No. 18-___

IN THE

Supreme Court of the United States

JAMES ROTHERY; ANDREA HOFFMAN,

Petitioners,

v.

LOU BLANAS; JOHN MCGINNIS; TIM SHEEHAN; SACRAMENTO COUNTY SHERIFF'S DEPARTMENT; COUNTY OF SACRAMENTO; XAVIER BECERRA, Attorney General of the State of California,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under California law, possessing a loaded handgun outside the home is generally prohibited, but concealed carry is permissible after obtaining a license to do so. There are no uniform state standards for the issuance of a permit; leaving the decision entirely within the discretion of the locally elected sheriff. The discretionary and arbitrary application process itself creates perverse incentives for the approval or denial of an application. Most individuals in many California counties, including Sacramento County, cannot obtain a permit to carry a concealed weapon unless the individual is a friend or campaign contributor to the local county sheriff. Honorably retired California peace officers are exempted from this restraint as they are automatically granted a lifetime right to carry concealed weapons, regardless of need or merit. The two questions presented are:

(1) Does California's general prohibition to carry a loaded handgun outside the home, coupled with an arbitrary and capricious licensing scheme for citizens who wish to carry a concealed weapon, violate Californians' fundamental right to keep and bear arms for self-defense guaranteed by the Second Amendment?

(2) Does California's grant of a lifetime right to honorably retired California peace officers to carry a concealed weapon, coupled with a grant of unbridled discretion to each elected Sheriff whereby concealed weapon permits are issued on a *quid pro quo* basis to political supporters, violate the Equal Protection Clause of the Fourteenth Amendment when average citizens, including former military, are subjected to the capriciousness of the locally elected Sheriff?

PARTIES TO THE PROCEEDING

Petitioners are James Rothery and Andrea Hoffman. They were plaintiffs in the district court and appellants in the Ninth Circuit Court of Appeals.

Respondents "*County of Sacramento"* in the Ninth Circuit Opinion found at App. 1, are as follows:
Lou Blanas, who was sued individually and in his official capacity as Sheriff of Sacramento County; John Mcginnis, who was sued individually and in his official capacity as Sheriff of Sacramento County; Tim Sheehan; Sacramento County Sheriff's Department; and County Of Sacramento. Scott R. Jones is the current Sheriff of the County of Sacramento.

Respondent Jerry Brown was sued in his official capacity as State of California Attorney General, Appellee/Defendant.

Respondent Xavier Becerra is the current Attorney General of California and the successor to Kamala Harris, now Senator Harris.

Reference to *Deanna Sykes; et al.,* references a filing of a Notice of Related Case at docket entry 25 in the District Court. However, a Non Related Case Order was entered on May 12, 2009 at docket entry number 30 in the District Court, which stated: "the Court has determined that it is inappropriate to relate or reassign the cases, and therefore declines to do so."

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JURISDICTION

Petitioners timely filed a petition for a panel rehearing and rehearing en banc, which the court denied on April 27, 2018. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment, the Fourteenth Amendment, the relevant portions of the California Penal Code, and the Sheriff's "good cause" policy are reproduced at Appendix 33a through 47a.

STATEMENT OF THE CASE

A. Statutory and Regulatory Scheme

At the time this action was filed (a few months after *District of Columbia v. Heller*, 554 U.S. 570 (2008)) and still presently, California generally prohibits the open or concealed carriage of a handgun,

whether loaded or unloaded, in public locations. See Cal. Penal Code § 25400 (prohibiting concealed carry of a firearm); *id.* § 25850 (prohibiting carry of a loaded firearm); *id.* § 26350 (prohibiting open carry of an unloaded firearm); see also *id.* § 25605 (exempting the gun owner's residence, other private property, and place of business from section 25400 and section 26350).[1]

Nonetheless, one may apply for a license in California to carry a concealed weapon in the county in which he or she works or resides. *Id.* §§ 26150, 26155. To obtain such a license, the applicant must meet several requirements. For example, one must demonstrate "good moral character," complete a specified training course, and establish "good cause." *Id.* §§ 26150, 26155.

In sum, California employs what is referred to as a "may issue" policy, compared to a "shall issue" policy employed by the majority of other states. Under "shall issue" laws, individuals applying for a concealed carry permit shall receive the permit unless disqualified for a reason necessary to further a compelling governmental interest. Conversely, under "may issue" policies, such as California's, the sheriff may approve or deny an applicant for any reason or no reason at all.

In addition, California also has a general exception to the ban on loaded and concealed firearms

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[1]Since this action was filed, the California Penal Code regarding firearms possession outside the home has been renumbered, but substantively has not changed.

in public in that upon a California peace officer's honorable retirement; they are issued a lifetime conceal carry permit which can only be revoked for "good cause." *Id.* §§ 25450, 25455, and 26315. App. 37a, 46a.

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. *Id.* § 26160. Sacramento County had issued such a policy. At issue in this appeal as to the County's liability, is that policy's interpretation of the "good cause" and law enforcement friends and family "prima facie good cause." Basically, as-written, only those related to law enforcement received permits. As-applied, campaign contributors received their permits routinely; while others, like petitioner Hoffman who was carjacked at gunpoint, are denied. FAC ¶ 18; ER 67.

California also allows a theoretical exception to the prohibition of carrying a loaded handgun on a public street; individuals are permitted to carry a loaded firearm if he or she faces immediate, grave danger provided that the weapon is only carried in "the brief interval" between the time law enforcement officials are notified of the danger and the time they arrive on the scene ("*where the fleeing victim would obtain a gun during that interval is apparently left to Providence*"). Cal. Penal Code § 26045 (immediate, grave danger). See *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1147 fn. 1 (9th Cir. 2014).

Citizens who are not an honorably retired California peace officer are subject to an arbitrary and

capricious permit process whereby the local sheriff has unbridled discretion to issue a permit. *Id.* §25655. An applicant must convince the sheriff or police chief that the applicant is of "good moral character" and has "good cause" to carry a loaded handgun in public. *Id.* §§26150(a)(1)-(2).

Rather than defining "good cause" and "good moral character," the State has delegated that task to each sheriff. *Id.* §26150. This has resulted in systemic abuse and corruption as to how permits are issued.

The net effect of this "good cause" standard (and to a lesser degree "good moral character") is that the typical law-abiding citizens had to make a campaign contribution or have a direct connection to the elected official, or have the political clout to have an exemption carved into the statute itself, such as what retired California law enforcement officers did. Indeed, the whole point of the Sheriff's policy was to confine concealed-carry licenses to a very narrow subset of residents and consolidate a very powerful donor base. Because California law prohibits openly carrying a handgun outside the home, the result is that the typical law- abiding resident cannot bear a handgun for self- defense outside the home at all. Of course, this does not apply to those who are politically connected or retired from government service. Further, as there is no exception made for honorably discharged military, the government's argument that law enforcement are.

B. District Court Proceedings

1. First Amended Complaint

Petitioners are good citizens, placed at great risk and disadvantage by California legislation, and the local Sheriffs' implementation of that legislation, restricting the possession of a handgun outside the home or place of business. Paragraphs 1-5, 15, 682, 693-705, 727-730, 735, 737, 756 of the First Amended Complaint gave general notice of their vital interests at stake and the concrete impact of the laws upon them. The operative First Amended Complaint ("FAC") is found at Court Record ("CR") docket entry number 24, and the Ninth Circuit's Excerpts of Record ("ER") commencing at page 65. It was filed over 7 years ago, on September 3rd, 2008, not long after this Court issued its landmark decision in *Heller*.

Petitioners initiated this case for equitable relief against the State of California, seeking injunctive relief against the State as to the facial challenge to state statutes implicating the permit process.

Petitioners are seeking monetary damages and equitable relief against the County Respondents as the action was brought against the then elected Sheriffs' in both their individual and official capacities based upon as-written and as-applied constitutional violations.

Over the last five (5) or six (6) terms of office for Sheriff, the County of Sacramento Sheriff's office and management level employees of the County of Sacramento have systematically exercised a sphere of influence over the issuance of Concealed Carry Weapon permits (also known as "CCW") and Honorary Deputy Commissions. FAC ¶ 51. (CR 24, ER71) The commissions consisted of a peace officer wallet badge

and a Sheriff's official identification card which stated that the holder is an honorary deputy sheriff, and usually accompanied with a CCW permit. FAC ¶ 51.

The three principal claims presented in the First Amended Complaint were: 1) Petitioners were being deprived of the right to keep and bear arms for purposes of immediate self defense outside the home through a complex statutory scheme that rewards a "privileged" few, completely unrelated to safety; 2) The Sheriff was issuing permits to friends, donors and supporters, to the exclusion of all others; 3) The statutory "good cause" standard infringed their Second Amendment rights to bear arms for self-defense outside the home. As petitioners explained in their complaint, "[t]hus, by state law, the only place one may possess a loaded firearm in California without prior authorization from Defendants is in the home or place of business." FAC ¶ 682.

Petitioners own handguns, which they would like to carry in their vehicles and/or on their persons, either open or concealed, for protection of themselves, their families. In sum, they want the same privilege and right to carry a loaded handgun, in the same manner that honorably retired peace officers and the Sheriff's various friends, political supporters and campaign contributors were granted. FAC ¶ 699. (CR 24, ER130)

In addition, Petitioner Hoffman specifically presented an Equal Protection claim for denying her application for, not only a CCW, but also an Honorary Deputy Sheriff badge and credential that is given to

political supporters of the Sheriff, along with their CCW. (CR24, ER 65 ¶s 5-8, 51-53, 55-59, 289-290, 469-473, 545-548, 699-700).

It was undisputed at the pleading stage that Petitioners, and others similarly situated, have been denied CCWs even though they were equally qualified as those who received CCWs per the purported "good cause" and "good moral character" criteria for issuance of a permit. FAC ¶ 4.

Per "Sacramento County Sheriff's Department, Concealed Weapons Permit Issuance Policy and Application Process" (codified in the challenged statutes), "Good cause exists for issuance of a concealed weapons permit as follows: General: The determination of good cause for the issuance of a concealed weapons permit is perhaps the most difficult aspect in this process. While every applicant may believe that he/she has good cause for a license, the Sheriff's determination is based on consideration of public good and safety." FAC ¶ 727. (CR 24, ER133)

However, under the same policy, the following is "prima facie evidence of good cause for issuance of a concealed weapons permit: Applicant is an active or honorably separated member of the criminal justice system directly responsible for the investigation, arrest, incarceration, prosecution or imposition of sentence on criminal offenders and has received threats of harm to person or family as a result of official duties." FAC ¶ 728. (CR 24, ER134)

Under this policy, all retired and former

members of the State DOJ, Judges, District Attorney's Office, and Sheriff's Department are automatically granted permits (as well as family members), whereas all other citizens must show "good cause", in direct violation of the Equal Protection clause of the Fourteenth Amendment. FAC ¶ 729. (CR 24, ER134) For instance, an officer who worked one day on the job, receives a disability retirement because of injury, is granted a privilege to carry a concealed handgun for life under the prima facie good cause standard, whereas all other citizens are not granted the same privilege. FAC ¶ 689. (CR 24, ER129) As follows, the CCW application is discriminatory on its face because it delineates differing standards for approval of CCW applicants among peace officers, those affiliated with law enforcement, and law abiding citizens. FAC ¶ 719. (CR 24, ER133)

2. District Court's Ruling on Respondents Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim under Both the Second Amendment and Equal Protection Clause

First, the district court did not even mention the honorary Deputy Sheriff commissions made available only to the affluent and politically connected. Second, and as addressed below, the district court's resistance to *Heller* is very evident.

In support of its application of law to the averments plead in the First Amended Complaint, the district court applied a "collateral estoppel" type

analysis by frequently citing the case of *Mehl v. Blanas*, No. 2:03-cv-2682-MCE-KJM, 2008 U.S. Dist. LEXIS 8349 (E.D. Cal. Feb. 5, 2008) as a factual and legal basis for dismissing Petitioners' case. However, the problem with relying upon the *Mehl* order was that it pre-dated *Heller*.

> "In terms of the complaint itself, it is for the most part a rehash of the 2003 lawsuit, ... It is a rehash of the prior lawsuit [*Mehl*] that was before Judge England."

App. D, transcript page 1.

Further, as the district court explained, "[i]n terms of the lawsuit itself, it is apparent to the Court that the plaintiffs are misreading cases. That they, in particular, have misread both the *Heller* case and the *Nordyke* case." App. D, transcript page 2.

> Throughout this discussion, you'll see that the Court completely disagrees with the plaintiffs' reading of *Heller*. Under no circumstances can *Heller* be read that an individual now has a fundamental right to carry a concealed weapon. That case has been completely misread by the plaintiffs.
> ...
>
> In that second cause of action, which does include the Attorney General, the plaintiffs have alleged that they were

> denied CCW permits, whereas retired peace officers were granted permits without having to demonstrate good cause. And plaintiffs argue that this violates the 14th Amendment right to equal protection.
>
> Again, both the Attorney General and the county defendants provided the Court with sound legal reasons why that second cause should be dismissed as well. And Judge England also addressed this argument as well in his 2004 order in the *Mehl vs. Blanas* case. That's case 03-2682.

App. D, transcript page 5.

> ... the plaintiffs did contend that the statutes that are being challenged here are unconstitutional because they grant retired law enforcement officers special treatment in allowing them to carry concealed weapons without having to show good cause for a permit.

App. D, transcript page 6.

> *Heller* is distinguishable because in that case, the D.C. ordinance banned the use of firearms in the home. That's not what's involved in this case. This case involves an attempt to get a permit to carry a concealed weapon.

Reading from a pre-Heller case (*Mehl v. County of Sacramento*) which was filed by Petitioners' attorneys, the hostility towards any Second Amendment challenge has permeated all the way down to the district court level in the Ninth Circuit.

> "In Silveira, the court went on to say that 'the federal and state governments have the full authority to enact prohibitions and restrictions on the use and possession of firearms, subject only to generally applicable constitutional constraints, such as due process, equal protection, and the like.' Plaintiffs' failure to confront Silveira is even more egregious when the Court considers that Mehl was a plaintiff in Silveira, and Gary Gorski, plaintiffs' current counsel, represented the plaintiffs in Silveira." App. D, transcript page 15.

"... Heller has been seriously misread by you ..." App. D, transcript page 20. "Again, the bottom line is that nothing in Heller changes that analysis ...." App. D, transcript page 16.

C. Panel Proceedings

Petitioners appealed, and the Ninth Circuit upheld the District Court's ruling.

The Order originally appealed from was filed July 29, 2009, (CR 45, ER9) on a First Amended Complaint filed on May 1, 2009, (CR 24, ER65). Because this was a *de novo* review before Ninth

Circuit, the First Amended Complaint (Vol. 2, ER 128) was to be broadly construed as to the Second Amendment and Equal Protection claims.

The three-judge panel's decision does not mention open carry (i.e. "loaded and exposed" carry), and states the issue was only about a "denial of a license to carry concealed firearms in public." (Opinion page 2 of 3). The three-judge panel goes on to rule that "[t]he district court properly dismissed plaintiffs' Second Amendment claim because 'the Second Amendment does not protect, in any degree, the carrying of concealed firearms by members of the general public.' *Peruta*, 824 F.3d at 942." (Opinion page 2 of 3)

The three-judge panel then states:

> The district court did not abuse its discretion by dismissing plaintiffs' action [in 2008] without leave to amend because leave to amend would have been futile." (Opinion page Page 3 of 3)

D. En Banc Proceedings

Petitioners sought rehearing en banc before the Ninth Circuit, but the court denied their petition.

REASONS FOR GRANTING THE PETITION

This Court has long made clear that the Constitution disables the government from employing certain means to prevent, deter, or detect violent crime.

The Ninth Circuit has erected an anomalous regime where all Second Amendment and Equal Protection challenges to firearms legislation is adjudged under a rational basis test or declared not to be covered under the Second Amendment. That result is deeply flawed, as demonstrated by the way the district court treated *Heller* in this case, and also cements a treacherous method of legal reasoning. No court has ever adopted this approach to the any other provision of the Bill of Rights. Indeed, the Ninth Circuit has not only created a slippery slope limiting the right to bear arms, but now also affects the Equal Protection clause. Since the Ninth Circuit has embraced this anomaly, the western part of the United States will now be legislated from San Francisco - this pattern of judicial hijacking of the Constitution will remain unless and until this Court grants review.

This Petition for a Writ of Certiorari ("Petition") comes before this Court on a single operative pleading, a First Amended Complaint. Since the facts alleged are taken as true; the asserted error does not consist of erroneous factual findings. Furthermore, this Petition is not based upon the misapplication of a properly stated rule of law. To the contrary, this Petition comes before this Court because the lower courts have refused to recognize that the Second Amendment is a fundamental individual right. Three decisions from this Court clearly state the scope of that right. I.e. *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and, *Caetano v. Massachusetts*, 577 U. S. ____, 136 S. Ct. 1027 (2016)(per curiam).

Heller, *McDonald*, and *Caetano* command that the Second Amendment protects an individual right to bear arms outside the home. As made clear in the pleading in this case, a system of granting a right and privilege to carry a loaded firearm is fraught with obvious abuse.

Petitioners made perfectly clear at both the District Court and Ninth Circuit that the right they are asserting is the right to carry a handgun in some manner outside the home for self-defense. Indeed, their complaint invokes the "right to bear arms" repeatedly without once mentioning any purported "right to concealed carry." Given California's decision to prohibit open carry but allow counties to grant concealed-carry licenses requiring "good cause" as some sort of vague particularized need for self-defense, Petitioners chose the only avenue permitted for assertion of the right to bear arms.

At the pleading stage, the facts asserted in the First Amended Complaint are undisputed and viewed in a light most favorable to Petitioners. Thus, the evidence, clearly established an Equal Protection violation considering the extent the pay-to-play scheme employed by not one Sheriff, but three.

I. EXCEPTIONAL IMPORTANCE AND THIS COURT'S NOTED DEPARTURE OF ITS SECOND AMENDMENT JURISPRUDENCE BY THE LOWER COURTS.

This Court has specifically pointed out the "exceptional importance" of the Second Amendment,

and has in fact advised the circuit courts of the Second Amendment's "exceptional importance."

Given the exceptional importance of the rights at issue, grant of this Petition is necessary to secure and maintain uniformity among the lower courts regarding this Court's decisions in *Heller, McDonald* and *Caetano.*

> Despite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts, including the ones here, have *failed to protect it.*

Jackson v. City & Cty. of S.F., 576 U. S. ____, 135 S. Ct. 2799, 192 L. Ed. 2d 865 (2015)(Thomas, J., dissenting from the denial of certiorari)(emphasis added).

> I would grant certiorari to prevent the Seventh Circuit from relegating the Second Amendment to a *second-class right.*

Friedman v. City of Highland Park, 577 U. S. ____, 136 S. Ct. 447, 450 (2015)(Justices Thomas and Scalia dissenting from denial of certiorari) (emphasis added).

When this Court issued a per curiam decision in the case of *Caetano v. Massachusetts*, 577 U. S. ____, 136 S. Ct. 1027 (2016), a petition for en banc review was filed in this case citing *Caetano.* Review was denied, and *Caetano* was not even mentioned in the

three-judge panel's decision. In *Caetano*, justices of this court recognized the dangers of states usurping the rights of the People.

> If the fundamental right of self-defense does not protect Caetano, then the safety of all Americans is left to the *mercy of state authorities* who may be more concerned about disarming the people than about keeping them safe.

Id. (concurring opinion)(emphasis added)

Most recently, there should be no doubt as to the "exceptional importance" hearing this case. The en banc panel's decision in *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc) has seriously eroded the Second Amendment.

> The approach taken by the en banc court is indefensible, and the petition raises important questions that this Court should address. I see no reason to await another case.

Peruta v. County of San Diego, 582 U. S. ____ Peruta v. California, 137 S. Ct. 1995 (2017)(Justice Thomas, with whom Justice Gorsuch joins, dissenting from the denial of certiorari).

This case provides the facts and issues that were missing in *Peruta*, based on an operative pleading with very specific and undisputed facts as to the pay-to-play carry concealed weapon permit scheme in California,

and in particular, the County of Sacramento.

The "open carry" issue left open by *Peruta v. County of San Diego*, 824 F.3d 919, 925 (9th Cir. 2016) (en banc) (constitutional issues) has resulted in a panel of the Ninth Circuit ignoring the protections afforded under the Second Amendment and the Equal Protection Clause of the Fourteenth Amendment.

II. INTENTIONAL AVOIDANCE OF *HELLER*.

California's gun laws are complicated. See *Peruta v. County of San Diego*, 824 F.3d 919, 925 (9th Cir. 2016) (en banc), cert. denied, 137 S. Ct. 1995 (June 26, 2017)("California has a multifaceted statutory scheme regulating firearms."). Each year, California adds one more layer of complexity to its Penal Code relating to firearms.

> The counties and California have chipped away at the Plaintiffs' right to bear arms by enacting first a concealed weapons licensing scheme that is tantamount to a complete ban on concealed weapons, and then by enacting an open carry ban. Constitutional rights would become meaningless if states could obliterate them by enacting incrementally more burdensome restrictions while arguing that a reviewing court must evaluate each restriction by itself when determining constitutionality.

Id. at 953 (Callahan, J., dissenting)

A. The Decisions Coming out of the Ninth Circuit Further Exacerbate the Conflict among the Circuits Regarding the Scope and Standard of Review Involving Second Amendment Challenges.

While the applicability of the Second Amendment outside the home seems clear- especially after this Court's decisions in *Heller, McDonald* and *Caetano* - the issue has divided the lower courts.

The *Peruta en banc* panel's decision, which was supported only by a bare majority of the 12 judges from the Ninth Circuit who have had the opportunity to consider *Peruta*, avoided the very issue that this case now squarely presents.

Instead of squarely addressing petitioners' argument that: 1) the Second Amendment demands some outlet-whether open or concealed carry-for the right to bear arms for self- defense outside the home; and 2) any licensing or permit scheme must comply with the Equal Protection clause applying strict scrutiny; the Ninth Circuit has adopted means-justify-the-ends test. Or, as United States District Court Judge Benitez calls it; a "tripartite binary test with a sliding scale and a reasonable fit."

The time has come for this Court to resolve the split of authority. In *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012), the Seventh Circuit held that "[t]he Supreme Court has decided that the [Second A]mendment confers a right to bear arms for

self-defense, which is as important outside the home as inside," because the Second Amendment is focused on "promot[ing] self-defense."

Other circuits have stated the same principle in dicta, but have not articulated the rule in a holding. See *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) ("[W]e merely assume that the Heller right exists outside the home and that such right of Appellee Woollard has been infringed."); *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013) (noting "the Second Amendment's individual right to bear arms may have some application beyond the home" but "declin[ing] to definitively declare that the individual right to bear arms for the purpose of self-defense extends beyond the home"); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) (making an "assumption" that the Second "Amendment must have some application in the very different context of the public possession of firearms").

The Ninth Circuit originally agreed with the Seventh Circuit's analysis. See *Peruta v. County of San Diego*, 771 F.3d 570 (9th Cir. 2014). However, it reversed that decision upon rehearing en banc, and determined that although the Second Amendment does not encompass a right to carry a concealed weapon in public, "[t]here may or may not be a Second Amendment right for a member of the general public to carry a firearm openly in public." *Peruta v. County of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016).

More recently, the District of Columbia Circuit held that the Second Amendment protects an

individual's right to carry firearms outside the home for self-defense. See *Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017). In *Wrenn*, the court, in a 2-to-1 decision, found that the "core" of the Second Amendment protected "the individual right to carry common firearms beyond the home for self-defense—even in densely populated areas, even for those lacking special self-defense needs." *Id.* at 661.

The court invalidated the District of Columbia's "good-reason" law as a categorical restriction on a "'core' Second Amendment right." *Id.* at 657. Because the good-reason law infringed on the "constitutional right to bear common arms for self-defense in any fashion at all," the court found it unnecessary to conduct a means-end analysis. *Id.* at 665-66 ("It's appropriate to strike down such 'total ban[s]' without bothering to apply tiers of scrutiny because no such analysis could ever sanction obliterations of an enumerated constitutional right.") (alteration in original).

Since *Heller*, circuit courts have wrestled with the proper standard of review to apply to Second Amendment claims. The Ninth Circuit has been fractured as Circuit Judge O'Scannlain (joined by Circuit Judges Tallman, Callahan, and Ikuta, stated:

> But I cannot agree with the majority's approach, which fails to explain the standard of scrutiny under which it evaluates the ordinance.

Nordyke v. King, 681 F.3d 1041, 1045-6 (9th Cir.

2012)

United States District Judge Roger T. Benitez for the Southern District of California explains the Ninth Circuit's new Second Amendment test and its departure from *Heller*.

> For a Second Amendment challenge, the Ninth Circuit uses what might be called a *tripartite binary test with a sliding scale and a reasonable fit*. In other words, there are three different two-part tests, after which the sliding scale of scrutiny is selected. ... It is, unfortunately, an overly complex analysis that people of ordinary intelligence cannot be expected to understand.

Duncan v. Becerra, 265 F. Supp. 3d 1106 (S.D. Cal. 2017)(emphasis added).

B. Given the Geographic Territory and Population the Ninth Circuit Covers; the Ninth Circuit's Departure from Clearly Established Second Amendment Jurisprudence is Causing a Systemic Abandonment of the Constitutional Jurisprudence of this Court, and Thereby Depriving Millions of U.S. Citizens of the Rights Freely Exercised in 37 Other States.

In *Heller*, this Court clearly stated that "the Second Amendment right is exercised individually and

belongs to *all Americans*", and not just those in Texas, Montana, Kansas, Arizona and 33 other states. *Id.* at 581 (emphasis added).

California and the judiciary of the Ninth Circuit have hijacked a fundamental right of the People, and continue to erase it's existence to this day. California and the Ninth Circuit have always been resistant to the Second Amendment; history shows a concerted effort to treat it as a "second-class" right.

The Ninth Circuit and its district courts' resistance and hostility towards *Heller* is clear, and it sends a message to California and it's Sheriffs that the Second Amendment does not apply with the full force as, say, the First Amendment applies. Both the district court and Ninth Circuit have so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by lower courts, Petitioners call for an exercise of this Court's supervisory power.

The hostility is particularly true given the Ninth Circuit's penchant for ordering *en banc* proceedings any time a panel recognizes even the possibility of a viable Second Amendment claim - a pattern that typically adds at least a year (here, almost a decade) onto already-drawn-out appellate proceedings. See *Teixeira v. Cty. of Alameda*, No. 13-17132, 2016 WL 7438631 (9th Cir. 2016)(granting rehearing en banc to reconsider panel's holding that plaintiff stated a viable claim by alleging that county effectively banned new gun stores); *Nordyke v. King*, 664 F.3d 775 (9th Cir. 2011) and *Nordyke v. King*, 575 F.3d 890 (9th Cir.

2009) (granting rehearing en banc twice to reconsider panel's holdings that plaintiffs could state a viable claim by alleging that county banned gun shows on county property), compared with *Silveira v. Lockyer*,312 F.3d 1052, 1060-1 (9th Cir. 2002), *reh'g en banc denied*, 328 F.3d 567 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 803 (2003)(en banc denied even though panel's decision abrogates a constitutional right).

Despite this Court's mandates, history shows a slow and gradual erosion of the Second Amendment in both Ninth Circuit and California.

1. Pre-*Heller* Ninth Circuit resistance to the Second Amendment.

Prior to *Heller*, the Ninth Circuit and California had a history of hostility towards the Second Amendment of the Bill of Rights.

In 1992, upholding California gun control law, the Ninth Circuit held that "the Second Amendment constrains only the actions of Congress, not the states." *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723 (9th Cir. 1992).

In 1996, upholding California gun control law, the Ninth Circuit then held that the Second Amendment is a collective "right" held by the states, and in no way confers an "individual" right to keep and bear arms. *Hickman v. Block*, 81 F.3d 98, 101 (9th Cir. 1996).

In 2002, upholding California gun control law, the Ninth Circuit re-affirmed the so-called "collective rights model" for the Second Amendment. *Silveira v. Lockyer*,312 F.3d 1052, 1060-1 (9th Cir. 2002), *reh'g en banc denied*, 328 F.3d 567 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 803 (2003).

> After conducting a full analysis of the amendment, its history, and its purpose, we reaffirm our conclusion in *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996), that it is this *collective rights model* which provides the best interpretation of the Second Amendment.

Silveira v. Lockyer, 312 F.3d 1052, 1060-1 (9th Cir. 2002)(emphasis added).

The decision in *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002) triggered six Circuit Judges to file dissents to a denial to hear the case *en banc*.

Circuit Judge Pregerson, dissenting from the denial of rehearing en banc:

> Because the panel's decision *abrogates a constitutional right,* this case should have been reheard en banc.

Silveira v. Lockyer, 328 F.3d 567, 568 (9th Cir. 2003)(emphasis added).

Circuit Judge Kozinski, dissenting from denial of rehearing en banc:

> Judges know very well how to read the Constitution *broadly* when they are sympathetic to the right being asserted. ... But, as the panel amply demonstrates, when we're none too keen on a particular constitutional guarantee, we can *be equally ingenious in burying language that is incontrovertibly there.*
>
> It is wrong to use some constitutional provisions as spring-boards for major social change while treating others like senile relatives to be cooped up in a nursing home until they quit annoying us. *As guardians of the Constitution, we must be consistent in interpreting its provisions*. ... Expanding some to gargantuan proportions while discarding others like a crumpled gum wrapper is *not faithfully applying the Constitution*; it's using our power as federal judges to *constitutionalize our personal preferences.*

Silveira v. Lockyer, 328 F.3d 567, 568-569 (9th Cir. 2003)(emphasis added).

In a very lengthy opinion, Circuit Judge Kleinfeld, with whom Circuit Judges Kozinski, O'Scannlain, and T. G. Nelson join, dissenting from denial of rehearing en banc:

> The panel opinion *erases the Second Amendment from our Constitution* as effectively as it can ...

> *About twenty percent of the American population, those who live in the Ninth Circuit, have lost one of the ten amendments in the Bill of Rights*. And, the methodology used to take away the right threatens the rest of the Constitution. ... The courts should *enforce* our individual rights guaranteed by our Constitution, *not erase* them.

Silveira v. Lockyer, 328 F.3d 567, 570, 572, 588-9 (9th Cir. 2003)(emphasis added).

Circuit Judge Gould, with whom Circuit Judge Kozinski joins, dissenting from denial of rehearing en banc:

> The error of *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996), is *repeated* once again, thus I respectfully dissent from denial of rehearing en banc for the reasons stated in my concurring opinion in *Nordyke v. King*, 319 F.3d 1185, 1192-98 (9th Cir. 2003)(Gould, J., specially concurring).

Silveira v. Lockyer, 328 F.3d 567, 568 (9th Cir. 2003)(emphasis added).

In 2004, in *Nordyke v. King*, 364 F.3d 1025 (9th Cir. 2004)(emphasis added), Circuit Judge Kozinski points out that:

> [t]he concerns raised by Judge Gould's dissent also triggered an en banc call in

> *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002). After a vigorous exchange of views, *the call misfired*, 328 F.3d 567 (9th Cir. 2003), and *the Supreme Court shot down the petition for certiorari* less than six months ago, 157 L. Ed. 2d 693, 124 S. Ct. 803 (2003). Because I believe prudential considerations militate against revisiting the issue quite so soon, I voted against taking this case en banc and so, regretfully, cannot join Judge Gould's bulls-eye dissent.

In addition Circuit Judge Gould, with whom O'Scannlain, Kleinfeld, Tallman, and Bea, Circuit Judges, join, dissenting from denial of rehearing en banc:

> I respectfully dissent from our denial of rehearing en banc. *This case presents an important issue of the scope of the constitutional guarantee of the Second Amendment*, arising in the context of state restriction of gun shows. The panel decision in this case, *Nordyke v. King*, 319 F.3d 1185, 1198 (9th Cir. 2003), was compelled by our circuit's prior holding in *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996), in which we embraced a "collective rights" reading of the Second Amendment. I believe *Hickman* was wrongly decided.

Nordyke v. King, 364 F.3d 1025, 1026 (9th Cir.

2004)(emphasis added).

2. Post-*Heller* Ninth Circuit resistance to the Second Amendment.

In 2008, following this Court's decision in *Heller District of Columbia v. Heller*, 554 U.S. 570 (2008), a three-judge panel in the Ninth Circuit overruled *Fresno Rifle*, holding that the Second Amendment is incorporated into the 14th Amendment and that it is therefore applicable against municipalities. *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), *vacated pending reh'g en banc*, 575 F.3d 890 (9th Cir. 2009). However, the Ninth Circuit granted rehearing en banc and vacated the three-judge decision in *Nordyke*, 575 F.3d 890, and re-wrote this Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008) when it used interest balancing disguised as some sort of scrutiny. See *McDonald*, 130 S. Ct. at 3047 (reiterating that "the scope of the Second Amendment right" is determined by historical analysis and not interest balancing).

From the outset, it was clear that the district court in this case was following the lead of the Ninth Circuit and other district court judges, and that *Heller* could simply be ignored.

> "In terms of the lawsuit itself, it is apparent to the Court that the plaintiffs are *misreading cases*. That they, in particular, have *misread both the Heller* case and the Nordyke case. Those cases in no way support this lawsuit or

> maintaining this lawsuit." 2:15-19. (emphasis added)

The district court continues: "Throughout this discussion, you'll see that the Court completely disagrees with the plaintiffs' reading of Heller." App. D, 16, p. 6.

"Under no circumstances can Heller be read that an individual now has a fundamental right to carry a concealed weapon. That case has been completely misread by the plaintiffs." App. D, 16a, p. 6.

"And again, there is nothing in Heller that changes that analysis, despite plaintiffs' arguments to the contrary." App. D, 15, p.8. "... Heller has been seriously misread by you ..." App. D, 15a, p. 2.

Nordyke v. King, 681 F.3d 1041, 1043 (9th Cir. 2012) is a classic example of the war going on in the Ninth Circuit due to the fractures created by a majority of the judges in that Circuit resisting the Second Amendment in general, and *Heller* in particular.

> The law and the facts relevant to Plaintiffs' Second Amendment claim have evolved during the 12 years since this case first reached our court. See *Nordyke v. King*, 644 F.3d 776, 781-82 (9th Cir. 2011) ("Nordyke V") ("summariz[ing] this case's long and tangled procedural history")
> ...

> Because the *Supreme Court has yet to articulate a standard of review in Second Amendment cases*, that task falls to the courts of appeals and the district courts.

Nordyke v. King, 644 F.3d 776, 782-3 (9th Cir. 2011); see also *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016)(emphasis added).

When the Ninth Circuit is cornered into addressing a decision which may result in a ruling favoring the fundamental right to keep and bear arms, it deploys legal trickery to avoid the answer to an important fundamental right question. *Peruta v. County of San Diego*, 824 F.3d 919, 925 (9th Cir. 2016)(en banc)(emphasis added):

> We do not reach the question whether the Second Amendment protects some ability to carry firearms in public, such as open carry. That *question was left open* by the Supreme Court in *Heller*, and we have no need to answer it here.
> ...
>
> The Second Amendment *may or may not* protect, to some degree, a right of a member of the general public to carry firearms in public.

Peruta v. County of San Diego, 824 F.3d 919, 925 (9th Cir. 2016) (en banc)(emphasis added).

After *Peruta* was decided, the three-judge panel

in this case completely ignored the procedural posture of this case in that it was only in the pleading stage, and then nonchalantly goes on to rule that "[t]he district court properly dismissed plaintiffs' Second Amendment claim because 'the Second Amendment does not protect, in any degree, the carrying of concealed firearms by members of the general public.' *Peruta*, 824 F.3d at 942." (Opinion page 2 of 3) The hostility of the three-judge panel is even more evident considering the action was just as much a claim for violation of the Equal Protection clause, as it was a Second Amendment claim.

In sum, judges within the Ninth Circuit recognize, and warn, that the Ninth Circuit is veering into dangerous and uncharted waters of re-writing the Second Amendment. It is time to answer the call of these judges to stop the Ninth Circuit's attempt to reduce the Second Amendment to a nullity. Absent review, California becomes more emboldened to disregard the Second Amendment.

III. NINTH CIRCUIT'S RESISTANCE TO THIS COURT'S SECOND AMENDMENT JURISPRUDENCE UNDERMINES THIS COURT'S EQUAL PROTECTION JURISPRUDENCE AS WELL.

It is very clear the district court and three-judge panel were totally dismissive of *Heller*. By being so dismissive, this cancer has now permeated into this Court's Equal Protection jurisprudence.

Since 1986, the California Supreme Court recognized the danger of using a "good cause" standard in issuing concealed weapon permits. See *CBS v. Block*, 42 Cal.3d 646 (1986). The California Supreme Court stated the "good cause data" was deemed critical for the proper ferreting of Equal Protection violations.

Applying only a rational basis test, the Ninth Circuit recognized a concealed weapons licensing program that is administered arbitrarily so as to unjustly discriminate between similarly situated people may deny equal protection. *Guillory v. County of Orange*, 731 F.2d 1379, 1383 (9th Cir. 1984). Even the rational-basis test will not sustain government conduct that is malicious, irrational or plainly arbitrary. *Wedges / Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56, 67 (9th Cir. 1994).

In *Silveira v. Lockyer*, 312 F.3d 1052, 1091 (9th Cir.) (Reinhardt, J), *rehearing en banc denied*, 328 F.3d 567 (9th Cir. 2003)(six dissents)(emphasis added), the Ninth Circuit three-judge panel recognized that "... the retired officers exception [for possession of semi-automatic firearms] arbitrarily and *unreasonably affords a privilege to one group of individuals that is denied to others*, including plaintiffs."

However, when it comes to concealed weapons licensing program that is administered arbitrarily post *Heller*, the Ninth Circuit not only ignores its own precedent (i.e. *Silveira* and *Guillory*), but it ignores this Court's Equal Protection jurisprudence when it implicates a fundamental right.

Heller recognized a fundamental right to self defense; therefore, Petitioners Equal Protection claim merited strict scrutiny. See *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 457-58 (1988). The Second Amendment is a fundamental right since it is enshrined in the Constitution. See *Planned Parenthood v. Casey*, 505 U.S. 833, 847-48 (1992)("The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights.")

This Court has been perfectly clear that the Second Amendment embodies a fundamental right to "self defense". Under this Court's Equal Protection jurisprudence, Petitioners' claim should not have been discarded "like a crumpled gum wrapper". See *Silveira v. Lockyer*, 328 F.3d 567, 568-569 (9th Cir. 2003)(Noting that the Ninth Circuit has a proclivity expanding some portions of the Constitution to "gargantuan proportions while discarding others like a crumpled gum wrapper ...")

In this case, the three-judge panel's dodging of Petitioners' Equal Protection challenge was no mere coincidence - *Peruta* allowed this to happen. As noted by Circuit Judge Kleinfeld in *Silveira v. Lockyer*, 328 F.3d 567, 572 (9th Cir. 2003)(emphasis added),

> [t]here is no logical boundary to this misreading, so it threatens all the rights the Constitution guarantees to "the people," including those having nothing to do with guns. I cannot imagine the judges on the panel similarly repealing the

> Fourth Amendment's protection of the right of "the people" to be secure against unreasonable searches and seizures, or the right of "the people" to freedom of assembly, but times and personnel change, so that this right and *all the other rights of "the people" are jeopardized by planting this weed in our Constitutional garden*.

As the dissent recognized in *Peruta*, 824 F.3d 919 at 955 (emphasis added),

> ... Plaintiffs have raised non-frivolous concerns as to whether the counties' discretion as to who obtains a license violates the Equal Protection Clause and constitutes an unlawful prior restraint. The issues are not ripe for review, but I note that a discretionary licensing scheme that grants concealed weapons permits to only *privileged individuals* would be troubling.
>
> ..., the right to keep and bear arms must not become a right only for a *privileged class* of individuals.

Though *Peruta* may not have been a case "ripe for review" regarding the Equal Protection clause in the Ninth Circuit, this case was and is such a case. The operative pleading is a template of the whose who in the pay-to-play scheme for issuing CCWs. At the pleading stage, no reasonable jurist could conclude the

pleading lacked sufficient facts to state a claim for relief under the Equal Protection clause.

In sum, the district court and Ninth Circuit completely discard any Equal Protection analysis even though the First Amended Complaint is replete with undisputed facts supporting an Equal Protection violation.

IV. THERE IS A CONFLICT AMONG CIRCUITS AS TO THE APPLICATION OF THE SECOND AMENDMENT TO EQUAL PROTECTION VIOLATIONS.

A circuit court conflict exists as to whether retired peace officers, as a class, are entitled to a "presumptive" right of self-defense under the Second Amendment, excluding all other citizens, including former military. However, Petitioners argue that no one group has a greater need of self-defense than any other group based upon occupation.

Moreover, confrontations that might necessitate self-defense are less likely to occur in the home than on the streets of a city with many dangerous neighborhoods. A legitimate need to protect oneself can arise at the drop of a hat. Thus, the right to "carry weapons in case of confrontation," *Heller*, 554 U.S. at 592, necessarily includes a right to carry firearms to protect oneself against unanticipated and suddenly arising threats. *District of Columbia v. Heller*, 554 U.S. 570, 679 (2008)(Stevens, J., dissenting)(acknowledging "the reality that the need to defend oneself may

suddenly arise in a host of locations outside the home").

In a case pre-dating *Heller*, the Ninth Circuit held that a state statue banning the sale or transfer of semi-automatic rifles (euphemistically called "assault weapons") in the State of California, but which also provided an exemption for retired peace officers, violated the Equal Protection clause of the Fourteenth Amendment. *Silveira v. Lockyer*,312 F.3d 1052, 1090-1 (9th Cir. 2002), *reh'g en banc denied*, 328 F.3d 567 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 803 (2003). There, applying only rational basis review, the court could not find "any hypothetical rational basis for the exemption." *Id.* at 1090.

After *Heller*, the Fourth Circuit disagrees:

> In pursuing their equal protection challenge, the plaintiffs rely primarily on *Silveira v. Lockyer*, wherein the Ninth Circuit concluded that a retired officer exception to an assault weapons ban contravened the Equal Protection Clause. See 312 F.3d 1052, 1089-92 (9th Cir. 2002). We agree with the district court, however, that the *Silveira* decision "is flawed," as it did not analyze whether there was differential treatment of similarly situated persons. See *Kolbe*, 42 F. Supp. 3d at 798 n.39. Otherwise, the plaintiffs insist that Maryland's retired law enforcement officers are similarly situated to the general public, in that some individual officers might not have

> been properly trained on assault weapons or large-capacity magazines. That contention lacks merit because we must look at retired officers as a broader class.

Kolbe v. Hogan, 849 F.3d 114, 147 fn. 18 (4th Cir. 2017).

As previously stated above, this Court has held that when a state statute burdens a fundamental right, that statute receives heightened scrutiny under the Fourteenth Amendment's Equal Protection Clause. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

Neither the Fourth Circuit or Ninth Circuit have correctly applied this Court's fundamental Equal Protection jurisprudence when viewed through the lense of the Second Amendment.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Date: July 26, 2018

/s/ Gary W. Gorski
(Counsel of Record)
Gary W. Gorski
Counsel for Petitioners

APPENDIX

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-16852
D.C. No. 2:08-cv-02064-JAM-KJM
MEMORANDUM*

JAMES ROTHERY; ANDREA HOFFMAN,
Plaintiffs-Appellants,
and
DEANNA SYKES; et al., Plaintiffs,
v.
COUNTY OF SACRAMENTO; et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of California
John A. Mendez, District Judge, Presiding

Submitted: October 23, 2017**
Filed: November 8, 2017

Before: McKEOWN, WATFORD, and FRIEDLAND, Circuit Judges

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

James Rothery and Andrea Hoffman appeal from the district court's judgment dismissing their 42

U.S.C. § 1983 action alleging violations of their constitutional rights arising from the denial of a license to carry concealed firearms in public. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Peruta v. County of San Diego*, 824 F.3d 919, 925 (9th Cir. 2016) (en banc) (constitutional issues); *Mashiri v. Epsten Grinnell & Howell*, 845 F.3d 984, 988 (9th Cir. 2017) (dismissal under Fed. R. Civ. P. 12(b)(6)). We affirm.

The district court properly dismissed plaintiffs' Second Amendment claim because "the Second Amendment does not protect, in any degree, the carrying of concealed firearms by members of the general public." *Peruta*, 824 F.3d at 942. The district court properly dismissed plaintiffs' derivative claim under the Privileges and Immunities Clause. See *Peruta*, 824 F.3d at 942 (holding that a derivative privilege and immunities claim was "necessarily resolve[d]" by the court's Second Amendment holding).

The district court properly dismissed plaintiffs' equal protection claim because plaintiffs failed to allege facts sufficient to state a plausible claim for relief. See *Romer v. Evans*, 517 U.S. 620, 631, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, [the Supreme Court] will uphold the legislative classification so long as it bears a rational relation to some legitimate end."); *Silveira v. Lockyer*, 312 F.3d 1052, 1088 (9th Cir. 2002) ("[F]or a state action to trigger equal protection review at all, that action must treat similarly situated persons disparately."), abrogated on other grounds by District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008); see also *Ashcroft v. Iqbal*, 556 U.S. 662, 678,

129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) ("To survive a motion to dismiss, a plaintiff must aver in the complaint sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." (citation omitted)).

The district court properly dismissed plaintiffs' claim alleging a Ninth Amendment violation because "the Ninth Amendment does not encompass an unenumerated, fundamental, individual right to bear firearms." *San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1125 (9th Cir. 1996).

The district court did not abuse its discretion by dismissing plaintiffs' action without leave to amend because leave to amend would have been futile. See *Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 725-26 (9th Cir. 2000) ("A district court acts within its discretion to deny leave to amend when amendment would be futile[.]").

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. See *Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. 08-cv-02064-JAM-KJM

JAMES ROTHERY, Esq.; ANDREA HOFFMAN,
Plaintiffs,

v.

LOU BLANAS; SHERIFF JOHN MCGINNIS; Detective TIM SHEEHAN; SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, an independent branch of government of the COUNTY OF SACRAMENTO; COUNTY OF SACRAMENTO; STATE OF CALIFORNIA ATTORNEY GENERAL JERRY BROWN; DOES 1 through 225, unknown co-conspirators,

Filed: July 29, 2009

ORDER DISMISSING FIRST AMENDED COMPLAINT WITH PREJUDICE AS TO DEFENDANT ATTORNEY GENERAL

The motion by Defendant Attorney General of California Edmund G. Brown Jr. to dismiss the First Amended Complaint ("FAC") came on regularly for hearing before this Court on July 15, 2009, with Deputy Attorney General Geoffrey L. Graybill appearing for defendant moving party and Daniel M. Karalash appearing for plaintiffs in opposition. For the

reasons stated on the record at the hearing and summarized below, the Attorney General's motion to dismiss is GRANTED, with prejudice. A copy of the transcript of the Court's ruling at the hearing is attached hereto and incorporated by reference as though fully set forth herein. The Court has adopted much of the reasoning set forth in the unpublished Memoranda and Orders by the Honorable Morrison C. England, Jr. entered on September 3, 2004 and February 5, 2008 in David K. Mehl et al. v. Lou Blanas et al., U.S. District Court for the Eastern District of California, No. CIV. S 03-2682 MCE KJM. Except for allegations against Sacramento County defendants in this action regarding violations of the federal Racketeer Influenced and Corrupt Organizations Act (RICO), the allegations in Mehl and in this case are virtually identical. Judge England's orders are attached hereto for ease of reference.

Of the seven causes of action alleged in the FAC, two are directed against Sacramento County defendants only and are addressed in a separate order.

The first cause of action alleged against the Attorney General is the Second Cause of Action of the FAC, which claims pursuant to 42 U.S.C. section 1983 that on their face and as applied by defendants California Penal Code sections 12027, 12031(b) and 12050-12054 deny plaintiffs equal protection of the law by providing preferences to certain classes of applicants for carry concealed weapons licenses ("CCW"). For the reasons the Court stated at the hearing including adoption of portions of Judge England's orders, these allegations fail to state a claim for which relief can be granted and cannot be amended to state a claim.

The second cause of action alleged against the Attorney General is the Fourth Cause of Action of the FAC, which alleges pursuant to 42 U.S.C. section 1983 that the Second Amendment incorporated through the Fourteenth Amendment prohibits operation of the CCW statutes to preclude plaintiffs from carrying loaded concealed weapons outside their homes. Even if incorporated through the Fourteenth Amendment, the Second Amendment as interpreted by the United States Supreme Court and by the United States Court of Appeals for the Ninth Circuit does not provide such a right. Therefore, this cause of action fails to state a claim for which relief can be granted and cannot be amended to state a claim.

The third cause of action alleged against the Attorney General is the Fifth Cause of Action of the FAC, which alleges pursuant to 42 U.S.C. section 1983 that the Privileges or Immunities Clause of the Fourteenth Amendment prohibits operation of the CCW statutes to preclude plaintiffs from carrying loaded concealed weapons outside their homes. As explained by this Court at the hearing and in Judge England's orders, there is no authority to support this contention. Therefore, this cause of action fails to state a claim for which relief can be granted and cannot be amended to state a claim.

The fourth cause of action alleged against the Attorney General is the Sixth Cause of Action of the FAC, which alleges pursuant to 42 U.S.C. section 1983 that the Ninth Amendment prohibits operation of the CCW statutes to preclude plaintiffs from carrying loaded concealed weapons outside their homes. As explained by this Court at the hearing and in Judge England's orders this contention has been squarely

rejected by the United States Court of Appeals for the Ninth Circuit. Therefore, this cause of action fails to state a claim for which relief can be granted and cannot be amended to state a claim.

The last cause of action alleged against the Attorney General is the Seventh Cause of Action of the FAC, which seeks declaratory and injunctive relief against all defendants based on the previous causes of action. As explained by this Court at the hearing and in Judge England's orders, this is not a proper separate claim because it merely requests relief based on the previous causes of action. Since the previous causes of action fail to state claims upon which relief can be granted, this cause of action also fails to state a claim for which relief can be granted and cannot be amended to state a claim.

Since none of the causes of action alleged against the Attorney General state a claim for which relief can be granted and the action is being dismissed as to him without leave to amend and with prejudice, this Court declines to consider his contentions that this action is barred by the Eleventh Amendment and that plaintiffs do not have standing under Article III. See *Silveira v. Lockyer*, 312 F.3d 1052, 1066-1068 (9th Cir. 2002).

For the reasons explained above, defendant Attorney General's motion to dismiss the First Amended Complaint as to him is granted. Wherefore, the First Amended Complaint is hereby DISMISSED, with prejudice

Correspondingly, and because it was procedurally improper as the pleadings here were never closed, plaintiffs' countermotion for judgment on the pleadings as to defendant Attorney General is

DENIED.
IT IS SO ORDERED.
DATED: July 28, 2009 /s/ John A. Mendez
JOHN A. MENDEZ
U N I T E D S T A T E S
DISTRICT COURT JUDGE

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. 08-cv-02064-JAM-KJM

JAMES ROTHERY, Esq.; ANDREA HOFFMAN,
Plaintiffs,
v.
Former Sheriff LOU BLANAS; SHERIFF JOHN MCGINNIS; Detective TIM SHEEHAN; SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, an independent branch of government of the COUNTY OF SACRAMENTO; COUNTY OF SACRAMENTO; STATE OF CALIFORNIA ATTORNEY GENERAL JERRY BROWN; DOES 1 through 225, unknown co-conspirators,

Filed July 27, 2009

ORDER

On July 15, 2009, the hearing on Defendants, County of Sacramento, Lou Blanas, Sheriff John McGinness, and Timothy Sheehan's Motion to Dismiss pursuant to FRCP 12(b)(6), was held before the Honorable John A. Mendez.

Daniel Karalash appeared for Plaintiffs James Rothery and Andrea Hoffman. Geoffrey Graybill appeared on behalf of the State of California Attorney General Jerry Brown. John A. Lavra of Longyear, O'Dea and Lavra appeared on behalf of the

Defendants, County of Sacramento, Lou Blanas, Sheriff John McGinness, and Timothy Sheehan, hereinafter "County Defendants".

After consideration of the Defendants' moving papers, Plaintiffs' opposition brief, and Defendants' reply brief, together with oral argument presented at the hearing, and good cause appearing therefore, the court hereby rules as follows:

The County Defendants' Motion to Dismiss the first claim for relief alleging violation of the RICO statute (18 U.S.C. §§1961-1968) is granted. Plaintiffs' complaint fails to state a claim upon which relief can be granted. The court hereby adopts the findings made at the time of the hearing as set forth in the transcript of the proceedings. Excerpts of the transcript are attached to this order as Exhibit 1, and incorporated herein.

The County Defendants' Motion to Dismiss the second claim for relief alleging a violation of Equal Protection Clause pursuant to 42 U.S.C. § 1983 is granted. Plaintiffs' complaint fails to state a claim upon which relief can be granted. The court hereby adopts the findings made at the time of the hearing as set forth in the transcript of the proceedings. Excerpts of the transcript are attached to this order as Exhibit 1, and incorporated herein.

The County Defendants' Motion to Dismiss the third claim, brought under the First and Fourteenth Amendments pursuant to 42 U.S.C. § 1983 is granted. Plaintiffs' complaint fails to state a claim upon which relief can be granted. The court hereby adopts the findings made at the time of the hearing as set forth in the transcript of the proceedings. Excerpts of the transcript are attached to this order as Exhibit 1, and

incorporated herein.

The County Defendants' Motion to Dismiss the fourth claim alleging violation of Second Amendment on the grounds that the denial of CCW permits violates Plaintiffs' right to bear arms under the Second Amendment, is granted. Plaintiffs' complaint fails to state a claim upon which relief can be granted. The court hereby adopts the findings made at the time of the hearing as set forth in the transcript of the proceedings. Excerpts of the transcript are attached to this order as Exhibit 1, and incorporated herein.

The County Defendants' Motion to Dismiss the fifth claim brought under the Privileges and Immunities Clause pursuant to 42 U.S.C. § 1983 is granted. Plaintiffs' complaint fails to state a claim upon which relief can be granted. The court hereby adopts the findings made at the time of the hearing as set forth in the transcript of the proceedings. Excerpts of the transcript are attached to this order as Exhibit 1, and incorporated herein.

The County Defendants' Motion to Dismiss the sixth claim brought under Ninth and Fourteenth Amendments pursuant to 42 U.S.C. § 1983, alleging that those amendments provide a constitutional right to carry a concealed weapon, is granted. Plaintiffs' complaint fails to state a claim upon which relief can be granted. The court hereby adopts the findings made at the time of the hearing as set forth in the transcript of the proceedings. Excerpts of the transcript are attached to this order as Exhibit 1, and incorporated herein.

The County Defendants' Motion to Dismiss the seventh claim, which is purportedly a claim for

injunctive relief and declaratory relief is granted. The declaratory and injunctive relief claim is not a separate claim for relief upon which relief may be based and therefore, Plaintiffs' complaint fails to state a claim upon which relief can be granted. The court hereby adopts the findings made at the time of the hearing as set forth in the transcript of the proceedings. Excerpts of the transcript are attached to this order as Exhibit 1, and incorporated herein.

The court further orders that this case, and each and every claim, be dismissed with prejudice and without leave to amend, for the reasons as set forth in both the Attorney General's and the County Defendants' briefs. There is no legal basis for the Plaintiffs' claims, and even if given the opportunity to amend, Plaintiffs would be unable to plead a legally cognizable complaint. The court finds this lawsuit to be almost frivolous, if not frivolous. There is no support in the law for this lawsuit. And even if the Court gave the Plaintiffs an opportunity to amend, they would be unable to. These are all solid, well-founded legal reasons set forth in the defendants' briefs as to why this case should not go forward. This lawsuit is just a rehash of David K. Mehl, et al. v. Lou Blanas, et al., U.S. District Court for the Eastern District of California, Civ. No. S03-2682 MCE KJM, and the findings and orders of Judge England from that case are incorporated herein in full.

IT IS SO ORDERED:

Dated: July 27, 2009 /s/ John A. Mendez

HONORABLE JOHN A. MENDEZ
UNITED STATES DISTRICT JUDGE

Appendix D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

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Case No. Civ. S-08-2064

BEFORE THE HONORABLE JOHN A. MENDEZ, JUDGE

---oOo---

JAMES ROTHERY, Esq.; ANDREA HOFFMAN,
Plaintiffs,

vs.

Former Sheriff LOU BLANAS, et al.,
Defendants.

---oOo---

REPORTER'S TRANSCRIPT COURT'S RULINGS ON MOTIONS TO DISMISS WEDNESDAY, JULY 15, 2009

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Reported by: KELLY O'HALLORAN, CSR #6660

APPEARANCES
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BY: GEOFFREY L. GRAYBILL

SACRAMENTO, CALIFORNIA

WEDNESDAY, JULY 15, 2009, 9:00 A.M.
* * * * (Excerpt of proceedings.)

[p. 1.]

THE COURT: Okay. Let me begin by focusing on the complaint itself. And I want this record to be clear because I assume this may end up in the Ninth Circuit, and so I want my comments to be clear as well.

In terms of the complaint itself, it is for the most part a rehash of the 2003 lawsuit, although it adds or attempts to add a RICO claim. It is a rehash of the prior lawsuit that was before Judge England. And the defendants request the Court take judicial notice of that prior lawsuit. In fact, I will make reference to that prior lawsuit throughout my comments, even in the context of a motion to dismiss.

The complaint itself is an example that more is not better. It's 808 paragraphs. It's 78 pages long. And it is a mishmash of thoughts, legal argument, speculation, with some allegations thrown in. Quite frankly, Mr. Karalash, it's Exhibit A of what you

should not do in terms of pleading a complaint in federal court.

And to the defendants' credit, you filed motions to dismiss. I don't know how you would have answered this complaint given that there were paragraphs that don't allege

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anything. They're simply statements. There's one paragraph in here where it just contains -- there it is, paragraph 784. "See Melendez vs. City of Los Angeles." How do you respond to an allegation like that in a complaint?

It contains a cause of action for declaratory and injunctive relief that is almost identical to the same cause of action in the 2003 case involving other plaintiffs which Judge England clearly set forth that you can't maintain a cause of action for declaratory and injunctive relief. It should have been included in the prayer for relief.

So the complaint itself, if I wasn't, as you see where I'm headed, going to grant the motions to dismiss, I clearly would have granted the motions to strike, and we would have started all over. We're not going to go there.

In terms of the lawsuit itself, it is apparent to the Court that the plaintiffs are misreading cases. That they, in particular, have misread both the Heller case and the Nordyke case. Those cases in no way support this lawsuit or maintaining this lawsuit. They have not done the necessary legal research in terms of maintaining a RICO claim. And nearly all of the other claims in this case, the 1983 claims, were dealt with by Judge England in his order dismissing the 2003 case. And I'll go through that.

In terms of the RICO claim, that, as Mr. Graybill, you point out, that allegation is only against the county
[p. 3.]
defendants, as we'll call them. So it does not involve the Attorney General. In terms of the county defendants, they provided at least seven reasons why the RICO claim should be dismissed. I don't need to reach all seven reasons raised by the county defendants, but the record should reflect that, in fact, I agree with all seven reasons for the dismissal of the first cause of action.

The seven reasons that they provided are as follows: I'm sorry. It's the AG's brief. Here it is. Okay.

One, that these plaintiffs do not have standing to maintain a RICO claim.

Two, that they failed to establish, in particular, that the defendant Sheehan engaged in any required conduct to constitute a violation of RICO laws. And I would note that plaintiffs in their opposition don't address that argument specifically.

Three, that the plaintiffs failed to establish that the defendant Blanas and defendant McGinness are distinct from the enterprise.

Four, that the plaintiffs failed to establish that the enterprise engaged in interstate commerce.

Five, that the plaintiffs failed to establish that any alleged predicate act under 18 USC Section 1951 had any effect on interstate commerce.

Sixth, that the plaintiffs failed to establish any
[p. 4.]
predicate acts by defendants subject to liability under 29 USC Section 186.

And, seven, that these civil rights violations do

not constitute racketeering activity.

All meritorious arguments. And for all the reasons set forth in the county's brief, the Court clearly agrees that the RICO claim cannot be maintained.

In the complaint, the plaintiffs have alleged that the sheriff's department is an enterprise for the purpose of RICO, and then they allege in detail that both sheriffs gave out concealed weapon permits, CCW permits, in exchange for campaign contributions and other perks. That's the allegation.

The defendants have argued, as I indicated, seven reasons why I should dismiss this claim. I want to focus on some of those in particular. One, that the plaintiffs do not have standing to bring a RICO claim. To bring a RICO claim, a person must show that he was injured in his business or property under 18 USC Section 1964(c), which reads that "Any person injured in his business or property by reason of a violation of Section 1962 of this chapter may sue therefor in any appropriate United States district court," citing also Sedima vs. Imrex Co., a U.S. Supreme Court case, 473 U.S. 479. "The plaintiff only has standing if, and can only recover to the extent that, he has been injured in his

[p. 5.]

business or property by the conduct constituting the violation." The Ninth Circuit has also stated that the harm must be economic in nature, citing Guerrero vs. Gates, 442 F.3d 697, a 2006 Ninth Circuit case, which provides that "To recover under RICO, the individual must show proof of concrete financial loss and must demonstrate that the racketeering activity proximately caused the loss."

In this case, plaintiffs do not have a property

interest in a CCW permit. They have not alleged that they have suffered any harm to their business. Therefore, they do not have standing to bring a RICO claim.

Defendants also argue, among other things, that the RICO claim should fail, as I indicated, because the sheriffs are not distinct from the enterprise because they were sued in their official capacity, that the enterprise was not engaged in interstate commerce, and there's statute of limitations arguments as well. Again, all those arguments the Court finds to be meritorious and give the Court basis to dismiss the RICO claim.

Throughout this discussion, you'll see that the Court completely disagrees with the plaintiffs' reading of Heller. Under no circumstances can Heller be read that an individual now has a fundamental right to carry a concealed weapon. That case has been completely misread by the plaintiffs. And as I indicated, so the record's clear, there is no basis in
[p. 6.]
law for the plaintiffs to maintain their claims under that theory.

Count 2 is an equal protection claim brought under 42 USC Section 1983. In that second cause of action, which does include the Attorney General, the plaintiffs have alleged that they were denied CCW permits, whereas retired peace officers were granted permits without having to demonstrate good cause. And plaintiffs argue that this violates the 14th Amendment right to equal protection.

Again, both the Attorney General and the county defendants provided the Court with sound legal reasons why that second cause should be dismissed as

well. And Judge England also addressed this argument as well in his 2004 order in the Mehl vs. Blanas case. That's case 03-2682. I'm going to take a quick break because I left my notes in chambers, and I want to make sure, again, that we make a complete record here. So I'll be right back.

(Brief recess taken.)

THE COURT: Okay. Back on the record. And this gets to Mr. Karalash's strict scrutiny versus rational basis review. And I'm going to adopt, because I agree with it completely, Judge England's opinion with respect to this claim. As written by Judge England, in the case before me as well as the case in 2003, the plaintiffs did contend that the statutes that are being challenged here are unconstitutional

[p. 7.]

because they grant retired law enforcement officers special treatment in allowing them to carry concealed weapons without having to show good cause for a permit. They specifically argue that California Penal Code Section 12027 and 12031(b) state that the statutes prohibiting the carrying of concealed weapons, which is Section 12025 of the Penal Code, and loaded weapons, which is Section 12031(a), do not apply to peace officers or to honorably retired peace officers.

Plaintiffs contend, as they do in this case, that Silveira vs. Lockyer compels judgment on the pleadings in their favor. And I'll get to that, by the way, as well. That the plaintiffs are asking for judgment on the pleadings. Silveira vs. Lockyer does not compel that. Silveira concerned California's ban on assault rifles, and the court upheld the statute in every respect save one. The court found no rational basis for allowing retired peace officers to possess assault weapons

without any restriction on use when active peace officers were permitted to possess and use such weapons when off-duty only for law enforcement purposes. The basis for allowing active off-duty officers to possess and use assault weapons was that a peace officer is on call 24 hours a day, and may be called upon at any time to respond to a call for help. The same is not true of retired officers. Because they are not on call at all after retirement, there was no rational basis in allowing retired
[p. 8.]
officers to keep assault weapons.

The justification and rationale for exempting retired peace officers from the CCW is not the same as for the exception to the assault weapon ban in Silveira. The justification for a CCW is personal protection, not public protection. Peace officers were entitled to carry assault weapons so that they would not be inadequately armed to confront criminals while protecting the public. On the other hand, they are entitled to carry concealed weapons to protect themselves from the enemies they have made in performing their duties. While an officer's duty to respond to the public's calls for help stops when he retires, the threat of danger from enemies he might have made during his service does not. Therefore, there is a rational basis for allowing a retired officer to continue to carry a concealed weapon, even though there was no rational basis for allowing the same officer to keep an assault weapon. Because "plaintiffs have no constitutional right to own or possess weapons, heightened scrutiny does not apply," and the statute need meet only rational basis review. That's a quote from Silveira, 312 F.3d at 1088.

And again, there is nothing in Heller that changes that analysis, despite plaintiffs' arguments to the contrary. Having concluded that the statutory exception allowing retired officers to carry concealed weapons is rationally
[p. 9.]
related to a legitimate governmental interest, protecting retired law enforcement officers, it follows that this claim in this case, which is the second claim, fails to state a claim upon which relief may be granted. Plaintiffs' arguments to the contrary are without merit.

Plaintiff contends in this case before this Court, as they did in the 2003 case, that all one must do is "join the club," that is, become a law enforcement officer and quit the following day to secure the right to carry a concealed weapon.Becoming a law enforcement officer is not a club one joins. Furthermore, the statute gives preference only to those officers "who have qualified for, and accepted a service or disability retirement." Thus, one who works for one day as a law enforcement officer and quits would not become exempt from the requirement to apply for a permit to carry a concealed weapon.

There was some argument in the 2003 case concerning officers who may have psychological issues or alcohol issues. And again, the law deals with that. In short, just as in 2003, it's clear that the statutory scheme allowing retired officers to carry concealed weapons passes a rational basis review. And therefore defendants motion on this cause of actions, as in 2003, must be dismissed.

I also want to make reference in the case before the Court to the fact that under another recent Supreme Court

[p. 10.]
case, Ashcroft vs. Iqbal, a plaintiff is required in a complaint to state a plausible claim for relief in order to survive a motion to dismiss. "Determining whether a case states a plausible claim for relief will be a context specific task that requires the reviewing court to draw on its judicial experience and common sense. Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged -- but it has not shown -- that the pleader is entitled to relief."

In this case plaintiff has not sufficiently shown that allowing retired peace officers to carry concealed weapons has no rational basis. And without that, without stating a plausible claim for relief, that second cause of action cannot be maintained as well.

In terms of Court 3, Count 3 alleges a claim under, again, 42 USC Section 1983, brought under the First and Fourteenth Amendments. And that claim and the allegation, as best as we can decipher from the complaint, is that plaintiff is arguing that because those who contribute to campaigns are given CCW permits, plaintiffs' First Amendment rights were somehow violated. As both defendants -- actually, this one also only applies to the county; correct?

MR. LAVRA: Yes.

THE COURT: As the county points out, there are no
[p. 11.]
cases stating that not contributing to a campaign violates the First Amendment. The cases dealing with the effect of campaign contributions on First Amendment rights deal with campaign contribution limits. And again, plaintiffs don't address the First

Amendment claim in their opposition. And there simply is no precedent for a First Amendment violation based on failure to make a campaign contribution.

For those reasons, and for the reasons set forth in the county's opposition, the third claim for relief should be dismissed and will be dismissed as well.

All right. Let's turn to the fourth cause of action which is a new cause of action, in effect, somewhat different from the prior claim. And that's the Second Amendment argument. Again, specifically it's pled as a violation of 42 USC Section 1983. The violation in particular is under the Second and Fourteenth Amendments. In the complaint, the plaintiffs allege that the denial of the CCW permits violate their right to bear arms under the Second Amendment. As pointed out, however, by both the Attorney General and the county defendants, there is no constitutional right to carry a concealed weapon. That is the Nordyke vs. King case, 563 F.3d 439, which upheld regulation of gun possession in public places post-Heller. Even in the District of Columbia vs. Heller case, 128 S. Ct. 2783, a 2008 Supreme Court case, the Supreme Court noted, "Like most rights, the rights
[p. 12.]
secured by the Second Amendment is not unlimited." The court went on to say that "The majority of the 19th-Century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." Heller is distinguishable because in that case, the D.C. ordinance banned the use of firearms in the home. That's not what's involved in this case. This case involves an attempt to get a permit to carry a concealed weapon. In Heller, the Supreme Court found

the right to use firearms in self-defense to protect one's home was guaranteed by the Constitution. On the other hand, the right to carry a concealed weapon is not guaranteed by the Constitution. And because plaintiffs do not have a Second Amendment right to carry a concealed weapon, and no court has so held, this claim also should be and will be denied.

Count 5 in the complaint is again brought under 42 USC Section 1983, under the Privileges and Immunities Clause. This is an identical claim to that which was brought back in the case before Judge England. He dealt with that at length in his order dismissing that case. And again, I'm going to adopt his analysis as well with respect to that claim.

Under Article IV, Section 2, of the United States Constitution, the citizens of each state are entitled to all privileges and immunities of citizens in the several states.

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In this case before this Court, the plaintiffs are claiming that by being denied a CCW permit, they were denied the ability to travel with a concealed weapon to other states that honor California's CCW permits. As again argued by the defendants in this case and as discussed by Judge England in his opinion, plaintiffs do not have a right to carry a concealed weapon. It's Erdelyi vs. O'Brien, 680 F.2d 61, a Ninth Circuit case from 1982, which holds that there is no liberty or property interest in carrying a concealed weapon. Therefore, plaintiffs were not denied the right to travel with concealed weapons.

This was the portion of the opposition brief in which the arguments concerning Freedmen and the effect on Freedmen somehow should lead this Court to

allow this case to go forward, which are, the best way I can put it, nonsensical arguments that really have little or anything to do with this case. Those same arguments were made before Judge England back in 2003. And they failed back then, and they fail this time as well. I want to read from Judge England's opinion. In dismissing the claim, the identical claim in the 2003 case, Judge England writes: "Plaintiffs proclaim that for the first time, this Court, and the Ninth Circuit, will be asked to define whether the 14th Amendment's Privileges and Immunities Clause includes the fundamental right to keep and
[p. 14.]
bear arms. Thus, it is finally clear to the Court that plaintiffs' errors are twofold. First, plaintiffs equate the right to keep and bear arms with the right to carry firearms concealed, without ever analyzing, or even acknowledging, a possible difference between the two. In their opposition, plaintiffs do not even address the particular subject of their lawsuit, which is the denial of a permit to carry concealed weapons. Even if the Court were to assume that if plaintiffs were prevented from possessing firearms a privileges and immunities violation would be found, it does not follow that merely being denied a permit to carry those firearms concealed amounts to such a violation. Plaintiffs have done nothing to persuade, indeed, they have not attempted to persuade, the Court that possession of a firearm equates to carrying that firearm concealed.

"Second, plaintiffs label the right to keep and bear arms as a fundamental right. In doing so, plaintiffs claim support from some 35 Supreme Court cases, while only citing strong dictum from one case."

Now, I recognize that this was written before the

Heller decision. But Judge England does go on to discuss Silveira vs. Lockyer. And Judge England writes, "Plaintiffs completely ignore the clear holding of Silveira vs. Lockyer, a 2002 Ninth Circuit case, which represents binding authority on this Court. In Silveira, the court analyzed rights
[p. 15.]
guaranteed under the Second Amendment and held that the Second Amendment right to keep and bear arms is a collective right that 'guarantees the right of the people to maintain effective state militias, but does not provide any type of individual right to own or possess weapons.'"

Admittedly, Heller has changed that somewhat. But again, Heller didn't deal with carrying weapons concealed.

"In Silveira, the court went on to say that 'the federal and state governments have the full authority to enact prohibitions and restrictions on the use and possession of firearms, subject only to generally applicable constitutional constraints, such as due process, equal protection, and the like.' Plaintiffs' failure to confront Silveira is even more egregious when the Court considers that Mehl was a plaintiff in Silveira, and Gary Gorski, plaintiffs' current counsel, represented the plaintiffs in Silveira."

Again, the bottom line is that nothing in Heller changes that analysis with respect to that privileges and immunities cause of action, Count 5 in this complaint. There is no constitutional right to carry a concealed weapon. And because plaintiffs do not have a right to carry concealed weapons, their right to travel to other states has not been violated, and the privileges and immunities claim must be dismissed as well.

[p. 16.]

And then the sixth cause of action is also brought under 42 USC Section 1983, alleging violations of the Ninth and Fourteenth Amendments.The Ninth Amendment provides that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."Plaintiffs argue that their natural right to self-preservation has been violated.

And as the defendants again point out in their briefs in support of the motion to dismiss and in the reply, that the Ninth Amendment does not encompass an individual right to bear arms. That's San Diego County Gun Rights Committee vs. Reno, 98 F.3d 1121, a 1996 Ninth Circuit case, in which the court wrote "We join our sister circuits in holding that the Ninth Amendment does not encompass an unenumerated, fundamental, individual right to bear firearms." Plaintiffs therefore lack standing to bring a claim under the Ninth Amendment. And because they lack standing to bring a claim under the Ninth Amendment, this sixth cause of action must be dismissed as well.

In terms of the seventh cause of action, which is a claim for injunctive relief and declaratory relief, it is almost identical to the claim that was filed in the Mehl case back in 2003. Again, I adopt Judge England's reasoning when he dismissed that claim as well. He wrote as follows: "Plaintiffs' first amended complaint contains a seventh claim

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seeking a preliminary injunction. The claim contains two paragraphs."

In this case before this Court, before me, there

are more paragraphs. But there is the same allegation.

In the 2003 case, the allegation was "Plaintiff seeks a declaration from the court regarding the constitutionality of the CCW statutes and policies enforced and promulgated by defendants."

In this complaint, it's paragraph 802.And that reads "Plaintiffs seek a declaration from the court regarding the constitutionality of the CCW statutes and policies, enforced and promulgated by defendants," and then they've added in this case, "providing preferential treatment to those associated with law enforcement."

The declaratory and injunctive relief claim is not a separate claim for relief upon which relief may be based. It is, in fact, nothing more than a request for a remedy based upon a favorable finding on the first six claims. It should have been included as part of the prayer for relief, not pled as a separate cause of action. And for those reasons, it should be dismissed.

As the defendants point out in their reply briefs, the plaintiff has requested that the Court grant judgment on the pleadings under Federal Rule of Civil Procedure 12(c). Again, the plaintiffs' request evidences just a fundamental

[p. 18.]

lack of understanding of the Federal Rules of Civil Procedure. And as both defendants point out, Federal Rule of Civil Procedure 12(c) authorizes a motion for judgment on the pleadings only "after pleadings are closed." None of the defendants have filed answers to this amended complaint. They filed motions to dismiss. Accordingly, pleadings are not closed in this case, and therefore a motion for judgment on the pleadings is not authorized. And then as cited by the Attorney General

in its brief, a third circuit case also confirms that, Season-All Industries, Inc. vs. Turkiye Sise Ve Cam Fabrikalari, A.S., 425 F.2d 34, a Third Circuit case 1970. There's no basis for that request. It should not have been made. And, of course, it is denied as well.

There are a number of other arguments, Mr. Graybill, I knowledge that you raised on behalf of the Attorney General. I'm not going to reach those and don't need to reach those, including that the Attorney General has sovereign immunity, that he, in fact, has no authority to issue CCWs, and therefore the case should be dismissed on those grounds. Those weren't even addressed in the opposition. I'm not going to specifically reach those arguments, other than -- and I don't have to -- other than to say, again, I think they're meritorious. I'm just not specifically going to reach a finding on those arguments as well. I don't need to, and I'm not going to.

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The final issue is whether I should for some reason allow the plaintiffs leave to amend or whether I should dismiss this with prejudice. The Court is going to order that this case, and each and every claim, be dismissed with prejudice for the reasons set forth in both the Attorney General and the county defendants' briefs. And that is there is no legal basis for this lawsuit. There is no support in the law for this lawsuit. And even if I gave the plaintiffs an opportunity to try to amend, they would be unable to. These are all solid, well-founded legal reasons set forth in the defendants' briefs as to why this case should not go forward.

I'm not sugarcoating this, obviously, Mr. Karalash. I find this lawsuit to be almost frivolous, if not frivolous. I recognize you disagree. But it seems to

me that your clients had their shot in 2003. I believe there also may be another case before Judge Karlton that was dismissed. I'm not sure if I'm correct about that. But I know at least -- is that true, there's a similar case before Judge Karlton? I thought I read somewhere in somebody's brief. Maybe I'm wrong.

MR. LAVRA: Not with respect to Mr. Gorski.There may be another CCW case out there.

THE COURT: Okay. But at least it just seems to me to be a rehash of this lawsuit that was dismissed back in 2004

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by Judge England. And Heller has not in any way changed that. And Heller has been seriously misread by you, as well as the Nordyke case. Those two cases do not give your clients a right to maintain this lawsuit.

Those comments being made, I'm not sure, since 1983 actions obviously sometimes raise issues of attorney's fees, whether you're going to seek that. Speaking to the defense counsel, if you do seek that, there are obviously local rules that govern those motions. You should follow those. I'm not going to take that up this morning. But I am, for all the reasons stated, going to dismiss this complaint in its entirety with prejudice against all defendants.

Did both of you submit proposed orders?

MR. GRAYBILL: The state didn't, your Honor, but we will.

THE COURT: Did you?

MR. LAVRA: No, we didn't, but we will.

THE COURT: Okay. I'm going to order both defendants to submit proposed orders. Run them by Mr. Karalash for approval as to form, and get those to me, if you can, within the next week. Okay?

MR. LAVRA: All right.

THE COURT: Anything further?

MR. KARALASH: Will the statement of reasons be reduced to an order and put into the record?

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THE COURT: They're going to prepare the proposed order. If someone wants to order a transcript and adopt that, that's fine with me, but I'm not going to send out a separate written order.

MR. KARALASH: Thank you.

THE COURT: Okay. Thank you.

MR. LAVRA: Thank you, your Honor.

(Proceedings were concluded.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Kelly O'Halloran

KELLY O'HALLORAN, CSR #6660

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-16852
D.C. No. 2:08-cv-02064-JAM-KJM
ORDER

JAMES ROTHERY; ANDREA HOFFMAN,
Plaintiffs-Appellants,
and
DEANNA SYKES; et al., Plaintiffs,
v.
COUNTY OF SACRAMENTO; et al.,
Defendants-Appellees.

Filed: April 27, 2018

Before: McKEOWN, WATFORD, and FRIEDLAND, Circuit Judges

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35.

Appellants' petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 99) are denied.

No further filings will be entertained in this closed case.

Appendix F

U.S. Const. amend. II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Cal. Penal Code § 25400
Crime of Carrying a Concealed Firearm

(a) A person is guilty of carrying a concealed firearm when the person does any of the following:
(1) Carries concealed within any vehicle that is under the person's control or direction any pistol, revolver, or other firearm capable of being concealed upon the person.
(2) Carries concealed upon the person any pistol, revolver, or other firearm capable of being concealed upon the person.
(3) Causes to be carried concealed within any vehicle in which the person is an occupant any pistol, revolver, or other firearm capable of being concealed upon the person.
(b) A firearm carried openly in a belt holster is not concealed within the meaning of this section.
(c) Carrying a concealed firearm in violation of this section is punishable as follows: ...
(1) If the person previously has been convicted of any felony, or of any crime made punishable by a provision listed in Section 16580, as a felony.
(2) If the firearm is stolen and the person knew or had reasonable cause to believe that it was stolen, as a felony.
(3) If the person is an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22, under the Street Terrorism Enforcement and Prevention Act (Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1), as a felony.
(4) If the person is not in lawful possession of the firearm or the person is within a class of persons prohibited from possessing or acquiring a firearm pursuant to Chapter 2 (commencing with Section

29800) or Chapter 3 (commencing with Section 29900) of Division 9 of this title, or Section 8100 or 8103 of the Welfare and Institutions Code, as a felony.
(5) If the person has been convicted of a crime against a person or property, or of a narcotics or dangerous drug violation, by imprisonment pursuant to subdivision (h) of Section 1170, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($1,000), or by both that imprisonment and fine.
(6) If both of the following conditions are met, by imprisonment pursuant to subdivision (h) of Section 1170, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($1,000), or by both that fine and imprisonment:
(A) The pistol, revolver, or other firearm capable of being concealed upon the person is loaded, or both it and the unexpended ammunition capable of being discharged from it are in the immediate possession of the person or readily accessible to that person.
(B) The person is not listed with the Department of Justice pursuant to paragraph (1) of subdivision (c) of Section 11106 as the registered owner of that pistol, revolver, or other firearm capable of being concealed upon the person.
(7) In all cases other than those specified in paragraphs (1) to (6), inclusive, by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($1,000), or by both that imprisonment and fine.
(d) (1) Every person convicted under this section who previously has been convicted of a misdemeanor offense enumerated in Section 23515 shall be punished by imprisonment in a county jail for at least three

months and not exceeding six months, or, if granted probation, or if the execution or imposition of sentence is suspended, it shall be a condition thereof that the person be imprisoned in a county jail for at least three months.

(2) Every person convicted under this section who has previously been convicted of any felony, or of any crime made punishable by a provision listed in Section 16580, if probation is granted, or if the execution or imposition of sentence is suspended, it shall be a condition thereof that the person be imprisoned in a county jail for not less than three months.

(e) The court shall apply the three-month minimum sentence as specified in subdivision (d), except in unusual cases where the interests of justice would best be served by granting probation or suspending the imposition or execution of sentence without the minimum imprisonment required in subdivision (d) or by granting probation or suspending the imposition or execution of sentence with conditions other than those set forth in subdivision (d), in which case, the court shall specify on the record and shall enter on the minutes the circumstances indicating that the interests of justice would best be served by that disposition.

(f) A peace officer may arrest a person for a violation of paragraph (6) of subdivision (c) if the peace officer has probable cause to believe that the person is not listed with the Department of Justice pursuant to paragraph (1) of subdivision (c) of Section 11106 as the registered owner of the pistol, revolver, or other firearm capable of being concealed upon the person, and one or more of the conditions in subparagraph (A) of paragraph (6) of subdivision (c) is met.

Cal. Penal Code § 25450
Peace Officer Exemption

As provided in this article, Section 25400 does not apply to, or affect, any of the following:
(a) Any peace officer, listed in Section 830.1 or 830.2, or subdivision (a) of Section 830.33, whether active or honorably retired.
(b) Any other duly appointed peace officer.
(c) Any honorably retired peace officer listed in subdivision (c) of Section 830.5.
(d) Any other honorably retired peace officer who during the course and scope of his or her appointment as a peace officer was authorized to, and did, carry a firearm.
(e) Any full-time paid peace officer of another state or the federal government who is carrying out official duties while in California.
(f) Any person summoned by any of these officers to assist in making arrests or preserving the peace while the person is actually engaged in assisting that officer.

Cal. Penal Code § 25455
Peace Officer Exemption

(a) Any peace officer described in Section 25450 who has been honorably retired shall be issued an identification certificate by the law enforcement agency from which the officer retired.
(b) The issuing agency may charge a fee necessary to cover any reasonable expenses incurred by the agency in issuing certificates pursuant to this article.
(c) Any officer, except an officer listed in Section 830.1 or 830.2, subdivision (a) of Section 830.33, or subdivision (c) of Section 830.5 who retired prior to January 1, 1981, shall have an endorsement on the

identification certificate stating that the issuing agency approves the officer's carrying of a concealed firearm.
(d) An honorably retired peace officer listed in Section 830.1 or 830.2, subdivision (a) of Section 830.33, or subdivision (c) of Section 830.5 who retired prior to January 1, 1981, shall not be required to obtain an endorsement from the issuing agency to carry a concealed firearm.

Cal. Penal Code § 25605
Other Exemptions

(a) Section 25400 and Chapter 6 (commencing with Section 26350) of Division 5 shall not apply to or affect any citizen of the United States or legal resident over the age of 18 years who resides or is temporarily within this state, and who is not within the excepted classes prescribed by Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9 of this title, or Section 8100 or 8103 of the Welfare and Institutions Code, who carries, either openly or concealed, anywhere within the citizen's or legal resident's place of residence, place of business, or on private property owned or lawfully possessed by the citizen or legal resident, any handgun.
(b) No permit or license to purchase, own, possess, keep, or carry, either openly or concealed, shall be required of any citizen of the United States or legal resident over the age of 18 years who resides or is temporarily within this state, and who is not within the excepted classes prescribed by Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9 of this title, or Section 8100 or 8103 of the Welfare and

Institutions Code, to purchase, own, possess, keep, or carry, either openly or concealed, a handgun within the citizen's or legal resident's place of residence, place of business, or on private property owned or lawfully possessed by the citizen or legal resident.
(c) Nothing in this section shall be construed as affecting the application of Sections 25850 to 26055, inclusive.

Cal. Penal Code § 25655
Other Exemptions

Section 25400 does not apply to, or affect, the carrying of a pistol, revolver, or other firearm capable of being concealed upon the person by a person who is authorized to carry that weapon in a concealed manner pursuant to Chapter 4 (commencing with Section 26150).

Cal. Penal Code § 25850
Crime of Carrying a Loaded Firearm in Public

(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.
(c) Carrying a loaded firearm in violation of this section is punishable, as follows:
(1) Where the person previously has been convicted of any felony, or of any crime made punishable by a provision listed in Section 16580, as a felony.
(2) Where the firearm is stolen and the person knew or had reasonable cause to believe that it was stolen, as a felony.
(3) Where the person is an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22, under the Street Terrorism Enforcement and Prevention Act (Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1), as a felony.
(4) Where the person is not in lawful possession of the firearm, or is within a class of persons prohibited from possessing or acquiring a firearm pursuant to Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9 of this title, or Section 8100 or 8103 of the Welfare and Institutions Code, as a felony.
(5) Where the person has been convicted of a crime against a person or property, or of a narcotics or dangerous drug violation, by imprisonment pursuant to subdivision (h) of Section 1170, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($1,000), or by both that imprisonment and fine.
(6) Where the person is not listed with the Department of Justice pursuant to Section 11106 as the registered owner of the handgun, by imprisonment pursuant to subdivision (h) of Section 1170, or by imprisonment in a county jail not to exceed one year, or by a fine not to

exceed one thousand dollars ($1,000), or both that fine and imprisonment.
(7) In all cases other than those specified in paragraphs (1) to (6), inclusive, as a misdemeanor, punishable by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($1,000), or by both that imprisonment and fine.
(d) (1) Every person convicted under this section who has previously been convicted of an offense enumerated in Section 23515, or of any crime made punishable under a provision listed in Section 16580, shall serve a term of at least three months in a county jail, or, if granted probation or if the execution or imposition of sentence is suspended, it shall be a condition thereof that the person be imprisoned for a period of at least three months.
(2) The court shall apply the three-month minimum sentence except in unusual cases where the interests of justice would best be served by granting probation or suspending the imposition or execution of sentence without the minimum imprisonment required in this section or by granting probation or suspending the imposition or execution of sentence with conditions other than those set forth in this section, in which case, the court shall specify on the record and shall enter on the minutes the circumstances indicating that the interests of justice would best be served by that disposition.
(e) A violation of this section that is punished by imprisonment in a county jail not exceeding one year shall not constitute a conviction of a crime punishable by imprisonment for a term exceeding one year for the purposes of determining federal firearms eligibility under Section 922(g)(1) of Title 18 of the United States

Code.
(f) Nothing in this section, or in Article 3 (commencing with Section 25900) or Article 4 (commencing with Section 26000), shall preclude prosecution under Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9 of this title, Section 8100 or 8103 of the Welfare and Institutions Code, or any other law with a greater penalty than this section.
(g) Notwithstanding paragraphs (2) and (3) of subdivision (a) of Section 836, a peace officer may make an arrest without a warrant:
(1) When the person arrested has violated this section, although not in the officer's presence.
(2) Whenever the officer has reasonable cause to believe that the person to be arrested has violated this section, whether or not this section has, in fact, been violated.
(h) A peace officer may arrest a person for a violation of paragraph (6) of subdivision (c), if the peace officer has probable cause to believe that the person is carrying a handgun in violation of this section and that person is not listed with the Department of Justice pursuant to paragraph (1) of subdivision (c) of Section 11106 as the registered owner of that handgun.

Cal. Penal Code § 26045
Carrying of Weapon to Protect Person or Property; Persons under Threat from Subject of Restraining Order; Exempt from Application of Section 25850

(a) Nothing in Section 25850 is intended to preclude the carrying of any loaded firearm, under circumstances where it would otherwise be lawful, by

a person who reasonably believes that any person or the property of any person is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property.

(b) A violation of Section 25850 is justifiable when a person who possesses a firearm reasonably believes that person is in grave danger because of circumstances forming the basis of a current restraining order issued by a court against another person who has been found to pose a threat to the life or safety of the person who possesses the firearm. This subdivision may not apply when the circumstances involve a mutual restraining order issued pursuant to Division 10 (commencing with Section 6200) of the Family Code absent a factual finding of a specific threat to the person's life or safety. It is not the intent of the Legislature to limit, restrict, or narrow the application of current statutory or judicial authority to apply this or other justifications to a defendant charged with violating Section 25400 or committing another similar offense. Upon trial for violating Section 25850, the trier of fact shall determine whether the defendant was acting out of a reasonable belief that the defendant was in grave danger.

(c) As used in this section, "immediate" means the brief interval before and after the local law enforcement agency, when reasonably possible, has been notified of the danger and before the arrival of its assistance.

Cal. Penal Code § 26150

Application for License to Carry Concealed Weapon; County Sheriff Responsibilities;

Authority to Enter into Agreement with Head of Municipal Police Department

(a) When a person applies for a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person, the sheriff of a county may issue a license to that person upon proof of all of the following:

(1) The applicant is of good moral character.

(2) Good cause exists for issuance of the license.

(3) The applicant is a resident of the county or a city within the county, or the applicant's principal place of employment or business is in the county or a city within the county and the applicant spends a substantial period of time in that place of employment or business.

(4) The applicant has completed a course of training as described in Section 26165.

(b) The sheriff may issue a license under subdivision (a) in either of the following formats:

(1) A license to carry concealed a pistol, revolver, or other firearm capable of being concealed upon the person.

(2) Where the population of the county is less than 200,000 persons according to the most recent federal decennial census, a license to carry loaded and exposed in only that county a pistol, revolver, or other firearm capable of being concealed upon the person.

(c) (1) Nothing in this chapter shall preclude the sheriff of the county from entering into an agreement with the chief or other head of a municipal police department of a city to process all applications for licenses, renewals of licenses, or amendments to licenses pursuant to this chapter, in lieu of the sheriff.

(2) This subdivision shall only apply to applicants who

reside within the city in which the chief or other head of the municipal police department has agreed to process applications for licenses, renewals of licenses, and amendments to licenses, pursuant to this chapter.

Cal. Penal Code § 26160
Written Policy to Be Made Available

Each licensing authority shall publish and make available a written policy summarizing the provisions of Section 26150 and subdivisions (a) and (b) of Section 26155.

Cal. Penal Code § 26315
Retired Peace Officer Carrying A Concealed and Loaded Firearm

(a) An identification certificate authorizing the officer to carry a concealed and loaded firearm or an endorsement may be permanently revoked only after a hearing, as specified in Section 26320.

(b) Any retired peace officer whose identification certificate authorizing the officer to carry a concealed and loaded firearm or an endorsement is to be revoked shall receive notice of the hearing. Notice of the hearing shall be served either personally on the retiree or sent by first-class mail, postage prepaid, return receipt requested to the retiree's last known place of residence.

(c) From the date the retiree signs for the notice or upon the date the notice is served personally on the retiree, the retiree shall have 15 days to respond to the notification. A retired peace officer who fails to respond to the notice of the hearing shall forfeit the right to a hearing and the authority of the officer to carry a firearm shall be permanently revoked. The retired

officer shall immediately return the identification certificate to the issuing agency.
(d) If a hearing is requested, good cause for permanent revocation shall be determined at the hearing, as specified in Section 26320. The hearing shall be held no later than 120 days after the request by the retired officer for a hearing is received.
(e) The retiree may waive the right to a hearing and immediately return the identification certificate to the issuing agency.

Cal. Penal Code § 26350
Crime of Openly Carrying an Unloaded Handgun

(a) (1) 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.
(2) A person is guilty of openly carrying an unloaded handgun when that person carries an exposed and unloaded handgun inside or on a vehicle, whether or not on his or her person, 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.
(b) (1) Except as specified in paragraph (2), a violation of this section is a misdemeanor.
(2) A violation of subparagraph (A) of paragraph (1) of subdivision (a) is punishable by imprisonment in a county jail not exceeding one year, or by a fine not to exceed one thousand dollars ($1,000), or by both that fine and imprisonment, if both of the following conditions exist:
(A) The handgun and unexpended ammunition capable of being discharged from that handgun are in the immediate possession of that person.
(B) The person is not in lawful possession of that handgun.
(c) (1) Nothing in this section shall preclude prosecution under Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9, Section 8100 or 8103 of the Welfare and Institutions Code, or any other law with a penalty greater than is set forth in this section.
(2) The provisions of this section are cumulative and shall not be construed as restricting the application of any other law. However, an act or omission punishable in different ways by different provisions of law shall not be punished under more than one provision.
(d) Notwithstanding the fact that the term "an unloaded handgun" is used in this section, each handgun shall constitute a distinct and separate offense under this section.

Appendix G

SACRAMENTO COUNTY SHERIFF'S CONCEALED WEAPONS PERMIT POLICY

Good cause exists for issuance of a concealed weapons permit as follows: General: The determination of good cause for the issuance of a concealed weapons permit is perhaps the most difficult aspect in this process. While every applicant may believe that he/she has good cause for a license, the Sheriff's determination is based on consideration of public good and safety.
FAC ¶ 727. (CR 24, ER133)

Prima facie evidence of good cause for issuance of a concealed weapons permit: Applicant is an active or honorably separated member of the criminal justice system directly responsible for the investigation, arrest, incarceration, prosecution or imposition of sentence on criminal offenders and has received threats of harm to person or family as a result of official duties.
FAC ¶ 728. (CR 24, ER134)