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11 VENTURA COUNTY SHERIFF'S OFFICE
12 (*erroneously sued as Ventura County Sheriffs*
13 *Department*)

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15 **UNITED STATES DISTRICT COURT**
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17 **CENTRAL DISTRICT OF CALIFORNIA**

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SIGITAS RAULINAITIS,

Plaintiff,

v.

VENTURA COUNTY SHERIFFS
DEPARTMENT,

Defendant.

CASE NO. CV13-02605-MAN

DEFENDANT'S REPLY BRIEF

[Submitted pursuant to Court's 5/31/13
order]

The Ninth Circuit stated:

We affirm because Erdelyi did not have a property or liberty interest in obtaining an initial license to carry a concealed weapon. ¶ Section 12050 [recodified without substantive change in 2010 as Penal Code Section 26150] explicitly grants discretion to the issuing officer to issue or not issue a license to applicants meeting the minimum statutory requirements.

Erdelyi v. O'Brien, 680 F.2d 61, 63 (9th Cir. 1982).

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1 The Supreme Court unanimously clarified that the mission of a federal court in
 2 civil rights matters is to get the correct answer as to controlling precedent. *Elder v.*
 3 *Holloway*, 510 U.S. 510 (1994). The issue there was that a plaintiff in a civil rights
 4 lawsuit was not able to locate, during the initial briefing stages, a binding appellate
 5 decision clearly establishing the impropriety of the defendants' actions sufficient to
 6 overcome a qualified immunity assertion. The Ninth Circuit found such a decision
 7 but denied the plaintiff the right to use it because the plaintiff's attorney did not find
 8 it himself.

9 The Supreme Court held that a federal court will not disregard relevant legal
 10 authority irrespective of belated discovery: "[P]recedent ... unearthed too late"
 11 (510 U.S. at 514) is nonetheless the law and must be obeyed. *Id.* at 516.

12 In the present case, defendant's initial brief did not discuss *Erdelyi* or its
 13 progeny. This omission was by oversight but should not stand in the way of the law.

14 It is now unfair to the plaintiff because he has no briefing left. Defendant
 15 requests that plaintiff be authorized to file another brief addressing the *Erdelyi* issue.
 16 The Court will specify the deadline for plaintiff's third brief. That filing will
 17 conclude the briefing.

18 In *Erdelyi*, the plaintiff was an employee of a licensed private investigator,
 19 though not herself a licensed private investigator. She had not been issued a
 20 concealed weapons license in the past. She applied to the police chief for a license to
 21 carry a concealed weapon.

22 The plaintiff brought the suit in federal district court under 42 U.S.C. §1983.
 23 The suit alleged that the police chief violated her constitutional rights to due process
 24 of law and equal protection of the laws. The district court granted summary judg-
 25 ment for the defendant.

26 The Ninth Circuit first addressed property interests. Property interests
 27 protected by the due process clause of the Fourteenth Amendment do not arise
 28 whenever a person has only an abstract need, desire, or unilateral expectation of a

benefit. 680 F.2d at 63. Rather, protectable property interests arise from legitimate claims of entitlement defined by existing rules or understandings which stem from an independent source, such as state law. *Id.*

Concealed weapons are closely regulated by the State of California. *Id.* Whether the statute creates a property interest in concealed weapons licenses depends largely upon the extent to which the statute contains mandatory language which restricts the discretion of the issuing authority to deny license to applicants who claim to meet the minimum eligibility requirements. Former Section 12050 explicitly granted discretion to the issuing officer to issue or not to issue a license to applicants meeting the minimum eligibility requirements. *Id.*

Section 26150(a) expressly provides that the sheriff of a county “may issue a license.” The word “may” in a statute dealing with an agency’s power normally confers a discretionary power, not a mandatory obligation, unless the legislative intent evidences a contrary purpose. *Dalton v. United States*, 816 F.2d 971, 973 (4th Cir. 1987). State law is to the same effect; the word “shall” is ordinarily used in laws, regulations, or directives to express what is mandatory, whereas “may,” on the other hand, is usually permissive, and the Legislature is presumed to be well aware of this distinction. *Hogya v. Superior Court*, 75 Cal.App.3d 122, 133 (1977).

Where state law gives the issuing authority broad discretion to grant or deny license applications in a closely regulated field, initial applicants do not have a property right in such licenses which is constitutionally protected by the Fourteenth Amendment. *Erdelyi*, 680 F.2d at 63. The Ninth Circuit stated, “*Erdelyi* therefore did not have a property interest in a concealed weapons license.” *Id.*

The *Erdelyi* court then turned to the argument that there was a liberty interest in a concealed weapons permit. Although liberty is a broad and majestic term, it is not all-inclusive. *Id.* It includes the right to be free from actions which impose a stigma or other disability which forecloses one’s freedom to take advantage of employment opportunities. *Id.*

1 The plaintiff in *Erdelyi* could not argue that she had an absolute liberty to carry
 2 a concealed weapon. *Id.* She claimed that the police chief's denial of her concealed
 3 weapons permit foreclosed her freedom to work as a criminal defense investigator
 4 because it was dangerous for her to undertake that work without carrying a concealed
 5 weapon. Rejecting this contention, the Ninth Circuit held that the denial was not
 6 based on charges of dishonesty, crime, or immorality to which any stigma was
 7 attached. It is undisputed that many people engage in the occupations of private
 8 investigator or criminal defense investigator without a concealed weapons license.

9 Although the plaintiff might not have been able to pursue her profession in
 10 precisely the way she would have liked, she had not been entirely, or even substan-
 11 tially, excluded. Further, no stigma attaches to the denial of an application to carry a
 12 concealed weapon. Therefore, the plaintiff was held not to have had a liberty interest
 13 in obtaining a concealed weapons license. *Erdelyi*, 680 F.2d at 63-64.

14 In *Association of Orange County Deputy Sheriffs v. Gates*, 716 F.2d 733 (9th
 15 Cir. 1983), former deputy sheriffs retired under medical disability brought a civil
 16 rights action alleging that they had been unconstitutionally deprived of permits
 17 allowing them to carry concealed, loaded weapons. The Central District granted
 18 summary judgment against the deputies, and the Ninth Circuit unanimously affirmed.
 19 The holding was that the statute providing for issuance of certificates allowing retired
 20 peace officers to carry concealed, loaded weapons did not create an entitlement
 21 sufficient to warrant constitutional protection.

22 A property interest in a benefit protected by the due process clause results from
 23 a legitimate claim of entitlement created and defined by an independent source, such
 24 as state or federal law. A reasonable expectation of entitlement is determined mostly
 25 by the language of the statute and the extent to which the entitlement is couched in
 26 mandatory terms. *Gates*, 716 F.2d at 734.

27 The only restrictions imposed by the relevant statutes in that case were that the
 28 agency from which the officer retires issue a certificate indicating whether or not the

1 officer may carry a concealed weapon and that the privilege of carrying a loaded
 2 concealed weapon might be denied or revoked for good cause. But the Ninth Circuit
 3 held that the requirement of good cause prior to the denial of a weapon certificate
 4 does not create a constitutionally protected liberty interest “because it is not a
 5 significant substantive restriction on the basis for the agency’s action.” *Gates*,
 6 716 F.2d at 734.

7 The *Gates* court also rejected the argument that the denial of the permit caused
 8 a loss of liberty without due process of law in that their reputations must have been
 9 damaged and foreclosed alternative sources of employment. *Id.* Unpublicized
 10 accusations do not infringe constitutional liberty interests. By definition, they cannot
 11 harm good name, reputation, honor, or integrity. When reasons are not given,
 12 inferences drawn from the denial of the concealed weapon request are insufficient to
 13 implicate liberty interests. The *Gates* court also wrote, “The right of a retired deputy
 14 sheriff to carry concealed weapons is not so fundamental as to warrant constitutional
 15 protection apart from its status under state law.” *Id.* at 735, n.4.

16 The California appellate court has analyzed the Ninth Circuit’s holdings in this
 17 regard and found them to be well reasoned. California appellate authority endorsing
 18 the Ninth Circuit analysis is provided below.

19 The issue was taken up in *Gifford v. City of Los Angeles*, 88 Cal.App.4th 801
 20 (2001). In that case, the plaintiff was an applicant for a concealed firearm license
 21 which the Los Angeles Police Department refused to issue. The applicant sought
 22 mandate from the superior court, which the superior court granted. But the appellate
 23 court unanimously reversed, reinstating the decision of the agency to deny the
 24 concealed weapons permit.

25 The *Gifford* court explained:

26 [Penal Code] Section 12050 gives extremely broad
 27 discretion to the sheriff concerning the issuance of con-
 28 cealed weapons licenses ... and explicitly grants discretion

1 to the issuing officer to issue or not issue a license to
 2 applicants meeting the minimum statutory requirements.

3 *Gifford*, 88 Cal.App.4th at 805 [citing *Erdelyi*].

4 The plaintiff's main argument in *Gifford* was that a stipulated judgment in
 5 earlier litigation between the city police department and applicants for concealed
 6 firearms licenses relieved the applicant of the statutory obligations, such as showing
 7 good cause for licensure. The appellate court disagreed.

8 In the case of *Nichols v. County of Santa Clara*, 223 Cal.App.3d 1236, 1241
 9 (1990), the California appellate court explained:

10 In light of this statute's [Penal Code Section 12500]
 11 delegation of such broad discretion to the sheriff, it is well
 12 established that an applicant for a license to carry a
 13 concealed firearm has no legitimate claim of entitlement to
 14 it under state law, and therefore has no property interest to
 15 be protected by the due process clause of the United States
 16 Constitution.

17 *Nichols*, 223 Cal.App.3d at 1241 [citing both *Erdelyi* and *Gates* with approval].

18 Former Penal Code Section 12050(a) was textually indistinguishable from
 19 current Penal Code Section 26150. Former Section 12050 provided, "The sheriff of a
 20 county or the chief or other head of a municipal police department of any city or city
 21 and county, upon proof that the person applying is of good moral character, that good
 22 cause exists for the issuance, and that the person applying is a resident of the county,
 23 may issue to such person a license to carry concealed a pistol" Former Pen. Code
 24 §12050, as quoted in *Gifford, supra*, 88 Cal.App.4th at 803. The Ninth Circuit's
 25 derivation of the conclusion that "Section 12050 explicitly grants discretion to the
 26 issuing officer to issue or not issue a license to applicants meeting the minimum
 27 statutory requirements" (680 F.2d at 63) was predicated upon the same permissive
 28 term "may" carried over into the recodified statute, Penal Code Section 26150.

1 Based upon these authorities, the Sheriff has the discretion not to issue a
 2 license to carry a concealed firearm even to applicants who meet all of the minimum
 3 statutory requirements. Even if the plaintiff in this matter were a Ventura County
 4 resident, he would have no constitutionally protected right vindicable in a §1983
 5 action. This rule of law moots the residency discussion.

6 It has long been recognized that even constitutional rights may be subject to
 7 governmental regulation of the time, place, and manner of their exercise. The
 8 Supreme Court has held that even “[t]he most stringent protection of free speech [a
 9 bedrock, fundamental constitutional protection] would not protect a man in falsely
 10 shouting fire in a theater and causing a panic. It does not even protect a man from an
 11 injunction against uttering words that may have all the effect of force.” *Schenck v.*
 12 *United States*, 249 U.S. 47, 52 (1919).

13 Mr. Raulinaitis, and all citizens who wish to use sidearms, can lawfully
 14 transport them to shooting ranges and game preserves or utilize them freely on
 15 private property without concealed weapons licenses. The high degree of trust
 16 associated with concealing a deadly weapon on one’s person elsewhere is a
 17 reasonable regulation of time, place, and manner as to which the issuing authority has
 18 full discretion which cannot be vindicated in a federal civil rights lawsuit.

19 It is therefore respectfully requested that this Court grant dismissal of the
 20 action.

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 22 DATED: June 27, 2013

WISOTSKY, PROCTER & SHYER

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 25 By: 

26 Jeffrey Field
 Attorneys for Defendant,
 27 VENTURA COUNTY SHERIFF’S OFFICE
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