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' REPLY BRIEF

ATHAN E. TRAMOUNTANAS
Short Cressman & Burgess PLLC
Attorneys for Plaintiffs-Appellants
999 Third Avenue, Suite 3000
Seattle WA 98104-4088
Phone: 206.682.3333
Fax: 206.340.8856

LISA ANN BATTALIA
Law Office of Lisa Ann Battalia
Attorneys for Plaintiffs-Appellants
5316 Glenwood Road
Bethesda MD 20814
Phone: 301.346.7891

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTORY AUTHORITIES

CONSTITUTIONAL PROVISIONS

I. INTRODUCTION

Respondent City of Seattle ("City") argues it is unbounded – even by the Constitution – in its power to restrict its police officers' exercise of fundamental constitutional rights: "the Constitution, in turn, does not dictate the scope or limits of a departmental policy." Brief of Appellees at 35. The City is wrong on this essential issue of constitutional rights and boundaries. As argued in the Appellant Officers' ("Officers") Opening Brief, public employers do not have the authority to disregard the fundamental rights of their employees, and citizens do not surrender their constitutional rights by reason of their public employment. Opening Brief at 27-34; *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006) (quoting *Connick v. Myers*, 461 U.S. 138, 147 (1983) ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government.").

The essential question on this appeal is whether the Officers have the constitutional protections they claim under the Second, Fifth, and Fourteenth Amendments. The Second Amendment protects the Officers' right to use weapons in self-defense, as well as their right of self-defense itself. The Fifth and Fourteenth Amendments protect the Officers' fundamental right of self-defense right and subjects restrictions on that right to heightened judicial scrutiny. Existing jurisprudence supports the Officers' claims and recognizes the long-standing and fundamental nature of an individual's right of self-defense. If this Court holds that

the Officers' rights are protected by any one of the constitutional bases asserted, and that the Officers' First Amended Complaint alleges sufficient facts to plausibly assert a violation of that constitutional protection, the District Court's dismissal should be reversed and this case should be remanded for a factual determination of whether the City of Seattle Police Department's Use of Force Policy ("UF Policy") passes constitutional scrutiny.

II. ARGUMENT

A. The Use of Force Policy Violates the Second Amendment by Restricting the Officers' Right to Use Weapons for the Core Lawful Purpose of Self-Defense.

The Second Amendment protects an individual's right to use a weapon in self-defense. It is not limited, as the City argues, to simply the right to "carry" weapons on one's person. In *District of Columbia v. Heller*, the Supreme Court held that a law restricting an individual's (in that case, a police officer's) possession of a *usable* handgun at home was unconstitutional. 554 U.S. 570, 630 (2008) (considering a restriction that required gun owners to keep permitted firearms (such as long guns) in their possession "unloaded and disassembled or bound by a trigger lock or similar device"). Thus, the law the Court held unconstitutional not

only restricted individuals from *carrying* handguns,[1] it prevented permitted weapons from being readily *usable* when they were being carried.

The essential holding in *Heller* was that a restriction on usable weapons "makes it impossible for citizens to use [handguns] for the core lawful purpose of self-defense and is hence unconstitutional." *Id*. The Court considered an argument that it should interpret the statute to include a self-defense exception (presumably making the law constitutional), but declined to do so because such an exception was precluded by the unequivocal language of the law. *Id*. This Circuit, when discussing *Heller*, noted that "the inherent right of self-defense has been central to the Second Amendment right." *Jackson v. City & County of San Francisco*, 746 F.3d 953, 959 (9th Cir. 2014) (quoting *Heller*, 554 U.S. at 628). The City's contrary assertion that the Second Amendment protects only the right to carry weapons, but not the right reasonably to use weapons in self-defense, is impossible to square with *Heller*, and undermines each of the City's Second Amendment arguments.

[1] The law made it a crime to carry unregistered handguns and also prohibited the registration of handguns. A separate law prohibited carrying a handgun without a license. *Heller*, 554 U.S. at 574-75.

1. The First Amended Complaint meets threshold requirements for a claim under the Second Amendment by alleging an infringement on the right to bear arms in self-defense.

The Officers assert a cognizable claim under the Second Amendment because they allege that the UF Policy unreasonably restricts their use of weapons in self-defense. As noted by the City, a necessary predicate for a claim under the Second Amendment is an allegation that the government has infringed on the right to "keep" or "bear" arms. Brief of Appellees at 14. The City also correctly notes that the right to "bear" arms includes the right "to carry weapons to be prepared for confrontation." *Id.* at 14 n.8. However, the City is wrong in its unsupported argument that "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." *Id.* at 15. The City cannot separate the right to bear arms from the right to use arms for lawful purposes. Instead, the right to use weapons in self-defense is part and parcel of the definition of "bearing" arms.

Heller defines the right to "bear" arms as the right to carry weapons for confrontation. 554 U.S. at 582-84 (stating that, when used with "arms," "bearing" means "carrying for a particular purpose – confrontation."). The Court quoted with approval Justice Ginsberg's definition of "carries a firearm" in her *Muscarello v. United States*, 524 U.S. 125, 143 (1998), dissent:

> 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.

Heller, 554 U.S. at 584. Indeed, the types of confrontation mentioned with approval in *Heller* include defensive uses:

- "self-defense," *Heller* at 585 (quoting T. Walker, *Introduction to American Law* 198 (1837)).
- "defense 'of one's person or house'" and "self-preservation," *Heller* at 585 (quoting 2 *Collected Works of James Wilson* 1142, and n x (K. Hall & M. Hall eds. 2007));

Because the right to "bear" arms includes the right to carry arms for defensive uses, any restriction on the right to use arms in self-defense necessarily restricts rights protected by the Second Amendment – as expressly held in *Heller*: "[the restriction] makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional." *Id*. at 630.

The City's argument – that the Second Amendment makes a full stop at the right to carry a gun – makes little sense in light of this understanding of "bearing" a weapon. A distinction between possession of a weapon for the purpose of self-defense (which the parties agree is protected by the Second Amendment) and the ability to use that weapon in self-defense during a confrontation (which the City argues has no constitutional protection) would render the Second Amendment meaningless. It would lead to laws allowing individuals to carry weapons only as fashion accessories, with the right to actually use those weapons for lawful

purposes foreclosed. It is also contrary to *Heller* and to the historical precedent that the Court relied on: "The right to keep and bear arms, also implies the right to use them if necessary in self-defence; without this right to use the guaranty would have hardly been worth the paper it consumed." *Heller*, 554 U.S. at 609 (quoting J. Tiffany, *A Treatise on the Unconstitutionality of Slavery*, 117-18 (1849) (citing Blackstone)).

Stemming from its mistaken understanding of what it means to "bear" weapons, the City argues that, because the Officers are *required* to carry weapons while on duty, there can be no violation of the Second Amendment. Brief of Appellees at 15. This is a deceptively simple proposition: the Second Amendment only protects the right to *carry* a gun; the Officers are *required* to carry a gun; *ipso facto*, the Second Amendment is not implicated. Brief of Appellees at 15. Assume, however, the City also required police officers' guns to be disabled in the holster, or locked in a manner that unreasonably prevents or delays their use (as in *Heller*). Though the City believes it could place such a restriction on the Officers (as they would still be "bearing arms"), the restriction would violate the Second Amendment because a restriction that makes it impossible to use weapons for self-defense is unconstitutional. *Heller*, 554 U.S. at 630. Therefore, even though Officers may be required to carry weapons, the UF Policy's restrictions on the *use*

of those weapons in self-defense implicates the Second Amendment.[2]

The Second Amendment is implicated when the City restricts the manner in which an Officer "bears" a weapon because "bear" includes the ability to effectively use weapons in a confrontation. The First Amended Complaint alleges the UF Policy restricts the Officers' ability to bear weapons in self-defense, and therefore asserts a cognizable claim under the Second Amendment. The District Court's dismissal should therefore be reversed.

2. While the City may set rules relating to the use of weapons, the rules are subject to scrutiny under the Second Amendment.

The City confuses the essential issue of the Officers' Second Amendment claim by arguing the Second Amendment does not "place *any* restrictions on" a police department's ability "to establish rules relating to the department-owned firearms and other force tools that it issues to its officers. . . ." Brief of Appellees at 16 (emphasis added). This argument is wrong because the Constitution applies to the City, and *Heller* holds that restrictions on the ability to use weapons in self-

[2] To the extent the City suggests that Officers carrying weapons in their official capacity are not entitled to the same Second Amendment protections as the "citizens" in *Heller*, it is wrong. Confrontations are inherent in police work, and the Officers routinely face life-threatening risks from suspects that may, themselves, be armed with weapons. If anything, the Officers' official capacity – which requires them to engage with armed suspects – underscores the importance of the Officers' ability to use weapons in self-defense. When Officers' lives are threatened by suspects, they become like other citizens who face dangers implicating the immediate and "natural rights of defense . . . what [is] called the law of self-preservation." *Heller*, 554 U.S. at 585.

defense *does* implicate the Second Amendment. The argument is also irrelevant because the Officers do not take the position that the Second Amendment removes the City's ability to establish rules related to use of force. Instead, their position is that these restrictions are subject to constitutional scrutiny. This position is clear from the First Amended Complaint:

- "Plaintiffs do not oppose reform related to UF, but are asking that reform be consistent with officers' constitutional rights." ER 28-29.
- "Plaintiffs, however, contend that this freedom [to adopt policies and practices that are more restrictive than the law] is limited to the point at which it begins to tread upon the fundamental, individual constitutional rights of the officers subject to such a policy." ER 29.

The Officers do not argue that the City is prevented from establishing *any* use of force restrictions. Their position is use of force restrictions are subject to scrutiny under the Second Amendment if they impact officers' ability to reasonably use weapons for self-defense. The restrictions are subject to scrutiny using judicially determined standards of review. The Ninth Circuit has noted that the Supreme Court in *Heller* did not specify which burdens on the Second Amendment rights would trigger which standards of review. *See Jackson*, 746 F.3d at 959-60. While the standard of review may not yet be determined, these cases make clear that the City's restrictions are subject to scrutiny under some standard of review.

Finally, to the extent the City argues that the Officers' attempt to elevate "every intra-department disagreement" into § 1983 litigation, *see* Brief of

Appellees at 17, it is misplaced. The Officers' claims relate only to departmental policy restricting their ability to take reasonable and effective defensive action in the face of suspect's life-threatening behavior (*i.e.*, self-defense). As a fundamental constitutional right, their claims cannot be diminished by such work place efficiency fears. Instead, the Supreme Court has concluded "that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (holding that officer statements compelled by a state forfeiture-of-office statute are inadmissible because they violate Fifth Amendment protections against self-incrimination). This is because, "there are rights of constitutional stature whose exercise a State may not condition by the exaction of a price." *Id.* So that even though police officers' duties and loyalties are owed entirely to their employer, they do not have to sacrifice constitutional rights to retain their job. See *Gardner v. Broderick*, 392 U.S. 273, 277-78 (1968). And, while the City argues the Officers' position subjects any police department policy to Second Amendment claims, the Supreme Court has already considered and rejected this "parade of horrible" argument: "Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms." *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010).

The Officers allege, among other things, the restrictions in the UF Policy impose unreasonable restrictions on their use of weapons for self-defense and put them at great and unnecessary risk of injury or death. *See* ER 2, 23. Such a risk is a devastating burden, but ultimately the extent of the burden, and therefore the proper standard of review, is a factual question and cannot be resolved on a motion to dismiss. Thus, because the Second Amendment protects the Officers' right to use weapons in self-defense, the case should be remanded to the District Court to define the standard of review to place on the UF Policy and to find as a factual matter whether the UF Policy violates that standard of review.

3. The Second Amendment protects the right of self-defense.

As a separate basis for reversal under the Second Amendment, the Officers argue that the UF Policy is overly restrictive of their right to defend themselves while on duty, without regard to whether that defense involves a weapon. The Second Amendment, by its plan language, protected existing rights from infringement: "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. Discussing the Second Amendment, the Supreme Court has recognized that self-defense "is a basic right, recognized by many legal systems from ancient times to present day," and is "'the *central component*' of the Second Amendment right." *McDonald v. City of Chicago*, 561 U.S. 742, 744 (2010)

(citing *Heller*, 554 U.S. at 599 (emphasis in *Heller*)). Thus, the Second Amendment protects against the infringement of not only the right to use weapons in self-defense, but the right of self-defense itself.

The City misreads *Heller* by arguing the Supreme Court only established that self-defense is "a purpose underlying the right to bear arms." Brief of Appellees at 17. *Heller* considered and rejected a similar argument, stating that Justice Breyer's "assertion that individual self-defense is merely a 'subsidiary interest' of the right to keep and bear arms . . . is profoundly mistaken." 554 U.S. at 599. This Circuit has also recognized that the Supreme Court confirmed the Second Amendment has "the core lawful purpose of self-defense" and elevates the right of using arms "in defense of hearth and home" above all other interests. *Fyock v. Sunnydale*, 779 F.3d 991, 996 (9th Cir. 2015). The Officers have the right to defend themselves while on duty, and the UF Policy's restrictions on those rights are subject to scrutiny under the Second Amendment.

The Court need not decide this issue independent of the other Second Amendment arguments in order to remand the case, but this protection of the right to self-defense – even without a weapon – is consistent with the core holdings and principles of the Supreme Court's decisions in *Heller* and *McDonald*.

4. Case law and historical sources show that the Second Amendment Protects the rights asserted by the Officers.

The Officers do not seek to create new law with its Second Amendment claim that the UF Policy unconstitutionally restricts their self-defense rights and right to use weapons in self-defense. The Supreme Court has repeatedly and consistently explained that the Second Amendment right can only be understood as incorporating the right to take reasonable, effective actions in self-defense. This is plain from the conclusion in *Heller* that self-defense is the "core lawful purpose" of bearing arms and that restrictions on such use violate the Second Amendment. 554 U.S. at 630. It is repeated in *McDonald* that individual self-defense is "the *central component*" of the Second Amendment right, and thus "we concluded citizens must be permitted 'to use [handguns] for the core lawful purpose of self-defense." 561 U.S. at 767-68 (quoting *Heller*, 554 U.S. at 599).

The City's only real authority for its false distinction between the right to carry a weapon (protected by the Second Amendment) and the right to use a weapon effectively for self-defense (not protected unless the first is expressly restricted) is a passage in *United States v. Morsette*, 622 F.3d 1200 (9th Cir. 2010). The issues in *Morssette*, a brief, per curiam decision, are unrelated to the relevant issues in this case. In *Morssette*, this Circuit considered whether a criminal defendant that drunkenly attacked his houseguests was entitled to this additional jury instruction on self-defense post-*Heller* and *McDonald*: "In the home, the need

for self-defense and property defense is most acute." *Morsette*, 622 F.3d at 1201. In that context, *Morsette* correctly stated that *Heller* and *McDonald* did not involve a party's specific use of a weapon. But it belies the plain language of *Heller* to argue that the Supreme Court was not considering the use of a weapon when the law at issue allowed people to carry handguns only if they were inoperable and therefore not available for use. 554 U.S. at 630. It also ignores that the challenge in *McDonald* was brought by Chicago residents "who would like to keep handguns in their homes *for self-defense* . . ." 561 U.S. at 750 (emphasis added). While the facts presented in *Heller* and *McDonald* did not require consideration of an actual use of a weapon in self-defense, they did require consideration of whether policies restricting the ability to use weapons in self-defense implicated the Second Amendment. The Court held that the restrictions do implicate the Second Amendment. It is the same issue in this case, and *Morsette* does not support a dismissal of the Officers' claims.

The City is wrong to assert the Officers selectively, and by implication unfairly, quote from the historical texts relied on by the Supreme Court in *Heller* and *McDonald*. *See* Appellee's Brief at 20. The Court does not in isolation tie the right to bear arms to the right reasonably to use weapons in self-defense. Instead, this understanding that is found throughout the sources cited *Heller* and *McDonald*:

- Noting that Americans understood the "arms" right as a right "permitting a citizen to repel force by force." *Heller*, 554 U.S. at 595.

- Reading pre- and post- Second Amendment adoptions in State constitutions as "secur[ing] an individual right to bear arms for defensive purposes," and "to protect an individual right to use arms for self-defense." *Heller*, 554 U.S. at 602-03.

- "It was plainly the understanding in the post-Civil War Congress that the Second Amendment protected an individual right to use arms for self-defense." *Heller*, 554 U.S. at 616.

- Noting congressional commentary that understood the right to a well-loaded musket as including the right to use that weapon to kill in self-defense. *McDonald*, 561 U.S. at 776.

By ignoring these historical sources, it is the City that selectively cited from the decisions. A full review of all the sources relied on by the Supreme Court show that the historical sources support the Court's protection of the self-defense rights sought by the Officers.

The City also mistakenly relies on the District Court's contrary interpretation of historical sources on the Second Amendment. Respectfully, the Officers disagree with the District Court's analysis. In particular, the quoted sections relate to historical sources that discuss restrictions on how weapons are *carried*. Brief of Appellees at 21-22; ER 13-14. These sources discuss open-carry laws, which prohibit concealing a weapon when it is carried by a person. *Id*. ("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.") These sources are not relevant to this case. The Officers acknowledge that requiring a particular manner of either carrying or using a weapon is not determinative under the Second Amendment. The question is whether the restrictions on carry or use have the effect of unreasonably burdening the individual's ability to take defensive action. Open carry laws do not restrict an individual's right to use weapons in self-defense – if anything, they make the weapons *easier* to use in self-defense.

The Officers do not challenge the UF Policy provisions directing *where* weapons are carried on their persons. The Officers only challenge the UF Policy to the extent they can demonstrate that its provisions prohibit or restrict their ability to take reasonable action in self-defense. Under *Heller* and *McDonald*, the Officers have this right, and the Court should remand the case for a determination of whether the UF Policy violates that right under the Second Amendment.

B. The Use of Force Policy Violates the Officers' Rights to Equal Protection.

The UF Policy also violates the Officers' right to equal protection by infringing their right to self-defense. The Officers' First Amended Complaint invokes a fundamental right, and the Officers have identified themselves as a class that is treated differently than similarly situated people outside their class.

The Officers' claims regarding self-defense invoke a fundamental right. While no Supreme Court case has had occasion to compare the right of self-

defense to the right to marry or vote, this does not call into question the fundamental nature of the right. *See e.g., McDonald*, 561 U.S. at 767 ("Self-defense is a basic right, recognized by many legal systems from ancient times to the present day. . ."). The reason the protections of the Second Amendment even apply to states is because they protect the fundamental right of self-defense. *McDonald*, 561 U.S. at 767-68; *See also Jackson*, 746 F.3d at 959 (quoting *Heller*, 554 U.S. at 628) ("Guided by the same historical inquiry, the Court emphasized that 'the inherent right to self-defense has been central to the Second Amendment right.'"). Thus, under existing jurisprudence, the Officers' right to self-defense is a fundamental right.

If laws impact a fundamental right, equal protection is violated regardless of whether the class impacted is a suspect class. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973). The Officers have alleged that they are an impacted class that is treated differently than similarly situated classes. The Officers are in a class of people whose right to defend themselves and the public when confronted with life-threatening danger is restricted as compared to similarly situated people – *i.e.*, other people that are confronted with danger and the need to protect themselves. The City asserts the Officers cannot compare themselves to other citizens because citizens do not "exercise police powers." In the context of the Officers' claims, however, they not significantly different from other citizens.

Citizens can use reasonable force, including deadly force, when confronted with life threatening danger in order to protect their lives. *See, e.g.,* RCW 9A.16.020; *State v. Meyer*, 96 Wash. 257, 262-63, 164 P. 926, 928 (1917). The Officers are treated differently because their ability to use the same reasonable force is restricted by the UF Policy. This different treatment, with respect to a fundamental right, is sufficient to state an equal protection claim.

Finally, the City posits that the Officers' equal protection argument is factually incorrect. *See* Brief of Appellees at 25. The City relies on one line regarding deadly force from the 51-page UF Policy that governs all officer use of force. In doing so, the City ignores other provisions of the UF Policy prohibiting use of force in certain instances, *see, e.g.,* ER 58-59, prohibiting deadly force in certain instances, *see, e.g.,* ER 60, and otherwise restricting the Officers' ability to take reasonable defensive action in response to threatening conduct by suspects. *See, e.g.* ER 62. In any event, if the Court engages in a factual determination about the meaning and effects of the UF Policy, it goes beyond the scope of a Motion to Dismiss and is an improper basis on which to uphold the dismissal of the Officers' claims.

The Officers have identified a fundamental right and have alleged facts showing they are treated differently than similarly situated citizens in their ability to make effective use of that fundamental right when defending themselves. Laws

are subject to strict scrutiny when they "discriminate based on *any* classification but impact a fundamental right. . . ." *Tucson Woman's Clinic v. Eden*, 371 F.3d 1173, 1185 (9th Cir. 2004) (emphasis added). The Officers have raised a cognizable equal protection claim, and the case should be remanded on this basis.

C. The Use of Force Policy Violates the Officers' Substantive Due Process Rights.

The Officers' substantive due process rights are implicated by the UF Policy's infringement of their fundamental right to self-defense. Restrictions on the right to self-defense implicate the Second Amendment. *Heller*, 554 U.S. at 630. The Second Amendment protects fundamental rights. *See McDonald*, 561 U.S. at 767. Because a fundamental right is implicated, it is also afforded substantive due process protection. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) ("the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'")). The Officers are entitled to that substantive due process protection.

The City's argument that no fundamental right is implicated fails to acknowledge or address the multiple cases cited by the Officers, from both the Supreme Court and the Ninth Circuit, that clearly identify self-defense – at least in the context of the Second Amendment – as a fundamental right. The City instead relies on a Seventh Circuit case that considered an inmate's right to assert self-

defense in a prison disciplinary hearing. *Rowe v. DeBruyn*, 17 F.3d 1047 (7th Cir. 1994). This decision can be distinguished on several grounds. It relies primarily on an earlier decision, *White v. Arn*, 788 F.2d 338 (6th Cir. 1986), that found no constitutional right to self-defense in the Eighth, Ninth, and Fourteenth Amendment. However, both *White* and *Rowe* note conflicting commentary and authority in other circuits. *See Rowe*, 17 F.3d at 1052; *See also White*, 788 F.2d at 347. The *White* court stated it need not find this self-defense right because the Supreme Court had established a specific analysis for allocating the burden of proof for affirmative defenses in criminal cases. *Id*. Finally, the *Rowe* case notes that, in any event, substantive due process claims would not be relevant under its facts because the plaintiff was involved in a prison disciplinary proceeding, not part of a criminal proceeding, so the full panoply of liberty protections did not apply. *Rowe*, 17 F.3d at 1052. *Rowe* was expressly limited to "the criminal law context," *Id*., and does not defeat the Officers' fundamental right in a civil constitutional challenge.

The City also relies on a *footnote* in Justice Stevens' dissent in *McDonald* (without noting that it is a footnote) discussing his difficulty with the Court announcing a substantive due process right to self-defense. *See* Brief for Appellees at 27; *McDonald*, 561 U.S. at 888, n.32. There are several problems with the City's argument. First, it ignores that Justice Stevens in fact acknowledged (even as he

disagreed) that the majority decision "linked" the Second Amendment "to the value of personal self-defense." *Id*. at 890 n.33. Thus, he acknowledged one of the Officers' core arguments that the City has attempted to dismiss. Second, the City ignores language in the *body* of Stevens' dissent that, in fact, recognizes the "serious" substantive due process problem a state might have if it deprived citizens of the right to self-defense:

> And it is true that if a State were to try to deprive its residents of any reasonable means of defending themselves from imminent physical threats, or to deny persons any ability to assert self-defense in response to criminal prosecution, that might pose a significant constitutional problem. The argument that there is a substantive due process right to be spared such untenable dilemmas is a serious one.

McDonald, 561 U.S. at 888 (Stevens, J., dissenting). The issue informing Stevens' dissent is that a substantive due process right would be difficult to manage as a matter of federalism because states have created different standards for implementing the right of self-defense. *Id*. at 888 n.32. Here, however, the issue of police officers' right of self-defense does not, perhaps uniquely, raise federalism issues. Police officers' conduct when using defensive tactics has long been evaluated under a consistent, federal, constitutional standard of reasonableness. As discussed below, these long-standing Fourth Amendment standards can be (and have been) readily used to evaluate the legitimacy and reasonableness of police officers' use of force in self-defense situations. In sum, there is clear precedent that a fundamental right of self-defense exists for these Officers, and the City's

restriction of that right in the UF Policy is subject to substantive due process protection under a strict scrutiny analysis.

Even if a "shocks the conscience" standard applied, as argued by the City, the case should be remanded. Such a standard clearly would require a factual analysis of the meaning and effect of the UF Policy overall, and by the District Court's dismissal of the case, the Officers never had the opportunity to present evidence on these essential points. The District Court drew conclusions based on isolated language that it alleged did not "shock the conscience," but ignored other language in the policy. The First Amended Complaint specifically identifies multiple provisions of the UF Policy that appear to give the Officers discretion in their use of force, but are contradicted by other provisions. *See e.g.*, ER 31, 36. For example, there are many instances where use of force (defined as "any physical coercion") is expressly prohibited. *See, e.g.*, ER 56, 58. Also, the Officers are required to consider multiple factors and contradictory provisions that make it impossible for them to make decisions for their (and the public's) safety in the split-seconds in which interactions with suspects often unfold. ER 57-58. While officers can carry certain less-lethal force tools (including TASERs, pepper spray, and impact weapons), they are prohibited from using them in certain circumstances even in the face of threatening conduct by suspects. *See, e.g.* ER 62. While the Supreme Court has recognized that, if officers are justified in firing at a suspect,

"the officers need not stop shooting until the threat has ended," *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022 (2014), the UF Policy requires Officers to separately justify each deployment of less-lethal force tools. ER 64 (beanbag shotgun); ER 69 (TASER); ER 72 (impact weapons); ER 73 (OC Spray). These are only some examples of many restrictions and contradictions, all of which create unreasonable dangers for the Officers and the public as Officers attempt to implement the UF Policy:

> If factors are too complicated and contradictory to facilitate reasonable decisions in the heat of the moment, they cannot be used, after-the-fact, to invalidate the officer's judgment and conduct as he or she faced an immediate threat.

ER 38. If a "shocks the conscience" standard applies to the Officers' substantive due process claim, the court must look at the policy as a whole, and the Officers must be allowed to present evidence regarding its practical effects on their ability to take timely and effective defensive action, before making its determination. The District Court erred in dismissing the substantive due process claim without a proper and full analysis, and the case should be remanded.

D. While the Fourth Amendment Does Not Provide the Officers with an Independent Claim, Fourth Amendment Jurisprudence Provides Standards to Evaluate Officers' Right of Self-Defense.

To be clear, the Officers are not asserting an independent Fourth Amendment right to use force in this appeal. Fourth Amendment jurisprudence is germane, however, to the Officers' right to use force in self-defense. Fourth

Amendment standards expressly incorporate "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. 1, 23-24 (1968) – in essence, self-defense. The Supreme Court just recently confirmed important Fourth Amendment law relevant to Officers' claims of self-defense. In particular, suspects' rights cannot justify 20/20 hindsight or second-guessing of police officers' decisions made during violent confrontations, because such situations require split-second, life and death decision-making to protect the lives of officers and others. *City and County of San Francisco v. Sheehan*, No. 13-1412, slip op. at 15-16 (U.S. May 18, 2015). Moreover, because Fourth Amendment standards are long-prevailing, *Brinegar v. United States*, 338 U.S. 160, 176 (1949), context specific, *Scott v. Harris*, 550 U.S. 372, 383 (2007) and objective, *Graham v. Connor*, 490 U.S. 386, 397 (1986), they provide the best compromise for balancing citizens' rights against the need to grant officers fair leeway to enforce the law for the community's protection. *Brinegar*, 338 U.S. at 176. While the City is willing to accept the importance of officer safety as identified by cases like *Graham* as a defense to a §1983 claim, the City is unwilling to consider the standards announced by the Supreme Court to allow the Officers to adequately defend themselves and protect the public in the same types of dangerous situations considered in those cases. Brief of Appellees at 32-33. Because these issues of

officer safety are at the essence of the Officers' claims, Fourth Amendment jurisprudence is highly relevant to this case, as it provides well established standards by which the Officers can demonstrate how the UF Policy makes their encounters with suspects unreasonably dangerous and creates unnecessary risk to the lives of Officers and the public.[3]

E. The District Court Failed to Give the Officers' Allegations Proper Weight Under Fed. R. Civ. Pro. 12(b)(6).

The District Court made conclusions about the UF Policy without giving any indication that it reviewed the policy in its entirety or that it considered the Officers' allegations in the First Amended Complaint. Any language in the UF Policy that suggests the City will apply a reasonableness standard to the Officers' use of force is rendered meaningless by inconsistent and contradictory provisions elsewhere in the policy. ER 31-32; 36-37. It was improper for the District Court to make factual determinations against a nonmoving party on a motion to dismiss. *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1029-30 (9th Cir. 2009) (quoting *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005) ("[We] accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party.")). This is particularly true when the

[3] Notwithstanding the City's contrary assertion, the relevance of Fourth Amendment reasonableness standards have been the foundation of the Officers' Complaint. *See, e.g.*, ER 26, 30-31, 35-36.

factual determinations about how a 51-page use of force policy will be applied to police officers are made in a courthouse without hearing how implementing the policy impacts those officers' ability to make split-second determinations in life or death situations. If this court finds that the Officers have any of the constitutional rights they claim, this case should be remanded so actual factual determinations can be made about the effects of the UF policy before ruling on its constitutionality.

F. The Officers Have Alleged Sufficient Facts Against Mayor Murray and City Attorney Holmes to Survive a Motion to Dismiss.

The Officers have alleged that Mayor Murray is involved in the implementation of the UF Policy, and that City Attorney Holmes was involved in the promulgation, and is involved in the implementation, of the policy. ER 21. Both Mayor Murray and City Attorney Homes are named Defendants in the First Amendment Complaint. The Officers have alleged in their First Amended Complaint that, by promulgating and implementing the UF Policy, the "Defendants" violated the Officers' constitutional rights of self-defense, ER 41; Second Amendment rights, ER 41-42; Fourth Amendment Rights, ER 41-42; and Fifth and Fourteenth Amendment Rights, ER 44-47. These allegations are sufficient to defeat a motion to dismiss as to Mayor Murray and City Attorney Holmes.

III. CONCLUSION

The Officers' First Amended Complaint alleges sufficient facts to plausibly make constitutional claims under the Second Amendment (the UF Policy unduly restricts their right to use weapons in self-defense, and to defend themselves without weapons); and the Fifth and Fourteenth Amendments (the UF Policy violates the Officers' equal protection and due process rights). For any and all of the reasons asserted by the Officers in their briefing, this Court should reverse and remand this case to the District Court.

RESPECTFULLY SUBMITTED this 8th day of June, 2015.

SHORT CRESSMAN & BURGESS PLLC

By *_/s/ Athan E. Tramountanas_*

Athan E. Tramountanas, WSBA No. 29248
athant@scblaw.com
999 Third Avenue, Suite 3000
Seattle, WA 98104-4088
Phone: (206) 682-3333
Fax: (206) 340-8856
Attorneys for Appellants

LAW OFFICE OF LISA ANN BATTALIA

By */s/ Lisa Ann Battalia*

Lisa Ann Battalia SBN:224455
lisabanthony@me.com
5316 Glenwood Road
Bethesda MD 20814
Phone: (301) 346.7891
Attorneys for Appellants

Certificate of Compliance:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,172 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B) (iii).

SHORT CRESSMAN & BURGESS PLLC

By */s/ Athan E. Tramountanas*

Athan E. Tramountanas, WSBA No. 29248
athant@scblaw.com
999 Third Avenue, Suite 3000
Seattle, WA 98104-4088
Phone: (206) 682-3333
Fax: (206) 340-8856
Attorneys for Appellants

LAW OFFICE OF LISA ANN BATTALIA

By */s/ Lisa Ann Battalia*

Lisa Ann Battalia SBN:224455
lisabanthony@me.com
5316 Glenwood Road
Bethesda MD 20814
Phone: (301) 346.7891
Attorneys for Appellants

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on June 8, 2015, a true and correct copy of Appellants' Reply Brief was served on the following via CM/ECF:

Gregory Colin Narver
Seattle City Attorney's Office
P.O. Box 94769
600 Fourth Avenue, 4th Floor
Seattle WA 98124
206-684-8233
Gregory.narver@seattle.gov

Bradley S. Keller
Nicholas Ryan-Lang
Byrnes Keller Cromwell LLP
1000 Second Avenue, 38th floor
Seattle WA 98104
206-622-2000
bkeller@byrneskeller.com
nryanlang@byrneskeller.com

/s/Tricia Backus
Tricia Backus