No. 14-35970

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OFFICER ROBERT MAHONEY; et al.,

Plaintiffs-Appellants,

v.

THE CITY OF SEATTLE; ED MURRAY, Mayor, City of Seattle; and PETER HOLMES, Seattle City Attorney,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF APPELLEES

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I. JURISDICTIONAL STATEMENT

Appellees The City of Seattle, Ed Murray and Peter Holmes (collectively, the "City") agree with the Jurisdictional Statement of Appellants ("Officers").

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. The Officers claim that rules governing the use of firearms and other force tools set forth in the Seattle Police Department's Use of Force policy ("UOF policy") violate a right to self-defense under the Second Amendment.

1. Was dismissal of the Second Amendment claim warranted when nothing in the UOF policy limits the Officers' right to either "keep" or "bear" arms?

2. Was dismissal warranted when no case has held that the individual right to keep and bear arms under the Second Amendment restricts the ability of a police department to set rules on how officers can use department-owned firearms and other force tools they are issued for use in their official duties, exercising police powers?

3. Was dismissal warranted when neither the Second Amendment nor its jurisprudence confers any free-standing right to self-defense independent of the right to keep and bear arms?

4. Was dismissal warranted when neither the Second Amendment nor its jurisprudence confers a right to use arms in a particular way, or dictates when or how arms can be used in self- defense?

B. The Officers claim that the UOF policy violates the Equal Protection Clause of the Fourteenth Amendment, because it treats them unequally when compared to ordinary citizens in their ability to use force in self-defense. Was dismissal of this claim warranted when the Officers are not "similarly situated" to ordinary citizens (who do not exercise police powers and to whom police department policies do not apply), and when the Officers have failed to establish the existence of a fundamental right to self-defense under the Second and Fourth Amendments?

C. The Officers claim a violation of substantive due process under the Fifth and Fourteenth Amendments, on the grounds that the UOF policy violates a fundamental right of self-defense found either in the "penumbras" of other constitutional provisions or as a right pre-existing the Constitution. Was dismissal of this claim warranted when the Officers have failed to state a claim under any of the other constitutional provisions they cite, when no case has recognized a substantive due process right to self-defense, and when nothing in the UOF policy itself "shocks the conscience?"

III. STATEMENT OF THE CASE

A. Background of Use of Force Policy

In March 2011, the U.S. Department of Justice ("DOJ") opened an investigation into whether the Seattle Police Department ("SPD") engaged in a pattern or practice of excessive use of force. ER 22, ¶ 9.[1] DOJ found that nearly 20 percent of the uses of force by Seattle police officers were excessive and filed a lawsuit against the City. *Id.* Although the City did not admit or agree with DOJ's allegations, in July 2012 it entered into a Settlement Agreement and Memorandum of Understanding with DOJ. *Id.*, ¶¶ 9, 12.

As a required part of the Settlement Agreement, the City, DOJ, and court-appointed Monitor Merrick Bobb submitted a Consensus Use of Force Policy (the "UOF policy") to the Honorable James L. Robart of the U.S. District Court for the Western District of Washington. ER 22-23, ¶¶ 8, 14.[2] The UOF policy sets forth SPD's policies regarding use of force by its officers, addressing (among other subjects) general principles relating to the use of force; the use of appropriate de-

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[1] All citations to "ER" refer to the Excerpts of Record filed by Appellants. Appellees are not filing any Supplemental Excerpts of Record.

[2] The Monitor was appointed by Judge Robart to oversee implementation of the Settlement Agreement, and to provide periodic reports on the City's progress in reaching compliance with its terms.

escalation tactics to reduce the need for force; when deadly force may be used; the circumstances under which firearms and other force tools may be used; and procedures relating to the investigation and review of uses of force by officers. ER 53-147.

Judge Robart approved the UOF policy, finding it constitutional. ER 22, ¶ 8. Specifically, Judge Robart noted that his role was "to insure that the Proposed Policies conform to the requirements of the Consent Decree, the United States Constitution, and judicial decisions interpreting the City's constitutional obligations."[3] The UOF policy went into effect on January 1, 2014. ER 22, ¶ 8.[4]

During the creation of the UOF policy, select Officers were invited to submit comments through their union, the Seattle Police Officers' Guild, and through a

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[3] *United States v. City of Seattle*, Case No. 12-1282JLR, Dkt. #115 at p. 2. As discussed below at p. 11, in ruling on a motion to dismiss the Court may take judicial notice of matters of public record. *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001). The Court may therefore consider filings in the *United States v. City of Seattle* litigation, including Judge Robart's order approving the UOF policy.

[4] The UOF policy is not etched in stone. All policies adopted under the Settlement Agreement, including the UOF policy, must be reviewed on an annual basis "to ensure that the policy or procedure continues to provide effective direction to SPD personnel and remains consistent with the purpose and requirements of the Settlement Agreement and current law." *United States v. City of Seattle*, Dkt. #3-1, ¶ 180.

departmental website. ER 24, ¶ 18. The Officers claim that they tried to further communicate their concerns about the UOF policy, but were "ignored." *Id.* But neither the Officers who are parties to this appeal nor their union sought leave to intervene in the consent decree proceedings before Judge Robart in order to object to the UOF policy (or for any other purpose).[5]

In the Amended Complaint, the Officers stated that they were suing Seattle Mayor Ed Murray "based on his involvement in the implementation" of the UOF policy, and that they were suing Seattle City Attorney Peter Holmes "based on his involvement in the promulgation and implementation of the unconstitutional" UOF policy. ER 21, ¶¶ 3, 5. But having said that, the Officers did not mention either Mayor Murray or City Attorney Holmes again in the Amended Complaint, and neither one is referred to by name or position in the Appellants' Opening Brief ("App. Br.") in this Court.

B. Procedural Background

On August 27, 2014, 102 Seattle police officers filed the Amended Complaint that is at issue in this appeal. ER 20. Named as defendants were the

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[5] *See United States v. City of Los Angeles*, 288 F.3d 391, 398-402 (9th Cir. 2002) (Los Angeles Police Protective League, as designated bargaining unit for rank and file LAPD officers, entitled to intervene as of right in consent decree proceedings).

City; Mayor Murray; City Attorney Holmes; Merrick Bobb, the court-appointed Monitor; U.S. Attorney General Eric Holder; and Jenny Durkan, who was at the time the U.S. Attorney for the Western District of Washington). *Id.*[6] In the Amended Complaint, the Officers alleged that the UOF policy violates their rights under the Second, Fourth, Fifth and Fourteenth Amendments to the U.S. Constitution by, among other things, constraining their options in defending themselves against potentially dangerous suspects. ER 20-21. The Officers asked the District Court to stop the implementation of the UOF Policy, and to declare it unconstitutional. ER 47.

Both the City and the Monitor moved to dismiss the Amended Complaint under Fed. R. Civ. P. 12(b)(6). On October 17, 2014, the District Court, the Honorable Marsha J. Pechman, granted both motions and dismissed the Amended Complaint with prejudice. ER 5-19. In granting the City's motion, the District Court found that the Officers had failed to state a claim under the Second Amendment, explaining that "nothing in the Supreme Court's recent Second

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[6] The original Complaint had been filed by 126 Seattle police officers, not only against the six defendants named in the Amended Complaint, but also against five additional employees of the U.S. Department of Justice, three additional members of the Mr. Bobb's Monitoring Team staff, the former Mayor of Seattle, and three former SPD Chiefs. District Court Docket No. ("Dkt. No.") 1.

Amendment jurisprudence lends support to Plaintiffs' novel theory that a police department policy outlining expectations for an officer's use of force can burden conduct protected by the Second Amendment," and that "restrictions on the manner in which a weapon is used fall outside the scope of the Second Amendment." ER 13. The District Court also held that the Officers had failed to state a claim under the Fourth Amendment (stating that the Officers had "grossly misconstrue[d] Fourth Amendment law"); under the Equal Protection Clause (stating that the Officers had failed to "make even the most rudimentary showing in an equal protection claim," by failing to describe themselves as members of an affected class similarly situated to those outside the class); or for violations of their right to Substantive or Procedural Due Process. ER 15-18. The District Court also granted the Monitor's motion to dismiss, concluding that as an agent of the court he was entitled to quasi-judicial immunity. ER 9-12. Judgment was entered on October 20, 2014. ER 4.

On November 14, 2014, 92 of the 102 Officers who had filed the Amended Complaint filed a timely notice of appeal. ER 1.

IV. SUMMARY OF THE ARGUMENT

Second Amendment. The Officers' Second Amendment claim fails for four reasons. First, the necessary threshold requirement – an infringement on the right

to keep and bear arms – is absent. The UOF policy in fact *requires* SPD officers to carry firearms. That fact alone mandates dismissal of this claim.

Second, while the Supreme Court has recognized an individual right to keep and bear arms, no case has held or even suggested that the Second Amendment impacts the ability of a police department to govern how officers can (and cannot) use the firearms and other department-owned force tools that are issued to them for use on the job in the exercise of police powers.

Third, while self-defense has been recognized as an important component of the right to keep and bear arms, no case has found that the Second Amendment guarantees an independent right to self-defense. Any such right does not come into play under the Second Amendment until the government has restricted the right to keep and bear arms.

Fourth, the Officers' complaint is not about their right to keep or bear arms (which has not been restricted or alleged to be), but instead about how they may *use* arms in self-defense. The Second Amendment, however, does not confer a right to use arms in any particular way. Restrictions on the way arms are used fall outside the scope of the Second Amendment.

Equal Protection. The Officers' Equal Protection claim similarly fails because they fail to identify a fundamental right at issue, and because they fail to

establish disparate treatment. The Officers argue that the UOF policy infringes on their "fundamental" right to self-defense as guaranteed by the Second Amendment. However, their claims under the Second Amendment fail, and the Officers have not established the existence of a fundamental right located elsewhere in the Constitution or in case law. The Officers have also failed to establish a necessary threshold requirement for an Equal Protection claim – the existence of a "similarly situated" class against which the Officers can be compared. The Officers claim that they are being treated unequally compared to ordinary citizens in their right to use self-defense. But police officers are not similarly situated to ordinary citizens, who do not exercise police powers and who are not subject to department policies. Disparate treatment of unlike groups cannot support an Equal Protection claim.

Substantive Due Process. The Officers ask this Court to find within the penumbras of other constitutional provisions a substantive due process right to self-defense – a right they concede that no court has recognized. Courts are understandably reluctant to expand the concept of substantive due process; and because nothing in the UOF policy "shocks the conscience," this case is a particularly poor vehicle in which to do so.

Fourth Amendment. The Officers appear to have abandoned the theories of liability they asserted under the Fourth Amendment in the District Court. Now, the

Officers invoke the Fourth Amendment as a standard for this Court to apply in defining the "contours" of their claimed substantive due process right to self-defense. Because that claim should be dismissed for the reasons discussed herein, there is no need for this Court to decide the hypothetical contours of such a right.

V. ARGUMENTAND AUTHORITY

A. Standard of Appellate Review

A District Court's decision to grant a motion to dismiss under Fed. R. Civ. P. 12(b)(6) is reviewed *de novo*. *Reid v. Johnson & Johnson*, 780 F.3d 952, 958 (9th Cir. 2015). The Court must assume the truth of the allegations in the Amended Complaint, and draw all reasonable inferences in the Officers' favor. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). And while a complaint challenged by a Rule 12(b)(6) motion need not provide detailed factual allegations, it must offer "more than labels and conclusions" and contain more than a "formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The complaint must indicate more than mere speculation of a right to relief. *Id.* "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 500 U.S. at 570). A complaint lacks "facial plausibility" if it merely

"tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). When a complaint fails to adequately state a claim, such deficiency should be "exposed at the point of minimum expenditure of time and money by the parties and the court." *Twombly*, 550 U.S. at 558.

Moreover, the Court is not bound by any of the Officers' legal conclusions. *See Papasan v. Allain*, 478 U.S. 265, 286 (1986) ("[Courts] are not bound to accept as true a legal conclusion couched as a factual allegation"). Nor is the Court bound by the Officers' characterization of the UOF policy, which is in the record and speaks for itself. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (court is not "required to accept as true allegations that contradict matters properly subject to judicial notice or by exhibit").

In ruling on a motion to dismiss, the Court may consider documents not physically attached to the complaint if their authenticity is not contested and the complaint necessarily relies on them. *Lee*, 250 F.3d at 688-89; *Cycle Barn v. Arctic Cat Sales*, 701 F. Supp.2d 1197, 1201-02 (W.D. Wash. 2010). The Court may also take judicial notice of matters of public record. *Id.* at 1202. Here, the SPD manual, which is cited throughout the Amended Complaint (and which contains the UOF policy that is the subject of this action as well as other SPD

policies), may be considered by the Court. The Court may also take judicial notice of filings in the *United States v. City of Seattle* litigation.

B. The Officers Failed to State Any Constitutional Claim against the City

A municipality may be liable under 42 U.S.C. § 1983 where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978). *Monell* liability requires an underlying unconstitutional act or consequence. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986); *Johnson v. City of Seattle*, 474 F.3d 634, 638-39 (9th Cir. 2007) (like individuals, municipalities are liable only if there is, at a minimum, an underlying constitutional tort) (citing *Monell*, 436 U.S. at 691). Because the Officers have alleged no cognizable unconstitutional act or consequence, their *Monell* claim and the entire lawsuit fail as a matter of law.

1. Second Amendment

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the United States Supreme Court held, for the first time, that the Second Amendment guaranteed an individual right to bear arms. The issue presented in

Heller was whether the District of Columbia's regulations, which barred the possession of handguns both inside and outside the home, and required other firearms to be kept "unloaded and disassembled or bound by a trigger lock or similar device," violated the plaintiff's Second Amendment rights. 554 U.S. at 575. After examining its original meaning, the Supreme Court concluded that the Second Amendment confers "an individual right to keep and bear arms." *Id.* at 595. The Court emphasized that because "the inherent right of self-defense has been central to the Second Amendment right," a prohibition on the possession of handguns was unconstitutional. *Id.* at 628-29. Similarly, the District of Columbia's requirement that "firearms in the home be rendered and kept inoperable at all times" made "it impossible for citizens to use [firearms] for the core lawful purpose of self-defense and [was] hence unconstitutional." *Id.* at 630.[7]

In the wake of *Heller*, the Ninth Circuit has adopted a two-step test for analyzing Second Amendment claims. The court first asks whether the challenged law burdens conduct protected by the Second Amendment. If so, the court then determines whether the law meets the appropriate level of scrutiny. *Fyock v.*

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[7] In 2010, the Supreme Court held that the Second Amendment right recognized in *Heller* applies to states and municipalities through the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

Sunnyvale, 779 F.3d 991, 996 (9th Cir. 2015); *Jackson v. City and County of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014). Here, the answer to the first question is emphatically "no": nothing in the UOF policy burdens any conduct or rights that are protected by the Second Amendment.

a. The necessary threshold requirement for a claim under the Second Amendment – an infringement on the right to keep and bear arms – is absent here.

The Officers argue that because the UOF policy places limits on their ability to use firearms and other force tools in particular circumstances, it violates their right to self-defense under the Second Amendment. This argument is based on a misreading of *Heller* and its progeny.

A necessary predicate for any claim under the Second Amendment claim is that the government must have infringed the right to "keep" or "bear" arms.[8] The Officers have not cited a single case finding a violation of the Second Amendment in the absence of such a restriction. The Officers rely heavily on the discussion of self-defense in *Heller* as it relates to the right to bear arms, and the concept of self-

[8] For Second Amendment purposes, to "keep" arms means to have weapons, and to "bear" arms means to carry weapons to be prepared for confrontation. *Heller*, 554 U.S. at 582, 584.

defense is an important component of that right.[9] But any right to self-defense does not come into play under the Second Amendment unless and until the government has restricted the right to keep and bear arms.

The Officers do not, and cannot, claim that the UOF policy limits their right to carry or possess firearms. To the contrary, SPD officers are *required* to carry firearms while working in their official capacity,[10] and are also required to carry at least one "less lethal" force tool. ER 62.[11] The failure to allege any infringement on the right to carry or possess arms, on its own, dictates dismissal of the Second Amendment claim.

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[9] *Heller* explained that the "inherent right of self-defense has been central to the Second Amendment right," and referred to self-defense as "the central component of the right itself." 554 U.S. at 599, 628. *See also McDonald*, 561 U.S. at 787 (explaining that the right to bear arms "was also valued because the possession of firearms was thought to be essential for self-defense"); *Peruta v. County of San Diego*, 742 F.3d 1144, 1155 (9th Cir. 2014) (explaining that the Second Amendment "right is, and has always been, oriented to the end of self-defense").

[10] *See* SPD Manual, 9.060 (requiring that "Sworn Employees Working in Official Capacity as a Seattle Police Officer Shall Carry an Approved Department Firearm"): http://www.seattle.gov/police/publications/manual/09_060_Firearms.html

[11] Examples of less lethal force tools include conducted electrical weapons (TASERs) and Oleoresin Capsicum (OC) spray, more commonly referred to as "pepper spray." ER 61.

b. The Second Amendment does not restrict the ability of a police department to set rules relating to the use of firearms and other force tools by its officers.

Heller and its progeny recognize an individual right to bear arms, and the Officers challenging SPD's UOF policy have the same right to keep and bear arms that any other citizen enjoys. See, e.g., *Heller*, 554 U.S. at 595 (Second Amendment confers "an individual right to keep and bear arms"); *McDonald* (cities' law banning possession of handguns violated the Second Amendment); *Peruta*, 742 F.3d at 1179 (county's requirement that "good cause" be shown before concealed weapon license would be issued violated Second Amendment). But no case has held, or suggested, that the Second Amendment places any restrictions on the ability of a police department to establish rules relating to the department-owned firearms and other force tools that it issues to its officers, to be used on the job, in the exercise of police powers.[12] The District Court correctly noted this important distinction:

> [T]he Policy represents an effort by an employer, the Seattle Police Department, to regulate the use not only of (employer-issued) weapons but of the force its employees are specially sanctioned to wield on behalf of the city government. This scenario has no relation

[12] The plaintiff in *Heller* happened to be a police officer. But the case involved guns he owned at home, not a police department-issued firearm. 554 U.S. at 575-76.

> to the Second Amendment guarantees for individuals recognized in *Heller*, *McDonald* and *Peruta*.

ER 14.

The implications of the Officers' position regarding the scope of the Second Amendment are extreme. The UOF policy establishes standards applying not only to the use of firearms, but also to numerous other force tools and tactics that are used by officers (each with their own set of rules, procedures, and prohibitions). These include TASERS, OC spray, beanbag shotguns, impact weapons, vehicle-related force tactics, and specialty unit weaponry. ER 63-75. Adopting the Officers position would subject any police department policy setting rules with respect to any force tool or tactic to potential *Monell* claims under the Second Amendment. This would risk elevating every intra-department disagreement over the proper scope of weapons-related rules and tactics into potential § 1983 litigation. This Court should decline the Officers' invitation to extend the Second Amendment into this uncharted and unwarranted terrain.

c. While self-defense is a purpose underlying the right to bear arms, it is not an independent, free-standing Second Amendment right.

As *Heller* establishes, self-defense is a purpose underlying the right to bear arms. 554 U.S. at 584 (right to bear arms means the right to "wear, bear, or carry

... upon the person or in the clothing or in a pocket, for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another person") (citing *Muscarello v. United States*, 524 U.S. 125, 143 (1998)) (Ginsburg, J., dissenting). However, the Officers have cited no case establishing that the Second Amendment codified an independent right to self-defense, divorced from the right to keep and bear arms. And every Second Amendment decision discussing self-defense does so *only* in the context of a governmental infringement on the right to keep and bear arms, absent here.

The Officers' erroneous assumption the Second Amendment provides a free-standing right to self-defense permeates their entire case, as their claims under the Fifth and Fourteenth Amendments stem in large part from a supposed Second Amendment "right of self-defense." *See, e.g.*, App. Br. at 22. The Officers' failure to state a claim under the Second Amendment impacts the validity of their other claims, as the District Court found. ER 16 (dismissing substantive due process claim, in part, on Officers' failure to state a Second Amendment claim).

d. The Second Amendment does not confer a right to use a weapon in a particular way.

The Officers ask this Court to create new law by reversing the District Court's holding that restrictions on how weapons are used fall outside the scope of

the Second Amendment. ER 13. According to the Officers, this holding renders Second Amendment protections "meaningless." App. Br. at 16.

The Second Amendment protects the right to keep and bear arms for the purpose of being ready to engage in self-defense, but nothing in the Second Amendment or its jurisprudence controls when or how force, firearms, or other weapons can be *used* in self-defense. To the contrary, the Supreme Court in *Heller* explained that the Second Amendment right "was not unlimited," explaining, "[w]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the rights of citizens to speak for any purpose." *Heller*, 554 U.S. at 594 (emphasis in original). *See also McDonald*, 561 U.S. at 889 (Stevens, J., dissenting) (recognizing that "the right to take a certain type of action is analytically distinct from the right to acquire and utilize specific instrumentalities in furtherance of that action"). The Ninth Circuit has also recognized the distinction between possession and use of a firearm:

> [N]either [*Heller* nor *McDonald*] purports to change, or even to comment on, the law as to the definition of self-defense in a criminal case. Indeed, neither case concerned the use of a weapon, as distinct from mere possession, so the Court had no occasion even to consider the issue now before us.

United States v. Morsette, 622 F.3d 1200, 1202 (9th Cir. 2010). Therefore, the Second Amendment offers no guidance about how officers may use the firearms that they are permitted by law and policy to possess.

Moreover, the right to carry a firearm is not absolute. Both the Supreme Court and Ninth Circuit have explicitly held that government bodies can impose reasonable restrictions on the right to bear arms, such as regulations restricting who may carry firearms and where people may do so. In *Heller*, the Supreme Court explained that "[l]ike most rights, the right secured by the Second Amendment is not unlimited," and that "the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. The Court added that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Id.* *See also Peruta*, 742 F.3d at 1178 ("*regulation* of the right to bear arms is not only legitimate but quite appropriate") (emphasis in original).

The Officers selectively quote from historical sources cited in *Heller* for the proposition that the Second Amendment right codified a pre-existing right not only to possess arms but to use them as well. App. Br. at 18 (arguing that *Heller*

recognized "the meaninglessness of the right to bear arms without also the right to use them"). But the sources cited by the Officers were relied on in *Heller* to recognize a pre-existing right to bear arms, not to self-defense. *Heller*, 554 U.S. at 595 ("[t]here seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms").

The District Court correctly rejected the Officers' attempt to reframe the historical sources cited in *Heller* (which support the conclusion that there is an individual right to *possess* arms) as support for the view that the Second Amendment also protects the right to *use* arms:

> Plaintiffs selectively quote historical sources cited in *Heller* to suggest that so long as self-defense is a purpose for the individual claiming a Second Amendment right, the Second Amendment forbids "unreasonable" restrictions on the manner a weapon is used. . . . In fact, contemporaneous sources relied on by the Supreme Court and the Ninth Circuit show that restrictions on the manner in which a weapon is used fall outside the scope of the Second Amendment. For example, the Ninth Circuit quoted and the Supreme Court cited the following nineteenth-century footnote: "[I]t is generally held that statutes prohibiting the carrying of concealed weapons are not in conflict with these constitutional provisions, since they merely forbid the carrying of arms *in a particular manner*, which is likely to lead to breaches of the peace and provoke to the commission of crime, rather than contribute to public or personal defence." *The American Students' Blackstone: Commentaries on the Laws of England* 84 n. 11 (George Chase ed., 3d ed. 1890) (emphasis supplied) . . . Similarly, the Ninth Circuit relied on nineteenth-century legal commentator John Ordronaux for the proposition that "the [Second] Amendment has

> never prevented 'a State from enacting laws regulating the manner in which arms may be carried.'"

ER 13-14 (citations to *Heller* and *Peruta* omitted).

In summary, the right announced in *Heller* is an individual right to *keep and bear* arms. There is no basis to conclude from the Second Amendment itself, from *Heller* and its progeny, or from the historical sources relief upon by the Supreme Court or this Court that a right to *use* arms in a particular manner falls within the protections of the Second Amendment. There is no authority supporting the Officers' attempt to assert a violation of Second Amendment rights based on the rules regarding firearms and other force tools in the UOF policy. The District Court's dismissal of the Second Amendment claim should be affirmed.

2. Equal Protection

The Officers argue that the UOF policy violates the Equal Protection Clause because, as police officers, "they are being treated unequally compared to other citizens in their ability to use force and take reasonable actions to protect the public and themselves from threatening behavior, *i.e.*, their fundamental right of self-defense." App. Br. at 26. The Officers argue that strict scrutiny should apply, because the government is infringing on a fundamental right. *Id.*

This claim fails for two reasons. First, as discussed elsewhere in this brief, the Officers are incorrect that there is a fundamental right to self-defense that is protected by the Constitution. As the District Court observed, "[n]o Supreme Court case identifies self-defense as a "fundamental right" on par with the right to marry or to vote." ER 16.

Second, the Officers have failed to make what the District Court accurately described as "the most rudimentary showing in an equal protection claim: they fail to describe themselves as members of an affected class similarly situated to those outside the class." ER 16.

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). "The first step in equal protection analysis is to identify the [defendants' asserted] classification of groups." *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995) (citation omitted). "The groups must be comprised of similarly situated persons so that the factor motivating the alleged discrimination can be identified." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005) (citation omitted). "An equal protection claim will not lie by 'conflating all persons not injured into a preferred class receiving better treatment' than the plaintiff." *Id.* (*quoting Joyce v. Mavromatis*, 783 F.2d 56, 57

(6th Cir. 1986)). "The groups need not be similar in all respects, but they must be similar in those respects relevant to the Defendants' policy." *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1064 (9th Cir. 2014) (citing *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)). As the court in *Freeman* explained, "Once the plaintiff establishes governmental classification, it is necessary to identify a 'similarly situated' class against which the plaintiff's class can be compared. The goal of identifying a similarly situated class ... is to isolate the factor allegedly subject to impermissible discrimination. The similarly situated group is the control group." 68 F.3d at 1187 (internal citations and quotations omitted).[13]

Here, the Officers have jumped ahead to advocating a strict scrutiny standard, without establishing any of threshold elements of an Equal Protection

[13] For example, in *Tucson Woman's Clinic v. Eden*, 371 F.3d 1173 (9th Cir. 2004), relied on by the Officers (App. Br. at 25), the court analyzed several allegations of different treatment, including allegations that the defendants (1) violated the equal protection rights of both patients and physicians by discriminating between doctors who provide abortions and those who provide comparably risky medical procedures; (2) violated the equal protection rights of physicians by discriminating between doctors who provide more abortions and those who provide fewer abortions; and (3) violated the equal protection rights of women by discriminating between abortion, a procedure sought only by women, and comparably risky procedures sought by men. *Id.* at 1186-91.

claim. They have not alleged that they are members of any class, identified a "similarly situated" class, or set forth any different treatment.

The Officers' claim that they "are being treated unequally compared to other citizens" in their ability to use force to defend themselves and others (App. Br. at 26) is both irrelevant for Equal Protection purposes and factually incorrect. The UOF policy, in fact, states that officers may use deadly force "in circumstances where threat of death or serious physical injury to the officer or others is imminent. A danger is imminent *when an objectively reasonable officer would conclude* …." ER 60. Officers, just like "citizens," may use force if they mistakenly, but reasonably, perceive a threat. Moreover, the Officers are simply not "similarly situated" to civilians, who do not and cannot exercise police powers, and who are not subject to the UOF policy. *See, e.g.*, *Thornton*, 425 F.3d at 1168 ("Evidence of different treatment of unlike groups does not support an equal protection claim"). The UOF policy governs when and how *police officers* can use force, and comparisons to the public at large are irrelevant. As the District Court held, "[p]laintiffs, like all officers with the Seattle Police Department, are subject to the Policy; they have identified no group that is similarly situated yet not subject to the Policy." ER 16.

Because the Officers have failed to state a claim under the Equal Protection Clause, this Court need not address the claim that the claim is subject to strict scrutiny analysis. Should the Court choose to reach this issue, however, it should be noted that the Officers apply the wrong standard.

When neither a fundamental right nor a protected class is implicated, rational basis review applies.[14] "Municipal decisions . . . 'are presumptively constitutional and, therefore, need only be rationally related to a legitimate state interest, unless the distinctive treatment of the party involves either a fundamental right or a suspect classification." *American Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1059 (9th Cir. 2014) (citations omitted). "A classification *rationally* furthers a state interest when there is some fit between the disparate treatment and the legislative purpose." *Nordlinger*, 505 U.S. at 34 (Stevens, J., dissenting). Here, there is a legitimate government interest in implementing a policy governing the use of force by police officers. Officers interact with criminal suspects in a way that the general public does not, and are often required to use force. As such, rational basis review would apply.

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[14] The Officers have not claimed, and could not, that they constitute a "protected class" meriting heightened scrutiny.

3. Substantive Due Process

The Officers assert a substantive due process claim under the Fifth and Fourteenth Amendments, based on the claimed "fundamental right" of self-defense independent of the rights established in specific provisions of the Constitution.[15] App. Br. at 22-25.[16] The Officers cite no case that has recognized such a right, and courts have expressly declined to do so, even in the criminal law context. *See McDonald*, 130 S. Ct. at 3106 (Stevens, J., dissenting) (recognizing that no substantive due process right to self-defense has been established and explaining the hurdles to such a theory even in the criminal context); *Rowe v. DeBruyn*, 17 F.3d 1047, 1052 (7th Cir. 1994) (in criminal cases, there is no constitutional right to self-defense founded in the Eighth, Ninth, and Fourteenth Amendments).

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[15] In the District Court, the Officers also claimed that the UOF policy violated their procedural due process rights. They appear to have abandoned this claim.

[16] To the extent that the Officers' substantive due process claim is based on rights enumerated in the Second Amendment, the Fourth Amendment or the Equal Protection Clause, it fails for the reasons discussed above. Substantive due process claims that relate to other constitutional provisions must be analyzed under the legal standards established for those provisions. *Graham v. Connor*, 490 U.S. 386, 394 (1989); *Tarabochia v. Adkins*, 766 F.3d 1115, 1128-29 (9th Cir. 2014); *Nordyke v. King*, 563 F.3d 439, 458 (9th Cir. 2009). Because the Officers have failed to state a claim under the Second or Fourth Amendment or the Equal Protection Clause, they cannot base a substantive due process claim on those provisions.

Nevertheless, the Officers ask this Court to recognize a substantive due process claim based on a fundamental right of self-defense by either locating it in the penumbras of other constitutional provisions, or as a fundamental right that pre-existed the Constitution.

This Court should decline the Officers' invitation to now create such a right. Courts are "reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (*citing Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-26 (1985)). "The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Collins*, 503 U.S. at 125. The context presented here is particularly ill-suited to recognizing a new substantive due process right. Just as adopting the Officers' expansive interpretation of the Second Amendment would risk elevating every intra-department disagreement over the scope of weapons-related rules and tactics into potential § 1983 litigation, so too would recognizing the new substantive due process right that the Officers advocate.

Where no fundamental right is implicated, courts look to whether an executive action "shocks the conscience" to determine whether there is a

substantive due process violation. "[O]nly official conduct that 'shocks the conscience' is cognizable as a due process violation." *Lemire v. California Dept. of Corrections and Rehabilitation*, 726 F.3d 1062, 1075 (9th Cir. 2013) (citations omitted). *Accord County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998). It strains credulity to claim that a use of force policy approved by SPD, DOJ and the Monitor, and reviewed and approved by a federal judge, could "shock the conscience." Even if the Officers had alleged that the UOF meets this standard, this is the type of implausible allegation that the Court would not be required to consider, even in reviewing a dismissal under Rule 12(b)(6). *Iqbal*, 556 U.S. at 678 (to survive a motion to dismiss, complaint must "state a claim to relief that is plausible on its face").

Not only does the "shocks the conscience" standard apply generally to substantive due process claims, but the Officers face an even higher burden given their status as government employees. *Collins*, 503 U.S. 115, 128 ("[p]etitioner cannot maintain ... that the city deprived [them] of [their] liberty when it made, and [they] voluntarily accepted, an offer of employment"). The Officers must show that the City *intended to harm* the Officers by implementing the UOF Policy. *Id.* at 125-27 & n. 10; *County of Sacramento*, 523 U.S. at 849 ("conduct intended to injure in some way unjustifiable by any government interest is the sort of official

action most likely to rise to the conscience-shocking level"); *Slaughter v. Mayor and City Council of Baltimore*, 682 F.3d 317, 322 (4th Cir. 2012) ("[b]ut in the voluntary employment context, the plaintiffs have not alleged arbitrary (in the constitutional sense) or conscience-shocking conduct because they did not assert that the Fire Department *intended to harm* Wilson, as would be necessary to establish a substantive due process violation") (emphasis supplied). Because the Officers have not alleged (and could do so plausibly) that their own Chief of Police intends to harm them, they have not met this standard.

The Officers claim that the District Court failed to give proper weight to their well-pleaded allegations regarding the UOF policy, thereby violating the standard for dismissal of a complaint under Rule 12(b)(6). App. Br. at 41-45. However, the only examples the Officers cite concerning the District Court's supposed failure to properly consider their allegations arise from the District Court's discussion of whether or not the UOF policy "shocks the conscience" for purposes of substantive due process. And in concluding that the policy does not shock the conscience, the District Court relied not on any characterization of the policy by the City, as the Officers allege, but rather on the language of the policy itself. For example, noting that DOJ had alleged a pattern of excessive use of force by SPD, the District Court cited the de-escalation provision of the policy (ER 59-

60) to conclude that "[i]t does not shock the conscience to see certain de-escalation procedures imposed on police officers in an effort by their Department to avoid a pattern or practice of excessive use of force." ER 17. The District Court also observed that the UOF policy contains a number of provisions recognizing that an assessment of whether an officer's use of force was reasonable must take into consideration the exigencies of the circumstances, including:

> The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second decisions – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.

ER 17-18 (quoting UOF policy at ER 54). The District Court also noted that the policy provides officers with a wide range of tools to gain control over situations and to protect themselves, "from use of verbal commands to physical restraint, TASERS, pepper spray, and batons, in addition to firearms." ER 18. The existence of these provisions, which specifically recognize that police officers may often need to use reasonable force to defend themselves and others, led the District Court to correctly conclude that the UOF policy "is not so inflexible and arbitrary as to shock the conscience, even if it slows or even forestalls the application of force in police interactions with resisting subjects." *Id.*

4. Fourth Amendment

The Officers' invocation of the Fourth Amendment has changed repeatedly throughout the course of this case. In their Amended Complaint, they alleged that they, as police officers, had an independent right under the Fourth Amendment to use force. ER 23-25, ¶¶ 66-68. This was plainly incorrect. The central inquiry under the Fourth Amendment is "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Terry v. Ohio*, 392 U.S. 1, 23 (1968). In the relevant circumstances here – an officer's ability to use force – police officers *are* the government and their actions are *restricted*, not *protected*, under the Fourth Amendment.

In reviewing uses of force by police officers under the Fourth Amendment, courts balance the governmental interests at stake with the individual's right to be free of government intrusion. *Espinosa v. City & County of San Francisco*, 598 F.3d 528, 537 (9th Cir. 2010) (summarizing factors from *Graham*, 490 U.S. at 396). As such, an officer's interest in personal safety is subsumed in the governmental interest, and does not exist independently under Fourth Amendment analysis.

This is not to suggest that the safety of officers and others is unimportant – in fact, it is the most important factor to consider when a court is deciding the

reasonableness of an officer's use of force when challenged by the individual against whom force was used. *Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir. 1994). But this factor is a justification for the *government* intrusion on the Fourth Amendment right of the *suspect*, not an affirmative right for an officer to use force.

In their brief opposing the City's motion to dismiss the Officers came up with a new theory – namely that that the UOF policy itself acts as a "seizure" of the Officers for Fourth Amendment purposes. Dkt. No. 59 at pp. 9-11.

The District Court dismissed the Fourth Amendment claim in short order, finding that both of the Officers' theories "grossly misconstrue Fourth Amendment law." ER 15. As to the first theory, the District Court observed that "[a] balancing test establishing the boundary where government action infringes on a citizen's Fourth Amendment rights cannot be reinterpreted as a positive Fourth Amendment right for government actors to inflict force up to that boundary." *Id.* As to the second, the District Court noted that the UOF policy "does not affect officers' freedom of movement." *Id.* As such, it cannot act as a "seizure" under the Fourth Amendment. *Id.* (*citing Brendlin v. California*, 551 U.S. 249, 254 (2007)).

It appears that on appeal the Officers have abandoned the Fourth Amendment altogether as the basis for an independent claim against the City. Instead, the Officers now cite the Fourth Amendment as a standard that this Court should adopt

to define the "contours" of their claimed substantive due process right to self-defense. App. Br. at 35. This latest theory – which is reflected nowhere in the Officers' Amended Complaint – is every bit as problematic as their earlier efforts, for three reasons.

First, because the substantive due process claim should be dismissed for the reasons discussed above, there is no reason for this Court to determine its "contours."

Second, it remains the case that the Officers are attempting to locate within the Fourth Amendment an affirmative right to use force up to the boundary established by case law. Specifically, the Officers claim that a policy that allegedly unreasonably restricts their ability to use force in self-defense violates their substantive due process rights, and that the standards for permissible force established by Fourth Amendment jurisprudence should be adopted as the standard for "reasonableness" for purposes of such a claim. In other words, they claim that a UOF policy that restricts the ability of officers to use force up to the level permitted under the *Graham* factors is unreasonable, and would therefore violate substantive due process. But no case supports such an interpretation of the Fourth Amendment. Under *Graham* and other Fourth Amendment jurisprudence, the safety of police officers can be an important justification for a governmental

intrusion and a defense to a § 1983 action. *Graham*, 490 U.S. at 396. It is not the basis for an affirmative constitutional right to use force up to the level permitted by the *Graham* factors.

Finally, the Officers' attempt to incorporate Fourth Amendment jurisprudence into a substantive due process claim suggests that they believe they have a constitutional right to a UOF policy that mirrors the parameters of the Fourth Amendment. No case law supports such a view. The fact that the Constitution allows officers to use force in accordance with *Graham* without being subject to § 1983 liability does not mean that police departments are constitutionally prohibited from implementing use of force policies that employ a more restrictive standard. A policy can neither create new constitutional rights nor diminish existing ones; the Constitution, in turn, does not dictate the scope or limits of a departmental policy. As such, the fact that a departmental policy may have been violated does not necessarily mean that any violation of constitutional or state law has occurred. *Allen v. City of Los Angeles*, 2012 WL 1641712, *3 (C.D. Cal. 2012) ("if an internal affairs investigation concluded that the officers breached the Los Angeles Police Department's guidelines, this would not be dispositive to the jury's determination of whether the officers intentionally violated a clearly established constitutional right") (citing *Davis v. Scherer*, 468 U.S. 183,

194 (1984)); *Edwards v. Baer*, 863 F.2d 606, 608 (8th Cir. 1989) ("police department guidelines do not create a constitutional right"). These cases demonstrate that the Constitution, while delineating a range of permissible officer conduct from a legal standpoint, does not curtail the ability of a police department to set a more restrictive standard through policy, and to craft policies tailored to the needs and expectations of the community.

C. Other Grounds for Affirming Dismissal

1. The District Court Properly Reviewed the Complaint Under Fed. R. Civ. P. 12(b)(6).

The Officers claim that the District Court "accepted the City's assertion of facts in order to dismiss the Officers' claims as implausible." App. Br. at 41. In so doing, the Officers claim, the District Court misapplied the standard of review applicable under Rule 12(b)(6).

As initial matter, this argument ignores the *de novo* appellate review applicable in this Court. Although the City urges this Court to reach the same legal conclusion as the District Court – that the UOF policy does not "shock the conscience," as would be necessary to establish a violation of substantive due process – this Court will make its own determination on that issue.

But more fundamentally, the Officers' allegations about the District Court's supposed failure to give proper weight to the allegations in the Amended Complaint are simply wrong. Nowhere did the District Court refuse to consider the allegations pled in the Amended Complaint, find that those allegations were "implausible," or "accept[] the City's assertion of facts," as the Officers contend. App. Br. at 41. Instead, as discussed above, the District Court reached its conclusion based on the law and on the express language of the UOF policy. To the extent that the Officers have made allegations about the policy that are inconsistent with its actual language, the Court is not required to accept them as true. *Sprewell*, 266 F.3d at 988.

2. The Officers Have Not Alleged Facts Sufficient to Support a Claim Against Mayor Murray or City Attorney Holmes.

The Officers alleged no facts in the Amended Complaint to show how either Mayor Murray or City Attorney Holmes had violated the civil rights of any Officer. The Officers do not even mention either of them in their appeal brief. No explanation is offered as to why either of these public servants has been individually named as a defendant in a § 1983 action. The failure to allege any such facts mandates affirmance of the dismissal of the claims against these defendants. *See Iqbal*, 556 U.S. at 678 (complaint lacks "facial plausibility" if it

merely "tenders 'naked assertion[s]' devoid of 'further factual enhancement'") (quoting *Twombly*, 500 U.S. at 570).

VI. CONCLUSION

For the reasons stated above, the City respectfully requests that this Court affirm the order of the District Court dismissing the Amended Complaint with prejudice.

RESPECTFULLY SUBMITTED this 23rd day of April, 2015.

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STATEMENT OF RELATED CASES

Appellees state that there are no known related cases pending in the Ninth Circuit Court of Appeals.

DATED at Seattle, Washington, this 23rd day of April, 2015.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief is proportionately spaced, has a typeface of 14 points or more, and contains 8,566 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)

DATED at Seattle, Washington this 23rd day of April, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF System.

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