No. 09-16852

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES ROTHERY, Esq. and ANDREA HOFFMAN

Appellants/Plaintiffs,

vs.

Former Sheriff LOU BLANAS; SHERIFF JOHN MCGINNIS; Detective TIM SHEEHAN; SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, an independent branch of government of the COUNTY OF SACRAMENTO; COUNTY OF SACRAMENTO; and STATE OF CALIFORNIA ATTORNEY GENERAL KAMALA D. HARRIS

Appellees/Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 2:08-cv-02064 JAM KJM

APPELLANTS' REPLY BRIEF

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INTRODUCTION

"All animals are equal, but some animals are more equal than others." *Animal Farm*, George Orwell. The Bill of Rights has a specific purpose - to prevent the state majority from taking rights from the state minority, and to ensure that everyone has their core fundamental rights protected as they travel from state to state.

The State and the County refuse to recognize fundamental rights protected by the Second Amendment. The County argues as though the case of *Mehl v. Blanas* is binding precedent. Regardless of the outcome of *Mehl* filed well before *Heller*, history has proven the core fundamental right to keep and bear arms proffered by Appellants' attorneys in *Mehl* was correctly presented to the Ninth Circuit. Following three opinions from the highest court regarding the Second Amendment, Appellee defendants keep proposing pre-*Heller* arguments, especially the County.

Silveira v. Lockyer, 312 F.3d 1052, 1090 (9th Cir.) (Reinhardt, J), rehearing en banc denied, 328 F.3d 567 (9th Cir. 2003)(six dissents) cert denied December 1st, 2003) was an action filed in 2000 prior to *District of Columbia v. Heller*, 554 U.S. 570 (2008)(Hereinafter "*Heller*") challenging not only the State's unconstitutional gun control laws, but also a good faith argument for a change in the Ninth's Circuit erroneous jurisprudence on the Second Amendment. In *Silveira*, appellants prevailed on the Equal Protection argument. On July 3rd, 2003, appellants filed a Petition for Writ of Certiorari. After requesting a response from State Appellee, the United States Supreme Court denied certiorari on December 1, 2003.

Later, in *Nordyke v. King*, 364 F.3d 1025 (9th Cir. 2004), Circuit Judge Kozinski had this to say about *Silveira*:

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

Because "the call misfired", and in a race to the United States Supreme Court, *Mehl v. Blanas* was filed in 2003 challenging the Ninth's Circuit clearly erroneous jurisprudence on the Second Amendment as set forth in *Silveira v. Lockyer*.

Mehl v. Blanas was decided on the issue of standing (e.g. failure to exhaust administrative remedies, etc.); not the core Second Amendment for which the case was brought. The lower court agreed on this point.

To chill Second Amendment litigation, the County continuously seeks Rule 11 sanctions against Appellants attorneys. In denying the County's Rule 11 motion, the District Court stated:

> Here, Plaintiffs and their attorneys did not act in an unreasonable, frivolous, meritless or vexatious manner. The *Mehl* case was dismissed for a lack of standing. In *Mehl*, the Court did not find that the underlying claim regarding the issuance of CCWs lacked merit, but rather dismissed the case for lack of standing based on factors that were personal to the individual plaintiffs in the that case.

CR 63, ER 6, lines 11-18.

While *Mehl* was pending on appeal, *District of Columbia v. Heller*, 554 U.S.

570 (2008) was published where the Supreme Court held that the Second Amendment protects an individual's right to possess firearms and use firearms for "immediate self-defense", unrelated to any militia context.

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government-even the Third Branch of Government-the power to decide on a case-by-case basis whether the right is really worth insisting upon.
>
> A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an "interest-balancing" approach to the prohibition of a peaceful neo-Nazi march through Skokie. See *National Socialist Party of America v. Skokie*, 432 U. S. 43 (1977) (per curiam). The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. Like the First, it is the very product of an interest-balancing by the people-which Justice Breyer would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.
>
> Justice Breyer chides us for leaving so many applications of the right to keep and bear arms in doubt, and for not providing extensive historical justification for those regulations of the right that we describe as permissible. See post, at 42-43. But since this case represents this Court's first in-depth examination of the Second Amendment , one should not expect it to clarify the entire field, any more than Reynolds v. United States, 98 U. S. 145 (1879) , our first in-depth Free Exercise Clause case, left that area in a state of utter certainty. And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.
>
> In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against

> rendering any lawful firearm in the home operable for the purpose of immediate self-defense. Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home.
>
> But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.

District of Columbia v. Heller, 554 U.S. 570, 683 (2008)

After *Heller*, and while *Mehl* was still pending before the Ninth Circuit, Plaintiffs James Rothery and Andrea Hoffman filed the now operative First Amended Complaint ("FAC") on May 5, 2009, which is the core record in this case. (CR 24, ER65).

In dismissing Appellants James Rothery and Andrea Hoffman's case, the District Court relied heavily upon *Mehl v. Blanas*, a case decided on the issue of standing; not the core Second Amendment and Equal Protection issues. See CR 45 ER10, 15; CR 41, ER24, 33-34.

While Appellants James Rothery and Andrea Hoffman's case was pending appeal, the Supreme Court issued another landmark Second Amendment ruling in *McDonald v. Chicago*, 561 U.S. 742 (2010). The Supreme Court held that the right of an individual to "keep and bear arms" protected by the Second Amendment is incorporated by the Due Process Clause of the Fourteenth Amendment and applies to the states.

The petitioners in *McDonald v. Chicago*, 561 U.S. 742 (2010), also argued that the Second Amendment right is one of the "privileges or immunities of citizens of the United States." However, over the objection of Justice Thomas, the majority of justices applied the narrow incorporation jurisprudence utilized for many decades; the Court analyzed the question of whether the right to keep and bear arms is protected against state infringement under the Fourteenth Amendment's Due Process Clause, and not the Privileges and Immunities clause. In Justice Thomas' separate opinion, he argued that the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause.

In the backdrop of *McDonald*, and in addition to this case, there were several other Second Amendment cases winding their way through the Ninth Circuit (e.g. *Jackson v. City and County of San Francisco*, 576 U. S. ____ (2015) and *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016).

In *Jackson v. City and County of San Francisco*, 576 U. S. ____ (2015), Justice Thomas, with whom Justice Scalia joined, published a dissent from the denial of certiorari. In Justice Thomas' scathing dissent addressing the Ninth Circuit, he states:

> "Self-defense is a basic right" and "the central component" of the Second Amendment's guarantee of an individual's right to keep and bear arms. *McDonald v. Chicago*, 561 U. S. 742, 767 (2010) (emphasis deleted). Less than a decade ago, we explained that an ordinance requiring firearms in the home to be kept inoperable, without an exception for self-defense, conflicted with the Second Amendment because it "ma[de] it impossible for citizens to use [their firearms] for the core lawful purpose of self-defense." *District of Columbia v.*

> *Heller*, 554 U. S. 570, 630 (2008). Despite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts, including the ones here, have failed to protect it. Because Second Amendment rights are no less protected by our Constitution than other rights enumerated in that document, I would have granted this petition. [emphasis added]

Thereafter, another Second Amendment case was working its way to the Supreme Court, and again, certiorari was denied, but not without some of the justices showing extreme displeasure with clear and unambiguous precedent being ignored by the lower courts.

In *Friedman v. City of Highland Park*, 577 U. S. ____ (2015), Justice Thomas, with whom Justice Scalia published another dissent from the denial of certiorari.

> Despite these holdings, several Courts of Appeals- including the Court of Appeals for the Seventh Circuit in the decision below-have upheld categorical bans on firearms that millions of Americans commonly own for lawful purposes. See 784 F. 3d 406, 410-412 (2015). Because noncompliance with our Second Amendment precedents warrants this Court's attention as much as any of our precedents, I would grant certiorari in this case.
>
> ***
>
> The Court's refusal to review a decision that flouts two of our Second Amendment precedents stands in marked contrast to the Court's willingness to summarily reverse courts that disregard our other constitutional decisions. E.g., *Maryland v. Kulbicki*, ante, at 1 (per curiam) (summarily reversing because the court below applied *Strickland v. Washington*, 466 U. S. 668 (1984), "in name only"); *Grady v. North Carolina*, 575 U. S. ___ (2015) (per curiam) (summarily reversing a judgment inconsistent with this Court's recent Fourth Amendment precedents); *Martinez v. Illinois*, 572 U. S. ___, ___ (2014) (per curiam) (slip op., at 10) (summarily reversing judgment that rested on an "understandable" double jeopardy holding that nonetheless "r[an] directly counter to our precedents"). There is no basis for a different result when our Second Amendment precedents

> are at stake. I would grant certiorari to prevent the Seventh Circuit from relegating the Second Amendment to a second-class right. [emphasis added]

Heeding the call to action in Justices Thomas and Scalia's scathing and highly unusual dissents in *Jackson* and *Friedman*, the Supreme Court reversed course and summarily, without argument, issued a *per curiam* decision in the case of *Jaime Caetano v. Massachusetts*, 577 U. S. ____ (2016). In the decision, it was the opinion of the Supreme Court decided that the lower court's attempt to reduce the Second Amendment to a "second-class right" was "bordering on the frivolous."

> This reasoning defies our decision in *Heller*, which rejected as "bordering on the frivolous" the argument "that only those arms in existence in the 18th century are protected by the Second Amendment." 554 U. S., at 582. The decision below also does a grave disservice to vulnerable individuals like Caetano who must defend themselves because the State will not.
>
> ***
>
> The state court repeatedly framed the question before it as whether a particular weapon was "'in common use at the time' of enactment of the Second Amendment." 470 Mass., at 781, 26 N. E. 3d, at 693; see also id., at 779, 780, 781, 26 N. E. 3d, at 692, 693, 694. In *Heller*, we emphatically rejected such a formulation. We found the argument "that only those arms in existence in the 18th century are protected by the Second Amendment" not merely wrong, but "bordering on the frivolous." 554 U. S., at 582. Instead, we held that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, *even those that were not in existence at the time of the founding*." *Ibid.* (emphasis added). It is hard to imagine language speaking more directly to the point. Yet the Supreme Judicial Court did not so much as mention it. [emphasis added]

Simply put, the government, consisting of Appellees and the Ninth Circuit as a whole, simply ignore the right to keep and bear arms and clear Supreme Court precedent and the warnings from its justices.

As to the issue of mootness, this is an action for both equitable relief and monetary damages. Appellants applied for CCWs, paid the application fee, and want their CCWs based upon their application and fees they already submitted. No one from any of the defendants contacted plaintiffs and provided them with their CCW permit and Honorary Deputy Sheriff's Badge and Credentials. Also, when do they get to attend meetings with the Sheriff's Posse and Aerosquadron?

Besides, this appeal pertains to open carry as well as concealed, and this circuit says the only possible right under the Second Amendment is open carry, not concealed.

ARGUMENT

I. SECOND CAUSE OF ACTION: THE EQUAL PROTECTION CLAUSE PROHIBITS TWO SEPARATE LICENSING SCHEMES FOR THE CARRYING OF A WEAPON, WHETHER CONCEALED OR OPENLY. [This section is in reply to **California's Argument I** and **County Argument B.**]

What separates this action from all other CCW cases is that 1) "rights" and "privileges" to carry a concealed weapon are sold as political bargaining chips, and 2) honorably retired peace officers obtained their CCW through a collective bargaining chip with the legislature. However, since the Constitution presumes that "the People" are reasonable, and that government is unreasonable, it is *per se* unreasonable to grant campaign contributors and retired government officials rights which are not universally provided to "the People". When a state statute burdens a fundamental right, that statute receives heightened scrutiny under the Fourteenth Amendment's Equal Protection Clause. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

The Supreme Court has held that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding," *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008), and that this "Second Amendment right is fully applicable to the States," *McDonald v. Chicago*, 561 U.S. 742, 750 (2010). However, in this circuit, and with the help of the State of California, the Second Amendment is treated as a second-class citizen.

This Circuit is no more bound to *Peruta*, than it is to *Presser v. Illinois*, 116 U.S. 252 (1886), *United States v. Cruikshank*, 92 U.S. 542 (1876), and *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873), all of which rest on a principle that is now thoroughly discredited. See *Jaime Caetano v. Massachusetts*, 577 U. S. ____ (2016)

California law severely restricts concealed carry, and has an outright ban as to open carry for all practical purposes. As a general rule, concealed carry is not allowed regardless of whether the weapon is loaded. See Penal Code § 25400. But there are certain exceptions for the privileged class. Concealed carry is acceptable with a proper discretionary permit. *Id.* §§ 26150, 26155. And even without a permit, it is sanctioned for particular groups, see, e.g., id. § 25450 (peace officers); id. § 25455 (retired peace officers); id.§ 25620 (military personnel); id. § 25650 (retired federal officers).

The retired peace officer exemption grants a blanket exemption to a broadly defined group of retired "peace officers," none of whom have continuing authority

to engage in "peace officer" activities. They are retired, they have returned to the ranks of private citizens, and they are no longer authorized to engage in law enforcement activities. Accordingly, allowing retired peace officers to carry weapons concealed is at odds with the purpose of the Act. The exemption is therefore unconstitutional because the classification is not rationally related to achieve the underlying legislative goal – which is to eliminate guns, especially in the public.

The fact that a small group of people have the ability to exercise their right to bear arms starts the inquiry under strict scrutiny. Clearly, the California scheme creates a privileged class. Because the Second Amendment "confer[s] an individual right to keep and bear arms," this court must assess whether the California scheme favors a group of individuals in the free exercise of their constitutional rights. *Heller*, 554 U.S. at 595. The question is not whether the California scheme allows some people to bear arms outside the home in some places at some times; instead, the question is whether it allows the typical responsible, law- abiding citizen to bear arms in public for the lawful purpose of self-defense. The answer to the latter question is a resounding "no."

Then the question is, applying strict scrutiny, why should certain groups be granted more rights under the Second Amendment.

This case is a challenge only to a single exemption to what is otherwise a complex statutory scheme providing carve-outs for active and retired peace officers set forth in the California Penal Code. This “carve-out” results in a massive transfer

of a fundamental right from the People in general, and Appellants in particular, to active and honorably retired California peace officers in several very specific ways: 1) allows exempts the privileged class to purchase and sell off-roster handguns (i.e. Unsafe Handguns), 2) allows exempts the privileged class to possess and purchase standard size handgun and rifle magazines which exceed 10 rounds (i.e. Large Capacity Magazines), 3) exempts the privileged class from a 10-day waiting period (affirmed in *Silverster v. Harris*, 9th Cirt. No. 14-16840 (December 14, 2016), 4) exempts the privileged class on the number of handguns which can be purchased in a month, 5) exempts the privileged class from the Assault Weapons Ban, including grandfather clauses, and of course 6) the privileged class is granted a lifetime CCW upon retirement without all the fees, red tape, and hurdles forced upon the People in essentially begging to exercise their fundamental right to keep and bear arms.

California law provides specified exceptions from the general prohibition against public carry, these do little to protect an individual's right to bear arms in public for the lawful purpose of self-defense. The exemptions for particular groups of law enforcement officers, especially retired officers, do not acknowledge nor accept the typical responsible, law-abiding citizen's the right to bear arms for self defense while away from home. And the exceptions for "making or attempting to make a lawful arrest" or for situations of "immediate, grave danger" (to the extent that they are not entirely illusory-for how would one obtain a gun for use in public when suddenly faced with such a circumstance?) do not cover the scope of the right, which includes the right to carry in case of public confrontation, not just after a

confrontation has occurred. *Heller,* 554 U.S. at 584 (defining bear arms to mean carrying a weapon "for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." It is as though Sacramento County banned all political speech, but exempted from this restriction particular people (like current or former police offiders), particular places (like private property), and particular situations (like the week before an election). Although these exceptions might preserve small pockets of freedom, they would do little to prevent destruction of the right to free speech as a whole. As the Court has said: "The Second Amendment is no different." *Heller*, 554 U.S. at 635. It too is destroyed when exercise of the right is limited to a few people, in a few places, at a few times.

A. The Separate CCW Licensing Scheme for Retired Peace Officers Violates the Equal Protection Clause.

When it comes to self-defense, providing retired peace officers with superior rights to that of ordinary law-abiding citizens does not further an important or compelling state interest. Appellants are entitled to the same fees, application process, rights, privileges and credentials that retired peace officers receive.

Appellants would concede that California could enforce a law requiring a background check, marksmanship test, and safety course – but the issuance of the license itself would be no different than that of a drivers license being issued nor any more burdensome than how a retired officer receives a CCW. The paperwork, procedures and fees must be the same for all!

For example, the government always states the notion that somehow law enforcement officers are superiorly trained and vetted entitling them to greater access to commonly used firearms and greater magazine capacity. According to this logic, a 21 year old police officer who never owned or fired a gun, but attends an 8 week POST academy, is more qualified than all other gun owners, including military veterans, or the training Appellant Rothery received in the United States Marines.

Or another example, a peace officer of Modoc County retires in San Diego, the government would have the court believe that there is a villain around every corner in San Diego just waiting to strike whereby the retired peace officer thereby creating the fictional need for a firearm. See FAC, ER135 ¶s 740-742, ER141.

> 799. There is absolutely no evidence or research that supports any rational basis why ALL retired law enforcement officers are at more risk of harm that ALL non-law enforcement affiliated citizens.
> 800. In fact, retired law enforcement officers, or those associated with the criminal justice system, are less likely to be victims of crime, not more likely.
> 801. However, law enforcement officers are at a greater risk of committing suicide with firearms than are non law enforcement citizens.

ER141.

Since a fundamental right is involved, the government is tasked to not only offer some theoretical reason why an officer is more deserving of self-protection than the People, they have to prove it – but they cannot. At the pleading stage, the averments in the operative complaint are taken as true, and interpreted in a light most favorable to the Appellants, not the government.

B. County Appellees have a pay-to-play system for issuing CCWs, Honorary Deputy Commissions, and membership in the Posse and Aerosquadron.

The best evidence of how important a right is to see who actually is allowed to excercise the right, and what they do to obtain it. In this case, it is retired law enforcement and the wealthy that are allowed to exercise their Second Amendment rights. The County submits as part of the Supplemental Excerpt of Record the Declarations of Fred Mason and Lou Blanas in the case of *Mehl v. Blanas* (SER 000004-00006, 000069-000078) and a Complaint in the case of *Barnsdale v. Polete* (SER 000008-000064), which was a union election fraud case. Not only are these documents inadmissible at the pleading stage, they are completely irrelevant.

Blanas states he issued 229 CCWs to individuals who never contributed, but never denies that he personally knew them. Furthermore, of that 229, Blanas never identifies the "good cause" facts relied upon. Also note that all of Blanas' friends and contributors who signed declarations and purportedly asked for a CCW never submitted an application.

From the 229 individuals issued a permit who purportedly did not directly contribute to Blanas, 228 of them can be accounted for through their connections to the Sheriff's Department. The only anomaly on that list Roland Lewis at SER 000073, 27. Once this matter proceeds to a trial on the merits, then the court will also know that the "good cause" statement in Roland Lewis' application consisted of two words, **"self defense"**, and this application was summarily approved by Blanas.

Besides Blanas not being very credible, the evidence on this appeal must be

viewed most favorably to the plaintiffs/appellants. As the Court will note, Blanas emphatically states at paragraph 4 of his declaration that he "… had never heard the names of David Mehl or Lok Lau …" However, with regard to every other person who has in fact received a CCW annotated on his "List of 'Non-Contributors' CCW Permits", he intentionally avoids stating whether he "had never heard the names" or if he knows their associates. As the Court will also note, he avoids stating whether any of the individuals received Honorary Deputy Sheriff's Badges and Commissions, or whether they are associated with the Posse or Aero-Squadron. This was no accident.

The "List of 'Non-Contributors' CCW Permits" is nothing but a list of friends, friends of campaign contributors, and associates of contributors (e.g. 41. Steve Raptakis at SER 000073 is the brother of John Raptakis at ER109 commencing at paragraph 498. Jullie Rollofson at SER 000074 #45 is the daughter of campaign contributor Dr. Rollofson identified at ER90, paragraphs 256-259). The three Smiths who all applied for CCWs at the same time as noted in items 52, 53, and 54 in SER 000074 are all related.

At SER 000074, item 60, Pano Stathos may not have contributed directly, but that is not to say payments for the CCW were not made on his behalf. Pano has a brother Frank Stathos (ER113 ¶s 554-557), and together they have business interests in and with 1) AKT Development Corporation, 2) AKT Investments, Inc., 3) Metro Properties and 4) Angelo Tsakopoulos. These four were Blanas' largest contributors. ER73, paragraphs 67-71, ER113, paragraphs 554-557.

SER 000075, item 10, Michael Hisaw is alleged by Blanas to not have contributed, but Hisaw's campaign contributions were made through his business associate Kermit Schayltz (who was also issued a CCW) and their business, Lucky Derby Casino.

To show the lack of candor on the part of Blanas, one only need review the "List of 'Non-Contributors' CCW Permits" and see the name Edwin Gerber missing. Gerber did not directly donate to Blanas either; however, Gerber's company, Energetic Painting and Drywall, Inc. sure did! But then again, to do so Blanas would have to admit that the FBI was investigating Blanas' issuance of a CCW to Gerber without a written application (ER68, 21), and the fact that Gerber bought Blanas a house in Reno, and flies him to Las Vegas on a private plane ER35, 69, 79, paragraphs 130-133.

Blanas identifies a department contract attorney, attorney Bart E. Hightower as a person who never gave him money. However not only was Hightower issued a CCW and a Deputy Sheriff's Commission on or about 9/27/2005, the law firm he was employed by at the time also happened to be the same law firm (Porter, Scott, Weiberg & Delehant) contracted by the Sheriff's Department. In pay-to-play, Porter, Scott, Weiberg & Delehant paid Blanas handsomely in the form of contributions. ER79 ¶s 136-139.

Had County Appellees presented the entire court record in the *Mehl* case, every single name mentioned in Blanas' "List of 'Non-Contributors' CCW Permits" is linked to a campaign contributor, except Rowland Lewis.

Furthermore, the County Appellees ignore the equally important cause of action regarding Honorary Deputy Sheriff's Commissions whereby the Honorary Deputy Sheriff is given the same wallet badge as is given to full time deputy sheriffs with a signed written credential issued by the Defendant Sheriff himself. Plaintiff Andrea Hoffman included a request for this credential with her CCW application as there are no forms available or instructions on how to obtain one, although all campaign contributors receive them. Her CCW denial letter was silent as to her badge, so she included that in her appeal, and no response was ever given – just silence – but then again, silence can be an admission.

II. FOURTH CAUSE OF ACTION: THE SECOND AMENDMENT PROTECTS THE RIGHT TO CARRY FIREARMS IN PUBLIC, WHETHER CONCEALED OR OPENLY, AND THE STATE MAY ONLY REGULATE THE FORM OF CARRY, BUT NOT OUTRIGHT PROHIBIT IT [This section is a reply to **California's Argument II** and **County Argument A.**]

California's regulatory scheme addresses two classifications of bearing arms: open and concealed carry. Under California law, open carry is prohibited. See Cal. Penal Code §§ 25850, 26350. Because California law has no permitting provision for open carry, cf. id. §§ 26150, 26155 (providing licensing only for concealed carry), it is illegal in virtually all circumstances.

The Supreme Court has long insisted that there is "no principled basis on which to create a hierarchy of constitutional values." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982). *McDonald* considered and rejected the view that the Second Amendment was somehow "a second-class right." 561 U.S. at 780 (plurality opinion). The

Supreme Court insisted that the right protected by the Second Amendment, like the other guarantees that the Framers enshrined in the first ten amendments, is "among those fundamental rights necessary to our system of ordered liberty." *Id.* at 778.

Since *McDonald*, the Ninth Circuit has acted in contravention to the Court's directions, upholding limitations on Second-Amendment conduct that would be unimaginable in any other context. It is well-settled that "[w]hen an opinion issues for the Court," lower courts are bound by "not only the result but also those portions of the opinion necessary to that result, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67(1996), the Ninth Circuit has ignored the essential reasoning of *Heller* and *McDonald*, narrowing those decisions to their facts. The Ninth Circuit has created the very "hierarchy of constitutional values" forbidden by the Supreme Court, and has relegated the Second Amendment to the lowest rung.

A. *Peruta v. Cnty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) has been sufficiently undermined by the Supreme Court's decision in *Jaime Caetano v. Massachusetts*, 577 U. S. ____ (2016), a case which was not cited by the Appellees.

Peruta v. Cnty. of San Diego, 824 F.3d 919 (9th Cir. 2016), decided after *Jaime Caetano v. Massachusetts*, 577 U. S. ____ (2016), is wrong and has no precedential value. Speakers of the English language will all agree: "bearing a weapon inside the home" does not exhaust this definition of "carry." For one thing, the very risk occasioning such carriage, "confrontation," is "not limited to the home." *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012). One needn't point to statistics to recognize that the prospect of conflict-at least, the sort of conflict for

which one would wish to be "armed and ready"-is just as menacing (and likely more so) beyond the front porch as it is in the living room. For that reason, "[t]o speak of 'bearing' arms within one's home would at all times have been an awkward usage." *Id.* To be sure, the idea of carrying a gun "in the clothing or in a pocket, for the purpose . . . of being armed and ready," does not exactly conjure up images of father stuffing a six- shooter in his pajama's pocket before heading downstairs to start the morning's coffee, or mother concealing a handgun in her coat before stepping outside to retrieve the mail. Instead, it brings to mind scenes such as a woman toting a small handgun in her purse as she walks through a dangerous neighborhood, or a night-shift worker carrying a handgun in his coat as he travels to and from his job site. *Peruta v. County of San Diego*, 758 F. Supp. 2d 1106 (S.D. Cal. 2010).

Appellees made absolutely no reference to the most recent Supreme Court Second Amendment case, *Jaime Caetano v. Massachusetts*, 577 U. S. ____ (2016) *Peruta v. Cnty. of San Diego*, 824 F.3d 919 (9th Cir. 2016), and for good reason — that case essentially overrules *Peruta* for the simple proposition that even a stun gun may be carried in public to thwart would-be attackers. "The decision below [e.g. *Peruta v. Cnty. of San Diego*, 824 F.3d 919 (9th Cir. 2016)] does a grave disservice to vulnerable individuals like Caetano who must defend themselves because the State will not." [emphasis added] *Jaime Caetano v. Massachusetts*, 577 U. S. ____ (2016) (page 2, Justice Alito, with whom Justice Thomas joins, concurring in the judgment.)

B. County Argument B. There is no Waiver of an issue raised in Opening Brief.

The County's citation to *Singleton v. Wulff*, 428 U.S. 106 (1976) and *Ramirez v. City of Buena Park*, 560 F3d 1012 (9th Cir. 2009) is both misplaced and deceptive. First, the review on this case is *de novo*, and it is irrelevant as to what was argued in the lower court. Second, at the time this action was filed, *McDonald v. Chicago*, 561 U. S. 742 (2010) had not been decided, so there was an intervening change in the law, which the Appellants and lower court did not have the opportunity to consider; this requires a *de novo* review.

Further, the appellant in *Ramirez* failed to address an issue in his opening brief; that is why it was deemed it waived. See *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 900 (9th Cir.2007) ("Generally, the federal courts deem waived any arguments that are not raised and presented in the parties' opening briefs.").

Here, Appellants' Opening Brief and First Amended Complaint is replete with argument that open-carry is an issue argued and raised. (See AOB p. 2, Issue #6, p. 20, p.21-28)

Therefore, the claim of waiver is specious at best.

III. THE FIFTH CAUSE OF ACTION: It is time for this Circuit to recognize the full panoply Privileges or Immunities promised by the Fourteenth Amendment after the Civil War, which guaranteed all the Right to Travel with a loaded firearm. [This section is a reply to State Argument III and County Argument C]

At least three generations of law students and constitutional lawyers have understood that *Presser v. Illinois*, 116 U.S. 252 (1886), *United States v.*

Cruikshank, 92 U.S. 542 (1876), and *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873) were not well reasoned and rest on a principle that is now thoroughly discredited.

The Ninth Circuit has limited rights guaranteed under the Second Amendment, but has expanded other rights, and therefore in keeping with the expansion of civil liberties, it should ignore *United States v. Cruikshank*, 92 U.S. 542 (1876), and *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873) as well.

In conclusion, Appellants have been denied the right to travel with a loaded firearm for personal self defense, in violation of their Privileges or Immunities of the Fourteenth Amendment, and this legal issue should not be considered merged with Appellants' Second Amendment claim.

IV. SIXTH CAUSE OF ACTION: Ninth Amendment Protects the Auxiliary Right to Carry a Loaded Firearm, Either Openly or Concealed.

Submitted on Appellants Opening Brief.

CONCLUSION

Appellants should have been given an opportunity to litigate their very substantial claims against Defendants in this matter. The motion to dismiss should be reversed, judgment as a matter of law should be enter or, in the alternative, the matter remanded to the District Court with leave to amend the complaint (if necessary) and to proceed to trial.

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Dated this 19th day of December 2016.

Respectfully submitted,
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STATEMENT OF RELATED CASES

Dated this 19th day of December 2016.

None that Appellants are aware of.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE PURSUANT TO

FED. R. APP. P. 32 AND CIRCUIT RULE 32-1 FOR

CASE NUMBER 09-16852

I certify that pursuant to Fed. R. App. 32 (a)(7) and Ninth Circuit Rule 32-1, the attached opening brief is proportionally spaced, has a typeface of 14 points or more and contains 6,960 words in total. Corel WordPerfect X4 was used to compute the word count.

Dated this 19th day of December 2016.

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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-1.1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 09-16852

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

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The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature of Attorney or Unrepresented Litigant: /s/ Gary W. Gorski

Date: 12/19/2016

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that on 12/9/2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system, and served and filed via Federal Express the Excerpts of Record on the Court and all parties to the action.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated this 19th day of December 2016.

Respectfully submitted,
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