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

MICHELLE FLANAGAN, SAMUEL
GOLDEN, DOMINIC NARDONE,
JACOB PERKIO, and THE
CALIFORNIA RIFLE & PISTOL
ASSOCIATION,

Plaintiffs,

v.

CALIFORNIA ATTORNEY
GENERAL KAMALA HARRIS, in her
official capacity as Attorney General of
the State of California, SHERIFF
JAMES McDONNELL, in his official
capacity as Sheriff of Los Angeles
County, California AND DOES 1
THROUGH 10, inclusive,

Defendants.

CASE NO. CV 16-06164-JAK-AS

Honorable John A. Kronstadt

**DEFENDANT SHERIFF JAMES
MCDONNELL'S REPLY IN
FURTHER SUPPORT OF MOTION
TO DISMISS PLAINTIFFS'
COMPLAINT PURSUANT TO
F.R.C.P. RULE 12(B)(6)**

Hearing Date:

Date: February 13, 2017

Time: 8:30 a.m.

Ctrm: 750

Complaint Filed: August 17, 2016

Defendant SHERIFF JAMES McDONNELL hereby submits this Reply in
further support of his Motion to Dismiss Plaintiffs' Complaint with prejudice
pursuant to Fed. R. Civ. P. 12(b)(6).

INTRODUCTION

Faced with two recent Ninth Circuit decisions that completely bar their claims as a matter of law, Plaintiffs' Opposition to Defendant McDonnell's motion to dismiss confirms that their complaint is merely an attempt to re-litigate matters that have already been decided. As set forth in Defendant McDonnell's motion to dismiss and in this reply, Plaintiffs' allegations that Defendant McDonnell's policy requiring good cause for the issuance of a concealed carry permit violates their rights under the Second Amendment and Equal Protection Clause of the Fourteenth Amendment fail to state a cognizable legal theory. Plaintiffs' Complaint must therefore be dismissed as a matter of law pursuant to Fed. R. Civ. P. 12(b)(6). *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988).

ARGUMENT

I. Plaintiffs' First Claim for Relief is Barred by the Ninth Circuit's Decision in *Peruta v. County of San Diego*.

As set forth in Defendant McDonnell's motion to dismiss, the Ninth Circuit's decision in *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) completely forecloses Plaintiffs' Second Amendment claim against Defendant. Faced with nearly identical facts as the allegations in this case, the *Peruta* court unequivocally held that a local law enforcement agency's requirement that a concealed weapons permit applicant demonstrate good cause does not violate the Second Amendment. *Peruta*, 824 F.3d at 924. Here, as in *Peruta*, Plaintiffs' challenge with respect to Defendant McDonnell is to the Los Angeles County Sheriff's Department's ("LASD") policies governing the issuance of concealed carry permits and the denial of their applications for concealed carry permits. (Complaint, ¶¶ 56-57, 72-79.)

After reviewing the history relevant to the Second Amendment and its application to the States and localities via the Fourteenth Amendment, the *Peruta* en banc court held: "We therefore conclude that the Second Amendment right to keep and bear arms does not include, in any degree, the right of a member of the general

1 public to carry concealed firearms in public. In so holding, we join several of our
 2 sister circuits that have upheld the authority of states to prohibit entirely or to limit
 3 substantially the carrying of concealed or concealable firearms." *Peruta*, 824 F.3d
 4 at 939 (citing cases). The *Peruta* court further held "[b]ecause the Second
 5 Amendment does not protect in any degree the right to carry concealed firearms in
 6 public, any prohibition or restriction a state may choose to impose on concealed
 7 carry – including a requirement of 'good cause,' however defined – is necessarily
 8 allowed by the Amendment." *Id.* This holding "fully answered" the questions
 9 presented to the *Peruta* court, which are identical to those presented in this case with
 10 respect to Defendant McDonnell. *Id.* at 939.

11 **A. Because Plaintiffs' Allegation That Defendants' Statutes and**
 12 **Policies "Collectively Destroy" Their Second Amendment Rights**
 13 **Was Explicitly Rejected by the Ninth Circuit's Decision in *Peruta*,**
 Plaintiffs' First Claim for Relief Fails to State a Claim Against
 Defendant McDonnell.

14 Faced with such unequivocal language, Plaintiffs' Opposition seeks to re-
 15 litigate *Peruta* by merely repeating the reasoning presented in the principal dissent.
 16 According to Plaintiffs, "[b]ecause California law prohibits [Plaintiffs] from openly
 17 carrying firearms, and Defendant McDonnell denies them the only lawful means of
 18 carrying a concealed firearm, Plaintiffs are completely barred from carrying a
 19 firearm for self-defense – in any manner." (Plaintiffs' Opposition at 5.) Thus
 20 Plaintiffs' challenge is to California state statutes and LASD policies "that
 21 collectively destroy their ability to carry a firearm in any manner." *Id.* at 7.

22 This is precisely the argument set forth by the principal dissent in *Peruta* that
 23 was explicitly addressed and thoroughly rejected by the majority. Plaintiffs'
 24 opposition is based on the principal dissent's characterization of California's
 25 restrictions on open carry as "effectively prohibiting" open carry because
 26 California's restriction on open and closed carry – considered together – somehow
 27 violate the Second Amendment. This reasoning was flatly dismissed by the

1 majority as based on a "logical fallacy." "Even construing the Second Amendment
2 as protecting the right of a member of the general public to carry a firearm in public
3 (an issue we do not decide), and even assuming that California's restrictions on
4 public open carry violate the Second Amendment so construed (an issue we also do
5 not decide), it does not follow that California's restrictions on public concealed carry
6 violate the Amendment." *Peruta*, 824 F.3d at 941-42.

7 The only difference between this case and *Peruta* is that Plaintiffs have
8 alleged that the California state statutes prohibiting open carry in the County of Los
9 Angeles violate the Second Amendment. This does *not*, however, re-open the
10 question of whether the statutes and policies governing *concealed* carry are
11 unconstitutional. The *Peruta* court unequivocally held that the Second Amendment
12 "does not protect in any degree the right to carry concealed firearms in public" and
13 that any "good cause" requirement is necessarily allowed by the Amendment. *Id.* at
14 939. In alleging the unconstitutionality of California state statutes prohibiting open
15 carry in the County of Los Angeles (Complaint, ¶ 8), Plaintiffs have merely
16 presented the question that was left open by *Peruta*.

17 Doing so, however, does not entitle Plaintiffs to a second bite at the apple
18 regarding concealed carry. The *Peruta* court – knowing full well that the question
19 of open carry was being left unanswered – definitively held that there is no Second
20 Amendment right to carry a concealed weapon. In reaching its holding, the court
21 delineated concealed carry as separate and distinct from open carry. Because there
22 is no constitutional right to concealed carry, statutes and policies addressing open
23 carry and concealed carry cannot be considered in tandem in order to cobble
24 together constitutional protections where none exist. As the court held, *if* there is a
25 Second Amendment right to carry a firearm openly in public, and *if* that right is
26 violated, the cure is to apply the Second Amendment to protect *that right*.

1 However, as the *Peruta* court concluded, "[t]he cure is not to apply the Second
2 Amendment to protect a right that does not exist under the Amendment." *Id.* at 942.

3 Accordingly, because there is no Second Amendment right to carry a
4 concealed weapon in public, Plaintiffs' challenge to Defendants' statutes and policy
5 governing the issuance of a concealed carry permit are barred as a matter of law.
6 The four individual plaintiffs¹ all applied for and were denied concealed carry
7 permits by Defendant McDonnell for lack of "good cause." (Complaint, ¶¶ 15-19.)
8 These plaintiffs allege that they "wish immediately to exercise their constitutional
9 right to carry a firearm in public for self-defense, but they are precluded from doing
10 so because they are unable to obtain a Carry License, which would allow them to
11 carry a firearm in a concealed manner, and because California law prohibits them
12 from carrying a firearm openly." (Complaint, ¶¶ 15-19, 23.) Because *Peruta* bars
13 their Second Amendment challenge to LASD's policies regarding concealed carry,
14 the only claim Plaintiffs could possibly state is that California state statutes
15 prohibiting open carry violate their Second Amendment rights. With respect to the
16 open carry of firearms, Plaintiffs allege that "[i]ssuing Authorities in counties with
17 populations over 200,000, like Los Angeles County, can only issue licenses to carry
18 a concealed firearm. California law prohibits them from issuing licenses to carry a
19 loaded handgun in an exposed, open manner (e.g., in a visible hip holster)."
20 (Complaint, ¶ 53.) As such, Plaintiffs have not and cannot allege that Defendant
21 McDonnell is in any way responsible for California laws prohibiting open carry.

22 Further, Plaintiffs' argument that dismissing the concealed carry aspects of
23 their complaint "could ultimately lead to the perverse result of confining the Court's
24

25 ¹ The Complaint further alleges that other members of Plaintiff CPRA have
26 also been denied Carry Licenses by Defendant McDonnell or have refrained from
27 doing so "because they know that applying will be futile based on Defendant
McDonnell's official written 'good cause' policy, which they cannot satisfy."
(Complaint, ¶¶ 62-63).

1 available remedies for the Second Amendment violation that Plaintiffs allege" is
 2 simply bizarre. (Plaintiffs' Opposition at 10-11.) There is nothing "perverse" about
 3 this court confining its available remedies for Plaintiffs' alleged Second Amendment
 4 violation; rather, that is exactly what this court is charged with in the face of a
 5 complaint alleging such a violation. The fact remains that Plaintiffs' only
 6 cognizable Second Amendment claim is whether California state laws regarding
 7 open carry violate the Second Amendment, and this court must confine its available
 8 remedies to that claim. *Peruta* has already established that a court cannot offer any
 9 remedy for alleged Second Amendment violations arising from concealed carry
 10 policies and restrictions, as the Second Amendment does not apply to concealed
 11 carry as a matter of law.

12 Plaintiffs cannot invoke the Second Amendment to protect a right to carry a
 13 concealed weapon, as that right "does not exist under the Amendment." *Peruta*, 824
 14 F.3d at 932. Plaintiffs' allegations that statutes and policies regarding concealed
 15 carry ***combined with*** statutes regarding open carry violate the Second Amendment
 16 does not entitle Plaintiffs to re-litigate *Peruta* and create a Second Amendment right
 17 where none exists. As the *Peruta* court unequivocally held, the cure for the
 18 violation of a Second Amendment right to open carry – ***if*** one exists – is to apply the
 19 Second Amendment to protect that right, not a right that does not exist. *Id.* at 942.
 20 Because the right to carry a concealed weapon does not exist under the Second
 21 Amendment, Plaintiffs' first claim for relief against Defendant McDonnell should be
 22 dismissed with prejudice.

23 **II. Plaintiffs' Equal Protection Claim Fails As a Matter of Law.**

24 **A. Because Plaintiffs' Equal Protection Challenge Specifically Arises** 25 **From the Second Amendment, Plaintiffs Cannot State a** 26 **Cognizable Claim Under the Equal Protection Clause.**

26 In yet another attempt to dodge the binding precedent of *Peruta*, Plaintiffs
 27 also allege that the LASD's good cause policy violates the Equal Protection Clause

1 because it purportedly does not recognize self-defense alone as good cause to obtain
 2 a concealed carry permit and thus "bar[s] law-abiding Los Angeles County residents
 3 from publicly carrying a firearm for self-defense in any manner,"² while allowing
 4 other law-abiding citizens to carry a firearm for self-defense." (Complaint, ¶ 85.)
 5 Thus, according to Plaintiffs, "Defendants have created a classification of persons,
 6 including Plaintiffs, who are treated unequally through the denial of their Second
 7 Amendment rights to publicly bear arms for self-defense." (Complaint, ¶ 85.) In
 8 *Teixeira v. County of Alameda*, 822 F.3d 1047, 1052 (9th Cir. 2016, however, the
 9 Ninth Circuit specifically rejected this argument, holding that claims emanating
 10 from the right to bear arms for self-defense must be analyzed under the Second
 11 Amendment and not the Equal Protection Clause.

12 Plaintiffs' argument in their Opposition that *Teixeira* is somehow
 13 distinguishable from this case because Defendants "misunderstand[] the nature of
 14 Plaintiffs' Equal Protection claim" completely ignores the central holding in
 15 *Teixeira*. (Plaintiffs' Opposition at 11.) Plaintiffs contend that their Equal
 16 Protection claim is "not simply challenging the denial of their right to carry a
 17 firearm outside the home for self-defense[, r]ather it challenges Defendants'
 18 confinement of Plaintiffs' right to bear arms to the home, while allowing others to
 19 exercise that same right outside the home." *Id.* at 12. The fact remains that
 20 Plaintiffs' entire complaint – including their purported equal protection claim – is
 21 based on their Second Amendment right to bear arms for self-defense. *See*
 22 Complaint at ¶ 31, quoting *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008)
 23 (alleging that the Second Amendment right to keep and bear arms "is a fundamental,

24 _____
 25 ² As discussed *supra*, the LASD good cause policy applies to the concealed
 26 carry of firearms. The prohibition on the open carry of firearms in Los Angeles
 27 County is per California state statute. Accordingly, Plaintiffs cannot allege LASD
 policies in and of themselves bar Los Angeles County residents from carrying a
 firearm "in any manner", as Defendant McDonnell has nothing to do with California
 state laws prohibiting open carry.

1 individual right that includes at its core the right of law-abiding, competent adults to
 2 'possess and carry weapons in case of confrontation.'; *see also* Complaint at ¶¶ 2,
 3 32-36, quoting, *inter alia*, *Heller*, *ibid.*, *McDonald v. City of Chicago*, 561 U.S. 742
 4 (2010).

5 Because Plaintiffs' claims emanate from the Second Amendment – "an
 6 explicit textual source of constitutional protection" – they cannot utilize the Equal
 7 Protection clause to generically assert a claim for the violation of that right.
 8 *Teixeira*, 822 F.3d at 1052, quoting *Albright v. Oliver*, 510 U.S. 266, 273 (1994)
 9 ("Where a particular Amendment 'provides an explicit textual source of
 10 constitutional protection' against a particular sort of government behavior, 'that
 11 Amendment, not the more generalized notion of "substantive due process," must be
 12 the guide for analyzing these claims.'") (quoting *Graham v. Connor*, 490 U.S. 386,
 13 395 (1989). Plaintiffs' equal protection challenge in this case is "subsumed by, and
 14 coextensive with" the Second Amendment and "therefore not cognizable under the
 15 Equal Protection Clause." *Id.*, quoting *Orin v. Barclay*, 272 F.3d 1207, 1213 n.3 (9th
 16 Cir. 2001). Plaintiffs' equal protection claim is merely duplicative of its Second
 17 Amendment claim and cannot be considered independently in order to have a
 18 second chance at that claim. *See, e.g., Albright v. Oliver*, 510 U.S. at 273
 19 (substantive due process analysis does not apply to a fundamental right emanating
 20 from the specific guarantees of the Bill of Rights).

21 Thus, despite Plaintiffs best efforts to dress their Second Amendment claim
 22 "in Equal Protection clothing" to avoid the binding Second Amendment precedent
 23 of *Peruta*, they have failed to state a cognizable claim under the Equal Protection
 24 clause. *Teixeira*, 822 F.3d at 1052, quoting *Orin v. Barclay*, 272 F.3d 1207, 1213
 25 n.3 (9th Cir. 2001). Plaintiffs' Equal Protection Clause claim should therefore be
 26 dismissed as duplicative.

B. Plaintiffs Fail to State An Equal Protection Claim Because There Is No Fundamental Right to Carry a Concealed Weapon.

Even if this court found that Plaintiffs' equal protection claim could somehow co-exist with their Second Amendment claim, their equal protection claim would nonetheless fail. As discussed *supra*, the Ninth Circuit has unequivocally held that there is no fundamental right to carry a concealed weapon under the Second Amendment. *Peruta*, 824 F.3d at 939. When a government's action does not implicate a fundamental right, even intentional discrimination will survive constitutional scrutiny for an equal protection violation as long as it bears a rational relation to a legitimate state interest. *New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985); *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990). Defendant McDonnell's good cause requirement for the issuance of a concealed carry permit easily satisfies this rational basis test. *See Teixeira*, 822 F.3d at 1052.

Courts have found that the increased presence of firearms in public presents a tremendous danger to public safety. *See Nichols v. Brown*, 2013 WL 3368922 *5 (C.D. Cal. 2013) ("[T]he California Legislature could have rationally concluded that the open carrying of firearms presents a danger to public safety in more densely populated areas."); *People v. Flores*, 159 Cal.App.4th 568, 576 (2008) (explaining that the statutory regime regulating the carrying of loaded firearms in public was designed "to reduce the incidence of unlawful public shootings. . . .") The LASD's good cause policy is certainly rationally related to this legitimate state interest of preserving public safety. As such, even if Plaintiff could plead its Second Amendment claims in "equal protection clothing," Plaintiff's Equal Protection Clause claim would fail.

CONCLUSION

Based on the foregoing and Defendant's Memorandum of Points and Authorities in Support of its Motion to Dismiss, Defendant Sheriff James McDonnell respectfully requests that the Court grant the instant motion and dismiss Plaintiffs' claims with prejudice.

DATED: January 9, 2017

Respectfully submitted,

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By */s/ Lana Choi*

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