No. 09-16852

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES ROTHERY, Esq.; 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; STATE OF CALIFORNIA ATTORNEY GENERAL JERRY BROWN

Appellees/Defendants.

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

No. 2:08-cv-02064 JAM KJM

APPELLANTS' OPENING BRIEF

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STATEMENT OF ISSUES PRESENTED[1]

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2. Whether Plaintiffs have a viable claim for relief under the Second Amendment, incorporated through the Fourteenth Amendment, against Defendants COUNTY OF SACRAMENTO, BLANAS, McGINNISS and BROWN under 42 U.S.C. § 1983, as pled in the Fourth Cause of Action. (CR 24, ER138)
3. Whether Plaintiffs have a viable claim for relief under the Privileges and Immunities clause of the Fourteenth Amendment, against Defendants COUNTY OF SACRAMENTO, BLANAS, McGINNISS and BROWN under 42 U.S.C. § 1983, as pled in the Fifth Cause of Action. (CR 24, ER139)
4. Whether Plaintiffs have a viable claim for relief under the Ninth Amendment, against Defendants COUNTY OF SACRAMENTO, BLANAS, McGINNISS and BROWN under 42 U.S.C. § 1983, as pled in the **Sixth Cause of Action** of the First Amended Complaint. (CR 24, ER140)
5. Whether a heightened standard of review should be applied to a State statute that specifically impacts fundamental rights expressly protected by the

[1] "CR" denotes Docket Number. "ER" denotes the Excerpts of Record.

Second Amendment and incorporated into the Fourteenth for additional reasons of family, home, business, and community defense that further emerged after the Civil War with the forced disarming of the freedmen and oppression of their families, and of entire communities, based upon race, as in the Colfax and New Orleans massacres.

6. Whether the Court of Appeals erred in denying standing for Appellants to challenge under the Second and Fourteenth Amendments' State statutes restricting possession of firearms for self defense, where Appellants are: **(A)** seriously affected by the statutes, **(B)** in the zone of interests impacted, and **(C)** would risk prosecution by possessing said firearms openly or concealed on their persons or in their vehicles.

7. Whether the Second and Fourteenth Amendments protect the rights of individual persons to keep and bear arms for personal, family, business and community defense, without state-decreed monopolization.

8. Whether California's current statutory scheme unconstitutionally infringes on an individual's constitutional right to keep and bear arms in light of the United States Supreme Court's holding that the right is an individual right.

9. Whether the absolute and unbridled discretion left to sheriffs and police chiefs by California Penal Code section 12050, *et al.* regarding the issuance of Carry Concealed Weapons (CCW) permits runs afoul of the United States Constitution.

10. Whether the exemption from the burdens of California Penal Code section

12050, *et al.* for honorably retired California peace officers as provided for by California Penal Code section 12027 violates the Equal Protection Clause of the Fourteenth Amendment.

11. Whether the written *prima facie* good cause policy of the County of Sacramento violates the Equal Protection Clause of the Fourteenth Amendment. (CR 24, ER133-4) FAC ¶s 727-728.

12. Whether *Hickman v. Block*, 81 F.3d 168 (9th Cir. (Cal.) 1996), *Erdelyi v. O'Brien*, 680 F.2d 61, 63 (9th Cir.1982), *Guillory v. County of Orange*, 731 F.2d 1379 (9th Cir. 1984) and *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121 (9TH Cir. 1996) have been sufficiently undermined by recent holdings of the United States Supreme court whereby they no longer have any precedential weight.

13. Whether the District Court erred in granting Defendants' motion to dismiss, without leave to amend, by relying on the case of *Mehl v. Blanas* Case No. 08-15773, now pending before the Ninth Circuit (U.S. District Court for the Eastern District of California, No. CIV. S 03-2682 MCE KJM.) (See CR 45 ER10, 15; CR 41, ER24, 33-34)

14. Whether the challenged state statutes and county policies should be struck down as unconstitutional on their face before an answer is even filed, similar to how the State's weapon ban was declared unconstitutional at the pleading stage in *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).

15. Whether the judgment of the District Court should be reversed and the case remanded for trial on the merits, and a record of expert and factual testimony developed concerning the specific carry concealed weapons control laws and factual issues involved in this case.

16. Whether this Court should order , for remand, assessment of 42 U.S.C. § 1988 interim litigation expenses and counsel fees for Appellants prior to trial on the merits of the remaining factual and legal questions.

ISSUES WITHDRAWN FROM CONSIDERATION

1. The **First Cause of Action** for RICO violations found at CR 24, ER73 of the First Amended Complaint.

2. The **Third Cause of Action** for First Amendment violations found at CR 24, ER138 of the First Amended Complaint.

STATEMENT OF JURISDICTION

Subject matter jurisdiction in the District Court was based on 28 U.S.C. §§ 1331 & 1342, authorized by 42 U.S.C. § 1983. This Court has jurisdiction over the appeal from the final orders on motions to dismiss in favor of Defendants, filed on July 27, 2009, (CR44, ER14) and July 29, 2009, (CR45, ER9) respectively, under 28 U.S.C. § 1291. Judgment was entered on August 28, 2009. (CR49, ER41). Notice of Appeal timely filed on August 24, 2009. (CR47, ER42).

STATEMENT OF THE CASE

This case comes before this Court as an appeal from a final order granting Defendants' motion to dismiss for failure to state a claim and lack of standing, and a

denial of leave to amend. (CR 45, ER9)(CR 44, ER13)(CR 41, ER17) Plaintiffs filed a complaint against Defendants for violations of the United States Constitution, specifically violations of the Second and Fourteenth Amendments relating to California's statutory scheme regulating firearms and the County of Sacramento's application of the state laws. Plaintiffs filed the operative First Amended Complaint ("FAC") on May 5, 2009. (CR 24, ER65). Defendants thereafter responded by filing a motion to dismiss on May 29, 2009. (ER149). Following a hearing on July 15, 2009, Defendants motion to dismiss was granted with prejudice on July 28, 2009. (CR 41, ER17).

In dismissing Plaintiffs' case, the District Court relied heavily upon the case of *Mehl v. Blanas* Case No. 08-15773, now pending before the Ninth Circuit (U.S. District Court for the Eastern District of California, Case No. CIV. S 03-2682 MCE KJM.) (See CR 45 ER10, 15; CR 41, ER24, 33-34)

Pursuant to F.R.A.P. Rule 4(a)(1)(A), Plaintiffs timely filed a notice of appeal on August 24, 2009. (CR 47, ER42). Plaintiffs respectfully request that this Court decide this case as a matter law, or in the alternative remand the matter to the District Court to proceed to trial.

STATEMENT OF FACTS

Appellants/Plaintiffs James Rothery, Esq. and Andrea Hoffman ("Plaintiffs" "Hoffman" and "Rothery") filed a First Amended Complaint (CR 24, ER65) pursuant to 42 U.S.C. § 1983 challenging the constitutionality of California's Concealed Carry Weapon (CCW) law (*i.e.* California Penal Code § 12025) on

Second Amendment, Ninth Amendment and Fourteenth Amendment (Equal Protection and Privileges and Immunities).

Plaintiffs James Rothery, Esq., and Andrea Hoffman have applied for permits to carry concealed weapons ("CCW"). FAC ¶ 1.[2] Both Plaintiffs Rothery and Hoffman have filled out the appropriate applications and payed the required fees. FAC ¶ 1. In addition, Plaintiffs have exhausted all CCW administrative appeal rights. FAC ¶ 2. (CR 24, ER66)

Plaintiff Hoffman applied for a CCW in November of 2007, and was denied. FAC ¶ 8. Thereafter, she appealed the decision and was again denied in 2008. FAC ¶ 8. (CR 24, ER66)

Plaintiff Rothery applied three (3) separate times over the course of Defendant Former Sheriff BLANAS' and Defendant SHERIFF McGINNIS' administrations. FAC ¶ 9. Plaintiff Rothery submitted his first application in 2003, and submitted his third and final consecutive application August 31, 2006. FAC ¶ 9. Each time an application was denied, Plaintiff Rothery was advised that he could not apply for another year. FAC ¶ 10. Approximately one (1) week after Plaintiff Rothery submitted his final application on August 31, 2006, he was contacted by a Detective of the Sheriff's Department. Approximately one (1) to two (2) weeks later he was notified via written letter from the Sheriff's Department that his application was denied, but that he had the right to appeal. FAC ¶ 11. Since he had lost his two

[2]The paragraphs of the First Amended Complaint (FAC) are contained in the Court's Record at docket entry 24.

previous appeals, Plaintiff Rothery now for the first time realized the CCW application process was wrought with unequal application of the law and was unfair. Knowing it would be futile, he did not file an appeal. FAC ¶ 12. (CR 24, ER67)

In addition, Hoffman specifically presented an equal protection claim for denying her access to 1) a Honorary Deputy Sheriff badge and credential that is given to political supporters of the Sheriff, and 2) membership in the Sacramento Sheriff's Aerosquadron, which is an association of private citizens who own airplanes based out of the headquarters of the Sheriff and fly the Sheriff and his friends around in private airplanes and receive CCWs for simple membership in the private association sponsored by government, and 3) membership in the Sheriff's Posse, an organization similar to the Aerosquadron except horses are substituted for planes. (CR24, ER66 ¶s 5-8, ER71 ¶s 51-53, ER72 ¶s 55-59, ER92 ¶s 289-290, ER107 ¶s 469-473, ER113 ¶s 545-548, ER130 ¶s 699-700).

As the record clearly indicates, there are many CCW permit holders who, because of their political contributions, are rewarded with an exclusive membership in the Sacrament Sheriff's Department (SSD) Aerosquadron and SSD Posse, and membership in which is not available to the general public; instead, only to those wealthy individuals who contribute to the political careers of the elected sheriffs (i.e. McGinnis and Blanas). (CR 24, ER68 ¶s 22-24, ER69 ¶ 35, ER71 ¶s 51-59, ER76 ¶s 96-117)

Defendants Blanas, Mcginnis, Sheehan, Sacramento County Sheriff's

Department and County of Sacramento (collectively referred to as "Defendants") violated Plaintiffs' constitutional rights under the Second, Ninth, and Fourteenth Amendments to the United States Constitution by denying their applications for a CCW permit.

For the purposes of this courts application of the facts to the law, it is undisputed that Plaintiffs, and others similarly situated, have been denied CCWs even though they were qualified and met the purported "good cause" criteria for issuance of a permit. (CR 24, ER66 ¶ 4, ER67-68 ¶s13-18, ER70 ¶s 46-48, ER130 ¶s 692-697, ER133 ¶s 727-737, ER136 ¶s 747-751) It is further undisputed that campaign contributors to McGinnes and Blanas have received CCWs simply because they have contributed. (CR 24, ER68 ¶s 21-26, ER69 ¶ 30-31, ER72 ¶ 59)(See also generally a specific list of individuals who have had made campaign contributions in exchange for a CCW, commencing at CR 24, ER74, ¶s 75 and ending at ¶ 597)

In total, 110 CCWs have been issued to campaign contributors whose purported “good cause” was either lacking or missing altogether. (CR 24, ER74, ¶s 75 and ending at ¶ 597)

For example, Gerber gave Blanas a house in Reno and flew Blanas to Las Vegas in his private plane, and in exchange for such payments, Gerber received a CCW without a written application even being submitted or a background check ever being conducted. CR 24, ER68 ¶ 21 ER69 ¶35, ER79 ¶s 130-134.

Another example plead in the FAC, Blanas and McGinnis issued CCWs to

John Christie, Julie Christie, and William Christie for contributing to their respective political campaigns and employing Blanas' wife, Nanette Blanas. (CR 24, ER73 ¶s 67-71, ER74 ¶s 78-94)

A standard state Department of Justice ("DOJ") application is used statewide for all CCW applications. FAC ¶ 692. (CR 24, ER130)(An actual blank application is at CR 33, ER45) In this standard application, there is a section (ER56-59) required to be filled out in the presence of an "investigator" in order to obtain facts justifying issuance of a CCW (i.e. good cause) FAC ¶ 693. The so-called "good cause" standard for Plaintiffs and other average citizens is addressed on the application in the form of "investigator's interview notes". FAC ¶ 693. However, information for the "prima facie" good cause standard for retired peace officers is not addressed in the application itself, even though the County Defendants have such a policy. FAC ¶ 694. (CR 24, ER130) See also (CR 33, ER43-64)

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

However, under the same policy, the following is "prima facie evidence of good cause for issuance of a concealed weapons permit: Applicant is an active or

honorably separated member of the criminal justice system directly responsible for the investigation, arrest, incarceration, prosecution or imposition of sentence on criminal offenders and has received threats of harm to person or family as a result of official duties." FAC ¶ 728. (CR 24, ER134)

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

Further, facts were plead that there is absolutely no factual support for retired law enforcement or law enforcement family members to receive preferential treatment. To the contrary, other professions and citizens are exposed to a greater risk of harm that retired law enforcement officers, but yet are not afforded the same protections under the law. (CR 24, ER135 ¶s 740-749)

Additionally, both Plaintiffs Rothery and Hoffman would have sought to apply for Honorary Deputy Sheriff's Commissions, had such commissions been

available to the general public. FAC ¶ 5. (CR 24, ER66) However, Honorary Deputy Commissions are issued only to close friends and supporters of the Sheriff, and are not available to members of the general public. FAC ¶ 52. (CR 24, ER71) By obtaining an Honorary Deputy Sheriff Commission, 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 Sheriffs' themselves. FAC ¶ 6. (CR 24, ER66)

Over the last five (5) or six (6) terms of office for Sheriff, the County of Sacramento Sheriff's office and management level employees of the County of Sacramento have systematically exercised a sphere of influence over the issuance of CCW permits and Honorary Deputy Commissions. FAC ¶ 51. (CR 24, ER71) The commissions consisted of a peace officer wallet badge and a Sheriff's official identification card which stated that the holder is an honorary deputy sheriff, and usually accompanied a CCW permit. FAC ¶ 51. The Sheriff often signed these commissions without the applicant having completed any POST training. FAC ¶ 51. These badges and identification cards are created using taxpayer funds, and were also made and issued by the same vendors and employees that are responsible for producing peace officer credentials for Full Time Active Duty Deputy Sheriffs. FAC ¶ 52. (CR 24, ER71)

In addition, the County of Sacramento Sheriff's office provides for exclusive membership in sub-organizations referred to as the Sheriff's Aero-Squadron and the Sheriff's Posse. FAC ¶ 56. (CR 24, ER72) The Sheriff's Aero-Squadron consists of

wealthy campaign contributors who own private planes and jets. FAC ¶ 57. (CR 24, ER72) These planes have been used to transport Defendants BLANAS and McGINNIS to Las Vegas, Nevada, and various other venues out of state for personal, non-business related reasons. FAC ¶ 57. The Sheriff's Posse consists of campaign contributors who own horses, and is similar in nature. FAC ¶ 58.

Plaintiff Hoffman requested an Honorary Deputy Sheriff's Commission, to join the Sheriff's Posse, and to join the Sheriff's Aero-Squadron. However, she was denied all such oral applications. There is no written application made available to the public and, to this date, there has been no response to her appeal regarding her Honorary Deputy Commission, or her membership in either the Sheriff's Posse or Sheriff's Aero-Squadron. FAC ¶ 7. (CR 24, ER66)

By mailing letters of denial indicating that Plaintiffs had failed to show "immediate" threat of harm and failed to meet the "good cause" criteria for issuance of a CCW, it was Defendants' specific intent to fraudulently conceal from Plaintiffs the true reason for the denial of their CCWs. FAC ¶ 13. Defendants actively misled Plaintiffs by issuing form letters of denial via mail that were knowingly false, without specifying that campaign contributors and friends received CCWs and honorary deputy badges and commissions. FAC ¶ 14. (CR 24, ER67)

The issuing CCW permits and commissions in return for political contributions has been a long standing practice in Sacramento County. FAC ¶ 59. (CR 24, ER72)

Former Sheriff Blanas, Sheriff Mcginnis, Detective Sheehan and former

Detective Mason conspired for years, commencing under the Craig/Blanas administration, by (1) setting up a fake CCW review committee and appeal process to act as a cover for how CCWs are really issued; and (2) issuing form denial letters to well deserved CCW applicants with intentionally false and misleading statement that the application was denied for lack of good cause, which was not the true reason for denial. FAC ¶ 15. These individuals were involved in a custom and practice of soliciting money from campaign contributors, and in return assisted in issuing CCWs and Honorary Deputy Sheriff's Commissions to campaign contributors. FAC ¶ 30. Further, Sheehan and Mason were co-conspirators with Blanas and Mcginnis in that they were used extensively to provide safety classes to campaign contributors, only so that these contributors could obtain CCWs, all during county hours and authorized by Blanas and Mcginnis. FAC ¶ 31. (CR 24, ER69)

Plaintiffs have applied for concealed weapons permits and have been systematically impeded and rejected in obtaining such permits, along with other ancillary governmental benefits such as honorary deputy sheriffs commissions and membership in the Sheriff's Posse and Sheriff's Aero-Squadron. (See FAC at CR 24, ER65 at ¶s 4-7, 14, 51-59, 697)

Plaintiffs own handguns which they would like to carry in their vehicles and/or on their persons, concealed for protection of themselves, their families, and other citizens, just as other privileged and well connected citizens, retired peace officers, and the Sheriff's various cronies and campaign contributors are allowed.

FAC ¶ 699. (CR 24, ER130)

STANDARD OF REVIEW

This Court reviews de novo a grant of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *Stone v. Travelers Corp.*, 58 F.3d 434, 436-37 (9th Cir. 1995). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Appellant can prove no set of facts in support of his claim which would entitle him to relief." *Hughes v. Rows*, 449 U.S. 5, 10 (1980) (citation omitted). When reviewing a district court's dismissal of a complaint for failure to state a claim, this Court must accept the facts alleged in the complaint as true. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 770 (1993).

Dismissal for lack of subject matter jurisdiction is reviewed de novo. *See United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 171 F.3d 1208, 1213 (9th Cir. 1999); *Kruse v. State of Hawaii*, 68 F.3d 331, 333 (9th Cir. 1995); *Harris v. Provident Life and Accident Ins. Co.*, 26 F.3d 930, 932 (9th Cir. 1994). "[A] district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995). This amendment policy is informed by Federal Rule of Civil Procedure 15(a), which provides that leave to amend should be freely granted "when justice so requires."

The Court must assume that all general allegations "embrace whatever specific facts might be necessary to support them." *Peloza v. Capistrano Unified*

School Dist., 37 F.3d 517, 521 (9th Cir. 1994).

Since the state's CCW statute and county's CCW policy burdens a fundamental right, the statute and policy receives heightened scrutiny under the Second Amendment and Fourteenth Amendment's Equal Protection Clause. *Silveira v. Lockyer*, 312 F.3d 1052, 1087-8 (9th Cir. 2002).

Errors in the District Court are presumed prejudicial. *Obrey v. Johnson (Obrey I)*, 400 F.3d 691, 699 –701 (9th Cir.2005) (affirming and readopting harmless error standard stated in *Haddad v. Lockheed Calif. Corp.*, 720 F2d 1454, 1459 (9th Cir. 1983) and abrogating inconsistent standard "inadvertently" stated in *Kisor v. Johns–Manville Corp.*, 783 F2d 1337, 1340 (9th Cir. 1986)); *Dang v. Cross*, 422 F3d 800, 811 (9th Cir. 2005).

SUMMARY OF ARGUMENT

The State of California presently employs a statutory scheme regulating firearms which assumes that the State has full authority to prohibit all private firearm ownership if the State so chooses. *See e.g. Hickman v. Block*, 81 F.3d 98, 101 (9th Cir. 1996). While the statutory scheme does not go this far, it does impose significant and arbitrary restrictions and regulations on private firearm ownership.

Prior to the U.S. Supreme Court's recent decision in *District of Columbia v. Heller*, the State was at least arguably justified in enacting and enforcing its regulations. However, in light of the Supreme Court's decision in *District of Columbia v. Heller,* 554 U.S. ___,128 S.Ct. 2783(2008) and pending a decision from the Court in *Mcdonald v. City of Chicago* U.S. Supreme Court Case No.

08-1521, in which the Court will likely find that the Second Amendment is incorporated through the Fourteenth Amendment to apply against the states as well as the federal government, California's current statutory scheme runs afoul of the U.S. Constitution.

Specifically, California Penal Code section 12025 prohibits an individual without a valid permit from carrying a concealed weapon: (a) within any vehicle under his or her control or direction; (b) on his or her person; or (c) within any vehicle in which he or she is an occupant. However, an individual who is issued a valid carry concealed weapon ("CCW") permit by the local law enforcement authority pursuant to state law is permitted to carry a concealed weapon in these otherwise prohibited circumstances. Notably, California Penal Code section 12050, *et al.* provides sheriffs and police chiefs with absolute and unbridled discretion regarding the issuance of CCW permits when the applicant is anyone other than a retired peace officer. This is in contrast to the thirty seven (37)[3] states that employ a "shall-issue" policy under which a CCW will be granted to every applicant who meets certain criteria. In a shall-issue jurisdiction, the granting authority has no discretion in the granting of a CCW permit.

What's more is that in Sacramento County, the Sheriff's Department's

[3] The 37 states currently employing a "shall issue" policy are as follows: Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming.

application of its unbridled discretion regarding the issuance of CCW permits has created a corrupt scheme whereby close friends of law enforcement and large campaign contributors receive CCW permits regardless of their fitness to carry a concealed weapon. (CR 24, ER 67 *et al.* ¶s 14, 15, 30, 31, 35-37, 55-57, 130-134, 735, 749, 750, 767-768; see also generally CR 24, ER74 *et al.* paragraphs 77 through 597, which is a detailed list of the some the notable and influential people in the Sacramento social/political caste who all received CCWs in exchange for campaign contributions) However, other individuals such as Plaintiffs ROTHERY and Hoffman who are fit to carry concealed weapons are denied that right. (CR 24, ER66 *et al.* ¶s 9-12, 14, 15, 17, 697, 699, 701-702, 726, 747)

The right to keep and bear arms is a fundamental right guaranteed by the United States Constitution. *See District of Columbia v. Heller,* 128 S.Ct. 2783 (2008). As such, regulations infringing upon that right must meet heightened scrutiny. *See Romer v. Evans*, 517 U.S. 620, 631 (1996); *see also Zablocki v. Redhail*, 434 U.S. 374 (1978); *Shapiro v. Thompson*, 394 U.S. 618 (1969). California Penal Code section 12050, *et al.* cannot pass constitutional muster under either intermediate or strict scrutiny review because of the unbridled discretion left to sheriffs and police chiefs regarding an individual's Second Amendment right to keep and bear arms.

Furthermore, California Penal Code section 12027 provides an exemption to C.P.C. § 12025 for active, honorably retired, and other duly appointed peace officers. California Penal Code section 12025 essentially creates four classes of

people: (1) active peace officers; (2) honorably retired peace officers; (3) other duly appointed peace officers; and (4) all others.

In *Silveira v. Lockyer*, a case pre-dating *Heller*, this Court held that a state statue banning the sale or transfer of assault weapons in the State of California, but which also provided an exemption for retired peace officers, violated the Equal Protection clause of the Fourteenth Amendment. 312 F.3d 1052,1091-1092 (9th Cir. 2002). There, applying only rational basis review, the court could not find "any hypothetical rational basis for the exemption." *Id*. at 1090. When it comes to the issuance of CCW permits for the purpose of self-defense, Defendants' disparate treatment of retired peace officers and ordinary law-abiding citizens cannot pass constitutional muster when reviewed under either heightened scrutiny or rational basis review.

As such, Plaintiffs are challenging the constitutionality of California's statutory scheme regarding the regulation of firearms and the issuance of CCW permits, and the application thereof by the County of Sacramento.

Furthermore, the District Court failed to draw all reasonable inferences in a light favorable to Plaintiffs, and instead, relied on the currently pending Ninth Circuit case of *Mehl v. Blanas* Case No. 08-15773 as some sort of binding precedent, though the District Court later concedes *Mehl* is factually and legally different than this case. (See CR 45 ER10, 15; CR 41, ER24, 33-34 as compared to CR 63, ER5, commencing at line 20).

The District Court erred in factual and legal determinations regarding the

issues of equal protection and the right to keep and bear arms when Plaintiffs were summarily denied honorary deputy sheriff's commissions and badges, memberships in the SSD's Aerosquadron and Posse, and denial of CCW permits.

Moreover, Plaintiffs have plead a plethora of facts acts whereby campaign contributors are rewarded with CCWs and Honorary Deputy Sheriff Commissions, in violation of 18 U.S.C. § 1951 (obtaining campaign contributions under color of official right)

In sum, the District Court failed to view facts in a light most favorable to the party opposing the motions to dismiss, misinterpreted substantive and procedural law, and erred in granting Defendants motion to dismiss and denying Plaintiff's request for leave to file an amended complaint.

ARGUMENT

I. THE SUPREME COURT'S DECISIONS IN DISTRICT OF *Columbia v. Heller*, 554 U.S. ___,128 S.Ct. 2783 (2008) AND *Mcdonald v. City of Chicago* U.S. Supreme Court Case No. 08-1521 REQUIRES THAT THE OFFENDING STATUTE BE DECLARED UNCONSTITUTIONAL OR THE CASE BE REMANDED ON THE FOURTH CAUSE OF ACTION.

It is now clear that the government cannot ban the use of functional firearms for personal self defense; thus reversing the State of California's trend to ban all such firearms. In the past, the State of California and local law enforcement agencies have typically justified arbitrary firearm regulations and restrictions on the abstract concept of "public safety" while exempting themselves from the very same regulations, without any traceable proof that the regulations even affect public safety. (*e.g.* CR 24, ER130 ¶ 701, ER133 ¶ 727, ER141 ¶s 799-801) To the

contrary, Defendants cannot even justify a tangible and legitimate reason why an average law abiding citizen, trained in the use of arms, can be prohibiting from possessing on their person or in their vehicle a functional firearm for personal self defense. (See CR 24, ER141 ¶s 799-801)

District of Columbia v. Heller, 554 U.S. ___, 128 S.Ct. 2783(2008) and *Mcdonald v. City of Chicago* U.S. Supreme Court Case No. 08-1521 overrule current Ninth Circuit precedent (e.g. *Silveira v. Lockyer*, 312 F.3d 1062 (9th Cir. 2002) reh'g en banc denied, 328 F.3d 567, cert. denied, 124 S. Ct. 803 (2003) and presents to this Court an issue of first impression pertaining to the licensing of an individuals right to self defense. Since there is no duty for the police to protect the public (i.e. *Zelig v. County of Los Angeles,* 24 Cal. 4th 1112, 1141 (2002)), each individual citizen is entitled to those same rights and privileges that political donors and retired law enforcement receive in the form of a license to carry a concealed weapon or an open and exposed weapon.

In *Zelig* beginning at page 1141, the opinion reviews California Government Code sections conferring governmental immunity, and cites the legislative intent for the enactment as:

> "This section grants a general immunity for failure to provide police protection or for failure to provide enough police protection. Whether police protection should be provided at all, and the extent to which it should be provided, are political decisions which are committed to the policy-making officials of government. To permit review of those decisions by judges and juries would remove the ultimate decision-making authority from those politically responsible for making the decisions."

Nothing in *Heller* and *Mcdonald* indicates the right to possess and use, in self

defense, a functional firearm is limited to the confines of the home. The language the Supreme Court uses is quite telling. The Court does not say that "laws forbidding the carrying of firearms in public places are constitutional." It specifically uses the term "sensitive places" and then describes a subset of public places. By implication, this means the Second Amendment applies to public places that are not "sensitive". In the most succinct distillation of the right conferred by the Second Amendment, the Court says, "we find that [the Second Amendment] guarantees the individual right to possess and carry weapons in case of confrontation." (*Heller* at p. 19.) The Court does not qualify the right to being limited to confrontations at home.

In its analysis of the unconstitutionality of the D.C. ban, the Court lists a series of cases which struck down laws prohibiting the public carrying of firearms as analogies of over-broad and unconstitutional laws. "Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban. And some of those few have been struck down." *Heller* at p. 57).

A. Since the State of California has an absolute ban on both the open carry and concealment of handguns, Plaintiffs right to keep and bear arms has been substantially impaired, and this impairment substantially limits their right to self defense and self preservation.

California Penal Code § 12025 prohibits the carrying of a concealed weapon unless an individual applies for, and receives, permission to do so pursuant to California Penal Code § 12050(a)(1)(A), which gives Defendant Sheriff unbridled discretion in choosing whom should be granted a license to carry a handgun in the

State of California. In addition to CCW permits, sheriffs also have a monopoly on the issuance of permits to carry "loaded and exposed", but only in counties with a population less than 200,000. Likewise, California Penal Code § 12031 prohibits the carrying of any loaded weapon on his or her person or in his or her car.

Thus, the various complex licensing scheme in California act as a complete ban on the public possession of functional firearms for self defense, much like the District of Columbia's complete ban on possession of functional firearms in the home for self defense in *Heller*.

Section 12050 is not limited to vetting the applicants for a disqualifying background (felons and the mentally ill) and their adequate training. But with the addition of the subjective "good cause" and "moral character" requirement, California has over 58 different standards of issuance. What a Sheriff in one county deems "good cause" or "good moral character" another Sheriff somewhere else does not, leaving the standard of issuance arbitrary and capricious. An applicant in one county can apply and be granted a license, and the same applicant meeting all of the same requirements can apply in a neighboring county, the being separated by only a yards from another, and be denied. Even worse, an applicant can be granted a permit in his home county, and have a change of the Sheriff administration and find that his or her "good cause" is no longer "good enough." This only takes into account the county Sheriff Departments. Add to it the various city police chiefs throughout the State who also have this power, and the system becomes a political cash cow of over two hundred and fifty different standards rife with abuse.

The only exception to this abusive law is if the individual is an "honorably" retired California peace officer; they receive the privilege to carry a concealed weapon for the rest of their life without being subjected to any licensing scheme whatsoever, or paying the same fees, if any.

Thus, by law, the only place one who did not retire from law enforcement may possess a loaded firearm in California without prior permission is in the home or place of business. Such a state decreed monopolization runs afoul of the Second Amendment. See *District of Columbia v. Heller*, 554 U.S. ___, 128 S.Ct. 2783 (2008) and *Mcdonald*.

A closer examination of the cases and authorities relied upon by the Supreme Court suggests that it did not intend to make all concealed weapon bans presumptively constitutional. See *State v. Chandler*, [5 La.Ann. 489, 489-90 (1850)]; *Nunn v. State*, [1 Ga. 243, 251 (1846)]; [2 J. Kent, *Commentaries on American Law* 340, n. 2 (O. Holmes ed., 12th ed. 1873)]; *The American Students' Blackstone* 84, n. 11 (G. Chase ed. 1884).

In *Heller*, the Supreme Court cites *Nunn v. State*, 1 Ga. 243, 250-251 (1846), as an example whereby a state court banned the concealed carry of weapons, but not the open carry of a firearm. The Supreme Court selected an important historical State case decided by the highest court of one of the original thirteen States.

Both *Chandler* and *Nunn*, the two cases relied upon by the Supreme Court, concerned prohibitions on carrying of concealed weapons where the affected individuals had alternate ways to exercise their Second Amendment rights-by

openly carrying those weapons. See *Chandler*, 5 La.Ann. at 489-90 (noting that the law against carrying of concealed weapons was "absolutely necessary" and that "[i]t interfered with no man's right to carry arms ... 'in full view,' which places men upon an equality"); *Nunn*, 1 Ga. at 251 ("We are of the opinion, then, that so far as the act of seeks to suppress the practice of carrying certain weapons *secretly*, that it is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void* ...." (emphases in original)). The applicability of these cases to the current state laws is quite illuminating where, as here, the State expressly prohibits individuals such as Plaintiff from openly carrying a loaded firearm in public places. See *Cal.Penal Code* § 12031(a)(1).

The holding of *Nunn* reflects the venerable view of Justice Joseph Story. Justice Joseph Story, certainly a credible authority on matters from the founding era, would agree with Plaintiffs. He stated, long ago, and in context: "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic …." III *Story, Joseph, Commentaries on the Constitution* at 746, §1890 (Rothman 1st ed 1991).

Nunn and *Justice Story* are much closer to the history and heart of the Founders' Second Amendment. The Supreme Court opinions in *Heller* and *Mcdonald* did not snub the rich jurisprudence in this field, nor should this Court. The Supreme Court could have cited current cases approving of statutes completely

banning firearms, but refused to do so. *Nunn* is a very important case in this context since that case also prohibited the complete banning the carrying of firearms. In other words, *Nunn* was limited to the banning of concealed firearms, not the open display of firearms.

As the Supreme Court has cited, the authoritative writings of Blackstone, Rawle, Justice Story, Cooley, and English historical documents and treatises demonstrate overwhelmingly that the carrying of weapons was not generally a crime under the common law of England or of this country. The Supreme Court carefully details this background to notes that historians have traced the individual legal duty to own arms and be skilled in their use to 690 A.D., and concluded that it is in fact older than our oldest records.

As the Supreme Court further notes, typically in those ancient years the possession of arms was never a crime, unless there was a factor of monarchial, parliamentary, or religious persecution-discrimination. Our Founders generally frowned upon such a legal rationale, and many British traditions. Also, there might be an offense if the carrier of arms were menacing the populace, rather than carrying for self or other defense.

Although this statute contains a number of exceptions, see *People v. Flores*, 169 Cal.App.4th 568, 576, 86 Cal.Rptr.3d 804 (2008), its overall effect cannot be compared to the unrestricted right to carry weapons openly as recognized in both *Chandler* and *Nunn*. Accordingly, in the present case, the issue is best addressed by determining whether Section 12050's requirements, and their application, meet the

appropriate level of constitutional scrutiny, rather than by a categorical approach advocated by Defendants.

There is nothing in the Second Amendment or in any of the other amendments to the Bill of Rights that an individual need to show some heightened justification to exercise his rights thereunder. The Constitution presumes that "the People" are reasonable, and that government is unreasonable! Hence, that is why the government is one of limited, and enumerated powers, and these powers are specifically kept in check by Bill of Rights. Likewise, the Supreme Court has never required any citizen to show "good cause" to the carrying of a firearm. The "good cause" is the fundamental exercise of the right to armed self defense and presumed in the Court's rulings in *Heller* and *Mcdonald*.

Here, Plaintiffs cannot carry a loaded weapon (whether in open in plain view or concealed under their seat) in their car to protect their family or self on a desolate highway in the Mojave Desert, or through gang infested territories of Oakland, Richmond, Los Angeles and South San Francisco. This is a right only bestowed upon the privileged class (i.e. retired California peace officers and the politically connected). Hoffman, who resides in a high crime area, was car-jacked once at gun point, and where was the government's protection then prohibiting felons from possessing firearms? (CR 24, ER68 ¶ 18)

Keeping in mind that the one of the significant purposes of the Fourteenth Amendment was to allow the Freedmen to keep and carry arms for self preservation in the South wherever they went upon their travels across state lines; had

California's laws been in place in the South during reconstruction, then the right to keep and bear arms would have been a nullity for such laws would obviously result in arbitrary and capricious enforcement based upon race (i.e. The Freedmen would have been denied CCWs). Why is the situation is any different today, except that arbitrariness and capriciousness has evolved from race to status (e.g. those with political connections and retired law enforcement) and economics (e.g. campaign contributions)? The old adage that power corrupts and absolute power corrupts absolutely is still valid today as it was back then. The First Amended Complaint (CR 24, ER65) is replete with factual averments of kickbacks and graft in the CCW issuance process (not to mention "honorary deputies commissions" and exclusive membership in the Sheriff's Aero Squadron) that has been going on for many years in the County of Sacramento. (CR 24, ER66-72 ¶s 4-7, 14, 51-59)

As Madison pointed out in *The Federalist No. 46*, at 299(c). Rossiter, ed. 1961) and, in particular, Blackstone in his 1803 COMMENTARIES:

> "5. The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence …."
> "[It] is indeed, a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."
> "… the right of having and using arms for self-preservation and defence. And all these rights and liberties it is our birth-right to enjoy entire …."

A review of *Heller* and *McDonald* leads to the obvious conclusion that a complete ban on both the open and concealed carry of a handgun, combined with an absolutely discretionary licensing scheme, runs afoul of the Second Amendment.

B. Since the State has prevented it citizens from carrying

firearms openly, and requires an arbitrary discretionary licensing scheme for concealment, the issuance of a license cannot be premised upon a subjective need criteria since a fundamental right is being infringed.

In *Heller* and *McDonald*, the Supreme Court makes it implicitly clear that the State statute and Defendants' policy for issuance of CCWs must be "narrowly tailored to achieve a compelling governmental interest." 554 U.S. at 128 S.Ct. 2818-2022, and footnote 27; See also *Abrams v. Johnson*, 521 U.S. 74, 82, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997).

The Supreme Court in *Heller*, while not designating any specific level of scrutiny for evaluating Second Amendment restrictions, explicitly rejected the "rational basis" test. According to the Supreme Court, the rational basis test "could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right," such as "the right to keep and bear arms." 128 S.Ct. at 2818 n. 27 (citation omitted). "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." *Id*. The *Heller* majority also rejected an "interest-balancing inquiry" suggested by the dissent that " 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effect upon other important governmental interests." *Id*. at 2821. According to the Supreme Court, such a "freestanding" approach, which is subject to future judges' assessments of the constitutional guarantee's usefulness, "is no constitutional guarantee at all." I*d*.

Under both "strict scrutiny" and "intermediate scrutiny" the burden is on the

government to show that the challenged law is constitutional, by demonstrating that the law is either "narrowly tailored to serve a compelling state interest," *Reno v. Flores*, 507 U.S. 292, 301-02, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993) (citations omitted), or necessary to further an important governmental interest, *Sell v. United States*, 539 U.S. 166, 178-80, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003). In the present case, apart from arguing that Section 12050 is within one of the "presumptively lawful" restrictions recognized in *Heller* and that it passes "rational basis" standard of review, the government has absolutely no evidence that can defend the statute's and poly's constitutionality under either of the heightened levels of scrutiny.

In this case, 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 who shall be issued a CCW. If there is a licensing scheme in place, it must be equally applied to all citizens, and not just those who happen to be retired California peace officers or friends of the Sheriff.

Furthermore, when it comes to retired California Peace Officers, retired law enforcement, and friends and family of law enforcement, CCWs are issued *carte blanch*.

Just imagine if the director of the DMV were given the same discretion for the issuance of a drivers license? Currently, the DMV requires a license applicant to 1) attend a school, 2) pass a driving test, 3) a vision test, 4) a written test, 5) pay a fee, and 6) not have any physical limitations like epilepsy. If all these conditions

are met, a citizen is summarily issued a drivers license – and that is the standard for a regulated "privilege." Here, there is a fundamental right involved. To obtain a CCW one is subjected to an arbitrary statute that requires "good moral character" (a vague and subjective term) and "good cause" (a vague and subjective term). If that threshold is met, the licensing authority "may" issue a CCW, but he does not have to. If there is going to be a licensing scheme for the free exercise of a fundamental right, it must be made available to all citizens equally. Absolute discretion must be removed from the process for any discretion in the process that is not relegated to a ministerial duty to issue a CCW is, and will always be, corrupt and abused.

A constitutional licensing scheme would be more akin to obtaining a drivers license. Attend a class, pass an objective background check for convictions and mental institution commitments, take a shooting test, and pay a fee – this would apply to all citizens and retired law enforcement officers ALIKE. In other words, IF government is to undertake the regulation of carrying firearms, it must be done in an objective manner, similar to how permits are issued that regulate speech, which is never left up to an absurdly subjective criteria.

In sum, the people are granted a "privilege" to drive the most deadliest weapon in America using a basic objective criteria. When it comes to a fundamental right, a single individual is granted the power under a state statute unrestricted and limitless discretion for the issuance of CCWs. If there is ever a case subject to government abuse and corruption under a statute, this is it!

C. Plaintiffs have a fundamental right to keep and bear arms, and any licensing scheme infringing upon that right must be

narrowly tailored to meet a compelling government interest.

Here, the licensing scheme challenged (State law and County written policy) gives absolute power to a single licensing official, without any system of checks or balances.

Even under the pre-*Heller* decision of *Guillory v. County of Orange*, 731 F.2d 1379 (9th Cir. 1984), wherein this Circuit previously held there was no liberty or property right to a gun permit; a concealed weapons licensing program that is administered arbitrarily so as to unjustly discriminate between similarly situated people may deny equal protection. *Guillory v. County of Orange*, 731 F.2d 1379, 1383 (9th Cir.1984); *Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56, 67 (9th Cir.1994).

In *CBS v. Block*, 42 Cal.3d 646 (1986), the "good cause data" was deemed critical for the proper sorting out of equal protection violations. However, the District Court judge completely ignored the very specific facts plead that clearly established that campaign contributors receive preferential treatment.

As stated above, the Second and Fourteenth Amendments protect the rights of individual persons to keep and bear arms for personal, family, business and community defense, without arbitrary and discretionary licensing or state-decreed monopolization. This is a case whereby both the State of California and a local Sheriff monopolize the right to keep and bear arms. What this case clearly shows, and why it must either be summarily struck down as Constitutionally impermissible (similar to how the State rifle ban was in *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) or be remanded to the District Court for a jury trial on the merits, is that the CCW permit process in California is ripe with inequities, arbitrariness, capriciousness and corruption.

If this Court declines to strike down the law as matter of law, this Court should then remand this case back to the District Court, with clear direction from this Court, that this case is to be judged under a strict scrutiny standard, as implicitly indicated in *Heller* and *Mcdonald.*

II. THE DISTRICT COURT ERRED IN DISMISSING THE SECOND CAUSE OF ACTION WHICH CLEARLY STATED SUFFICIENT FACTS TO SUPPORT A VIABLE ACTION UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, WHICH ALSO EMBODIES A FUNDAMENTAL RIGHT TO KEEP AND BEAR ARMS.

There are four (4) separate and distinct violations of the Equal Protection clause that Plaintiffs have adequately plead: **1)** State law exempting honorably retired California peace officers from the laws applicable to Plaintiffs; **2)** State law and County policy establishing a double standard between Plaintiffs and those affiliated with law enforcement, also known as the "Prima Facie Good Cause" standard for law enforcement affiliation; **3)** Campaign contributors and political cronies receiving CCWs and not being subjected to the same CCW application process as Plaintiffs; and, **4)** Precluding Plaintiffs from membership in the County of Sacramento Sheriff's Department Aerosquadron and Posse. FAC 697, ER130

The Equal Protection Clause prohibits states from treating similarly situated people in a dissimilar manner. *City of Cleburne v. Cleburne Living Center Inc.*, 473

U.S. 432 (1985). In, *Village of Willowbrook v. Olech*, (2000) 120 S.Ct. 1073, 145 L.Ed.2d 1060, the United States Supreme Court unanimously held that denial of Equal Protection may occur in a "class of one" situation if there is no rational basis for intentionally different treatment which results in arbitrariness and capriciousness.

Here, the local Sheriff abuses his authority by issuing CCWs to campaign contributors.

Likewise, to keep law enforcement officials pleased when California decides to pass laws that only favor the privileged, it carves an exception to nullify local officials' absolute discretion regarding issuance of CCWs by exempting retired *California* peace officers from the abuses and power of the local sheriff.

A. The Retired California Peace Officer Exemption under State Law. California Penal Code Sections 12027, 12031(b), 12050-12054.

As a matter of law in line with the holding in *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), the honorably retired peace officer exemption is unconstitutional on its face. Both Penal Code Sections 12027, 12031(b), 12050-12054 and Defendants' "prima facie" good cause standard (for Defendants' "Prima Facie Good Cause policy" see CR 150-2, ER 182) for CCW issuance are unconstitutional in that this CCW issuance scheme specifically exempts retired California law enforcement personnel from those provisions and burdens which are held applicable to common good citizens, including Plaintiffs. The holding in

Silveira v. Lockyer, 312 F.3d 1062 (9th Cir. 2002) mandates that these statutory and policy provisions be struck down under the Fourteenth Amendment's Equal Protection Clause, which was used to strike down an identical exemption in the State's Semi-Automatic Rifles statute.

The State of California essentially creates three distinct groups of citizens when it comes to who is able to obtain CCW licenses: (1) honorably retired California peace officers (as compared to not honorably retired), (2) those involved in the criminal justice system (e.g. prosecutors and judges), and (3) "the People" who are not part of the class of individuals included in the statute. See California Penal Code Sections 12027, 12031(b), 12050-12054.

This Circuit has previously held that there is no enumerated right to keep and bear arms, and that therefore there could be no property or liberty interest in a CCW. See *Erdelyi v. O'Brien*, 680 F.2d 61, 63 (9th Cir.1982) (finding no liberty interest in a concealed weapons permit sought for the personal safety of a criminal defense investigator); *Guillory v. County of Orange*, 731 F.2d 1379 (9th Cir. 1984); *Hickman v. Block*, 81 F.3d 168 (9th Cir. (Cal.) 1996). But see *Peruta v. County of San Diego*, S.D.Cal.2010, 2010 WL 143762.

However, this Circuit has always recognized that even if a fundamental right is not involved, a concealed weapons licensing program that is administered arbitrarily so as to unjustly discriminate between similarly situated people may deny equal protection. *Guillory v. County of Orange,* 731 F.2d 1379, 1383 (9th Cir.1984). Even the rational basis test will not sustain government conduct that is malicious,

irrational or plainly arbitrary. *Wedges / Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56, 67 (9th Cir.1994).

To sustain their burden, Plaintiffs need only plead sufficient facts that others similarly situated generally have not been treated in a like manner, and that the denials of their concealed weapons licenses were based on impermissible grounds. See *Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1349 (9th Cir.1983).

However, if classification impinges upon a "fundamental right", the action is subject to strict judicial scrutiny. *Plyer v. Doe*, 457 U.S. 202, 216-217 (1982). In *Fresno Rifle Club v. Van de Kamp*, 965 F.2d 723 f. 9 (9th Cir.), the Ninth Circuit refused to address whether strict scrutiny or rational basis review should be applied in deciding whether a particular statute "is in harmony with the Second Amendment." See *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996). However, with *Heller* and *Mcdonald* declaring that the right to self-defense and to keep and bear arms is a fundamental right, the challenged conduct is now subject to strict scrutiny.

Defendants cannot articulate a tangible and legitimate reason why an average law abiding citizen, trained in the use of arms, can be prohibited from possessing, on his person or in his vehicle, a functional firearm for personal self-defense, whereas a California retired peace officer is bestowed such a right. (See CR 24, ER141 ¶s 799-801)

Defendants rely on a conjecturally weak argument that "all" honorably retired peace officers throughout the state are going to be stalked and attacked at a moments notice in the far regions of the State. Assuming arguendo, without

conceding the point, that the purpose of the law is to afford an "honorably" retired peace officer protection against those who may harbor some sort of grudge against him or her; then why is an honorably retired Deputy Sheriff in Modoc County entitled to have a lifetime CCW when that retired individual moves to San Diego County. The likelihood of any contact with someone who holds this hypothetical grudge is farfetched to say the least. The law could easily be restricted to the jurisdiction in which the retired officer worked (e.g. Modoc County)

Furthermore, the mere fact that the statute differentiates honorably retired officers from those who are not honorably retired speaks volumes as to the irrational basis of the law. A peace officer who was injured in the line of duty the first day on the job would be entitled to an honorable retirement for the injuries sustained – without ever having made an arrest. Compare this to a 30-year veteran officer who is terminated for being late to work, who has made thousands of felony arrests, has been threatened on the job by those arrested: because he did not receive the golden handshake of an honorable retirement, this officer must now apply for a CCW like the average citizen. Can the government equate being late for work with a lack of justification for personal safety?

The incongruence in the law cannot be reconciled with the proffered reason for such preferential treatment. Taking it another step further, there are those peace officers who perform strictly administrative duties but are given the same privileges as a 30-year undercover narcotics investigator. The law cannot be rationalized, other than to simply afford privileges to a group of individuals who happen to also

hold a lot of clout with politicians. Surprisingly, honorably retired California Correctional Officers are not entitled to CCWs, though they too deal with dangerous felons who may hold a grudge against them and whose union is notoriously powerful.

Plaintiffs can discern no legitimate state interest in permitting retired California peace officers to possess and enjoy concealed handguns. "Rather, the retired officers exception arbitrarily and unreasonably affords a privilege to one group of individuals that is denied to others, including plaintiffs." See *Silveira*, 312 F.3d at 1091.

B. The County of Sacramento's *Prima Facie* Standard for the Issuance of CCWs Offends the Equal Protection Clause.

The above law applicable to the State statute is applicable to the County's policy as well.

The County of Sacramento (and Blanas and Mcginnis) have maintained the same identical written policy for the issuance of CCWs:

> "Sacramento County Sheriff's Department, Concealed Weapons Permit Issuance Policy and Application Process" (codified in the challenged statutes), "Good cause exists for issuance of a concealed weapons permit as follows: General: The determination of good cause for the issuance of a concealed weapons permit is perhaps the most difficult aspect in this process. While every applicant may believe that he/she has good cause for a license, the Sheriff's determination is based on consideration of public good and safety." (CR 24, ER132, ¶ 727.)

However, under the same policy, the following is "prima facie evidence of good cause" for issuance of a concealed weapons permit:

> "Applicant is an active or honorably separated member of the criminal justice system directly responsible for the investigation, arrest,

> incarceration, prosecution or imposition of sentence on criminal offenders and has received threats of harm to person or family as a result of official duties." (CR 24, ER132, ¶ 728.)

Furthermore, the so-called "good cause" standard for Plaintiffs and other average citizens is addressed by the CCW application itself in the form of "investigator's interview notes", but information for the "prima facie" good cause standard for retired peace officers is not addressed in the application itself – even though the statute requires such. (See CR 33, ER58)

Here, the policy in question affords those affiliated with law enforcement a privilege, to the exclusion of all other residents of Sacramento County, including Plaintiffs.

As a matter of law, the County's policies are unconstitutional since they are not narrowly tailored and burden a fundamental right.

C. The First Amended Complaint Pleads Specific Facts that Elected Officials Have a Long-Standing Custom and Policy of Issuing CCWs to Campaign Contributors and Political Cronies and Not to Plaintiffs and Others Who Did Not Contribute.

As the pleading states, CCW permits are issued to those who contribute as compared to Plaintiffs who did not contribute, regardless of any purported subjective criteria (e.g. good cause and good moral character). In Sacramento County, the Sheriff's Department's application of its unbridled discretion regarding the issuance of CCW permits has created a corrupt scheme whereby close friends of law enforcement and large campaign contributors receive CCW permits regardless of their fitness to carry a concealed weapon. (CR 24, ER 67 *et al.* ¶s 14, 15, 30, 31,

35-37, 55-57, 130-134, 735, 749, 750, 767-768; see generally CR 24, ER74 *et al.* paragraphs 77 through 597) However, Plaintiffs who are fit to carry concealed weapons are denied that right. (CR 24, ER66 *et al.* ¶s 9-12, 14, 15, 17, 697, 699, 701-702, 726, 747) Sufficient facts were plead to state a claim for relief under 42 U.S.C. § 1983 and *Monell v. Department of Social Services of City of New York*, 426 U.S. 658 (1978).

For the purposes of this court's application of the facts to the law, it is undisputed that Plaintiffs, and others similarly situated, have been denied CCWs even though they were qualified and met the purported "good cause" criteria for issuance of a permit. (CR 24, ER66 ¶ 4, ER67-68 ¶s13-18, ER70 ¶s 46-48, ER130 ¶s 692-697, ER133 ¶s 727-737, ER136 ¶s 747-751) It is further undisputed that campaign contributors to McGinnes and Blanas have received CCWs simply because they have contributed. (CR 24, ER68 ¶s 21-26, ER69 ¶ 30-31, ER72 ¶ 59)(See also generally a specific list of individuals who have had made campaign contributions in exchange for a CCWs, commencing at CR 24, ER74, ¶s 75 and ending at ¶ 597)

In total, 110 CCWs have been issued to campaign contributors whose purported "good cause" was either lacking or missing altogether. (CR 24, ER74, ¶s 75 and ending at ¶ 597)

For example, Gerber gave Blanas a house in Reno and flew Blanas to Las Vegas in his private plane, and in exchange for such payments, Gerber received a CCW without a written application ever being submitted or a background check

ever being conducted. CR 24, ER68 ¶ 21 ER69 ¶35, ER79 ¶s 130-134.

Another example pled in the FAC, Blanas and McGinnis issued CCWs to John Christie, Julie Christie, and William Christie for contributing to their respective political campaigns and employing Blanas' wife, Nanette Blanas. (CR 24, ER73 ¶s 67-71, ER74 ¶s 78-94)

The First Amended Complaint pleads sufficient facts to support a viable cause of action for the preferential treatment political supporters received in the CCW permit process.

D. Plaintiffs Have Been Denied Equal Access to Membership and Privileges Afforded Others Similarly Situated.

As the record clearly indicates, there are some CCW permit holders who, because of their political contributions, are rewarded with exclusive memberships in the Sacrament Sheriff's Department (SSD) Aerosquadron and SSD Posse. Such membership is not available to the general public, but only to those wealthy individuals who support the elected official. (CR 24, ER68 ¶s 22-24, ER76 ¶s 96-117)

Hoffman specifically presented an equal protection claim for being denied access to 1) an Honorary Deputy Sheriff badge and credential that is given to political supporters of the Sheriff, 2) membership in the Sacramento Sheriff's Aerosquadron, which is an association, based out of the headquarters of the Sheriff, of private citizens who own airplanes, fly the Sheriff and his friends around, and receive CCWs for simple membership in this private association sponsored by government, and 3) membership in the Sheriff's Posse, an organization similar to

the Aerosquadron except horses are substituted for planes. (CR24, ER66 ¶s 5-8, ER71 ¶s 51-53, ER72 ¶s 55-59, ER92 ¶s 289-290, ER107 ¶s 469-473, ER113 ¶s 545-548, ER130 ¶s 699-700).

The County of Sacramento Sheriff's office provides for exclusive membership in sub-organizations referred to as the Sheriff's Aero-Squadron and the Sheriff's Posse. FAC ¶ 56. (CR 24, ER72) The Sheriff's Aero-Squadron consists of wealthy campaign contributors who own private planes and jets. FAC ¶ 57. (CR 24, ER72) These planes have been used to transport Defendants BLANAS and McGINNIS to Las Vegas, Nevada, and various other out-of-state venues for personal, non-business-related reasons. FAC ¶ 57. The Sheriff's Posse consists of campaign contributors who own horses, and is similar in nature. FAC ¶ 58.

Plaintiff Hoffman requested an Honorary Deputy Sheriff's Commission, to join the Sheriff's Posse, and to join the Sheriff's Aero-Squadron. However, she was denied all such oral applications. There is no written application available to the public and, to this date, there has been no response to her appeal regarding her Honorary Deputy Commission, or her membership in either the Sheriff's Posse or Sheriff's Aero-Squadron. FAC ¶ 7. (CR 24, ER66)

Since others similarly situated have been provided exclusive governmental membership in these organizations, to the exclusion of Plaintiffs, Plaintiffs have sufficiently pled a viable cause of action for a violation of their equal protection rights.

III. THE FIFTH CAUSE OF ACTION IS VIABLE UNDER THE FOURTEENTH AMENDMENT PRIVILEGES AND

IMMUNITIES CLAUSE AS THAT CLAUSE GUARANTEES A FUNDAMENTAL RIGHT TO SELF PRESERVATION, INCLUDING THE RIGHT TO POSSESS A FIREARM FOR PURPOSES OF TRAVEL.

Section 1 of the Fourteenth Amendment provides in pertinent part that :

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; ....

Senator Howard, who introduced the Fourteenth Amendment for passage in the Senate, stated:

> Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution [the Senator had just read from the old opinion of Corfield v. Coryell, 6 Fed. Cas. 546 (No. 3,230) (E. D. Pa. 1825), also cited in n14 of Saenz v. Roe, 526 U.S. 489]. To these privileges and immunities, whatever they may be - for they are not and cannot be fully defined in their entire extent and precise nature - to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.
>
> Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution; and it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guarantied by the Constitution or recognized by it, are secured to the citizens solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation. . . .
>
> . . . The great object of the first section of this amendment is, therefore, to

> restrain the power of the States and compel them at all times to respect these great fundamental guarantees.

Cong. Globe, 39th Cong., 1st Sess., 2765-2766 (1866).

The Ninth Circuit acknowledged in *Silveira* that:

> *Fresno Rifle* itself relied on *United States v. Cruikshank*, 92 U.S. 542, 23 L. Ed. 588 (1876), and *Presser v. Illinois*, 116 U.S. 252, 29 L. Ed. 615, 6 S. Ct. 580 (1886), decided before the Supreme Court held that the Bill of Rights is incorporated by the Fourteenth Amendment's **Due Process Clause**. Following the now-rejected *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 8 L. Ed. 672 (1833) (holding that the Bill of Rights did not apply to the states), *Cruikshank* and *Presser* found that the Second Amendment restricted the activities of the federal government, but not those of the states. One point about which we are in agreement with the Fifth Circuit is that *Cruikshank* and *Presser* rest on a principle that is now thoroughly discredited. See *Emerson*, 270 F.3d at 221 n.13.

312 F.3d at 1060.

The Fifth Cause of Action does not seek to define the Second Amendment. Rather, it seeks to define the outer parameter of the Privileges and Immunities Clause of the Fourteenth Amendment.

With the *Mcdonald* decision resolving the Second Amendment fundamental rights issue of incorporation, it is now appropriate to address the effect of *Mcdonald* on the interpretation of the Privileges and Immunities Clause.

Pockets of bias against firearms are not unlike the all too frequent prejudice toward persons of color, women and sometimes men as a class, quirky religions, access to birth control, homosexual persons, and the next prejudice de jour. Broad bias typically persists because of misinformation and insufficient thoughtful study. The Bill of Rights are the citizens' protection from such bias. See Sandra Day O'Connor, *The Majesty of the Law* 59 (N.Y.: Random House 2003).

In *Brown v. Board*, 347 U.S. 483 (1954), the United States Supreme Court took pains to be unanimous and to overrule *Plessy v. Ferguson*, 163 U.S. 537 (1896) after many hours of argument and reargument. The Court struggled with the issues leading up to *Brown* for what today seems to have been a very long time. See Del Dickson ed., *The Supreme Court in Conference* 635-671 (1940-1985)(N.Y.: Oxford 2001).

Bradwell v. The State, 83 U.S. 130 (1873), is now seen as a curiosity of condescending patriarchy. It follows the *Slaughter-House Cases*, 83 U.S. 36 (1873), which have been roundly criticized. Categorical discrimination against women was not remedied by the Fourteenth Amendment. The government endorsed the irrational bias of sex discrimination even in the very hour when it was abolishing slavery and empowering freed-men-only to vote. Millions of qualified women were thus denied the right to vote from 1868 to 1920.

The Supreme Court allowed Reconstruction to fail and abandoned the Freedmen to an unkind fate. The Supreme Court, from 1873 into the nineteenth century, perpetuated the same errors, often over the lone dissent of Justice Harlan, and sometimes Justice Field. The progression of decisions following the narrow *Slaughter-House* mode included *Presser v. Illinois*, 116 U.S. 252 (1886) (Woods, J), which held that the First and Second Amendments did not inhibit state action infringing the rights to assemble and to keep and bear arms without a discretionary permit from the Governor. *Presser* remains on the books, but has essentially now been overruled by *Heller* and *McDonald*.

The right to keep and bear arms for purposes of self defense and travel should further be considered a privilege or immunity protected by the Fourteenth Amendment. The right is express throughout the history of the Fourteenth. It is of stature similar to the right to travel upheld in *Saenz v. Roe*, 526 U.S. 489 (1999), and earlier in *Doe v. Bolton*, 410 U.S. 179 (1973). See also *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

Saenz v. Roe, 526 U.S. 489 (1999) (Stevens, J), is important here as a step toward recognizing the intended original strength of the privileges or immunities clause. The *Saenz* majority followed *U.S. v. Guest*, 383 U.S. 745 (1966), in recognizing the right to travel as protected by that neglected clause of the Fourteenth Amendment. *Saenz* recalled that "Justice Stewart reminded us in Shapiro v. Thompson, 394 U.S. 618, 643 (1969), [that] the right is so important that it is 'assertable against private interference as well as governmental action ... a virtually unconditional personal right, guaranteed by the Constitution ….'" (concurring opinion).

Because of *Saenz* and *Mcdonald,* the present case presents for this Court a rare opportunity after 130 years to ignore the wrongful legacy of the *Slaughter-House Cases* and *Cruikshank* and its progeny.

Though the *Mapp* Court applied the Due Process Clause, the Supreme Court has always held that "the full scope of the liberty guaranteed by the Due Process Clause . . . is not a series of isolated points. . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and

purposeless restraints. . . ." *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (dissenting opinion); *Moore v. East Cleveland*, 431 U.S. 494, 501-2 (1977); *Roe v. Wade*, 410 U.S. 113, 169 (1973).

At least three generations of law students and constitutional lawyers have understood that the *Slaughter-House Cases*, 83 U.S. 36 (1873) (5-4), and *United States v. Cruikshank*, 92 U.S. 542 (1876), were not well considered. Many of the Justices of that era chose to disregard the historical circumstances, legislative debates, and plain purposes of the Fourteenth Amendment and related legislation. Justice Black has leveled that specific criticism against them: "[P]revious decisions of this Court … however, had not appraised the historical evidence on that subject." *Adamson v. California*, 332 U.S. 46, 74 (1947) (separate opinion).

It is no coincidence that the *Slaughter-House Cases* in the U.S. Reports is followed immediately by *Bradwell v. The State*, 83 U.S. 130 (1873), another legacy of the then judicial disregard for the Fourteenth Amendment and individual rights. Adherence to the *Slaughter-House Cases* and *Cruikshank* can only provoke continued solid criticism and frustration with the system of justice. The evidence of past error is too strong and widely known.

Justice Noah Swayne observed in the *Slaughter-House Cases* that the majority turned "what was meant for bread into a stone." 83 U.S. at 129. One need not be a constitutional scholar to shudder at the reasoning and brutal reality of the *Slaughter-House Cases* and *Cruikshank* as they attempted to gut the Fourteenth Amendment, leaving next to no protection for the lives and liberty of Freedmen,

Freedwomen, and supporters of their cause.

Cruikshank did so following the murderous "Colfax massacre" of Freedmen in Louisiana. Federal prosecutors charged Klansmen with conspiracy to prevent blacks from exercising civil rights, including the rights to vote and to bear arms for community defense. The *Cruikshank* Court freed the Klansmen to ride again and again, with no reference to the massacre, without any mention of the refusal of Louisiana to enforce its laws, or the complicity of state and local officials in the massacre.

The *Slaughter-House Cases* and *Cruikshank* may be precedent on the books, but they are not entitled to controlling recognition any more than *Bradwell* or *Plessy*. See *Mcdonald.*

As historian Flack noted, "the decisions in the above cases have given to the Fourteenth Amendment a meaning quite different from that which many of those who participated in its drafting and ratification intended it to have." Flack, *The Adoption of the Fourteenth Amendment* 7 (Johns Hopkins 1908).

Professor Antieau is even more blunt about the *Slaughter-House Cases* majority opinion:

> Of the outrageous decision, a contemporary scholar wrote: 'Ninety-nine out of every hundred educated men, upon reading this (Privileges and Immunities) section over, would at first say that it forbade a state to make or enforce a law which abridged any Privilege or Immunity whatever of one who was a citizen of the United States.'

Antieau, *The Intended Significance of the Fourteenth Amendment* (Wm. Hein, Buffalo, N.Y. 1997), citing Royall, *The Fourteenth Amendment: The Slaughter*

House Cases, 4 So. L. Rev. (N.S.) 558, 563 (1879). All of the authorities from varying venues cited in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), cert. denied, 536 U.S. 907 (2002), *Silveira v. Lockyer*, 328 F.3d 567 (9th Cir. 2003) and *Nordyke v. King*, 364 F.3d 1025 (9th 2004) agree, and explain themselves well, as do Story, Blackstone, Rawle, and many others.

Akhil Reed Amar of Yale writes:

> [T]he framers of the Fourteenth Amendment strongly believed in an individual's right to own and keep guns for self-protection. Blacks and Unionists down South could not always count on the local police to keep white night-riders at bay. When guns were outlawed, only Klansmen would have guns. Thus, the Reconstruction Congress made quite clear that a right to keep a gun at home for self-protection was indeed a constitutional right -- a true 'privilege' or 'immunity' of citizens.

The post-Civil War Freedmen's Bureau Act attempted to protect newly freed men in their personal "constitutional right to bear arms." 14 Stat. 173, 176 (1866). That Act of Congress has enormous significance for interpreting the Fourteenth Amendment as protecting the right to arms for family and community defense against official and Klan violence, or contemporary gangs. The same Congress drafted and passed both overwhelmingly.

The *Cruikshank* Court, however, restored the Klan and supporting reactionary officialdom to power. The Supreme Court has never undone that wrong. The evil of the Klan persists today, as we were recently reminded in *Virginia v. Black*, 538 U.S. 343, 355 (2003).

State and local lawmen all too often have been supportive of the Klan with pervasive state inaction: refusal to provide protection, refusal to prosecute, tacit

cooperation, and obstruction of justice at every level.

The disarmament of blacks via the Black Codes and oppressive state gun control legislation left the power of firearms in the hands of the Klan, gangs, and looters. The Fourteenth Amendment was intended in part to redress that imbalance and provide means of self-defense to law abiding citizens, black and white. Again, a single handgun would mean the difference between life or death from an assault by a truckload of Klansmen.

Senator Saulsbury of Delaware opposed the Fourteenth Amendment Privileges or Immunities Clause, the Freeman's Bureau, and the Civil Rights Bills since they **"deprive the state of their police power, and would nullify the laws of his State which forbade negroes to keep-arms or ammunition.**" *Flack* at 22, 25, 38 (emphasis added).

Senator Trumbull recognized "the right to keep and bear arms was a right all were entitled." *Flack* at 20-22. Senator Trumble was adamant that the "privileges or immunities clause" was necessary to "destroy the discrimination made against the negro in the laws of the Southern States . . . .", citing the reenactment of slave codes prohibiting the right to travel and firearm ownership.

In this case we have the explicit right to keep and bear arms, protected by the Second Amendment and the privileges or immunities clause of the Fourteenth Amendment, and specifically mentioned in the legislative history such as that of the Freedmen's Bureau Act, overwhelmingly passed by the same Congress that proposed the Fourteenth Amendment.

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

IV. THE SIXTH CAUSE OF ACTION UNDER THE NINTH AMENDMENT IS NOW VIABLE IN THE NINTH CIRCUIT DUE TO RECENT SUPREME COURT PRECEDENT.

Heller and *Mcdonald* overrule current Ninth Circuit precedent *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121 (9TH Cir. 1996). The only issue to consider is whether the Ninth Amendment can also be read to broaden the right to self preservation, and the right to self defense is useless unless one has the tools to defend against crime and violence.

In *Heller*, the Court states

> ... [I]t was not necessary that the right to bear arms should be granted in the Constitution, for it had always existed."

554 U.S. at 340; J. Ordronaux, Constitutional Legislation in the United States 241-242 (1891). Thus, the Ninth Amendment embodies the idea that the right to self defense and to bear arms for such a purpose is a right which cannot be licensed or arbitrarily controlled, and need not be codified in the Constitution.

V. THE ATTORNEY GENERAL IS A PROPER PARTY, AND PLAINTIFFS HAVE STANDING TO ASSERT CONSTITUTIONAL CLAIMS AGAINST HIM.

The District Court declined to consider the State's contentions that this action is barred by the Eleventh Amendment. (See ER36)

Anticipating the State will raise such an argument, it fails. Plaintiffs have plead sufficient facts demonstrating that the Attorney General has caused injury-in-fact to the Plaintiffs. (CR 24, ER130 ¶s 692-696, ER131 ¶s 707-719)

In California, a sheriff is not designated by the constitution as a member of the executive branch, which is defined in Article V, titled "Executive." Instead, sheriffs in California are defined in Article XI of the Constitution, titled "Local Government". The California Constitution recognizes two forms of local government: counties and cities, with the sheriff designated as the chief law enforcement officer of the county. See Cal. Const. art. XI, §§ 1, 2. See, e.g., *Robinson v. Solano County*, 00 C.D.O.S. 5735, 5737 (9th Cir. July 12, 2000); *Headwaters Forest Defense v. County of Humboldt*, 211 F.3d 1121, 1126 n. 2 (9th Cir.2000); *LaLonde v. County of Riverside*, 204 F.3d 947, 961 (9th Cir.2000).

California Constitution Article V, section 13 grants the Attorney General a supervisory role over "every district attorney and sheriff and over such other law enforcement officers as may be designated by law." Thus, the Attorney General is a proper party for the case and controversy requirement.

VII. AT A MINIMUM, THIS COURT SHOULD REVERSE THE JUDGMENT OF THE DISTRICT COURT AND REMAND FOR AMENDMENT OF THE FIRST AMENDED COMPLAINT, CONSISTENT WITH A RULING FROM THIS COURT PERTAINING TO THE ABOVE LEGAL ISSUES.

Generally, leave to amend is only denied when it is clear that the deficiencies of the complaint cannot be cured by amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992); *Schreiber Distributing Co. v. Serv–Well*

Furniture Co., Inc., 806 F2d 1393, 1401 (9th Cir. 1986). As a practical matter, leave to amend is almost always granted by the court. *Allen v. City of Beverly Hills*, 911 F2d 367, 373 (9th Cir. 1990). F.R.C.P. Rule 15(a) severely restricts the court's discretion to dismiss without leave to amend. See *Silva v. Bieluch,* 351 F3d 1045, 1048 (11th Cir. 2003).

The District Court acknowledged the factual and legal differences between *Mehl* and the present action; and yet, the District Court still denied Plaintiffs leave to amend. (CR 63, ER5, commencing at line 20).

Plaintiffs, at a minimum, should have been afforded an opportunity to amend the complaint to dismiss the RICO action and plead around the *Mehl* action. To deny Plaintiffs leave to amend constituted an abuse of discretion.

VIII. THIS COURT SHOULD ASSESS REASONABLE INTERIM COUNSEL FEES UNDER 42 U.S.C. §1988.

If Plaintiffs prevail in this Court sufficiently on the legal issues set out above, they will have assisted this Circuit in sorting out the law of the Second and Fourteenth Amendments from the past 64 years. As substantially prevailing parties, Appellants should receive costs, reasonable counsel fees, and appropriate litigation expenses under 42 U.S.C. §1988.

This would fit the requirement from *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) (per curiam). Prevailing on the principal questions presented by this appeal would be a far greater victory than an award of nominal damages, sufficient in *Farrar v. Hobby*, 506 U.S. 103 (1992). *Hensley v. Eckerhart*, 461 U.S. 424 (1983), applies. This Court should order that the fees be assessed before other

proceedings below on remand in the district court when the successful party has conferred a substantial benefit on the public. *See United States for Use & Benefit of Reed v. Callahan*, 884 F.2d 1180, 1185 (9th Cir. 1989).

CONCLUSION

Plaintiffs 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 to proceed to trial.

Dated this 5 day of May 2010.

Respectfully submitted,
THE LAW OFFICES OF GARY W. GORSKI

/s/ Gary W. Gorski
Gary W. Gorski
Attorney for Appellants/Plaintiffs

THE LOUISIANA MURDERS—GATHERING THE DEAD AND WOUNDED.—[See Page 781.]

GATHERING THE DEAD AND WOUNDED
Harpers, May 10, 1873
(After the Colfax Massacre, before *US* v. *Cruikshank)*

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, I certify that to my knowledge there are related cases: The panels of this Court in which other cases are pending have stayed further proceedings until the United States Supreme Court decides *McDonald v. City of Chicago* (Docket # 08-1521) in which applicability to the states through the Fourteenth Amendment of Second Amendment rights of individuals to keep and bear arms is at issue. The en banc panel in *Nordyke v. King*, No. 07-15763 (9th Cir.) has withdrawn submission of that case pending a decision in *McDonald* and the panel in *Mehl v. Blanas*, No. 08-15773 (9th Cir.) has also withdrawn submission pending decisions in *Nordyke* and *McDonald*.

Dated this 5 day of May 2010.

Respectfully submitted,
THE LAW OFFICES OF GARY W. GORSKI

/s/ Gary W. Gorski
Gary W. Gorski
Attorney for Appellants/Plaintiffs

REQUEST FOR ATTORNEY FEES

Appellants hereby notify the Court of their intention to request attorney fees on appeal based upon 42 U.S.C. § 1988.

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 13,817 words. Corel WordPerfect X4 was used to compute the word count.

Dated this 5 day of May 2010.

Respectfully submitted,
THE LAW OFFICES OF GARY W. GORSKI

/s/ Gary W. Gorski
Gary W. Gorski
Attorney for Appellants/Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2010, 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 5 day of May 2010.

Respectfully submitted,
THE LAW OFFICES OF GARY W. GORSKI

/s/ Gary W. Gorski

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RE: Rothery; et al. v. Blanas; el al.
Case #: 09-16852

Dear Sir/Madam:

This letter will confirm my extension request today via telephone with the Ninth Circuit Court Clerk regarding a 14 day extension of time to file the Opening Brief per my email communication to your office.

The Court granted my request. As such, the *Opening Brief* is now due **May 5, 2010**, the *Opposition Brief* is now due **June 4, 2010**, and a reply is due 14 days after receipt of the opposition. A copy of this extension letter is to accompany the original brief - last page.

If you have any questions, please feel free to contact me. Thank you for your cooperation in this regard.

Very truly yours,
LAW OFFICES OF GARY W. GORSKI
/s/ Gary W. Gorski
Gary W. Gorski
Attorney at Law

GWG