both *Heller* and *McDonald* rejected *Salerno*.

Persons who fall outside of the scope of the Second Amendment, even in sensitive places, cannot be punished by both the laws at issue in this appeal and the laws which remove them from the scope of the Second Amendment for the same act (see *People v. Jones*, 278 P. 3d 821 - Cal: Supreme Court 2012, already briefed). The laws at issue are facially invalid as well as as-applied.

The laws at issue in this appeal should be preliminarily and/or permanently enjoined.

Date: September 17, 2013

Respectfully Submitted,

Charles Nichols
Plaintiff-Appellant
In Pro Per

ADDENDUM

Concealable Firearms Charges in California, 2000-2003, Publication of Attorney General, Department of Justice, Charges for Carrying a Loaded Firearm, pg 16, Race/Ethnic Group By Level Of Charged Offense

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. ALBERTO AGUILAR, Appellant. Illinois State Supreme Court. No. 112116. Opinion filed September 12, 2013.

RACE/ETHNIC GROUP BY LEVEL OF CHARGED OFFENSE

Comparing 2000 to 2003:

- The proportion of whites charged with PC section 12031 resulting in felony-level filings increased 7.3 percentage points (from 31.6 percent to 38.9 percent); misdemeanor-level filings for whites decreased identically.
- The proportion of Hispanics charged with PC section 12031 resulting in felony-level filings increased 8.3 percentage points (from 61.0 percent to 69.3 percent); misdemeanor-level filings for Hispanics decreased identically.
- The proportion of blacks charged with PC section 12031 resulting in felony-level filings decreased 0.5 percentage points (from 71.6 percent to 71.1 percent); misdemeanor-level filings for blacks increased identically.
- The proportion of other race/ethnic groups charged with PC section 12031 resulting in felony-level filings increased 3.1 percentage points (from 51.9 percent to 55.0 percent); misdemeanor-level filings for other race/ethnic groups decreased identically.

Table N-9
PC 12031
Race/Ethnic Group of Person Charged
By Level of Charged Offense, 2000-2003

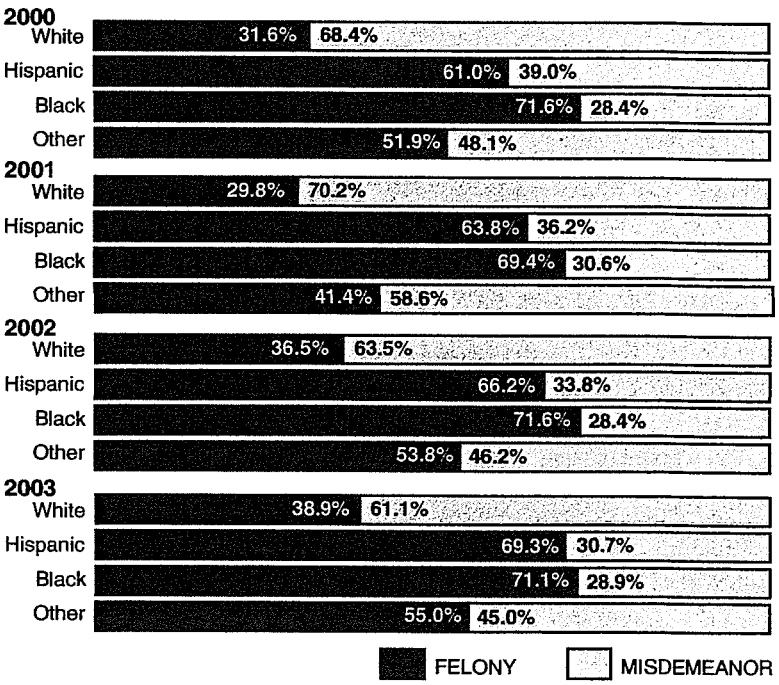
Race/ethnic group of person charged	Total		Felony		Misdemeanor	
	Number	Percent	Number	Percent	Number	Percent
2000 total[1]	1,679	100.0	925	55.1	754	44.9
White	449	100.0	142	31.6	307	68.4
Hispanic	723	100.0	441	61.0	282	39.0
Black	401	100.0	287	71.6	114	28.4
Other	106	100.0	55	51.9	51	48.1
2001 total	2,055	100.0	1,137	55.3	918	44.7
White	537	100.0	160	29.8	377	70.2
Hispanic	874	100.0	558	63.8	316	36.2
Black	545	100.0	378	69.4	167	30.6
Other	99	100.0	41	41.4	58	58.6
2002 total	2,068	100.0	1,231	59.5	837	40.5
White	502	100.0	183	36.5	319	63.5
Hispanic	964	100.0	638	66.2	326	33.8
Black	483	100.0	346	71.6	137	28.4
Other	119	100.0	64	53.8	55	46.2
2003 total	1,973	100.0	1,213	61.5	760	38.5
White	488	100.0	190	38.9	298	61.1
Hispanic	918	100.0	636	69.3	282	30.7
Black	467	100.0	332	71.1	135	28.9
Other	100	100.0	55	55.0	45	45.0

[1] Please see "Appendix I - Data Characteristics and Known Limitations" for district attorneys unable to submit complete data for 2000.

The subjectivity of the classification and labeling process must be considered in the analysis of race/ethnic group data. As commonly used, race refers to large populations that share certain similar physical characteristics such as skin color. Because these physical characteristics can vary greatly within groups as well as between groups, determination of race is frequently, by necessity, subjective. Ethnicity refers to cultural heritage and can cross racial lines. For example, the ethnic designation "Hispanic" includes persons of any race. Most commonly, self-identification of race/ethnicity is used in the classification and labeling process.

When charged with PC section 12031, blacks were proportionately most likely to be filed on at the felony level, followed by Hispanics, other race/ethnic groups, and whites. This pattern exists throughout the period shown.

Figure 13
PC 12031
Race/Ethnic Group of Person Charged
By Level of Charged Offense, 2000-2003



2013 IL 112116

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

(Docket No. 112116)

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. ALBERTO AGUILAR, Appellant.

Opinion filed September 12, 2013.

JUSTICE THOMAS delivered the judgment of the court, with opinion.

Chief Justice Kilbride and Justices Freeman, Garman, Karmeier, Burke, and Theis concurred in the judgment and opinion.

OPINION

¶ 1 The principal issue in this case is whether section 24-1.6(a)(1), (a)(3)(A) of the Illinois aggravated unlawful use of weapons (AUUW) statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2008)) violates the right to keep and bear arms, as guaranteed by the second amendment to the United States Constitution (U.S. Const., amend. II). We hold that it does.

¶ 2 BACKGROUND

¶ 3 The facts are not in dispute. Officer Thomas Harris of the Chicago police department testified that, on the evening of June 12, 2008, he was on surveillance duty near 4217 West 25th Place. Officer Harris observed a group of male teenagers screaming, making gestures, and throwing bottles at passing vehicles. This group included defendant,

who Officer Harris noticed was holding the right side of his waist area. After watching the group walk into a nearby alley, Officer Harris radioed other officers who were nearby.

¶ 4 Officer John Dolan testified that, after receiving a radio communication from Officer Harris, he and Officers Wagner and Triantafillo traveled to 4217 West 25th Place. Once there, Officer Dolan watched several individuals walk into the backyard. The officers followed, and Officer Dolan heard defendant yell an expletive. Officer Dolan then saw that defendant had a gun in his right hand. Defendant dropped the gun to the ground, and Officer Dolan took defendant into custody while another officer recovered the gun. When Officer Dolan examined the gun, he saw that the serial number had been scratched off and that it was loaded with three live rounds of ammunition. Officer Dolan learned later that defendant did not live at 4217 West 25th Place.

¶ 5 Defense witness Romero Diaz testified that he lived at 4217 West 25th Place and that defendant was his friend. Diaz explained that, on the evening in question, he was with defendant and another friend in his backyard waiting for defendant's mother to pick up defendant, when three or four police officers entered the backyard with flashlights and ordered him and his friends to the ground. When defendant hesitated to comply, one of the officers tackled him to the ground. According to Diaz, defendant did not have a gun and did not drop a gun to the ground when the officers entered the backyard.

¶ 6 Defendant testified that, on the night of June 12, 2008, he was with friends at the corner of 26th Street and Keeler Avenue. After spending about 45 minutes there, he and another friend walked to Diaz's backyard. While defendant was waiting there for his mother to pick him up, three police officers entered the yard with flashlights and guns drawn. One officer yelled at defendant to get on the ground, and when defendant moved slowly, another of the officers tackled defendant. The officers then searched the yard, showed defendant a gun, and accused him of dropping it. Defendant denied ever having a gun that evening, and he denied dropping a gun to the ground.

¶ 7 After weighing the credibility of the witnesses, the trial court found defendant guilty of AUUW (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2008)) and unlawful possession of a firearm (UPF) (720 ILCS 5/24-3.1(a)(1) (West 2008)). The trial court sentenced defendant to

24 months' probation for the AUUW conviction and did not impose sentence on the UPF conviction.

¶ 8 Defendant appealed, and the appellate court affirmed with one justice dissenting. 408 Ill. App. 3d 136. We allowed defendant's petition for leave to appeal. Ill. S. Ct. R. 315 (eff. Feb. 26, 2010).[1]

¶ 9 DISCUSSION

¶ 10 Standing

¶ 11 In this case, we are asked to decide whether the two statutes under which defendant stands convicted—namely, section 24-1.6(a)(1), (a)(3)(A) of the AUUW statute and section 24-3.1(a)(1) of the UPF statute—violate the right to keep and bear arms, as guaranteed by the second amendment to the United States Constitution. Before we get to those questions, however, we must quickly dispose of the State's argument that defendant lacks standing to contest the constitutionality of these statutes. In support of this argument, the State invokes the familiar principle that, in order to have standing to contest the constitutionality of a statutory provision, the party bringing that challenge must show that he falls within the class of persons aggrieved by the alleged unconstitutionality. See, *e.g.*, *People v. Bombacino*, 51 Ill. 2d 17, 20 (1972). According to the State, this principle means that, in this case, before defendant can argue that either of these statutes violates the second amendment, he first must be able to show that he was engaged in conduct that enjoys second amendment protection. Yet there is no way defendant can do this, the State maintains, because defendant himself concedes that the conduct involved in this case, namely, possessing a loaded, defaced, and illegally modified handgun on another person's property without consent, enjoys no such protection. Thus, the State insists, defendant has no standing to bring a second amendment challenge.

¶ 12 We reject the State's argument. The State assumes that defendant is arguing that the enforcement of sections 24-1.6(a)(1), (a)(3)(A) and 24-3.1(a)(1) in this particular case violates his personal right to keep and bear arms, as guaranteed by the second amendment. But that is

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[1]We also allowed several briefs *amici curiae* to be filed on behalf of both defendant and the State. Ill. S. Ct. R. 345 (eff. Sept. 20, 2010).

not what defendant is arguing. Rather, he is arguing that sections 24-1.6(a)(1), (a)(3)(A) and 24-3.1(a)(1) *themselves* facially violate the second amendment, and that consequently neither statute can be enforced against *anyone*, defendant included. See, *e.g.*, *People v. Manuel*, 94 Ill. 2d 242, 244-45 (1983) (a defendant cannot be prosecuted under a criminal statute that is unconstitutional in its entirety, as such a statute is void *ab initio*). This is a very different argument from the one the State assumes, and one that defendant undoubtedly has the standing to make. "One has standing to challenge the validity of a statute if he has sustained or if he is in immediate danger of sustaining some direct injury as a result of enforcement of the statute." *People v. Mayberry*, 63 Ill. 2d 1, 8 (1976). Here, sections 24-1.6(a)(1), (a)(3)(A) and 24-3.1(a)(1) were enforced against defendant in the form of a criminal prosecution initiated by the People of the State of Illinois, and the "direct injury" he sustained was the entry of two felony convictions for which he was sentenced to 24 months' probation. If anyone has standing to challenge the validity of these sections, it is defendant. Or to put it another way, if defendant does *not* have standing to challenge the validity of these sections, then no one does. The State's standing objection is rejected.

¶ 13 Second Amendment

¶ 14 *Section 24-1.6(a)(1), (a)(3)(A)*

¶ 15 We now turn to the main issue, namely, the constitutionality of the two statutes at issue. We begin with section 24-1.6(a)(1), (a)(3)(A), which states:

> "(a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:
>
> (1) Carries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode or fixed place of business any pistol, revolver, stun gun or taser or other firearm; [and]
>
> ***
>
> (3) One of the following factors is present:
>
> (A) the firearm possessed was uncased, loaded and immediately accessible at the time of the

offense[.]" 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2008).

Statutes are presumed constitutional, and the party challenging the constitutionality of a statute carries the burden of proving that the statute is unconstitutional. *People v. Hollins*, 2012 IL 112754, ¶ 13. Moreover, this court has a duty to construe the statute in a manner that upholds the statute's validity and constitutionality, if it can reasonably be done. *Id.* The constitutionality of a statute is a question of law that we review *de novo*. *Id.*

¶ 16 The second amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const., amend. II. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court undertook its first-ever "in-depth examination" of the second amendment's meaning. *Id.* at 635. After a lengthy historical discussion, the Court ultimately concluded that the second amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation" (*id.* at 592); that "central to" this right is "the inherent right of self-defense" (*id.* at 628); that "the home" is "where the need for defense of self, family, and property is most acute" (*id.* at 628); and that, "above all other interests," the second amendment elevates "the right of law abiding, responsible citizens to use arms in defense of hearth and home" (*id.* at 635). Based on this understanding, the Court held that a District of Columbia law banning handgun possession in the home violated the second amendment. *Id.* at 635.

¶ 17 Two years later, in *McDonald v. City of Chicago*, 561 U.S. ___, ___, 130 S. Ct. 3020, 3050 (2010), the Supreme Court held that the second amendment right recognized in *Heller* is applicable to the states through the due process clause of the fourteenth amendment. In so holding, the Court reiterated that "the Second Amendment protects the right to keep and bear arms for the purpose of self-defense" (*id.* at ___, 130 S. Ct. at 3026); that "individual self-defense is 'the *central component*' of the Second Amendment right" (emphasis in original) (*id.* at ___, 130 S. Ct. at 3036 (quoting *Heller*, 554 U.S. at 599)); and that "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day" (*id.* at ___, 130 S. Ct. at 3036).

¶ 18 The issue before us today is whether section 24-1.6(a)(1), (a)(3)(A) violates the second amendment right to keep and bear arms, as construed by the United States Supreme Court in *Heller* and *McDonald*. We are not the first court to consider this question. On the contrary, the constitutionality of section 24-1.6(a)(1), (a)(3)(A) has been considered by several panels of our appellate court. See, *e.g.*, *People v. Moore*, 2013 IL App (1st) 110793; *People v. Montyce H.*, 2011 IL App (1st) 101788; *People v. Mimes*, 2011 IL App (1st) 082747; *People v. Williams*, 405 Ill. App. 3d 958 (2010); *People v. Dawson*, 403 Ill. App. 3d 499 (2010). Uniformly, these courts have held that section 24-1.6(a)(1), (a)(3)(A) passes constitutional muster. According to these decisions, despite their broad and lengthy historical discussions concerning the scope and meaning of the second amendment, neither *Heller* nor *McDonald* expressly recognizes a right to keep and bear arms *outside the home*. Rather, the core holding of both cases is that "the Second Amendment protects the right to possess a handgun *in the home* for the purpose of self-defense." (Emphasis added.) *McDonald*, 561 U.S. at ___, 130 S. Ct. at 3050. And because section 24-1.6(a)(1), (a)(3)(A) prohibits only the possession of operable handguns *outside the home*, it does not run afoul of the second amendment, as presently construed by the United States Supreme Court. See, *e.g.*, *Moore*, 2013 IL App (1st) 110793, ¶¶ 15-18; *Montyce H.*, 2011 IL App (1st) 101788, ¶¶ 27-28; *Dawson*, 403 Ill. App. 3d at 505-10.

¶ 19 In stark contrast to these Illinois decisions stands the Seventh Circuit Court of Appeals' recent decision in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012). In *Moore*, the court held that section 24-1.6(a)(1), (a)(3)(A) is effectively "a flat ban on carrying ready-to-use guns outside the home" (*id.* at 940) and that, as such, it violates the second amendment right to keep and bear arms, as construed in *Heller* and *McDonald* (*id.* at 942). In reaching this result, *Moore* relied not on the specific holding of *Heller*—*i.e.*, that the second amendment protects the right to possess a handgun in the home for the purpose of self-defense—but rather on the broad principles that informed that holding. According to *Moore*, the clear implication of *Heller*'s extensive historical analysis is that "the constitutional right of armed self-defense is broader than the right to have a gun in one's home." *Id.* at 935. *Moore* notes, for example, that "[t]he first sentence

of the *McDonald* opinion states that 'two years ago, in *District of Columbia v. Heller*, we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense.' " *Id.* at 935 (quoting *McDonald*, 561 U.S. at ___, 130 S. Ct. at 3026). Moreover, *Moore* explains that, although both *Heller* and *McDonald* state that the need for self-defense is "most acute" in the home, that "doesn't mean it is not acute outside the home." *Id.* (quoting *McDonald*, 561 U.S. at ___, 130 S. Ct. at 3036, and *Heller*, 554 U.S. at 628). On the contrary:

> "*Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one's home, as when it says that the amendment 'guarantee[s] the individual right to possess and carry weapons in case of confrontation.' [Citation.] Confrontations are not limited to the home." *Id.* at 935-36 (quoting *Heller*, 554 U.S. at 592).

Finally, *Moore* notes that the second amendment guarantees not only the right to "keep" arms, but also the right to "bear" arms, and that these rights are not the same:

> "The right to 'bear' as distinct from the right to 'keep' arms is unlikely to refer to the home. To speak of 'bearing' arms within one's home would at all times have been an awkward usage. A right to bear arms thus implies a right to carry a loaded gun outside the home." *Id.* at 936.

In other words, *Moore* concludes, "[t]he Supreme Court has decided that the [second] amendment confers a right to bear arms for self-defense, which is as important outside the home as inside." *Id.* at 942. As a result, *Moore* held that Illinois' "flat ban on carrying ready-to-use guns outside the home," as embodied in section 24-1.6(a)(1), (a)(3)(A), is unconstitutional on its face. *Id* at 940.[2]

¶ 20 After reviewing these two lines of authority—the Illinois cases holding that section 24-1.6(a)(1), (a)(3)(A) is constitutional, and the Seventh Circuit's decision holding that it is not—we are convinced that the Seventh Circuit's analysis is the correct one. As the Seventh Circuit correctly noted, neither *Heller* nor *McDonald* expressly limits the second amendment's protections to the home. On the contrary,

[2]The State of Illinois did not appeal from the decision in *Moore*.

both decisions contain language strongly suggesting if not outright confirming that the second amendment right to keep and bear arms extends beyond the home. Moreover, if *Heller* means what it says, and "individual self-defense" is indeed "the central component" of the second amendment right to keep and bear arms (*Heller*, 554 U.S. at 599), then it would make little sense to restrict that right to the home, as "[c]onfrontations are not limited to the home." *Moore*, 702 F.3d at 935-36. Indeed, *Heller* itself recognizes as much when it states that "the right to have arms *** was by the time of the founding understood to be an individual right protecting against both *public* and private violence." (Emphasis added.) *Heller*, 554 U.S. at 593-94.

¶ 21 Of course, in concluding that the second amendment protects the right to possess and use a firearm for self-defense outside the home, we are in no way saying that such a right is unlimited or is not subject to meaningful regulation. See *infra* ¶¶ 26-27. That said, we cannot escape the reality that, in this case, we are dealing not with a reasonable regulation but with a comprehensive ban. Again, in the form presently before us, section 24-1.6(a)(1), (a)(3)(A) categorically prohibits the possession and use of an operable firearm for self-defense outside the home. In other words, section 24-1.6(a)(1), (a)(3)(A) amounts to a wholesale statutory ban on the exercise of a personal right that is specifically named in and guaranteed by the United States Constitution, as construed by the United States Supreme Court. In no other context would we permit this, and we will not permit it here either.

¶ 22 Accordingly, as the Seventh Circuit did in *Moore*, we here hold that, on its face, section 24-1.6(a)(1), (a)(3)(A) violates the right to keep and bear arms, as guaranteed by the second amendment to the United States Constitution. Defendant's conviction under that section therefore is reversed.[3]

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[3]Following the decision in *Moore*, the General Assembly enacted the Firearm Concealed Carry Act, which *inter alia* amended the AUUW statute to allow for a limited right to carry certain firearms in public. See Pub. Act 98-0063 (eff. July 9, 2013), Neither the Firearm Concealed Carry Act nor the amended AUUW statute is at issue in this case.

¶ 23 Section 24-3.1(a)(1)

¶ 24 Defendant also argues that this court should reverse his UPF conviction because, like section 24-1.6(a)(1), (a)(3)(A), the statute upon which his UPF conviction is based violates the second amendment.

¶ 25 Defendant, who was 17 years old at the time of the offenses charged in this case, was convicted of violating section 24-3.1(a)(1) of the Criminal Code of 1961, which provides:

> "A person commits the offense of unlawful possession of firearms or firearm ammunition when:
>
> (1) He is under 18 years of age and has in his possession any firearm of a size which may be concealed upon the person[.]" 720 ILCS 5/24-3.1(a)(1) (West 2008).[4]

According to defendant, at the time the second amendment was drafted and ratified, the right to keep and bear arms extended to persons 16 and 17 years of age. In support, defendant relies principally on the fact that, at the time of this nation's founding, many colonies "required those as young as 15 years old to bear arms" for purposes of militia service. Consequently, defendant argues, "because Illinois' ban on handgun possession by 17-year-olds regulates conduct that traditionally falls within the protection of the second amendment, the validity of the law depends upon the government's ability to satisfy heightened constitutional scrutiny." Defendant then insists that the State cannot meet this burden because "Illinois' unconditional abrogation of a 17-year-old's constitutional right to defend himself with a handgun" is in no way tailored to meet any identifiable state interest. In other words, defendant is arguing that, as far as the second amendment is concerned, a 17-year-old minor is on exactly the same constitutional footing as a full-fledged adult.

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[4]Section 24-3.1(c) of the UPF statute contains an express exception for persons under the age 18 who are "participating in any lawful recreational activity with a firearm such as, but not limited to, practice shooting at targets upon established public or private target ranges or hunting, trapping, or fishing in accordance with the Wildlife Code or the Fish and Aquatic Life Code." 720 ILCS 5/24-3.1(c) (West 2008).

¶ 26 We reject this argument. In *Heller*, the Supreme Court expressly stated that:

> "Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626.

From there, the Court went on to emphasize that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27. The Court then immediately added, by way of footnote, that "[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 627 n.26.

¶ 27 Now admittedly, the list enumerated in *Heller* does not specifically include laws prohibiting the possession of firearms by minors. Nevertheless, several courts have since undertaken a thorough historical examination of such laws, and all of them have concluded that, contrary to defendant's contention, the possession of handguns by minors is conduct that falls outside the scope of the second amendment's protection. See, *e.g.*, *National Rifle Ass'n of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, Explosives*, 700 F.3d 185, 204 (5th Cir. 2012) (concluding that "[m]odern restrictions on the ability of persons under 21 to purchase handguns—and the ability of persons under 18 to possess handguns—seem, to us, to be firmly historically rooted"); *United States v. Rene E.*, 583 F.3d 8, 16 (1st Cir. 2009) (concluding that the "right to keep arms in the founding period did not extend to juveniles"); *Powell v. Tompkins*, No. 12-10744-WGY, 2013 WL 765339, at *16 (D. Mass Feb. 28, 2013) (holding that a Massachusetts law proscribing the carry of firearms by persons under the age of 21 "comports with the Second Amendment and imposes no burden on" the right to keep and bear arms). In essence, these cases explain that, although many colonies *permitted* or even *required* minors to own and possess firearms for purposes of militia service, nothing like *a*

right for minors to own and possess firearms has existed at any time in this nation's history. On the contrary, laws banning the juvenile possession of firearms have been commonplace for almost 150 years and both reflect and comport with a "longstanding practice of prohibiting certain classes of individuals from possessing firearms—those whose possession poses a particular danger to the public." *Rene*, 583 F.3d at 15. We will not repeat or rehash the historical evidence set forth in these decisions. Rather, for present purposes, we need only express our agreement with the obvious and undeniable conclusion that the possession of handguns by minors is conduct that falls outside the scope of the second amendment's protection.

¶ 28 For these reasons, we reject defendant's second amendment challenge to section 24-3.1(a)(1) and affirm his conviction thereunder.

¶ 29 CONCLUSION

¶ 30 For the reasons set forth above, we reverse defendant's conviction under section 24-1.6(a)(1), (a)(3)(A), affirm defendant's conviction under section 24-3.1(a)(1), and remand to the trial court for imposition of sentence on the UPF conviction. The sentence imposed on the UPF conviction shall not exceed the sentence imposed on the AUUW conviction, and defendant shall receive credit for time already served on the AUUW conviction.

¶ 31 Affirmed in part, reversed in part, and remanded.

CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2013, I have filed and served the foregoing **APPELLANT'S REPLY BRIEF** by causing an original and seven copies of the document and any attachments to be delivered to the Clerk of the Court by United States Mail and two copies by United States Mail to:

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