No. 14-55873 [DC 2:11-cv-09916-SJO-SS]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Charles Nichols,

Plaintiff-Appellant

v.

Edmund Brown, Jr., in his official capacity as the Governor of California
and
Kamala Harris in her official capacity as the Attorney General of California

Defendants-Appellees.

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

PLAINTIFF-APPELLANT NICHOLS' EXCERPTS OF RECORD VOLUME 1

Charles Nichols
PO Box 1302
Redondo Beach, CA 90278
Tel. No. (424) 634-7381
e-mail: CharlesNichols@Pykrete.info
In Pro Per

TABLE OF CONTENTS

Page:

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHARLES NICHOLS,

Plaintiff,

v.

KAMALA D. HARRIS, in her official capacity as Attorney General of California,

Defendant.

Case No. CV 11-9916 SJO (SS)

JUDGMENT

Pursuant to the Court's Order Accepting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS HEREBY ADJUDGED that the above-captioned action is dismissed with prejudice.

DATED: May 1, 2014.

S. JAMES OTERO
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHARLES NICHOLS,

Plaintiff,

v.

KAMALA D. HARRIS, in her official capacity as Attorney General of California,

Defendant.

Case No. CV 11-9916 SJO (SS)

ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Second Amended Complaint, all the records and files herein, the Report and Recommendation of the United States Magistrate Judge, Plaintiff's Objections, and Defendant's Response to Plaintiff's Objections. After having made a de novo determination of the portions of the Report and Recommendation to which Objections were directed, the Court concurs with and accepts the findings and conclusions of the Magistrate Judge. In addition, the Court will address certain arguments raised by Plaintiff in his Objections.

Plaintiff asserts that the Ninth Circuit's recent decision in Peruta v. County of San Diego, 742 F.3d 1144 (9th Cir. 2014), has been "stayed" and is neither binding on this Court nor relevant to his claims. (Obj. at 8). Plaintiff is mistaken.

On February 28, 2014, the Ninth Circuit stayed the issuance of the mandate in Peruta pending briefing and a decision on a motion for rehearing en banc. See Peruta v. County of San Diego, 9th Cir. Case No. 10-56971 (Dkt. No. 126, entered Feb. 28, 2014) (order extending time for filing petition for rehearing en banc and staying mandate). However, entry of the mandate is merely a "ministerial act," White v. Klitzkie, 281 F.3d 920, 924 n.4 (9th Cir. 2002), that "formally marks the end of appellate jurisdiction." Northern California Power Agency v. Nuclear Regulatory Com'n, 393 F.3d 223, 224 (D.C. Cir. 2004) (internal quotation marks omitted). A panel decision of the Ninth Circuit is binding on lower courts as soon as it is published, even before the mandate issues, and remains binding authority until the decision is withdrawn or reversed by the Supreme Court or an en banc court. See, e.g., Gonzalez v. Arizona, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc) ("[A] published decision of this court constitutes binding authority which 'must be followed unless and until overruled by a body competent to do so.'") (quoting Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001)); United States v. Gomez–Lopez, 62 F.3d 304, 306 (9th Cir. 1995) ("The government first urges us to ignore Armstrong since we have stayed the mandate to allow filing of a petition for certiorari; this we will not do, as Armstrong is the law of this circuit.");

Castillo v. Clark, 610 F. Supp. 2d 1084, 1122 n.17 (C.D. Cal. 2009) ("Although the Ninth Circuit has granted a stay of the mandate in Butler, the panel decision remains the law of the Circuit."). Indeed, three weeks after the stay in Peruta issued, the Ninth Circuit vacated a district court decision in another matter and remanded the case "for further proceedings consistent with Peruta." See Baker v. Kealoha, __ Fed. Appx. __, 2014 WL 1087765 at *1 (9th Cir. Mar. 20, 2014). As of the date of this Order, Peruta remains binding precedent on this Court.

Plaintiff further appears to misinterpret the import of the Peruta court's clarification in footnote 19 that it was not "ruling on the constitutionality of California statutes." (Obj. at 2) (quoting Peruta, 742 F.3d at 1173 n.19). This footnote is part of the discussion in which the Ninth Circuit explained that because the Second Amendment does not protect any particular mode of carry, a claim that a state must permit a specific form of carry, such as open carry, fails as a matter of law. See id. at 1172-73 ("As the California legislature has limited its permitting scheme to concealed carry -- and has thus expressed a preference for that manner of arms-bearing -- a narrow challenge to the San Diego County regulations on concealed carry, rather than a broad challenge to the state-wide ban on open carry, is permissible."). Accordingly, Peruta did not rule on the overall

constitutionality of California statutes because it accepted the lawfulness of California's firearms regime, including the state's preference for concealed carry over open carry. Id. at 1172.

Plaintiff suggests that the Ninth Circuit's recent decision in Jackson v. City and County of San Francisco, __ F.3d __, 2014 WL 1193434 (9th Cir. Mar. 25, 2014), is helpful to his case as he opens his Objections with a lengthy quotation from that decision. (See Obj. at 1-2) (quoting Jackson, 2014 WL 1193434 at *4-5). However, Plaintiff does not explain why the passages he quotes support his claims. The Jackson court found that two San Francisco Police Code regulations that prohibit the unsecured storage of handguns in residences and the sale of "hollow point" ammunition passed constitutional muster. Id. at *1. In the passages quoted by Plaintiff, the court determined that the plaintiff could bring a facial challenge to section 4512, which requires that handguns in residences be stored in a locked container, disabled with an approved trigger lock, or carried on the person over the age of 18, despite the Jackson plaintiff's concession that locked storage is appropriate in some circumstances. Id. at *5. Again, as Plaintiff has failed to articulate in his Objections why he believes Jackson changes the outcome here, the Objections do not alter the Court's ultimate resolution of Plaintiff's claims.

\\

\\

Finally, Plaintiff asserts that he does in fact have standing to assert an equal protection challenge to California Penal Code Section 25850 due to its allegedly racist origin and application because contrary to the criminal complaint on which the Magistrate Judge relied, he is not white but of "mixed race" heritage. (Obj. at 16). Plaintiff's equal protection claim still fails, however, because as the Magistrate Judge observed, Plaintiff did not squarely raise a race-based challenge to Section 25850 against the Attorney General. (Report and Recommendation at 26-27).

To state an equal protection claim under section 1983, a plaintiff typically must allege that "'defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class.'" Furnace v. Sullivan, 705 F.3d 1021, 1030 (9th Cir. 2013) (quoting Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998) (emphasis added)). Even liberally construed, the Second Amended Complaint fails to make any connection between Plaintiff's race and the allegedly racist design motivating the passage of the facially race-neutral predecessor to Section 25850. Indeed, the record in this case, including Plaintiff's Second Amended Complaint and Plaintiff's Motion for Partial Summary Judgment, is devoid of any allegation that Plaintiff is a member of a racial minority whose members were the intended target of the legislature's alleged racial animus in enacting the predecessor to Section 25850. Despite three opportunities to state his claims, Plaintiff simply did not raise a race-based Fourteenth Amendment claim in this action.

Assertion of a new claim on summary judgment is improper. Coleman v. Quaker Oats Co., 232 F.3d 1271, 1294 (9th Cir. 2000). Accordingly, even if Plaintiff is of "mixed race" heritage, he may not raise new claims at this late stage of the litigation.

IT IS ORDERED that Plaintiff's Motion for Partial Summary Judgment is DENIED.

IT IS FURTHER ORDERED that Defendant's Motion for Judgment on the Pleadings is GRANTED and that Judgment be entered in favor of Defendant Kamala D. Harris.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: May 1, 2014.

S. James Otero

S. JAMES OTERO
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHARLES NICHOLS,

Plaintiff,

v.

KAMALA D. HARRIS, in her official capacity as Attorney General of California,

Defendant.

Case No. CV 11-9916 SJO (SS)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable S. James Otero, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

INTRODUCTION

This civil rights action purports to challenge the constitutionality of seventeen California statutes that regulate the open carry of firearms and the issuance of firearm licenses

solely as they relate to open carry. Plaintiff, a California resident proceeding pro se, filed the operative Second Amended Complaint pursuant to 42 U.S.C. § 1983 on March 29, 2013. ("SAC," Dkt. No. 83). The Court denied Plaintiff's Motion for a Preliminary Injunction on July 3, 2013. ("PI Order," Dkt. No. 108). On July 18, 2013, the Court denied Plaintiff's ex parte application for a stay pending appeal of the denial of his preliminary injunction motion. (Dkt. No. 121). Plaintiff voluntarily dismissed Defendants City of Redondo Beach ("CRB") and Does 1-10 on August 5, 2013, leaving only his claims against Defendant Kamala D. Harris in her official capacity as the Attorney General of the State of California. (Dkt. No. 125).

On November 8, 2013, Plaintiff filed a Motion for Partial Summary Judgment, (Dkt. No. 131), including a Memorandum in support of the Motion, ("MSJ," Dkt. No. 132), and the Declaration of Plaintiff Charles Nichols. ("Nichols MSJ Decl.," Dkt. Nos. 133-34). Plaintiff also lodged a Statement of Uncontroverted Facts and Conclusions of Law pursuant to Local Rule 56-1. ("SUF," Dkt. No. 136). On December 2, 2013, Defendant filed a Memorandum in Opposition to the MSJ, (Dkt. No. 140), including a Statement of Genuine Disputes, ("SGD," Dkt. No. 140.1), and the Declaration of Jonathan M. Eisenberg. ("Eisenberg MSJ Decl.," Dkt. No. 140.2). The following day, December 3, 2013, Defendant filed a Notice of Errata and a corrected Memorandum in Opposition to the MSJ. ("MSJ Opp.," Dkt. No. 141). On December 9, 2013, Plaintiff filed a Reply in support of the MSJ, ("MSJ Reply," Dkt. No. 143), and a "reply" to Defendant's Statement of Genuine

Disputes. ("Reply SGD," Dkt. No. 144). On the same day, Plaintiff also filed Objections to Defendant's Notice of Errata, (Dkt. No. 145), and Objections to the Declaration of Jonathan M. Eisenberg.[1] (Dkt. No. 146).

On November 12, 2013, Defendant filed a Motion for Judgment on the Pleadings, (Dkt. No. 129), including a Memorandum in support of the Motion, ("MJP," Dkt. No. 129.1), and a Request for Judicial Notice. ("MJP RJN," Dkt. No. 129.2). On November 26, 2013, Plaintiff filed an Opposition to the MJP, ("MJP Opp.," Dkt. No. 139), and Objections to Evidence.[2] ("P MJP Evid. Obj.," Dkt.

[1] Plaintiff objected to the Notice of Errata on the ground that Defendant's corrected Memorandum in Opposition to the MSJ was untimely, as it was filed the day after the Court's deadline for opposing the MSJ. (Dkt. No. 145 at 2-3). However, the corrected Opposition is substantively similar to the inadvertently-filed earlier version, which Plaintiff concedes was timely. (Id.). Accordingly, Plaintiff's Objections to the Notice of Errata are overruled.

Plaintiff's Objections to the Eisenberg Declaration are directed to the exhibits attached to the declaration, which consist of: (1) the Los Angeles County Sheriff's Department's Concealed Weapons Licensing Policy, (2) a brief biography of former Assistant Sheriff Paul Tanaka, available at www.paultanaka.com, and (3) a web article describing the instant litigation, including comments, available at http://lagunaniguel-danapoint.patch.com. (See Dkt. No. 146 at 1-2) (citing Eisenberg Decl., Exhs. A-C). However, the exhibits did not affect the outcome of the Court's recommendation. Accordingly, Plaintiff's Objections to the Eisenberg Declaration and its exhibits are overruled. See PacifiCorp v. Northwest Pipeline GP, 879 F. Supp. 2d 1171, 1194 n.7 & 1214 (D. Or. 2012) (declining to address evidentiary objections where the court would reach the same conclusions whether or not it considered the challenged materials).

[2] Plaintiff objects to Exhibit A of Defendant's RJN, which is a copy of CRB's Opposition to Plaintiff's Ex Parte Application for Stay Pending Appeal, on the ground that "[t]he facts [asserted in CRB's Opposition brief] and exhibits attached to [the Opposition]

No. 138). Defendant filed a Reply in support of the MJP on December 3, 2013. ("MJP Reply," Dkt. No. 142). Plaintiff subsequently filed five separate Notices of Supplemental Authority, each of which included a supplemental brief and a separately-filed declaration in addition to a copy of a recent court decision.[3] (Dkt. No. 157 at 2).

. . . were and are very much in dispute . . . ." (P MJP Evid. Obj. at 1). The exhibits attached to CRB's Opposition are copies of the criminal complaint in CRB's misdemeanor action against Plaintiff and the court minutes in that matter. (See MJP RJN, Exh. A). While contested facts are not properly subject to judicial notice, the Court may take judicial notice of the criminal complaint and court minutes as they are public records "whose accuracy cannot reasonably be questioned." See Louis v. McCormick & Schmick Restaurant Corp., 460 F. Supp. 2d 1153, 1155, fn.4 (C.D. Cal. 2006) ("Under Rule 201 of the Federal Rules of Evidence, the court may take judicial notice of the records of state courts, the legislative history of state statutes, and the records of state administrative agencies."). Furthermore, Plaintiff does not deny that he was charged with carrying a weapon into a City of Redondo Beach park and that he pled nolo contendere to the misdemeanor violation. To that extent, Plaintiff's Objections are overruled and Defendant's Request for Judicial Notice is GRANTED.

[3] Defendant's Objections to the supplemental briefs accompanying Plaintiff's Notices of Supplemental Authority are well taken. "Filing a notice of supplemental authority to inform the Court of a new judicial opinion that has been issued is appropriate, but it is an improper occasion to argue outside the pleadings." Rosenstein v. Edge Investors, L.P., 2009 WL 903806 at *1 n.1 (S.D. Fla. Mar. 30, 2009); see also C.D. Cal. L.R. 7-10 (prohibiting further briefing after a reply is filed absent written authorization from the Court); Hagens Berman Sobol Shapiro LLP v. Rubinstein, 2009 WL 3459741 at *1 (W.D. Wash. Oct. 22, 2009) (notice of supplemental authority improper "because it contained argument regarding the case" submitted for the court's review). In sum, filing a Notice of Supplemental Authority with a copy of or a citation to a recently published case is proper; including a memorandum with the Notice explaining why the case is relevant is not. However, the largely repetitive arguments presented in the briefs accompanying Plaintiff's Notices of Supplemental Authority did not affect the outcome of the Court's

For the reasons discussed below, it is recommended that Plaintiff's Motion for Partial Summary Judgment be DENIED. It is further recommended that Defendant's Motion for Judgment on the Pleadings be GRANTED and that this action be DISMISSED WITH PREJUDICE.

II.

FACTUAL ALLEGATIONS OF THE SECOND AMENDED COMPLAINT

As amended by Plaintiff's voluntary dismissal of City of Redondo Beach and the Doe Defendants, the SAC sues only Defendant Kamala D. Harris in her official capacity as the Attorney General of the State of California. (SAC at 1-2). The SAC raises a facial challenge to the constitutionality of seventeen California statutes that Plaintiff contends violate the fundamental right to openly carry loaded and unloaded firearms.[4] (Id. at 25-30; see

---

recommendation. Accordingly, while it would be proper to strike Plaintiff's supplemental briefs, the Court exercises its discretion instead to overrule Defendant's Objections as moot. PacifiCorp, 879 F. Supp. 2d at 1194 n.7 & 1214.

[4] Plaintiff purports to assert both facial and "as applied" challenges to the California statutes at issue in the SAC. (See SAC at 26-30). A "claim is 'facial' [if] . . . it is not limited to plaintiffs' particular case, but challenges the application of the law more broadly . . . ." John Doe No. 1 v. Reed, __ U.S. __, 130 S. Ct. 2811, 2817 (2010). The SAC does not allege that the challenged statutes are unconstitutional due to the particular manner in which they were applied to Plaintiff. Indeed, Plaintiff does not allege facts showing that the majority of the statutes were enforced against him at all and thus provides no facts for an "as applied" challenge. Rather, the gravamen of Plaintiff's action is that the laws are unconstitutional because they generally inhibit the purported right to open carry. Accordingly, as the Court has already

also PI Order at 4 ("The Court notes at the outset that Plaintiff is mounting a facial challenge.")).

According to the SAC, on May 21, 2012, Plaintiff openly carried an unloaded firearm in a beach zone within City of Redondo Beach as part of a peaceful protest in support of the open carry movement. (SAC at 19-20). CRB Police Officer Heywood took the firearm from Plaintiff without Plaintiff's permission and conducted a chamber check to determine if it was loaded. (Id. at 19). Officer Heywood and an unidentified officer informed Plaintiff that he was in violation of city ordinances prohibiting the carrying of firearms in public areas and seized his firearm and carrying case. (Id. at 20). The CRB City Prosecutor later filed a misdemeanor charge against Plaintiff for carrying a firearm in a city park in violation of a city ordinance.[5] (Id.).

Also on May 21, 2012, CRB Police Chief Leonardi informed Plaintiff that his request for an application and license to openly carry a loaded handgun could not be approved. (Id. at 21). Leonardi's email explained that state law (1) prohibits municipalities in counties with populations exceeding 200,000 persons from issuing open carry licenses and (2) limits a

---

found, Plaintiff's claims are facial, not "as applied," challenges to the relevant state statutes. (PI Order at 4).

[5] On May 13, 2013, Plaintiff entered a plea of nolo contendere to violating the CRB anti-carrying ordinance and was found guilty. (See RJN, Exh. A at 16). The Court will cite to the exhibits in Defendant's RJN as though each separate exhibit were consecutively paginated.

municipality's authority to issue any state handgun license to that city's residents only. (Id.). Because CRB is located in Los Angeles County, which has a population exceeding 200,000, and Plaintiff is not a resident of CRB, Plaintiff was unable to secure an open carry license from CRB. (Id.).

Plaintiff generally alleges that in addition to the incident on May 21, 2012, he "has frequently and countless times violated California Penal Code Section 25850, the Redondo Beach City Ordinances and other California statutes prohibiting firearms from being carried in non-sensitive public places." (Id. at 22). Plaintiff states that he will continue to "openly carry a loaded holstered handgun, loaded rifle and loaded shotgun," as well as unloaded firearms, in public places in CRB and around the state of California. (Id. at 23). Plaintiff specifically alleges that he will openly carry a firearm on August 7, 2013 in CRB and Torrance and on the seventh day of every month thereafter. (Id. at 22).

III.

PLAINTIFF'S CLAIMS

The SAC raises a single, multi-faceted claim under the Second, Fourth and Fourteenth Amendments against the California Attorney General. (SAC at 25-30). At issue are three California statutes that collectively prohibit, subject to numerous exceptions, the open carry of loaded and unloaded firearms and handguns in public, and fourteen statutes that govern the

issuance of licenses to carry concealable firearms to the extent that they infringe on the alleged "fundamental right" to open carry. (Id.). Plaintiff emphasizes that "[n]one of his challenges should be construed as challenging any California statute as it pertains to the carrying of a weapon concealed on one's person in a public place." (Id. at 29). Instead, Plaintiff appears to claim that the Second Amendment not only extends beyond the home, but also affirmatively requires states to authorize the open carry of firearms. (See id. at 27).

Specifically, the SAC challenges California Penal Code section 25850, which prohibits carrying a loaded firearm on the person or in a vehicle while in any public place or on any public street and authorizes peace officers to conduct warrantless chamber checks of any firearm carried by a person in a public place. (Id. at 26-28) (citing Cal. Penal Code § 25850).[6]

[6] California Penal Code section 25850 provides, in relevant part:

> (a) A person is guilty of carrying a loaded firearm when the person carries a loaded firearm on the person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory.
>
> (b) In order to determine whether or not a firearm is loaded for the purpose of enforcing this section, peace officers are authorized to examine any firearm carried by anyone on the person or in a vehicle while in any public place or on any public street in an incorporated city or prohibited area of an unincorporated territory. Refusal to allow a peace officer to inspect a firearm pursuant to this section constitutes probable cause for arrest for violation of this section.

Similarly, Plaintiff also challenges California's prohibitions on openly carrying unloaded handguns and firearms in public places.[7] (Id. at 28) (citing Cal. Penal Code §§ 26350 & 26400). Finally, Plaintiff challenges California's firearm licensing regime to the extent that it infringes on the right to open carry. (SAC at 29) (citing Cal. Penal Code §§ 26150, 26155, 26160, 26165, 26175, 26180, 26185, 26190, 26200, 26202, 26205, 26210, 26215 & 26220). However, although Plaintiff summarily lists nearly every statute in the chapter of California's Penal Code governing the issuance of licenses to carry concealable firearms, the only provisions

---

Cal. Penal Code § 25850.

[7] California Penal Code section 26350 provides in relevant part:

> A person is guilty of openly carrying an unloaded handgun when that person carries upon his or her person an exposed and unloaded handgun outside a vehicle while in or on any of the following:
>
> (A) A public place or public street in an incorporated city or city and county.
>
> (B) A public street in a prohibited area of an unincorporated area of a county or city and county.
>
> (C) A public place in a prohibited area of a county or city and county.

Cal. Penal Code § 26350(a)(1) (emphasis added). Subsection 26350(a)(2) prohibits carrying an "exposed or unloaded handgun inside or on a vehicle, whether or not on his or her person" in any of the same areas. Id. § 26350(a)(2) (emphasis added).

California Penal Code section 26400 provides in relevant part that "[a] person is guilty of carrying an unloaded firearm that is not a handgun in an incorporated city or city and county when that person carries upon his or her person an unloaded firearm that is not a handgun outside a vehicle while in the incorporated city or city and county." Cal. Penal Code § 26400(a) (emphasis added).

specifically relating to open carry that the SAC squarely addresses concern the population cap on counties that may issue open carry licenses.[8] (See SAC at 29). Sections 26150 and 26155 respectively provide that where the population of the county is less than 200,000 persons, a county sheriff or head of a municipal police department may issue "a license to carry loaded and exposed in only that county a pistol, revolver, or other firearm capable of being concealed upon the person." Cal. Penal Code §§ 26150(b)(2) & 26155(b)(2); (see also SAC at 29).

Plaintiff asserts four primary arguments to support his claims. First, Plaintiff alleges that the "Second Amendment invalidates [all of the challenged] California Statutes to the extent they prevent private citizens who are not otherwise barred from exercising their Second Amendment Right (examples of prohibited persons include convicted felons, mentally ill, etc.) from openly carrying firearms in non-sensitive public places, loaded and unloaded, for the purpose of self-defense and for other lawful purposes." (SAC at 27). Second, Plaintiff alleges that Section 25850(b) violates the Fourth Amendment by authorizing peace officers to inspect openly carried firearms to determine if they are loaded, and to arrest any person who does not consent to a chamber check, without a warrant. (Id. at 26).

[8] As noted above, Plaintiff has limited his suit solely to laws infringing on the "right" to open carry and is not challenging California's firearms scheme in its entirely. (SAC at 29). Accordingly, statutory provisions requiring applicants for firearms licenses to meet certain conditions, which Plaintiff does not specifically identify, are relevant only to the extent that they "pertain to licenses to carry firearms openly." (Id. at 29-30).

Third, Plaintiff raises a Fourteenth Amendment equal protection challenge to Sections 26150 and 26155 because they "restrict licenses to openly carry a loaded handgun only to persons [who reside] within counties of a population of fewer than 200,000 persons which is [sic] valid only in those counties . . . ." (Id. at 29). Fourth, Plaintiff alleges that Section 25850's prohibition on loaded open carry of weapons is unconstitutionally vague.[9] (Id. at 28).

Plaintiff seeks declaratory and injunctive relief prohibiting the enforcement of the challenged California statutes "to the extent that [they are] applied to prohibit private citizens who are otherwise qualified to possess firearms" from openly carrying loaded and unloaded firearms "on their own property, in their vehicles and in non-sensitive public places," or "prohibit or infringe private citizens" from obtaining licenses to engage in these activities. (Id. at 36-38).

\\

\\

[9] Plaintiff alleges that Section 25850 is unconstitutionally vague for three reasons. First, Plaintiff claims that it is vague because a "reasonable person would not conclude that either his private residential property or the inside of his motor vehicle is a public place." (SAC at 27). Second, it is vague because exceptions to the prohibition on open carry are "scattered throughout the California Penal Code to such an extent that . . . a reasonable person would have to spend days searching through the California statutes and case law and still be uncertain as to whether or not a particular act . . . is in violation of Section 25850." (Id. at 28). Third, Plaintiff claims the statute is vague because "[m]ere possession of matching ammunition cannot make an unloaded handgun [or firearm] 'loaded.'" (Id.).

IV.

THE PARTIES' MOTIONS

A. Plaintiff's Motion For Partial Summary Judgment

Plaintiff's MSJ challenges the constitutionality only of Sections 25850, 26350 and 26400, which collectively prohibit the open carry of loaded and unloaded firearms and handguns. (See MSJ at 2). Plaintiff does not seek summary judgment on his claims in the SAC relating to California's firearm licensing scheme or on his Section 25850 void-for-vagueness claim.[10]

Plaintiff raises three general arguments that he believes show his entitlement to summary judgment. First, Plaintiff argues that summary judgment is warranted because the Second Amendment protects the "basic right" of law-abiding gun owners to openly carry loaded and unloaded firearms for the purpose of self-defense in all non-sensitive public places. (MSJ at 10-11). According to Plaintiff, "[t]o carry arms openly (Open Carry) is the right guaranteed by the Constitution according to Heller." (See MSJ at 8; MSJ Reply at 12-13). Furthermore, to the extent that exceptions to the general prohibitions on open carry exist,

[10] In addition, the MSJ raises a new Fourteenth Amendment challenge based on the allegedly racist origins and application of Section 25850 that is not squarely put at issue in the SAC. (MSJ at 11-13). Accordingly, while the arguments raised by the parties in connection with the MSJ and the MJP largely overlap, they are not fully co-extensive and will be addressed separately in this Report and Recommendation where necessary.

Plaintiff contends that they are too narrow.[11] (MSJ at 9). Second, Plaintiff argues that section 25850's prohibition on carrying loaded firearms in public violates the Fourteenth Amendment's equal protection clause due to the statute's allegedly racist origins and disproportionate impact on minorities. (Id. at 11-12). Third, Plaintiff argues that Section 25850(b) violates the Fourth Amendment because the "mere refusal" to consent to a chamber check by an officer to verify whether an openly carried firearm is loaded cannot constitute probable cause for an arrest. (Id. at 10).

B. Defendant's Motion For Judgment On The Pleadings

Defendant argues in her Motion for Judgment on the Pleadings that all four of Plaintiff's claims in the SAC -- (1) the Second Amendment challenge to all statutes at issue, (2) the Fourth Amendment challenge to Section 25850's warrantless chamber check authorization, (3) the Fourteenth Amendment equal protection challenge to the restriction on open carry licenses to residents of counties with fewer than 200,000 persons, and (4) the claim

[11] Plaintiff's arguments concerning the existence or non-existence of exceptions to California's general open carry prohibitions are confusing and contradictory. He appears to find it significant that sections 25850 (loaded firearms), 26350 (unloaded handguns) and 26400 (unloaded firearms) do not contain any exceptions within the "plain text" of those specific sections. (MSJ Reply at 12). At the same time, he appears to acknowledge that those statutes are subject to exceptions found elsewhere in the Penal Code that allow for open carry in certain circumstances or by certain classes of people. (Id. at 13). It is unclear to the Court why or if Plaintiff believes that these statutory exceptions are somehow ineffective if not included in the specific section setting forth the general prohibition.

that Section 25850 is unconstitutionally vague -- fail as a matter of law. First, Defendant argues that open carry is not a core right protected by the Second Amendment, and even if the Second Amendment reaches outside the home, California's numerous exceptions to the general prohibition on open carry satisfy the requisite level of scrutiny. (MJP at 7-10; MJP Reply at 4-5). Second, Defendant argues that pursuant to Heck v. Humphries, 512 U.S. 477, 486-87 (1994), Plaintiff's misdemeanor conviction for violation of a CRB city ordinance bars his Fourth Amendment challenge to the warrantless chamber check authorized by section 25850(b). (MJP at 11). Furthermore, Defendant contends that because none of the open carry laws challenged by Plaintiff violates the constitution, an "officer seeing [a] person openly carry [a] firearm in a public place necessarily has probable cause to search the firearm to see if it is loaded." (Id. at 12; see also MJP Reply at 6-7) (emphasis omitted). Third, Defendant argues that California's restriction on open carry licenses to residents of counties with fewer than 200,000 person rationally furthers a legitimate state purpose and is therefore constitutional. (Id. at 11). Fourth, Defendant argues that Plaintiff's vagueness arguments are not cognizable, and even if they were, the challenged statutes are not vague. (MJP at 13).

\\

\\

\\

\\

\\

V.

STANDARDS

A. Summary Judgment

Pursuant to Federal Rule of Civil Procedure 56, a moving party's entitlement to summary judgment depends on whether or not the evidence, viewed in the light most favorable to the nonmoving party, contains genuine issues of material fact. See Adams v. Synthes Spine Co., LP, 298 F.3d 1114, 1116-17 (9th Cir. 2002). The moving party bears the initial burden of production and the ultimate burden of persuasion to establish the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

If the moving party carries its burden of production, the nonmoving party must go beyond the pleadings and produce evidence that shows a genuine issue for trial. Id. at 324; see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party is entitled to summary judgment if the nonmoving party "fails to produce enough evidence to create a genuine issue of material fact . . . ." Nissan Fire & Marine Ins. Co. v. Fritz Companies, 210 F.3d 1099, 1103 (9th Cir. 2000).

B. Judgment On The Pleadings

After the pleadings are closed, Federal Rule of Civil Procedure 12(c) permits a party to seek judgment on the

pleadings. Fed. R. Civ. P. 12(c). "A Rule 12(c) motion challenges the legal sufficiency of the opposing party's pleadings and operates in much the same manner as a motion to dismiss under Rule 12(b)(6)." Morgan v. County of Yolo, 436 F. Supp. 2d 1152, 1154-1155 (E.D. Cal. 2006). Under that standard, a complaint must contain "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). The plaintiff must articulate "enough facts to state a claim to relief that is plausible on its face." Id. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). The court must "accept all factual allegations in the complaint as true and construe them in the light most favorable to the non-moving party." Fleming v. Pickard, 581 F.3d 922, 925 (9th Cir. 2009). However, the court may properly "discount[] conclusory statements, which are not entitled to the presumption of truth . . . ." Chavez v. United States, 683 F.3d 1102, 1108 (9th Cir. 2012).

"When considering a motion for judgment on the pleadings, this court may consider facts that are contained in materials of which the court may take judicial notice." Heliotrope General, Inc. v. Ford Motor Co., 189 F.3d 971, 981 n.18 (9th Cir. 1999) (internal quotation marks omitted). Judicial notice may be taken "where the fact is 'not subject to reasonable dispute,' either because it is 'generally known within the territorial

jurisdiction,' or is 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" Castillo-Villagra v. I.N.S., 972 F.2d 1017, 1026 (9th Cir. 1992) (quoting Fed. R. Evid. 201(b)). Courts may take judicial notice of matters of public record without converting a motion for judgment on the pleadings into a motion for summary judgment. Xcentric Ventures, L.L.C. v. Borodkin, 934 F. Supp. 2d 1125, 1134 (D. Ariz. 2013).

C. Facial Challenges

As previously noted, a "claim is 'facial' [if] . . . it is not limited to plaintiffs' particular case, but challenges the application of the law more broadly . . . ." John Doe No. 1, 130 S. Ct. at 2817. Facial challenges are disfavored. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450 (2008). A facial challenge to a legislative Act is "'the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [statute] would be valid.'" Alphonsus v. Holder, 705 F.3d 1031, 1042 (9th Cir. 2013) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987) (brackets in original)); see also Issacson v. Horne, 716 F.3d 1213, 1230-31 (9th Cir. 2013) (Salerno's "no set of circumstances" standard applies to all facial challenges except in First Amendment and abortion cases); Alphonsus, 705 F.3d at 1042 n.10 (same). "[A] generally applicable statute is not facially invalid unless the statute 'can never be applied in a constitutional manner,'" United States v. Kaczynski, 551 F.3d

1120, 1125 (9th Cir. 2009) (quoting Lanier v. City of Woodburn, 518 F.3d 1147, 1150 (9th Cir. 2008) (emphasis in original)), or "lacks any 'plainly legitimate sweep.'" United States v. Stevens, 559 U.S. 460, 472 (2010) (quoting Washington v. Glucksberg, 521 U.S. 702, 740 n.7 (1997) (Stevens, J., concurring in judgments) (internal quotation marks omitted)).

VI.

DISCUSSION

A. Plaintiff's Motion For Partial Summary Judgment

1. Second Amendment

Plaintiff contends that the Supreme Court's decision in District of Columbia v. Heller, 554 U.S. 570 (2008), which was applied to the states in McDonald v. City of Chicago, Ill., __ U.S. __, 130 S. Ct. 3020 (2010), should be interpreted to support a blanket right for qualified persons to openly carry arms outside the home "except in certain public places the Court called 'sensitive,'" such as schools and government buildings. (MSJ at 8-9). According to Plaintiff, the Supreme Court's finding that individual self-defense is a "basic right" and the "core component" of the Second Amendment means that the right to carry arms openly for the purpose of self-defense is fundamental and does not "evaporate[] the moment one steps outside of his home." (Id. at 8 & 11; see also MSJ Reply at 15).

Following this Court's decision denying Plaintiff's preliminary injunction motion, the Ninth Circuit formally adopted a two-step inquiry to be applied in Second Amendment challenges. See United States v. Chovan, 735 F.3d 1127, 1136 (9th Cir. 2013) (citing with approval and explicitly adopting two-step inquiry taken by United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010), and United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010), cert. denied, 131 S. Ct. 958 (2011)). First, the court "asks whether the challenged law burdens conduct protected by the Second Amendment" as historically understood. Chovan, 735 F.3d at 1136. Second, if the challenged law does burden protected conduct, or if the lack of historical evidence in the record renders the court unable to say that the Second Amendment's protections did not apply to the conduct at issue, the court "'must assume'" that the plaintiff's Second Amendment rights "'are intact'" and "apply an appropriate level of scrutiny." Chovan, 735 F.3d at 1136-37 (quoting Chester, 628 F.3d at 681). The level of scrutiny depends on (1) "'how close the law comes to the core of the Second Amendment right,'" and (2) "'the severity of the law's burden on the right.'" Chovan, 735 F.3d at 1138 (quoting Ezell v. City of Chicago, 651 F.3d 684, 703 (7th Cir. 2011)). According to the Chovan Court, "the core of the Second Amendment is 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" Chovan, 735 F.3d at 1138 (quoting Heller, 554 U.S. at 635)).[12]

[12] The Chovan court concluded that where the core Second Amendment right of self-defense of hearth and home is not at issue but the burden on the right to bear arms is substantial, "intermediate

On February 13, 2014, the Ninth Circuit issued a decision in Peruta v. County of San Diego, __ F.3d __, 2014 WL 555862 (9th Cir. Feb. 13, 2014) in which it held that "the right to bear arms includes the right to carry an operable firearm outside the home for the lawful purpose of self-defense . . . ." Id. at *18. Peruta involved a challenge to San Diego County's policy concerning the procedures for obtaining a concealed carry license.[13] Id. at *1. As a preliminary matter, the Peruta Court noted that "California law has no permitting provision for open carry" in San Diego County. Id. at *20. Accordingly, under California's licensing scheme, only concealed carry permits are available to San Diego County residents. Id. (citing Cal. Penal Code §§ 26150, 26155). The Peruta Court found that in light of California's choice to prohibit open carry "in virtually all circumstances," San Diego County's policy limiting the issuance of concealed carry licenses only to applicants who can show "good cause" amounted to the "destruction" of the Second Amendment rights of "the typical, responsible, law-abiding citizen" who desired to carry a loaded weapon outside the home for self-protection, even in the absence of a showing of immediate, articulable danger. (Id. at *20).

---

rather than strict scrutiny is the proper standard to apply." Chovan, 735 F.3d at 1138.

[13] "California law delegates to each city and county the power to issue a written policy setting forth the procedures for obtaining a concealed-carry license." Peruta, 2014 WL 555862 at *1 (citing Cal. Penal Code § 26160).

Importantly, and fatal to Plaintiff's open carry claims in this case, in reaching this conclusion the Peruta Court also found that:

> [T]he state has a right to prescribe a particular manner of carry, provided that it does not "cut[] off the exercise of the right of the citizen altogether to bear arms, or, under the color of prescribing the mode, render[] the right itself useless." [Nunn v. State, 1 Ga. 243, 243 (1846)). California's favoring concealed carry over open carry does not offend the Constitution, so long as it allows one of the two.
>
> To put it simply, concealed carry per se does not fall outside the scope of the right to bear arms; but insistence upon a particular mode of carry does. As we have explained previously, this is not the latter type of case. Peruta seeks a concealed carry permit because that is the only type of permit available in the state. As the California legislature has limited its permitting scheme to concealed carry -- and has expressed a preference for that manner of arms-bearing -- a narrow challenge to the San Diego County regulations on concealed carry, rather than a broad challenge to the state-wide ban on open carry, is permissible.

Peruta, 2014 WL 555862 at *24 (footnotes omitted; emphasis added).

Plaintiff's claim is exactly the type of "broad challenge" insisting on a purported right to a particular mode of carry that the Peruta Court found does not implicate the Second Amendment. Unlike the plaintiffs in Peruta, who claimed that the Second Amendment required the state to "permit some form of carry for self-defense outside the home," Plaintiff claims that the Second Amendment affirmatively requires California to permit a specific mode of carry, i.e., open carry.[14] Id. However, the Ninth Circuit has found that the Second Amendment does not protect a purported "right" to one mode of carry over another and a state "has a right to prescribe a particular manner of carry . . . ." Id. Therefore, Plaintiff's Second Amendment challenge fails at the first step of the two-step analysis adopted by the Chovan Court. Chovan, 735 F.3d at 1136. Because the Ninth Circuit instructs that the Second Amendment as it is historically understood is not implicated by a state's decision to favor (or disfavor) one mode of carry, there is no "burden" on any constitutional right to analyze at the second step of the Chovan

[14] Accordingly, Plaintiff's case is not simply the mirror image of the challenge at issue in Peruta. According to the Ninth Circuit, the plaintiffs in Peruta accepted that the Second Amendment does not require a state to authorize a particular mode of public carry, but argued that once a state has made a choice to favor one form of public carry, it cannot foreclose the other form of public carry without offending the Second Amendment. Peruta, 2014 WL 555862 at *24. In the current action, Plaintiff claims that the Second Amendment requires a state to authorize open carry. (See SAC at 3).

analysis. Accordingly, rational basis review applies.[15] See Peruta, 2014 WL 555862 at *24; Nordyke v. King, 681 F.3d 1041, 1043 n.2 (9th Cir. 2012) (en banc) ("[B]ecause we hold that the ordinance does not violate either the First or Second Amendments, rational basis scrutiny applies.").

Under rational basis review, a court will uphold a statute if "the ordinance is rationally-related to a legitimate government interest." Honolulu Weekly, Inc. v. Harris, 298 F.3d 1037, 1047 (9th Cir. 2002); see also Wright v. Incline Village General Improvement Dist., 665 F.3d 1128, 1140 (9th Cir. 2011). As this Court has previously found, the governmental objective at issue here is more than just "legitimate" because "California has a substantial interest in increasing public safety by restricting the open carry of firearms, both loaded and unloaded." (PI Order at 7). California courts have explained that the statutory regime regulating the carrying of loaded firearms in public was designed "to reduce the incidence of unlawful public shootings, while at the same time respecting the need for persons to have access to firearms for lawful purposes, including self-defense." People v. Flores, 169 Cal. App. 4th 568, 576 (2008) (emphasis in original). Likewise, the Legislative Histories discussing Sections 26350 (unloaded handguns) and 26400 (unloaded firearms) explain in identical language that these statutes were enacted because:

[15] Furthermore, because the Second Amendment does not protect the right that Plaintiff seeks to assert, the cases submitted as Supplemental Authority in support of Plaintiff's Second Amendment challenge are irrelevant.

The absence of a prohibition on "open carry" has created an increase in problematic instances of guns carried in public, alarming unsuspecting individuals causing issues for law enforcement.

Open carry creates a potentially dangerous situation. In most cases when a person is openly carrying a firearm, law enforcement is called to the scene with few details other than one or more people are present at a location and are armed.

In these tense situations, the slightest wrong move by the gun carrier could be construed as threatening by the responding officer, who may feel compelled to respond in a manner that could be lethal. In this situation, the practice of "open carry" creates an unsafe environment for all parties involved: the officer, the gun-carrying individual, and for any other individuals nearby as well.

Additionally, the increase in "open carry" calls placed to law enforcement has taxed departments dealing with under-staffing and cutbacks due to the current fiscal climate in California, preventing them from protecting the public in other ways.

(Dkt. No. 104, Eisenberg Decl., Ex. A at AG0021 (legislative history of A.B. No. 144 re unloaded handguns) & Ex. B at AG0092 (legislative history of A.B. No. 1527 re unloaded firearms)).[16]

The Court also finds that the challenged prohibitions are more than merely rationally related to the objective of increasing public safety. California has determined that regulating the carrying of loaded firearms in public reduces public shootings. Allowing the open carry of unloaded handguns and firearms would create an unsafe environment for law enforcement, the person carrying the firearm, and bystanders. At the same time, California has created numerous exceptions that allow for the open carry of loaded and unloaded handguns and firearms.[17] See Cal. Penal Code §§ 25900-26060, 26361-26391, 26405. However, even assuming, as the Peruta court found, that despite these exceptions, open carry is illegal in California "in

[16] The Court takes judicial notice of the legislative histories of A.B. Nos. 144 and 1527. See Anderson, 673 F.3d at 1094 fn.1.

[17] For example, each of the challenged statutes is subject to an exception for self-defense. Cal. Penal Code §§ 26045(a) (self-defense exception to Section 25850's prohibition on carrying loaded firearms in public), 26362 (incorporating certain Section 25850 exceptions, including the self-defense exception, and applying them to Section 26350's prohibition on the open carry of unloaded handguns), 26405(f) (incorporating certain Section 25850 exceptions, including the self-defense exception, and applying them to Section 26400's prohibition on the open carry of unloaded firearms). In addition, Sections 25850, 26350 and 26400 are each subject to numerous other exceptions, including, for example, exceptions for defense of property, hunters, target shooters, police officers, members of the military, security guards, persons who possess firearms on their own property, and persons who possess a firearm at their lawful residence, "including any temporary residence or campsite." Id. §§ 25900-26060, 26361-62, 26405(e-f).

virtually all circumstances," California's choice to prohibit a particular form of carry does not implicate the Second Amendment and the challenged prohibitions on open carry are rationally related to the legitimate state goal of public safety. Accordingly, Plaintiff's Motion for Partial Summary Judgment on his Second Amendment claim as applied to Sections 25850, 26350 and 26400 should therefore be DENIED.

2. Fourteenth Amendment

A central argument in the MSJ and its accompanying exhibits appears to be that Section 25850 violates the 14th Amendment's equal protection clause due to the statute's allegedly racist origins and application.[18] (MSJ 11-13). Plaintiff asserts that "[t]he ban on openly carrying loaded firearms was enacted in July of 1967 with the unmistakable purpose of disarming minorities and that ban is disproportionately enforced against minorities today." (MSJ at 9). Accordingly, Plaintiff contends that Section 25850 is unconstitutional and that summary judgment is proper. (See MSJ Reply at 5).

There are two procedural infirmities with Plaintiff's race-based equal protection claim as alleged in the MSJ, each of which is independently dispositive. First, the SAC does not assert an equal protection claim against the Attorney General based on

[18] The Court notes that Section 25850, like all of the statutes at issue in this litigation, is facially race-neutral. Cal. Penal Code § 25850.

Section 25850's allegedly racist origins and application. (See generally SAC at 25-30). Therefore, the claim cannot be asserted on summary judgment as it has not been properly placed at issue and litigated. See, e.g., Coleman v. Quaker Oats Co., 232 F.3d 1271, 1294 (9th Cir. 2000) (where plaintiff neither asserted claim in the complaint nor made known his intention to pursue recovery on the claim during discovery, assertion of that ground for relief on summary judgment was improper). While the SAC briefly alleges in its fact section that Section 25850's origins and application reflect racial animus, (see SAC at 17-19), the SAC cannot be fairly read, even when liberally construed, to elevate this background assertion into a race-based equal protection claim against the Attorney General. (See SAC at 25-30).

However, even if, as Plaintiff argues, he has always included a race-based "suspect classification" [sic] claim in this action, the claim is not cognizable because Plaintiff does not have standing to assert it. (MSJ Reply at 4); see also Chapman v. Pier 1 Imports (U.S.) Inc., 631 F.3d 939, 954 (9th Cir. 2011) (federal courts "are required sua sponte to examine jurisdictional issues such as standing," which is not waivable and must be demonstrated "at the successive stages of the litigation") (internal quotation marks omitted). To have Article III standing to pursue a claim, the plaintiff must show that he has suffered an "injury in fact." Maya v. Centex Corp., 658 F.3d 1060, 1067 (9th Cir. 2011). "The Supreme Court has repeatedly refused to recognize a generalized grievance against allegedly

illegal government conduct as sufficient to confer standing." Carroll v. Nakatani, 342 F.3d 934, 940 (9th Cir. 2003) (citing United States v. Hays, 515 U.S. 737, 743 (1995)). "[T]he rule against generalized grievances applies in equal protection challenges." Carroll, 342 F.3d at 940-41. To state an equal protection claim under section 1983, a plaintiff typically must allege that "'defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class.'" Furnace v. Sullivan, 705 F.3d 1021, 1030 (9th Cir. 2013) (quoting Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998) (emphasis added)).

According to the criminal complaint filed in CRB's misdemeanor action against Plaintiff, Plaintiff is white. (RJN, Exh. A at 8). In addition, nowhere in the record does Plaintiff contend that he is a member of a racial minority or that he has suffered discrimination because of his race. Therefore, even if Section 25850 was motivated by a racist design and has had a disproportionate impact on racial minorities, facts which Plaintiff has not proved, the statute and its predecessor were not enacted with the intent or purpose to discriminate against Plaintiff and do not threaten to have a disproportionate impact against Plaintiff because of his race. "[E]ven if a government actor discriminates on the basis of race, the resulting injury 'accords a basis for standing only to those persons who are personally denied equal treatment.'" Carroll, 342 F.3d at 940 (quoting Allen v. Wright, 468 U.S. 737, 755 (1984)); see also Doe ex rel. Doe v. Lower Merion School Dist., 665 F.3d 524, 542 n.28

(3d Cir. 2011) ("In the equal protection context, an injury resulting from governmental racial discrimination 'accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct.'") (quoting Hays, 515 U.S. at 744-45); RK Ventures, Inc. v. City of Seattle, 307 F.3d 1045, 1055 (9th Cir. 2002) ("' [A] white plaintiff generally does not have standing under Section 1983 solely for the purpose of vindicating the rights of minorities who have suffered from racial discrimination.'") (quoting Maynard v. City of San Jose, 37 F.3d 1396, 1402 (9th Cir. 1994)); Halet v. Wend Inv. Co., 672 F.2d 1305, 1307 n.1 (9th Cir. 1982) (white plaintiff denied an apartment due to the complex's adults-only rental policy lacked standing to challenge that policy on the ground that it had a greater adverse effect on minorities).[19]

Because the SAC failed to allege a race-based equal protection claim against the Attorney General and, alternatively, because Plaintiff does not have standing to raise such a claim even if he had attempted to do so, Plaintiff's race-based equal protection challenge to Section 25850 is not cognizable in this action. Accordingly, Plaintiff is not entitled to summary judgment on the ground that Section 25850 violates the Fourteenth

[19] Even if Plaintiff had standing to assert a race-based equal protection claim and had properly put the claim at issue here, Plaintiff would still not be entitled to summary judgment on this claim. The record is simply not sufficiently developed for Plaintiff to establish the absence of a genuine issue of material fact as to the origins and application of Section 25850 and its predecessor. (See MSJ at 3 & 8); see also Celotex Corp., 477 U.S. at 323.

Amendment due to its allegedly racist origin and application. See Coleman, 232 F.3d at 1292.

3. Fourth Amendment

Pursuant to Section 25850(b), peace officers are authorized to examine "any firearm carried by anyone on the person or in a vehicle while in any public place or on any public street." Cal. Penal Code 25850(b). The statute further provides that "[r]efusal to allow a peace officer to inspect a firearm pursuant to this section constitutes probable cause for arrest for violation of this section." Id. Plaintiff briefly argues in his MSJ that Section 25850(b) violates the Fourth Amendment because "the mere refusal to consent to a search" cannot constitute probable cause for an arrest.[20] (MSJ at 10) (citing United States v. Fuentes, 105 F.3d 487, 490 (9th Cir. 1997)).

[20] The Court disagrees with Defendant that Plaintiff's misdemeanor conviction for violation of Redondo Beach Municipal Section 4-35.20(a), which prohibits carrying a weapon "across, in, or into a park," necessarily bars Plaintiff's challenge to California Penal Code Section 25850(b). (See MJP RJN, Exh. A (CRB criminal complaint); see also MSJ Opp. at 17). Pursuant to the Heck doctrine, a Section 1983 complaint must be dismissed if judgment in favor of the plaintiff would undermine the validity of his conviction or sentence, unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. Heck, 512 U.S. at 486-87. Even if Plaintiff's constitutional challenge to Section 25850(b) were successful, a favorable finding on that claim would not undermine the validity of Plaintiff's misdemeanor conviction. While the record is not entirely clear, it appears that Plaintiff was arrested (and convicted) for carrying a firearm in a city park, not for refusing to consent to a search of his weapon. (See MJP RJN, Exh. A (CRB criminal complaint)).

The Fourth Amendment protects the "right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" absent a warrant supported by probable cause. U.S. Const. amend. IV. Warrantless arrests must be supported by probable cause. United States v. Lopez, 482 F.3d 1067, 1072 (9th Cir. 2007). "Probable cause" is "knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person being arrested." Id. Accordingly, a determination of probable cause generally requires a factual analysis of "the totality of the circumstances known to the officers at the time of the search." Lacey v. Maricopa Cnty., 693 F.3d 896, 918 (9th Cir. 2012) (en banc).

Plaintiff's argument is predicated on the dual propositions that (1) the inspection of a firearm by a peace officer to see if it is loaded constitutes a "search" under the Fourth Amendment, and (2) the exercise of a constitutional right, i.e., Plaintiff's refusal to consent to a warrantless search, can never provide probable cause for an arrest. As a preliminary matter, it is questionable whether a chamber check constitutes a "search" under the Fourth Amendment. "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." United States v. Jefferson, 566 F.3d 928, 933 (9th Cir. 2009) (internal quotation marks omitted); see also Illinois v. Andreas, 463 U.S. 765, 771 (1983) ("The Fourth Amendment protects legitimate expectations of privacy . . . . If the inspection by police does not intrude upon a legitimate

expectation of privacy, there is no 'search' subject to the Warrant Clause."). As the California Court of Appeal observed in upholding the constitutionality of the substantively identical predecessor to Section 25850(b):

> In the first place, the examination of the weapon may hardly be deemed to be a search at all. The chamber of a gun is not the proper or usual receptacle for anything but a bullet or a shell. The loading of a gun simply affects the condition of the weapon by making it immediately useful for firing. The ammunition becomes, as it were, part of the gun. There is nothing private or special or secret about a bullet. The use of the word 'examine' in the statutes instead of the word 'search' is not at all a devious one. In examining the weapon, the officers are not attempting to find some kind of contraband which is unrelated to the gun itself.

People v. Delong, 11 Cal. App. 3d 786, 791-92 (1970). Accordingly, a person who displays a weapon in public does not have a privacy interest that "society is prepared to consider reasonable" in the condition of the gun, i.e., whether it is loaded and presents an immediate potential threat to public safety. Jefferson, 566 F.3d at 933.

However, even if an examination of a firearm to see if it is loaded is properly considered a "search," it still would not

appear to implicate the Fourth Amendment. As the Delong court explained:

> But if the examination may be called a search, it is not an unreasonable one; and only unreasonable searches are forbidden by the Fourth Amendment. (Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 [1968].) It is, as we have said, limited to a single purpose. It does not have about it any except the slightest element of embarrassment or annoyance, elements overbalanced by far by the purpose of preventing violence or threats of violence. The minimal intrusion does not begin to approach the indignity of the frisk, as graphically described in Terry v. Ohio, Supra, at p. 17, fn.13, 88 S. Ct. 1868 [1968]. . . . [¶] [W]e hold that the mere examination of a weapon which is brought into a place where it is forbidden to have a loaded weapon, is not unreasonable and that the statutes authorizing such examination are constitutional.

Delong, 11 Cal. App. 3d at 792-93; see also United States v. Brady, 819 F.2d 884, 889 (9th Cir. 1987) (citing Delong with approval for the proposition that under the predecessor to current section 25850(b), "police may inspect a firearm which they know is in a vehicle, regardless of whether they have probable cause to believe that it is loaded").

Accordingly, Plaintiff's reliance on United States v. Fuentes for the proposition that "[m]ere refusal to consent to a . . . search does not give rise to reasonable suspicion or probable cause" is inapposite. (MSJ at 10); see also Fuentes, 105 F.3d at 490. A chamber check is arguably not a "search" because it does not infringe on a reasonable expectation of privacy and even if it is, the Fourth Amendment is not implicated because such a search is reasonable. Plaintiff's reliance on Patel v. City of Los Angeles also appears misplaced. (See Dkt. No. 150, Notice of Supplemental Authority). The Patel Court found that a Los Angeles city ordinance that authorized police officers to inspect private hotel guest records at any time without consent and without a warrant was facially invalid under the Fourth Amendment. Patel, 738 F.3d at 1061. Critical to the court's decision was the recognition that hotels retain a "reasonable expectation of privacy" in the content of their private guest records. Id. at 1061-62. The court noted, however, that if the records were available for public view, they would not be protected by the Fourth Amendment because "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Id. at 1062 (internal quotation marks omitted). Because the ordinance at issue in Patel systematically authorized warrantless inspections without providing an opportunity for judicial review of the reasonableness of the inspection demand, the ordinance failed a facial challenge. Id. at 1065. Patel is easily distinguishable from the facts alleged here. A person who openly carries a firearm in public does not have the same reasonable

expectation of privacy regarding the condition of that weapon, whether it is loaded or unloaded, that a hotel owner has in the contents of privately maintained guest records unavailable for public view. Accordingly, Plaintiff has failed to show the existence of a federal constitutional right by his refusal to allow an officer to inspect a weapon carried in public.

However, Plaintiff's Fourth Amendment claim still fails even if, as a hypothetical matter, there may be some circumstances in which a person openly carrying a firearm in public has a cognizable privacy interest in preventing law enforcement from determining whether the firearm is loaded, which Plaintiff has not shown. Plaintiff is mounting a facial challenge and must therefore establish that "no set of circumstances exists under which the Act would be valid." (PI Order at 10) (quoting Salerno, 481 U.S. at 745). It is readily apparent to the Court that the refusal to permit a peace officer to inspect an openly-carried firearm may provide probable cause in any number of circumstances. Plaintiff has not shown that there are no circumstances under which section 25850(b) may be applied constitutionally. Accordingly, Plaintiff is not entitled to summary judgment on his claim that Section 25850(b) violates the Fourth Amendment.

Plaintiff has failed to show the absence of triable issues of material fact with respect to the constitutionality of Sections 25850, 26350 and 26400. Indeed, the Court has found that all of these Sections easily survive a facial constitutional

challenge. Accordingly, it is recommended that Plaintiff's Motion for Partial Summary Judgment be DENIED.

B. Defendant's Motion For Judgment On The Pleadings

1. Second Amendment

The Court has addressed Plaintiff's Second Amendment arguments as applied to the prohibitions on loaded and unloaded open carry in Sections 25850, 26350 and 26400 in Part VI.A.1 above. Because the Court considered only facts included in the pleadings or properly subject to judicial notice in its analysis of Plaintiff's MSJ claims, and because the issues presented in this facial challenge involve solely issues of law, the Court's analysis applies to both Plaintiff's MSJ and Defendant's MJP. Fleming, 581 F.3d at 925 (court must accept facts alleged as true); Xcentric Ventures, 934 F. Supp. 2d at 1134 (judicial notice of matters of public record does not convert motion for judgment on the pleadings into motion for summary judgment). After the SAC was filed, the Ninth Circuit has clarified that the

Second Amendment does not protect any particular mode of carry in public for self-defense. Peruta, 2014 WL 555862 at *24. The Court therefore concludes that Defendant is entitled to judgment on the pleadings to the extent that the SAC alleges that Sections 25850, 26350 and 26400 violate the Second Amendment.

However, Plaintiff did not move for summary judgment on his claims involving California's firearm licensing regime codified at California Penal Code Sections 26150-26220. The SAC summarily argues that these statutes are "invalid" to the extent that they "prohibit, or infringe, PLAINTIFF and private citizens who are otherwise eligible to possess a firearm from openly carrying a loaded and operable handgun for the purpose of self-defense in non-sensitive places." (SAC at 29). Other than this broad allegation, with the exception of Plaintiff's challenge to the restriction on open carry licenses to residents of counties of fewer than 200,000 people, Plaintiff fails to explain why the specific licensing provisions listed in the SAC inhibit the alleged right to openly carry a firearm or violate the Second Amendment.[21] Accordingly, these claims fail and Defendant is

[21] Plaintiff merely asserts that "no license is required for a private citizen to exercise his Second Amendment right to self-defense," or, in the alternative, that the only requirements for the issuance of an open carry license should be the provision of information "required to undergo a background check through the FBI National Instant Criminal Background Check System (NICS)." (SAC at 36, ¶ 85). Plaintiff does not identify the information an applicant is required to provide for a NICS background check. (Id.).

In addition, even Plaintiff's argument regarding the county population cap where open carry licenses may be issued does not appear to be based on the Second Amendment. The gravamen of that

entitled to judgment on the pleadings on Plaintiff's Second Amendment licensing claims. See Twombly, 550 U.S. at 555 (complaint must contain more than conclusory allegations and formulaic recitations); BankAmerica Pension Plan v. McMath, 206 F.3d 821, 826 (9th Cir. 2000) (a party "abandons an issue when it has a full and fair opportunity to ventilate its views with respect to an issue and instead chooses a position that removes the issue from the case," such as by failing to raise the issue in a complaint or develop it during discovery).

Furthermore, because Plaintiff's licensing challenge is predicated on the erroneous contention that the Second Amendment requires a state to authorize open carry, it fails for the same reasons that his Second Amendment challenge to Sections 25850, 26350 and 26400 fails. Because the Second Amendment does not guarantee a specific mode of carry, California's firearm licensing scheme as it applies solely to a purported "right" to open carry does not raise constitutional concerns and need only be rationally related to a legitimate government interest. Peruta, 2014 WL 555862 at *24; Nordyke, 681 F.3d at 1043 n.2. The state plainly has an interest in public safety that is furthered by setting conditions on firearm licenses. Although Plaintiff has not identified which licensing conditions he believes infringe on open carry, it is self-evident that California may place some conditions on the issuance of a firearms license, as even Plaintiff admits that felons and the

---

argument appears to be grounded in the Fourteenth Amendment's equal protection clause. (SAC at 5 & 29).

mentally ill may be screened. (SAC at 27). In this facial challenge, Plaintiff must show that no circumstances exist in which California's licensing regime as it affects open carry is constitutional. Alphonsus, 705 F.3d at 1042. Bare assertions of a right to open carry fail to meet that burden. After the SAC was filed, the Ninth Circuit has clarified that the Second Amendment does not protect any particular mode of public carry. Peruta, 2014 WL 555862 at *24. Accordingly, Defendant is entitled to judgment on the pleadings on Plaintiff's claim that California's licensing regime violates the Second Amendment as it pertains to an alleged "right" to open carry.

2. Fourth Amendment

The Court addressed Plaintiff's Fourth Amendment challenge to Section 25850(b) in Part VI.A.3 above. Because the Court considered only facts included in the pleadings or properly subject to judicial notice in its discussion of Section 25850(b), and because the issues presented in this facial challenge involve solely issues of law, the Court's analysis applies to both Plaintiff's MSJ and Defendant's MJP. Fleming, 581 F.3d at 925; Xcentric Ventures, 934 F. Supp. 2d at 1134. The Court therefore concludes that Defendant is entitled to judgment on the pleadings to the extent that the SAC alleges that Section 25850(b) violates the Fourth Amendment.

3. Fourteenth Amendment

Plaintiff alleges that California's firearms licensing scheme is unconstitutional to the extent that it restricts "licenses to openly carry a loaded handgun only to persons within counties of a population of fewer than 200,000 persons which is valid only in those counties, to only those residents who reside within those counties and leaves the issuance of such licenses solely to the discretion of the issuing authority . . . ." (SAC at 29); see also Cal. Penal Code §§ 26150(b)(2) & 26155(b)(2). Construed liberally, Plaintiff alleges an equal protection claim under the Fourteenth Amendment based on the allegedly improper classification of open carry license applicants according to the population size of the county in which they reside.

The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." Plyler v. Doe, 457 U.S. 202, 216 (1982). The Constitution does not "forbid classifications[,]" but "simply keeps governmental decision makers from treating differently persons who are in all relevant respects alike." Nordlinger v. Hahn, 505 U.S. 1, 10 (1992). In determining whether a classification violates the Equal Protection Clause, the first step is to identify "the proper level of scrutiny to apply for review." Honolulu Weekly, 298 F.3d at 1047.

A Court will apply strict scrutiny if the statute "targets a suspect class or burdens the exercise of a fundamental right." Wright v. Incline Village Gen. Improvement Dist., 665 F.3d 1128, 1141 (9th Cir. 2011) (internal quotation marks omitted); see also Kahawaiolaa v. Norton, 386 F.3d 1271, 1277 (9th Cir. 2004) (identifying race, ancestry, and alienage as "suspect classifications" and rights such as privacy, marriage, voting, travel and freedom of association as "fundamental"). Under strict scrutiny, a law will survive an equal protection challenge only if "the state can show that the statute is narrowly drawn to serve a compelling state interest." Green v. City of Tuscon, 340 F.3d 891, 896 (9th Cir. 2003). "Laws are subject to intermediate scrutiny when they discriminate based on certain other suspect classifications, such as gender." Kahawaiolaa, 386 F.3d at 1277. Under intermediate scrutiny, "the statute will be upheld if the government can demonstrate that the classification 'substantially furthers an important government interest.'" Green, 340 F.3d at 896 (quoting Kirchberg v. Feenstra, 450 U.S. 455, 460, 101 S. Ct. 1195, 67 L. Ed. 2d 428 (1981)). However, if a classification "does not concern a suspect or semi-suspect class or a fundamental right, [the courts] apply rational basis review and simply ask whether the ordinance is rationally-related to a legitimate government interest." Honolulu Weekly, 298 F.3d at 1047 (internal quotation marks omitted).

Here, the Court has already concluded that California's licensing regime, including the classification of applicants by county size, as it pertains solely to a purported right to open

carry does not implicate the Second Amendment. Accordingly, rational basis review applies. See Nordyke, 681 F.3d at 1043 n.2. It is readily apparent that restricting open carry licenses to residents of sparsely-populated counties "rationally further[s] a legitimate state purpose." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 54 (1983). The Legislature could rationally determine that openly carrying firearms poses a greater threat to public safety in densely-populated urban areas than in sparsely-populated rural areas. Accordingly, Plaintiff's facial challenge to the restrictions on the issuance of open carry licenses to applicants living in counties of fewer than 200,000 residents fails. Defendant is entitled to judgment on the pleadings on Plaintiff's equal protection claim.

4. Vagueness

Plaintiff alleges that Section 25850, as part of a statutory regime regulating the carriage of loaded firearms in public, is unconstitutionally vague. (SAC at 28). However, as the Court observed in denying Plaintiff's Motion for Preliminary Injunction, "facial challenges on the ground of unconstitutional vagueness that do not involve the First Amendment are not cognizable pursuant to Ninth Circuit precedent." (PI Order at 10) (citing United States v. Purdy, 264 F.3d 809, 811 (9th Cir. 2001)). Plaintiff is mounting a facial challenge, and his claims concerning Section 25850 do not implicate the First Amendment. Accordingly, Defendant is entitled to judgment on the pleadings

to the extent that the SAC can be construed as raising a void-for-vagueness claim as to Section 25850.

As described more fully above, all of Plaintiff's challenges to California's laws regulating open carry and the issuance of firearms licenses related to the purported right to open carry are without merit. In analyzing Plaintiff's claims, the Court relied solely on facts alleged in the SAC or facts that are properly subject to judicial notice. After the SAC was filed, the Ninth Circuit has clarified that the Second Amendment does not guarantee any particular mode of public carry. Peruta, 2014 WL 555862 at *24. Accordingly, it is recommended that Defendant's Motion for Judgment on the Pleadings be GRANTED.

VII.

CONCLUSION

For the reasons stated above, it is recommended that the Court (1) DENY Plaintiff's Motion for Partial Summary Judgment; (2) GRANT Defendant's Motion for Judgment on the Pleadings; and (3) DISMISS this action WITH PREJUDICE.

DATED: March 18, 2014

/S/
SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file Objections as provided in Local Civil Rule 72 and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHARLES NICHOLS, Plaintiff, v. EDMUND G. BROWN, et al., Defendants.	NO. CV 11-09916 SJO (SS) **ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the First Amended Complaint, all the records and files herein, the Report and Recommendation of the United States Magistrate Judge, Defendant Kamala D. Harris's Objections to the Report and Recommendation, Plaintiff's Response to Harris's Objections, and Plaintiff's "Supplemental Authorities". After having made a de novo determination of the portions of the Report and Recommendation to which Harris's Objections and Plaintiff's Response were directed, the Court accepts and adopts the findings, conclusions and recommendations of the Magistrate Judge, with the following correction: the date on line 23, page 1 of the Report and Recommendation is amended to reflect the filing date of the First Amended Complaint, i.e., May 30, 2012. In addition, the Court will

address below certain arguments raised by the Parties in their Objections and Response to the Report and Recommendation.

Harris's primary objection is that Plaintiff lacks standing to challenge California's general ban on carrying a loaded weapon in public because Plaintiff has failed to allege an injury-in-fact. (Obj. at 3-11). Harris contends that Plaintiff's alleged injuries are not sufficiently particularized because Plaintiff "has admittedly never before been arrested or prosecuted under Section 25850 . . . ." (Obj. at 6). According to Harris, the Court must disregard any allegations that Plaintiff has in the past unlawfully carried a loaded firearm because Plaintiff earlier submitted "a sworn declaration in this action avowing that he has never violated Section 25850 (out of fear of being arrested and prosecuted for violating the law)." (Id. at 4) (emphasis and parentheses in original). Harris further contends that Plaintiff's intention to carry firearms openly in the future fails to establish a concrete plan because his "vows to carry a firearm -- not necessarily loaded -- on the 7th day of each coming month . . . will not necessarily implicate Section 25850." (Id. at 7). Harris also argues that the threat of prosecution is not imminent because the Attorney General has not communicated to Plaintiff "a specific warning or threat to initiate proceedings" under section 25850. (Id. at 8).

The gravamen of Harris's injury-in-fact arguments appears to be that in order to challenge section 25850, Plaintiff must actually violate the law. (See Obj. at 6 ("[Plaintiff] has admittedly never before been arrested or prosecuted under Section 25850."); id. at 6-7 ("Plaintiff admittedly carried an unloaded firearm [when he was

arrested] and thus did not implicate the possession ban of Section 25850, subdivision (a), which concerns loaded firearms only."); id. at 7 ("[T]here is only speculation that [Plaintiff] will openly carry a loaded, as opposed to unloaded firearm, in Redondo Beach, especially given that [Plaintiff's] only other open-carry incident in Redondo Beach was with an unloaded gun."); id. ("It should also be noted that there is no evidence (of which the Attorney General is aware) that [Plaintiff], on the 7th day of any month since May 2012, has openly carried a firearm in Redondo Beach.")). However, the Supreme Court and the Ninth Circuit have clearly stated that a plaintiff is not required to actually violate a criminal law to challenge its constitutionality. See Babbitt v. United Farm Workers, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979) (plaintiff challenging the constitutionality of a criminal law "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.") (internal quotation marks omitted); McCormack v. Hiedeman, 694 F.3d 1004, 1021 (9th Cir. 2012) (same). To hold the opposite would put the court in the untenable position of encouraging would-be litigants to break criminal laws in order to gain standing.

Short of requiring Plaintiff to actually violate section 25850, the Court must determine what facts Plaintiff must allege to show a particularized injury and an imminent threat of prosecution. In the original Complaint, Plaintiff stated that he would like to openly carry a loaded firearm, but does not because he fears arrest. (Dkt. No. 1 at 6). The Court concluded that this was too indefinite to establish a particularized injury. (Dkt. No. 40 at 14). In contrast, in the First Amended Complaint, Plaintiff states that he has openly carried a loaded

weapon in the past and will openly carry a loaded firearm on the seventh day of each month in the City of Redondo Beach. (FAC at 12). Plaintiff further states that he is being prosecuted by the City of Redondo Beach for openly carrying a firearm in public. (FAC at 10-11). 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.

The Court finds that Harris misreads Plaintiff's prior declaration in which Plaintiff stated that he has openly carried loaded and unloaded weapons in California in the past where and when it was legal and that he now "refrain[s] from openly carry[ing] a loaded handgun or long gun in non-sensitive public places because [he] would in all certainty be arrested, prosecuted, fined and imprisoned for doing so." (See Nichols Decl., Dkt. No. 37 at 3-4). Plaintiff did not affirmatively state under oath that he has never illegally carried a loaded or unloaded weapon in the past. Courts must "construe pro se complaints liberally." Silva v. Di Vittorio, 658 F.3d 1090, 1101 (9th Cir. 2011). The declaration's affirmative statements do not preclude the possibility, as Plaintiff now alleges, that in the past he also carried loaded firearms in this state where and when it was illegal. Consequently, because Plaintiff's prior sworn statements do not necessarily contradict Plaintiff's current allegations, the Court must consider Plaintiff's current allegations as true in assessing whether Plaintiff has sufficiently alleged a

particularized injury. (See R&R at 34); cf. Data Disc., Inc. v. Systems Tech. Assocs., Inc., 557 F.2d 1280, 1284 (9th Cir. 1977).

Plaintiff's seventh-day-of-the-month plan is also easily distinguishable from the cases Harris relies on in which the Ninth Circuit found the "concrete plan" insufficient. Unlike the landlords in Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1140 (9th Cir. 2000), who stated that if an unmarried couple ever wanted to rent from them, they would refuse due to their religious convictions, Plaintiff's plan is not contingent on the actions of third parties but is entirely under his control. (See Obj. at 5). Unlike the environmentalist in Wilderness Society, Inc. v. Rey, 622 F.3d 1251, 1256 (9th Cir. 2010), who expressed a general intention to visit the national forests but who did not identify concrete plans to hike in the specific park affected by the challenged regulations, Plaintiff need only walk outside his home carrying a loaded firearm to effectuate his plan.

As to the threat of imminent prosecution, Harris argues that even though it is "theoretically possible that the Attorney General" could prosecute Plaintiff under section 25850, Plaintiff cannot establish a "genuine threat of imminent Attorney General prosecution under Section 25850." (Obj. at 9). The Court disagrees. 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).

In his Response to Harris's Objections, Plaintiff appears to argue that his firearm should be deemed to have been "loaded" in the May 21, 2012 incident because he taped a cartridge to the barrel of the gun. (Resp. at 6-7; FAC Exh. 1). Although Plaintiff's Opposition conceded that Plaintiff's long gun was unloaded in that incident, (RBD Opp. at 7), Plaintiff now relies on California Penal Code section 16840, which provides that "a firearm shall be deemed to be 'loaded' when there is an unexpended cartridge or shell . . . in, or attached in any manner to, the firearm, including, but not limited to, in the firing chamber, magazine, or clip thereof attached to the firearm." Cal. Penal Code § 16840(b)(1). However, California courts have made clear that "a firearm is 'loaded' when a shell or cartridge has been placed into a position from which it can be fired; the shotgun is not 'loaded' if the shell or cartridge is stored elsewhere and not yet placed in a firing position." People v. Clark, 45 Cal. App. 4th 1147, 1153, 53 Cal. Rptr. 2d 99 (1996) (construing former California Penal Code § 12031) (firearm is not "loaded" where ammunition is stored in a compartment in the gun's stock because it could not be fired). Nonetheless, even though Plaintiff did not carry a "loaded" firearm, it is not necessary for Plaintiff to violate Section 25850 in order to challenge the statute.

Plaintiff seeks a stay of 120 days pending the outcome of three cases taken under submission by the Ninth Circuit in December 2012: Richards v. Prieto, Case No. 11-16255 (hearing December 6, 2012); Peruta v. County of San Diego, Case No. 10-56971 (hearing December 6, 2012); and Mehl v. Blanas, Case No. 08-15773 (hearing December 10, 2012). According to Plaintiff, these cases challenge California's licensing scheme under section 26150, which is "substantially similar" to section 26155 challenged here, except that it applies to firearm permits issued by county sheriffs as opposed to municipal police chiefs. (Resp. at 4). However, a stay is inappropriate because it is unclear that these cases will control the outcome here. Therefore, Plaintiff's request for a stay is DENIED. (Resp. at 2-3).

Finally, Plaintiff's request for permission to file additional Objections to the Report and Recommendation is also DENIED. (Resp. at 15). Plaintiff had an opportunity to articulate all of his Objections. See GoPets Ltd. v. Hise, 657 F.3d 1024, 1029 (9th Cir. 2011) (no abuse of discretion where district court refused to consider late-filed supplemental materials in opposition to motion for summary judgment). Even though Plaintiff is proceeding pro se, he is required to follow the same rules of procedure as other litigants. See King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1986), overruled on other grounds by Lacey v. Maricopa County, 693 F.3d 896, 925 (9th Cir. 2012) ("Pro se litigants must follow the same rules of procedure that govern other litigants.").

\\

\\

\\

\\

Accordingly, IT IS ORDERED THAT:

1. The Motion to Dismiss the First Amended Complaint filed by the Redondo Beach Defendants is GRANTED. Specifically,

A. Claim One of the First Amended Complaint, challenging the constitutionality of City of Redondo Beach Municipal Code sections 4-35.01 and 4-35.20 and including any purported pendent state law claims, is DISMISSED without leave to amend but without prejudice, on Younger abstention grounds.

B. Claim Two of the First Amended Complaint, challenging the application of City of Redondo Beach Municipal Code sections 4-35.01 and 4-35.20, is DISMISSED without leave to amend and with prejudice as to the claims against the individual Redondo Beach Defendants Chief Leonardi, Officer Heywood, and Does 1-10, as they are entitled to qualified immunity, and with leave to amend as to the Monell claims against the City of Redondo Beach.

2. The Motion to Dismiss the First Amended Complaint filed by Attorney General Kamala D. Harris is DENIED.

\\

\\

\\

\\

\\

3. The First Amended Complaint is DISMISSED with leave to amend. If Plaintiff desires to proceed with his claims against Attorney General Harris and City of Redondo Beach, Plaintiff shall file a Second Amended Complaint within thirty (30) days of the date of this Order.

The Clerk shall serve copies of this Order by United States mail on Plaintiff and on counsel for Defendants.

DATED: March 3, 2013.

S. JAMES OTERO
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHARLES NICHOLS, Plaintiff, v. KAMALA D. HARRIS, et al., Defendants.	NO. CV 11-9916 SJO (SS) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE** [DKT NOS. 54 AND 58]

This Report and Recommendation is submitted to the Honorable S. James Otero, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

On May 30, 2011, plaintiff Charles Nichols ("Plaintiff"), a California resident then proceeding pro se, filed a First Amended Complaint pursuant to 42 U.S.C. § 1983. Defendant California Attorney General Kamala D. Harris ("Harris") subsequently filed a Motion to Dismiss the First Amended Complaint, (Dkt. No. 58, "Harris MTD"), and a Request for Judicial Notice. (Id., "Harris RJN"). Defendants City of

Redondo Beach, City of Redondo Beach Police Chief Joseph Leonardi, and City of Redondo Beach Police Officer Todd Heywood (collectively, the "Redondo Beach Defendants" or "RBD") also filed a Motion to Dismiss (Dkt. Nos. 54-55, "RBD MTD"), including the Declaration of Lisa Bond (Dkt. No. 56, "Bond Decl."). Plaintiff, now represented by attorney Michael F. Sisson[1], filed Oppositions to the Motions (Dkt. No. 65, "Pl. Harris Opp."; Dkt. No. 64, "Pl. RBD Opp."), including the Declaration of Charles Nichols, (id., "Nichols Decl."), and a Request for Judicial Notice. (Dkt. No. 66, "Pl. RJN"). Harris filed a Reply, (Dkt. No. 69, "Harris Reply"), as did the Redondo Beach Defendants, (Dkt. No. 67, "RBD Reply"), along with Evidentiary Objections to and Motion to Strike Portions of the Declaration of Charles Nichols. (Dkt. No. 68, "RBD Obj.").

For the reasons discussed below, it is recommended that the Redondo Beach Defendants' Motion to Dismiss be GRANTED. Specifically, it is recommended that Claim One be dismissed without leave to amend, but also without prejudice. It is further recommended that Claim Two be dismissed with prejudice as to the individually-named Redondo Beach Defendants, who are entitled to qualified immunity, and that the surviving claim against City of Redondo Beach be dismissed with leave to amend. It is further recommended that Harris's Motion to Dismiss be DENIED. However, because portions of the FAC, as currently pled, fail to comply with Rule 8, it is further recommended that Plaintiff be ORDERED to file a Second Amended Complaint limited to the facts and

[1] On July 13, 2012, this Court granted Plaintiff's request for approval of substitution of attorney. Attorney Michael F. Sisson entered his appearance on that date on behalf of Plaintiff.

claims relevant to Plaintiff's challenges to California Penal Code sections 25850 and 26155 in Claims Three and Four against the Attorney General, and, if he is able, to a claim for damages against City of Redondo Beach relating to the enforcement of City of Redondo Beach Municipal Code section 4-35.20. Plaintiff may not include any claims dismissed without leave to amend in a Second Amended Complaint.

II.

ALLEGATIONS OF THE COMPLAINT

The First Amended Complaint names four Defendants: Attorney General Harris, City of Redondo Beach, City of Redondo Beach Police Chief Leonardi, and City of Redondo Beach Police Officer Heywood.[2] (FAC at 2-3). Harris is sued in her official capacity only. (Id. at 2). The FAC does not indicate whether Plaintiff is suing the Redondo Beach Defendants in their official or individual capacities. (Id. at 2-3).

The First Amended Complaint challenges the constitutionality of two City of Redondo Beach ordinances and two California statutes that Plaintiff contends violate his Second Amendment right to openly carry a loaded firearm. (FAC at 35-39). The FAC alleges that on May 21, 2012, after notifying Chief Leonardi of his plans, (id. at 27-28), Plaintiff

[2] In addition, the FAC includes Doe allegations involving an unnamed City of Redondo Beach police officer, and lists "DOES 1-10" as Defendants in the caption. (See, e.g., FAC at 1, 19). However, the specific claims against the Redondo Beach Defendants do not include Officer Doe. (See id. at 35-37).

openly carried a firearm in an open space within City of Redondo Beach.[3] (Id. at 10). Officer Heywood took the firearm from Plaintiff without Plaintiff's permission and inspected it, thereby "enforc[ing] on Plaintiff" California Penal Code section 25850, which prohibits carrying loaded firearms in public and authorizes warrantless inspections in the enforcement of the statute. (Id. at 4-5, 10). Officer Heywood and Officer Doe informed Plaintiff that he was in violation of "city ordinances prohibiting the carrying of firearms in open spaces" and seized his firearm and carrying case. (Id. at 10). Shortly thereafter, the City of Redondo Beach City Prosecutor filed a misdemeanor criminal charge against Plaintiff for carrying a firearm in a city park in violation of Municipal Code section 4-35.20 ("section 4-35.20"). (Id.; Pl. RJN, Exh. 1 at 1).

Also on May 21, 2012, Chief Leonardi, through his attorney, informed Plaintiff via email that his earlier request for an application and license to openly carry a loaded handgun could not be fulfilled. (FAC at 30). The email explained that (1) City of Redondo Beach, which is located in Los Angeles County, cannot issue open carry licenses because state law prohibits municipalities in counties with populations exceeding 200,000 persons from issuing open carry licenses, and (2) pursuant to state law, a municipality may issue state handgun licenses only to its residents, and Plaintiff is not a resident of City of Redondo Beach. (Id.).

---

[3] The FAC does not identify the type of firearm Plaintiff was carrying or specify whether it was loaded or unloaded. However, Plaintiff states in his Opposition to the Redondo Beach Defendants' Motion that he "is facing criminal charges and his long gun was seized as a result of plaintiff carrying an unloaded long gun in public . . . ." (Pl. RDB Opp. at 7 (emphasis in original); see also RBD MTD at 1).

Plaintiff generally alleges that in addition to the incident on May 21, 2012, he "has frequently and countless times violated California Penal Code Section 25850, the Redondo Beach City Ordinances and other California statutes prohibiting firearms from being carried in non-sensitive public places." (Id. at 11). Plaintiff states that he will continue to "openly carry a loaded holstered handgun, loaded rifle and loaded shotgun" in public places in City of Redondo Beach and the state of California. (Id. at 12).

In Claim One, Plaintiff raises a facial and "as applied" challenge against the Redondo Beach Defendants to City of Redondo Beach Municipal Code section 4-35.01, which defines the term "park," and section 4-35.20, which provides that it is "unlawful for any person to use, carry, fire or discharge any firearm . . . or any other form of weapon across, in or into a park." (FAC at 36); see also Redondo Beach Municipal Code §§ 4-35.01 & 4-35.20, available at http://www.qcode.us/codes/redondobeach/. Plaintiff contends that section 4-35.20 violates his Second Amendment rights and is preempted by state law governing firearm possession because "[m]ere possession or carrying a firearm (i.e., exercising a fundamental right) when otherwise lawful cannot support the unlawful detention, search, arrest, prosecution and seizure of a firearm and other property which is lawfully possessed and carried under both state and Federal law." (FAC at 36).

In Claim Two, Plaintiff seeks monetary damages against the Redondo Beach Defendants "for losses incurred as a result of the warrantless search of PLAINTIFF'S FIREARM, his detention, search and the subsequent illegal seizure of his valuable property (firearm, firearm's case,

padlock and key); and for expenditures (fees/costs) associated with the defense of criminal charges . . . ." (FAC at 37).

In Claim Three, Plaintiff raises a facial and "as applied" challenge against Harris to California Penal Code 25850, which provides in relevant part:

> (a) A person is guilty of carrying a loaded firearm when the person carries a loaded firearm on the person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory.
>
> (b) In order to determine whether or not a firearm is loaded for the purpose of enforcing this section, peace officers are authorized to examine any firearm carried by anyone on the person or in a vehicle while in any public place or on any public street in an incorporated city or prohibited area of an unincorporated territory. Refusal to allow a peace officer to inspect a firearm pursuant to this section constitutes probable cause for arrest for violation of this section.

Cal. Penal Code § 25850(a)-(b). According to Plaintiff, "[o]penly carrying a loaded firearm in non-sensitive public places of a type in common use for the purpose of self-defense" is a right guaranteed by the Second Amendment, and the exercise of that right "cannot support a finding of probable cause . . . such that the Fourth Amendment's warrant requirement can be legislatively disregarded." (FAC at 37-38).

In Claim Four, Plaintiff raises a facial and "as applied" challenge against Harris to California Penal Code section 26155, which in part authorizes municipal police chiefs to issue state licenses to residents of their cities to carry a "pistol, revolver, or other firearm capable of being concealed upon the person," but which restricts the availability of licenses to openly carry a loaded firearm to cities located in counties with populations of fewer than 200,000 persons, and the validity of such open carry licenses only to the county in which the issuing city is located. Cal. Penal Code § 26155(a)-(c). Plaintiff appears to contend that because he lives in Los Angeles County, which has more than 200,000 residents, section 26155 improperly prohibits him "from obtaining a license to openly carry a loaded handgun for the purpose of self-defense afforded to similarly situated persons [in more rural counties]."[4] (FAC at 11, 39).

---

[4] In opposition to and support of the Motions to Dismiss, Plaintiff and Harris both filed Requests for Judicial Notice asking the Court to take notice of certain municipal ordinances, Attorney General opinions, court decisions and other government documents not included in the FAC. "When ruling on a motion to dismiss, [a court] may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." Colony Cove Properties, LLC v. City Of Carson, 640 F.3d 948, 955 (9th Cir. 2011) (internal quotation marks omitted). "[N]otice may be taken where the fact is 'not subject to reasonable dispute,' either because it is 'generally known within the territorial jurisdiction,' or is 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" Castillo-Villagra v. I.N.S., 972 F.2d 1017, 1026 (9th Cir. 1992) (quoting Fed. R. Evid. 201(b)). The Court GRANTS Plaintiff's and Harris's Requests to the extent that they are compatible with Federal Rule of Evidence 201 and do not require the acceptance of facts "subject to reasonable dispute." The Evidentiary Objections filed by the Redondo Beach Defendants to the Declaration of Charles Nichols, in which the Redondo Beach Defendants contend that Plaintiff's reference to "death threats" he has received should be stricken as hearsay and irrelevant, are DENIED because the statements are completely immaterial to the Court's decision. See Lake v. First Nat. Ins. Co. of America, 2010 WL 4807059 at *7 n.4 (N.D. Cal. 2010)

Plaintiff seeks declaratory relief finding that City of Redondo Beach Municipal Code sections 4-35.01 and 4-35.20 and California Penal Code sections 25850 and 26155 are unconstitutional, and an injunction prohibiting all Defendants from committing "future violations of the Second, Fourth and Fourteenth Amendments." (Id. at 39). Plaintiff also seeks damages against the Redondo Beach Defendants in an amount according to proof and an injunction requiring the immediate return of property seized from Plaintiff by Officer Heywood. (Id. at 40).

III.

DEFENDANTS' MOTIONS TO DISMISS

The Redondo Beach Defendants contend that Claims One and Two, which challenge the constitutionality and specific enforcement of Municipal Code section 4-35.20, respectively, should be dismissed pursuant to the doctrine of Younger abstention. (RBD MTD at 2) (citing Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)). The City of Redondo Beach is currently prosecuting Plaintiff for a criminal violation of section 4-35.20 based on the May 21, 2012 incident in which Plaintiff carried an unloaded rifle in a City park. (Id.). The Redondo Beach Defendants argue that because there are ongoing state judicial proceedings which implicate important state interests and which will provide Plaintiff an opportunity to assert his federal constitutional challenges to the Ordinance, Younger requires this Court to refrain from exercising subject matter jurisdiction over the claims against the

---

(overruling evidentiary objections as moot where it was not necessary for the court to consider the exhibits that were the subject of the objections).

Redondo Beach Defendants. (Id. at 4-5). The Redondo Beach Defendants also contend that Officer Heywood, Chief Leonardi, and Officer Doe are entitled to qualified immunity because "there is no existing precedent placing 'beyond debate' the question of whether the Ordinance the officers were enforcing violates the Second Amendment . . . ." (Id. at 9-10). The Redondo Beach Defendants also contend that Plaintiff lacks Article III standing to challenge the Ordinance because even if the Ordinance were enjoined, Plaintiff would still be prohibited from openly carrying a loaded firearm under state law. (Id. at 10). The Redondo Beach Defendants also contend that the claims against them fail to state a claim under Rule 12(b)(6) because the Supreme Court has found that Second Amendment protects only the possession of handguns for self-defense within the home, but has not extended that right to possession of guns outside the home. (Id. at 10-11).

Harris contends that Claims Three and Four, which challenge the constitutionality of Penal Code Sections 25850 and 26155, respectively, should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction because Plaintiff lacks standing to assert his claims against the Attorney General. According to Harris, Plaintiff fails to allege an injury-in-fact with respect to section 25850(a)'s prohibition on carrying a loaded firearm in public because he makes no "substantive allegations of ever having openly carried a loaded firearm in Redondo Beach (or anywhere else)." (Harris MTD at 2-3; see also id. at 9-10). For the same reasons, Harris claims that Plaintiff's challenge to section 25850(a) is unripe. (Id. at 12-14). Furthermore, Harris argues that Plaintiff fails to establish a causal nexus between the Attorney General and any alleged injuries arising from section

25850(b)'s warrantless search authorization because the search complained of in the FAC was conducted by City of Redondo Beach police officers, not the Attorney General or state actors under her control, and "any subsequent prosecution" for a misdemeanor violation of section 25850(b) would be undertaken by a prosecutor for the City of Redondo Beach. (Id. at 3, 10-11). Harris also argues that Plaintiff has failed to establish a causal nexus between the Attorney General and Plaintiff's alleged injuries under section 26155 because the Attorney General has "no role" in licensing decisions made pursuant to that statute. (Id. at 3, 11-12). Finally, Harris contends that all of Plaintiff's claims against the Attorney General are barred by the Eleventh Amendment. (Id. at 14-16).

IV.

STANDARDS GOVERNING MOTIONS TO DISMISS

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of an action for lack of subject matter jurisdiction. A motion under Rule 12(b)(1) can either be "facial," attacking a pleading on its face and accepting all allegations as true, or "factual," contesting the truth of some or all of the pleading's allegations as they relate to jurisdiction. Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004). The standards that must be applied vary according to the nature of the jurisdictional challenge.

Here, the challenge to jurisdiction is a facial attack. Defendants contend that the allegations of jurisdiction contained in the Complaint are insufficient on their face to demonstrate the existence of

jurisdiction. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). In a Rule 12(b)(1) motion of this type, the plaintiff is entitled to safeguards similar to those applicable when a Rule 12(b)(6) motion is made. See Sea Vessel Inc. v. Reyes, 23 F.3d 345, 347 (11th Cir. 1994). The material factual allegations of the complaint are presumed to be true, and the motion is granted only if the plaintiff fails to allege an element necessary for subject matter jurisdiction. Maya v. Centex Corp., 658 F.3d 1060, 1068 (9th Cir. 2011) ("'For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party.'") (citations omitted).

Under Rule 12(b)(6), a defendant may also seek dismissal of a complaint for failure to state a claim. See Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). The court must accept all factual allegations as true even if doubtful in fact. Twombly, 550 U.S. at 555-56.

A court considering a motion to dismiss must also decide, if it grants the motion, whether to grant leave to amend. Even when a request

to amend is not made, "[l]eave to amend should be granted unless the pleading could not possibly be cured by the allegation of other facts, and should be granted more liberally to pro se plaintiffs." Lira v. Herrera, 427 F.3d 1164, 1176 (9th Cir. 2005) (internal quotation marks omitted). If amendment of the pleading would be futile, leave to amend may be denied. See Ventress v. Japan Airlines, 603 F.3d 676, 680 (9th Cir. 2010).

V.

DISCUSSION

In light of the pending criminal proceedings against Plaintiff for violation of City of Redondo Beach Municipal Code section 4-35.20, Plaintiff's claims against the Redondo Beach Defendants should be dismissed pursuant to the Younger abstention doctrine. Claim One, which challenges the constitutionality of section 4-35.20, should be dismissed without prejudice. Claim Two, which seeks damages for the Redondo Beach Defendants' enforcement of section 4-35.20, should be dismissed with prejudice as to the individually-named Redondo Beach Defendants on the ground of qualified immunity. The remaining allegations against City of Redondo Beach in Claim Two should be dismissed with leave to amend to permit Plaintiff, if he is able, to identify an injury under section 4-35.20 that could be redressed even if Penal Code section 25850 is valid, and a specific City policy or practice that resulted in his alleged injuries.[5] The Court finds that Plaintiff has standing to challenge

[5] The Court notes that even if Plaintiff is able to allege facts stating a claim for damages against City of Redondo Beach arising from the enforcement of section 4-35.20, any such amended claim would still be subject to Younger abstention. As it is unclear at this time whether

sections 25850 and 26155 against Attorney General Harris in Claims Three and Four and that suit against her is not barred by the Eleventh Amendment. However, because portions of the FAC fail to comply with Rule 8, the FAC should be dismissed with leave to amend.

A. The Claims Against The Redondo Beach Defendants

1. The Younger Abstention Doctrine Applies To Plaintiff's Claims Against The Redondo Beach Defendants

The Redondo Beach Defendants contend that Claims One and Two, the only claims brought against them, should be dismissed pursuant to the doctrine of Younger abstention. (RBD MTD at 2). Claim One challenges the constitutionality of Municipal Code section 4-35.20, which prohibits, inter alia, carrying a firearm in a City park. (FAC at 35-36). Claim Two seeks damages against the Redondo Beach Defendants for actions taken in their enforcement of the Ordinance on May 21, 2012. (FAC at 35-36). According to the Redondo Beach Defendants, after Plaintiff filed the FAC on May 30, 2012, City of Redondo Beach filed misdemeanor charges against Plaintiff for violation of the Ordinance. (RBD MTD at 4). The Redondo Beach Defendants contend that because there are ongoing state judicial proceedings which implicate important state interests and which will provide Plaintiff an opportunity to challenge the constitutionality of the Ordinance under federal law, the Court should refrain from exercising subject matter jurisdiction over the

---

Plaintiff will be able to allege such facts, however, it is premature for the Court to take any action under Younger with respect to a claim for damages against City of Redondo Beach in Claim Two.

claims against them. (Id. at 4-5). Plaintiff argues that Younger abstention is not appropriate because his federal action had proceeded beyond the "embryonic" stage by the time state criminal charges were filed. (Pl. RBD Opp. at 1-2). Plaintiff further argues that "[t]here is absolutely no way the criminal court is going to allow plaintiff to present" a constitutional challenge to sections 25850 and 26155 in a misdemeanor trial for violation of a municipal code. (Pl. RBD Opp. at 1-3).

Younger and its progeny "espouse a strong federal policy against federal court interference with pending state judicial proceedings absent extraordinary circumstances." Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423, 431, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982). Under the Younger abstention doctrine, federal courts are precluded from enjoining a state statute that is the basis for a pending criminal prosecution against the federal plaintiff.[6] Younger, 401 U.S. at 54; Steffel v. Thompson, 415 U.S. 452, 454, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974). The duty to abstain under Younger is not jurisdictional but is premised on principles of equity and comity. See Younger, 401 U.S. at 43-44.

Younger abstention is appropriate "when there is a pending state proceeding that implicates important state interests and provides the plaintiff with an opportunity to raise federal claims." Baffert v.

[6] Younger abstention originally applied only to federal cases in which criminal proceedings were pending in state court. However, the Supreme Court has since held that the Younger doctrine is fully applicable when there are non-criminal judicial proceedings in state court. See Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716-718, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996).

California Horse Racing Bd., 332 F.3d 613, 617 (9th Cir. 2003). A federal court considering whether to invoke Younger must therefore examine whether: "(1) a state-initiated proceeding is ongoing; (2) the proceeding implicates important state interests; (3) the federal plaintiff is not barred from litigating federal constitutional issues in the state proceeding; and (4) the federal court action would enjoin the proceeding or have the practical effect of doing so, i.e., would interfere with the state proceeding in a way that Younger disapproves." San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose, 546 F.3d 1087, 1092 (9th Cir. 2008). When all four of these requirements are met, federal courts must abstain because "'there is no discretion vested in the district courts to do otherwise.'" Id. (quoting Green v. City of Tucson, 255 F.3d 1086, 1093 (9th Cir. 2001), overruled in part by Gilbertson v. Albright, 381 F.3d 965 (9th Cir. 2004) (en banc)). The only exception is when there is a showing of prosecutorial bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate. Middlesex County Ethics Comm., 457 U.S. at 435; Steffel, 415 U.S. at 454.

While the Younger abstention doctrine requires dismissal where declaratory or injunctive relief is sought, and a federal court should abstain from a damages claim where a necessary predicate of the claim for damages undermines a necessary element in the pending state proceeding, the court should stay, not dismiss, damages claims only "until the state proceedings are completed." Gilbertson, 381 F.3d at 968. Additionally, where a plaintiff is seeking wholly prospective relief from enforcement that would not interfere with an ongoing state proceeding, Younger abstention is not appropriate. See Wooley v.

Maynard, 430 U.S. 705, 711, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977) (abstention inappropriate where plaintiff sought to enjoin only future bad faith prosecutions under a statute, even though plaintiff had previously been convicted of violating the statute).

The Court finds that the four factors requiring Younger abstention are present with respect to Plaintiff's claims against the Redondo Beach Defendants. First, there exists an ongoing state proceeding. Even though City of Redondo Beach did not file charges against Plaintiff until after this action, and indeed, the First Amended Complaint, were filed, the first prong of the Younger abstention test is satisfied so long as the state court proceedings are initiated "before any proceedings of substance on the merits have taken place in federal court." Fresh Int'l Corp. v. Agric. Labor Relations Bd., 805 F.2d 1353, 1358 (9th Cir. 1986) (internal quotation marks omitted). The instant action has not progressed beyond the pleading stage. Defendants have not yet answered the FAC, no hearings have been held, and no contested substantive matter has been decided. Therefore, the first Younger requirement is satisfied.

Furthermore, even if Plaintiff's criminal trial has by now been completed, a fact not presently before the Court, a state proceeding is deemed "pending" for the purposes of Younger abstention until state appellate remedies are exhausted. Dubinka v. Judges of Superior Court of State of Cal. for County of Los Angeles, 23 F.3d 218, 223 (9th Cir. 1994); see also New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 369, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989) ("'[A] necessary concomitant of Younger is that a party . . . must

exhaust his state appellate remedies before seeking relief in the District Court.'") (quoting Huffman v. Pursue, Ltd., 420 U.S. 592, 608, 95 S. Ct. 1200, 1208, 43 L. Ed. 2d 482 (1975)). Additionally, "[f]or Younger purposes . . . a party may not seek federal review by terminating the state judicial process prematurely -- forgoing the state appeal to attack a trial court's judgment in federal court." United States v. Morros, 268 F.3d 695, 710 (9th Cir. 2001). Therefore, Plaintiff's criminal case remains "pending" in state court for purposes of Younger abstention because Plaintiff has not yet exhausted his state appellate remedies. New Orleans Pub. Serv., Inc., 491 U.S. at 369.

Second, the pending state proceeding clearly implicates important state interests in enforcing criminal laws. "The key to determining whether comity concerns are implicated in an ongoing state proceeding -- and thus whether the second Younger requirement is met -- is to ask whether federal court adjudication would interfere with the state's ability to carry out its basic executive, judicial, or legislative functions." Potrero Hills Landfill, Inc. v. County of Solano, 657 F.3d 876, 883 (9th Cir. 2011). "Where the state is in an enforcement posture in the state proceedings, the 'important state interest' requirement is easily satisfied, as the state's vital interest in carrying out its executive functions is presumptively at stake." Id. at 883-84. Indeed, Younger, which involved abstention due to a pending criminal proceeding, explicitly recognized that a state must be permitted to "enforce . . . laws against socially harmful conduct that the State believes in good faith to be punishable under its laws and the Constitution." Younger, 401 U.S. at 51-52.

The presumption of a state's vital interest in enforcing its laws is overcome "only under extraordinary circumstances," such as when the "'state proceeding is motivated by a desire to harass or is conducted in bad faith,' [or] the challenged provision is 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it . . . .'" Potrero Hills Landfill, Inc., 657 F.3d at 884 n.9 (quoting Huffman, 420 U.S. at 611, and Younger, 401 U.S. at 53-54) (internal citations omitted)). Plaintiff does not argue that the City's charges were brought in bad faith. Indeed, Plaintiff alleges that he contacted the City to coordinate when and where he would openly carry a firearm within the City, including "through a place which is actually covered by the plain text of your city ordinance, a park," and that he anticipated being arrested for his actions. (FAC at 27-28). Furthermore, Plaintiff also impliedly concedes that section 4-35.20 would not violate "express constitutional provisions" when applied, for example, to a person who carries a machine gun in a city park. (See FAC at 33-34) ("Relief is not sought against any Federal law regulating the carrying or possession of firearms . . . and leaves over 30,000 lines of state statutes regulating the carrying, types of, or possession of firearms also unaffected."); see also United States v. Henry, 688 F.3d 637, 640 (9th Cir. 2012) ("[T]he Second Amendment does not apply to machine guns."). Therefore, Plaintiff has not established the existence of any "extraordinary circumstances" that would undermine the state's vital interest in enforcing its criminal laws, and the second Younger requirement is met.

Third, Plaintiff has not established that he is or will be barred from raising federal constitutional challenges in the state proceedings. The Supreme Court has noted that "where vital state interests are involved, a federal court should abstain 'unless state law clearly bars the interposition of the constitutional claims.'" Middlesex County Ethics Commission, 457 U.S. at 432; see also Hirsh v. Justices of Supreme Court of State of Cal., 67 F.3d 708, 713 (9th Cir. 1995) ("Judicial review is inadequate [for Younger abstention purposes] only when state procedural law bars presentation of the federal claims.") (emphasis in original). California courts routinely hold that federal constitutional protections apply to state misdemeanor trials. See, e.g., Serna v. Superior Court, 40 Cal. 3d 239, 256, 219 Cal. Rptr. 420 (1985) (federal Sixth Amendment right to speedy trial is triggered by filing of state misdemeanor complaint); In re Olsen, 176 Cal. App. 3d 386, 390-91, 221 Cal. Rptr. 772 (1986) ("The guarantees of the federal Constitution do not apply exclusively to felony proceedings; one accused of a misdemeanor [in state court] is accorded the due process right to counsel . . . .") (internal citations omitted). Therefore, there is no bar to Plaintiff's ability to raise a federal constitutional defense during the underlying misdemeanor proceedings.

Furthermore, even if such a bar somehow existed in Plaintiff's state misdemeanor trial, to satisfy Younger's third requirement, it is sufficient that federal constitutional claims may be raised during state court judicial review of the underlying proceeding. See Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619, 629, 106 S. Ct. 2718, 91 L. Ed. 2d 512 (1986); Fresh Int'l Corp. v. ALRB, 805 F.2d 1353, 1362 (9th Cir. 1986) (abstention applicable because plaintiff

"could have presented [its federal claim] to the court of appeal in its petition for review"). In addition, a plaintiff's failure "to avail itself of the opportunity to litigate its constitutional claim in the state forum[] does not demonstrate that the state forum did not provide an opportunity to litigate that claim." World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079, 1083 (9th Cir. 1987). Therefore, the third Younger requirement is met.

Fourth, granting the relief requested by Plaintiff would have the practical effect of enjoining or interfering with ongoing state proceedings. See Amerisourcebergen Corp. v. Roden, 495 F.3d 1143, 1149 (9th Cir. 2007) (even if the first three elements for Younger abstention "are satisfied, the court does not automatically abstain, but abstains only if there is a Younger-based reason to abstain -- i.e., if the court's action would enjoin, or have the practical effect of enjoining, ongoing state court proceedings."). A declaration by this Court that section 4-35.20 violates the Second Amendment would "interfere" with the state proceeding because it would effectively "enjoin . . . or otherwise involve the federal courts in terminating or truncating" the state court action. San Jose Silicon Valley, 546 F.3d at 1096 (internal quotation marks omitted). Therefore, the fourth, and final, Younger requirement is met.

Claim One seeks injunctive and declaratory relief against Defendant City of Redondo Beach, including a declaration that the challenged City Ordinances are unconstitutional. (FAC at 35-36). Because all of the Younger requirements apply, dismissal of Claim One is mandatory. San Jose Silicon Valley, 546 F.3d at 1092. It is therefore recommended that

Claim One be dismissed without leave to amend, but without prejudice. Claim Two seeks damages against Officer Heywood, Chief Leonardi, and City of Redondo Beach "for losses incurred as a result of the warrantless search . . . and for expenditures (fees/costs) associated with the defense of criminal charges . . . ." (FAC at 37). As further discussed below, dismissal of the claims against the individually-named Redondo Beach Defendants in Claim Two is appropriate on the ground of qualified immunity. (See Part V.A.2.). Furthermore, Plaintiff's claim for damages against City of Redondo Beach, as currently alleged, fails to state a claim and should be dismissed with leave to amend. (See Parts V.A.3-4.) Should Plaintiff be able to allege facts stating a claim against City of Redondo Beach arising from its enforcement of section 4-35.20, however, a "necessary predicate" of any such amended claim for damages would "undermine[] a necessary element in the pending state proceeding," i.e., the validity of the City's prohibition on the carrying of firearms in certain public areas, and abstention would also be appropriate. See Gilbertson, 381 F.3d at 968 (claims for damages are subject to Younger abstention). However, because it is unclear whether Plaintiff will be able to state such a claim, the Court need not take any action at this time under Younger with respect to Plaintiff's claim for damages against City of Redondo Beach.

Finally, although the heading to Claim One indicates that Plaintiff's challenge is based on the Second, Fourth, and Fourteenth Amendments of the United States Constitution, (FAC at 35), it is unclear whether Plaintiff is also attempting to assert a state law claim with respect to section 4-35.20. To the extent that Plaintiff is attempting to assert such a claim, pendent jurisdiction is not appropriate once the

court abstains from exercising jurisdiction over Plaintiff's federal claims. Les Shockley Racing, Inc. v. National Hot Rod Ass'n, 884 F.2d 504, 509 (9th Cir. 1989); 28 U.S.C. § 1367(c)(3). Therefore, it is recommended that the Court also dismiss any purported pendent state law claim in Claim One without prejudice.

2. Qualified Immunity Applies To Plaintiff's Damages Claims Against Chief Leonardi, Officer Heywood, And Officer Doe

The Redondo Beach Defendants also contend that Chief Leonardi, Officer Heywood, and Officer Doe have qualified immunity protecting them from suit for damages because "there is no existing precedent placing 'beyond debate' the question of whether the Ordinance the officers were enforcing violates the Second Amendment . . . ." (Id. at 9-10). Plaintiff summarily argues that the "right to bear arms" has been enshrined in the Second Amendment for "well over two hundred years" and thus is "clearly established." (Pl. RBD Opp. at 5).

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Pearson v. Callahan, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). "Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.'" Hopkins v. Bonvicino, 573 F.3d 752, 762 (9th Cir. 2009) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)). Indeed, "the 'driving

force' behind creation of the qualified immunity doctrine was a desire to ensure that 'insubstantial claims' against government officials [will] be resolved prior to discovery.'" Pearson, 555 U.S. at 231 (quoting Anderson v. Creighton, 483 U.S. 635, 640, n.2, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)).

In analyzing whether qualified immunity applies, a court must determine "whether, taken in the light most favorable to [Plaintiffs], Defendants' conduct amounted to a constitutional violation, and . . . whether or not the right was clearly established at the time of the violation." Bull v. City and County of San Francisco, 595 F.3d 964, 971 (9th Cir. 2010) (internal quotation marks omitted; brackets in original). "For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Hope v. Pelzer, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) (internal quotation marks omitted). The Supreme Court has recently emphasized that a finding that a government official's conduct violates clearly established law requires that "existing precedent must have placed the statutory or constitutional question beyond debate." Aschroft v. al-Kidd, __ U.S. __, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011). A court is not required to address these two inquiries in a particular order, but may instead "exercise [its] sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." Pearson, 555 U.S. at 226; see also Bull, 595 F.3d at 971.

The Court exercises its discretion to address the second prong of the qualified immunity analysis, namely, whether the right Plaintiff asserts to openly carry a firearm, whether loaded or unloaded, in a public park was "clearly established" under the Second Amendment as of May 21, 2012, when Plaintiff was stopped by Officer Heywood and Officer Doe. Even assuming, without deciding, for the limited purpose of the qualified immunity analysis only, that a constitutional violation occurred in the warrantless inspection and confiscation of Plaintiff's long gun, the Court concludes that the right to openly carry a firearm in a public park was not "clearly established" at the time of the alleged violation and that the individually-named Redondo Beach defendants are therefore entitled to qualified immunity from Plaintiff's claim for money damages.

The Supreme Court has "recognized an individual right under the Second Amendment . . . [and has] held that this right is fundamental and is incorporated against states and municipalities under the Fourteenth Amendment." Nordyke v. King, 681 F.3d 1041, 1043-44 (9th Cir. 2012) (citing Dist. of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008); McDonald v. City of Chicago, __ U.S. __, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010)). Heller explicitly recognized "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." Heller, 554 U.S. at 635; see also McDonald, 130 S. Ct. at 3050 ("In Heller, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense.") (plurality opinion). The Heller Court noted, however, that "the right secured by the Second Amendment is not unlimited" and is "not a right to keep and carry any weapon whatsoever in any manner

whatsoever and for whatever purpose." Heller, 554 U.S. at 626. The Heller Court specifically cautioned 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," which it described as a list of "presumptively lawful regulatory measures" that "does not purport to be exhaustive." Id. at 626-27 & 627 n.26.

Lower courts attempting to address the scope and application of Second Amendment rights following Heller and McDonald have typically emphasized that Heller "warns readers not to treat [the decision] as containing broader holdings than the Court set out to establish: that the Second Amendment creates individual rights, one of which is keeping operable handguns at home for self-defense." United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (en banc). As the Fourth Circuit recently explained regarding "the dilemma faced by lower courts in the post-Heller world: how far to push Heller beyond its undisputed core holding,"

> There may or may not be a Second Amendment right in some places beyond the home, but we have no idea what those places are, what the criteria for selecting them should be, what sliding scales of scrutiny might apply to them, or any one of a number of other questions. It is not clear in what places public authorities may ban firearms altogether without shouldering the burdens of litigation. The notion that

> 'self-defense has to take place wherever [a] person happens to be,' Eugene Volokh, Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda, 56 UCLA L. Rev. 1443, 1515 (2009), appears to us to portend all sorts of litigation over schools, airports, parks, public thoroughfares, and various additional government facilities. And even that may not address the place of any right in a private facility where a public officer effects an arrest. The whole matter strikes us as a vast terra incognita that courts should enter only upon necessity and only then by small degree.

United States v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011).

Due to this uncertainty, courts have proceeded cautiously when addressing Second Amendment rights beyond the core right of possession of a handgun in the home. See, e.g., Kachalsky v. Cacace, 817 F. Supp. 2d 235, 258 (S.D. N.Y. 2011) ("[Heller's] emphasis on the Second Amendment's protection of the right to keep and bear arms for the purpose of 'self-defense in the home' permeates the Court's decision and forms the basis for its holding -- which, despite the Court's broad analysis of the Second Amendment's text and historical underpinnings, is actually quite narrow."); United States v. Tooley, 717 F. Supp. 2d 580, 596 (S.D. W.Va. 2010) ("[P]ossession of a firearm outside of the home or for purposes other than self-defense in the home are not within the 'core' of the Second Amendment right as defined by Heller."), aff'd, 468 Fed. Appx. 357 (4th Cir. 2012), cert. denied, __ S. Ct. __, 2012 WL 2132468 (Oct. 1, 2012); United States v. Hart, 726 F. Supp. 2d 56, 60

(D. Mass. 2010) ("Heller does not hold, nor even suggest, that concealed weapons laws are unconstitutional. . . . Therefore, it was not a violation of [defendant's] Second Amendment rights to stop him on the basis of the suspicion of a concealed weapon."), aff'd 674 F.3d 33 (1st Cir. 2012), cert. denied __ S. Ct. __, 2012 WL 2194023 (Oct. 1, 2012); Sutterfield v. City of Milwaukee, __ F. Supp. 2d __, 2012 WL 1534009 at *8 (E.D. Wis. Apr. 30, 2012) ("Neither Heller nor McDonald prohibit[s] the government from seizing firearms for certain purposes.") (internal citations omitted); Osterweil v. Bartlett, 819 F. Supp. 2d 72, 85 (N.D. N.Y. 2011) (state's firearm licensing scheme, which limits licenses to carry or possess firearms to state residents and non-residents employed in the state, does not offend Second Amendment).

In particular, courts have found that Heller did not reach, much less settle "beyond debate," the issue of whether and when open carry regulations are unconstitutional. See, e.g., Gonzalez v. Village of West Milwaukee, 671 F.3d 649, 659 (7th Cir. 2012) ("Whatever the Supreme Court's decisions in Heller and McDonald might mean for future questions about open-carry rights, for now this is unsettled territory."); United States v. Masciandaro, 648 F. Supp. 2d 779, 788 (E.D. Va. 2009) ("[A]lthough Heller does not preclude Second Amendment challenges to laws regulating firearm possession outside the home, Heller's dicta makes pellucidly clear that the Supreme Court's holding should not be read by lower courts as an invitation to invalidate the existing universe of public weapons regulations.") (emphasis in original) (footnotes omitted), aff'd, 638 F.3d 458, 470 (4th Cir. 2011) ("[W]e assume that any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to

strict scrutiny. But, as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense."), cert. denied, 132 S. Ct. 756, 181 L. Ed. 2d 482 (2011); Peruta v. County of San Diego, 758 F. Supp. 2d 1106, 1117 (S.D. Cal. 2010) (regulations restricting the carrying of firearms in public are constitutional so long as there is a reasonable fit between the regulation and a significant, substantial, or important governmental interest, such as interests "in public safety and in reducing the rate of gun use in crime").

In light of the continued uncertainty as to the scope of the rights accorded by the Second Amendment following the Supreme Court's recent decisions in Heller and McDonald, the Court concludes that the right to openly carry a firearm in a public park was not "beyond debate" at the time of the alleged violation such that a reasonable official would understand that enforcing a city ordinance that prohibits carrying a firearm in specified public areas was unconstitutional. Hope, 536 U.S. at 739. As such, the individually-named Redondo Beach defendants are entitled to qualified immunity on Plaintiff's claims for damages in Claim Two. See, e.g., Embody v. Ward, 695 F.3d 577, 581-2 (6th Cir. 2012) (ranger entitled to qualified immunity for stopping and temporarily disarming plaintiff for openly carrying a loaded pistol in a state park, even though such carrying was lawful under state law, because "[n]o court has held that the Second Amendment encompasses a right to bear arms within state parks"); Fisher v. Kealoha, __ F. Supp. 2d __, 2012 WL 1379320 at *18 (D. Hawaii Apr. 19, 2012) (police chief entitled to qualified immunity where the alleged right to a firearm ownership permit following a harassment conviction was not clearly

established); Dorr v. Weber, 741 F. Supp. 2d 993, 1005-06 (N.D. Iowa 2010) (sheriff entitled to qualified immunity for denying concealed weapons permit because "a right to carry a concealed weapon under the Second Amendment has not been recognized to date").[7] Therefore, because amendment of Claim Two would be futile as to the individually-named Redondo Beach Defendants, i.e., Chief Leonardi, Officer Heywood, and, to the extent that Plaintiff is attempting to assert a claim against him, Officer Doe, it is recommended that Claim Two be dismissed with prejudice as to these Defendants. See Dougherty, 654 F.3d at 901.

\\

\\

\\

\\

\\

\\

\\

[7] The FAC is not entirely clear as to whether Plaintiff is seeking damages in Claim Two for the RBD's allegedly unconstitutional acts in the enforcement of Penal Code section 25850(b) as well as Municipal Code section 4-35.20. Because Plaintiff is not charged with violating section 25850 in the state criminal proceeding, Younger abstention does not apply to Plaintiff's challenges to that statute. However, the qualified immunity analysis remains the same whether Plaintiff's claims in Claim Two are predicated on the allegedly unconstitutional authorization in section 25850(b) to conduct a warrantless firearm search or the allegedly unconstitutional prohibition on carrying a firearm in a public park in section 4-35.20. If, as the Court has found, it was not "beyond debate" in May 2012 that an ordinance prohibiting the carrying of a firearm (whether loaded or unloaded) in a public park was constitutional, it necessarily follows that the constitutionality of a statute prohibiting the open carry of a loaded firearm in public was also not "beyond debate."

3. Plaintiff Lacks Standing To Bring His Claims As Currently Alleged Against The Redondo Beach Defendants

The Redondo Beach Defendants also contend that Plaintiff lacks standing to challenge section 4-35.20 because even if the Ordinance were enjoined, Plaintiff would still be prohibited from openly carrying a loaded firearm under state law. (Id. at 10). Therefore, it is not likely that Plaintiff's injury will be redressed by a favorable decision invalidating the Ordinance, as required under Article III standing jurisprudence. See Maya, 658 F.3d at 1067. Plaintiff argues that the Redondo Beach Defendants' "premise is faulty" because Plaintiff is "facing criminal charges and his long gun was seized as a result of plaintiff carrying an unloaded long gun in public -- not a loaded firearm." (Pl. RBD Opp. at 7). Furthermore, Plaintiff contends that enjoining the Ordinance "would simply require the Defendants to comply with the Second Amendment to the United States Constitution and the laws of the State of California . . . ." (Id.).

The Court agrees with the Redondo Beach Defendants that a favorable decision on Claims One and Two, as currently alleged, would not redress Plaintiff's purported injury if the state statutes that Plaintiff challenges in Claims Three and Four are allowed to stand. The City Ordinance at issue in Claims One and Two does not distinguish between loaded and unloaded firearms, different types of firearms, or open or concealed carrying of weapons, but simply makes it unlawful for "any person to use, carry, fire or discharge any firearm . . . or any other form of weapon across, in or into a park." Redondo Beach Municipal Code § 4-35.20, available at http://www.qcode.us/codes/redondobeach/. The

FAC plainly states that "[t]his case involves an important constitutional principle, that neither the state nor local governments may prohibit PLAINTIFF or The People from carrying a fully functional loaded firearm for the purpose of self-defense in public places." (FAC at 3). Therefore, to the extent that Plaintiff's purpose in filing suit is to vindicate his right to carry a loaded firearm in public, the invalidation of section 4-35.20 will not redress his injury if Penal Code section 25850, which prohibits carrying "a loaded firearm on the person or in a vehicle while in any public place," is permitted to stand. Consequently, as Plaintiff's claims are currently alleged, Plaintiff lacks standing to challenge section 4-35.20 because success on this claim will not ultimate redress his injury arising from the State's prohibition against carrying a loaded firearm.

4. The FAC Fails To State A Claim Against Defendant City Of Redondo Beach In Claim Two Pursuant To Rule 12(b)(6)

The Redondo Beach Defendants also contend that the claims against them fail to state a claim under Rule 12(b)(6) because the Supreme Court has found that the Second Amendment protects only the possession of handguns for self-defense within the home, but has not extended that right to conduct outside the home. (Id. at 10-11). Plaintiff argues that enjoining the City's Ordinance is consistent with the individual right to bear arms recognized in Heller and McDonald and with the "natural individual right to carry unloaded long guns in public" enjoyed by Californians for 162 years. (Pl. RBD Opp. at 8).

Although not specifically raised by the Redondo Beach Defendants, the Court finds that Plaintiff's claim for damages against the sole remaining Defendant in Claim Two, City of Redondo Beach, fails to state a claim under Rule 12(b)(6). (FAC at 36-37). As the Court explained in dismissing Plaintiff's original Complaint, a municipality is liable under 42 U.S.C. § 1983 only if the plaintiff can establish that the local government "had a deliberate policy, custom, or practice that was the 'moving force' behind the constitutional violation he suffered." Galen v. County of Los Angeles, 477 F.3d 652, 667 (9th Cir. 2007) (quoting Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694-95, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)). The FAC summarily alleges that "[i]t is the policy and custom of Defendant CITY OF REDONDO BEACH to violate PLAINTIFF's Second, Fourth, and Fourteenth Amendment Rights," but does not identify the specific City policy or practice, as required by Monell, that caused Plaintiff's alleged constitutional injuries. (FAC at 20). Therefore, it is recommended that Plaintiff's Monell claim for damages against the City of Redondo Beach be dismissed with leave to amend. However, the Court notes that if this claim is properly pled in an amended complaint, it will likely be subject to Younger abstention.[8]

[8] The Court also finds that Plaintiff has failed to state a claim against Chief Leonardi in Claim Two because Plaintiff fails to show any personal involvement by Chief Leonardi in the warrantless search of Plaintiff, the seizure of Plaintiff's property, or the criminal charges brought against him, which are the only acts Plaintiff challenges in that Claim. (See FAC at 37). There is no supervisory liability under section 1983. Plaintiff must establish that the supervisor had personal involvement in the civil rights violation or that his specific action or inaction caused the harm suffered. Starr v. Baca, 652 F.3d 1202, 1205-06, (9th Cir. 2011). This pleading defect is moot, however, because Plaintiff's claims against Chief Leonardi should be dismissed on the ground of qualified immunity, as discussed in Part V.A.2.

B. The Claims Against The Attorney General

1. Plaintiff Alleges An Injury-In-Fact In His Challenge To Section 25850(a) And His Claim Is Ripe For Adjudication

Harris contends that Plaintiff lacks standing to challenge section 25850(a)'s prohibition on carrying a loaded firearm in public because he fails to allege an injury-in-fact. According to Harris, Plaintiff makes no "substantive allegations of ever having openly carried a loaded firearm in Redondo Beach (or anywhere else)," but merely describes an incident in which he was stopped by Redondo Beach police officers for carrying an unloaded long gun in a park. (Harris MTD at 2-3; see also id. at 9-10). Furthermore, Harris argues that "[n]o law-enforcement official, including the Attorney General, has tried or threatened, or even could possibly try, to enforce Section 25850(a) against [Plaintiff] based on the facts alleged in the FAC." (Id. at 9). For the same reasons, Harris claims that Plaintiff's challenge to section 25850(a) is unripe. (Id. at 12-14). Plaintiff argues that he is not required to expose himself to the threat of prosecution to establish an injury-in-fact. (Pl. Harris Opp. at 3).

As the Court has previously explained in dismissing Plaintiff's original Complaint, to establish Article III standing, a plaintiff must show that (1) he "has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

Maya, 658 F.3d at 1067 (internal quotation marks omitted). Because Plaintiff has not been arrested, prosecuted, or incarcerated for violating section 25850, he must satisfy the criteria for an injury-in-fact that apply to pre-enforcement challenges to statutes regulating conduct. Plaintiff "must show a genuine threat of imminent prosecution," not the "mere possibility of criminal sanctions." San Diego Cnty. Gun Rights Comm. v. Reno, 98 F.3d 1121, 1126 (9th Cir. 1996) (internal quotation marks omitted; emphasis in original). "In evaluating the genuineness of a claimed threat of prosecution, [the court] look[s] to whether the plaintiffs have articulated a 'concrete plan' to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under the challenged statute." Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc).

Unlike the original Complaint, in which Plaintiff alleged merely that he "would openly carry a loaded and functional handgun in public for the purpose of self-defense" but for his fear of arrest and prosecution, (Complaint, Dkt. No. 1 at 6), the FAC alleges that Plaintiff has "often carried a firearm within California in violation of California statutes including, but not limited to, California Penal Code Section 25850" and that he plans on continuing to do so "for as long as he is physically able to carry a loaded and/or unloaded firearm in violation of California statutes and city ordinances which prohibit the carrying of firearms."[9] (FAC at 15). More specifically, the FAC also

[9] Harris argues that the Court should ignore Plaintiff's "sudden" claims in the FAC that he has violated section 25850 "countless" times

alleges that Plaintiff "will continue to violate California Penal Code Section 25850, the Redondo Beach City Ordinances and other California statutes prohibiting firearms from being carried in public places on the 7th day of every month in the City of Redondo Beach, California by carrying a firearm (a holstered handgun, rifle, or shotgun of a type in common use by the public) in a public place. . . . Plaintiff will openly carry a loaded holstered handgun, loaded rifle and loaded shotgun of a type in common use by the public while traveling within the state of California." (Id. at 12).

The Court finds that although Plaintiff has not been arrested or charged with a violation of section 25850, he has sufficiently alleged an injury-in-fact. The Supreme Court has instructed that a plaintiff challenging the constitutionality of a criminal statute need not "first expose himself to actual arrest or prosecution" but must establish Article III standing by "alleg[ing] an intention to engage in a course

---

because "they contradict [Plaintiff's] prior sworn statement in this case denying having openly carried firearms in public in California when and where unlawful to do so." (Harris MTD at 9). In a Declaration submitted in connection with his oppositions to the motions to dismiss the original Complaint, Plaintiff asserted that he has openly carried a loaded handgun when and where it was lawful to do so but "do[es] not openly carry a loaded handgun or long gun in non-sensitive public places because [he] would in all certainty be arrested, prosecuted, fined and imprisoned for doing so." (Decl. of Charles Nichols, Dkt. No. 21, at 4). Plaintiff's current allegations concerning his past violations of section 25850 may arguably, but not necessarily, be at odds with his previous allegations and assertions under oath. However, the Ninth Circuit has instructed that "there is nothing in the Federal Rules of Civil Procedure to prevent a party from filing successive pleadings that make inconsistent or even contradictory allegations. Unless there is a showing that the party acted in bad faith -- a showing that can only be made after the party is given an opportunity to respond under the procedures of Rule 11 -- inconsistent allegations are simply not a basis for striking the pleading." PAE Gov't Serv., Inc. v. MPRI, Inc., 514 F.3d 856, 860 (9th Cir. 2007).

of conduct arguably affected with a constitutional interest, but proscribed by a statute," and demonstrating that "there exists a credible threat of prosecution thereunder." Babbitt v. United Farm Workers, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979). The FAC clearly describes Plaintiff's plan to openly carry a loaded firearm in public in violation of California law, not a mere "general intent to violate a statute at some unknown date in the future." Thomas, 220 F.3d at 1139. Furthermore, Plaintiff's fear of prosecution is "more than a 'generalized grievance shared in substantially equal measure by . . . a large class of citizens'" who may also desire to violate the challenged statute. National Rifle Assoc. of America v. Magaw, 132 F.3d 272, 294 (6th Cir. 1997) (citations omitted). Plaintiff is facing charges for carrying a firearm in public and his long gun was searched and seized by authorities. While the firearm in the incident alleged was not loaded, it is simply not reasonable to conclude that Plaintiff somehow would not have been charged had he carried a loaded weapon, and indeed, it is likely that the charges would have been more serious than the violation of a City Ordinance. See Leverett v. City of Pinellas Park, 775 F.2d 1536, 1539 (11th Cir. 1985) (plaintiffs' past arrests under statutes and ordinances "similar" to challenged ordinances, combined with their "direct, authentic and continuing interest in engaging in the conduct prohibited" by the challenged ordinances were sufficient to establish standing because plaintiffs "had reason other than the mere existence of the challenged ordinances to fear prosecution," even though plaintiffs had neither violated nor received a "specific threat of prosecution under" those ordinances). Plaintiff's injury is sufficiently particularized.

For the same reason, Plaintiff's challenge to section 25850(a) is ripe. Ripeness is a question of timing intended to "prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract agreements." Thomas, 220 F.3d at 1138 (quoting Abbott Laboratories v. Gardner, 387 U.S. 13, 148, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)). "[I]n many cases, ripeness coincides squarely with standing's injury-in-fact prong. . . . [I]n measuring whether the litigant has asserted an injury that is real and concrete rather than speculative and hypothetical, the ripeness inquiry merges almost completely with standing." Thomas, 220 F.3d at 1138-39. Because Plaintiff has sufficiently established a pre-enforcement injury-in-fact, his challenge to section 25850(a) is ripe for adjudication.

2. Plaintiff Alleges A Causal Nexus Between His Alleged Injuries Under Section 25850(b) And The Attorney General

Harris also argues that Plaintiff also lacks standing because he has failed to establish a causal nexus between the Attorney General and any alleged injuries arising from section 25850(b)'s authorization of warrantless firearm searches. According to Harris, the search complained of in the FAC was conducted by City of Redondo Beach police officers, not the Attorney General or her subordinates, and "any subsequent prosecution" for a misdemeanor violation of subsection (b) would be undertaken by City of Redondo Beach City Prosecutor. (Id. at 3, 10-11). Plaintiff generally asserts that he has standing, without directly addressing Harris's specific argument. (See Pl. Harris Opp. at 1-3).

"To survive a motion to dismiss for lack of constitutional standing, plaintiffs must establish a 'line of causation' between defendants' action and their alleged harm that is more than 'attenuated.' A causal chain does not fail simply because it has several 'links,' provided those links are 'not hypothetical or tenuous' and remain 'plausible.'" Maya, 658 F.3d at 1070 (internal citations and alterations omitted). However, "if it appears that plaintiff's alleged injuries are the result of conduct of a third person not a party-defendant, or the result of other circumstances not within the control of the defendant, there can be no finding that a sufficient causal nexus exists between the plaintiff's alleged injuries and the defendant's challenged conduct." NAACP v. State of California, 511 F. Supp. 1244, 1261 (E.D. Cal. 1981).

According to Harris, the City of Redondo Beach City Attorney is required to prosecute state-law misdemeanors occurring in Redondo Beach. (Harris MTD at 10). Therefore, because violation of section 25850 is, with certain exceptions not relevant here, a misdemeanor, Harris contends that there is "no connection" to the Attorney General and that an "injunction against the Attorney General in this regard would not redress any alleged injury" to Plaintiff. (Id. at 10-11); see also Cal. Penal Code § 25850(c). Harris's arguments are based on two errors. The first is that "any prosecution" of Plaintiff for violation section 25850(b) "would be handled by the Redondo Beach City Prosecutor." (Id. at 10). The FAC describes Plaintiff's intent to violate section 25850(b) by refusing to consent to warrantless searches not only in City of Redondo Beach, but also throughout the State of California while traveling. (FAC at 12). Therefore, not every prosecution of Plaintiff

for the violations of state law he alleges would necessarily be handled by the City of Redondo Beach City Attorney, or even another city attorney. Even in Los Angeles County, for example, in most cities it is the district attorney, not the city attorney, who is responsible for prosecuting misdemeanor violations of state law. (See Harris MTD at 10 (citing http://da.lacounty.gov/lacountycities.htm)).

Harris's second error is the contention that the Attorney General has "no connection" to prosecutions of state law misdemeanors undertaken by a city prosecutor. As a preliminary matter, and as the Court previously noted in connection with Harris's first motion to dismiss, the California Attorney General is the "head of the Department of Justice" and "has charge, as attorney, of all legal matters in which the state is interested." Cal. Gov't Code §§ 12510 & 12511. The Attorney General has particularly broad responsibility and expansive powers in the enforcement of criminal law, and may "take full charge of any investigation or prosecution of violations of the law," with "all the powers of a district attorney." Cal. Gov't Code § 12550; see also Pitts v. County of Kern, 17 Cal. 4th 340, 357, 70 Cal. Rptr. 2d 823 (1998) (California Constitution, Art. V, sec. 13, "confers broad discretion upon the Attorney General to determine when to step in and prosecute a criminal case") (internal quotation marks omitted). The Ninth Circuit has found that where a state Attorney General may assume the role of district attorney, the Attorney General has a sufficient connection to the enforcement of the state's criminal laws to be a proper defendant in suits challenging their constitutionality. Planned Parenthood of Idaho v. Wasden, 376 F.3d 908, 919-20 (9th Cir. 2004).

California law authorizes charter cities to charge their city attorney with the duty to prosecute misdemeanor offenses arising out of violations of state laws. Cal. Gov't Code § 72193; see also 79 Ops. Cal. Atty. Gen 46, 1996 WL 272279 at *1 (May 20, 1996) ("[T]he prosecution of all state laws, including state misdemeanor offenses, is a matter of statewide concern, wherever committed. Accordingly, it is only through legislative authorization that a city prosecutor, whether in a general law or charter city, may prosecute state misdemeanors."). City of Redondo Beach is a charter city. See http://www.redondo.org/in_the_city/default.asp. Pursuant to the City's Charter, the City Attorney is required to "[p]rosecute on behalf of the People any and all criminal cases arising from violations of this Charter or city ordinances" and "violations of State misdemeanors, unless otherwise directed by the City Council." Redondo Beach City Charter, sec. 11.2(c), available at http://www.qcode.us/codes/redondobeach/.

The delegation of authority to the City of Redondo Beach City Attorney to prosecute state law misdemeanors does not mean, however, that the state abdicates all responsibility for misdemeanor prosecutions to city attorneys, even in City of Redondo Beach. As the California Attorney General explained, when and if:

> a city prosecuting attorney may be disqualified or for some reason be unable to conduct the prosecution of a particular criminal action involving the commission of a state penal law, then it would be the duty of the district attorney to conduct such prosecution. Likewise, it would be [the district attorney's] duty to prosecute in the municipal and justice

> courts when the laws of this state are not being uniformly and adequately enforced.

79 Ops. Cal. Atty. Gen 46 at *2 (quoting 20 Ops. Cal. Atty. Gen 234 (1952) (internal quotation marks omitted)). Therefore, as the Attorney General explained, "when the provisions of [California Government Code] section 72193 are implemented by a charter city, the city attorney has the primary duty of prosecuting state misdemeanors within the city, with the district attorney acting in a subsidiary or 'backup' role." Id.

"A causal chain does not fail simply because it has several 'links,' provided those links are 'not hypothetical or tenuous' and remain 'plausible.'" Maya, 658 F.3d at 1070. Consequently, because the California Attorney General may stand in for a county district attorney and "take full charge" of any prosecution, and because a district attorney may in some circumstances prosecute state misdemeanors even in charter cities like City of Redondo Beach, there is a sufficient causal nexus between the Attorney General and Plaintiff's alleged injuries under section 25850(b) to confer standing.

3. Plaintiff Has Standing To Challenge Section 26155

Harris argues that because Plaintiff does not allege that he has applied for a permit to carry a firearm with the "proper licensing authority where [Plaintiff] lives," he has "not attempted to show that he would qualify for consideration for a permit" and therefore lacks standing. (Harris MTD at 11). In addition, Harris argues that the Attorney General's limited responsibilities in connection with section

26155's firearm permit application process, which consist only of preparing the statewide uniform application form and reporting upon receipt of an applicant's fingerprints as to whether or not the applicant is prohibited from possessing a firearm, "are inapposite in this case." (Id. at 11-12). Plaintiff argues that the Attorney General does have a causal nexus with his injuries under section 26155 because when Chief Leonardi informed Plaintiff that he could not issue Plaintiff a permit, "[t]he obvious inference . . . is that the Attorney General's office reported to the Redondo Beach chief of police that plaintiff 'is prohibited by state or federal law from possessing a firearm.'" (Pl. Harris Opp. at 3).

Section 26155 authorizes local police chiefs to issue licenses to residents of their city to carry firearms within the state of California. Cal. Penal Code § 26155(a). The license may be either to carry a concealed weapon, or, if the city is located in a county of fewer than 200,000 persons, to openly carry a loaded pistol, revolver, or other firearm capable of being concealed, in which case the open carry permit is valid only in the issuing county. Cal. Penal Code § 26155(b). If Plaintiff's claim were that section 26155's residency requirement improperly prevented him from obtaining a concealed weapon permit, the Court agrees with Harris that Plaintiff's failure to apply for a license within his city of residence would be fatal to his standing to challenge the statute. A concealed weapon permit under section 26155 is a state license, and Plaintiff would have indeed failed to establish that he did not qualify for such a permit if he had applied only in City of Redondo Beach.

However, Plaintiff's challenge to section 26155 in Claim Four is that the statute is unconstitutional "to the extent that it restricts licenses to openly carry a loaded handgun only to persons within counties of a population of fewer than 200,000 persons which is valid only in those counties, to only those residents who reside within those counties . . . [and] thereby prohibit[s] Plaintiff from obtaining a license to openly carry a loaded handgun for the purpose of self-defense afforded to similarly situated persons [in rural counties] . . . ." (FAC at 39). Because Plaintiff lives in the city of Lawndale in Los Angeles County, http://www.lawndalecity.org/home.asp, even if he had applied to the Lawndale Police Chief, he would not have been able to obtain a permit to openly carry a loaded gun under existing law. Any such "attempt[] to show that he would qualify for consideration for [an open carry] permit" would have been denied for the same reason Chief Leonardi gave to Plaintiff: cities in Los Angeles County may not issue open carry permits. (Harris MTD at 11; FAC at 30-31). That Plaintiff applied for an open carry permit, and was denied at least in part on the ground that cities in Los Angeles County, unlike cities in more rural counties, are prohibited from issuing open carry permits, is sufficient to establish standing. See, e.g., Breiner v. Nevada Dept. of Corrections, 610 F.3d 1202, 1206-07 (9th Cir. 2010) (male correctional officer challenging employment policy of state department of corrections of hiring only female correctional lieutenants at women's prison not required to submit application to women's prison to establish standing).

Furthermore, while the Attorney General may not have a substantial role in issuing an individual applicant a license to carry a firearm under section 26155, the statute's restriction of open carry licenses to

residents of counties with fewer than 200,000 persons does not entail individualized decision-making. It is well established that "a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." Snoeck v. Brussa, 153 F.3d 984, 986 (9th Cir. 1998). However, "no . . . special charge need be found directly in the challenged statute to meet the requisite 'some connection' so long as there is sufficient indicia of the defendant's enforcement powers found elsewhere in the laws of the state." Okpalobi v. Foster, 244 F.3d 405, 419 (5th Cir. 2001) (en banc). If a municipal employee or police chief in Los Angeles County unlawfully issued an open carry permit to a local resident, the Attorney General or county district attorney would undoubtedly have the power to take appropriate action. It is sufficient for standing purposes that the Attorney General is charged with the enforcement of the state's criminal laws, including section 26155, and has broad powers to do so.

4. Eleventh Amendment

Finally, Harris contends, as she did in moving to dismiss Plaintiff's original complaint, that all of Plaintiff's claims against the Attorney General are barred by the Eleventh Amendment. (Harris MTD at 14-16).

The Eleventh Amendment generally "prohibit[s] federal courts from hearing suits brought by private citizens against state governments without the state's consent." Sofamor Danek Group, Inc. v. Brown, 124 F.3d 1179, 1183 (9th Cir. 1997). Pursuant to Ex Parte Young, however,

an exception is made for suits against state officers for prospective declaratory or injunctive relief to enjoin official actions that violate federal law. Id. (citing Ex Parte Young, 209 U.S. 123, 155-56, 28 S. Ct. 441, 52 L. Ed. 714 (1908)). This exception is "predicated on the notion that a state cannot authorize one of its agents to violate the Constitution and laws of the United States," so a "state officer acting in violation of federal law is considered stripped of his official or representative character" and is "not shielded from suit by the state's sovereign immunity." Sofamor Danek Group, Inc., 124 F.3d at 1183 (internal quotation marks omitted). The "obvious fiction" of Ex Parte Young, however, is subject to several constraints. Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 270, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997). Among those constraints is the requirement that "the state official sued 'must have some connection with the enforcement of the act' to avoid making that official a mere representative of the state." Culinary Workers Union, Local 226 v. Del Papa, 200 F.3d 614, 619 (9th Cir. 1999) (quoting Ex Parte Young, 209 U.S. at 157).

While state law determines "whether and under what circumstances a particular defendant has any connection with the enforcement of the law of that state . . . it is a question of federal jurisdictional law whether the connection is sufficiently intimate to meet the requirements of Ex Parte Young." NAACP, 511 F. Supp. at 1261 (quoting Shell Oil Company v. Noel, 608 F.2d 208, 211 (1st Cir. 1979)). As discussed above, the Ninth Circuit has found that where, as in California, a state attorney general may "stand in the role of a county prosecutor, and in that role exercise the same power to enforce the statute the prosecutor would have," a sufficient connection is established for the Ex Parte

Young exception to apply. Planned Parenthood of Idaho, 376 F.3d at 919-20. Consequently, the Eleventh Amendment does not prohibit Plaintiff's claims for declaratory or injunctive relief against Harris.

C. Portions Of The FAC Violate Federal Rule Of Civil Procedure 8

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Rule 8(e)(1) instructs that "[e]ach averment of a pleading shall be simple, concise, and direct." A complaint violates Rule 8 if a defendant would have difficulty responding to the complaint. Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc., 637 F.3d 1047, 1059 (9th Cir. 2011).

Although the Court has found that Plaintiff has standing to challenge sections 25850 and 26155, portions of the FAC do not comply with the standards of Rule 8. Plaintiff's rambling allegations, many of which may or may not have been intended to relate to Claims Three and Four, often include irrelevant and unclear facts and argument. As the Court has noted, it is even sometimes difficult to determine the precise right that Plaintiff is seeking to vindicate. The FAC therefore fails to provide fair notice of some of the claims in a short, clear and concise statement. See Twombly, 550 U.S. at 555. Accordingly, it is recommended that the FAC be dismissed with leave to amend and that in

any amended complaint, Plaintiff must comply with the standards of Rule 8.

VI.

RECOMMENDATION

Consistent with the foregoing, IT IS RECOMMENDED that the District Court issue an Order: (1) accepting and adopting this Report and Recommendation; (2) GRANTING the City of Redondo Beach Defendants' Motion to dismiss by (a) dismissing Claim One without prejudice pursuant to the Younger abstention doctrine, as well as any purported pendent state law preemption claims; (b) dismissing the claims against the individual Redondo Beach Defendants in Claim Two with prejudice on the ground of qualified immunity; and (c) dismissing the damages claim against City of Redondo Beach in Claim Two with leave to amend; (3) DENYING Attorney General Harris's Motion to Dismiss; and (4) ORDERING Plaintiff to file a Second Amended Complaint within thirty (30) days of the District Judge's Order accepting the Report should Plaintiff wish to pursue this action.

DATED: November 20, 2012

/S/
SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file Objections as provided in Local Civil Rule 72 and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHARLES NICHOLS, Plaintiff, v. EDMUND G. BROWN, in his official capacity as Governor of California, et al., Defendants.	NO. CV 11-09916 SJO (SS) **ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Complaint in the above-captioned matter, Plaintiff's Motion for Review of Magistrate Judge's Report and Recommendation, which the Court construes as Objections, Plaintiff's Notice of Errata, the Response of Defendants Gov. Edmund G. Brown, Jr. and Atty. Gen. Kamala D. Harris to Plaintiff's Objections, all the records and files herein, and the Report and Recommendation of the United States Magistrate Judge. After having made a de novo determination of the portions of the Report and Recommendation to which Objections were directed, the Court accepts and adopts the findings, conclusions and recommendations of the Magistrate Judge, excluding the citation to Oklevueha Native American Church of Hawai'i,

Inc. v. Holder, 719 F. Supp. 2d 1217 (D. Hawaii 2010) on page 15, lines 15-23.

Accordingly, IT IS ORDERED THAT:

1. Plaintiff's claims against Attorney General Kamala D. Harris are DISMISSED WITH LEAVE TO AMEND for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).

2. Plaintiff's claims against Governor Edmund G. Brown, Jr. are DISMISSED WITH PREJUDICE for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and the Eleventh Amendment.

3. Plaintiff's claims against the City of Redondo Beach and City of Redondo Beach Police Chief Leonardi are DISMISSED WITH LEAVE TO AMEND for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and for failure to state a claim pursuant to Rule 12(b)(6).

4. Plaintiff's claims against City of Redondo Beach Police Department are DISMISSED WITH PREJUDICE for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and for failure to state a claim pursuant to Rule 12(b)(6).

5. Plaintiff's Seventh Claim for Relief alleging a violation of state constitutional law is DISMISSED WITH PREJUDICE pursuant to the Eleventh Amendment.

6. If Plaintiff desires to proceed with his claims against Attorney General Harris, City of Redondo Beach, and Police Chief Leonardi, Plaintiff shall file a First Amended Complaint within thirty (30) days of the date of this Order.

The Clerk shall serve copies of this Order by United States mail on Plaintiff and on counsel for Defendants.

DATED: May 7, 2012.

S. JAMES OTERO
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHARLES NICHOLS, Plaintiff, v. EDMUND G. BROWN, in his official capacity as Governor of California, et al., Defendants.	No. CV 11-09916 SJO (SS) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This Report and Recommendation is submitted to the Honorable S. James Otero, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

INTRODUCTION

On November 30, 2011, plaintiff Charles Nichols ("Plaintiff"), a California resident proceeding pro se, filed a civil rights complaint

pursuant to 42 U.S.C. § 1983. On January 30, 2012, Defendants California Attorney General Kamala D. Harris ("Harris"), and the City of Redondo Beach, City of Redondo Beach Police Department, and City of Redondo Beach Police Chief Joseph Leonardi (collectively, the "Redondo Beach Defendants" or "RBD"), separately filed Motions to Dismiss. Plaintiff filed Oppositions to the Motions on February 8, 2012. Harris and the Redondo Beach Defendants filed Replies on February 14, 2012. On March 8, 2012, Governor Edmund G. Brown, Jr. ("Brown"), the only other individually-named defendant, filed a Motion to Dismiss. Plaintiff filed an Opposition on March 12, 2012. On March 19, 2012, Brown filed a Reply.

For the reasons discussed below, it is recommended that the Motions to Dismiss be GRANTED. It is recommended that the claims against the Attorney General, the City of Redondo Beach, and City of Redondo Beach Police Chief Leonardi be DISMISSED with leave to amend. It is further recommended that the claims against the Governor and the City of Redondo Beach Police Department be DISMISSED without leave to amend. Finally, it is recommended that Plaintiff's Seventh Claim for Relief be DISMISSED without leave to amend.

II.

ALLEGATIONS OF THE COMPLAINT

The Complaint names five Defendants: Attorney General Harris, Governor Brown, the City of Redondo Beach, the City of Redondo Beach Police Department and City of Redondo Beach Police Chief Leonardi. (7AC 3-4). All Defendants are sued in their official capacity. (Id.).

Plaintiff raises seven related claims challenging the constitutionality of California Penal Code 25850, which provides in relevant part:

> (a) A person is guilty of carrying a loaded firearm when the person carries a loaded firearm on the person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory.
>
> (b) In order to determine whether or not a firearm is loaded for the purpose of enforcing this section, peace officers are authorized to examine any firearm carried by anyone on the person or in a vehicle while in any public place or on any public street in an incorporated city or prohibited area of an unincorporated territory. Refusal to allow a peace officer to inspect a firearm pursuant to this section constitutes probable cause for arrest for violation of this section.

Cal. Penal Code §25850(a)(b).[1]

---

[1] The Complaint generally cites to Penal Code section 12031, the prior statute codifying California's ban on carrying a loaded weapon in public. However, "[e]ffective January 1, 2012, section 12031 was repealed and section 25850, which similarly prohibits carrying a loaded firearm in public, became operative." People v. Elliott, 53 Cal. 4th 535, 587 n.7, 137 Cal. Rptr. 3d 59 (2012). Plaintiff acknowledges that former subsection 12031(a)(1), the prohibition on carrying a loaded firearm in public, is now codified in section 25850(a), and that former subsection 12031(e), the authorization for officers to conduct a warrantless search of a loaded weapon, is now codified in section 25850(b). (Complaint at 24). For ease of reference, the Court will cite to section 25850.

In Claim One, Plaintiff raises a facial challenge to section 25850(a) under the Second Amendment because it prohibits him from openly carrying in public a "fully functional loaded handgun[] for the purpose of self-defense and for other lawful purposes." (Complaint at 18). In Claim Two, Plaintiff raises a facial challenge to section 25850(b) under the Fourth Amendment because the "mere possession of a loaded firearm . . . cannot support a finding of probable cause . . . such that the Fourth Amendment's warrant requirement can be legislatively disregarded." (Id. at 19-20). In Claim Three, Plaintiff alleges that section 25850(a), as applied, violates his "right to openly carry a loaded handgun in public" as guaranteed by the Second Amendment. In Claim Four, Plaintiff alleges that section 25850(b), as applied, violates his right to be "free from unreasonable search and/or seizure under the Fourth Amendment" in the exercise of his Second Amendment rights. (Id. at 21).

In his Fifth and Sixth Claims, Plaintiff raises facial challenges under the Equal Protection and Due Process clauses of the Fourteenth Amendment on the grounds that section 25850 inhibits "the fundamental right of self-defense" (Claim Five) and "is arbitrary or irrational" (Claim Six). (Id. at 22). In Claim Seven, Plaintiff alleges that section 25850 is unconstitutional under Article I, Section I of the California Constitution because the prohibition on "openly carrying a loaded handgun in non-sensitive public places for the purpose of self-defense" denies Plaintiff and other legal residents of the state "the

instrument by which he and they may defend their life, liberty, property

and safeguard their liberty."[2] (Id. at 23).

Plaintiff seeks a declaration that section 28580 is "null and void" under the United States and California Constitutions. (Id. at 24). Plaintiff further seeks preliminary and permanent injunctions enjoining Defendants from enforcing the provisions of section 28580 against "Plaintiff and private citizens who are otherwise qualified to possess handguns." (Id. at 25).

III.

DEFENDANTS' MOTIONS TO DISMISS

[2] Plaintiff filed two Requests for Judicial Notice with his Oppositions to the Harris and RBD Motions. (See Dkt. Nos. 17, 24). Plaintiff also filed a "Notice of Lodging of Computer Disc Containing Videos" in support of his Opposition to the RBD Motion. (Dkt. No. 20). The RBD filed Objections to the Requests for Judicial Notice, in which Harris joined, and to the Notice of Lodging. (See Dkt. Nos. 25-26; Harris Reply at 6 n.1). "When ruling on a motion to dismiss, [a court] may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." Colony Cove Properties, LLC v. City Of Carson, 640 F.3d 948, 955 (9th Cir. 2011) (internal quotation marks omitted). "[N]otice may be taken where the fact is 'not subject to reasonable dispute,' either because it is 'generally known within the territorial jurisdiction,' or is 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" Castillo-Villagra v. I.N.S., 972 F.2d 1017, 1026 (9th Cir. 1992) (quoting Fed. R. Evid. 201(b)). The Court GRANTS Plaintiff's First Request for Judicial Notice with respect to attached Exhibits A and B and Plaintiff's Second Request for Judicial Notice, all of which involve court opinions and dockets, to the extent that they are compatible with Federal Rule of Evidence 201 and do not require the acceptance of facts "subject to reasonable dispute." The Court DENIES Plaintiff's First Request for Judicial Notice with respect to the news articles attached as Exhibits C, D and E and similarly declines to take notice of the video clips submitted in the Notice of Lodging. The Court notes, however, that even if it were to take notice of these materials, the analysis of Plaintiff's claims and the Court's recommendations would remain the same.

All Defendants seek dismissal of the Complaint under Rule 12(b)(1) for lack of subject matter jurisdiction. In addition, the RBD seek dismissal under Rule 12(b)(6) for failure to state a claim.

Harris contends that Plaintiff lacks Article III standing because he has not suffered an injury-in-fact. (Harris MTD at 7). She notes that Plaintiff has not been arrested for violating section 25850 and argues that arrest is not imminent because "the Attorney General has not threatened to enforce Section 25850" against Plaintiff. (Id. at 7-8). For the same reasons, Harris contends that Plaintiff's suit is not ripe. (Id. at 9). Harris further contends that Plaintiff's claims are barred by the Eleventh Amendment and do not meet the narrow circumstances in which federal suits against state officials for their oversight of state law are permitted, as articulated in Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). Specifically, Harris argues that even though Plaintiff seeks only prospective declaratory and injunctive relief, the Complaint does not show a "credible" threat of enforcement, and even if it did, the Attorney General's general law enforcement powers are insufficient to draw more than a "tenuous connection" between the Attorney General and Plaintiff's alleged injury. (Harris MTD at 10-11; Harris Reply at 5). Finally, Harris contends that the Eleventh Amendment bars Plaintiff's seventh claim, which alleges that section 25850 violates the California Constitution. (Harris MTD at 12).

Governor Brown also argues that Plaintiff lacks standing and that the case is not ripe for the same reasons presented by the Attorney General. (Brown MTD at 1, 6, 10-11). Brown further argues that suit against him is barred by the Eleventh Amendment and that the Ex Parte

Young exception does not apply because Plaintiff cannot establish that the Governor has a direct connection with the enforcement of section 25850. (Id. at 7-10). Brown also argues that Plaintiff's state constitutional claim is barred by the Eleventh Amendment. (Id. at 14).

The RBD contend that Plaintiff does not have standing to bring suit against them because he "cannot show that any of his alleged injuries are traceable to the actions of Redondo Beach Defendants." (RBD MTD at 5). They note that all but two of Plaintiff's claims are facial challenges to a state law and that the Third and Fourth Claims for Relief, which challenge section 25850 as applied, "do not even make an allegation that the Redondo Beach Defendants are applying the challenged provisions at all . . . ." (Id.). Furthermore, the RBD cannot grant the relief Plaintiff seeks because even if "the City's assumed policies or customs [were] enjoined by this Court, the general state law provisions that [Plaintiff] alleges cause his supposed injuries would remain in effect." (Id. at 6). The RBD also seek dismissal of the Complaint under Rule 12(b)(6) for failure to state a claim because Plaintiff "does not allege that the Redondo Beach Defendants even have a policy or custom concerning any of the general law provisions he challenges as unconstitutional." (Id. at 7). They also seek dismissal of Plaintiff's state constitutional claim pursuant to the Eleventh Amendment and because California's Constitution does not guarantee a right to bear arms. (Id. at 9).

IV.

STANDARDS GOVERNING MOTIONS TO DISMISS

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of

an action for lack of subject matter jurisdiction. It is well established that the party seeking to invoke the jurisdiction of the federal courts has the burden of establishing that jurisdiction exists. Assoc. of Medical Colleges v. United States, 217 F.3d 770, 778–779 (9th Cir. 2000). A motion under Rule 12(b)(1) can either be "facial," attacking a pleading on its face and accepting all allegations as true, or "factual," contesting the truth of some or all of the pleading's allegations as they relate to jurisdiction. Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004). The standards that must be applied vary according to the nature of the jurisdictional challenge.

Here, the challenge to jurisdiction is a facial attack. Defendants contend that the allegations of jurisdiction contained in the Complaint are insufficient on their face to demonstrate the existence of jurisdiction. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). In a Rule 12(b)(1) motion of this type, the plaintiff is entitled to safeguards similar to those applicable when a Rule 12(b)(6) motion is made. See Sea Vessel Inc. v. Reyes, 23 F.3d 345, 347 (11th Cir. 1994). The material factual allegations of the complaint are presumed to be true, and the motion is granted only if the plaintiff fails to allege an element necessary for subject matter jurisdiction. Savage v. Glendale Union High Sch. Dist. No. 205, 343 F.3d 1036, 1039 n.1 (9th Cir. 2003); see also Maya v. Centex Corp., 658 F.3d 1060, 1068 (9th Cir. 2011) ("'For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party.'") (quoting Warth v. Seldin, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)).

Under Rule 12(b)(6), a defendant may also seek dismissal of a complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A court may grant such a dismissal only where the plaintiff fails to present a cognizable legal theory or to allege sufficient facts to support a cognizable legal theory. See Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008).

To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). The court must accept all factual allegations as true even if doubtful in fact. Twombly, 550 U.S. at 555-56. However, the court does not have to accept as true mere legal conclusions. See Iqbal, 129 S. Ct. at 1949 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

A court considering a motion to dismiss must also decide, if it grants the motion, whether to grant the plaintiff leave to amend. Even when a request to amend is not made, "[l]eave to amend should be granted unless the pleading could not possibly be cured by the allegation of other facts, and should be granted more liberally to pro se plaintiffs." Lira v. Herrera, 427 F.3d 1164, 1176 (9th Cir. 2005) (internal quotation marks omitted). However, if amendment of the pleading would be futile,

leave to amend may be denied. See Ventress v. Japan Airlines, 603 F.3d 676, 680 (9th Cir. 2010).

V.

DISCUSSION

Plaintiff lacks standing to bring his claims as currently alleged against all named Defendants. Even liberally construed, the Complaint fails to establish that Plaintiff has suffered an injury-in-fact sufficiently particularized to bring this preenforcement challenge. Additionally, even if Plaintiff were able to show an injury-in-fact, he cannot show a direct connection between the Governor or the Redondo Beach Defendants and his alleged injuries, or that his injuries would be redressed by a favorable decision against those Defendants. For the same reasons, Plaintiff's claims are not ripe for adjudication. Even if Plaintiff could establish jurisdiction, he has failed to state a claim against the RBD. Finally, the Eleventh Amendment bars Plaintiff's claims against the Governor and Plaintiff's state constitutional claim.

A. Plaintiff Lacks Standing To Bring This Preenforcement Challenge

"Article III, § 2, of the Constitution restricts the federal 'judicial Power' to the resolution of 'Cases' and 'Controversies.' That case-or-controversy requirement is satisfied only where a plaintiff has standing." Sprint Communications Co., L.P. v. APCC Servs., Inc., 554 U.S. 269, 273, 128 S. Ct. 2531, 171 L. Ed. 2d 424 (2008). To establish

Article III standing, a plaintiff must show that (1) he "has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Maya, 658 F.3d at 1067 (internal quotation marks omitted). A failure to meet any one of these three criteria constitutes a "lack of Article III standing [and] requires dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1)." Id.

1. Injury-in-Fact

The first factor a court will consider in addressing a plaintiff's standing is whether he "has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent." Maya, 658 F.3d at 1067. Plaintiff does not allege that he has ever violated section 25850 or been charged with a violation. Rather, Plaintiff states that after receiving a "not so thinly veiled death threat" on September 1, 2011, he "would openly carry a loaded and functional handgun in public for the purpose of self-defense, but he refrains from doing so because he fears arrest, prosecution, fine, and imprisonment as he understands it is unlawful to openly carry a handgun in California for the purpose of self-defense." (Complaint at 6, ¶ 15).

Because Plaintiff has not been arrested, prosecuted, or incarcerated for violating section 25850, he must satisfy the criteria for an injury-in-fact that apply to preenforcement challenges to statutes regulating

conduct.[3] Plaintiff "must show a genuine threat of imminent prosecution," not the "mere possibility of criminal sanctions." San Diego Cnty. Gun Rights Comm. v. Reno, 98 F.3d 1121, 1126 (9th Cir. 1996) (internal quotation marks omitted; emphasis in original). "In evaluating the genuineness of a claimed threat of prosecution, [the court] look[s] to whether the plaintiffs have articulated a 'concrete plan' to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under the challenged statute." Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc); see also Babbitt v. United Farm Workers, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979) (a plaintiff challenging the constitutionality of a criminal statute need not "first expose himself to actual arrest or prosecution" but must establish Article III standing by "alleg[ing] an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute," and demonstrating that "there exists a credible threat of prosecution thereunder."). "A general intent to violate a

---

[3] Article III standing jurisprudence distinguishes between preenforcement challenges to statutes regulating speech and statutes regulating conduct. The Supreme Court has recognized that chilling protected speech may by itself constitute a cognizable Article III injury because "self-censorship" of speech is "a harm that can be realized even without an actual prosecution." Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 393, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988). The Ninth Circuit has found, however, that where the constitutional challenge involves a statute regulating conduct, not speech, mere allegations of self-censorship are insufficient to establish an injury and "the standing requirements for preenforcement challenges set out in Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134 (9th Cir. 2000), apply." Humanitarian Law Project v. U.S. Treas. Dep't., 578 F.3d 1133, 1138 (9th Cir. 2009); see also id. at 1143 ("[N]either self-censorship nor subjective chill is the functional equivalent of a well-founded fear of enforcement when the statute on its face does not regulate expressive activity.").

statute at some unknown date in the future does not rise to the level of an articulated, concrete plan." Thomas, 220 F.3d at 1139. Additionally, "neither the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement." Id.; see also Stoianoff v. State of Montana, 695 F.2d 1214, 1223 (9th Cir. 1983) ("The mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III.").

a. Plaintiff Fails To Allege A Concrete Plan To Violate Section 25850

The first element of the injury-in-fact analysis for preenforcement challenges is whether the plaintiff has articulated a "concrete plan" to violate the contested statute. Thomas, 220 F.3d at 1139. Even liberally construed, the Complaint fails to allege that Plaintiff has a concrete plan to violate section 25850. The Complaint merely alleges that Plaintiff "would openly carry a loaded and functional handgun in public for the purpose of self-defense" but for his fear of arrest and prosecution. (Complaint at 6, ¶ 15).[4] The mere assertion of a desire to engage in a prohibited activity, particularly when the "acts necessary to make plaintiffs' injury -- prosecution under the challenged statute -- materialize are almost entirely within plaintiffs' own control" is too indefinite to constitute a "concrete plan." San Diego Cnty. Gun Rights

[4] In a Declaration submitted with his Oppositions to the Harris and RBD Motions to Dismiss, Plaintiff similarly asserts that he "do[es] not openly carry a loaded handgun or long gun in non-sensitive public places because [he] would in all certainty be arrested, prosecuted, fined and imprisoned for doing so." (Decl. of Charles Nichols, Dkt. No. 21, at 4).

Comm., 98 F.3d at 1127.

Plaintiff is not required to violate section 25850 and subject himself to prosecution to establish an injury-in-fact, but must articulate a concrete plan in sufficient detail to convey the timing and circumstances of the anticipated action. See Babbitt, 442 U.S. at 298; Thomas, 220 F.3d at 1139. In Thomas, landlords claimed that their pro-marriage religious beliefs prevented them from renting housing to unmarried couples and would therefore compel them to violate a law banning housing discrimination on the basis of marital status. The Ninth Circuit found that the landlords' general "intent" to violate the law "on some uncertain day in the future," coupled with their inability even to specify "when, to whom, where, or under what circumstances" they had refused to rent to unmarried couples in the past, "does not rise to the level of an articulated, concrete plan." Id. at 1139-40. Similarly, a complaint challenging federal drug laws on the ground that they infringed on a Native American church's use of cannabis, but that failed to "allege exactly how, where, in what quantities, and under what circumstances Plaintiffs intend[ed] to consume cannabis" and to articulate how the church planned to acquire, cultivate and distribute the drug, did not "describe a concrete plan to violate a federal drug law." Oklevueha Native American Church of Hawai'i, Inc. v. Holder, 719 F. Supp. 2d 1217, 1222 (D. Hawaii 2010). Plaintiff's vague assertion that he "would" openly carry a firearm does not provide any of the specificity required to identify a concrete plan to violate section 25850.

b. Plaintiff Fails To Allege That Prosecuting Authorities Have Communicated An Intent To Prosecute Him

The second element of the injury-in-fact analysis for preenforcement challenges is whether prosecuting authorities "have communicated a specific warning or threat to initiate proceedings" against the plaintiff should he violate the contested statute. Thomas, 220 F.3d at 1139. The mere allegation of a fear of prosecution that "amounts to no more than a 'generalized grievance shared in substantially equal measure by . . . a large class of citizens'" who may also desire to violate the challenged statute "does not warrant the exercise of jurisdiction." National Rifle Assoc. of America v. Magaw, 132 F.3d 272, 294 (6th Cir. 1997) (quoting Warth, 422 U.S. at 499); see also Seegars v. Gonzales, 396 F.3d 1248, 1255 (D.C. Cir. 2005) (challenge to firearm regulatory statutes failed to show "a threat of prosecution reaching the level of imminence" required to establish a preenforcement injury where plaintiffs did not allege any specific prior threats by authorities and "nothing . . . indicates any special priority placed upon preventing these parties from engaging in specified conduct") (internal quotation marks omitted; emphasis in original). However, a plaintiff may establish a "real and immediate" threat of an injury where, for example, the plaintiff has been previously charged with violating the challenged statute, see American-Arab Anti-Discrimination Committee v. Thornburgh, 970 F.2d 501, 508 (9th Cir. 1992), or has received a specific warning of intent to prosecute. See Ripplinger v. Collins, 868 F.2d 1043, 1047 (9th Cir. 1989).

Plaintiff does not allege that he has been previously charged with violating section 25850 or has received any specific warning, directed to him, that he will be prosecuted if he openly carries a loaded firearm in public. His fear of prosecution, based on his "understanding" of California law, is no different than the "generalized grievance" of any

gun owner who wishes to openly carry a handgun and is insufficient to establish a particularized, imminent preenforcement threat of prosecution. (See Complaint at 6, ¶ 15); Warth, 422 U.S. at 499; see also San Diego Cnty. Gun Rights Comm., 98 F.3d at 1128 ("[A] possibility of . . . eventual prosecution . . . is clearly insufficient to establish a 'case' or 'controversy.'").

c. The Attorney General's Concession That Violations of Section 25850 Are Prosecuted Is Not Dispositive

The third element of the injury-in-fact analysis for preenforcement challenges examines the "history of past prosecution or enforcement under the challenged statute." Thomas, 220 F.3d at 1139. An absence of past prosecutions "undercuts [plaintiffs'] argument that they face a genuine threat of prosecution." San Diego Cnty. Gun Rights Comm., 98 F.3d at 1128. Here, the Attorney General concedes that "statewide, law enforcement authorities have appropriately enforced Section 25850 . . . ." (Harris MTD at 11). While this factor weighs in favor of finding a preenforcement injury-in-fact, it is not dispositive. See, e.g., Seegars, 396 F.3d at 1255 (government's prior admission that it prosecutes all gun law violators "under normal prosecutorial standards" is insufficient to establish an imminent preenforcement threat of prosecution where plaintiffs alleged no prior threats of prosecution "against them"). Consequently, because Plaintiff has failed to allege a concrete plan to violate section 25850 or any specific communication directed to him threatening to enforce the statute, he has stated only a "generalized grievance" that does not constitute a preenforcement injury-in-fact. Consequently, Plaintiff's jurisdictional allegations

fail to establish standing to bring these preenforcement claims.

2. Causation

Even though Plaintiff has failed to allege an injury-in-fact, and therefore lacks standing on that ground alone, the Court will address the other factors of the standing analysis raised by Defendants to provide guidance to the parties. The second factor a court will consider is whether "the injury is fairly traceable to the challenged action of the defendant." Maya, 658 F.3d at 1067. "To survive a motion to dismiss for lack of constitutional standing, plaintiffs must establish a 'line of causation' between defendants' action and their alleged harm that is more than 'attenuated.' A causal chain does not fail simply because it has several 'links,' provided those links are 'not hypothetical or tenuous' and remain 'plausible.'" Id. at 1070 (internal citations and alterations omitted). However, "if it appears that plaintiff's alleged injuries are the result of conduct of a third person not a party-defendant, or the result of other circumstances not within the control of the defendant, there can be no finding that a sufficient causal nexus exists between the plaintiff's alleged injuries and the defendant's challenged conduct." NAACP v. State of California, 511 F. Supp. 1244, 1261 (E.D. Cal. 1981).

a. Attorney General Harris

Harris argues that Plaintiff "draws only a tenuous connection between himself and the Attorney General" based on her general law

enforcement powers, a connection which she claims is insufficient to "satisfy the requirement that enforcement be threatened, so as to establish standing and an Ex Parte Young exception to the Eleventh Amendment."[5] (Harris Reply at 5). The California Attorney General is the "head of the Department of Justice" and "has charge, as attorney, of all legal matters in which the state is interested." Cal. Gov't Code §§ 12510 & 12511. The Attorney General has particularly broad responsibility and expansive powers in the enforcement of criminal law:

> The Attorney General has direct supervision over the district attorneys of the several counties of the State . . . . ¶ When he deems it advisable or necessary in the public interest, or when directed to do so by the Governor, he shall assist any district attorney in the discharge of his duties, and may, where he deems it necessary, take full charge of any investigation or prosecution of violations of law of which the superior court has jurisdiction. In this respect he has all the powers of a district attorney, including the power to issue or cause to be issued subpenas or other process.

---

[5] A state official's enforcement connection with a plaintiff's alleged injuries is a factor in both Article III standing and Eleventh Amendment sovereign immunity analyses. However, "[w]hile the Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power . . . it is not coextensive with the limitations on judicial power in Article III." Calderon v. Ashmus, 523 U.S. 740, 745 n.2, 118 S. Ct. 1694, 140 L. Ed. 2d 970 (1998) (before reaching Eleventh Amendment issues, the court "must first address whether this action" satisfies the Article III "case or controversy" requirement); see also Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267, 117 S. Ct. 2028, 2033, 138 L. Ed. 2d 438 (1997) (state may waive Eleventh Amendment immunity but not Article III case or controversy requirement).

Cal. Gov't Code § 12550; see also Pitts v. County of Kern, 17 Cal. 4th 340, 357, 70 Cal. Rptr. 2d 823 (1998) (California Constitution, Art. V, sec. 13, "confers broad discretion upon the Attorney General to determine when to step in and prosecute a criminal case") (internal quotation marks omitted).

The Ninth Circuit has found that where a state Attorney General may assume the role of County Prosecutor, the Attorney General has a sufficient connection to the enforcement of the state's criminal laws to be a proper defendant in suits challenging their constitutionality:

> State attorneys general are not invariably proper defendants in challenges to state criminal laws. Where an attorney general cannot direct, in a binding fashion, the prosecutorial activities of the officers who actually enforce the law or bring his own prosecution, he may not be a proper defendant. . . . However, and determinatively here . . . the [Idaho] attorney general may in effect deputize himself (or be deputized by the governor) to stand in the role of a county prosecutor, and in that role exercise the same power to enforce the statute the prosecutor would have. That power demonstrates the requisite causal connection for standing purposes. An injunction against the attorney general could redress plaintiffs' alleged injuries . . . .

Planned Parenthood of Idaho v. Wasden, 376 F.3d 908, 919-20 (9th Cir. 2004). Consequently, because the California Attorney General may stand in for a county prosecutor and "take full charge" of any prosecution, the

connection between the Attorney General and Plaintiff's alleged injuries is sufficient to satisfy the second prong of the standing analysis.

b. Governor Brown

Brown claims that he "does not have a role in enforcing section 25850" and that the Governor's general duty to enforce state law is an insufficient connection to Plaintiff's alleged injuries to confer standing. (Brown MTD at 8); see also Cal. Const., Art. V, sec. 1 ("The Governor shall see that the law is faithfully executed."). It is well established that "a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." Snoeck v. Brussa, 153 F.3d 984, 986 (9th Cir. 1998); see also Los Angeles Branch NAACP v. Los Angeles Unified School Dist., 714 F.2d 946, 953 (9th Cir. 1983) (governor's "general duty to enforce California law . . . does not establish the requisite connection between him and the unconstitutional acts" alleged in suit claiming de jure segregation of city school system); Shell Oil Co. v. Noel, 608 F.2d 208, 211 (1st Cir. 1979) ("The mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute."). Additionally, "[w]here the enforcement of a statute is the responsibility of parties other than the governor . . . the governor's general executive power [to enforce laws] is insufficient to confer jurisdiction."). Women's Emergency Network v. Bush, 323 F.3d 937, 949-50 (11th Cir. 2003).

However, "no . . . special charge need be found directly in the

challenged statute to meet the requisite 'some connection' so long as there is sufficient indicia of the defendant's enforcement powers found elsewhere in the laws of the state." Okpalobi v. Foster, 244 F.3d 405, 419 (5th Cir. 2001). The Governor's connection to a plaintiff's injury may be sufficiently direct based on other duties the law places on him related to the challenged statute. See, e.g., Los Angeles Cnty. Bar Ass'n v. Eu, 979 F.2d 697, 704 (9th Cir. 1992) (governor proper party in suit challenging statute limiting the number of judges the governor could appoint to any county due to his "specific connection to the challenged statute"); Artichoke Joe's v. Norton, 216 F. Supp. 2d 1084, 1110–11 (E.D. Cal. 2002) (governor proper party in suit challenging statute prohibiting certain gaming machines because the governor had a specific duty under state law, "not based on any general duty to enforce state law," to negotiate and approve gaming compacts with tribes), aff'd, 353 F.3d 712 (2003).

Here, Plaintiff is suing Brown in his official capacity because "[t]he Governor has the supreme executive power in the State and is responsible for the faithful execution of the laws of the State of California." (Complaint at 3). This generalized enforcement power, however, is insufficient to establish the requisite connection between Brown and Plaintiff's alleged injury. See Young v. Hawaii, 548 F. Supp. 2d 1151, 1164 (D. Hawaii 2008) (suit challenging laws prohibiting the carrying or use of firearms in certain circumstances failed to establish "required nexus" between the governor and plaintiff's injury where complaint relied solely on governor's "general oversight of State laws"). Nor does the fact that Brown signed into law a bill that prohibits openly carrying an unloaded handgun in public, as Plaintiff contends in his

Opposition, establish the requisite connection. (Brown Opp. at 4); see also Cal. Penal Code § 26350 (former Assembly Bill 144). A governor is entitled to absolute immunity for the act of signing a bill into law. See Torres-Rivera v. Calderon-Serra, 412 F.3d 205, 213 (1st Cir. 2005) ("[A] governor who signs into law or vetoes legislation passed by the legislature is also entitled to absolute immunity for that act."); Women's Emergency Network, 323 F.3d at 950 ("Under the doctrine of absolute legislative immunity, a governor cannot be sued for signing a bill into law.") (citing Supreme Ct. of Va. v. Consumers Union of United States, Inc., 446 U.S. 719, 731-34, 100 S. Ct. 1967, 1974-76, 64 L. Ed. 2d 641 (1980)).

Consequently, because Plaintiff's sole basis for suing Brown is based on the Governor's general enforcement powers, Plaintiff has failed to show that his injury is "fairly traceable" to the Governor. See, e.g., Nat'l Audubon Soc'y, Inc. v. Davis, 307 F.3d 835, 847 (9th Cir. 2002) (California governor dismissed from challenge to law banning use of certain traps and poisons due to lack of enforcement ability); Confederated Tribes & Bands of Yakama Indian Nation v. Locke, 176 F.3d 476, 469-70 (9th Cir. 1999) (Washington governor improper defendant in challenge to state lottery because governor had no involvement with operation of lottery). Plaintiff's claims against Governor Brown therefore fail to satisfy the second prong of the standing analysis.

c. Redondo Beach Defendants

Plaintiff has failed to allege facts establishing that the RBD have a sufficient connection to his alleged injury to establish jurisdiction.

The Complaint makes four specific allegations concerning the RBD. In Paragraph Seven, Plaintiff identifies the City of Redondo Beach as a "municipal division of the State of California" that is responsible for setting the policies and procedures of its Police Department. (Complaint at 3-4). In Paragraphs Eight and Nine, Plaintiff identifies the City of Redondo Beach Police Department as a police department and Police Chief Joseph Leonardi as the person with "final departmental authority in all matters of policy, operation and discipline." (Id. at 4). The only other specific reference to the RBD is in Paragraph Forty-Eight, in which Plaintiff claims that the Redondo Beach Municipal Code "imposes a fine for illegally hunting or discharging a bullet ' . . . in, over, across, along, or upon any public street, sidewalk, lane, alley, or public place in the City.'" (Id. at 15) (citing Redondo Beach Municipal Code §§ 4-25.01, 1-2.03).[6] Nowhere in the Complaint does Plaintiff allege that the RBD actually enforce section 25850 or that the City has a policy that improperly applies or exceeds the state statute's provisions.

Plaintiff's injury, as currently alleged, is not traceable to the RBD. Section 25850 is a state law, not a municipal ordinance. Indeed, the California Legislature has "chosen to preempt 'discrete areas of gun regulation,'" including "public handgun possession." Fiscal v. City and

[6] Section 4-25.01 of the Redondo Beach Municipal Code reads: "Places to play ball and hunt restricted. It shall be unlawful for any person to play ball or any game of sport with a ball or football or to throw, cast, shoot, or discharge any stone, pellet, bullet, arrow, or other missile in, over, across, along, or upon any public street, sidewalk, lane, alley, or public place in the City. Persons may play ball or any game of sport with a ball or football in any area in any public park or playground designated or set apart for such purpose by the Council by resolution." See http://www.qcode.us/codes/redondobeach/. Section 1-2.03 provides that a violation of section 4-25.01 "shall constitute an infraction and not a misdemeanor." Id.

County of San Francisco, 158 Cal. App. 4th 895, 905, 909, 70 Cal. Rptr. 3d 324 (2008). Under California law, "where the Legislature has manifested an intention, expressly or by implication, wholly to occupy the field . . . municipal power to regulate in that area is lost." Id. at 904 (alterations and internal quotation marks omitted). Section 4-25.01, which Plaintiff erroneously cites as a gun control ordinance, is in fact in the chapter of the Municipal Code entitled "Ball Games and Hunting" and does not encroach on the field occupied by section 25850. See http://www.qcode.us/codes/redondobeach/. The ordinance regulates where certain games may be played in the City and prohibits hunting in public places. Id. at § 4.25-01. It says nothing about openly carrying a loaded firearm in public for self-defense and could not because that area of gun regulation has been pre-empted by the state.

At most, Plaintiff's claim against the RBD appears to be based on the fact that these defendants enforce state law, including section 25850. (See, e.g., RBD Opp. at 5) ("As Redondo Beach Defendants are well aware, it has been the 'official policy or custom' of the Defendants to enforce PC 12031(e) since at least August 7, 2010."). However, "mere enforcement of a state statute is not a sufficient basis for imposing § 1983 municipal liability." Wong v. City & County of Honolulu, 333 F. Supp. 2d 942, 951 (D. Hawaii 2004); see also Surplus Store and Exchange, Inc. v. City of Delphi, 928 F.2d 788, 791 n.4 (7th Cir. 1991) (refusing to construe state law as a municipal policy in section 1983 claim on the ground that doing so "would allow municipalities to be nothing more than convenient receptacles of liability for violations caused entirely by state actors -- here, the [state] legislature"). Consequently, Plaintiff's claims do not establish that the RBD have any connection to

his alleged injury and fail to satisfy the second prong of the standing analysis.

3. Likelihood That The Injury Will Be Redressed By A Favorable Decision

The third factor of the standing analysis is whether "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Maya, 658 F.3d at 1067. If Plaintiff is able to amend his Complaint to allege an injury-in-fact, it is likely that a favorable decision against the Attorney General would redress Plaintiff's injury due to her direct enforcement powers over California criminal law. Planned Parenthood of Idaho, 376 F.3d at 919-20. However, as discussed above, because the Governor is not directly responsible for enforcing section 25850, a favorable decision against the Governor is not likely to redress Plaintiff's injury. Furthermore, Plaintiff's injury, as currently alleged, would not be redressed by a favorable decision against the RBD. Even if the Court could construe enforcement of state law by the RBD as a municipal "policy," enjoining the RBD from implementing that "policy" would not provide any real relief if the provisions of section 25850 remain intact. It is possible, however, that Plaintiff may be able to amend his claims against the RBD to identify a municipal policy that exceeds or unconstitutionally applies the provisions of section 25850. If Plaintiff is able to articulate facts establishing that the RBD do not simply enforce state law, but do so in a particular manner that violates the Constitution, Plaintiff may state a claim.

In sum, Plaintiff has failed to establish a particularized preenforcement injury-in-fact and therefore lacks standing to bring his claims as currently alleged against any of the named Defendants. However, assuming that Plaintiff will be able to amend his Complaint to allege an injury-in-fact, the Attorney General would appear to be a proper defendant. Therefore, it is recommended that Plaintiff's claims against the Attorney General be DISMISSED, but with leave to amend. Even assuming that Plaintiff can allege an injury-in-fact, however, the Governor does not have a sufficiently direct connection to the enforcement of section 25850 such that a favorable decision against him would be likely to redress Plaintiff's injury. Therefore, because amendment of the Complaint would be futile as to the Governor, it is recommended that Plaintiff's claims against the Governor be DISMISSED without leave to amend. Finally, if Plaintiff is able to allege facts establishing that the RBD do not merely enforce state law but apply section 25850 in a particular manner that violates the Constitution, the RBD would appear to have a sufficient connection to Plaintiff's injury and a favorable decision against them would be likely to redress Plaintiff's injury. Therefore, it is recommended that Plaintiff's claims against the RBD be DISMISSED, but with leave to amend.[7]

B. Plaintiff's Claims Are Not Ripe For Adjudication

[7] Specifically, it is recommended that Plaintiff's claims against the City of Redondo Beach and Police Chief Leonardi be dismissed with leave to amend. For the reasons stated in Part V.D. below, which do not involve standing, the City of Redondo Beach Police Department is an improper defendant in a section 1983 suit. Consequently, it is recommended that Plaintiff's claims against the City of Redondo Beach Police Department be dismissed without leave to amend.

Ripeness is question of timing intended to "prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract agreements." Thomas, 220 F.3d at 1138 (quoting Abbott Laboratories v. Gardner, 387 U.S. 13, 148, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)). "[I]n many cases, ripeness coincides squarely with standing's injury-in-fact prong. . . . [I]n measuring whether the litigant has asserted an injury that is real and concrete rather than speculative and hypothetical, the ripeness inquiry merges almost completely with standing." Thomas, 220 F.3d at 1138-39. In a preenforcement challenge, the ripeness inquiry tracks the analysis articulated in Thomas for determining whether a "genuine threat of imminent prosecution" exists. Stormans, Inc. v. Selecky, 586 F.3d 1109, 1122 (9th Cir. 2009). Because Plaintiff has failed to establish a preenforcement injury-in-fact, his claims, as currently alleged, are not ripe for adjudication.

Furthermore, this case is not ripe for review for prudential reasons as well. To evaluate the "prudential component of ripeness," a court considers "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Wolfson v. Brammer, 616 F.3d 1045, 1060 (9th Cir. 2010) (internal quotation marks omitted). A claim is "fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." Id. (internal quotation marks omitted). Although most of Plaintiff's claims are facial challenges, Claims Three and Four purport to challenge section 25850 "as applied." However, the Complaint is devoid of factual allegations describing how the law is applied or explaining what Plaintiff's specific objections are to the

manner in which the law is applied. "[A] party bringing a preenforcement challenge must nonetheless present a concrete factual situation . . . to delineate the boundaries of what conduct the government may or may not regulate without running afoul of the Constitution." Alaska Right to Life Political Action Comm. v. Feldman, 504 F.3d 840, 849 (9th Cir. 2007) (internal quotation marks omitted). Plaintiff has failed to articulate such a "concrete factual situation" and instead presents only a generalized grievance that would impermissibly require the Court to "decide constitutional questions in a vacuum." Id. Consequently, his claims, as currently alleged, are not ripe for review.

C. The Eleventh Amendment Bars Suit Against The Governor

Harris and Brown contend that the Eleventh Amendment bars suit against them.[8] (Harris MTD at 10-11; Brown MTD 6-8). The Eleventh Amendment generally "prohibit[s] federal courts from hearing suits brought by private citizens against state governments without the state's consent." Sofamor Danek Group, Inc. v. Brown, 124 F.3d 1179, 1183 (9th Cir. 1997). Pursuant to Ex Parte Young, however, an exception is made for suits against state officers for prospective declaratory or injunctive relief to enjoin official actions that violate federal law. Id. (citing Ex Parte Young, 209 U.S. at 155-56). This exception is "predicated on the notion that a state cannot authorize one of its agents to violate the Constitution and laws of the United States," so a "state officer acting in violation of federal law is considered stripped of his

[8] The Eleventh Amendment does not prohibit suit against political subdivisions of states, such as counties and municipalities, and as such, does not apply to the claims against the Redondo Beach Defendants. See Alaska v. EEOC, 564 F.3d 1062, 1085-86 (9th Cir. 2009).

ER140

official or representative character" and is "not shielded from suit by the state's sovereign immunity." Sofamor Danek Group, Inc., 124 F.3d at 1183 (internal quotation marks omitted). The "obvious fiction" of Ex Parte Young, however, is subject to several constraints. Coeur d'Alene Tribe of Idaho, 521 U.S. at 270. Among those constraints is the requirement that "the state official sued 'must have some connection with the enforcement of the act' to avoid making that official a mere representative of the state." Culinary Workers Union, Local 226 v. Del Papa, 200 F.3d 614, 619 (9th Cir. 1999) (quoting Ex Parte Young, 209 U.S. at 157).

While state law determines "whether and under what circumstances a particular defendant has any connection with the enforcement of the law of that state . . . it is a question of federal jurisdictional law whether the connection is sufficiently intimate to meet the requirements of Ex Parte Young." Shell Oil Company, 608 F.2d at 211. As discussed above, the Ninth Circuit has found that where, as in California, a state attorney general may "stand in the role of a county prosecutor, and in that role exercise the same power to enforce the statute the prosecutor would have," a sufficient connection is established for the Ex Parte Young exception to apply. Planned Parenthood of Idaho, 376 F.3d at 919-20. Consequently, the Eleventh Amendment does not prohibit suit against Harris. However, where, as here, the Governor does not have "the requisite enforcement connection" to a challenged state law, the Eleventh Amendment prohibits suit against him. Nat'l Audubon Soc'y, Inc., 307 F.3d at 847. Consequently, Plaintiff's claims against Brown are barred by the Eleventh Amendment.

\\

\\

\\

\\

D. Plaintiff Fails To State A Claim Against The Redondo Beach Defendants Under Rule 12(b)(6)

In addition to failing to establish jurisdiction over the Redondo Beach Defendants, Plaintiff has also failed to state a claim against the RBD under Rule 12(b)(6). When an individual sues a local government for violation of his constitutional rights, the municipality is liable only if the individual can establish that the local government "had a deliberate policy, custom, or practice that was the 'moving force' behind the constitutional violation he suffered." Galen v. County of Los Angeles, 477 F.3d 652, 667 (9th Cir. 2007) (quoting Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694-95, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)). The Complaint does not identify any specific City policy, as required by Monell, that caused Plaintiff's alleged injuries. Plaintiff's argument that the RBD have a "policy" of enforcing state law is an insufficient ground for municipal liability under section 1983. (See RBD Opp. at 5); Wong, 333 F. Supp. 2d at 951. However, it is possible that Plaintiff could amend his complaint to state such a claim.

In addition, even if Plaintiff could somehow establish jurisdiction over the City of Redondo Beach and otherwise state a claim against the City, the City of Redondo Beach Police Department would still be an improper defendant. Section 1983 provides a cause of action against any "person" who, under color of law, deprives an individual of federal

constitutional or statutory rights. 42 U.S.C. §1983. The term "person" includes local governmental entities, Cortez v. County of Los Angeles, 294 F.3d 1186, 1188 (9th Cir. 2002), but does not encompass municipal or county departments. See United States v. Kama, 394 F.3d 1236, 1239 (9th Cir. 2005) (Ferguson, J., concurring) (municipal police departments and bureaus are generally not considered "persons" within the meaning of section 1983); Vance v. County of Santa Clara, 928 F. Supp. 993, 995-96 (N.D. Cal. 1996) (dismissing sua sponte Santa Clara Department of Corrections as improper defendant); Garcia v. City of Merced, 637 F. Supp. 2d 731, 760 (E.D. Cal. 2008) (dismissing Sheriff's Department as improper defendant). Although Plaintiff does not specifically allege what he believes the City of Redondo Beach Police Department, as a unit, did to violate his constitutional rights, it is clear that as a department of the City of Redondo Beach, the Police Department is not a proper defendant in Plaintiff's section 1983 action.

Finally, the Complaint is completely devoid of any allegations at all involving actions taken by Police Chief Leonardi. The Complaint merely observes that Leonardi is the Chief of Police for the City of Redondo Beach and is "the final departmental authority in all matters of policy, operation and discipline." (Complaint at 4). To demonstrate a civil rights violation, a plaintiff must show that the defendant's conduct caused a deprivation of the plaintiff's constitutional or statutory rights. See 42 U.S.C. § 1983; Starr v. Baca, 652 F.3d 1202, 1205-06 (9th Cir. 2011). Where the defendant holds a supervisory position, the plaintiff must still show the defendant's "personal participation in the alleged rights deprivation" because there is "no respondeat superior liability under section 1983." Jones v. Williams,

297 F.3d 930, 934 (9th Cir. 2002). A supervisor's objectionable participation may properly include his "own culpable action or inaction in the training, supervision, or control of his subordinates, his acquiescence in the constitutional deprivations of which the complaint is made, or conduct that showed a reckless or callous indifference to the rights of others." Starr, 652 F.3d at 1205-06 (internal quotation marks omitted).

Plaintiff alleges that Leonardi is responsible for setting and implementing the City of Redondo Beach Police Department's policies, but does not indicate how his actions or omissions caused Plaintiff harm. Furthermore, Plaintiff's claim against Leonardi appears to be based solely on the fact that Leonardi and the Police Department have a "policy" of enforcing state law. This fails to state a claim because a municipality's enforcement of a state law is not a ground for liability under section 1983. Wong, 333 F. Supp. 2d at 951.

Consequently, it is recommended that the claims against the RBD be dismissed under Rule 12(b)(6) for the additional reason that they fail to state a claim. Because it is at least theoretically possible that Plaintiff may be able to amend his claims against the City of Redondo Beach to identify an objectionable municipal policy and against Police Chief Leonardi to show his personal participation in causing Plaintiff's injury, it is recommended that the claims against these two Defendants be dismissed with leave to amend. However, because municipal departments are improper defendants in section 1983 suits, amendment of Plaintiff's claims against the City of Redondo Beach Police Department would be futile. Therefore, it is recommended that Plaintiff's claims against the

Police Department be dismissed without leave to amend.

\\

\\

\\

E. Plaintiff's Seventh Claim For Relief Fails To State A Federal Claim

In his Seventh Claim for Relief, Plaintiff contends that section 25850 violates the California Constitution, which provides that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness, and privacy." (Complaint at 23); see also Cal. Const. Art. I, § I. However, it is well-settled that the "Eleventh Amendment bars a suit against state officials when the state is the real, substantial party in interest . . . ." Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 101-02, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). Consequently, pursuant to the Eleventh Amendment, a federal court may not grant relief "in a suit against state officials on the basis of state law." Id. at 106; see also Han v. United States Dept. of Justice, 45 F.3d 333, 339 (9th Cir. 1995) ("We are barred by the Eleventh Amendment from deciding claims against state officials based solely on state law."). Nor may a federal court exercise pendent jurisdiction over such a claim. Pennhurst, 465 U.S. at 89. at 120-21. Consequently, it is recommended that Plaintiff's Seventh Claim for relief be dismissed without leave to amend.

VI.

RECOMMENDATION

Consistent with the foregoing, IT IS RECOMMENDED that the District Court issue an Order: (1) accepting and adopting this Report and Recommendation; (2) dismissing this action WITH LEAVE TO AMEND as to Defendant Harris for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1); (3) dismissing this action WITH PREJUDICE as to Defendant Brown for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and the Eleventh Amendment; (4) dismissing this action WITH LEAVE TO AMEND as to Defendants City of Redondo Beach and Police Chief Leonardi for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6); (5) dismissing this action WITH PREJUDICE as to Defendant City of Redondo Beach Police Department for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and for failure to state a claim pursuant to Rule 12(b)(6); and (6) dismissing Plaintiff's Seventh Claim for Relief alleging a violation of state constitutional law WITH PREJUDICE because it is barred by the Eleventh Amendment.

DATED: April 5, 2012

/S/
SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file Objections as provided in Local Civil Rule 72 and review by the District Judge whose

initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.