No. 14-35970

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OFFICER ROBERT MAHONEY; et al.,

Plaintiffs-Appellants,

v.

THE CITY OF SEATTLE, including the Seattle Police Department; ED MURRAY, individually and in his official capacity, Mayor, City of Seattle; and PETER HOLMES, individually and in his official capacity, Seattle City Attorney,

Defendants-Respondents.

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

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

The nearly 100 Seattle police officers, Plaintiffs-Appellants ("Officers") in this case, assert their constitutional right to act reasonably in self-defense to protect the public and themselves in response to uncertain and rapidly evolving threats. The District Court's Order ("Order") denied this right.

The Supreme Court has long recognized and given reasonable deference to police officers based on the dynamics and dangers of officers' duty-bound job: "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 397-98 (1986).

The Supreme Court has also broadly affirmed the "the inherent right of self-defense." *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008). The Officers assert that when they undertake a public responsibility, with significant risk of encountering threatening or dangerous suspects, they have the right to use all objectively reasonable force to protect the public, themselves, and other officers.

Nevertheless, the Department of Justice ("DOJ") required the City to implement a prescriptive, overly-complicated, inherently contradictory use of force

policy for the Seattle Police Department ("SPD"). The policy is unreasonable and unworkable in the real world of violent encounters and volatile suspects.

A complicated, over-50-page workplace policy (not including the nearly 50-page accompanying procedural manual) would be impractical in almost any employment setting. The SPD's use of force policy is not only impractical, it is life-threatening. The policy's flaws endanger the Officers because the Officers routinely engage in uncertain circumstances with unpredictable suspects, and must make split-second decisions, in the course of their duties. (A complete copy of the SPD's Use of Force Policy (Section 8 of the Seattle Police Manual and the Force Investigations Unit Procedural Manual) (hereinafter "UF Policy") is included in the Excerpts of Record ("ER") 53-149). The UF Policy remains in effect, however, making the Officers' job unreasonably dangerous in violation of their constitutional rights. The Officers appeal and ask the Court to reverse the District Court's dismissal of their case.

II. JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because the Officers brought this action under 42 U.S.C. § 1983. The Appellate Court has jurisdiction pursuant to 28 U.S.C. § 1291. The District Court issued its written Order on Motions to Dismiss on October 17, 2014, ER 5-19, and issued a Judgment on October 20, 2014, which disposed of all the Officers' claims.

ER 4. On November 14, 2014, the Officers filed a timely notice of appeal. ER 1-3, 178.

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Does the Second Amendment protect the right of self-defense, which is its "core" purpose as reflected by the Supreme Court's holding in *Heller*?

2. Does the Second Amendment protect the right to use weapons for "the core lawful purpose of self-defense" as stated in *Heller*?

3. Do restrictions on the use of weapons that go beyond the traditional limitations in *Heller* and its progeny, and effectively destroy the right to use weapons in self-defense, violate the Second Amendment?

4. Is self-defense a "fundamental element of personal liberty" protected by the due process and equal protection provisions of the Fifth and Fourteenth Amendments?

5. Does the fundamental right of self-defense extend to police officers?

6. Does the Fourth Amendment provide compelling standards to define the boundaries of police officers' right of self-defense?

7. Did the District Court misapply the pleading standards in *Bell Atlantic Corp. v. Twombly*, to the Officers' First Amended Complaint by not accepting their well-pled factual allegations as true or accepting the reasonable inferences therefrom?

IV. PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

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

U.S. Const. amend. II.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

> No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

U.S. Const. amend. V. (in relevant part).

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, §1 (in relevant part).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2006) (in relevant part).

V. STATEMENT OF THE CASE

In 2011-12, DOJ conducted and concluded an investigation of the SPD. ER 22 ¶9. After the investigation, DOJ determined that SPD officers had not engaged in discriminatory policing. *Id*. Nevertheless, DOJ found that SPD officers had a pattern and practice of using excessive force in their encounters with suspects. *Id*. This finding was disputed by the City even as it consented to a settlement with DOJ ("Settlement Agreement"). *Id*. The excessive force finding was discredited by an independent researcher who is also a former DOJ statistician. *Id*., ER 46 ¶73. The finding was contradicted by DOJ itself which expressly narrowed the focus of expected oversight only on the "'small number'" and very small "subset" of officers who misused force. *Id*. DOJ has consistently refused all requests by the public, the media, and the City to provide the methods, data, or analysis DOJ used to reach its excessive force finding. *Id*.

Nevertheless, under the Settlement Agreement, the City agreed to revise its use of force policy. ER 22-23 ¶12. It also hired Merrick Bobb, as a Monitor, to oversee implementation of the consent decree as required by the Settlement Agreement. ER 23 ¶13. The process resulted in an overly complicated, contradictory, and dangerously restrictive policy. *See, e.g*., ER 31-32 ¶¶34-38, ER 35-37 ¶¶47-53. The SPD did not have meaningful input into the policy. ER 24 ¶17. As a result of DOJ's and the Monitor's failure to adequately include

recommendations from police officers or designated SPD representatives, the final policy was drafted at the expense of public and officer safety and reflects a complete disregard for the practical, everyday dangers and difficulties of policing in Seattle. ER 24-25 ¶¶17, 18, 20.

The Monitor offered what it called a "consensus" policy to Honorable James L. Robart of the Western District of Washington for approval as required by the Settlement Agreement. ER 23 ¶14, ER 25 ¶19. The Officers allege that any appearance of consensus is because the Monitor ran roughshod over any criticisms and the various other involved parties yielded. ER 25 ¶¶19, 20. Neither the Officers nor their union representative, the Seattle Police Officers Guild (SPOG), were a party to the proceedings that resulted in the approval of the UF Policy, nor were they at the table for significant decisions regarding the UF Policy. ER 23-24 ¶¶15, 16, 18. Judge Robart approved the UF Policy in a one-and-a-half page order. ER 22 ¶¶8, 11. The UF Policy went into effect on January 1, 2014. *Id*. at ¶8. Prior to and after the UF Policy went into effect, the Officers attempted to explain to the SPD, City, DOJ, and the Monitor the fundamental flaws in the policy and the high potential for injury to the public and the police as a result. ER 24-25 ¶18. These attempts were rebuffed. ER 24-26 ¶¶18, 21. Accordingly, over 100 officers filed a complaint in district court naming DOJ officials, the City, certain City officials, and the Monitor as defendants. ER 150-71.

The crux of the Officers' allegations is that DOJ and the Monitor, through the City's new UF Policy, fundamentally changed the rules of encounters between police officers and threatening suspects in ways that are unworkable when the goal is to keep the public and officers safe. They allege that specific provisions of the UF Policy outright prohibit the use of even reasonable force in response to suspects' threatening behavior. *See, e.g.*, ER 31 ¶35, ER 32-33 ¶41 (prohibiting force unless all other options have been considered and eliminated), ER 32 ¶¶39-40 (prohibiting use of "less-lethal tools"). They further allege and identify unreasonable restrictions on officers' ability to take reasonable actions in self-defense under threatening, volatile, and potentially deadly circumstances, s*ee, e.g.*, ER 30-31 ¶¶30, 32, 34, 36, ER 35-36 ¶47, and that make it virtually impossible under rapidly evolving and often dangerous circumstances for officers to make reasonable decisions to protect the public and themselves. *See, e.g.*, ER 30 ¶32, ER 37 ¶52 (requiring officers to make "perfect" decisions); ER 32-33 ¶41, ER 36-37 ¶¶48, 49 50, 51 (creating impossible standards for decision-making).

When a policy is overly complicated and conflicting it also creates the opportunity for post-hoc, second-guessing of officers' use of force that is inconsistent with split-second decision making in the face of life threatening dangers. *See, e.g.*, ER at 38-40 ¶¶51, 53, 56, 57, 58, 61. These policy changes have created a Hobson's choice for officers: either protect public and personal

safety with reasonable use of force at the expense of their job, or do not use reasonable force at the expense of public and personal safety. As such, the UF Policy necessarily implicates officers' right of self-defense. *See*, *e.g.*, ER at p 20-21¶2, ER 29 ¶29, ER 32 ¶38, ER 35-36 ¶47, ER 41 ¶63, ER 43-46 ¶¶67, 69, 73.

The Officers allege that being required to consistently face these unreasonable risks to their lives and livelihoods is itself a constitutional injury. ER 47 ¶75. The Officers also alleged other harms caused by the UF Policy: Officers reprimanded for even reasonable use of force (ER 26-27 ¶24); Officers being measured by an impossible, rather than reasonable, standard (*id*.); significant decreases in proactive police work and responses for backup (*id*. at ¶¶22, 23); increased lawlessness and feelings of vulnerability by Seattle citizens (*id*.); and significant increases in incidents where Officers failed to, delayed, or stopped using force where force was the appropriate response for officer and public safety. *Id*., ER 38 ¶60. Most significantly, the Officers allege evidence of a significant increase in injuries to and assaults on officers. ER 26 ¶22. The Officers are not asking to use force without expectations, limits, or discipline. ER 28-29 ¶27, ER 42 ¶65. The Officers have a constitutional right, however, to a UF Policy that does not consistently require them to go into dangerous encounters handicapped and at unreasonable risk that they or innocent bystanders will be needlessly killed or injured. ER 20-21 ¶2, ER 26-29 ¶¶24, 27, 29.

The Officers commenced this action on May 28, 2014. ER 171. On August 21, 2014, the City filed a Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) ER 172. The Officers filed their First Amended Complaint on August 27, 2014. ER 173. The City withdrew its initial motion and filed a Motion to Dismiss First Amended Complaint on September 11, 2014. *Id*. The Monitor also filed a motion to dismiss on August 21, 2014, limited to his assertion of alleged quasi-judicial immunity. ER 172. The Officers filed Responses to the Monitor's and City's motions on September 22, 2014, and September 29, 2014, respectively. ER 174, 176. To date, DOJ has not made an appearance in the case. Oral argument on the motions to dismiss were held on October 9, 2014. ER 177. On October 17, 2014 the District Court issued its Order, holding that the Officers failed to state a claim for relief under §1983. ER 178.

The District Court's decision held that the Second Amendment does not provide public employees, and police officers in particular, a right of self-defense. ER 13. It also found that a police officer's use of his or her service weapon in self-defense has "no relation" to the individual rights recognized in *Heller*. ER 14. The decision held that no independent right of self-defense exists anywhere under the Constitution. ER 15-18. By the District Court's reasoning, there is no fundamental right of self-defense protected by substantive due process. ER 16-17. The District Court found that self-defense is not a right *on par* with the right to marry or to

vote, nor does it "shock the conscience" if police officers are restricted or even denied the ability to use force against resisting, *i.e.*, threatening, suspects. ER at 16-18.

VI. SUMMARY OF THE ARGUMENT

The District Court's final Order dismissed the Officers' First Amended Complaint for failing to state a claim under Rule 12(b)(6). It should be reversed to correct numerous errors of law.

The District Court incorrectly held that police officers' use of force in self-defense is not protected by the Constitution. The Officers assert a fundamental right of self-defense under the Second Amendment. This right is supported by the Supreme Court's recent confirmation in *Heller* and *McDonald* that the Second Amendment right "to keep and bear arms" was intended to "enshrine" a broad, individual right to possess and use weapons for "the core lawful purpose of self-defense."[1] Accordingly, the Second Amendment right includes within its scope the right reasonably to use weapons for self-defense. While the Second

[1] In this case, the Officers' claims relate to the use in self-defense of firearms and other force tools referred to by the UF Policy as "less lethal tools," including TASER, impact weapons, beanbag shotgun, and OC Spray (commonly known as pepper spray). ER 32 ¶39. Whether these tools are covered under the Second Amendment definition of weapon is a factual question that cannot be resolved on a motion to dismiss.

Amendment right can be regulated to some degree, a policy cannot be justified if, as alleged by the Officers, it destroys the right afforded them by the amendment.

This fundamental right of self-defense extends beyond the weapons protected by the Second Amendment to include the use of any reasonable force in self-defense under the Fifth and Fourteenth Amendments because the right of self-preservation is fundamental to "our sense of ordered liberty." Policy that infringes on police officers' ability to use reasonable force in self-defense must survive strict scrutiny analysis to overcome claims under substantive due process and equal protection. The Officers' allegations regarding the unreasonable dangers created by the UF Policy defeat any argument that the UF Policy is narrowly tailored to enhance public or police officer safety.

The Officers are not advocating a new Wild West; that any employee, public or private, can use whatever force, under any circumstances. But when a public employer requires individual employees that are sworn to uphold the law, to consistently face life threatening dangers, and at the same time denies them the ability to use reasonable force to protect the public and themselves, those employees' right of self-defense is necessarily implicated. Jurisprudence regarding constitutional rights for public employees support finding this right of self-defense.

Consideration of police officers' right of self-defense can borrow from long-standing and extensive jurisprudence establishing a reasonableness standard under

the Fourth Amendment to evaluate officers' use of force. This is an objective, context-specific, practical standard that can sensibly be used to define the contours of police officers' right of self-defense.

The District Court went further than simply rejecting the Officers' claims as not cognizable. It dismissed them as legally implausible based on the District Court's acceptance, as true, factual allegations that were specifically contested by the Officers' allegations. This fails to give the appropriate weight under Fed. R. Civ. P. 12(b)(6) to the Officers' factual allegations.

If this Court agrees on any of these issues raised by the Officers on appeal, it must remand to the District Court to let the case proceed.

VII. ARGUMENT

A. The Standard of Review is De Novo.

A District Court's decision to grant a 12(b)(6) motion to dismiss is reviewed de novo. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). All issues appealed are issues of law and no deference is given to the District Court's conclusions of law. In addition, in evaluating the plausibility of the Officers' legal claims, this Court must accept as true all material allegations in the First Amended Complaint, as well as reasonable inferences to be drawn from them. *Mendocino Envtl. Center v. Mendocino County*, 14 F.3d 457, 460 (9th Cir. 1994). The First

Amended Complaint must be construed in the light most favorable to the Officers. *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).

B. The Right of Self-Defense Is Protected by the Second Amendment.

The UF Policy has so narrowed the discretion of the Officers to use force that the Officers are unable to effectively defend the public or themselves, and they now face unreasonable risk of injury or death when policing city streets. This has not previously been an issue before the courts because it has not been the practice for a federal agency to dictate the practical decision making of municipal police officers. The Officers' right of self-defense, nevertheless, is protected by the Second Amendment and flows directly from the holdings of *Heller* and *McDonald.* Attempts by the District Court to diminish the right of self-defense ignore the core holdings and principles of these Supreme Court decisions.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Court engaged in a detailed historical review of the Second Amendment to determine what right it protected. The central issue was whether "the right of the people to keep and bear arms" defined a right of the government to arm its military, or rather, as the Court ultimately held, a right "exercised individually and belong[ing] to all Americans." *Id*. at 581. The linchpin of its holding was the specific purpose of the right, which is to be "ready for offensive or defensive action in a case of conflict with another person." *Id*. at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998)

(dissenting opinion)). In other words, self-defense. The Court reviewed numerous historical sources that considered the right to keep and bears arms and the right of individual self-defense as, in essence, one and the same right. *See, e.g., id*. at 585 ("the arms-bearing right...[w]as a recognition of the natural right of defense of one's person or home"); *id*. at 594 ("it is a natural right which the people have reserved for themselves, confirmed by the Bill of Rights, to keep arms for their own defense"); *id*. at 662 ("self-defense...was the *central component* of the right itself") (emphasis in original). Ultimately, the Court concluded that "[a]s the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right." *Id*. at 628. This is a significantly different holding then the one characterized by the District Court where "facilitation of self-defense" was merely one of many "purposes" of the right to keep and bear arms. ER 13.

Two years later, in *McDonald v. City of Chicago*, 561 U.S. 742, 130 S. Ct. 3020 (2010), the Court decided whether the right it recognized in *Heller* as applicable to the District of Columbia, was incorporated in the concept of due process and applied to the States. To apply to the States, the Court considered whether the right to keep and bear arms was "fundamental" to our sense of liberty, and "deeply rooted" in our Nation's traditions. *Id*. at 3036. The Court answered in the affirmative. Again, the Court explicitly equated the right to keep and bear arms

with the individual right of self-defense. Self-defense is the "basic right" at issue, and the right "to use [weapons] for the core lawful purpose of self-defense" is the right that is "deeply rooted" and held to be fundamental by the Court in *Heller*. *Id*. (noting *Heller's* reliance, for example, in the English Bill of Rights' explicit protection of "a right to keep arms for self-defense").

This Circuit in *Peruta v. Cnty. of San Diego*, 742 F.3d 1144 (9th Cir. 2014), determined that the protections granted by the Second Amendment included the right to carry an operable handgun not only in the home, but outside as well. It relied also on language where the right to "bear" arms is expressly equated with "the natural right of resistance and self-preservation," and the "inherited right to armed self-defense." *Id*. at 1154. It was precisely because the need for self-protection extends to public dangers, *Id*. at 1153, that this Circuit held that right to bear arms extends outside the home: "Carrying a gun outside the home for self-defense comes within the meaning of 'bearing arms.'" *Id*. at 1167.

Heller, *McDonald*, and *Peruta* support the Officers' position that the Second Amendment protects the Officers' right of self-defense. The District Court incorrectly concluded that self-defense is peripheral to, and not the essential right protected by, the Second Amendment. The District Court also erroneously concluded that assertions of a right of self-defense fail properly to bring claims

under the Second Amendment. The Second Amendment protects the Officers' right of self-defense, and this Court should reverse the District Court's Order.

C. The Second Amendment Also Protects the Use of Weapons in Self-Defense.

The District Court dismissed the Officers' asserted right of self-defense by holding that any, even unreasonable, restrictions on how weapons are *used* in self-defense fall outside the scope of the Second Amendment. ER 13. To hold, however, that the scope of the Second Amendment goes only so far as "mere possession," *id*., is like holding that the First Amendment does not protect the right to use speech to express opinions – the right alone without the ability to use it for the "core lawful purpose" is meaningless. Nor can such a holding be supported by the holdings and analysis of *Heller* and *McDonald*.

Indeed, the key issue in *Heller* was whether the prohibition "on the possession of *usable* handguns in the home violates the Second Amendment," *Heller,* 554 U.S. at 575 (emphasis added), and its focus was on D.C.'s restriction "insofar as it *prohibits the use* of 'functional firearms within the home.'" *Id.* at 576 (emphasis added). When the Court invalidated D.C.'s near total ban on handgun possession, its holding directly related to restrictions on handgun *use*: "[H]andguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete *prohibition of their use is invalid*." *Id*. at 629 (emphasis added). Moreover, the Court also invalidated D.C.'s regulation requiring that, in the limited

cases permitting D.C. citizens to obtain licensed handguns, such handguns had to be kept unloaded and with a trigger lock. In doing so, the Court had to address restrictions on the use of weapons as part of the Second Amendment right. It had no trouble concluding that the trigger lock requirement "makes it impossible for citizens *to use them for the core lawful purpose of self-defense and is hence unconstitutional*." *Id*. at 630 (emphasis added). Under the Court's analysis, the result would have been the same if the restriction prevented D.C. citizens from carrying assembled or operable weapons – because such restrictions make it impossible for citizens *to use the weapons for the core lawful purpose of self-defense*.

To reach its conclusion that the Second Amendment included the right to use weapons in self-defense, the Court looked in depth at the meaning of "to keep and bear arms." "Keep" means to possess. *Id.* at 583. "Bear," when used with "arms," "has a meaning that refers to carrying for a particular purpose — confrontation." *Id.* at 584. The Court noted the historical understanding of the right to bear arms as applying "to all instruments that constitute bearable arms," which have been historically defined to include "weapons of offence, or armour of defense," "anything that a man wears for his defence, or takes into his hands or useth . . . to cast at or strike another," and "bows and arrows." *Id.* at 581 (spelling as in original). In other words, the term "bear arms" includes within it, use for self-

defense. *See also McDonald*, 130 S. Ct. at 3041 (discussing a congressional debate noting that the "right to bear arms," included having a "well-loaded musket" and the right use that weapon to kill someone who was a threat).

The Court in *Heller* also confirmed that the Second Amendment codified a pre-existing right, *Id.* at 592, that was not a purposeless right to possess arms. Instead it was the "right of having and using arms for self-preservation and defence." *Id.* at 594, (quoting 1 Blackstone 136, 139-40 (1765)) (spelling as in original)). The Court quoted specific historical commentary recognizing the meaninglessness of the right to bear arms without also the right to use them: "the right to keep and bear arms, also *implies the right to use them* if necessary in self-defense; *without this right to use the guaranty would hardly been worth the paper it consumed*.'" *Id*. at 609 (quoting J. Tiffany, *A Treatise on the Unconstitutionality of Slavery*, 117-18 (1849), citing Blackstone) (emphasis added).

The District Court cites this Circuit's per curium decision in *United States v. Morsette*, 622 F.3d 1200 (9th Cir. 2010), for the proposition that, unlike possession, restrictions on use do not fall within the scope of the Second Amendment. ER 13. In that case, Defendant sought, unsuccessfully, to use the *Heller* and *McDonald* decisions to challenge the use of a model self-defense jury instruction without an additional instruction emphasizing that the need for self-defense is most acute in the home. *Id.* at 1201. Despite the obvious factual

differences, the *Morsette* case stands only for the proposition that *Heller* and *McDonald* did not fully expound upon the definition of self-defense. This is not novel — it is a point conceded in the cases themselves. *See e.g.*, *Heller*, 554 U.S. at 635 ("But since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field"). Contrary to the District Court's ruling, *Heller* and *McDonald* explicitly hold that the Second Amendment protects the use of weapons for self-defense. The Officers' First Amended Complaint alleges unreasonable restrictions on their ability to use force tools in self-defense in violation of the Second Amendment. Accordingly, the District Court's dismissal should be reversed.

D. The Limited Regulations Allowed Under the Second Amendment Cannot Be Used to Invalidate the Officers' Right to Use Reasonable Force Tools in Self-Defense.

The District Court held that the Second Amendment right is not absolute or unlimited. ER 9. The Officers agree. Unreasonable and excessive use of force by police can – and should – be prohibited. ER 28-29 ¶27. The District Court asserts that the Second Amendment right is not a right to carry a weapon in a particular manner. ER 13. Again, the Officers agree. They do not assert a right to carry or use weapons or force tools in a specific manner, nor that their rights under the Second Amendment mean that the City cannot "outline expectations for an officer's use of force." *Id*. The Officers fully expect the City to have a use of force

policy in place, based on an objective reasonableness standard, to guide and discipline officers. ER 28-29 ¶¶27, 29, ER 42 ¶65. However, the uncontroverted proposition that there may be some reasonable restrictions placed on the Second Amendment right (if the restrictions meet an appropriate level of scrutiny) does not mean that the Second Amendment provides no protection against regulations (reasonable or not) related to use of a weapon.

The operative distinction under the Second Amendment is not between a regulation restricting the possession of a weapon (protected conduct under the District Court's analysis) versus one restricting use of a weapon (not protected under the same); it is whether the regulation restricting either the carrying or use of the weapon unreasonably defeats the purposes of self-defense. *See, e.g.*, *Peruta* at 1160 (discussing with approval Texas Supreme Court's distinction between legislation that discourages carrying dangerous weapons (permissible) and legislation that effectively prohibits the weapon's use in self-defense (impermissible)); *see also id.* at 1165 (noting with approval a regulation restricting the carrying of concealed weapons that leaves available other reasonable options for self-defense).

As an example of the District Court's reasoning, if the Second Amendment right is limited to "mere possession," ER 13, citizens of Seattle would not have the right to challenge even unreasonable regulations requiring a particular *manner* in

which they carry or use individually owned firearms. This means the City could impose, as a "safety" regulation, ER 14, a requirement that citizens keep their guns disassembled even if the delay caused in being able to use the weapon precluded reasonable action taken in self-defense. This is in significant conflict with the Supreme Court's holdings in *Heller* and *McDonald*, as well as a misreading of this Circuit's decision in *Peruta*.

The implication of the District Court's ruling is that since some restrictions on possession are permissible under the Second Amendment, policy-based restrictions can readily be used to defeat the amendment's core purpose of self-defense. In fact, the opposite is true. While reasonable regulations are "quite appropriate," a regulation that destroys the right cannot survive any level of scrutiny. *Peruta*, 742 F.3d at 1174 ("states may not destroy the right to bear arms in public under the guise of regulating it"). This is why the Court in *Heller* did not need to reach the issue of what level of scrutiny applied to the restrictions at issue because, under any standard, prohibitions that destroyed the right to "keep *and* use [firearms] for protection of one's home and family" would fail. 554 U.S. at 628-29 (emphasis added).

This was true regardless of how sympathetic the Court was to the goals of the regulations. The Court in *Heller* noted its "aware[ness] of the problem with handgun violence" and the persuasiveness of arguments that prohibiting hand gun

ownership would be a solution. 554 U.S. at 636. Nevertheless, it concluded that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Id*. The Officers assume the City has policy justifications for how it would like to manage encounters between police officers and suspects. However, to the extent the UF Policy prohibits and restricts officers' ability to reasonably use force tools in self-defense, which is what the Officers' allege in their First Amended Complaint (*see e.g.*, ER 21-22 ¶2, ER 30 ¶32, ER 32 ¶¶38-40), and must be accepted as true at this stage of litigation, the UF Policy would burden to the point of destruction their right of self-defense. Because this right is protected by the Second Amendment, the Officers have stated a claim that should be allowed to proceed in the District Court.

E. The Officers Have Cognizable Claims Under the Fifth and Fourteenth Amendments to Substantive Due Process and Equal Protection of the Law That Are Subject to Strict Scrutiny Analysis.

The Supreme Court has expressly held the right of self-defense to be a "fundamental right" and a "natural right." *Heller*, 554 U.S. at 594, 612. The right of self-defense, though central to the right to keep and bear arms under the Second Amendment, "pre-existed" it. *Id*. at 592. The Court has identified it as a "basic right" that is "deeply rooted in the Nation's history and tradition." *McDonald*, 130 S. Ct. at 3036. This Circuit has cited the right to armed self-defense as the "first law of nature." *Peruta*, 742 F.3d at 1154 (quoting St. George Tuckers'

Blackstone's Commentaries at 289 (1803)). It is an "ancient right," *Heller,* 554 U.S. at 599, thus, like the right of privacy "older than the Bill of Rights." *See Griswold v. Connecticut,* 381 U.S. 479, 486 (1965) (right of privacy). In other words, the right to defend one's life is the ultimate liberty right; the ultimate freedom.

The Supreme Court has found other fundamental, preexisting rights, that are not expressly stated in the Constitution, to nevertheless be embodied in and protected by the Constitution. *Bowers v. Hardwick,* 478 U.S. 186, 191 (1986) (the Fourteenth Amendment's protection of liberty interests recognizes "rights that have little or no textual support in constitutional language"). Moreover, such rights are often drawn from more than one place in the Constitution. In *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984), the Court found, for example, that the right of free association, though nowhere mentioned in the Constitution, has been constitutionally protected as a fundamental element of personal liberty under the Fourteenth Amendment and also as a right essential to carrying out the purposes of the First Amendment. In *Griswold,* the Court found a "zone of privacy" that was protected by the First, Third, Fourth, Fifth and Ninth Amendments, and, thus, could be used to invalidate a regulation restricting the use of contraception by married persons. 381 U.S. at 484. In *Roe v. Wade*, 410 U.S. 113, 152 (1973), the Court struck down an abortion regulation, enfolding the zone of privacy rights into

the substantive due process right under the Fourteenth Amendment because only "personal rights" that are "fundamental" or "implicit in the concept of ordered liberty" are included in the right of privacy.

Based on this jurisprudence, the right of self-defense can be characterized as analogous to the "zone of privacy." The right of self-defense is clearly personal, deeply-rooted, and essential to liberty, *i.e.*, life itself, and, thus, a "zone of self preservation" that emanates from the Bill of Rights. These cases make clear that it is unimportant whether the right is considered a penumbra of the Bill of Rights or a substantive due process right under the Fourteenth Amendment, as long as it is a fundamental right. As discussed above, the right of self-defense is fundamental. *See id.* at 152-53. Because it is a fundamental right, the District Court erred in saying it is not a right on par with the right to marry or to vote. *See* ER 16.

The District Court was wrong to dismiss the Officers' claims on the basis that they were asking it unreasonably to expand the concept of substantive due process. ER 17. The Officers allege that the UF Policy impacts their "ancient," fundamental right, including their Second Amendment right to use arms in self-defense (*see, e.g.*, ER 20-21 ¶ 2, ER 30-32 ¶¶29, 32, 37-39, ER 41-42 ¶¶64-65). The Supreme Court has held, "[t]hus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992) (quoting

Whitney v. California, 274 U.S. 357, 373 (1927) (concurring opinion)). The Supreme Court has "regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-1 (1997), quoting *Moore v. E. Cleveland*, 431 U. S. 494, 503 (1977) (plurality opinion). As an ancient, fundamental, deeply rooted right, the right of self-defense falls squarely within the Court's existing protection for substantive due process rights.

Policy that impacts fundamental rights also implicates the equal protection requirements of the Fifth and Fourteenth Amendments. *See Tucson Women's Clinic v. Eden*, 371 F.3d 1173, 1185 (9th Cir. 2004) (equal protection is implicated when a rule (a) discriminates against a *suspect class*, or (b) discriminates based on any classification, but impacts a *fundamental right*) (emphasis added). This is true regardless of whether the class impacted is a suspect class, if the rights implicated are fundamental rights. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973). For example, in *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969), the Supreme Court struck down under equal protection analysis laws that impacted the right to vote of adult children living with their parents. *See also Zablocki v. Redhail*, 434 U.S. 374, 388 (1977) (striking down an ordinance

restricting people delinquent in child support obligations from their fundamental right to marry).

Thus, the District Court misconstrued the nature of the claim by requiring the Officers to show an "affected class." ER 16. The Officers are not asserting that as a class they are treated differently than other police officers in the SPD. *Id*. Their equal protection claim is that 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. ER 30 ¶¶31-32.

When it is alleged that government action deprives individuals of fundamental rights, both substantive due process and equal protection analysis require the action to pass strict scrutiny; in other words, the infringement must be narrowly tailored to meet a compelling government interest. *See Nunez v. City of San Diego*, 114 F.3d 935, 952 (9th Cir. 1997), quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993) (substantive due process claim); *Zablocki*, 434 U.S. at 388 (equal protection claim). The District Court was wrong to apply a test of whether the UF policy was "arbitrary," or "shocks the conscience" under substantive due process.

If, as can be implied from the City's pleadings, the government's interest is in the safety of the public and police officers, the UF Policy is not narrowly tailored. The Officers alleged that, in direct conflict with such a goal, the UF

Policy conflicts with longstanding standards of reasonable police conduct, and in doing so, "consistently and inevitably place[s] them at unnecessary and, therefore, unreasonable risk." ER 38-39 ¶58, ER 42 ¶65; *see also* ER 20-21 ¶2. For purposes of the 12(b)(6) motion at issue here, these allegations must be accepted as true and the UF Policy cannot be held to meet strict scrutiny. Any final analysis of the City's goals and the dangers created by the UF Policy requires factual determinations that cannot be decided on a motion to dismiss. The District Court erred in dismissing the Officers' claims without benefit of factual determinations and the Order should be reversed so that the case can proceed to trial.

F. Officers Are Not Relegated to a Lesser Version of Constitutional Rights Than the General Public.

1. The Right of Self-Defense Applies to Police Officers.

The District Court also erred by concluding that a policy promulgated by an employer "to regulate the use not only of (employer-issued) weapons but of the force its employees are specifically sanctioned to wield on behalf of the [C]ity . . . has no relation to the Second Amendment guarantees for individuals recognized in *Heller*, *McDonald*, and *Peruta*." ER 14. The opposite, in fact, is true and requires recognition of the Officers' right of self-defense under both the Second Amendment and substantive due process: When a public employer requires individual employees, sworn to uphold the law, to consistently encounter violent and volatile suspects in uncertain and rapidly evolving circumstances, but at the

same time denies them the ability to use reasonable force to protect the public and themselves, those employees' right of self-defense are necessarily implicated. Both Supreme Court and Ninth Circuit jurisprudence is consistent with recognition of this right.

Heller speaks broadly regarding those covered by the Second Amendment. 554 U.S. at 581 ("We start therefore with the strong presumption that the Second Amendment right is exercised individually and belongs to all Americans"). The Court was also explicit about the limited, historical categories of persons that can lawfully be prohibited from exercising the right: "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Id*. at 626.[2] The *Peruta* decision similarly recognized a broad Second Amendment right subject only to "traditional restrictions." 742 F.3d at 1166.

Police officers are well-trained, and under a duty, to confront the very individuals *Heller* identifies as especially at risk for engaging in violent, volatile behavior. Traditional jurisprudence under the Fourth Amendment, not surprisingly, acknowledges that police officers' duties require them routinely to confront dangers of harm from violence. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 23

[2] The Court also identified the validity of longstanding restriction on "sensitive places such as schools and government buildings," where guns can be prohibited. *Heller*, 554 U.S. at 581.

(1968) ("American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty."). More importantly, Fourth Amendment law recognizes that officers have a compelling interest in taking reasonable, including lethal, action to protect the public and themselves. *Id*. at 24 ("it would be clearly unreasonable to deny the officer the power to take necessary measures to . . . neutralize the threat of physical harm"); *Scott v. Harris*, 550 U.S. 372, 384-85 (2007) (it is unreasonable to require police to try potentially less lethal action in response to suspects' life-threatening behavior). In would make little sense in light of this history and tradition to uniquely deny police officers the right of self-defense.

The traditions of self-defense jurisprudence also support police officers' right of self-defense. In *New Orleans & Northeastern R. Co. v. Jopes*, 142 U.S. 18 (1891), the Court held that an individual's right of self-defense is not forfeited because of the type of employment he or she has undertaken. *Id.* at 26 ("the rules which determine what is self-defence are of universal application, and are not affected by the character of the employment in which the party is engaged") (spelling as in original). In fact, an employee with a duty to protect others (in that case passengers because the employer was a common carrier), may have an enhanced right of self-defense. *Id*. at 25. In *Brown v. United States*, 256 U.S. 335, 344 (1921), the Court held that the individual right of self-defense was available as

a defense even to a public employee whose actions took place while engaged in his public employment (defendant was supervising excavation work on a United States Post Office site).

Thus, neither the traditional and historical restrictions on the Second Amendment right, nor the jurisprudence regarding the fundamental right of self-defense, exclude police officers from, and in fact support their inclusion within, the broad individual right of self-defense that pre-existed the Second Amendment. Therefore, the District Court should be reversed and the Officers' constitutional claims allowed to proceed to trial.

2. Police Officers, as Public Employees, Are Not Denied the Right of Self-Defense.

The Officers recognize that public employers are in a different relationship with their employees than with other citizens because the government provides public services through its employees. *Garcetti v. Ceballos*, 547 U.S. 410, 418-19 (2006). Public employees therefore lose some freedoms when they assume work for the government. *Id*. at 418. This is in large part an "efficiency" argument, to allow for the effective delivery of public services and to avoid the "constitutionalization" of every employee grievance. *Id*. at 419-20. Nevertheless, citizens cannot be "deprived of fundamental rights by virtue of working for the government." *Id*. at 420, citing *Connick v. Myers*, 461 U.S. 138, 147 (1983). Section 1983 prohibits the City from implementing unconstitutional policy, *Monell*

v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978). The Court has made clear that §1983 is intended to protect employees of the government as much as citizens served by the government. *Collins v. Harker Heights*, 503 U.S. 115, 120 (1992), Being a public employee is not determinative when considering constitutional rights. *Id*. This Circuit has made clear that an employee does "not forfeit all constitutional rights" by accepting voluntary employment with the government, even dangerous work as a police officer. *Jensen v. City of Oxnard*, 145 F.3d 1078, 1084 and n.2 (9th Cir. 1998) (specifically rejecting arguments that voluntary employment precludes constitutional claim for deadly injury).

Much of the discussion regarding permissible restrictions on federal employees' constitutional rights has taken place in the context of the First Amendment. Courts have allowed some limitations on employees' speech based largely on distinctions between protected and unprotected activity under the First Amendment. *Dahlia v. Rodriguez*, 735 F.3d 1060, 1068 (9th Cir. 2013) (en banc). The First Amendment only protects speech of public employees when they speak as citizens, related to politics and public concerns. Speech related to private matters and issues of internal affairs or work duties are not protected by the First Amendment and thus can be restricted. *Id*., citing *Garcetti*, 547 U.S. at 421.[3]

[3] Where the employee's speech can be categorized as a matter of public concern, it may still be restricted by the employer based on a balancing of interests depending

First Amendment rights are not at issue in this case. The Supreme Court has noted that distinguishing between public and private speech is complicated and difficult. *Garcetti*, 547 U.S. at 418.[4] This is not analogous to the fundamental right of self-defense which – particularly for police officers – cannot turn on making subtle distinctions when police work requires "split-second judgments in situations that are tense, uncertain, and rapidly unfolding." *Graham*, 490 U.S. at 397-98. Moreover, this Circuit recognized in *Peruta* that there is no constitutionally valid distinction between the need to act in self-defense whether in response to private or public violence. 742 F.3d at 1153.

Looking past this irrelevant distinction, it is clear that public employees cannot be relegated to "a watered-down version of constitutional rights." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). In *Garrity*, the Court held that police officers retain, and share equally with other citizens, the constitutional privilege against self-incrimination under the Fifth Amendment. In a subsequent case, a police officer refused to waive the privilege when subpoenaed before a grand jury. *Gardner v. Broderick*, 392 U.S. 273 (1968). The City argued, unsuccessfully, that

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on the facts of the case. *See e.g., Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). Thus, even if First Amendment cases were held applicable here, the District Court did not undertake such a balancing, nor could it at the motion to dismiss stage.

[4] Certainly such a distinction cannot be decided on a motion to dismiss. *See Dahlia*, 735 F.3d at 1072 (questions regarding work responsibilities are questions of fact).

the policeman, as a City employee who is responsible to and whose duty and loyalty is owed entirely to the City, cannot refuse to waive his constitutional privilege and expect to keep his job. The Court held, instead, that public employees, like all other citizens, are protected from a Hobson's choice between asserting a constitutional right only to forfeit one's livelihood *Id*. at 277-78. Police officers also specifically retain Fourth Amendment rights and cannot be fired for their refusal to comply with an unconstitutional search. *Jackson v. Gates*, 975 F. 2d 648 (9th Cir. 1992). The Officers here similarly allege that their employer is placing them in a constitutionally invalid predicament. *See, e.g*., ER 20-21¶2, ER 26 ¶¶22, 23. Their allegations, which must be accepted as true, therefore require reversal of the District Court decision.

3. Workplace Safety Cases are not Applicable to the Officers' Claims.

The District Court dismissed the First Amended Complaint, in part, because "substantive due process does not guarantee a reasonably safe workplace." ER 17 (citing *Collins v. Harker Heights)*. The Officers, however, do not assert a claim to a reasonably safe workplace. Thus, *Collins* and its progeny are inapposite. The Court in *Collins* was unwilling to create a new "right" for public employees, resting solely in substantive due process, to a workplace free of unreasonable risks. 503 U.S. at 125. It specifically distinguished the case at hand from an employee claim that would be meritorious under §1983 because the danger created by the

employer directly impacted an established right. *Id*. at 120 (noting, for example, that the employee would have had a valid claim if the dangerous assignment was given in retaliation for political speech). Moreover, the Court was reluctant to find a constitutional violation for a mere failure to act to provide minimal safety as opposed to the government affirmatively creating the danger, noting that mere voluntary employment does not create a duty of minimal safety. *Id*. at 125.

On every ground, the Officers' claims can be distinguished from workplace safety cases. The Officers are not asserting a right to a safe workplace, they are asserting their fundamental right of self-defense. This is not a new right, but long established and constitutionally grounded. Whereas the Supreme Court in *Collins* found that employees do not have a general right to a workplace free of unreasonable risk, the Supreme Court has recognized a specific, cognizable interest for police officers to be free of unreasonable risks. *Terry v. Ohio*, 392 U.S. at 23 ("it is unreasonable to require police officers to take unnecessary risks in the performance of their duties"). The Officers recognize that they have voluntarily accepted a job with a certain degree of danger, and they do not allege that their employer has a duty to keep them safe at all times, nor even that their employer has a duty to keep them safe from dangerous suspects.[5] Instead, they allege that the

[5] In *Jensen*, the court found that an injured police officer's constitutional rights had been violated, distinguishing safe work place cases based primarily on the

City has promulgated and imposed an unworkable UF Policy; the UF Policy creates substantial risk that officers and the public will be injured or killed expressly because it restricts the officers' ability to respond reasonably in self-defense; the City knows of these risks; and still has failed to change the UF Policy. *LW v. Grubbs*, 92 F.3d 894 (9th Cir. 1996); ER 24-26 ¶¶18, 20, 21, 22, 23. This is a cognizable claim under the Constitution and should be allowed to proceed.

G. Fourth Amendment Jurisprudence Provides a Compelling Standard to Define The Contours Of Police Officers' Right of Self-Defense.

The District Court was incorrect to dismiss the Officers' Due Process claim on the basis that the Officers asserted a "positive Fourth Amendment right" to use force. ER 15. That is not the Officers' claim. They assert only a right of self-defense. But as the *Griswold* Court made clear, "the Bill of Rights have penumbras, formed by emanations from those guarantees, that help give them life and substance." 381 U.S. at 484. In other words, all fundamental rights, those enumerated, or those that pre-date and are implicit within the Bill of Rights, must be read together to make each "fully meaningful." *Id*. at 483.

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distinction that the injury to the police officer was caused by another police officer and not a third-party. However, that is not the relevant distinction. Courts hold employers liable even for injuries caused by third-parties when the government creates the danger of harm to the employee from the third-party. *See LW v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992) (nurse stated a §1983 claim when she was raped by an inmate who was assigned to work with her alone despite the employers' knowledge of his history as a repeat sexual offender).

Fourth Amendment jurisprudence has long and extensively considered and provided a standard for whether officers' use of force is reasonable where a suspect engages in threatening, violent, or otherwise dangerous behavior. The Court has acknowledged that "long-prevailing" reasonableness-based standards under the Fourth Amendment are the "best compromise" for accommodating the interests in protecting citizens from unreasonable interference and ensuring "fair leeway" that laws can be enforced for the communities' protection. *Brinegar v. United States*, 338 U.S. 160, 176 (1949). The reasonableness standard is context-specific. *See Scott v. Harris*, 550 U.S. at 383 ("in the end we must still slosh our way through the factbound morass of reasonableness"). It is also objective. *Graham*, 490 U.S. at 397 ("the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them"), citing *Terry v. Ohio*, 392 U.S. at 21. Fourth Amendment jurisprudence can thus readily be borrowed to determine reasonable boundaries for police officers' right of self-defense.[6] *Cf. Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994) (expressly equating Fourth Amendment reasonableness standard with an officer's right of self-defense), citing

[6] For example, regarding the issue of whether the right of self-defense includes the right to defend the life of others, the Fourth Amendment provides an answer: the analysis of reasonableness "is the same whether the officer sought to protect himself or others." *See, e.g. Smith v. Freland*, 954 F.2d 343, 348 (6th Cir. 1992).

Tennessee v. Gardner, 471 U.S. 1, 3 (1985) (carving out, in effect, a self-defense exception to the Fourth Amendment's fleeing felon rule).

There are significant aspects of the reasonableness standard that are missing from the UF Policy. The Officers challenge the UF Policy only to the extent they can demonstrate, as a factual matter, that the policy's deviation from essential aspects of the reasonableness standard has placed the public and officers at unreasonable risk of death or serious injury in violation of their fundamental right of self-defense.[7]

For example, the reasonableness standard is intended to accommodate the practical realities of the Officers' job: "Police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 397. Thus, policy and procedures implicating the Fourth Amendment must be of practical use to officers: "Often enough, the Fourth

[7] The Officers are not alleging that every encounter with suspects will result in situations implicating their right of self-defense. However, departmental policy such as the UF Policy that applies to all police encounters must be workable based on the assumption that any encounter can become life threatening and police officers require the ability to respond with reasonable force throughout the encounter. *See e.g.*, ER 31-34 at ¶¶34-43. This is because there is no "magical on/off switch" that distinguishes deadly force situations from other use of force, "all that matters is whether [the officers'] actions were reasonable." *Scott v. Harris*, 550 U.S. at 383. In fact, the Court recognizes that police encounters are diverse and fluid and can change quickly, from friendly to deadly, based on unexpected conduct by the suspect. *Terry v. Ohio*, 392 U.S. at 13.

Amendment has to be applied on the spur (and in the heat) of the moment and thus reasonableness standards must be drawn *clearly* and *simply* enough to survive judicial second-guessing." *Atwater v. Lago Vista*, 532 U.S. 318, 347 (2001) (emphasis added); *see also New York v. Belton*, 453 U.S. 454, 458 (1981) ("Fourth Amendment doctrine . . . is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged"). By contrast, the Officers allege that the UF Policy is overly complicated and contradictory and makes split-second decision making impossible, therefore engagement with suspects becomes unreasonably dangerous. *See, e.g.*, ER 32-33 ¶¶ 41, 42, ER 35-37 ¶¶47, 48, 51.

The Fourth Amendment's reasonableness standard incorporates the "immediate interest" of police officers to take immediate steps to "protect themselves and other prospective victims of violence." *Terry v. Ohio*, 392 U.S. at 23; *see also, Elliott v. Leavitt*, 99 F.3d 640, 641 (4th Cir. 1996) ("The Constitution simply does not require police to gamble with their lives in the face of a serious threat of harm"). The reasonableness standard thus cannot require, for example, a consideration of the behavioral status of a suspect to take precedence over responding to the threat the suspect presents. *See, e.g., Hayek v. City of St. Paul*, 488 F.3d 1049, 1055 (8th Cir. 2007) ("a suspects mental state does not change the

fact that he posed a deadly threat to the officers"), *Bates v. Chesterfield*, 216 F.3d 367, 373 (4th Cir. 2000) ("knowledge of a person's disability simply cannot foreclose officers from protecting themselves, the disabled person and the general public when faced with threatening conduct by the disabled individual"). By contrast, the Officers allege that multiple provisions of the UF Policy dangerously prohibit and restrict officers' ability to respond to threatening behavior based, not on the threat presented, but on unrelated factors, such as the mental status of the suspect. *See, e.g.*, ER 31-32 ¶¶35, 39, ER 34-35 ¶¶44, 45.

The reasonableness standard gives deference to the experience and specialized training of officers. *See, e.g.*, *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (reasonableness determinations "allow officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information . . . that 'might well elude an untrained person'"). The standard gives deference to an officers' judgments made by necessity in the "heat of the moment," *Atwater*, 582 U.S. at 387, and without benefit of hindsight from, for example, the "peace of a judge's chambers." *Graham*, 490 U.S. at 397. The Officers allege, by contrast, that the UF Policy has been written by persons without law enforcement experience or experience with violent suspects, who have created prescribed rules, preconditions, and factors that are unrealistic, and eliminate

officers' discretion and ability to respond to the actual risks and harm that they face. *See, e.g.*, ER 20-21 ¶2, ER 24 ¶17, ER 30 ¶30, ER 32 ¶38, ER 37 ¶¶52, 53.

This Circuit, under its application of the Fourth Amendment's reasonableness standard, recognizes the practical dangers to police officers from unreasonable rules that create delay and hesitation:

> Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the least intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves.

Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994). While this decision was in the context of claims against police officers under the Fourth Amendment, the reasoning applies to the Officers' constitutional claims in this appeal. The recognition of the unique challenges and dangers that police officers face should not only apply when police officers defend themselves in court, but should also apply when the police are defending their lives and the lives of others in the line of duty. The Officers' self-defense rights should be recognized and interpreted consistent with Fourth Amendment jurisprudence, and the District Court's dismissal of the case should be reversed.

H. The District Court Improperly Dismissed the Officers' First Amended Complaint Under Fed. R. Civ. P. 12(b)(6) by Failing to Give Proper Weight to their Well-Pled Allegations.

The District Court's dismissal was based, in part, on its holding that the Officers have no constitutional right of self-defense. As discussed above, this holding should be reversed. The District Court went further, however, and accepted the City's assertion of facts in order to dismiss the Officers' claims as implausible. ER 17-18. This is an error and should be reversed as well because if the Officers' allegations are assumed true, as they should have been, the facts of the First Amended Complaint support a cognizable infringement of the Officers' constitutional rights.

"When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal,* 556 U.S. 662, 678-79 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*., citing *Bell Atlantic v. Twombly,* 550 U.S. 544 (2007). The District Court did not assert that the Officers' factual allegations were not well-plead, *i.e.*, "naked assertions," "formulaic," or "labels and conclusions." *Iqbal*, 556 U.S. at 678. Importantly, "Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual

allegations." *Twombly*, 550 US at 556, citing *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989).

Yet that is precisely the action taken by the District Court. For example, while the District Court accepted the Officers' fundamental assertion that any UF Policy must reflect the reasonableness standard, ER 17, it concluded that other "stricter" standards were additionally required based on its acceptance of the finding that SPD officers engaged in a pattern and practice of excessive force. *Id*. The Officers, however, specifically challenged the factual basis for this finding. ER 22 ¶9. Without the flawed DOJ finding, SPD's previous policy based on the proper reasonableness standard would have remained in effect allowing officers reasonable latitude to protect the public and themselves.

Moreover, the District Court assumed that since the UF Policy made "concessions" to the reasonableness standard, the policy was constitutionally valid. ER 17. Yet that is merely where the factual dispute begins. The Officers' First Amended Complaint details multiple ways in which the included reasonableness language is rendered meaningless by additional, inconsistent, and contradictory provisions in the policy. *See, e.g.*, ER 31-32 at ¶¶ 37, 38, ER 36-37 ¶¶50, 52. The UF Policy must be read in its entirety to see how it is unworkable and dangerous overall. Yet, the District Court made contrary factual conclusions based on its

reading of piecemeal provisions of the UF Policy to conclude the Officers' claims were implausible.

The District Court acknowledged that the UF Policy contains "stricter" (*i.e.*, beyond reasonableness) standards, ER 17, and conceded that these stricter standards "slow[] or even forestall[] the application of force in police interactions with resisting [*i.e.* threatening] subjects." ER 18. Nevertheless, it concluded as fact its belief that the UF Policy still provides officers with "a wide range of tools to gain control over situations." *Id.* The Officers specifically contested this factual assessment, alleging in their First Amended Complaint that taken together the UF Policy provisions create highly restrictive and unworkable standards that deny them the range of force tools needed in the real world of street policing. It is precisely these restrictive standards that place the public's and officers' lives in unreasonable, therefore unconstitutional, jeopardy. *See, e.g.*, ER 32 ¶38 (the UF Policy requires officers to hesitate and delay so that they remain at dangerous force deficits in encounters with violent suspects); ER 31-32 ¶¶34-35, 38, 39-40, ER 33-34 ¶43 (where there is an immediate threat to officer safety, the UF Policy does not permit officers to avail themselves immediately of a range of reasonable force options); ER 26-27 ¶24, ER 32-33 ¶41, ER 35-37 ¶¶47, 51-53 (common sense, practical standards have been replaced with rigid, complicated ones that do not

give officers flexibility to make reasonable decisions for public and officer safety).[8]

Finally, the Officers' First Amended Complaint alleges that the UF Policy, by restricting their ability to respond adequately to dangerous circumstances, creates incentives for officers to avoid situations that put them in untenable situations. This allows the situation to become more dangerous for both the public and officers. ER 26 ¶¶22, 23, ER 32 ¶38. The District Court, however, apparently accepted as true the City's assertion that these allegations are "irresponsible," and "hyperbole," even a "dereliction of duty," in rejecting the Officers' allegations about the impacts of the UF Policy. ER 17-18. These are factual issues, and acceptance of these assertions is a factual determination that is improper on a motion to dismiss.[9]

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[8] For example, the Officers allege that at a disciplinary meeting regarding officers' use of force under the new UF Policy, the Monitor, who was in attendance, stated that "practical considerations never trump this policy." ER 26-27 ¶22, 24.

[9] That this is a complex, factual issue inappropriate for a motion to dismiss is demonstrated by a recent amicus brief submitted to the Supreme Court by organizations of cities, mayors and municipal attorneys – including the Association of Washington Cities of which the City of Seattle is a member. These organizations cited numerous studies that examine issues of public and officer safety as officers respond to an ever increasing number of calls involving mentally ill suspects. This research included addressing issues related to life-threatening dangers to public and officer safety created by the "risk of officer hesitancy or delay." *See* Brief for Nat'l League of Cities, et al., as Amici Curiae Supporting Petitioner's Writ of Certiorari, *City and County of San Francisco v. Sheehan*, No. 13-1412 at 10, 25-26 (S. Ct. 2015). In the amicus brief, and contrary to its

The District Court's dismissal should be reversed so this case can proceed to discovery. Understanding the real and practical impact of this UF Policy is precisely the role of discovery in the case. *Cf. Brinegar*, 338 U.S. at 175 (noting that determinations of probable cause like other police responsibilities "are factual and practical considerations of everyday life of which reasonable and prudent men, not legal technicians, act"). Instead, the District Court improperly relied on the City's and its own assumptions and beliefs as to the facts in order to reject the plausibility of the Officers' claims. This wrongly denies the Officers the opportunity to develop the facts and evidence to demonstrate the life-threatening dangers of the UF Policy. The District Court should be reversed for its failure to assume the truth of the Officers' well-plead allegations and the case remanded to proceed with factual discovery.

VIII. CONCLUSION

For any and all of the reasons asserted by the Officers' above, this Court should reverse the District Court's Order and Judgment and remand the case to the District Court for it to proceed.

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positions in this case, the City joins much of the same arguments the Officers make in the First Amended Complaint about the dangerous impacts of requiring officer hesitancy and delay.

RESPECTFULLY SUBMITTED this 23rd day of February, 2015.

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Statement Of Related Cases:

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

Certificate of Compliance:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,488 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on February 23rd, 2015 a true and correct copy of Appellants' Excerpts of Record was served on the following via CM/ECF:

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