

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

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**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**Charles Nichols,**

*Plaintiff-Appellant*

**v.**

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

*Defendants-Appellees.*

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

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**PLAINTIFF-APPELLANT NICHOLS'  
EXCERPTS OF RECORD  
VOLUME 1**

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

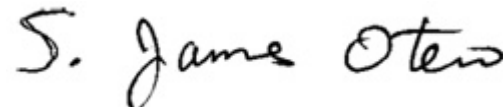
CHARLES NICHOLS,  
Plaintiff,  
v.  
KAMALA D. HARRIS, in her  
official capacity as Attorney  
General of California,  
Defendant.

Case No. CV 11-9916 SJO (SS)

JUDGMENT

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

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



DATED: May 1, 2014.

\_\_\_\_\_  
S. JAMES OTERO  
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CHARLES NICHOLS,  
  
Plaintiff,  
  
v.  
  
KAMALA D. HARRIS, in her  
official capacity as Attorney  
General of California,  
  
Defendant.

Case No. CV 11-9916 SJO (SS)  
  
**ORDER ACCEPTING FINDINGS,  
CONCLUSIONS AND  
RECOMMENDATIONS OF  
UNITED STATES MAGISTRATE JUDGE**

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

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

5  
6 On February 28, 2014, the Ninth Circuit stayed the issuance  
7 of the mandate in Peruta pending briefing and a decision on a  
8 motion for rehearing en banc. See Peruta v. County of San Diego,  
9 9th Cir. Case No. 10-56971 (Dkt. No. 126, entered Feb. 28, 2014)  
10 (order extending time for filing petition for rehearing en banc  
11 and staying mandate). However, entry of the mandate is merely a  
12 "ministerial act," White v. Klitzkie, 281 F.3d 920, 924 n.4 (9th  
13 Cir. 2002), that "formally marks the end of appellate  
14 jurisdiction." Northern California Power Agency v. Nuclear  
15 Regulatory Com'n, 393 F.3d 223, 224 (D.C. Cir. 2004) (internal  
16 quotation marks omitted). A panel decision of the Ninth Circuit  
17 is binding on lower courts as soon as it is published, even  
18 before the mandate issues, and remains binding authority until  
19 the decision is withdrawn or reversed by the Supreme Court or an  
20 en banc court. See, e.g., Gonzalez v. Arizona, 677 F.3d 383, 389  
21 n.4 (9th Cir. 2012) (en banc) ("[A] published decision of this  
22 court constitutes binding authority which 'must be followed  
23 unless and until overruled by a body competent to do so.'" )  
24 (quoting Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001));  
25 United States v. Gomez-Lopez, 62 F.3d 304, 306 (9th Cir. 1995)  
26 ("The government first urges us to ignore Armstrong since we have  
27 stayed the mandate to allow filing of a petition for certiorari;  
28 this we will not do, as Armstrong is the law of this circuit.");

1 Castillo v. Clark, 610 F. Supp. 2d 1084, 1122 n.17 (C.D. Cal.  
2 2009) (“Although the Ninth Circuit has granted a stay of the  
3 mandate in Butler, the panel decision remains the law of the  
4 Circuit.”). Indeed, three weeks after the stay in Peruta issued,  
5 the Ninth Circuit vacated a district court decision in another  
6 matter and remanded the case “for further proceedings consistent  
7 with Peruta.” See Baker v. Kealoha, \_\_\_ Fed. Appx. \_\_\_, 2014 WL  
8 1087765 at \*1 (9th Cir. Mar. 20, 2014). As of the date of this  
9 Order, Peruta remains binding precedent on this Court.

10  
11 Plaintiff further appears to misinterpret the import of the  
12 Peruta court’s clarification in footnote 19 that it was not  
13 “ruling on the constitutionality of California statutes.” (Obj.  
14 at 2) (quoting Peruta, 742 F.3d at 1173 n.19). This footnote is  
15 part of the discussion in which the Ninth Circuit explained that  
16 because the Second Amendment does not protect any particular mode  
17 of carry, a claim that a state must permit a specific form of  
18 carry, such as open carry, fails as a matter of law. See id. at  
19 1172-73 (“As the California legislature has limited its  
20 permitting scheme to concealed carry -- and has thus expressed a  
21 preference for that manner of arms-bearing -- a narrow challenge  
22 to the San Diego County regulations on concealed carry, rather  
23 than a broad challenge to the state-wide ban on open carry, is  
24 permissible.”). Accordingly, Peruta did not rule on the overall  
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constitutionality of California statutes because it accepted the  
lawfulness of California’s firearms regime, including the state’s  
preference for concealed carry over open carry. Id. at 1172.

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

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

11  
12 To state an equal protection claim under section 1983, a  
13 plaintiff typically must allege that "'defendants acted with an  
14 intent or purpose to discriminate against the plaintiff based  
15 upon membership in a protected class.'" Furnace v. Sullivan, 705  
16 F.3d 1021, 1030 (9th Cir. 2013) (quoting Barren v. Harrington,  
17 152 F.3d 1193, 1194 (9th Cir. 1998) (emphasis added)). Even  
18 liberally construed, the Second Amended Complaint fails to make  
19 any connection between Plaintiff's race and the allegedly racist  
20 design motivating the passage of the facially race-neutral  
21 predecessor to Section 25850. Indeed, the record in this case,  
22 including Plaintiff's Second Amended Complaint and Plaintiff's  
23 Motion for Partial Summary Judgment, is devoid of any allegation  
24 that Plaintiff is a member of a racial minority whose members  
25 were the intended target of the legislature's alleged racial  
26 animus in enacting the predecessor to Section 25850. Despite  
27 three opportunities to state his claims, Plaintiff simply did not  
28 raise a race-based Fourteenth Amendment claim in this action.



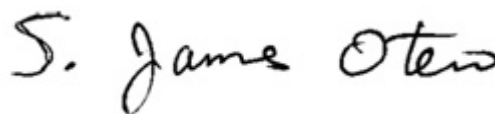
1 Assertion of a new claim on summary judgment is improper.  
2 Coleman v. Quaker Oats Co., 232 F.3d 1271, 1294 (9th Cir. 2000).  
3 Accordingly, even if Plaintiff is of "mixed race" heritage, he  
4 may not raise new claims at this late stage of the litigation.

5  
6 **IT IS ORDERED** that Plaintiff's Motion for Partial Summary  
7 Judgment is DENIED.

8  
9 **IT IS FURTHER ORDERED** that Defendant's Motion for Judgment  
10 on the Pleadings is GRANTED and that Judgment be entered in favor  
11 of Defendant Kamala D. Harris.

12  
13 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

14  
15 DATED: May 1, 2014.



16 \_\_\_\_\_  
17 S. JAMES OTERO  
18 UNITED STATES DISTRICT JUDGE

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

CHARLES NICHOLS,  
Plaintiff,  
v.  
KAMALA D. HARRIS, in her  
official capacity as Attorney  
General of California,  
Defendant.

Case No. CV 11-9916 SJO (SS)  
**REPORT AND RECOMMENDATION OF  
UNITED STATES MAGISTRATE JUDGE**

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

**I.  
INTRODUCTION**

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

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

13  
14 On November 8, 2013, Plaintiff filed a Motion for Partial  
15 Summary Judgment, (Dkt. No. 131), including a Memorandum in  
16 support of the Motion, ("MSJ," Dkt. No. 132), and the Declaration  
17 of Plaintiff Charles Nichols. ("Nichols MSJ Decl.," Dkt. Nos.  
18 133-34). Plaintiff also lodged a Statement of Uncontroverted  
19 Facts and Conclusions of Law pursuant to Local Rule 56-1.  
20 ("SUF," Dkt. No. 136). On December 2, 2013, Defendant filed a  
21 Memorandum in Opposition to the MSJ, (Dkt. No. 140), including a  
22 Statement of Genuine Disputes, ("SGD," Dkt. No. 140.1), and the  
23 Declaration of Jonathan M. Eisenberg. ("Eisenberg MSJ Decl.,"  
24 Dkt. No. 140.2). The following day, December 3, 2013, Defendant  
25 filed a Notice of Errata and a corrected Memorandum in Opposition  
26 to the MSJ. ("MSJ Opp.," Dkt. No. 141). On December 9, 2013,  
27 Plaintiff filed a Reply in support of the MSJ, ("MSJ Reply," Dkt.  
28 No. 143), and a "reply" to Defendant's Statement of Genuine

1 Disputes. ("Reply SGD," Dkt. No. 144). On the same day,  
2 Plaintiff also filed Objections to Defendant's Notice of Errata,  
3 (Dkt. No. 145), and Objections to the Declaration of Jonathan M.  
4 Eisenberg.<sup>1</sup> (Dkt. No. 146).

5  
6 On November 12, 2013, Defendant filed a Motion for Judgment  
7 on the Pleadings, (Dkt. No. 129), including a Memorandum in  
8 support of the Motion, ("MJP," Dkt. No. 129.1), and a Request for  
9 Judicial Notice. ("MJP RJN," Dkt. No. 129.2). On November 26,  
10 2013, Plaintiff filed an Opposition to the MJP, ("MJP Opp.," Dkt.  
11 No. 139), and Objections to Evidence.<sup>2</sup> ("P MJP Evid. Obj.," Dkt.

12  
13 <sup>1</sup> Plaintiff objected to the Notice of Errata on the ground that  
14 Defendant's corrected Memorandum in Opposition to the MSJ was  
15 untimely, as it was filed the day after the Court's deadline for  
16 opposing the MSJ. (Dkt. No. 145 at 2-3). However, the corrected  
17 Opposition is substantively similar to the inadvertently-filed  
18 earlier version, which Plaintiff concedes was timely. (Id.).  
19 Accordingly, Plaintiff's Objections to the Notice of Errata are  
20 overruled.

21  
22 Plaintiff's Objections to the Eisenberg Declaration are  
23 directed to the exhibits attached to the declaration, which  
24 consist of: (1) the Los Angeles County Sheriff's Department's  
25 Concealed Weapons Licensing Policy, (2) a brief biography of  
26 former Assistant Sheriff Paul Tanaka, available at  
27 [www.paultanaka.com](http://www.paultanaka.com), and (3) a web article describing the instant  
28 litigation, including comments, available at <http://lagunaniguel-danapoint.patch.com>. (See Dkt. No. 146 at 1-2) (citing Eisenberg  
Decl., Exhs. A-C). However, the exhibits did not affect the  
outcome of the Court's recommendation. Accordingly, Plaintiff's  
Objections to the Eisenberg Declaration and its exhibits are  
overruled. See PacifiCorp v. Northwest Pipeline GP, 879 F. Supp.  
2d 1171, 1194 n.7 & 1214 (D. Or. 2012) (declining to address  
evidentiary objections where the court would reach the same  
conclusions whether or not it considered the challenged  
materials).

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

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

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7  
 8 . . . were and are very much in dispute . . . ." (P MJP Evid.  
 9 Obj. at 1). The exhibits attached to CRB's Opposition are copies  
 10 of the criminal complaint in CRB's misdemeanor action against  
 11 Plaintiff and the court minutes in that matter. (See MJP RJN,  
 12 Exh. A). While contested facts are not properly subject to  
 13 judicial notice, the Court may take judicial notice of the  
 14 criminal complaint and court minutes as they are public records  
 15 "whose accuracy cannot reasonably be questioned." See Louis v.  
 16 McCormick & Schmick Restaurant Corp., 460 F. Supp. 2d 1153, 1155,  
 17 fn.4 (C.D. Cal. 2006) ("Under Rule 201 of the Federal Rules of  
 18 Evidence, the court may take judicial notice of the records of  
 19 state courts, the legislative history of state statutes, and the  
 20 records of state administrative agencies."). Furthermore,  
 21 Plaintiff does not deny that he was charged with carrying a  
 22 weapon into a City of Redondo Beach park and that he pled nolo  
 23 contendere to the misdemeanor violation. To that extent,  
 24 Plaintiff's Objections are overruled and Defendant's Request for  
 25 Judicial Notice is GRANTED.

26  
 27  
 28 <sup>3</sup> Defendant's Objections to the supplemental briefs accompanying  
 Plaintiff's Notices of Supplemental Authority are well taken.  
 "Filing a notice of supplemental authority to inform the Court of  
 a new judicial opinion that has been issued is appropriate, but  
 it is an improper occasion to argue outside the pleadings."  
Rosenstein v. Edge Investors, L.P., 2009 WL 903806 at \*1 n.1  
 (S.D. Fla. Mar. 30, 2009); see also C.D. Cal. L.R. 7-10  
 (prohibiting further briefing after a reply is filed absent  
 written authorization from the Court); Hagens Berman Sobol  
Shapiro LLP v. Rubinstein, 2009 WL 3459741 at \*1 (W.D. Wash. Oct.  
 22, 2009) (notice of supplemental authority improper "because it  
 contained argument regarding the case" submitted for the court's  
 review). In sum, filing a Notice of Supplemental Authority with  
 a copy of or a citation to a recently published case is proper;  
 including a memorandum with the Notice explaining why the case is  
 relevant is not. However, the largely repetitive arguments  
 presented in the briefs accompanying Plaintiff's Notices of  
 Supplemental Authority did not affect the outcome of the Court's

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

6  
7 **II.**

8 **FACTUAL ALLEGATIONS OF THE SECOND AMENDED COMPLAINT**

9  
10 As amended by Plaintiff's voluntary dismissal of City of  
11 Redondo Beach and the Doe Defendants, the SAC sues only Defendant  
12 Kamala D. Harris in her official capacity as the Attorney General  
13 of the State of California. (SAC at 1-2). The SAC raises a  
14 facial challenge to the constitutionality of seventeen California  
15 statutes that Plaintiff contends violate the fundamental right to  
16 openly carry loaded and unloaded firearms.<sup>4</sup> (Id. at 25-30; see

17  
18 recommendation. Accordingly, while it would be proper to strike  
19 Plaintiff's supplemental briefs, the Court exercises its  
20 discretion instead to overrule Defendant's Objections as moot.  
PacifiCorp, 879 F. Supp. 2d at 1194 n.7 & 1214.

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

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

3

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

17

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

24

25 found, Plaintiff’s claims are facial, not “as applied,”  
26 challenges to the relevant state statutes. (PI Order at 4).

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

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

6  
 7 Plaintiff generally alleges that in addition to the incident  
 8 on May 21, 2012, he "has frequently and countless times violated  
 9 California Penal Code Section 25850, the Redondo Beach City  
 10 Ordinances and other California statutes prohibiting firearms  
 11 from being carried in non-sensitive public places." (Id. at 22).  
 12 Plaintiff states that he will continue to "openly carry a loaded  
 13 holstered handgun, loaded rifle and loaded shotgun," as well as  
 14 unloaded firearms, in public places in CRB and around the state  
 15 of California. (Id. at 23). Plaintiff specifically alleges that  
 16 he will openly carry a firearm on August 7, 2013 in CRB and  
 17 Torrance and on the seventh day of every month thereafter. (Id.  
 18 at 22).

19  
 20 **III.**

21 **PLAINTIFF'S CLAIMS**

22  
 23 The SAC raises a single, multi-faceted claim under the  
 24 Second, Fourth and Fourteenth Amendments against the California  
 25 Attorney General. (SAC at 25-30). At issue are three California  
 26 statutes that collectively prohibit, subject to numerous  
 27 exceptions, the open carry of loaded and unloaded firearms and  
 28 handguns in public, and fourteen statutes that govern the



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

10  
 11 Specifically, the SAC challenges California Penal Code  
 12 section 25850, which prohibits carrying a loaded firearm on the  
 13 person or in a vehicle while in any public place or on any public  
 14 street and authorizes peace officers to conduct warrantless  
 15 chamber checks of any firearm carried by a person in a public  
 16 place. (Id. at 26-28) (citing Cal. Penal Code § 25850).<sup>6</sup>

---

17 <sup>6</sup> California Penal Code section 25850 provides, in relevant part:

18 (a) A person is guilty of carrying a loaded firearm  
 19 when the person carries a loaded firearm on the person  
 20 or in a vehicle while in any public place or on any  
 21 public street in an incorporated city or in any public  
 22 place or on any public street in a prohibited area of  
 23 unincorporated territory.

24 (b) In order to determine whether or not a firearm is  
 25 loaded for the purpose of enforcing this section,  
 26 peace officers are authorized to examine any firearm  
 27 carried by anyone on the person or in a vehicle while  
 28 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.

1 Similarly, Plaintiff also challenges California's prohibitions on  
 2 openly carrying unloaded handguns and firearms in public places.<sup>7</sup>  
 3 (Id. at 28) (citing Cal. Penal Code §§ 26350 & 26400). Finally,  
 4 Plaintiff challenges California's firearm licensing regime to the  
 5 extent that it infringes on the right to open carry. (SAC at 29)  
 6 (citing Cal. Penal Code §§ 26150, 26155, 26160, 26165, 26175,  
 7 26180, 26185, 26190, 26200, 26202, 26205, 26210, 26215 & 26220).  
 8 However, although Plaintiff summarily lists nearly every statute  
 9 in the chapter of California's Penal Code governing the issuance  
 10 of licenses to carry concealable firearms, the only provisions  
 11 Cal. Penal Code § 25850.

12 <sup>7</sup> California Penal Code section 26350 provides in relevant part:

13 A person is guilty of openly carrying an unloaded  
 14 handgun when that person carries upon his or her  
 15 person an exposed and unloaded handgun outside a  
 16 vehicle while in or on any of the following:

- 17 (A) A public place or public street in an  
 18 incorporated city or city and county.
- 19 (B) A public street in a prohibited area of an  
 20 unincorporated area of a county or city and county.
- 21 (C) A public place in a prohibited area of a county  
 22 or city and county.

23 Cal. Penal Code § 26350(a)(1) (emphasis added). Subsection  
 24 26350(a)(2) prohibits carrying an "exposed or unloaded handgun  
 25 inside or on a vehicle, whether or not on his or her person" in  
 26 any of the same areas. Id. § 26350(a)(2) (emphasis added).

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

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

10  
 11 Plaintiff asserts four primary arguments to support his  
 12 claims. First, Plaintiff alleges that the "Second Amendment  
 13 invalidates [all of the challenged] California Statutes to the  
 14 extent they prevent private citizens who are not otherwise barred  
 15 from exercising their Second Amendment Right (examples of  
 16 prohibited persons include convicted felons, mentally ill, etc.)  
 17 from openly carrying firearms in non-sensitive public places,  
 18 loaded and unloaded, for the purpose of self-defense and for  
 19 other lawful purposes." (SAC at 27). Second, Plaintiff alleges  
 20 that Section 25850(b) violates the Fourth Amendment by  
 21 authorizing peace officers to inspect openly carried firearms to  
 22 determine if they are loaded, and to arrest any person who does  
 23 not consent to a chamber check, without a warrant. (Id. at 26).

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

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

9  
 10 Plaintiff seeks declaratory and injunctive relief  
 11 prohibiting the enforcement of the challenged California statutes  
 12 "to the extent that [they are] applied to prohibit private  
 13 citizens who are otherwise qualified to possess firearms" from  
 14 openly carrying loaded and unloaded firearms "on their own  
 15 property, in their vehicles and in non-sensitive public places,"  
 16 or "prohibit or infringe private citizens" from obtaining  
 17 licenses to engage in these activities. (Id. at 36-38).

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

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IV.

THE PARTIES' MOTIONS

A. Plaintiff's Motion For Partial Summary Judgment

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

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

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

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

11

12 **B. Defendant's Motion For Judgment On The Pleadings**

13

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

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

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

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V.

STANDARDS

A. Summary Judgment

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

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

B. Judgment On The Pleadings

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



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

21  
 22 "When considering a motion for judgment on the pleadings,  
 23 this court may consider facts that are contained in materials of  
 24 which the court may take judicial notice." Heliotrope General,  
 25 Inc. v. Ford Motor Co., 189 F.3d 971, 981 n.18 (9th Cir. 1999)  
 26 (internal quotation marks omitted). Judicial notice may be taken  
 27 "where the fact is 'not subject to reasonable dispute,' either  
 28 because it is 'generally known within the territorial

1 jurisdiction,' or is 'capable of accurate and ready determination  
2 by resort to sources whose accuracy cannot reasonably be  
3 questioned.'" Castillo-Villagra v. I.N.S., 972 F.2d 1017, 1026  
4 (9th Cir. 1992) (quoting Fed. R. Evid. 201(b)). Courts may take  
5 judicial notice of matters of public record without converting a  
6 motion for judgment on the pleadings into a motion for summary  
7 judgment. Xcentric Ventures, L.L.C. v. Borodkin, 934 F. Supp. 2d  
8 1125, 1134 (D. Ariz. 2013).

### 9 10 **C. Facial Challenges**

11  
12 As previously noted, a "claim is 'facial' [if] . . . it is  
13 not limited to plaintiffs' particular case, but challenges the  
14 application of the law more broadly . . . ." John Doe No. 1, 130  
15 S. Ct. at 2817. Facial challenges are disfavored. Wash. State  
16 Grange v. Wash. State Republican Party, 552 U.S. 442, 450 (2008).  
17 A facial challenge to a legislative Act is "the most difficult  
18 challenge to mount successfully, since the challenger must  
19 establish that no set of circumstances exists under which the  
20 [statute] would be valid.'" Alphonsus v. Holder, 705 F.3d 1031,  
21 1042 (9th Cir. 2013) (quoting United States v. Salerno, 481 U.S.  
22 739, 745 (1987) (brackets in original)); see also Issacson v.  
23 Horne, 716 F.3d 1213, 1230-31 (9th Cir. 2013) (Salerno's "no set  
24 of circumstances" standard applies to all facial challenges  
25 except in First Amendment and abortion cases); Alphonsus, 705  
26 F.3d at 1042 n.10 (same). "[A] generally applicable statute is  
27 not facially invalid unless the statute 'can never be applied in  
28 a constitutional manner,'" United States v. Kaczynski, 551 F.3d

1 1120, 1125 (9th Cir. 2009) (quoting Lanier v. City of Woodburn,  
 2 518 F.3d 1147, 1150 (9th Cir. 2008) (emphasis in original)), or  
 3 "lacks any 'plainly legitimate sweep.'" United States v.  
 4 Stevens, 559 U.S. 460, 472 (2010) (quoting Washington v.  
 5 Glucksberg, 521 U.S. 702, 740 n.7 (1997) (Stevens, J., concurring  
 6 in judgments) (internal quotation marks omitted)).

7  
8 **VI.**

9 **DISCUSSION**

10  
11 **A. Plaintiff's Motion For Partial Summary Judgment**

12  
13 **1. Second Amendment**

14  
15 Plaintiff contends that the Supreme Court's decision in  
 16 District of Columbia v. Heller, 554 U.S. 570 (2008), which was  
 17 applied to the states in McDonald v. City of Chicago, Ill., \_\_\_  
 18 U.S. \_\_\_, 130 S. Ct. 3020 (2010), should be interpreted to support  
 19 a blanket right for qualified persons to openly carry arms  
 20 outside the home "except in certain public places the Court  
 21 called 'sensitive,'" such as schools and government buildings.  
 22 (MSJ at 8-9). According to Plaintiff, the Supreme Court's  
 23 finding that individual self-defense is a "basic right" and the  
 24 "core component" of the Second Amendment means that the right to  
 25 carry arms openly for the purpose of self-defense is fundamental  
 26 and does not "evaporate[] the moment one steps outside of his  
 27 home." (Id. at 8 & 11; see also MSJ Reply at 15).

1           Following this Court's decision denying Plaintiff's  
2 preliminary injunction motion, the Ninth Circuit formally adopted  
3 a two-step inquiry to be applied in Second Amendment challenges.  
4 See United States v. Chovan, 735 F.3d 1127, 1136 (9th Cir. 2013)  
5 (citing with approval and explicitly adopting two-step inquiry  
6 taken by United States v. Chester, 628 F.3d 673, 680 (4th Cir.  
7 2010), and United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir.  
8 2010), cert. denied, 131 S. Ct. 958 (2011)). First, the court  
9 "asks whether the challenged law burdens conduct protected by the  
10 Second Amendment" as historically understood. Chovan, 735 F.3d  
11 at 1136. Second, if the challenged law does burden protected  
12 conduct, or if the lack of historical evidence in the record  
13 renders the court unable to say that the Second Amendment's  
14 protections did not apply to the conduct at issue, the court  
15 "'must assume'" that the plaintiff's Second Amendment rights  
16 "'are intact'" and "apply an appropriate level of scrutiny."  
17 Chovan, 735 F.3d at 1136-37 (quoting Chester, 628 F.3d at 681).  
18 The level of scrutiny depends on (1) "'how close the law comes to  
19 the core of the Second Amendment right,'" and (2) "'the severity  
20 of the law's burden on the right.'" Chovan, 735 F.3d at 1138  
21 (quoting Ezell v. City of Chicago, 651 F.3d 684, 703 (7th Cir.  
22 2011)). According to the Chovan Court, "the core of the Second  
23 Amendment is 'the right of law-abiding, responsible citizens to  
24 use arms in defense of hearth and home.'" Chovan, 735 F.3d at  
25 1138 (quoting Heller, 554 U.S. at 635)).<sup>12</sup>

26  
27 <sup>12</sup> The Chovan court concluded that where the core Second Amendment  
28 right of self-defense of hearth and home is not at issue but the  
burden on the right to bear arms is substantial, "intermediate

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

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

26 <sup>13</sup> “California law delegates to each city and county the power to  
27 issue a written policy setting forth the procedures for obtaining  
28 a concealed-carry license.” Peruta, 2014 WL 555862 at \*1 (citing  
Cal. Penal Code § 26160).

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

4  
5           [T]he state has a right to prescribe a particular  
6 manner of carry, provided that it does not “cut[] off  
7 the exercise of the right of the citizen altogether to  
8 bear arms, or, under the color of prescribing the  
9 mode, render[] the right itself useless.” [Nunn v.  
10 State, 1 Ga. 243, 243 (1846)]. California’s favoring  
11 concealed carry over open carry does not offend the  
12 Constitution, so long as it allows one of the two.

13  
14           To put it simply, concealed carry per se does not  
15 fall outside the scope of the right to bear arms; but  
16 insistence upon a particular mode of carry does. As  
17 we have explained previously, this is not the latter  
18 type of case. Peruta seeks a concealed carry permit  
19 because that is the only type of permit available in  
20 the state. As the California legislature has limited  
21 its permitting scheme to concealed carry -- and has  
22 expressed a preference for that manner of arms-bearing  
23 -- a narrow challenge to the San Diego County  
24 regulations on concealed carry, rather than a broad  
25 challenge to the state-wide ban on open carry, is  
26 permissible.

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

3  
4 Plaintiff's claim is exactly the type of "broad challenge"  
5 insisting on a purported right to a particular mode of carry that  
6 the Peruta Court found does not implicate the Second Amendment.  
7 Unlike the plaintiffs in Peruta, who claimed that the Second  
8 Amendment required the state to "permit some form of carry for  
9 self-defense outside the home," Plaintiff claims that the Second  
10 Amendment affirmatively requires California to permit a specific  
11 mode of carry, i.e., open carry.<sup>14</sup> Id. However, the Ninth  
12 Circuit has found that the Second Amendment does not protect a  
13 purported "right" to one mode of carry over another and a state  
14 "has a right to prescribe a particular manner of carry . . . ."  
15 Id. Therefore, Plaintiff's Second Amendment challenge fails at  
16 the first step of the two-step analysis adopted by the Chovan  
17 Court. Chovan, 735 F.3d at 1136. Because the Ninth Circuit  
18 instructs that the Second Amendment as it is historically  
19 understood is not implicated by a state's decision to favor (or  
20 disfavor) one mode of carry, there is no "burden" on any  
21 constitutional right to analyze at the second step of the Chovan  
22

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

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

6  
7 Under rational basis review, a court will uphold a statute  
8 if “the ordinance is rationally-related to a legitimate  
9 government interest.” Honolulu Weekly, Inc. v. Harris, 298 F.3d  
10 1037, 1047 (9th Cir. 2002); see also Wright v. Incline Village  
11 General Improvement Dist., 665 F.3d 1128, 1140 (9th Cir. 2011).  
12 As this Court has previously found, the governmental objective at  
13 issue here is more than just “legitimate” because “California has  
14 a substantial interest in increasing public safety by restricting  
15 the open carry of firearms, both loaded and unloaded.” (PI Order  
16 at 7). California courts have explained that the statutory  
17 regime regulating the carrying of loaded firearms in public was  
18 designed “to reduce the incidence of unlawful public shootings,  
19 while at the same time respecting the need for persons to have  
20 access to firearms for lawful purposes, including self-defense.”  
21 People v. Flores, 169 Cal. App. 4th 568, 576 (2008) (emphasis in  
22 original). Likewise, the Legislative Histories discussing  
23 Sections 26350 (unloaded handguns) and 26400 (unloaded firearms)  
24 explain in identical language that these statutes were enacted  
25 because:

26  
27 <sup>15</sup> Furthermore, because the Second Amendment does not protect the  
28 right that Plaintiff seeks to assert, the cases submitted as  
Supplemental Authority in support of Plaintiff’s Second Amendment  
challenge are irrelevant.



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

5  
6 Open carry creates a potentially dangerous situation.  
7 In most cases when a person is openly carrying a  
8 firearm, law enforcement is called to the scene with  
9 few details other than one or more people are present  
10 at a location and are armed.

11  
12 In these tense situations, the slightest wrong move by  
13 the gun carrier could be construed as threatening by  
14 the responding officer, who may feel compelled to  
15 respond in a manner that could be lethal. In this  
16 situation, the practice of "open carry" creates an  
17 unsafe environment for all parties involved: the  
18 officer, the gun-carrying individual, and for any  
19 other individuals nearby as well.

20  
21 Additionally, the increase in "open carry" calls  
22 placed to law enforcement has taxed departments  
23 dealing with under-staffing and cutbacks due to the  
24 current fiscal climate in California, preventing them  
25 from protecting the public in other ways.

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1 (Dkt. No. 104, Eisenberg Decl., Ex. A at AG0021 (legislative  
2 history of A.B. No. 144 re unloaded handguns) & Ex. B at AG0092  
3 (legislative history of A.B. No. 1527 re unloaded firearms)).<sup>16</sup>

4  
5 The Court also finds that the challenged prohibitions are  
6 more than merely rationally related to the objective of  
7 increasing public safety. California has determined that  
8 regulating the carrying of loaded firearms in public reduces  
9 public shootings. Allowing the open carry of unloaded handguns  
10 and firearms would create an unsafe environment for law  
11 enforcement, the person carrying the firearm, and bystanders. At  
12 the same time, California has created numerous exceptions that  
13 allow for the open carry of loaded and unloaded handguns and  
14 firearms.<sup>17</sup> See Cal. Penal Code §§ 25900-26060, 26361-26391,  
15 26405. However, even assuming, as the Peruta court found, that  
16 despite these exceptions, open carry is illegal in California "in

17  
18 <sup>16</sup> The Court takes judicial notice of the legislative histories of  
19 A.B. Nos. 144 and 1527. See Anderson, 673 F.3d at 1094 fn.1.

20 <sup>17</sup> For example, each of the challenged statutes is subject to an  
21 exception for self-defense. Cal. Penal Code §§ 26045(a) (self-  
22 defense exception to Section 25850's prohibition on carrying  
23 loaded firearms in public), 26362 (incorporating certain Section  
24 25850 exceptions, including the self-defense exception, and  
25 applying them to Section 26350's prohibition on the open carry of  
26 unloaded handguns), 26405(f) (incorporating certain Section 25850  
27 exceptions, including the self-defense exception, and applying  
28 them to Section 26400's prohibition on the open carry of unloaded  
29 firearms). In addition, Sections 25850, 26350 and 26400 are each  
30 subject to numerous other exceptions, including, for example,  
31 exceptions for defense of property, hunters, target shooters,  
32 police officers, members of the military, security guards,  
33 persons who possess firearms on their own property, and persons  
34 who possess a firearm at their lawful residence, "including any  
35 temporary residence or campsite." Id. §§ 25900-26060, 26361-62,  
36 26405(e-f).

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

8

9 **2. Fourteenth Amendment**

10

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

21

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

26

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27 <sup>18</sup> The Court notes that Section 25850, like all of the statutes at  
 28 issue in this litigation, is facially race-neutral. Cal. Penal  
 Code § 25850.

1 Section 25850's allegedly racist origins and application. (See  
2 generally SAC at 25-30). Therefore, the claim cannot be asserted  
3 on summary judgment as it has not been properly placed at issue  
4 and litigated. See, e.g., Coleman v. Quaker Oats Co., 232 F.3d  
5 1271, 1294 (9th Cir. 2000) (where plaintiff neither asserted  
6 claim in the complaint nor made known his intention to pursue  
7 recovery on the claim during discovery, assertion of that ground  
8 for relief on summary judgment was improper). While the SAC  
9 briefly alleges in its fact section that Section 25850's origins  
10 and application reflect racial animus, (see SAC at 17-19), the  
11 SAC cannot be fairly read, even when liberally construed, to  
12 elevate this background assertion into a race-based equal  
13 protection claim against the Attorney General. (See SAC at 25-  
14 30).

15  
16 However, even if, as Plaintiff argues, he has always  
17 included a race-based "suspect classification" [sic] claim in  
18 this action, the claim is not cognizable because Plaintiff does  
19 not have standing to assert it. (MSJ Reply at 4); see also  
20 Chapman v. Pier 1 Imports (U.S.) Inc., 631 F.3d 939, 954 (9th  
21 Cir. 2011) (federal courts "are required sua sponte to examine  
22 jurisdictional issues such as standing," which is not waivable  
23 and must be demonstrated "at the successive stages of the  
24 litigation") (internal quotation marks omitted). To have Article  
25 III standing to pursue a claim, the plaintiff must show that he  
26 has suffered an "injury in fact." Maya v. Centex Corp., 658 F.3d  
27 1060, 1067 (9th Cir. 2011). "The Supreme Court has repeatedly  
28 refused to recognize a generalized grievance against allegedly

1 illegal government conduct as sufficient to confer standing.”  
 2 Carroll v. Nakatani, 342 F.3d 934, 940 (9th Cir. 2003) (citing  
 3 United States v. Hays, 515 U.S. 737, 743 (1995)). “[T]he rule  
 4 against generalized grievances applies in equal protection  
 5 challenges.” Carroll, 342 F.3d at 940-41. To state an equal  
 6 protection claim under section 1983, a plaintiff typically must  
 7 allege that “‘defendants acted with an intent or purpose to  
 8 discriminate against the plaintiff based upon membership in a  
 9 protected class.’” Furnace v. Sullivan, 705 F.3d 1021, 1030 (9th  
 10 Cir. 2013) (quoting Barren v. Harrington, 152 F.3d 1193, 1194  
 11 (9th Cir. 1998) (emphasis added)).

12  
 13 According to the criminal complaint filed in CRB’s  
 14 misdemeanor action against Plaintiff, Plaintiff is white. (RJN,  
 15 Exh. A at 8). In addition, nowhere in the record does Plaintiff  
 16 contend that he is a member of a racial minority or that he has  
 17 suffered discrimination because of his race. Therefore, even if  
 18 Section 25850 was motivated by a racist design and has had a  
 19 disproportionate impact on racial minorities, facts which  
 20 Plaintiff has not proved, the statute and its predecessor were  
 21 not enacted with the intent or purpose to discriminate against  
 22 Plaintiff and do not threaten to have a disproportionate impact  
 23 against Plaintiff because of his race. “[E]ven if a government  
 24 actor discriminates on the basis of race, the resulting injury  
 25 ‘accords a basis for standing only to those persons who are  
 26 personally denied equal treatment.’” Carroll, 342 F.3d at 940  
 27 (quoting Allen v. Wright, 468 U.S. 737, 755 (1984)); see also Doe  
 28 ex rel. Doe v. Lower Merion School Dist., 665 F.3d 524, 542 n.28

1 (3d Cir. 2011) (“In the equal protection context, an injury  
 2 resulting from governmental racial discrimination ‘accords a  
 3 basis for standing only to those persons who are personally  
 4 denied equal treatment by the challenged discriminatory  
 5 conduct.’”) (quoting Hays, 515 U.S. at 744-45); RK Ventures, Inc.  
 6 v. City of Seattle, 307 F.3d 1045, 1055 (9th Cir. 2002) (“ [A]  
 7 white plaintiff generally does not have standing under Section  
 8 1983 solely for the purpose of vindicating the rights of  
 9 minorities who have suffered from racial discrimination.’”)  
 10 (quoting Maynard v. City of San Jose, 37 F.3d 1396, 1402 (9th  
 11 Cir. 1994)); Halet v. Wend Inv. Co., 672 F.2d 1305, 1307 n.1 (9th  
 12 Cir. 1982) (white plaintiff denied an apartment due to the  
 13 complex’s adults-only rental policy lacked standing to challenge  
 14 that policy on the ground that it had a greater adverse effect on  
 15 minorities).<sup>19</sup>

16  
 17 Because the SAC failed to allege a race-based equal  
 18 protection claim against the Attorney General and, alternatively,  
 19 because Plaintiff does not have standing to raise such a claim  
 20 even if he had attempted to do so, Plaintiff’s race-based equal  
 21 protection challenge to Section 25850 is not cognizable in this  
 22 action. Accordingly, Plaintiff is not entitled to summary  
 23 judgment on the ground that Section 25850 violates the Fourteenth

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

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

3  
4 **3. Fourth Amendment**

5  
6 Pursuant to Section 25850(b), peace officers are authorized  
7 to examine "any firearm carried by anyone on the person or in a  
8 vehicle while in any public place or on any public street." Cal.  
9 Penal Code 25850(b). The statute further provides that  
10 "[r]efusal to allow a peace officer to inspect a firearm pursuant  
11 to this section constitutes probable cause for arrest for  
12 violation of this section." Id. Plaintiff briefly argues in his  
13 MSJ that Section 25850(b) violates the Fourth Amendment because  
14 "the mere refusal to consent to a search" cannot constitute  
15 probable cause for an arrest.<sup>20</sup> (MSJ at 10) (citing United States  
16 v. Fuentes, 105 F.3d 487, 490 (9th Cir. 1997)).

17  
18  
19 <sup>20</sup> The Court disagrees with Defendant that Plaintiff's misdemeanor  
20 conviction for violation of Redondo Beach Municipal Section 4-  
21 35.20(a), which prohibits carrying a weapon "across, in, or into  
22 a park," necessarily bars Plaintiff's challenge to California  
23 Penal Code Section 25850(b). (See MJP RJN, Exh. A (CRB criminal  
24 complaint); see also MSJ Opp. at 17). Pursuant to the Heck  
25 doctrine, a Section 1983 complaint must be dismissed if judgment  
26 in favor of the plaintiff would undermine the validity of his  
27 conviction or sentence, unless the plaintiff can demonstrate that  
28 the conviction or sentence has already been invalidated. Heck,  
512 U.S. at 486-87. Even if Plaintiff's constitutional challenge  
to Section 25850(b) were successful, a favorable finding on that  
claim would not undermine the validity of Plaintiff's misdemeanor  
conviction. While the record is not entirely clear, it appears  
that Plaintiff was arrested (and convicted) for carrying a  
firearm in a city park, not for refusing to consent to a search  
of his weapon. (See MJP RJN, Exh. A (CRB criminal complaint)).

1           The Fourth Amendment protects the "right of people to be  
 2 secure in their persons, houses, papers, and effects, against  
 3 unreasonable searches and seizures" absent a warrant supported by  
 4 probable cause. U.S. Const. amend. IV. Warrantless arrests must  
 5 be supported by probable cause. United States v. Lopez, 482 F.3d  
 6 1067, 1072 (9th Cir. 2007). "Probable cause" is "knowledge or  
 7 reasonably trustworthy information sufficient to lead a person of  
 8 reasonable caution to believe that an offense has been or is  
 9 being committed by the person being arrested." Id. Accordingly,  
 10 a determination of probable cause generally requires a factual  
 11 analysis of "the totality of the circumstances known to the  
 12 officers at the time of the search." Lacey v. Maricopa Cnty.,  
 13 693 F.3d 896, 918 (9th Cir. 2012) (en banc).

14  
 15           Plaintiff's argument is predicated on the dual propositions  
 16 that (1) the inspection of a firearm by a peace officer to see if  
 17 it is loaded constitutes a "search" under the Fourth Amendment,  
 18 and (2) the exercise of a constitutional right, i.e., Plaintiff's  
 19 refusal to consent to a warrantless search, can never provide  
 20 probable cause for an arrest. As a preliminary matter, it is  
 21 questionable whether a chamber check constitutes a "search" under  
 22 the Fourth Amendment. "A 'search' occurs when an expectation of  
 23 privacy that society is prepared to consider reasonable is  
 24 infringed." United States v. Jefferson, 566 F.3d 928, 933 (9th  
 25 Cir. 2009) (internal quotation marks omitted); see also Illinois  
 26 v. Andreas, 463 U.S. 765, 771 (1983) ("The Fourth Amendment  
 27 protects legitimate expectations of privacy . . . . If the  
 28 inspection by police does not intrude upon a legitimate



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

5  
6 In the first place, the examination of the weapon may  
7 hardly be deemed to be a search at all. The chamber  
8 of a gun is not the proper or usual receptacle for  
9 anything but a bullet or a shell. The loading of a  
10 gun simply affects the condition of the weapon by  
11 making it immediately useful for firing. The  
12 ammunition becomes, as it were, part of the gun.  
13 There is nothing private or special or secret about a  
14 bullet. The use of the word 'examine' in the statutes  
15 instead of the word 'search' is not at all a devious  
16 one. In examining the weapon, the officers are not  
17 attempting to find some kind of contraband which is  
18 unrelated to the gun itself.

19  
20 People v. Delong, 11 Cal. App. 3d 786, 791-92 (1970).  
21 Accordingly, a person who displays a weapon in public does not  
22 have a privacy interest that "society is prepared to consider  
23 reasonable" in the condition of the gun, i.e., whether it is  
24 loaded and presents an immediate potential threat to public  
25 safety. Jefferson, 566 F.3d at 933.

26  
27 However, even if an examination of a firearm to see if it is  
28 loaded is properly considered a "search," it still would not

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

3  
4 But if the examination may be called a search, it  
5 is not an unreasonable one; and only unreasonable  
6 searches are forbidden by the Fourth Amendment. (Terry  
7 v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889  
8 [1968].) It is, as we have said, limited to a single  
9 purpose. It does not have about it any except the  
10 slightest element of embarrassment or annoyance,  
11 elements overbalanced by far by the purpose of  
12 preventing violence or threats of violence. The  
13 minimal intrusion does not begin to approach the  
14 indignity of the frisk, as graphically described in  
15 Terry v. Ohio, Supra, at p. 17, fn.13, 88 S. Ct. 1868  
16 [1968]. . . . [¶] [W]e hold that the mere examination  
17 of a weapon which is brought into a place where it is  
18 forbidden to have a loaded weapon, is not unreasonable  
19 and that the statutes authorizing such examination are  
20 constitutional.

21  
22 Delong, 11 Cal. App. 3d at 792-93; see also United States v.  
23 Brady, 819 F.2d 884, 889 (9th Cir. 1987) (citing Delong with  
24 approval for the proposition that under the predecessor to  
25 current section 25850(b), "police may inspect a firearm which  
26 they know is in a vehicle, regardless of whether they have  
27 probable cause to believe that it is loaded").

28

1           Accordingly, Plaintiff's reliance on United States v.  
2 Fuentes for the proposition that "[m]ere refusal to consent to a  
3 . . . search does not give rise to reasonable suspicion or  
4 probable cause" is inapposite. (MSJ at 10); see also Fuentes,  
5 105 F.3d at 490. A chamber check is arguably not a "search"  
6 because it does not infringe on a reasonable expectation of  
7 privacy and even if it is, the Fourth Amendment is not implicated  
8 because such a search is reasonable. Plaintiff's reliance on  
9 Patel v. City of Los Angeles also appears misplaced. (See Dkt.  
10 No. 150, Notice of Supplemental Authority). The Patel Court  
11 found that a Los Angeles city ordinance that authorized police  
12 officers to inspect private hotel guest records at any time  
13 without consent and without a warrant was facially invalid under  
14 the Fourth Amendment. Patel, 738 F.3d at 1061. Critical to the  
15 court's decision was the recognition that hotels retain a  
16 "reasonable expectation of privacy" in the content of their  
17 private guest records. Id. at 1061-62. The court noted,  
18 however, that if the records were available for public view, they  
19 would not be protected by the Fourth Amendment because "[w]hat a  
20 person knowingly exposes to the public, even in his own home or  
21 office, is not a subject of Fourth Amendment protection." Id.  
22 at 1062 (internal quotation marks omitted). Because the  
23 ordinance at issue in Patel systematically authorized warrantless  
24 inspections without providing an opportunity for judicial review  
25 of the reasonableness of the inspection demand, the ordinance  
26 failed a facial challenge. Id. at 1065. Patel is easily  
27 distinguishable from the facts alleged here. A person who openly  
28 carries a firearm in public does not have the same reasonable

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

7  
 8 However, Plaintiff's Fourth Amendment claim still fails even  
 9 if, as a hypothetical matter, there may be some circumstances in  
 10 which a person openly carrying a firearm in public has a  
 11 cognizable privacy interest in preventing law enforcement from  
 12 determining whether the firearm is loaded, which Plaintiff has  
 13 not shown. Plaintiff is mounting a facial challenge and must  
 14 therefore establish that "no set of circumstances exists under  
 15 which the Act would be valid." (PI Order at 10) (quoting  
 16 Salerno, 481 U.S. at 745). It is readily apparent to the Court  
 17 that the refusal to permit a peace officer to inspect an openly-  
 18 carried firearm may provide probable cause in any number of  
 19 circumstances. Plaintiff has not shown that there are no  
 20 circumstances under which section 25850(b) may be applied  
 21 constitutionally. Accordingly, Plaintiff is not entitled to  
 22 summary judgment on his claim that Section 25850(b) violates the  
 23 Fourth Amendment.

24  
 25 Plaintiff has failed to show the absence of triable issues  
 26 of material fact with respect to the constitutionality of  
 27 Sections 25850, 26350 and 26400. Indeed, the Court has found  
 28 that all of these Sections easily survive a facial constitutional

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

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**B. Defendant's Motion For Judgment On The Pleadings**

**1. Second Amendment**

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

1 Second Amendment does not protect any particular mode of carry in  
2 public for self-defense. Peruta, 2014 WL 555862 at \*24. The  
3 Court therefore concludes that Defendant is entitled to judgment  
4 on the pleadings to the extent that the SAC alleges that Sections  
5 25850, 26350 and 26400 violate the Second Amendment.

6  
7 However, Plaintiff did not move for summary judgment on his  
8 claims involving California's firearm licensing regime codified  
9 at California Penal Code Sections 26150-26220. The SAC summarily  
10 argues that these statutes are "invalid" to the extent that they  
11 "prohibit, or infringe, PLAINTIFF and private citizens who are  
12 otherwise eligible to possess a firearm from openly carrying a  
13 loaded and operable handgun for the purpose of self-defense in  
14 non-sensitive places." (SAC at 29). Other than this broad  
15 allegation, with the exception of Plaintiff's challenge to the  
16 restriction on open carry licenses to residents of counties of  
17 fewer than 200,000 people, Plaintiff fails to explain why the  
18 specific licensing provisions listed in the SAC inhibit the  
19 alleged right to openly carry a firearm or violate the Second  
20 Amendment.<sup>21</sup> Accordingly, these claims fail and Defendant is

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

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

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

10  
 11 Furthermore, because Plaintiff's licensing challenge is  
 12 predicated on the erroneous contention that the Second Amendment  
 13 requires a state to authorize open carry, it fails for the same  
 14 reasons that his Second Amendment challenge to Sections 25850,  
 15 26350 and 26400 fails. Because the Second Amendment does not  
 16 guarantee a specific mode of carry, California's firearm  
 17 licensing scheme as it applies solely to a purported "right" to  
 18 open carry does not raise constitutional concerns and need only  
 19 be rationally related to a legitimate government interest.  
 20 Peruta, 2014 WL 555862 at \*24; Nordyke, 681 F.3d at 1043 n.2.  
 21 The state plainly has an interest in public safety that is  
 22 furthered by setting conditions on firearm licenses. Although  
 23 Plaintiff has not identified which licensing conditions he  
 24 believes infringe on open carry, it is self-evident that  
 25 California may place some conditions on the issuance of a  
 26 firearms license, as even Plaintiff admits that felons and the  
 27  
 28 argument appears to be grounded in the Fourteenth Amendment's  
 equal protection clause. (SAC at 5 & 29).

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

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**2. Fourth Amendment**

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



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**3. Fourteenth Amendment**

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

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

1 A Court will apply strict scrutiny if the statute "targets a  
 2 suspect class or burdens the exercise of a fundamental right."  
 3 Wright v. Incline Village Gen. Improvement Dist., 665 F.3d 1128,  
 4 1141 (9th Cir. 2011) (internal quotation marks omitted); see also  
 5 Kahawaiolaa v. Norton, 386 F.3d 1271, 1277 (9th Cir. 2004)  
 6 (identifying race, ancestry, and alienage as "suspect  
 7 classifications" and rights such as privacy, marriage, voting,  
 8 travel and freedom of association as "fundamental"). Under  
 9 strict scrutiny, a law will survive an equal protection challenge  
 10 only if "the state can show that the statute is narrowly drawn to  
 11 serve a compelling state interest." Green v. City of Tuscon, 340  
 12 F.3d 891, 896 (9th Cir. 2003). "Laws are subject to intermediate  
 13 scrutiny when they discriminate based on certain other suspect  
 14 classifications, such as gender." Kahawaiolaa, 386 F.3d at 1277.  
 15 Under intermediate scrutiny, "the statute will be upheld if the  
 16 government can demonstrate that the classification 'substantially  
 17 furthers an important government interest.'" Green, 340 F.3d at  
 18 896 (quoting Kirchberg v. Feenstra, 450 U.S. 455, 460, 101 S. Ct.  
 19 1195, 67 L. Ed. 2d 428 (1981)). However, if a classification  
 20 "does not concern a suspect or semi-suspect class or a  
 21 fundamental right, [the courts] apply rational basis review and  
 22 simply ask whether the ordinance is rationally-related to a  
 23 legitimate government interest." Honolulu Weekly, 298 F.3d at  
 24 1047 (internal quotation marks omitted).

25  
 26 Here, the Court has already concluded that California's  
 27 licensing regime, including the classification of applicants by  
 28 county size, as it pertains solely to a purported right to open

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

15  
 16 **4. Vagueness**

17  
 18 Plaintiff alleges that Section 25850, as part of a statutory  
 19 regime regulating the carriage of loaded firearms in public, is  
 20 unconstitutionally vague. (SAC at 28). However, as the Court  
 21 observed in denying Plaintiff's Motion for Preliminary  
 22 Injunction, "facial challenges on the ground of unconstitutional  
 23 vagueness that do not involve the First Amendment are not  
 24 cognizable pursuant to Ninth Circuit precedent." (PI Order at  
 25 10) (citing United States v. Purdy, 264 F.3d 809, 811 (9th Cir.  
 26 2001)). Plaintiff is mounting a facial challenge, and his claims  
 27 concerning Section 25850 do not implicate the First Amendment.  
 28 Accordingly, Defendant is entitled to judgment on the pleadings

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

3

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

14

15 **VII.**

16 **CONCLUSION**

17

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

22

23 DATED: March 18, 2014

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/s/  
\_\_\_\_\_  
SUZANNE H. SEGAL  
UNITED STATES MAGISTRATE JUDGE

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**NOTICE**

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

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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

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

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

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

23  
24 The gravamen of Harris's injury-in-fact arguments appears to be  
25 that in order to challenge section 25850, Plaintiff must actually  
26 violate the law. (See Obj. at 6 ("[Plaintiff] has admittedly never  
27 before been arrested or prosecuted under Section 25850."); id. at 6-7  
28 ("Plaintiff admittedly carried an unloaded firearm [when he was

1 arrested] and thus did not implicate the possession ban of Section  
2 25850, subdivision (a), which concerns loaded firearms only."); id. at  
3 7 ("[T]here is only speculation that [Plaintiff] will openly carry a  
4 loaded, as opposed to unloaded firearm, in Redondo Beach, especially  
5 given that [Plaintiff's] only other open-carry incident in Redondo Beach  
6 was with an unloaded gun."); id. ("It should also be noted that there is  
7 no evidence (of which the Attorney General is aware) that [Plaintiff],  
8 on the 7th day of any month since May 2012, has openly carried a firearm  
9 in Redondo Beach.")). However, the Supreme Court and the Ninth Circuit  
10 have clearly stated that a plaintiff is not required to actually violate  
11 a criminal law to challenge its constitutionality. See Babbitt v.  
12 United Farm Workers, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895  
13 (1979) (plaintiff challenging the constitutionality of a criminal law  
14 "should not be required to await and undergo a criminal prosecution as  
15 the sole means of seeking relief.") (internal quotation marks omitted);  
16 McCormack v. Hiedeman, 694 F.3d 1004, 1021 (9th Cir. 2012) (same). To  
17 hold the opposite would put the court in the untenable position of  
18 encouraging would-be litigants to break criminal laws in order to gain  
19 standing.

20  
21 Short of requiring Plaintiff to actually violate section 25850, the  
22 Court must determine what facts Plaintiff must allege to show a  
23 particularized injury and an imminent threat of prosecution. In the  
24 original Complaint, Plaintiff stated that he would like to openly carry  
25 a loaded firearm, but does not because he fears arrest. (Dkt. No. 1 at  
26 6). The Court concluded that this was too indefinite to establish a  
27 particularized injury. (Dkt. No. 40 at 14). In contrast, in the First  
28 Amended Complaint, Plaintiff states that he has openly carried a loaded



1 weapon in the past and will openly carry a loaded firearm on the seventh  
 2 day of each month in the City of Redondo Beach. (FAC at 12). Plaintiff  
 3 further states that he is being prosecuted by the City of Redondo Beach  
 4 for openly carrying a firearm in public. (FAC at 10-11). There can be  
 5 no serious doubt that Plaintiff is a committed gun enthusiast who has  
 6 exercised and intends to continue to exercise what he believes is his  
 7 right to openly carry firearms, both loaded and unloaded, within this  
 8 state. It is unclear what more the Court could require Plaintiff to  
 9 allege without demanding that he specifically violate section 25850 in  
 10 contravention of the holdings of the Supreme Court and Ninth Circuit.

11  
 12 The Court finds that Harris misreads Plaintiff's prior declaration  
 13 in which Plaintiff stated that he has openly carried loaded and unloaded  
 14 weapons in California in the past where and when it was legal and that  
 15 he now "refrain[s] from openly carry[ing] a loaded handgun or long gun  
 16 in non-sensitive public places because [he] would in all certainty be  
 17 arrested, prosecuted, fined and imprisoned for doing so." (See Nichols  
 18 Decl., Dkt. No. 37 at 3-4). Plaintiff did not affirmatively state under  
 19 oath that he has never illegally carried a loaded or unloaded weapon in  
 20 the past. Courts must "construe pro se complaints liberally." Silva v.  
 21 Di Vittorio, 658 F.3d 1090, 1101 (9th Cir. 2011). The declaration's  
 22 affirmative statements do not preclude the possibility, as Plaintiff now  
 23 alleges, that in the past he also carried loaded firearms in this state  
 24 where and when it was illegal. Consequently, because Plaintiff's prior  
 25 sworn statements do not necessarily contradict Plaintiff's current  
 26 allegations, the Court must consider Plaintiff's current allegations as  
 27 true in assessing whether Plaintiff has sufficiently alleged a

28

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

3  
4 Plaintiff's seventh-day-of-the-month plan is also easily  
5 distinguishable from the cases Harris relies on in which the Ninth  
6 Circuit found the "concrete plan" insufficient. Unlike the landlords in  
7 Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1140 (9th Cir.  
8 2000), who stated that if an unmarried couple ever wanted to rent from  
9 them, they would refuse due to their religious convictions, Plaintiff's  
10 plan is not contingent on the actions of third parties but is entirely  
11 under his control. (See Obj. at 5). Unlike the environmentalist in  
12 Wilderness Society, Inc. v. Rey, 622 F.3d 1251, 1256 (9th Cir. 2010),  
13 who expressed a general intention to visit the national forests but who  
14 did not identify concrete plans to hike in the specific park affected by  
15 the challenged regulations, Plaintiff need only walk outside his home  
16 carrying a loaded firearm to effectuate his plan.

17  
18 As to the threat of imminent prosecution, Harris argues that even  
19 though it is "theoretically possible that the Attorney General" could  
20 prosecute Plaintiff under section 25850, Plaintiff cannot establish a  
21 "genuine threat of imminent Attorney General prosecution under Section  
22 25850." (Obj. at 9). The Court disagrees. Once again, Harris's  
23 arguments appear predicated on the contention that because Plaintiff has  
24 not been prosecuted for violating section 25850 specifically, he cannot  
25 establish the threat of imminent prosecution. However, as noted above,  
26 Plaintiff has been prosecuted for openly carrying a firearm in public.  
27 It is simply implausible to contend that had the firearm been loaded,  
28 prosecution would be less likely. The Court will not insist that

1 Plaintiff escalate his alleged criminal activity merely to gain standing  
 2 in this suit. Moreover, absent a promise by Harris not to prosecute,  
 3 Plaintiff has shown the possibility of prosecution and "even the  
 4 remotest threat of prosecution" has been deemed sufficient. Peachlum v.  
 5 City of York, Penn., 333 F.3d 429, 435 (3rd Cir. 2003).

6  
 7 In his Response to Harris's Objections, Plaintiff appears to argue  
 8 that his firearm should be deemed to have been "loaded" in the May 21,  
 9 2012 incident because he taped a cartridge to the barrel of the gun.  
 10 (Resp. at 6-7; FAC Exh. 1). Although Plaintiff's Opposition conceded  
 11 that Plaintiff's long gun was unloaded in that incident, (RBD Opp. at  
 12 7), Plaintiff now relies on California Penal Code section 16840, which  
 13 provides that "a firearm shall be deemed to be 'loaded' when there is an  
 14 unexpended cartridge or shell . . . in, or attached in any manner to,  
 15 the firearm, including, but not limited to, in the firing chamber,  
 16 magazine, or clip thereof attached to the firearm." Cal. Penal Code  
 17 § 16840(b)(1). However, California courts have made clear that "a  
 18 firearm is 'loaded' when a shell or cartridge has been placed into a  
 19 position from which it can be fired; the shotgun is not 'loaded' if the  
 20 shell or cartridge is stored elsewhere and not yet placed in a firing  
 21 position." People v. Clark, 45 Cal. App. 4th 1147, 1153, 53 Cal. Rptr.  
 22 2d 99 (1996) (construing former California Penal Code § 12031) (firearm  
 23 is not "loaded" where ammunition is stored in a compartment in the gun's  
 24 stock because it could not be fired). Nonetheless, even though  
 25 Plaintiff did not carry a "loaded" firearm, it is not necessary for  
 26 Plaintiff to violate Section 25850 in order to challenge the statute.

1 Plaintiff seeks a stay of 120 days pending the outcome of three  
 2 cases taken under submission by the Ninth Circuit in December 2012:  
 3 Richards v. Prieto, Case No. 11-16255 (hearing December 6, 2012); Peruta  
 4 v. County of San Diego, Case No. 10-56971 (hearing December 6, 2012);  
 5 and Mehl v. Blanas, Case No. 08-15773 (hearing December 10, 2012).  
 6 According to Plaintiff, these cases challenge California’s licensing  
 7 scheme under section 26150, which is “substantially similar” to section  
 8 26155 challenged here, except that it applies to firearm permits issued  
 9 by county sheriffs as opposed to municipal police chiefs. (Resp. at 4).  
 10 However, a stay is inappropriate because it is unclear that these cases  
 11 will control the outcome here. Therefore, Plaintiff’s request for a  
 12 stay is DENIED. (Resp. at 2-3).

13  
 14 Finally, Plaintiff’s request for permission to file additional  
 15 Objections to the Report and Recommendation is also DENIED. (Resp. at  
 16 15). Plaintiff had an opportunity to articulate all of his Objections.  
 17 See GoPets Ltd. v. Hise, 657 F.3d 1024, 1029 (9th Cir. 2011) (no abuse  
 18 of discretion where district court refused to consider late-filed  
 19 supplemental materials in opposition to motion for summary judgment).  
 20 Even though Plaintiff is proceeding pro se, he is required to follow the  
 21 same rules of procedure as other litigants. See King v. Atiyeh, 814  
 22 F.2d 565, 567 (9th Cir. 1986), overruled on other grounds by Lacey v.  
 23 Maricopa County, 693 F.3d 896, 925 (9th Cir. 2012) (“Pro se litigants  
 24 must follow the same rules of procedure that govern other litigants.”).

25 \\  
 26 \\  
 27 \\  
 28 \\

Accordingly, IT IS ORDERED THAT:

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

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

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

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

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

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

DATED: March 3, 2013.



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S. JAMES OTERO  
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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

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

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

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

14  
 15 For the reasons discussed below, it is recommended that the Redondo  
 16 Beach Defendants' Motion to Dismiss be GRANTED. Specifically, it is  
 17 recommended that Claim One be dismissed without leave to amend, but also  
 18 without prejudice. It is further recommended that Claim Two be  
 19 dismissed with prejudice as to the individually-named Redondo Beach  
 20 Defendants, who are entitled to qualified immunity, and that the  
 21 surviving claim against City of Redondo Beach be dismissed with leave to  
 22 amend. It is further recommended that Harris's Motion to Dismiss be  
 23 DENIED. However, because portions of the FAC, as currently pled, fail  
 24 to comply with Rule 8, it is further recommended that Plaintiff be  
 25 ORDERED to file a Second Amended Complaint limited to the facts and

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26  
 27  
 28 <sup>1</sup> On July 13, 2012, this Court granted Plaintiff's request for approval of substitution of attorney. Attorney Michael F. Sisson entered his appearance on that date on behalf of Plaintiff.



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

7  
8 **II.**

9 **ALLEGATIONS OF THE COMPLAINT**

10  
11 The First Amended Complaint names four Defendants: Attorney  
12 General Harris, City of Redondo Beach, City of Redondo Beach Police  
13 Chief Leonardi, and City of Redondo Beach Police Officer Heywood.<sup>2</sup> (FAC  
14 at 2-3). Harris is sued in her official capacity only. (Id. at 2).  
15 The FAC does not indicate whether Plaintiff is suing the Redondo Beach  
16 Defendants in their official or individual capacities. (Id. at 2-3).

17  
18 The First Amended Complaint challenges the constitutionality of two  
19 City of Redondo Beach ordinances and two California statutes that  
20 Plaintiff contends violate his Second Amendment right to openly carry a  
21 loaded firearm. (FAC at 35-39). The FAC alleges that on May 21, 2012,  
22 after notifying Chief Leonardi of his plans, (id. at 27-28), Plaintiff  
23  
24  
25

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

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

14  
 15 Also on May 21, 2012, Chief Leonardi, through his attorney,  
 16 informed Plaintiff via email that his earlier request for an application  
 17 and license to openly carry a loaded handgun could not be fulfilled.  
 18 (FAC at 30). The email explained that (1) City of Redondo Beach, which  
 19 is located in Los Angeles County, cannot issue open carry licenses  
 20 because state law prohibits municipalities in counties with populations  
 21 exceeding 200,000 persons from issuing open carry licenses, and  
 22 (2) pursuant to state law, a municipality may issue state handgun  
 23 licenses only to its residents, and Plaintiff is not a resident of City  
 24 of Redondo Beach. (Id.).

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25  
 26 <sup>3</sup> The FAC does not identify the type of firearm Plaintiff was  
 27 carrying or specify whether it was loaded or unloaded. However,  
 28 Plaintiff states in his Opposition to the Redondo Beach Defendants'  
 Motion that he "is facing criminal charges and his long gun was seized  
 as a result of plaintiff carrying an unloaded long gun in public . .  
 . ." (Pl. RDB Opp. at 7 (emphasis in original); see also RBD MTD at 1).

1 Plaintiff generally alleges that in addition to the incident on May  
 2 21, 2012, he "has frequently and countless times violated California  
 3 Penal Code Section 25850, the Redondo Beach City Ordinances and other  
 4 California statutes prohibiting firearms from being carried in non-  
 5 sensitive public places." (Id. at 11). Plaintiff states that he will  
 6 continue to "openly carry a loaded holstered handgun, loaded rifle and  
 7 loaded shotgun" in public places in City of Redondo Beach and the state  
 8 of California. (Id. at 12).

9  
 10 In Claim One, Plaintiff raises a facial and "as applied" challenge  
 11 against the Redondo Beach Defendants to City of Redondo Beach Municipal  
 12 Code section 4-35.01, which defines the term "park," and section 4-  
 13 35.20, which provides that it is "unlawful for any person to use, carry,  
 14 fire or discharge any firearm . . . or any other form of weapon across,  
 15 in or into a park." (FAC at 36); see also Redondo Beach Municipal Code  
 16 §§ 4-35.01 & 4-35.20, available at <http://www.qcode.us/codes/redondobeach/>. Plaintiff contends that section 4-35.20 violates his  
 17 Second Amendment rights and is preempted by state law governing firearm  
 18 possession because "[m]ere possession or carrying a firearm (i.e.,  
 19 exercising a fundamental right) when otherwise lawful cannot support the  
 20 unlawful detention, search, arrest, prosecution and seizure of a firearm  
 21 and other property which is lawfully possessed and carried under both  
 22 state and Federal law." (FAC at 36).

23  
 24  
 25 In Claim Two, Plaintiff seeks monetary damages against the Redondo  
 26 Beach Defendants "for losses incurred as a result of the warrantless  
 27 search of PLAINTIFF'S FIREARM, his detention, search and the subsequent  
 28 illegal seizure of his valuable property (firearm, firearm's case,

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

3  
4 In Claim Three, Plaintiff raises a facial and "as applied"  
5 challenge against Harris to California Penal Code 25850, which provides  
6 in relevant part:

7  
8 (a) A person is guilty of carrying a loaded firearm when the  
9 person carries a loaded firearm on the person or in a vehicle  
10 while in any public place or on any public street in an  
11 incorporated city or in any public place or on any public  
12 street in a prohibited area of unincorporated territory.

13  
14 (b) In order to determine whether or not a firearm is loaded  
15 for the purpose of enforcing this section, peace officers are  
16 authorized to examine any firearm carried by anyone on the  
17 person or in a vehicle while in any public place or on any  
18 public street in an incorporated city or prohibited area of an  
19 unincorporated territory. Refusal to allow a peace officer to  
20 inspect a firearm pursuant to this section constitutes  
21 probable cause for arrest for violation of this section.

22  
23 Cal. Penal Code § 25850(a)-(b). According to Plaintiff, "[o]penly  
24 carrying a loaded firearm in non-sensitive public places of a type in  
25 common use for the purpose of self-defense" is a right guaranteed by the  
26 Second Amendment, and the exercise of that right "cannot support a  
27 finding of probable cause . . . such that the Fourth Amendment's warrant  
28 requirement can be legislatively disregarded." (FAC at 37-38).

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

---

15  
16 <sup>4</sup> In opposition to and support of the Motions to Dismiss,  
17 Plaintiff and Harris both filed Requests for Judicial Notice asking the  
18 Court to take notice of certain municipal ordinances, Attorney General  
19 opinions, court decisions and other government documents not included in  
20 the FAC. "When ruling on a motion to dismiss, [a court] may generally  
21 consider only allegations contained in the pleadings, exhibits attached  
22 to the complaint, and matters properly subject to judicial notice."  
23 Colony Cove Properties, LLC v. City Of Carson, 640 F.3d 948, 955 (9th  
24 Cir. 2011) (internal quotation marks omitted). "[N]otice may be taken  
25 where the fact is 'not subject to reasonable dispute,' either because it  
26 is 'generally known within the territorial jurisdiction,' or is 'capable  
27 of accurate and ready determination by resort to sources whose accuracy  
28 cannot reasonably be questioned.'" Castillo-Villagra v. I.N.S., 972  
F.2d 1017, 1026 (9th Cir. 1992) (quoting Fed. R. Evid. 201(b)). The  
Court GRANTS Plaintiff's and Harris's Requests to the extent that they  
are compatible with Federal Rule of Evidence 201 and do not require the  
acceptance of facts "subject to reasonable dispute." The Evidentiary  
Objections filed by the Redondo Beach Defendants to the Declaration of  
Charles Nichols, in which the Redondo Beach Defendants contend that  
Plaintiff's reference to "death threats" he has received should be  
stricken as hearsay and irrelevant, are DENIED because the statements  
are completely immaterial to the Court's decision. See Lake v. First  
Nat. Ins. Co. of America, 2010 WL 4807059 at \*7 n.4 (N.D. Cal. 2010)

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

9  
 10 **III.**

11 **DEFENDANTS' MOTIONS TO DISMISS**

12  
 13 The Redondo Beach Defendants contend that Claims One and Two, which  
 14 challenge the constitutionality and specific enforcement of Municipal  
 15 Code section 4-35.20, respectively, should be dismissed pursuant to the  
 16 doctrine of Younger abstention. (RBD MTD at 2) (citing Younger v.  
 17 Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)). The City  
 18 of Redondo Beach is currently prosecuting Plaintiff for a criminal  
 19 violation of section 4-35.20 based on the May 21, 2012 incident in which  
 20 Plaintiff carried an unloaded rifle in a City park. (Id.). The Redondo  
 21 Beach Defendants argue that because there are ongoing state judicial  
 22 proceedings which implicate important state interests and which will  
 23 provide Plaintiff an opportunity to assert his federal constitutional  
 24 challenges to the Ordinance, Younger requires this Court to refrain from  
 25 exercising subject matter jurisdiction over the claims against the  
 26  
 27 \_\_\_\_\_  
 28 (overruling evidentiary objections as moot where it was not necessary  
 for the court to consider the exhibits that were the subject of the  
 objections).

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

15  
16 Harris contends that Claims Three and Four, which challenge the  
17 constitutionality of Penal Code Sections 25850 and 26155, respectively,  
18 should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1)  
19 for lack of subject matter jurisdiction because Plaintiff lacks standing  
20 to assert his claims against the Attorney General. According to Harris,  
21 Plaintiff fails to allege an injury-in-fact with respect to section  
22 25850(a)’s prohibition on carrying a loaded firearm in public because he  
23 makes no “substantive allegations of ever having openly carried a loaded  
24 firearm in Redondo Beach (or anywhere else).” (Harris MTD at 2-3; see  
25 also id. at 9-10). For the same reasons, Harris claims that Plaintiff’s  
26 challenge to section 25850(a) is unripe. (Id. at 12-14). Furthermore,  
27 Harris argues that Plaintiff fails to establish a causal nexus between  
28 the Attorney General and any alleged injuries arising from section

1 25850(b)'s warrantless search authorization because the search  
 2 complained of in the FAC was conducted by City of Redondo Beach police  
 3 officers, not the Attorney General or state actors under her control,  
 4 and "any subsequent prosecution" for a misdemeanor violation of section  
 5 25850(b) would be undertaken by a prosecutor for the City of Redondo  
 6 Beach. (Id. at 3, 10-11). Harris also argues that Plaintiff has failed  
 7 to establish a causal nexus between the Attorney General and Plaintiff's  
 8 alleged injuries under section 26155 because the Attorney General has  
 9 "no role" in licensing decisions made pursuant to that statute. (Id. at  
 10 3, 11-12). Finally, Harris contends that all of Plaintiff's claims  
 11 against the Attorney General are barred by the Eleventh Amendment. (Id.  
 12 at 14-16).

13  
 14 **IV.**

15 **STANDARDS GOVERNING MOTIONS TO DISMISS**

16  
 17 Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of  
 18 an action for lack of subject matter jurisdiction. A motion under Rule  
 19 12(b)(1) can either be "facial," attacking a pleading on its face and  
 20 accepting all allegations as true, or "factual," contesting the truth of  
 21 some or all of the pleading's allegations as they relate to  
 22 jurisdiction. Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004).  
 23 The standards that must be applied vary according to the nature of the  
 24 jurisdictional challenge.

25  
 26 Here, the challenge to jurisdiction is a facial attack. Defendants  
 27 contend that the allegations of jurisdiction contained in the Complaint  
 28 are insufficient on their face to demonstrate the existence of



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

13  
14 Under Rule 12(b)(6), a defendant may also seek dismissal of a  
15 complaint for failure to state a claim. See Mendiondo v. Centinela  
16 Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule  
17 12(b)(6) motion to dismiss, a complaint must contain “enough facts to  
18 state a claim to relief that is plausible on its face.” Bell Atl.  
19 Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929  
20 (2007). “A claim has facial plausibility when the plaintiff pleads  
21 factual content that allows the court to draw the reasonable inference  
22 that the defendant is liable for the misconduct alleged.” Ashcroft v.  
23 Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009).  
24 The court must accept all factual allegations as true even if doubtful  
25 in fact. Twombly, 550 U.S. at 555-56.

26  
27 A court considering a motion to dismiss must also decide, if it  
28 grants the motion, whether to grant leave to amend. Even when a request

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

8  
9 **V.**

10 **DISCUSSION**

11  
 12 In light of the pending criminal proceedings against Plaintiff for  
 13 violation of City of Redondo Beach Municipal Code section 4-35.20,  
 14 Plaintiff’s claims against the Redondo Beach Defendants should be  
 15 dismissed pursuant to the Younger abstention doctrine. Claim One, which  
 16 challenges the constitutionality of section 4-35.20, should be dismissed  
 17 without prejudice. Claim Two, which seeks damages for the Redondo Beach  
 18 Defendants’ enforcement of section 4-35.20, should be dismissed with  
 19 prejudice as to the individually-named Redondo Beach Defendants on the  
 20 ground of qualified immunity. The remaining allegations against City of  
 21 Redondo Beach in Claim Two should be dismissed with leave to amend to  
 22 permit Plaintiff, if he is able, to identify an injury under section 4-  
 23 35.20 that could be redressed even if Penal Code section 25850 is valid,  
 24 and a specific City policy or practice that resulted in his alleged  
 25 injuries.<sup>5</sup> The Court finds that Plaintiff has standing to challenge

---

26  
 27 <sup>5</sup> The Court notes that even if Plaintiff is able to allege facts  
 28 stating a claim for damages against City of Redondo Beach arising from  
 the enforcement of section 4-35.20, any such amended claim would still  
 be subject to Younger abstention. As it is unclear at this time whether

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

5  
6 **A. The Claims Against The Redondo Beach Defendants**

7  
8 **1. The Younger Abstention Doctrine Applies To Plaintiff's Claims**  
9 **Against The Redondo Beach Defendants**

10  
11 The Redondo Beach Defendants contend that Claims One and Two, the  
12 only claims brought against them, should be dismissed pursuant to the  
13 doctrine of Younger abstention. (RBD MTD at 2). Claim One challenges  
14 the constitutionality of Municipal Code section 4-35.20, which  
15 prohibits, inter alia, carrying a firearm in a City park. (FAC at 35-  
16 36). Claim Two seeks damages against the Redondo Beach Defendants for  
17 actions taken in their enforcement of the Ordinance on May 21, 2012.  
18 (FAC at 35-36). According to the Redondo Beach Defendants, after  
19 Plaintiff filed the FAC on May 30, 2012, City of Redondo Beach filed  
20 misdemeanor charges against Plaintiff for violation of the Ordinance.  
21 (RBD MTD at 4). The Redondo Beach Defendants contend that because there  
22 are ongoing state judicial proceedings which implicate important state  
23 interests and which will provide Plaintiff an opportunity to challenge  
24 the constitutionality of the Ordinance under federal law, the Court  
25 should refrain from exercising subject matter jurisdiction over the

26  
27 \_\_\_\_\_  
28 Plaintiff will be able to allege such facts, however, it is premature  
for the Court to take any action under Younger with respect to a claim  
for damages against City of Redondo Beach in Claim Two.

1 claims against them. (Id. at 4-5). Plaintiff argues that Younger  
2 abstention is not appropriate because his federal action had proceeded  
3 beyond the "embryonic" stage by the time state criminal charges were  
4 filed. (Pl. RBD Opp. at 1-2). Plaintiff further argues that "[t]here  
5 is absolutely no way the criminal court is going to allow plaintiff to  
6 present" a constitutional challenge to sections 25850 and 26155 in a  
7 misdemeanor trial for violation of a municipal code. (Pl. RBD Opp. at  
8 1-3).

9  
10 Younger and its progeny "espouse a strong federal policy against  
11 federal court interference with pending state judicial proceedings  
12 absent extraordinary circumstances." Middlesex County Ethics Committee  
13 v. Garden State Bar Ass'n, 457 U.S. 423, 431, 102 S. Ct. 2515, 73 L. Ed.  
14 2d 116 (1982). Under the Younger abstention doctrine, federal courts  
15 are precluded from enjoining a state statute that is the basis for a  
16 pending criminal prosecution against the federal plaintiff.<sup>6</sup> Younger,  
17 401 U.S. at 54; Steffel v. Thompson, 415 U.S. 452, 454, 94 S. Ct. 1209,  
18 39 L. Ed. 2d 505 (1974). The duty to abstain under Younger is not  
19 jurisdictional but is premised on principles of equity and comity. See  
20 Younger, 401 U.S. at 43-44.

21  
22 Younger abstention is appropriate "when there is a pending state  
23 proceeding that implicates important state interests and provides the  
24 plaintiff with an opportunity to raise federal claims." Baffert v.

25  
26 <sup>6</sup> Younger abstention originally applied only to federal cases in  
27 which criminal proceedings were pending in state court. However, the  
28 Supreme Court has since held that the Younger doctrine is fully  
applicable when there are non-criminal judicial proceedings in state  
court. See Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716-718, 116  
S. Ct. 1712, 135 L. Ed. 2d 1 (1996).

1 California Horse Racing Bd., 332 F.3d 613, 617 (9th Cir. 2003). A  
2 federal court considering whether to invoke Younger must therefore  
3 examine whether: "(1) a state-initiated proceeding is ongoing; (2) the  
4 proceeding implicates important state interests; (3) the federal  
5 plaintiff is not barred from litigating federal constitutional issues in  
6 the state proceeding; and (4) the federal court action would enjoin the  
7 proceeding or have the practical effect of doing so, i.e., would  
8 interfere with the state proceeding in a way that Younger disapproves."  
9 San Jose Silicon Valley Chamber of Commerce Political Action Comm. v.  
10 City of San Jose, 546 F.3d 1087, 1092 (9th Cir. 2008). When all four of  
11 these requirements are met, federal courts must abstain because "'there  
12 is no discretion vested in the district courts to do otherwise.'" Id.  
13 (quoting Green v. City of Tucson, 255 F.3d 1086, 1093 (9th Cir. 2001),  
14 overruled in part by Gilbertson v. Albright, 381 F.3d 965 (9th Cir.  
15 2004) (en banc)). The only exception is when there is a showing of  
16 prosecutorial bad faith, harassment, or some other extraordinary  
17 circumstance that would make abstention inappropriate. Middlesex County  
18 Ethics Comm., 457 U.S. at 435; Steffel, 415 U.S. at 454.

19  
20 While the Younger abstention doctrine requires dismissal where  
21 declaratory or injunctive relief is sought, and a federal court should  
22 abstain from a damages claim where a necessary predicate of the claim  
23 for damages undermines a necessary element in the pending state  
24 proceeding, the court should stay, not dismiss, damages claims only  
25 "until the state proceedings are completed." Gilbertson, 381 F.3d at  
26 968. Additionally, where a plaintiff is seeking wholly prospective  
27 relief from enforcement that would not interfere with an ongoing state  
28 proceeding, Younger abstention is not appropriate. See Wooley v.

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

5  
6 The Court finds that the four factors requiring Younger abstention  
7 are present with respect to Plaintiff's claims against the Redondo Beach  
8 Defendants. First, there exists an ongoing state proceeding. Even  
9 though City of Redondo Beach did not file charges against Plaintiff  
10 until after this action, and indeed, the First Amended Complaint, were  
11 filed, the first prong of the Younger abstention test is satisfied so  
12 long as the state court proceedings are initiated "before any  
13 proceedings of substance on the merits have taken place in federal  
14 court." Fresh Int'l Corp. v. Agric. Labor Relations Bd., 805 F.2d 1353,  
15 1358 (9th Cir. 1986) (internal quotation marks omitted). The instant  
16 action has not progressed beyond the pleading stage. Defendants have  
17 not yet answered the FAC, no hearings have been held, and no contested  
18 substantive matter has been decided. Therefore, the first Younger  
19 requirement is satisfied.

20  
21 Furthermore, even if Plaintiff's criminal trial has by now been  
22 completed, a fact not presently before the Court, a state proceeding is  
23 deemed "pending" for the purposes of Younger abstention until state  
24 appellate remedies are exhausted. Dubinka v. Judges of Superior Court  
25 of State of Cal. for County of Los Angeles, 23 F.3d 218, 223 (9th Cir.  
26 1994); see also New Orleans Pub. Serv., Inc. v. Council of City of New  
27 Orleans, 491 U.S. 350, 369, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989)  
28 ("[A] necessary concomitant of Younger is that a party . . . must

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

11  
12 Second, the pending state proceeding clearly implicates important  
13 state interests in enforcing criminal laws. "The key to determining  
14 whether comity concerns are implicated in an ongoing state proceeding --  
15 and thus whether the second Younger requirement is met -- is to ask  
16 whether federal court adjudication would interfere with the state's  
17 ability to carry out its basic executive, judicial, or legislative  
18 functions." Potrero Hills Landfill, Inc. v. County of Solano, 657 F.3d  
19 876, 883 (9th Cir. 2011). "Where the state is in an enforcement posture  
20 in the state proceedings, the 'important state interest' requirement is  
21 easily satisfied, as the state's vital interest in carrying out its  
22 executive functions is presumptively at stake." Id. at 883-84. Indeed,  
23 Younger, which involved abstention due to a pending criminal proceeding,  
24 explicitly recognized that a state must be permitted to "enforce . . .  
25 laws against socially harmful conduct that the State believes in good  
26 faith to be punishable under its laws and the Constitution." Younger,  
27 401 U.S. at 51-52.

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

27  
28



1 Third, Plaintiff has not established that he is or will be barred  
 2 from raising federal constitutional challenges in the state proceedings.  
 3 The Supreme Court has noted that "where vital state interests are  
 4 involved, a federal court should abstain 'unless state law clearly bars  
 5 the interposition of the constitutional claims.'" Middlesex County  
 6 Ethics Commission, 457 U.S. at 432; see also Hirsh v. Justices of  
 7 Supreme Court of State of Cal., 67 F.3d 708, 713 (9th Cir. 1995)  
 8 ("Judicial review is inadequate [for Younger abstention purposes] only  
 9 when state procedural law bars presentation of the federal claims.")  
 10 (emphasis in original). California courts routinely hold that federal  
 11 constitutional protections apply to state misdemeanor trials. See,  
 12 e.g., Serna v. Superior Court, 40 Cal. 3d 239, 256, 219 Cal. Rptr. 420  
 13 (1985) (federal Sixth Amendment right to speedy trial is triggered by  
 14 filing of state misdemeanor complaint); In re Olsen, 176 Cal. App. 3d  
 15 386, 390-91, 221 Cal. Rptr. 772 (1986) ("The guarantees of the federal  
 16 Constitution do not apply exclusively to felony proceedings; one accused  
 17 of a misdemeanor [in state court] is accorded the due process right to  
 18 counsel . . . .") (internal citations omitted). Therefore, there is no  
 19 bar to Plaintiff's ability to raise a federal constitutional defense  
 20 during the underlying misdemeanor proceedings.

21  
 22 Furthermore, even if such a bar somehow existed in Plaintiff's  
 23 state misdemeanor trial, to satisfy Younger's third requirement, it is  
 24 sufficient that federal constitutional claims may be raised during state  
 25 court judicial review of the underlying proceeding. See Ohio Civil  
 26 Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619, 629, 106  
 27 S. Ct. 2718, 91 L. Ed. 2d 512 (1986); Fresh Int'l Corp. v. ALRB, 805  
 28 F.2d 1353, 1362 (9th Cir. 1986) (abstention applicable because plaintiff

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

8  
9 Fourth, granting the relief requested by Plaintiff would have the  
10 practical effect of enjoining or interfering with ongoing state  
11 proceedings. See Amerisourcebergen Corp. v. Roden, 495 F.3d 1143, 1149  
12 (9th Cir. 2007) (even if the first three elements for Younger abstention  
13 "are satisfied, the court does not automatically abstain, but abstains  
14 only if there is a Younger-based reason to abstain -- i.e., if the  
15 court's action would enjoin, or have the practical effect of enjoining,  
16 ongoing state court proceedings."). A declaration by this Court that  
17 section 4-35.20 violates the Second Amendment would "interfere" with the  
18 state proceeding because it would effectively "enjoin . . . or otherwise  
19 involve the federal courts in terminating or truncating" the state court  
20 action. San Jose Silicon Valley, 546 F.3d at 1096 (internal quotation  
21 marks omitted). Therefore, the fourth, and final, Younger requirement  
22 is met.

23  
24 Claim One seeks injunctive and declaratory relief against Defendant  
25 City of Redondo Beach, including a declaration that the challenged City  
26 Ordinances are unconstitutional. (FAC at 35-36). Because all of the  
27 Younger requirements apply, dismissal of Claim One is mandatory. San  
28 Jose Silicon Valley, 546 F.3d at 1092. It is therefore recommended that

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

22  
 23 Finally, although the heading to Claim One indicates that  
 24 Plaintiff's challenge is based on the Second, Fourth, and Fourteenth  
 25 Amendments of the United States Constitution, (FAC at 35), it is unclear  
 26 whether Plaintiff is also attempting to assert a state law claim with  
 27 respect to section 4-35.20. To the extent that Plaintiff is attempting  
 28 to assert such a claim, pendent jurisdiction is not appropriate once the

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

6  
7 **2. Qualified Immunity Applies To Plaintiff's Damages Claims**  
8 **Against Chief Leonardi, Officer Heywood, And Officer Doe**  
9

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

18  
19 "The doctrine of qualified immunity protects government officials  
20 'from liability for civil damages insofar as their conduct does not  
21 violate clearly established statutory or constitutional rights of which  
22 a reasonable person would have known.'" Pearson v. Callahan, 555 U.S.  
23 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (quoting Harlow v.  
24 Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396  
25 (1982)). "Qualified immunity is 'an entitlement not to stand trial or  
26 face the other burdens of litigation.'" Hopkins v. Bonvicino, 573 F.3d  
27 752, 762 (9th Cir. 2009) (quoting Mitchell v. Forsyth, 472 U.S. 511,  
28 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)). Indeed, "the 'driving

1 force' behind creation of the qualified immunity doctrine was a desire  
2 to ensure that 'insubstantial claims' against government officials  
3 [will] be resolved prior to discovery.'" Pearson, 555 U.S. at 231  
4 (quoting Anderson v. Creighton, 483 U.S. 635, 640, n.2, 107 S. Ct. 3034,  
5 97 L. Ed. 2d 523 (1987)).  
6

7 In analyzing whether qualified immunity applies, a court must  
8 determine "whether, taken in the light most favorable to [Plaintiffs],  
9 Defendants' conduct amounted to a constitutional violation, and . . .  
10 whether or not the right was clearly established at the time of the  
11 violation." Bull v. City and County of San Francisco, 595 F.3d 964, 971  
12 (9th Cir. 2010) (internal quotation marks omitted; brackets in  
13 original). "For a constitutional right to be clearly established, its  
14 contours must be sufficiently clear that a reasonable official would  
15 understand that what he is doing violates that right." Hope v. Pelzer,  
16 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) (internal  
17 quotation marks omitted). The Supreme Court has recently emphasized  
18 that a finding that a government official's conduct violates clearly  
19 established law requires that "existing precedent must have placed the  
20 statutory or constitutional question beyond debate." Aschroft v. al-  
21 Kidd, \_\_ U.S. \_\_, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011). A  
22 court is not required to address these two inquiries in a particular  
23 order, but may instead "exercise [its] sound discretion in deciding  
24 which of the two prongs of the qualified immunity analysis should be  
25 addressed first in light of the circumstances in the particular case at  
26 hand." Pearson, 555 U.S. at 226; see also Bull, 595 F.3d at 971.  
27  
28

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

14  
15           The Supreme Court has "recognized an individual right under the  
16 Second Amendment . . . [and has] held that this right is fundamental and  
17 is incorporated against states and municipalities under the Fourteenth  
18 Amendment." Nordyke v. King, 681 F.3d 1041, 1043-44 (9th Cir. 2012)  
19 (citing Dist. of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171  
20 L. Ed. 2d 637 (2008); McDonald v. City of Chicago, \_\_ U.S. \_\_, 130 S.  
21 Ct. 3020, 177 L. Ed. 2d 894 (2010)). Heller explicitly recognized "the  
22 right of law-abiding, responsible citizens to use arms in defense of  
23 hearth and home." Heller, 554 U.S. at 635; see also McDonald, 130 S.  
24 Ct. at 3050 ("In Heller, we held that the Second Amendment protects the  
25 right to possess a handgun in the home for the purpose of  
26 self-defense.") (plurality opinion). The Heller Court noted, however,  
27 that "the right secured by the Second Amendment is not unlimited" and is  
28 "not a right to keep and carry any weapon whatsoever in any manner

1 whatsoever and for whatever purpose." Heller, 554 U.S. at 626. The  
2 Heller Court specifically cautioned that "nothing in our opinion should  
3 be taken to cast doubt on longstanding prohibitions on the possession of  
4 firearms by felons and the mentally ill, or laws forbidding the carrying  
5 of firearms in sensitive places such as schools and government  
6 buildings, or laws imposing conditions and qualifications on the  
7 commercial sale of arms," which it described as a list of "presumptively  
8 lawful regulatory measures" that "does not purport to be exhaustive."  
9 Id. at 626-27 & 627 n.26.

10  
11 Lower courts attempting to address the scope and application of  
12 Second Amendment rights following Heller and McDonald have typically  
13 emphasized that Heller "warns readers not to treat [the decision] as  
14 containing broader holdings than the Court set out to establish: that  
15 the Second Amendment creates individual rights, one of which is keeping  
16 operable handguns at home for self-defense." United States v. Skoien,  
17 614 F.3d 638, 640 (7th Cir. 2010) (en banc). As the Fourth Circuit  
18 recently explained regarding "the dilemma faced by lower courts in the  
19 post-Heller world: how far to push Heller beyond its undisputed core  
20 holding,"

21  
22 There may or may not be a Second Amendment right in some  
23 places beyond the home, but we have no idea what those places  
24 are, what the criteria for selecting them should be, what  
25 sliding scales of scrutiny might apply to them, or any one of  
26 a number of other questions. It is not clear in what places  
27 public authorities may ban firearms altogether without  
28 shouldering the burdens of litigation. The notion that

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

12  
13 United States v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011).

14  
15 Due to this uncertainty, courts have proceeded cautiously when  
16 addressing Second Amendment rights beyond the core right of possession  
17 of a handgun in the home. See, e.g., Kachalsky v. Cacace, 817 F. Supp.  
18 2d 235, 258 (S.D. N.Y. 2011) ("[Heller's] emphasis on the Second  
19 Amendment's protection of the right to keep and bear arms for the  
20 purpose of 'self-defense in the home' permeates the Court's decision and  
21 forms the basis for its holding -- which, despite the Court's broad  
22 analysis of the Second Amendment's text and historical underpinnings, is  
23 actually quite narrow."); United States v. Tooley, 717 F. Supp. 2d 580,  
24 596 (S.D. W.Va. 2010) ("[P]ossession of a firearm outside of the home or  
25 for purposes other than self-defense in the home are not within the  
26 'core' of the Second Amendment right as defined by Heller."), aff'd, 468  
27 Fed. Appx. 357 (4th Cir. 2012), cert. denied, \_\_ S. Ct. \_\_, 2012 WL  
28 2132468 (Oct. 1, 2012); United States v. Hart, 726 F. Supp. 2d 56, 60



1 (D. Mass. 2010) ("Heller does not hold, nor even suggest, that concealed  
2 weapons laws are unconstitutional. . . . Therefore, it was not a  
3 violation of [defendant's] Second Amendment rights to stop him on the  
4 basis of the suspicion of a concealed weapon."), aff'd 674 F.3d 33 (1st  
5 Cir. 2012), cert. denied \_\_ S. Ct. \_\_, 2012 WL 2194023 (Oct. 1, 2012);  
6 Sutterfield v. City of Milwaukee, \_\_ F. Supp. 2d \_\_, 2012 WL 1534009 at  
7 \*8 (E.D. Wis. Apr. 30, 2012) ("Neither Heller nor McDonald prohibit[s]  
8 the government from seizing firearms for certain purposes.") (internal  
9 citations omitted); Osterweil v. Bartlett, 819 F. Supp. 2d 72, 85 (N.D.  
10 N.Y. 2011) (state's firearm licensing scheme, which limits licenses to  
11 carry or possess firearms to state residents and non-residents employed  
12 in the state, does not offend Second Amendment).

13  
14 In particular, courts have found that Heller did not reach, much  
15 less settle "beyond debate," the issue of whether and when open carry  
16 regulations are unconstitutional. See, e.g., Gonzalez v. Village of  
17 West Milwaukee, 671 F.3d 649, 659 (7th Cir. 2012) ("Whatever the Supreme  
18 Court's decisions in Heller and McDonald might mean for future questions  
19 about open-carry rights, for now this is unsettled territory."); United  
20 States v. Masciandaro, 648 F. Supp. 2d 779, 788 (E.D. Va. 2009)  
21 ("[A]lthough Heller does not preclude Second Amendment challenges to  
22 laws regulating firearm possession outside the home, Heller's dicta  
23 makes pellucidly clear that the Supreme Court's holding should not be  
24 read by lower courts as an invitation to invalidate the existing  
25 universe of public weapons regulations.") (emphasis in original)  
26 (footnotes omitted), aff'd, 638 F.3d 458, 470 (4th Cir. 2011) ("[W]e  
27 assume that any law that would burden the 'fundamental,' core right of  
28 self-defense in the home by a law-abiding citizen would be subject to

1 strict scrutiny. But, as we move outside the home, firearm rights have  
2 always been more limited, because public safety interests often outweigh  
3 individual interests in self-defense.”), cert. denied, 132 S. Ct. 756,  
4 181 L. Ed. 2d 482 (2011); Peruta v. County of San Diego, 758 F. Supp. 2d  
5 1106, 1117 (S.D. Cal. 2010) (regulations restricting the carrying of  
6 firearms in public are constitutional so long as there is a reasonable  
7 fit between the regulation and a significant, substantial, or important  
8 governmental interest, such as interests “in public safety and in  
9 reducing the rate of gun use in crime”).

10  
11 In light of the continued uncertainty as to the scope of the rights  
12 accorded by the Second Amendment following the Supreme Court’s recent  
13 decisions in Heller and McDonald, the Court concludes that the right to  
14 openly carry a firearm in a public park was not “beyond debate” at the  
15 time of the alleged violation such that a reasonable official would  
16 understand that enforcing a city ordinance that prohibits carrying a  
17 firearm in specified public areas was unconstitutional. Hope, 536 U.S.  
18 at 739. As such, the individually-named Redondo Beach defendants are  
19 entitled to qualified immunity on Plaintiff’s claims for damages in  
20 Claim Two. See, e.g., Embody v. Ward, 695 F.3d 577, 581-2 (6th Cir.  
21 2012) (ranger entitled to qualified immunity for stopping and  
22 temporarily disarming plaintiff for openly carrying a loaded pistol in  
23 a state park, even though such carrying was lawful under state law,  
24 because “[n]o court has held that the Second Amendment encompasses a  
25 right to bear arms within state parks”); Fisher v. Kealoha, \_\_ F. Supp.  
26 2d \_\_, 2012 WL 1379320 at \*18 (D. Hawaii Apr. 19, 2012) (police chief  
27 entitled to qualified immunity where the alleged right to a firearm  
28 ownership permit following a harassment conviction was not clearly

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

10 \\  
 11 \\  
 12 \\  
 13 \\  
 14 \\  
 15 \\  
 16 \\

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

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

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

18  
19           The Court agrees with the Redondo Beach Defendants that a favorable  
20 decision on Claims One and Two, as currently alleged, would not redress  
21 Plaintiff's purported injury if the state statutes that Plaintiff  
22 challenges in Claims Three and Four are allowed to stand. The City  
23 Ordinance at issue in Claims One and Two does not distinguish between  
24 loaded and unloaded firearms, different types of firearms, or open or  
25 concealed carrying of weapons, but simply makes it unlawful for "any  
26 person to use, carry, fire or discharge any firearm . . . or any other  
27 form of weapon across, in or into a park." Redondo Beach Municipal Code  
28 § 4-35.20, available at <http://www.qcode.us/codes/redondobeach/>. The

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

14  
 15 **4. The FAC Fails To State A Claim Against Defendant City Of**  
 16 **Redondo Beach In Claim Two Pursuant To Rule 12(b)(6)**  
 17

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

1 Although not specifically raised by the Redondo Beach Defendants,  
 2 the Court finds that Plaintiff's claim for damages against the sole  
 3 remaining Defendant in Claim Two, City of Redondo Beach, fails to state  
 4 a claim under Rule 12(b)(6). (FAC at 36-37). As the Court explained in  
 5 dismissing Plaintiff's original Complaint, a municipality is liable  
 6 under 42 U.S.C. § 1983 only if the plaintiff can establish that the  
 7 local government "had a deliberate policy, custom, or practice that was  
 8 the 'moving force' behind the constitutional violation he suffered."  
 9 Galen v. County of Los Angeles, 477 F.3d 652, 667 (9th Cir. 2007)  
 10 (quoting Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694-95, 98 S. Ct.  
 11 2018, 56 L. Ed. 2d 611 (1978)). The FAC summarily alleges that "[i]t is  
 12 the policy and custom of Defendant CITY OF REDONDO BEACH to violate  
 13 PLAINTIFF's Second, Fourth, and Fourteenth Amendment Rights," but does  
 14 not identify the specific City policy or practice, as required by  
 15 Monell, that caused Plaintiff's alleged constitutional injuries. (FAC  
 16 at 20). Therefore, it is recommended that Plaintiff's Monell claim for  
 17 damages against the City of Redondo Beach be dismissed with leave to  
 18 amend. However, the Court notes that if this claim is properly pled in  
 19 an amended complaint, it will likely be subject to Younger abstention.<sup>8</sup>

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21  
 22 <sup>8</sup> The Court also finds that Plaintiff has failed to state a claim  
 23 against Chief Leonardi in Claim Two because Plaintiff fails to show any  
 24 personal involvement by Chief Leonardi in the warrantless search of  
 25 Plaintiff, the seizure of Plaintiff's property, or the criminal charges  
 26 brought against him, which are the only acts Plaintiff challenges in  
 27 that Claim. (See FAC at 37). There is no supervisory liability under  
 28 section 1983. Plaintiff must establish that the supervisor had personal  
 involvement in the civil rights violation or that his specific action or  
 inaction caused the harm suffered. Starr v. Baca, 652 F.3d 1202, 1205-  
 06, (9th Cir. 2011). This pleading defect is moot, however, because  
 Plaintiff's claims against Chief Leonardi should be dismissed on the  
 ground of qualified immunity, as discussed in Part V.A.2.

1 **B. The Claims Against The Attorney General**

2  
3 **1. Plaintiff Alleges An Injury-In-Fact In His Challenge To**  
4 **Section 25850(a) And His Claim Is Ripe For Adjudication**

5  
6 Harris contends that Plaintiff lacks standing to challenge section  
7 25850(a)'s prohibition on carrying a loaded firearm in public because he  
8 fails to allege an injury-in-fact. According to Harris, Plaintiff makes  
9 no "substantive allegations of ever having openly carried a loaded  
10 firearm in Redondo Beach (or anywhere else)," but merely describes an  
11 incident in which he was stopped by Redondo Beach police officers for  
12 carrying an unloaded long gun in a park. (Harris MTD at 2-3; see also  
13 id. at 9-10). Furthermore, Harris argues that "[n]o law-enforcement  
14 official, including the Attorney General, has tried or threatened, or  
15 even could possibly try, to enforce Section 25850(a) against [Plaintiff]  
16 based on the facts alleged in the FAC." (Id. at 9). For the same  
17 reasons, Harris claims that Plaintiff's challenge to section 25850(a) is  
18 unripe. (Id. at 12-14). Plaintiff argues that he is not required to  
19 expose himself to the threat of prosecution to establish an injury-in-  
20 fact. (Pl. Harris Opp. at 3).

21  
22 As the Court has previously explained in dismissing Plaintiff's  
23 original Complaint, to establish Article III standing, a plaintiff must  
24 show that (1) he "has suffered an 'injury in fact' that is (a) concrete  
25 and particularized and (b) actual or imminent, not conjectural or  
26 hypothetical; (2) the injury is fairly traceable to the challenged  
27 action of the defendant; and (3) it is likely, as opposed to merely  
28 speculative, that the injury will be redressed by a favorable decision."

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

16  
17 Unlike the original Complaint, in which Plaintiff alleged merely  
18 that he "would openly carry a loaded and functional handgun in public  
19 for the purpose of self-defense" but for his fear of arrest and  
20 prosecution, (Complaint, Dkt. No. 1 at 6), the FAC alleges that  
21 Plaintiff has "often carried a firearm within California in violation of  
22 California statutes including, but not limited to, California Penal Code  
23 Section 25850" and that he plans on continuing to do so "for as long as  
24 he is physically able to carry a loaded and/or unloaded firearm in  
25 violation of California statutes and city ordinances which prohibit the  
26 carrying of firearms."<sup>9</sup> (FAC at 15). More specifically, the FAC also

---

27  
28 <sup>9</sup> Harris argues that the Court should ignore Plaintiff's "sudden"  
claims in the FAC that he has violated section 25850 "countless" times



1 alleges that Plaintiff "will continue to violate California Penal Code  
 2 Section 25850, the Redondo Beach City Ordinances and other California  
 3 statutes prohibiting firearms from being carried in public places on the  
 4 7th day of every month in the City of Redondo Beach, California by  
 5 carrying a firearm (a holstered handgun, rifle, or shotgun of a type in  
 6 common use by the public) in a public place. . . . Plaintiff will openly  
 7 carry a loaded holstered handgun, loaded rifle and loaded shotgun of a  
 8 type in common use by the public while traveling within the state of  
 9 California." (Id. at 12).

10  
 11 The Court finds that although Plaintiff has not been arrested or  
 12 charged with a violation of section 25850, he has sufficiently alleged  
 13 an injury-in-fact. The Supreme Court has instructed that a plaintiff  
 14 challenging the constitutionality of a criminal statute need not "first  
 15 expose himself to actual arrest or prosecution" but must establish  
 16 Article III standing by "alleg[ing] an intention to engage in a course

---

17  
 18 because "they contradict [Plaintiff's] prior sworn statement in this  
 19 case denying having openly carried firearms in public in California when  
 20 and where unlawful to do so." (Harris MTD at 9). In a Declaration  
 21 submitted in connection with his oppositions to the motions to dismiss  
 22 the original Complaint, Plaintiff asserted that he has openly carried a  
 23 loaded handgun when and where it was lawful to do so but "do[es] not  
 24 openly carry a loaded handgun or long gun in non-sensitive public places  
 25 because [he] would in all certainty be arrested, prosecuted, fined and  
 26 imprisoned for doing so." (Decl. of Charles Nichols, Dkt. No. 21, at  
 27 4). Plaintiff's current allegations concerning his past violations of  
 28 section 25850 may arguably, but not necessarily, be at odds with his  
 previous allegations and assertions under oath. However, the Ninth  
 Circuit has instructed that "there is nothing in the Federal Rules of  
 Civil Procedure to prevent a party from filing successive pleadings that  
 make inconsistent or even contradictory allegations. Unless there is a  
 showing that the party acted in bad faith -- a showing that can only be  
 made after the party is given an opportunity to respond under the  
 procedures of Rule 11 -- inconsistent allegations are simply not a basis  
 for striking the pleading." PAE Gov't Serv., Inc. v. MPRI, Inc., 514  
 F.3d 856, 860 (9th Cir. 2007).

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

28

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

13

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

16

17 Harris also argues that Plaintiff also lacks standing because he  
 18 has failed to establish a causal nexus between the Attorney General and  
 19 any alleged injuries arising from section 25850(b)’s authorization of  
 20 warrantless firearm searches. According to Harris, the search  
 21 complained of in the FAC was conducted by City of Redondo Beach police  
 22 officers, not the Attorney General or her subordinates, and “any  
 23 subsequent prosecution” for a misdemeanor violation of subsection (b)  
 24 would be undertaken by City of Redondo Beach City Prosecutor. (Id. at  
 25 3, 10-11). Plaintiff generally asserts that he has standing, without  
 26 directly addressing Harris’s specific argument. (See Pl. Harris Opp. at  
 27 1-3).

28

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

14  
15           According to Harris, the City of Redondo Beach City Attorney is  
16 required to prosecute state-law misdemeanors occurring in Redondo Beach.  
17 (Harris MTD at 10). Therefore, because violation of section 25850 is,  
18 with certain exceptions not relevant here, a misdemeanor, Harris  
19 contends that there is “no connection” to the Attorney General and that  
20 an “injunction against the Attorney General in this regard would not  
21 redress any alleged injury” to Plaintiff. (Id. at 10-11); see also Cal.  
22 Penal Code § 25850(c). Harris’s arguments are based on two errors. The  
23 first is that “any prosecution” of Plaintiff for violation section  
24 25850(b) “would be handled by the Redondo Beach City Prosecutor.” (Id.  
25 at 10). The FAC describes Plaintiff’s intent to violate section  
26 25850(b) by refusing to consent to warrantless searches not only in City  
27 of Redondo Beach, but also throughout the State of California while  
28 traveling. (FAC at 12). Therefore, not every prosecution of Plaintiff

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

7  
8 Harris's second error is the contention that the Attorney General  
9 has "no connection" to prosecutions of state law misdemeanors undertaken  
10 by a city prosecutor. As a preliminary matter, and as the Court  
11 previously noted in connection with Harris's first motion to dismiss,  
12 the California Attorney General is the "head of the Department of  
13 Justice" and "has charge, as attorney, of all legal matters in which the  
14 state is interested." Cal. Gov't Code §§ 12510 & 12511. The Attorney  
15 General has particularly broad responsibility and expansive powers in  
16 the enforcement of criminal law, and may "take full charge of any  
17 investigation or prosecution of violations of the law," with "all the  
18 powers of a district attorney." Cal. Gov't Code § 12550; see also Pitts  
19 v. County of Kern, 17 Cal. 4th 340, 357, 70 Cal. Rptr. 2d 823 (1998)  
20 (California Constitution, Art. V, sec. 13, "confers broad discretion  
21 upon the Attorney General to determine when to step in and prosecute a  
22 criminal case") (internal quotation marks omitted). The Ninth Circuit  
23 has found that where a state Attorney General may assume the role of  
24 district attorney, the Attorney General has a sufficient connection to  
25 the enforcement of the state's criminal laws to be a proper defendant in  
26 suits challenging their constitutionality. Planned Parenthood of Idaho  
27 v. Wasden, 376 F.3d 908, 919-20 (9th Cir. 2004).

1 California law authorizes charter cities to charge their city  
2 attorney with the duty to prosecute misdemeanor offenses arising out of  
3 violations of state laws. Cal. Gov't Code § 72193; see also 79 Ops.  
4 Cal. Atty. Gen 46, 1996 WL 272279 at \*1 (May 20, 1996) ("[T]he  
5 prosecution of all state laws, including state misdemeanor offenses, is  
6 a matter of statewide concern, wherever committed. Accordingly, it is  
7 only through legislative authorization that a city prosecutor, whether  
8 in a general law or charter city, may prosecute state misdemeanors.").  
9 City of Redondo Beach is a charter city. See [http://www.redondo.org/  
10 in\\_the\\_city/default.asp](http://www.redondo.org/in_the_city/default.asp). Pursuant to the City's Charter, the City  
11 Attorney is required to "[p]rosecute on behalf of the People any and all  
12 criminal cases arising from violations of this Charter or city  
13 ordinances" and "violations of State misdemeanors, unless otherwise  
14 directed by the City Council." Redondo Beach City Charter, sec.  
15 11.2(c), available at <http://www.qcode.us/codes/redondobeach/>.

16  
17 The delegation of authority to the City of Redondo Beach City  
18 Attorney to prosecute state law misdemeanors does not mean, however,  
19 that the state abdicates all responsibility for misdemeanor prosecutions  
20 to city attorneys, even in City of Redondo Beach. As the California  
21 Attorney General explained, when and if:

22  
23 a city prosecuting attorney may be disqualified or for some  
24 reason be unable to conduct the prosecution of a particular  
25 criminal action involving the commission of a state penal law,  
26 then it would be the duty of the district attorney to conduct  
27 such prosecution. Likewise, it would be [the district  
28 attorney's] duty to prosecute in the municipal and justice

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

3  
4 79 Ops. Cal. Atty. Gen 46 at \*2 (quoting 20 Ops. Cal. Atty. Gen 234  
5 (1952) (internal quotation marks omitted)). Therefore, as the Attorney  
6 General explained, "when the provisions of [California Government Code]  
7 section 72193 are implemented by a charter city, the city attorney has  
8 the primary duty of prosecuting state misdemeanors within the city, with  
9 the district attorney acting in a subsidiary or 'backup' role." Id.

10  
11 "A causal chain does not fail simply because it has several  
12 'links,' provided those links are 'not hypothetical or tenuous' and  
13 remain 'plausible.'" Maya, 658 F.3d at 1070. Consequently, because the  
14 California Attorney General may stand in for a county district attorney  
15 and "take full charge" of any prosecution, and because a district  
16 attorney may in some circumstances prosecute state misdemeanors even in  
17 charter cities like City of Redondo Beach, there is a sufficient causal  
18 nexus between the Attorney General and Plaintiff's alleged injuries  
19 under section 25850(b) to confer standing.

### 20 21 **3. Plaintiff Has Standing To Challenge Section 26155**

22  
23 Harris argues that because Plaintiff does not allege that he has  
24 applied for a permit to carry a firearm with the "proper licensing  
25 authority where [Plaintiff] lives," he has "not attempted to show that  
26 he would qualify for consideration for a permit" and therefore lacks  
27 standing. (Harris MTD at 11). In addition, Harris argues that the  
28 Attorney General's limited responsibilities in connection with section

1 26155's firearm permit application process, which consist only of  
2 preparing the statewide uniform application form and reporting upon  
3 receipt of an applicant's fingerprints as to whether or not the  
4 applicant is prohibited from possessing a firearm, "are inapposite in  
5 this case." (Id. at 11-12). Plaintiff argues that the Attorney General  
6 does have a causal nexus with his injuries under section 26155 because  
7 when Chief Leonardi informed Plaintiff that he could not issue Plaintiff  
8 a permit, "[t]he obvious inference . . . is that the Attorney General's  
9 office reported to the Redondo Beach chief of police that plaintiff 'is  
10 prohibited by state or federal law from possessing a firearm.'" (Pl.  
11 Harris Opp. at 3).

12  
13 Section 26155 authorizes local police chiefs to issue licenses to  
14 residents of their city to carry firearms within the state of  
15 California. Cal. Penal Code § 26155(a). The license may be either to  
16 carry a concealed weapon, or, if the city is located in a county of  
17 fewer than 200,000 persons, to openly carry a loaded pistol, revolver,  
18 or other firearm capable of being concealed, in which case the open  
19 carry permit is valid only in the issuing county. Cal. Penal Code  
20 § 26155(b). If Plaintiff's claim were that section 26155's residency  
21 requirement improperly prevented him from obtaining a concealed weapon  
22 permit, the Court agrees with Harris that Plaintiff's failure to apply  
23 for a license within his city of residence would be fatal to his  
24 standing to challenge the statute. A concealed weapon permit under  
25 section 26155 is a state license, and Plaintiff would have indeed failed  
26 to establish that he did not qualify for such a permit if he had applied  
27 only in City of Redondo Beach.

28



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

25  
26           Furthermore, while the Attorney General may not have a substantial  
27 role in issuing an individual applicant a license to carry a firearm  
28 under section 26155, the statute's restriction of open carry licenses to

1 residents of counties with fewer than 200,000 persons does not entail  
2 individualized decision-making. It is well established that "a  
3 generalized duty to enforce state law or general supervisory power over  
4 the persons responsible for enforcing the challenged provision will not  
5 subject an official to suit." Snoeck v. Brussa, 153 F.3d 984, 986 (9th  
6 Cir. 1998). However, "no . . . special charge need be found directly in  
7 the challenged statute to meet the requisite 'some connection' so long  
8 as there is sufficient indicia of the defendant's enforcement powers  
9 found elsewhere in the laws of the state." Okpalobi v. Foster, 244 F.3d  
10 405, 419 (5th Cir. 2001) (en banc). If a municipal employee or police  
11 chief in Los Angeles County unlawfully issued an open carry permit to a  
12 local resident, the Attorney General or county district attorney would  
13 undoubtedly have the power to take appropriate action. It is sufficient  
14 for standing purposes that the Attorney General is charged with the  
15 enforcement of the state's criminal laws, including section 26155, and  
16 has broad powers to do so.

#### 17 18 **4. Eleventh Amendment**

19  
20 Finally, Harris contends, as she did in moving to dismiss  
21 Plaintiff's original complaint, that all of Plaintiff's claims against  
22 the Attorney General are barred by the Eleventh Amendment. (Harris MTD  
23 at 14-16).

24  
25 The Eleventh Amendment generally "prohibit[s] federal courts from  
26 hearing suits brought by private citizens against state governments  
27 without the state's consent." Sofamor Danek Group, Inc. v. Brown, 124  
28 F.3d 1179, 1183 (9th Cir. 1997). Pursuant to Ex Parte Young, however,

1 an exception is made for suits against state officers for prospective  
2 declaratory or injunctive relief to enjoin official actions that violate  
3 federal law. Id. (citing Ex Parte Young, 209 U.S. 123, 155-56, 28 S.  
4 Ct. 441, 52 L. Ed. 714 (1908)). This exception is "predicated on the  
5 notion that a state cannot authorize one of its agents to violate the  
6 Constitution and laws of the United States," so a "state officer acting  
7 in violation of federal law is considered stripped of his official or  
8 representative character" and is "not shielded from suit by the state's  
9 sovereign immunity." Sofamor Danek Group, Inc., 124 F.3d at 1183  
10 (internal quotation marks omitted). The "obvious fiction" of Ex Parte  
11 Young, however, is subject to several constraints. Idaho v. Coeur  
12 d'Alene Tribe of Idaho, 521 U.S. 261, 270, 117 S. Ct. 2028, 138 L. Ed.  
13 2d 438 (1997). Among those constraints is the requirement that "the  
14 state official sued 'must have some connection with the enforcement of  
15 the act' to avoid making that official a mere representative of the  
16 state." Culinary Workers Union, Local 226 v. Del Papa, 200 F.3d 614,  
17 619 (9th Cir. 1999) (quoting Ex Parte Young, 209 U.S. at 157).

18  
19 While state law determines "whether and under what circumstances a  
20 particular defendant has any connection with the enforcement of the law  
21 of that state . . . it is a question of federal jurisdictional law  
22 whether the connection is sufficiently intimate to meet the requirements  
23 of Ex Parte Young." NAACP, 511 F. Supp. at 1261 (quoting Shell Oil  
24 Company v. Noel, 608 F.2d 208, 211 (1st Cir. 1979)). As discussed  
25 above, the Ninth Circuit has found that where, as in California, a state  
26 attorney general may "stand in the role of a county prosecutor, and in  
27 that role exercise the same power to enforce the statute the prosecutor  
28 would have," a sufficient connection is established for the Ex Parte

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

4  
5 **C. Portions Of The FAC Violate Federal Rule Of Civil Procedure 8**

6  
7 Federal Rule of Civil Procedure 8(a)(2) requires that a complaint  
8 contain "'a short and plain statement of the claim showing that the  
9 pleader is entitled to relief,' in order to 'give the defendant fair  
10 notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167  
11 L. Ed. 2d 929 (2007). Rule 8(e)(1) instructs that "[e]ach averment of  
12 a pleading shall be simple, concise, and direct." A complaint violates  
13 Rule 8 if a defendant would have difficulty responding to the complaint.  
14 Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc., 637 F.3d  
15 1047, 1059 (9th Cir. 2011).

16  
17  
18 Although the Court has found that Plaintiff has standing to  
19 challenge sections 25850 and 26155, portions of the FAC do not comply  
20 with the standards of Rule 8. Plaintiff's rambling allegations, many of  
21 which may or may not have been intended to relate to Claims Three and  
22 Four, often include irrelevant and unclear facts and argument. As the  
23 Court has noted, it is even sometimes difficult to determine the precise  
24 right that Plaintiff is seeking to vindicate. The FAC therefore fails  
25 to provide fair notice of some of the claims in a short, clear and  
26 concise statement. See Twombly, 550 U.S. at 555. Accordingly, it is  
27 recommended that the FAC be dismissed with leave to amend and that in  
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**NOTICE**

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

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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

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

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

3  
4 Accordingly, IT IS ORDERED THAT:

5  
6 1. Plaintiff's claims against Attorney General Kamala D. Harris  
7 are DISMISSED WITH LEAVE TO AMEND for lack of subject matter  
8 jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).

9  
10 2. Plaintiff's claims against Governor Edmund G. Brown, Jr. are  
11 DISMISSED WITH PREJUDICE for lack of subject matter jurisdiction  
12 pursuant to Rule 12(b)(1) and the Eleventh Amendment.

13  
14 3. Plaintiff's claims against the City of Redondo Beach and City  
15 of Redondo Beach Police Chief Leonardi are DISMISSED WITH LEAVE TO AMEND  
16 for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and  
17 for failure to state a claim pursuant to Rule 12(b)(6).

18  
19 4. Plaintiff's claims against City of Redondo Beach Police  
20 Department are DISMISSED WITH PREJUDICE for lack of subject matter  
21 jurisdiction pursuant to Rule 12(b)(1) and for failure to state a claim  
22 pursuant to Rule 12(b)(6).

23  
24 5. Plaintiff's Seventh Claim for Relief alleging a violation of  
25 state constitutional law is DISMISSED WITH PREJUDICE pursuant to the  
26 Eleventh Amendment.





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

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

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

23  
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**I.  
INTRODUCTION**

26  
27  
28

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

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

11  
 12 For the reasons discussed below, it is recommended that the Motions  
 13 to Dismiss be GRANTED. It is recommended that the claims against the  
 14 Attorney General, the City of Redondo Beach, and City of Redondo Beach  
 15 Police Chief Leonardi be DISMISSED with leave to amend. It is further  
 16 recommended that the claims against the Governor and the City of Redondo  
 17 Beach Police Department be DISMISSED without leave to amend. Finally,  
 18 it is recommended that Plaintiff's Seventh Claim for Relief be DISMISSED  
 19 without leave to amend.

20  
 21 **II.**  
 22 **ALLEGATIONS OF THE COMPLAINT**  
 23

24 The Complaint names five Defendants: Attorney General Harris,  
 25 Governor Brown, the City of Redondo Beach, the City of Redondo Beach  
 26 Police Department and City of Redondo Beach Police Chief Leonardi. (7AC  
 27 3-4). All Defendants are sued in their official capacity. (Id.).

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

4  
5 (a) A person is guilty of carrying a loaded firearm when the  
6 person carries a loaded firearm on the person or in a vehicle  
7 while in any public place or on any public street in an  
8 incorporated city or in any public place or on any public  
9 street in a prohibited area of unincorporated territory.

10  
11 (b) In order to determine whether or not a firearm is loaded  
12 for the purpose of enforcing this section, peace officers are  
13 authorized to examine any firearm carried by anyone on the  
14 person or in a vehicle while in any public place or on any  
15 public street in an incorporated city or prohibited area of an  
16 unincorporated territory. Refusal to allow a peace officer to  
17 inspect a firearm pursuant to this section constitutes  
18 probable cause for arrest for violation of this section.

19  
20 Cal. Penal Code §25850(a)(b).<sup>1</sup>

21  
22  
23 <sup>1</sup> The Complaint generally cites to Penal Code section 12031, the  
24 prior statute codifying California's ban on carrying a loaded weapon in  
25 public. However, "[e]ffective January 1, 2012, section 12031 was  
26 repealed and section 25850, which similarly prohibits carrying a loaded  
27 firearm in public, became operative." People v. Elliott, 53 Cal. 4th  
28 535, 587 n.7, 137 Cal. Rptr. 3d 59 (2012). Plaintiff acknowledges that  
former subsection 12031(a)(1), the prohibition on carrying a loaded  
firearm in public, is now codified in section 25850(a), and that former  
subsection 12031(e), the authorization for officers to conduct a  
warrantless search of a loaded weapon, is now codified in section  
25850(b). (Complaint at 24). For ease of reference, the Court will  
cite to section 25850.

1  
2 In Claim One, Plaintiff raises a facial challenge to section  
3 25850(a) under the Second Amendment because it prohibits him from openly  
4 carrying in public a "fully functional loaded handgun[] for the purpose  
5 of self-defense and for other lawful purposes." (Complaint at 18). In  
6 Claim Two, Plaintiff raises a facial challenge to section 25850(b) under  
7 the Fourth Amendment because the "mere possession of a loaded firearm  
8 . . . cannot support a finding of probable cause . . . such that the  
9 Fourth Amendment's warrant requirement can be legislatively disregarded."  
10 (Id. at 19-20). In Claim Three, Plaintiff alleges that section 25850(a),  
11 as applied, violates his "right to openly carry a loaded handgun in  
12 public" as guaranteed by the Second Amendment. In Claim Four, Plaintiff  
13 alleges that section 25850(b), as applied, violates his right to be "free  
14 from unreasonable search and/or seizure under the Fourth Amendment" in  
15 the exercise of his Second Amendment rights. (Id. at 21).

16  
17 In his Fifth and Sixth Claims, Plaintiff raises facial challenges  
18 under the Equal Protection and Due Process clauses of the Fourteenth  
19 Amendment on the grounds that section 25850 inhibits "the fundamental  
20 right of self-defense" (Claim Five) and "is arbitrary or irrational"  
21 (Claim Six). (Id. at 22). In Claim Seven, Plaintiff alleges that  
22 section 25850 is unconstitutional under Article I, Section I of the  
23 California Constitution because the prohibition on "openly carrying a  
24 loaded handgun in non-sensitive public places for the purpose of self-  
25 defense" denies Plaintiff and other legal residents of the state "the

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

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1 and safeguard their liberty.”<sup>2</sup> (Id. at 23).

2  
3 Plaintiff seeks a declaration that section 28580 is “null and void”  
4 under the United States and California Constitutions. (Id. at 24).  
5 Plaintiff further seeks preliminary and permanent injunctions enjoining  
6 Defendants from enforcing the provisions of section 28580 against  
7 “Plaintiff and private citizens who are otherwise qualified to possess  
8 handguns.” (Id. at 25).

9  
10 **III.**

11 **DEFENDANTS’ MOTIONS TO DISMISS**

12  
13  
14 <sup>2</sup> Plaintiff filed two Requests for Judicial Notice with his  
15 Oppositions to the Harris and RBD Motions. (See Dkt. Nos. 17, 24).  
16 Plaintiff also filed a “Notice of Lodging of Computer Disc Containing  
17 Videos” in support of his Opposition to the RBD Motion. (Dkt. No. 20).  
18 The RBD filed Objections to the Requests for Judicial Notice, in which  
19 Harris joined, and to the Notice of Lodging. (See Dkt. Nos. 25-26;  
20 Harris Reply at 6 n.1). “When ruling on a motion to dismiss, [a court]  
21 may generally consider only allegations contained in the pleadings,  
22 exhibits attached to the complaint, and matters properly subject to  
23 judicial notice.” Colony Cove Properties, LLC v. City Of Carson, 640  
24 F.3d 948, 955 (9th Cir. 2011) (internal quotation marks omitted).  
25 “[N]otice may be taken where the fact is ‘not subject to reasonable  
26 dispute,’ either because it is ‘generally known within the territorial  
27 jurisdiction,’ or is ‘capable of accurate and ready determination by  
28 resort to sources whose accuracy cannot reasonably be questioned.’”  
Castillo-Villagra v. I.N.S., 972 F.2d 1017, 1026 (9th Cir. 1992)  
(quoting Fed. R. Evid. 201(b)). The Court GRANTS Plaintiff’s First  
Request for Judicial Notice with respect to attached Exhibits A and B  
and Plaintiff’s Second Request for Judicial Notice, all of which involve  
court opinions and dockets, to the extent that they are compatible with  
Federal Rule of Evidence 201 and do not require the acceptance of facts  
“subject to reasonable dispute.” The Court DENIES Plaintiff’s First  
Request for Judicial Notice with respect to the news articles attached  
as Exhibits C, D and E and similarly declines to take notice of the  
video clips submitted in the Notice of Lodging. The Court notes,  
however, that even if it were to take notice of these materials, the  
analysis of Plaintiff’s claims and the Court’s recommendations would  
remain the same.

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

4  
5 Harris contends that Plaintiff lacks Article III standing because  
6 he has not suffered an injury-in-fact. (Harris MTD at 7). She notes  
7 that Plaintiff has not been arrested for violating section 25850 and  
8 argues that arrest is not imminent because "the Attorney General has not  
9 threatened to enforce Section 25850" against Plaintiff. (Id. at 7-8).  
10 For the same reasons, Harris contends that Plaintiff's suit is not ripe.  
11 (Id. at 9). Harris further contends that Plaintiff's claims are barred  
12 by the Eleventh Amendment and do not meet the narrow circumstances in  
13 which federal suits against state officials for their oversight of state  
14 law are permitted, as articulated in Ex Parte Young, 209 U.S. 123, 28 S.  
15 Ct. 441, 52 L. Ed. 714 (1908). Specifically, Harris argues that even  
16 though Plaintiff seeks only prospective declaratory and injunctive  
17 relief, the Complaint does not show a "credible" threat of enforcement,  
18 and even if it did, the Attorney General's general law enforcement powers  
19 are insufficient to draw more than a "tenuous connection" between the  
20 Attorney General and Plaintiff's alleged injury. (Harris MTD at 10-11;  
21 Harris Reply at 5). Finally, Harris contends that the Eleventh Amendment  
22 bars Plaintiff's seventh claim, which alleges that section 25850 violates  
23 the California Constitution. (Harris MTD at 12).

24  
25 Governor Brown also argues that Plaintiff lacks standing and that  
26 the case is not ripe for the same reasons presented by the Attorney  
27 General. (Brown MTD at 1, 6, 10-11). Brown further argues that suit  
28 against him is barred by the Eleventh Amendment and that the Ex Parte



1 Young exception does not apply because Plaintiff cannot establish that  
2 the Governor has a direct connection with the enforcement of section  
3 25850. (Id. at 7-10). Brown also argues that Plaintiff's state  
4 constitutional claim is barred by the Eleventh Amendment. (Id. at 14).

5  
6 The RBD contend that Plaintiff does not have standing to bring suit  
7 against them because he "cannot show that any of his alleged injuries are  
8 traceable to the actions of Redondo Beach Defendants." (RBD MTD at 5).  
9 They note that all but two of Plaintiff's claims are facial challenges  
10 to a state law and that the Third and Fourth Claims for Relief, which  
11 challenge section 25850 as applied, "do not even make an allegation that  
12 the Redondo Beach Defendants are applying the challenged provisions at  
13 all . . . ." (Id.). Furthermore, the RBD cannot grant the relief  
14 Plaintiff seeks because even if "the City's assumed policies or customs  
15 [were] enjoined by this Court, the general state law provisions that  
16 [Plaintiff] alleges cause his supposed injuries would remain in effect."  
17 (Id. at 6). The RBD also seek dismissal of the Complaint under Rule  
18 12(b)(6) for failure to state a claim because Plaintiff "does not allege  
19 that the Redondo Beach Defendants even have a policy or custom concerning  
20 any of the general law provisions he challenges as unconstitutional."  
21 (Id. at 7). They also seek dismissal of Plaintiff's state constitutional  
22 claim pursuant to the Eleventh Amendment and because California's  
23 Constitution does not guarantee a right to bear arms. (Id. at 9).

24  
25 **IV.**

26 **STANDARDS GOVERNING MOTIONS TO DISMISS**

27  
28 Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of

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

11  
12 Here, the challenge to jurisdiction is a facial attack. Defendants  
13 contend that the allegations of jurisdiction contained in the Complaint  
14 are insufficient on their face to demonstrate the existence of  
15 jurisdiction. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th  
16 Cir. 2004). In a Rule 12(b)(1) motion of this type, the plaintiff is  
17 entitled to safeguards similar to those applicable when a Rule 12(b)(6)  
18 motion is made. See Sea Vessel Inc. v. Reyes, 23 F.3d 345, 347 (11th  
19 Cir. 1994). The material factual allegations of the complaint are  
20 presumed to be true, and the motion is granted only if the plaintiff  
21 fails to allege an element necessary for subject matter jurisdiction.  
22 Savage v. Glendale Union High Sch. Dist. No. 205, 343 F.3d 1036, 1039 n.1  
23 (9th Cir. 2003); see also Maya v. Centex Corp., 658 F.3d 1060, 1068 (9th  
24 Cir. 2011) ("For purposes of ruling on a motion to dismiss for want of  
25 standing, both the trial and reviewing courts must accept as true all  
26 material allegations of the complaint and must construe the complaint in  
27 favor of the complaining party.") (quoting Warth v. Seldin, 422 U.S.  
28 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)).

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

7  
 8 To survive a Rule 12(b)(6) motion to dismiss, a complaint must  
 9 contain "enough facts to state a claim to relief that is plausible on its  
 10 face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955,  
 11 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the  
 12 plaintiff pleads factual content that allows the court to draw the  
 13 reasonable inference that the defendant is liable for the misconduct  
 14 alleged." Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173  
 15 L. Ed. 2d 868 (2009). The court must accept all factual allegations as  
 16 true even if doubtful in fact. Twombly, 550 U.S. at 555-56. However,  
 17 the court does not have to accept as true mere legal conclusions. See  
 18 Iqbal, 129 S. Ct. at 1949 ("Threadbare recitals of the elements of a  
 19 cause of action, supported by mere conclusory statements, do not  
 20 suffice.").

21  
 22 A court considering a motion to dismiss must also decide, if it  
 23 grants the motion, whether to grant the plaintiff leave to amend. Even  
 24 when a request to amend is not made, "[l]eave to amend should be granted  
 25 unless the pleading could not possibly be cured by the allegation of  
 26 other facts, and should be granted more liberally to pro se plaintiffs."  
 27 Lira v. Herrera, 427 F.3d 1164, 1176 (9th Cir. 2005) (internal quotation  
 28 marks omitted). However, if amendment of the pleading would be futile,

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1 leave to amend may be denied. See Ventress v. Japan Airlines, 603 F.3d  
2 676, 680 (9th Cir. 2010).

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6 **V.**

7 **DISCUSSION**

8

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

21

22 **A. Plaintiff Lacks Standing To Bring This Preenforcement Challenge**

23

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

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

11

12 **1. Injury-in-Fact**

13

14 The first factor a court will consider in addressing a plaintiff's  
 15 standing is whether he "has suffered an 'injury in fact' that is (a)  
 16 concrete and particularized and (b) actual or imminent." Maya, 658 F.3d  
 17 at 1067. Plaintiff does not allege that he has ever violated section  
 18 25850 or been charged with a violation. Rather, Plaintiff states that  
 19 after receiving a "not so thinly veiled death threat" on September 1,  
 20 2011, he "would openly carry a loaded and functional handgun in public  
 21 for the purpose of self-defense, but he refrains from doing so because  
 22 he fears arrest, prosecution, fine, and imprisonment as he understands  
 23 it is unlawful to openly carry a handgun in California for the purpose  
 24 of self-defense." (Complaint at 6, ¶ 15).

25

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

1 conduct.<sup>3</sup> Plaintiff "must show a genuine threat of imminent  
 2 prosecution," not the "mere possibility of criminal sanctions." San  
 3 Diego Cnty. Gun Rights Comm. v. Reno, 98 F.3d 1121, 1126 (9th Cir. 1996)  
 4 (internal quotation marks omitted; emphasis in original). "In evaluating  
 5 the genuineness of a claimed threat of prosecution, [the court] look[s]  
 6 to whether the plaintiffs have articulated a 'concrete plan' to violate  
 7 the law in question, whether the prosecuting authorities have  
 8 communicated a specific warning or threat to initiate proceedings, and  
 9 the history of past prosecution or enforcement under the challenged  
 10 statute." Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1139  
 11 (9th Cir. 2000) (en banc); see also Babbitt v. United Farm Workers, 442  
 12 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979) (a plaintiff  
 13 challenging the constitutionality of a criminal statute need not "first  
 14 expose himself to actual arrest or prosecution" but must establish  
 15 Article III standing by "alleg[ing] an intention to engage in a course  
 16 of conduct arguably affected with a constitutional interest, but  
 17 proscribed by a statute," and demonstrating that "there exists a credible  
 18 threat of prosecution thereunder."). "A general intent to violate a

---

19 \_\_\_\_\_  
 20 <sup>3</sup> Article III standing jurisprudence distinguishes between  
 21 preenforcement challenges to statutes regulating speech and statutes  
 22 regulating conduct. The Supreme Court has recognized that chilling  
 23 protected speech may by itself constitute a cognizable Article III  
 24 injury because "self-censorship" of speech is "a harm that can be  
 25 realized even without an actual prosecution." Virginia v. Am.  
 26 Booksellers Ass'n, 484 U.S. 383, 393, 108 S. Ct. 636, 98 L. Ed. 2d 782  
 27 (1988). The Ninth Circuit has found, however, that where the  
 28 constitutional challenge involves a statute regulating conduct, not  
 speech, mere allegations of self-censorship are insufficient to  
 establish an injury and "the standing requirements for preenforcement  
 challenges set out in Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d  
 1134 (9th Cir. 2000), apply." Humanitarian Law Project v. U.S. Treas.  
Dep't., 578 F.3d 1133, 1138 (9th Cir. 2009); see also id. at 1143  
 ("[N]either self-censorship nor subjective chill is the functional  
 equivalent of a well-founded fear of enforcement when the statute on its  
 face does not regulate expressive activity.").

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

9  
 10 **a. Plaintiff Fails To Allege A Concrete Plan To Violate**  
 11 **Section 25850**

12  
 13 The first element of the injury-in-fact analysis for preenforcement  
 14 challenges is whether the plaintiff has articulated a "concrete plan" to  
 15 violate the contested statute. Thomas, 220 F.3d at 1139. Even liberally  
 16 construed, the Complaint fails to allege that Plaintiff has a concrete  
 17 plan to violate section 25850. The Complaint merely alleges that  
 18 Plaintiff "would openly carry a loaded and functional handgun in public  
 19 for the purpose of self-defense" but for his fear of arrest and  
 20 prosecution. (Complaint at 6, ¶ 15).<sup>4</sup> The mere assertion of a desire to  
 21 engage in a prohibited activity, particularly when the "acts necessary  
 22 to make plaintiffs' injury -- prosecution under the challenged statute --  
 23 materialize are almost entirely within plaintiffs' own control" is too  
 24 indefinite to constitute a "concrete plan." San Diego Cnty. Gun Rights

---

25  
 26 <sup>4</sup> In a Declaration submitted with his Oppositions to the Harris and  
 27 RBD Motions to Dismiss, Plaintiff similarly asserts that he "do[es] not  
 28 openly carry a loaded handgun or long gun in non-sensitive public places  
 because [he] would in all certainty be arrested, prosecuted, fined and  
 imprisoned for doing so." (Decl. of Charles Nichols, Dkt. No. 21, at  
 4).

1 Comm., 98 F.3d at 1127.

2

3 Plaintiff is not required to violate section 25850 and subject

4 himself to prosecution to establish an injury-in-fact, but must

5 articulate a concrete plan in sufficient detail to convey the timing and

6 circumstances of the anticipated action. See Babbitt, 442 U.S. at 298;

7 Thomas, 220 F.3d at 1139. In Thomas, landlords claimed that their

8 pro-marriage religious beliefs prevented them from renting housing to

9 unmarried couples and would therefore compel them to violate a law

10 banning housing discrimination on the basis of marital status. The Ninth

11 Circuit found that the landlords' general "intent" to violate the law "on

12 some uncertain day in the future," coupled with their inability even to

13 specify "when, to whom, where, or under what circumstances" they had

14 refused to rent to unmarried couples in the past, "does not rise to the

15 level of an articulated, concrete plan." Id. at 1139-40. Similarly, a

16 complaint challenging federal drug laws on the ground that they infringed

17 on a Native American church's use of cannabis, but that failed to "allege

18 exactly how, where, in what quantities, and under what circumstances

19 Plaintiffs intend[ed] to consume cannabis" and to articulate how the

20 church planned to acquire, cultivate and distribute the drug, did not

21 "describe a concrete plan to violate a federal drug law." Oklevueha

22 Native American Church of Hawai'i, Inc. v. Holder, 719 F. Supp. 2d 1217,

23 1222 (D. Hawaii 2010). Plaintiff's vague assertion that he "would"

24 openly carry a firearm does not provide any of the specificity required

25 to identify a concrete plan to violate section 25850.

26

27 **b. Plaintiff Fails To Allege That Prosecuting Authorities**

28 **Have Communicated An Intent To Prosecute Him**

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1 The second element of the injury-in-fact analysis for preenforcement  
2 challenges is whether prosecuting authorities "have communicated a  
3 specific warning or threat to initiate proceedings" against the plaintiff  
4 should he violate the contested statute. Thomas, 220 F.3d at 1139. The  
5 mere allegation of a fear of prosecution that "amounts to no more than  
6 a 'generalized grievance shared in substantially equal measure by . . .  
7 a large class of citizens'" who may also desire to violate the challenged  
8 statute "does not warrant the exercise of jurisdiction." National Rifle  
9 Assoc. of America v. Magaw, 132 F.3d 272, 294 (6th Cir. 1997) (quoting  
10 Warth, 422 U.S. at 499); see also Seegars v. Gonzales, 396 F.3d 1248,  
11 1255 (D.C. Cir. 2005) (challenge to firearm regulatory statutes failed  
12 to show "a threat of prosecution reaching the level of imminence"  
13 required to establish a preenforcement injury where plaintiffs did not  
14 allege any specific prior threats by authorities and "nothing . . .  
15 indicates any special priority placed upon preventing these parties from  
16 engaging in specified conduct") (internal quotation marks omitted;  
17 emphasis in original). However, a plaintiff may establish a "real and  
18 immediate" threat of an injury where, for example, the plaintiff has been  
19 previously charged with violating the challenged statute, see American-  
20 Arab Anti-Discrimination Committee v. Thornburgh, 970 F.2d 501, 508 (9th  
21 Cir. 1992), or has received a specific warning of intent to prosecute.  
22 See Ripplinger v. Collins, 868 F.2d 1043, 1047 (9th Cir. 1989).

23  
24 Plaintiff does not allege that he has been previously charged with  
25 violating section 25850 or has received any specific warning, directed  
26 to him, that he will be prosecuted if he openly carries a loaded firearm  
27 in public. His fear of prosecution, based on his "understanding" of  
28 California law, is no different than the "generalized grievance" of any

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

7  
 8 **c. The Attorney General’s Concession That Violations of**  
 9 **Section 25850 Are Prosecuted Is Not Dispositive**

10  
 11 The third element of the injury-in-fact analysis for preenforcement  
 12 challenges examines the “history of past prosecution or enforcement under  
 13 the challenged statute.” Thomas, 220 F.3d at 1139. An absence of past  
 14 prosecutions “undercuts [plaintiffs’] argument that they face a genuine  
 15 threat of prosecution.” San Diego Cnty. Gun Rights Comm., 98 F.3d at  
 16 1128. Here, the Attorney General concedes that “statewide, law  
 17 enforcement authorities have appropriately enforced Section 25850  
 18 . . . .” (Harris MTD at 11). While this factor weighs in favor of  
 19 finding a preenforcement injury-in-fact, it is not dispositive. See,  
 20 e.g., Seegars, 396 F.3d at 1255 (government’s prior admission that it  
 21 prosecutes all gun law violators “under normal prosecutorial standards”  
 22 is insufficient to establish an imminent preenforcement threat of  
 23 prosecution where plaintiffs alleged no prior threats of prosecution  
 24 “against them”). Consequently, because Plaintiff has failed to allege  
 25 a concrete plan to violate section 25850 or any specific communication  
 26 directed to him threatening to enforce the statute, he has stated only  
 27 a “generalized grievance” that does not constitute a preenforcement  
 28 injury-in-fact. Consequently, Plaintiff’s jurisdictional allegations

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1 fail to establish standing to bring these preenforcement claims.

2

3

4

5 **2. Causation**

6

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

24

25 **a. Attorney General Harris**

26

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

1 enforcement powers, a connection which she claims is insufficient to  
 2 "satisfy the requirement that enforcement be threatened, so as to  
 3 establish standing and an Ex Parte Young exception to the Eleventh  
 4 Amendment."<sup>5</sup> (Harris Reply at 5). The California Attorney General is  
 5 the "head of the Department of Justice" and "has charge, as attorney, of  
 6 all legal matters in which the state is interested." Cal. Gov't Code §§  
 7 12510 & 12511. The Attorney General has particularly broad  
 8 responsibility and expansive powers in the enforcement of criminal law:

9  
 10 The Attorney General has direct supervision over the district  
 11 attorneys of the several counties of the State . . . . ¶  
 12 When he deems it advisable or necessary in the public  
 13 interest, or when directed to do so by the Governor, he shall  
 14 assist any district attorney in the discharge of his duties,  
 15 and may, where he deems it necessary, take full charge of any  
 16 investigation or prosecution of violations of law of which the  
 17 superior court has jurisdiction. In this respect he has all  
 18 the powers of a district attorney, including the power to  
 19 issue or cause to be issued subpoenas or other process.

---

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

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

6  
7 The Ninth Circuit has found that where a state Attorney General may  
8 assume the role of County Prosecutor, the Attorney General has a  
9 sufficient connection to the enforcement of the state's criminal laws to  
10 be a proper defendant in suits challenging their constitutionality:

11  
12 State attorneys general are not invariably proper defendants  
13 in challenges to state criminal laws. Where an attorney  
14 general cannot direct, in a binding fashion, the prosecutorial  
15 activities of the officers who actually enforce the law or  
16 bring his own prosecution, he may not be a proper defendant.  
17 . . . However, and determinatively here . . . the [Idaho]  
18 attorney general may in effect deputize himself (or be  
19 deputized by the governor) to stand in the role of a county  
20 prosecutor, and in that role exercise the same power to  
21 enforce the statute the prosecutor would have. That power  
22 demonstrates the requisite causal connection for standing  
23 purposes. An injunction against the attorney general could  
24 redress plaintiffs' alleged injuries . . . .

25  
26 Planned Parenthood of Idaho v. Wasden, 376 F.3d 908, 919-20 (9th Cir.  
27 2004). Consequently, because the California Attorney General may stand  
28 in for a county prosecutor and "take full charge" of any prosecution, the

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

3  
4 **b. Governor Brown**

5  
6 Brown claims that he "does not have a role in enforcing section  
7 25850" and that the Governor's general duty to enforce state law is an  
8 insufficient connection to Plaintiff's alleged injuries to confer  
9 standing. (Brown MTD at 8); see also Cal. Const., Art. V, sec. 1 ("The  
10 Governor shall see that the law is faithfully executed."). It is well  
11 established that "a generalized duty to enforce state law or general  
12 supervisory power over the persons responsible for enforcing the  
13 challenged provision will not subject an official to suit." Snoeck v.  
14 Brussa, 153 F.3d 984, 986 (9th Cir. 1998); see also Los Angeles Branch  
15 NAACP v. Los Angeles Unified School Dist., 714 F.2d 946, 953 (9th Cir.  
16 1983) (governor's "general duty to enforce California law . . . does not  
17 establish the requisite connection between him and the unconstitutional  
18 acts" alleged in suit claiming de jure segregation of city school  
19 system); Shell Oil Co. v. Noel, 608 F.2d 208, 211 (1st Cir. 1979) ("The  
20 mere fact that a governor is under a general duty to enforce state laws  
21 does not make him a proper defendant in every action attacking the  
22 constitutionality of a state statute."). Additionally, "[w]here the  
23 enforcement of a statute is the responsibility of parties other than the  
24 governor . . . the governor's general executive power [to enforce laws]  
25 is insufficient to confer jurisdiction." Women's Emergency Network v.  
26 Bush, 323 F.3d 937, 949-50 (11th Cir. 2003).

27  
28 However, "no . . . special charge need be found directly in the

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1 challenged statute to meet the requisite 'some connection' so long as  
2 there is sufficient indicia of the defendant's enforcement powers found  
3 elsewhere in the laws of the state." Okpalobi v. Foster, 244 F.3d 405,  
4 419 (5th Cir. 2001). The Governor's connection to a plaintiff's injury  
5 may be sufficiently direct based on other duties the law places on him  
6 related to the challenged statute. See, e.g., Los Angeles Cnty. Bar  
7 Ass'n v. Eu, 979 F.2d 697, 704 (9th Cir. 1992) (governor proper party in  
8 suit challenging statute limiting the number of judges the governor could  
9 appoint to any county due to his "specific connection to the challenged  
10 statute"); Artichoke Joe's v. Norton, 216 F. Supp. 2d 1084, 1110-11 (E.D.  
11 Cal. 2002) (governor proper party in suit challenging statute prohibiting  
12 certain gaming machines because the governor had a specific duty under  
13 state law, "not based on any general duty to enforce state law," to  
14 negotiate and approve gaming compacts with tribes), aff'd, 353 F.3d 712  
15 (2003).

16  
17 Here, Plaintiff is suing Brown in his official capacity because  
18 "[t]he Governor has the supreme executive power in the State and is  
19 responsible for the faithful execution of the laws of the State of  
20 California." (Complaint at 3). This generalized enforcement power,  
21 however, is insufficient to establish the requisite connection between  
22 Brown and Plaintiff's alleged injury. See Young v. Hawaii, 548 F. Supp.  
23 2d 1151, 1164 (D. Hawaii 2008) (suit challenging laws prohibiting the  
24 carrying or use of firearms in certain circumstances failed to establish  
25 "required nexus" between the governor and plaintiff's injury where  
26 complaint relied solely on governor's "general oversight of State laws").  
27 Nor does the fact that Brown signed into law a bill that prohibits openly  
28 carrying an unloaded handgun in public, as Plaintiff contends in his

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1 Opposition, establish the requisite connection. (Brown Opp. at 4); see  
 2 also Cal. Penal Code § 26350 (former Assembly Bill 144). A governor is  
 3 entitled to absolute immunity for the act of signing a bill into law.  
 4 See Torres-Rivera v. Calderon-Serra, 412 F.3d 205, 213 (1st Cir. 2005)  
 5 (“[A] governor who signs into law or vetoes legislation passed by the  
 6 legislature is also entitled to absolute immunity for that act.”);  
 7 Women’s Emergency Network, 323 F.3d at 950 (“Under the doctrine of  
 8 absolute legislative immunity, a governor cannot be sued for signing a  
 9 bill into law.”) (citing Supreme Ct. of Va. v. Consumers Union of United  
 10 States, Inc., 446 U.S. 719, 731-34, 100 S. Ct. 1967, 1974-76, 64 L. Ed.  
 11 2d 641 (1980)).

12  
 13 Consequently, because Plaintiff’s sole basis for suing Brown is  
 14 based on the Governor’s general enforcement powers, Plaintiff has failed  
 15 to show that his injury is “fairly traceable” to the Governor. See,  
 16 e.g., Nat’l Audubon Soc’y, Inc. v. Davis, 307 F.3d 835, 847 (9th Cir.  
 17 2002) (California governor dismissed from challenge to law banning use  
 18 of certain traps and poisons due to lack of enforcement ability);  
 19 Confederated Tribes & Bands of Yakama Indian Nation v. Locke, 176 F.3d  
 20 476, 469-70 (9th Cir. 1999) (Washington governor improper defendant in  
 21 challenge to state lottery because governor had no involvement with  
 22 operation of lottery). Plaintiff’s claims against Governor Brown  
 23 therefore fail to satisfy the second prong of the standing analysis.

24  
 25 **c. Redondo Beach Defendants**

26  
 27 Plaintiff has failed to allege facts establishing that the RBD have  
 28 a sufficient connection to his alleged injury to establish jurisdiction.



1 The Complaint makes four specific allegations concerning the RBD. In  
 2 Paragraph Seven, Plaintiff identifies the City of Redondo Beach as a  
 3 "municipal division of the State of California" that is responsible for  
 4 setting the policies and procedures of its Police Department. (Complaint  
 5 at 3-4). In Paragraphs Eight and Nine, Plaintiff identifies the City of  
 6 Redondo Beach Police Department as a police department and Police Chief  
 7 Joseph Leonardi as the person with "final departmental authority in all  
 8 matters of policy, operation and discipline." (Id. at 4). The only  
 9 other specific reference to the RBD is in Paragraph Forty-Eight, in which  
 10 Plaintiff claims that the Redondo Beach Municipal Code "imposes a fine  
 11 for illegally hunting or discharging a bullet ' . . . in, over, across,  
 12 along, or upon any public street, sidewalk, lane, alley, or public place  
 13 in the City.'" (Id. at 15) (citing Redondo Beach Municipal Code §§ 4-  
 14 25.01, 1-2.03).<sup>6</sup> Nowhere in the Complaint does Plaintiff allege that the  
 15 RBD actually enforce section 25850 or that the City has a policy that  
 16 improperly applies or exceeds the state statute's provisions.

17  
 18 Plaintiff's injury, as currently alleged, is not traceable to the  
 19 RBD. Section 25850 is a state law, not a municipal ordinance. Indeed,  
 20 the California Legislature has "chosen to preempt 'discrete areas of gun  
 21 regulation,'" including "public handgun possession." Fiscal v. City and

---

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

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1 County of San Francisco, 158 Cal. App. 4th 895, 905, 909, 70 Cal. Rptr.  
 2 3d 324 (2008). Under California law, "where the Legislature has  
 3 manifested an intention, expressly or by implication, wholly to occupy  
 4 the field . . . municipal power to regulate in that area is lost." Id.  
 5 at 904 (alterations and internal quotation marks omitted). Section 4-  
 6 25.01, which Plaintiff erroneously cites as a gun control ordinance, is  
 7 in fact in the chapter of the Municipal Code entitled "Ball Games and  
 8 Hunting" and does not encroach on the field occupied by section 25850.  
 9 See <http://www.qcode.us/codes/redondobeach/>. The ordinance regulates  
 10 where certain games may be played in the City and prohibits hunting in  
 11 public places. Id. at § 4.25-01. It says nothing about openly carrying  
 12 a loaded firearm in public for self-defense and could not because that  
 13 area of gun regulation has been pre-empted by the state.

14  
 15 At most, Plaintiff's claim against the RBD appears to be based on  
 16 the fact that these defendants enforce state law, including section  
 17 25850. (See, e.g., RBD Opp. at 5) ("As Redondo Beach Defendants are well  
 18 aware, it has been the 'official policy or custom' of the Defendants to  
 19 enforce PC 12031(e) since at least August 7, 2010."). However, "mere  
 20 enforcement of a state statute is not a sufficient basis for imposing  
 21 § 1983 municipal liability." Wong v. City & County of Honolulu, 333 F.  
 22 Supp. 2d 942, 951 (D. Hawaii 2004); see also Surplus Store and Exchange,  
 23 Inc. v. City of Delphi, 928 F.2d 788, 791 n.4 (7th Cir. 1991) (refusing  
 24 to construe state law as a municipal policy in section 1983 claim on the  
 25 ground that doing so "would allow municipalities to be nothing more than  
 26 convenient receptacles of liability for violations caused entirely by  
 27 state actors -- here, the [state] legislature"). Consequently,  
 28 Plaintiff's claims do not establish that the RBD have any connection to

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

3  
4

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

7

8 The third factor of the standing analysis is whether "it is likely,  
9 as opposed to merely speculative, that the injury will be redressed by  
10 a favorable decision." Maya, 658 F.3d at 1067. If Plaintiff is able to  
11 amend his Complaint to allege an injury-in-fact, it is likely that a  
12 favorable decision against the Attorney General would redress Plaintiff's  
13 injury due to her direct enforcement powers over California criminal law.  
14 Planned Parenthood of Idaho, 376 F.3d at 919-20. However, as discussed  
15 above, because the Governor is not directly responsible for enforcing  
16 section 25850, a favorable decision against the Governor is not likely  
17 to redress Plaintiff's injury. Furthermore, Plaintiff's injury, as  
18 currently alleged, would not be redressed by a favorable decision against  
19 the RBD. Even if the Court could construe enforcement of state law by  
20 the RBD as a municipal "policy," enjoining the RBD from implementing that  
21 "policy" would not provide any real relief if the provisions of section  
22 25850 remain intact. It is possible, however, that Plaintiff may be able  
23 to amend his claims against the RBD to identify a municipal policy that  
24 exceeds or unconstitutionally applies the provisions of section 25850.  
25 If Plaintiff is able to articulate facts establishing that the RBD do not  
26 simply enforce state law, but do so in a particular manner that violates  
27 the Constitution, Plaintiff may state a claim.

28

1 In sum, Plaintiff has failed to establish a particularized  
 2 preenforcement injury-in-fact and therefore lacks standing to bring his  
 3 claims as currently alleged against any of the named Defendants.  
 4 However, assuming that Plaintiff will be able to amend his Complaint to  
 5 allege an injury-in-fact, the Attorney General would appear to be a  
 6 proper defendant. Therefore, it is recommended that Plaintiff's claims  
 7 against the Attorney General be DISMISSED, but with leave to amend. Even  
 8 assuming that Plaintiff can allege an injury-in-fact, however, the  
 9 Governor does not have a sufficiently direct connection to the  
 10 enforcement of section 25850 such that a favorable decision against him  
 11 would be likely to redress Plaintiff's injury. Therefore, because  
 12 amendment of the Complaint would be futile as to the Governor, it is  
 13 recommended that Plaintiff's claims against the Governor be DISMISSED  
 14 without leave to amend. Finally, if Plaintiff is able to allege facts  
 15 establishing that the RBD do not merely enforce state law but apply  
 16 section 25850 in a particular manner that violates the Constitution, the  
 17 RBD would appear to have a sufficient connection to Plaintiff's injury  
 18 and a favorable decision against them would be likely to redress  
 19 Plaintiff's injury. Therefore, it is recommended that Plaintiff's claims  
 20 against the RBD be DISMISSED, but with leave to amend.<sup>7</sup>

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22 **B. Plaintiff's Claims Are Not Ripe For Adjudication**

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

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

16  
17 Furthermore, this case is not ripe for review for prudential reasons  
18 as well. To evaluate the "prudential component of ripeness," a court  
19 considers "the fitness of the issues for judicial decision and the  
20 hardship to the parties of withholding court consideration." Wolfson v.  
21 Brammer, 616 F.3d 1045, 1060 (9th Cir. 2010) (internal quotation marks  
22 omitted). A claim is "fit for decision if the issues raised are  
23 primarily legal, do not require further factual development, and the  
24 challenged action is final." Id. (internal quotation marks omitted).  
25 Although most of Plaintiff's claims are facial challenges, Claims Three  
26 and Four purport to challenge section 25850 "as applied." However, the  
27 Complaint is devoid of factual allegations describing how the law is  
28 applied or explaining what Plaintiff's specific objections are to the

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

11

12 **C. The Eleventh Amendment Bars Suit Against The Governor**

13

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

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27 <sup>8</sup> The Eleventh Amendment does not prohibit suit against political  
 28 subdivisions of states, such as counties and municipalities, and as  
 such, does not apply to the claims against the Redondo Beach Defendants.  
 See Alaska v. EEOC, 564 F.3d 1052, 1085-86 (9th Cir. 2009).

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

11  
 12 While state law determines "whether and under what circumstances a  
 13 particular defendant has any connection with the enforcement of the law  
 14 of that state . . . it is a question of federal jurisdictional law  
 15 whether the connection is sufficiently intimate to meet the requirements  
 16 of Ex Parte Young." Shell Oil Company, 608 F.2d at 211. As discussed  
 17 above, the Ninth Circuit has found that where, as in California, a state  
 18 attorney general may "stand in the role of a county prosecutor, and in  
 19 that role exercise the same power to enforce the statute the prosecutor  
 20 would have," a sufficient connection is established for the Ex Parte  
 21 Young exception to apply. Planned Parenthood of Idaho, 376 F.3d at 919-  
 22 20. Consequently, the Eleventh Amendment does not prohibit suit against  
 23 Harris. However, where, as here, the Governor does not have "the  
 24 requisite enforcement connection" to a challenged state law, the Eleventh  
 25 Amendment prohibits suit against him. Nat'l Audubon Soc'y, Inc., 307  
 26 F.3d at 847. Consequently, Plaintiff's claims against Brown are barred  
 27 by the Eleventh Amendment.

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

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8 In addition to failing to establish jurisdiction over the Redondo  
9 Beach Defendants, Plaintiff has also failed to state a claim against the  
10 RBD under Rule 12(b)(6). When an individual sues a local government for  
11 violation of his constitutional rights, the municipality is liable only  
12 if the individual can establish that the local government "had a  
13 deliberate policy, custom, or practice that was the 'moving force' behind  
14 the constitutional violation he suffered." Galen v. County of Los  
15 Angeles, 477 F.3d 652, 667 (9th Cir. 2007) (quoting Monell v. Dep't of  
16 Soc. Servs., 436 U.S. 658, 694-95, 98 S. Ct. 2018, 56 L. Ed. 2d 611  
17 (1978)). The Complaint does not identify any specific City policy, as  
18 required by Monell, that caused Plaintiff's alleged injuries.  
19 Plaintiff's argument that the RBD have a "policy" of enforcing state law  
20 is an insufficient ground for municipal liability under section 1983.  
21 (See RBD Opp. at 5); Wong, 333 F. Supp. 2d at 951. However, it is  
22 possible that Plaintiff could amend his complaint to state such a claim.

23

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



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

16  
 17 Finally, the Complaint is completely devoid of any allegations at  
 18 all involving actions taken by Police Chief Leonardi. The Complaint  
 19 merely observes that Leonardi is the Chief of Police for the City of  
 20 Redondo Beach and is "the final departmental authority in all matters of  
 21 policy, operation and discipline." (Complaint at 4). To demonstrate a  
 22 civil rights violation, a plaintiff must show that the defendant's  
 23 conduct caused a deprivation of the plaintiff's constitutional or  
 24 statutory rights. See 42 U.S.C. § 1983; Starr v. Baca, 652 F.3d 1202,  
 25 1205-06 (9th Cir. 2011). Where the defendant holds a supervisory  
 26 position, the plaintiff must still show the defendant's "personal  
 27 participation in the alleged rights deprivation" because there is "no  
 28 respondeat superior liability under section 1983." Jones v. Williams,

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1 297 F.3d 930, 934 (9th Cir. 2002). A supervisor's objectionable  
 2 participation may properly include his "own culpable action or inaction  
 3 in the training, supervision, or control of his subordinates, his  
 4 acquiescence in the constitutional deprivations of which the complaint  
 5 is made, or conduct that showed a reckless or callous indifference to the  
 6 rights of others." Starr, 652 F.3d at 1205-06 (internal quotation marks  
 7 omitted).

8  
 9 Plaintiff alleges that Leonardi is responsible for setting and  
 10 implementing the City of Redondo Beach Police Department's policies, but  
 11 does not indicate how his actions or omissions caused Plaintiff harm.  
 12 Furthermore, Plaintiff's claim against Leonardi appears to be based  
 13 solely on the fact that Leonardi and the Police Department have a  
 14 "policy" of enforcing state law. This fails to state a claim because a  
 15 municipality's enforcement of a state law is not a ground for liability  
 16 under section 1983. Wong, 333 F. Supp. 2d at 951.

17  
 18 Consequently, it is recommended that the claims against the RBD be  
 19 dismissed under Rule 12(b)(6) for the additional reason that they fail  
 20 to state a claim. Because it is at least theoretically possible that  
 21 Plaintiff may be able to amend his claims against the City of Redondo  
 22 Beach to identify an objectionable municipal policy and against Police  
 23 Chief Leonardi to show his personal participation in causing Plaintiff's  
 24 injury, it is recommended that the claims against these two Defendants  
 25 be dismissed with leave to amend. However, because municipal departments  
 26 are improper defendants in section 1983 suits, amendment of Plaintiff's  
 27 claims against the City of Redondo Beach Police Department would be  
 28 futile. Therefore, it is recommended that Plaintiff's claims against the

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1 Police Department be dismissed without leave to amend.

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

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8 In his Seventh Claim for Relief, Plaintiff contends that section  
9 25850 violates the California Constitution, which provides that "[all  
10 people are by nature free and independent and have inalienable rights.  
11 Among these are enjoying and defending life and liberty, acquiring,  
12 possessing and protecting property, and pursuing and obtaining safety,  
13 happiness, and privacy." (Complaint at 23); see also Cal. Const. Art.  
14 I, § I. However, it is well-settled that the "Eleventh Amendment bars  
15 a suit against state officials when the state is the real, substantial  
16 party in interest . . . ." Pennhurst State School & Hosp. v. Halderman,  
17 465 U.S. 89, 101-02, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984).  
18 Consequently, pursuant to the Eleventh Amendment, a federal court may not  
19 grant relief "in a suit against state officials on the basis of state  
20 law." Id. at 106; see also Han v. United States Dept. of Justice, 45  
21 F.3d 333, 339 (9th Cir. 1995) ("We are barred by the Eleventh Amendment  
22 from deciding claims against state officials based solely on state  
23 law."). Nor may a federal court exercise pendent jurisdiction over such  
24 a claim. Pennhurst, 465 U.S. at 89. at 120-21. Consequently, it is  
25 recommended that Plaintiff's Seventh Claim for relief be dismissed  
26 without leave to amend.

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**RECOMMENDATION**

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

DATED: April 5, 2012

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 /s/  
 SUZANNE H. SEGAL  
 UNITED STATES MAGISTRATE JUDGE

**NOTICE**

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

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

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