

08-15773

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**DAVID K. MEHL; LOK T. LAU; FRANK
FLORES,**

Appellants,

v.

**LOU BLANAS, individually and in his official
capacity as SHERIFF OF COUNTY OF
SACRAMENTO; COUNTY OF
SACRAMENTO, SHERIFF'S
DEPARTMENT; BILL LOCKYER, Attorney
General, State of California; RANDI ROSSI,
State Firearms Director and Custodian of
Records,**

Appellees.

On Appeal from the United States District Court
for the Eastern District of California
No. 2:03-cv-02682 MCE KJM
The Honorable Morrison C. England, Jr., Judge

**ANSWERING BRIEF OF APPELLEE
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA**

EDMUND G. BROWN JR.
Attorney General of the State of California

CHRISTOPHER E. KRUEGER
Senior Assistant Attorney General

DOUGLAS J. WOODS
Supervising Deputy Attorney General

GEOFFREY GRAYBILL
Deputy Attorney General
State Bar No. 53643
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5465
Fax: (916) 324-8835

Attorneys for Appellee Attorney General
of the State of California

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INTRODUCTION

The principal focus of the appeal before this Court is whether the U.S. Supreme Court's decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), requires a result different from this Court's decision in *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996), which held that the Second Amendment does not provide an individual right to carry a concealed weapon.

Heller acknowledges that the Second Amendment's protection of an individual right to bear arms does not preclude government regulation to protect against the inherent danger of firearms and explicitly recognizes that licensing requirements for carrying concealed weapons have long been held not to impair rights protected by the Second Amendment. *Heller*, 128 S. Ct. at 2816. Accordingly, even if the Second Amendment were applicable to states by incorporation through the Fourteenth Amendment – which remains an open question – nothing in *Heller* would preclude California's license requirement for carrying loaded concealed weapons ("CCW"). Thus, *Heller* does not contradict the result in *Hickman*, which should govern in this case.

In any event, as a threshold matter, appellants' applications for CCW licenses were denied by appellee Sacramento County Sheriff's Office ("Sheriff"), not the Attorney General. Accordingly, appellants (hereinafter

referred to as “Applicants”) cannot establish federal jurisdiction to litigate the constitutionality of the CCW licensing statutes against the Attorney General.^{1/} The first amended complaint does not and cannot demonstrate Article III jurisdiction (“standing”) for either of the appellants because: (1) it has not alleged an “injury in fact” by any imminent threat of prosecution of the state statute by the Attorney General; (2) it could not be amended to show that the hypothetical harm plaintiffs allegedly suffer is caused by any action of the Attorney General; and (3) it could not be amended to show that the relief requested against the Attorney General would redress grievances claimed by any plaintiff.

JURISDICTIONAL STATEMENT

The District Court properly found that it lacked Article III jurisdiction of Applicants’ claims against the Attorney General, as described in Section III of the Argument below. This Court has jurisdiction to resolve Applicants’ appeal of the District Court’s decision, under 28 U.S.C. § 1291.

1. Appellants have dismissed appellee Randy Rossi, the former Director of the Division of Firearms of the California Department of Justice, and his successors. *See* Ninth Circuit Order in this matter issued on September 26, 2008. Accordingly, the Attorney General is the only state appellee. For simplicity in the description here of the proceedings below, both state defendants are referenced as “the Attorney General.”

STATEMENT OF ISSUES

1. Whether the District Court properly dismissed Applicants' various claims asserting that California's CCW license requirements violate an unrecognized constitutional right to carry a concealed weapon in public.

2. Whether the District Court properly determined that allowing retired peace officers to carry concealed weapons without obtaining a CCW license does not deny the non-qualifying Applicants equal protection of the law under the Fourteenth Amendment.

3. Whether the District Court properly dismissed Applicants' action against the Attorney General for lack of Article III jurisdiction, where the challenge to California's CCW license requirements put no recognized federal right at stake, and where in any event the Attorney General has no role in CCW license decisions under the challenged provisions.

4. Whether Applicants' action is likewise barred by the Eleventh Amendment as to the Attorney General because the Attorney General has no role in CCW license decisions under the challenged provisions.

STATEMENT OF THE CASE

After the Sheriff's Office denied their applications for CCW licenses, Applicants David K. Mehl and Lok T. Lau^{2/} brought suit in the U.S. District Court for the Eastern District of California on December 30, 2003. Appellants' Excerpt of Record ("AER") 1527, entry 1. They alleged that the statutory CCW license requirement violated their constitutionally protected right to keep and bear arms, that statutes authorizing certain classes of persons to carry concealed weapons denied appellants equal protection of law and that the Sheriff acted so arbitrarily in denying their applications as to deny them due process and equal protection of law. *Id.*

By order entered March 26, 2004, the District Court granted a motion by defendants Attorney General and Director of the Firearms Division of the California Department of Justice ("Attorney General") to dismiss the complaint as to them, but allowed leave to amend. AER 1528, entry 7.

A. The First Amended Complaint

On April 23, 2004, Applicants filed the first amended complaint ("FAC"). AER 1528, entry 9. The FAC alleges seven causes of action pursuant to 42 U.S.C. § 1983. AER 1505-1525. The demand for relief seeks

2. There was a third plaintiff, Frank Flores, who is not a party to this appeal.

general and special damages and an injunction against violating Applicants' rights and attorneys' fees.

In the first cause of action, Applicants allege that the CCW license application form published by state defendants does not call for identification of the applicant by race, gender or national origin and therefore discriminates on the basis of race, gender and national origin. AER 1519.

The second cause of action alleges that California Penal Code sections 12027, 12031(b) and 12050-12054 are unconstitutional because they authorize retired law enforcement personnel, but not Applicants, to carry loaded concealable firearms without CCW licenses. AER 1507:8-18.

The third cause of action alleges political supporters of, and campaign contributors to, the Sheriff receive CCW licenses "upon request" while other applicants, including Applicants, are summarily denied licenses, which they assert violates their First Amendment rights to freedom of expression and association. AER 1523:3-17.

The fourth cause of action alleges generally, based on all preceding allegations, that Applicants' right to keep and bear arms provided by the

Second Amendment incorporated through the Fourteenth Amendment has been

violated. AER 1523:18-24.

The fifth cause of action alleges generally, based on all preceding allegations, that the Privileges and Immunities Clause of the Fourteenth Amendment protects Applicants' right to keep and bear arms, which they claim has been violated by all defendants. AER 1523-1524.

The sixth cause of action alleges that the violation of Applicants' asserted right to keep and bear arms also violates their Ninth Amendment right to self-preservation because that right cannot be secured without the right to keep and bear arms. AER 1524-1525.

The seventh cause of action seeks a declaration "regarding the constitutionality of the CCW statutes and policies enforced and promulgated by Defendants." AER 1525.

B. The District Court's Order Dismissing the First Amended Complaint as to the Attorney General

On September 3, 2004, the District Court issued an order granting State Defendants' motion, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, to dismiss the FAC in its entirety with prejudice on the ground that Article III jurisdiction had not been established because the Attorney General has no role in awarding or denying CCW licenses. AER 43-46. The District Court also granted the Attorney General's motion pursuant to Rule 12(b)(6) for

failure to state a claim upon which relief can be granted regarding causes of action alleged against him. AER 46-55; see also, AER 2:19-21.

The District Court dismissed the first cause of action because the absence from the CCW application form of a request for the applicant's race, gender or national origin could not possibly constitute discrimination based on race, gender or national origin. AER 47-48.^{3/}

As to the second cause of action, the District Court followed this Court's decision in *Silveira v. Lockyer*, 312 F.3d 1062, 1088 (9th Cir. 2002), *reh'g en banc denied*, 328 F.3d 567, *cert. denied*, 124 S. Ct. 803 (2003), which concluded there is no general constitutional right to own or possess firearms and, therefore, applied the rational basis test to California statutes regulating assault weapons. The District Court concluded that the separate statutory authorization for retired law enforcement officers to carry loaded concealable weapons challenged in the second cause of action is rationally related to the legitimate governmental interest in protecting retired law enforcement officers from retaliation by enemies they have made in performing their duties. AER

3. Applicants have not appealed from the District Court's dismissal of the First Cause of Action. The dismissal of the First Cause of Action has not been briefed and is not mentioned in the Statement of Issues Presented or the Summary of Argument.

49-51.^{4/}

Acknowledging that Ninth Circuit precedent forecloses their fourth and sixth causes of action regarding the right to bear arms and asserting that they were included only to preserve for appeal, Applicants did not oppose the State Defendants' Rule 12(b)(6) motion as to those causes of action. AER 54:13-17. Accordingly, the District Court dismissed both causes of action with prejudice. AER 54:16-18.

The District Court dismissed the fifth cause of action, which alleges that the Privileges and Immunities Clause of the Fourteenth Amendment provides a right to keep and bear arms, because *Silveira v. Lockyer* is controlling and Applicants made no effort to distinguish it. AER 52-54.

The seventh cause of action was dismissed because it is not a separate claim for relief, but consists only of a request for a remedy if relief is granted for any of the first six causes of action. AER 54-55.

C. District Court's Order For Entry of Judgment Against Applicants

4. The third cause of action pertaining to political favoritism is alleged against the Sheriff only.

Following dismissal of the Attorney General and dismissal of all but the claims against the Sheriff alleging political favoritism in granting CCW licenses, the Sheriff and Applicants engaged in discovery from January 6, 2006 through August 2007. AER 1529-1539. On February 5, 2008, the District Court granted the Sheriff's motion for summary judgment on the grounds that there were no genuine material issues of fact regarding the Sheriff's reasons for denying the licenses and because those reasons were legitimate and non-discriminatory. AER 8-15. Judgment in favor of all defendants was also entered on February 5, 2008.

STATEMENT OF FACTS

A. California's Regulation of Concealed Weapons

California's system for regulation of firearms is set forth in its Dangerous Weapons Control Law. Cal. Penal Code § 12000, et seq.

Unless disqualified due to commission of a felony, use of narcotic drugs or a determination of mental infirmity, Californians may keep loaded and concealable firearms in their homes, businesses and other private property without a CCW license, and may use them for self-defense or defense of another. Cal. Penal Code §§ 12026(b), § 12031(h), (j), (l).

CCW licenses can be issued only by a chief of police or county sheriff

(“licensing authority”) in the jurisdiction within which the applicant resides, is employed or conducts a business. Cal. Penal Code § 12050(a)(1)(A), (B).

The licensing authority is required to publish its policy for reviewing applications (Cal. Penal Code § 12050.2) and may impose restrictions on the licenses it issues (Cal. Penal Code § 12050(b)).

The licensing authority may issue a license only if the applicant establishes to the satisfaction of the sheriff or police chief that he or she is of good moral character, that good cause exists for issuance, and that he or she has completed an acceptable course of training in firearm safety and the law regarding the permissible use of a firearm. Cal. Penal Code § 12050(a)(1)(A), (B), (E). Moreover, the licensing agency may require the applicant to submit to the same psychological examination process used for law enforcement officers. Cal. Penal Code § 12054(c).

The elements of a CCW application are prescribed by California Penal Code section 12051(a)(1) and (3). The Attorney General is required to make available a standardized application form developed by a committee including representatives of the California State Sheriffs’ Association, the California Police Chiefs’ Association and the California Department of Justice (“DOJ”) which must be used to apply for a CCW license. Cal. Penal Code

§ 12051(a)(3)(A); *see also* Sheriff Appellees' Supplemental Excerpt of Record ("SER") 186-199 (sample CCW Application). The applicant must submit a written, signed application (Cal. Penal Code § 12051(a)(1)) attesting to the truth of the information provided (Cal. Penal Code § 12051(a)(3)(B)).

As part of the application process chiefs or sheriffs must forward the applicants' fingerprints to the DOJ. Cal. Penal Code § 12052. A CCW license cannot be issued until the licensing authority receives a DOJ report showing that the applicant is not prohibited from possessing, receiving, owning or purchasing a firearm based upon data about the applicant which DOJ is required by law to retain. *Id.* DOJ retains state summary criminal history information (Cal. Penal Code § 11105(a)) and federal criminal history information (Cal. Penal Code § 11105(a)). DOJ also retains information about mental health adjudications (Cal. Welf. & Instit. Code §§ 8103(h), 8104) and protective orders (Cal. Family Code § 6380) that result in the loss of firearms eligibility. DOJ checks all of these databases and informs the licensing authority whether the applicant may lawfully own or possess firearms. *See* Cal. Penal Code § 12052(a). The licensing agency then makes the determination of whether the applicant qualifies for a CCW license.

A retired peace officer is not entitled under state law to carry a loaded

concealable weapon unless the employing agency certifies on the identification card issued at retirement that it approves the officer's carrying such a firearm.

Cal. Penal Code § 12027.1(a).^{5/} An officer who is retired for psychiatric disability cannot receive this certification. Cal. Penal Code § 12027.1(e).

B. Sheriff's Review and Evaluation of Applicants' Applications For California Concealed Weapon Licenses

1. Applicant Mehl

Applicant Mehl submitted an application for a CCW license to the Sheriff in July 2002. AER 3:17. The Sheriff denied Mehl's application because he repeatedly refused or failed to submit a complete application form containing a statement of his need to carry a concealed weapon. AER 3:18-4:4. Mehl provided another CCW license application in 2003. AER 4:25-28. Again Mehl refused to complete the portion of the application requiring a statement of need

5. Applicants contend without substantiation that state and federal judges have eligibility requirements for CCW licenses different from ordinary citizens, carrying forward an incorrect contention from the FAC. *See* AOB 17-18; AER 1514:9-17. Applicants cite the "Official Use Only" box on the CCW application form, but this is only a check-off box for judges so that the DOJ can comply with California Penal Code section 12053(c), which requires the DOJ to collect and keep a record of the total number of CCW licenses issued to judges and reserve officers. Contrary to Applicants' argument, there is no exception from or modifications of the eligibility requirements of California Penal Code section 12050 for judges. There is a one-year difference in the maximum initial CCW license validation period for judges, (Cal. Penal Code § 12050(a)(2)(A)(i)) but the differential in validity periods was not an issue raised by the FAC.

for the license. *Id.* Accordingly, the Sheriff again denied the application on the grounds that it was incomplete. *Id.*

2. Applicant Lau

Applicant Lau, a former FBI Special Agent, submitted a voluminous application to the Sheriff in August 2003. AER 4:6-10.

The documentation submitted with Lau's application revealed that he had twice been arrested for shoplifting and subsequently had his FBI security clearance revoked for providing false and misleading information regarding the incidents. AER 4:12-15. It also revealed that he had been retired for disability due to a diagnosis of post traumatic stress disorder ("PTSD") and depression. AER 4:16-18. The application materials included copies of reports suggesting that in the Fall of 1996, his government vehicle and gun had been taken away due to a diagnosed sleep apnea disorder. AER 4:18-32.

At the time of his application, Lau was mentally disabled from depression, PTSD and sleep apnea, and was unable to work. AER 5:1-3. He was under a doctor's care for those conditions and was prescribed anti-depressant and anxiety medications. AER 5:4-6.

The three-member application review committee denied the application in light of the foregoing information. AER 5:7-11.

In approximately January 2004, Lau appealed the decision to a chief deputy sheriff, who reviewed the application file and committee findings and interviewed Lau. AER 5:12-6:12. The chief deputy observed that Lau presented as drowsy, unusually nervous and overly suspicious. AER 5:12-15. He noted that Lau's representation that he needed a CCW license because he was at personal risk due to his past employment with the FBI was contradicted by documentation provided by the FBI. AER 6:1-9. Based on his independent review of the file and the findings from his interview of Lau, the chief deputy affirmed the denial of Lau's application. AER 6:9-12.

STANDARD OF REVIEW

Dismissal of the FAC as to the Attorney General, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, is reviewable *de novo*. *King County v. Rasmussen*, 299 F.3d 1077, 1088 (9th Cir. 2002). However, factual findings underlying the District Court's jurisdictional decision are reviewed under the clearly erroneous standard. *Association of Flight Attendants, AFL-CIO v. Horizon Air Indus. Inc.*, 280 F.3d 901, 904 (9th Cir. 2002).

Individual dismissal of the various causes of action alleged against the Attorney General, pursuant to Rule 12(b)(6) of the Federal Rules of Civil

Procedure, is reviewable *de novo*. *Corrie v. Caterpillar Inc.*, 503 F.3d 974, 979 (9th Cir. 2007). All well-pleaded allegations of the complaint are accepted as true and construed in the light most favorable to the plaintiff. *Rodriguez v. Panayiotou*, 314 F.3d 979, 983 (9th Cir. 2002). However, allegations that are merely conclusory, unwarranted deductions of fact or unreasonable inferences need not be accepted as true. *Spewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001), *amended by* 275 F.3d 1187.

SUMMARY OF ARGUMENT

The District Court's dismissal of the Attorney General, on multiple procedural and substantive grounds, was proper.

Substantively, well-established Ninth Circuit precedent holds that carrying a concealed weapon is not a federally protected right. *Hickman v. Block*, 81 F.3d 98, 101-103 (9th Cir. 1996); *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121, 1125 (9th Cir. 1996). Nothing in the recent decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), which establishes an individual right to keep and bear arms for protection and security within one's home, undermines this Court's precedents. Accordingly, California's regulation of carrying concealed weapons continues to be reviewed pursuant to the rational basis test.

Like many states, California closely regulates the privilege of carrying concealed weapons. Tracy Bateman Farrell, Annotation, *Constitutionality of State Statutes and Local Ordinances Regulating Concealed Weapons*, 33 A.L.R. 6th 407, 424 (2008). The license requirement to carry a concealed firearm or a firearm capable of being concealed is one ordinary way to advance the governmental interest of minimizing the risk to the public health and safety inherent with firearms. Thus, no federal claim can be stated to invalidate the statutory CCW licensing requirement under the governing rational basis test.

As for the special statutory authorization to carry loaded concealable firearms applicable only to retired peace officers challenged by Applicants, these provisions are rationally related to protecting peace officers from retaliation by persons who bear a grudge due to the officer's performance while on active duty. Retired peace officers' privileges, of course, are not unchecked; they are subject to revocation for abuse of the privilege or subsequent disqualifying status. Applicants here are not similarly situated to retired peace officers and therefore are not denied equal protection of the laws by the valid distinction between retired peace officers and CCW license applicants.

On the jurisdiction issue, only sheriffs and chiefs of police are authorized to issue CCW licenses. The statutes regulating issuance of CCW licenses do not authorize the Attorney General to review or oversee the sheriffs' and chiefs' decisions to grant or deny CCW licenses. Since here there was no (and can be no) causal nexus between the actions or authority of the Attorney General and the implementation of the CCW license statutes regarding any applicant, there is no Article III jurisdiction to litigate claims alleged against him in this case. All of the allegations against the Attorney General are based on implementation of the CCW license statutes as to Applicants.

Moreover, California has not waived its Eleventh Amendment immunity, which is applicable to this action against the Attorney General for the same reasons that there is no Article III jurisdiction.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED APPLICANTS' CLAIMS BASED ON THE RIGHT TO BEAR ARMS

A. There Is No Federally Protected Right to Carry a Concealed Weapon in Public

1. The Second Amendment Does Not Establish A Right To Carry A Concealed Weapon In Public

This Court holds that the Second Amendment does not provide an individual right to carry a concealed weapon. *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996); *see also, Erdelyi v. O'Brien*, 680 F.2d 61, 63-64 (9th Cir. 1982) (denial of CCW license to private detective not a deprivation of property or liberty interest protected by Due Process Clause of 14th Amendment); *accord Guillory v. County of Orange*, 731 F.3d 1379, 1382-1383 (9th Cir. 1984).

In *Hickman*, the operator of a responding security alarm company authorized by California law to carry an exposed firearm while in uniform was denied a CCW license for use when not operating his business in uniform. *Id.* at 100-101. This Court rejected his claim that the Second Amendment provided a right to keep and bear arms in “reasonable” circumstances, holding that the applicant could show no legal injury because the Second Amendment did not provide an individual right to keep and bear arms. *Id.* This result governs Applicants’ claim as well.

Hickman was decided, of course, at a time when the Second Amendment was understood to protect a collective right vested in the states, rather than in individuals. The U.S. Supreme Court has since decided, last term, that the Second Amendment does provide an individual right to keep and bear arms, but it was careful to confirm the limited scope of such right. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816-2818 (2008). Indeed, the *Heller* decision effectively endorses the result in *Hickman*.

In *Heller*, the District of Columbia's ban on handguns, which among other things, prohibited handgun use for self-defense in the home and required that the weapons be inoperable even in the home. *Id.* at 2817. The U.S. Supreme Court struck down the ban to the extent it applied in the home, as defeating the core right to self-defense implicated by the Second Amendment. *Id.* at 2821-2822. In doing so, however, the Court carefully limited the scope of its opinion to prevent calling into question longstanding state regulation of firearms, specifically including concealed weapons. *Id.* at 1216-1217 n.26 (“these presumptively lawful regulatory measures”).^{6/} Aside from standard

6. Other items on the non-exclusive list of “presumptively lawful regulatory measures” include: forbidding carrying of firearms in sensitive places; imposing conditions and qualifications on commercial sale of firearms; and prohibiting the carrying of “dangerous and unusual weapons.” *Id.* at 2817.

prohibitions against certain persons possessing *any* firearm^{7/}, it is undisputed (AOB 40-41) that, unlike the District of Columbia, California does *not* restrict the right to keep loaded concealable firearms in one's home, business or private property.^{8/}

Thus, nothing in California's regulation of concealed weapons infringes on the carefully circumscribed individual Second Amendment right recognized in *Heller*. Accordingly, *Heller* does not undercut this Court's conclusion in *Hickman* that the Second Amendment does not provide an unrestricted individual right to carry a concealed firearm. Applicants' invitation to extrapolate from the carefully confined right to defend one's home and its inhabitants set forth in *Heller* into a generalized right to carry a weapon at any time and in any place for amorphous "self-defense" purposes (AOB 41-42) has no support in *Heller* or from any other authority. The District Court's decision

7. California disqualifies persons with mental disorders or mental illnesses (Cal. Welf. & Inst. Code §§ 8100, 8103) and convictions for certain crimes and addiction to narcotics (Cal. Penal Code §§ 12021, 12021.1) from owning or possessing firearms. *Heller* likewise classifies these types of disqualification as "presumptively lawful regulatory measures." *Heller*, 128 S. Ct. at 2816-2817. California's disqualification criteria have not been challenged in this litigation.

8. Under California law, it is lawful for a person over the age of eighteen, who is not otherwise disqualified by law, to possess within his or her residence, business or private property a weapon capable of being concealed, without a CCW license. Cal. Penal Code § 12026.

in this regard remains correct, and Applicants' fourth cause of action was properly dismissed.

2. Even if *Heller* Could be Read as Applicants' Argue, the Due Process Clause of the Fourteenth Amendment Does Not Make the Second Amendment Rights Prescribed in *Heller* Applicable to the States

Applicants contend that the Second Amendment rights set forth in *Heller* are applicable to the states through the Due Process Clause of the Fourteenth Amendment (AOB 34-35), but the governing Ninth Circuit law on this question is to the contrary. *See Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 729-731 (9th Cir. 1992), *followed in Hickman*, 81 F.3d at 103; *see also Nordyke v. King*, 319 F.3d 1185, 1192 n.4 (9th Cir. 2003) (only the Supreme Court or the Circuit en banc can overrule *Fresno Rifle* and *Hickman*). *Fresno Rifle* addressed and rejected the arguments presented by Applicants to support incorporation. *See* AOB 34-35; *Fresno Rifle*, 965 F.2d at 729-731. *Heller* expressly declined to address the issue of whether the Second Amendment is applicable to the states. *Heller*, 128 S. Ct. at 2813 n.23. Unless and until the Supreme Court resolves the issue to the contrary, it is the law of this Circuit that the Second Amendment is not incorporated by the Fourteenth Amendment as a constraint on states.

Applicants cite to dicta in *Silveira v. Lockyer*, 312 F.3d 1052, 1067 (9th

Cir. 2002) (AOB 34-35) to try to cast doubt upon *Fresno Rifle*'s holding that the Second Amendment is not incorporated by the Fourteenth, but the dictate of *Fresno Rifle* is unmistakable:

Until such time as *Cruikshank* and *Presser* are overturned, the *Second Amendment* limits only federal action, and we affirm the district court's decision "that the *Second Amendment* stays the hand of the National Government only."

Fresno Rifle, 965 F.2d at 731 (citation omitted).

The Supreme Court's venerable decisions in *United States v. Cruikshank*, 92 U.S. 542, 553 (1876), and *Presser v. Illinois*, 116 U.S. 252 (1886), held that the Second Amendment does not apply to the states. *Heller* notes that *Cruikshank* did not apply modern incorporation analysis, but its holding is far from overturned. Moreover, the Supreme Court may not see an urgency to apply its doctrine of selective incorporation for application of the Second Amendment to the states through the Due Process Clause of the Fourteenth Amendment. See Chester James Aniteau & William J. Rich, *Modern Constitutional Law* § 39.01 (2d ed. 1997) ("doctrine of selective incorporation was recognized as the prevailing approach of the Court's majority"); accord Laurence H. Tribe, *American Constitutional Law* § 11-2 (2d ed. 1988) ("full incorporation of the Bill of Rights into the fourteenth amendment [has never]

commanded a majority on the Court”).

For example, in *Wolf v. Colorado*, 338 U.S. 25, 33 (1949), the Supreme Court declined to incorporate the exclusionary rule when it held that states were bound by the Fourth Amendment ban on unreasonable search and seizure. The Court held that the availability of other means of protection against illegal searches and seizures weighed against incorporation of the exclusionary rule. *Id.* at 27-33. The Court ultimately later determined that these alternate means of protection had proved “worthless and futile,” and therefore applied the exclusionary rule to states in *Mapp v. Ohio*, 367 U.S. 643, 653-655 (1961). The lesson of *Wolf* is, though, that *recognition* of a Federal right does not equate to *incorporation* through the Due Process Clause as applicable to the States.

In light of the limited scope *Heller* has given to the individual right to bear arms protected under the Second Amendment and its acknowledgment of the expansiveness and legitimacy of states’ historical regulation of firearms, this would seem a likely setting for the Supreme Court to follow its approach in *Wolf*, 338 U.S. at 23-32. Thus, there is no reason for this Court to abandon its holding that the Due Process Clause of the Fourteenth Amendment does not incorporate the Second Amendment, and for this alternative reason, the District Court’s dismissal of the fourth cause of action was proper.

3. The Ninth Amendment Does Not Establish A Right To Carry A Concealed Weapon

Notwithstanding *Heller* and the above Second Amendment analysis, Applicants apparently invite this Court to find the right to keep and bear arms in the Ninth Amendment. AOB 33. The Ninth Amendment, however, is of no more avail to Applicants than the Second Amendment.

The Ninth Amendment to the United States Constitution states:

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

It is the law of this Circuit that the “Ninth Amendment has not been interpreted as independently securing any constitutional rights for purposes of making out a constitutional violation.” *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121, 1125 (9th Cir. 1996) (quoting *Schowengerdt v. United States*, 944 F.2d 483, 490 (9th Cir. 1991)). Accordingly, this Court has determined that the Ninth Amendment does not recognize a right to keep and bear arms. *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121, 1125 (“We join our sister circuits in holding that the Ninth Amendment does not encompass an unenumerated, fundamental, individual right to bear firearms.”). *Heller* relies exclusively on the Second Amendment and does not mention the Ninth Amendment, let alone treat it more expansively than the

Second Amendment. Therefore, nothing in *Heller* undercuts or calls into question this Circuit's holding in *San Diego County Gun Rights Committee*.

Thus, Applicants can allege no injury under the Ninth Amendment, and the District Court's dismissal of the sixth cause of action was proper. AER 1524-1525.

4. The Privileges or Immunities Clause of the Fourteenth Amendment Does Not Establish A Right To Carry A Concealed Weapon

Applicants likewise attempt to find a non-existent generalized right to carry a concealed weapon in the Privileges or Immunities Clause of the Fourteenth Amendment. *See* AER 1524:2-7; AOB 21-32.

The Privileges or Immunities Clause of the Fourteenth Amendment states:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States

Applicants appear to contend that the Privileges or Immunities Clause is a source of a right to keep and bear arms separate from and independent of the Second Amendment, citing *Saenz v. Roe*, 526 U.S. 489 (1999), and an excerpt from Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 542-543. *See* AOB 25-27. Neither authority addresses concealed weapons or in any way

supports Appellants' point.

Saenz simply held that California's reduction of welfare payments for newly arrived residents violated their right as citizens of the United States to become citizens of any state, and to be treated equally with any other citizen of the state where they reside. *Saenz*, 526 U.S. at 502-507. The Court derived this right from its attribution of a consensus among the majority and dissent in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). *Saenz*, 526 U.S. at 502-504. That consensus in turn was derived from the preamble to the Fourteenth Amendment, which provides:

All persons born or naturalized in the United States,
and subject to the jurisdiction thereof, are citizens of
the United States and of the State wherein they reside.

Id. at 503. The preamble, referred to as the Citizenship Clause, recognizes the absolute right of a citizen of the United States to also be a citizen of the state in which he or she resides. *Id.*

The decision in *Saenz* did in fact take an unprecedented view of the Privileges or Immunities Clause, but it was still interpreted as implementing the Citizenship Clause ensuring the right of a citizen of the United States to move freely among the states and to be afforded by a new state of residence the same privileges or immunities that state affords to all of its citizens. *Id.* at 507

("[T]he Citizenship Clause of the Fourteenth Amendment expressly equates citizenship with residence: 'That Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence.' *Zobel*, 457 U.S. at 69.") Applicants do not allege that they were denied the right to keep and bear arms based on previous residence in another state. Thus, Applicants cannot state a claim pursuant to the Privileges or Immunities Clause even under the *sui generis* view of *Saenz*.^{9/}

9. Notably, in dissent from the *Saenz* majority's reliance on the Privileges or Immunities Clause, Justice Thomas stated:

Before invoking the Clause, however, we should endeavor to understand what the framers of the Fourteenth Amendment thought that it meant. We should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence. The majority's failure to consider these important questions raises the specter that the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the "predilections of those who happen at the time to be Members of this Court."

Con't

Con't: *Saenz*, 526 U.S. at 528 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977)). The caveat by Justice Thomas appears to have been influential because the Supreme Court has not extended the Privileges and Immunities Clause beyond the scope of *Saenz* (durational residency requirements) to find additional rights of national or state citizenship. See Laurence H. Tribe, Comment: *Saenz* Sans Prophecy: Does The Privileges or Immunities Revival Portend The Future - Or Reveal The Structure of the Present?, 113 Harv. L. Rev. 110 at 110 (1999) (concluding that *Saenz* has not been expanded beyond durational residency issues and is not likely to); Howard J. Vogel, Article: The "Ordered Liberty" of Substantive Due Process and the Future of Constitutional

As for *Poe v. Ullman*, Professor Tribe shares Applicants' fondness for Justice Harlan's dissent, but recognizes this view of the Privileges or Immunities Clause has not been accepted by the U. S. Supreme Court and is not likely to be. Tribe, *supra*, at 170.

The Privileges or Immunities Clause provides no basis for Applicants' argument for a generalized right to carry a concealed weapon, and Applicants' fifth cause of action was properly dismissed.

5. Nor Does The Privileges or Immunities Clause Incorporate the Second Amendment

Applicants' alternative argument that the Privileges and Immunities Clause incorporates the Second Amendment fares no better. *See* AOB 36-38. Even if *Heller* could be read as Applicants argue, as described in the preceding section, the Privileges or Immunities Clause of the Fourteenth Amendment is a self-contained source of rights limited to proscription of durational residence requirements. There is no authority for the proposition that other rights provided by the Constitution are applicable to the states *through* the Privileges or Immunities Clause. Accordingly, the Privilege or Immunities Clause neither directly nor indirectly provides a basis for Appellants' challenge to California's

Law as a Rhetorical Art: Variations on a Theme from Justice Cardozo in the United States Supreme Court, 70 Alb. L. Rev. 1473, 1481 (2007) ("Privileges or Immunities Clause of the Fourteenth Amendment virtually meaningless").

CCW provisions, and the District Court thus properly dismissed Appellant's fifth cause of action.

B. California's Interest in Regulating Concealed Weapons Is Shared by Most Other States and Fully Justifies Those Regulations

As described above in Section I.A.1., Applicants' claim does not implicate a fundamental constitutional right because the CCW licenses Applicants were denied are not necessary for Applicants to exercise the rights encompassed within the Second Amendment, as defined by *Heller*. Therefore, applicants' challenge to CCW statutes is reviewed pursuant to the rational basis test. *Silveira v. Lockyer*, 312 F.3d 1052, 1088 (9th Cir. 2003), *rehearing en banc denied*, 328 F.3d 567 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 803 (2003). "When a statute is reviewed under the rational-basis test, 'the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.' *Heller v. Doe*, 509 U.S. 312, 320 (1993) (citation and quotation marks omitted)." *Id.*

Like California, many states regulate concealed weapons and require a license to carry them. Annotation, *supra*, 33 A.L.R.6th at 424. The purpose of regulating concealed weapons, stated succinctly, is to "protect the public by preventing an individual from having on hand a weapon of which the public is

unaware, and which might be used by the individual in a fit of passion.” *Id.* (citing Am. Jur. 2d, Weapons and Firearms § 12). California’s CCW provisions generally provide that it is a crime to carry a concealed weapon without a license. Cal. Penal Code § 12025; see *People v. Superior Court for Santa Barbara County*, 2 Cal. App. 3d 197, 201-202 (1969); cf. *U.S. v. Garcia*, 555 F.2d 708, 711 (9th Cir. 1977) (prosecution has burden of presenting evidence of existence or non-existence of license in prosecution under § 12025). California’s CCW law does not overreach; notwithstanding the general prohibition, it is lawful for a person over the age of eighteen, who is not otherwise disqualified by law, to possess within his or her residence,

business or private property a weapon capable of being concealed, without a CCW license.^{10/} Cal. Penal Code § 12026.

Since a CCW license is not required to keep a loaded concealable firearm in one’s home, business and other property and for immediate defense in

10. The handgun can be kept loaded for these purposes. Cal. Penal Code § 12031(h), (j), (l). Even California’s child protection requirements allow for maintaining a loaded handgun for these purposes. Cal. Penal Code § 12035(c).

general, it is hardly irrational to require a person who seeks a CCW license to explain why he or she needs to carry one in other situations. Retired peace officer are presumed to need a concealed weapon because of the obvious risk of retaliation from dangerous felons whom he or she has pursued, arrested and incarcerated while on active duty. Moreover, it is sensible to assure that the applicant has received training in proper and safe use of firearms as is required of peace officers for the protection of the general public. Likewise, it would be most imprudent not to subject the applicant to the same psychiatric screening applicable to peace officers in order to protect the public from erratic behavior becoming more dangerous due to the availability of a loaded concealed firearm.

Thus, Applicants' have failed to meet their burden of showing that requiring a CCW for purposes other than defending one's person, family home, business and property is not rationally related to any conceivable state interest.

II. THE DISTRICT COURT PROPERLY DISMISSED APPLICANTS' EQUAL PROTECTION CLAIMS BECAUSE AUTHORIZATION FOR RETIRED PEACE OFFICERS TO CARRY CONCEALED WEAPONS WITHOUT A CCW LICENSE DOES NOT DENY NON-PEACE OFFICERS EQUAL PROTECTION OF THE LAW

Applicants specifically challenge statutory authorization for retired peace officers to carry concealed weapons without demonstrating "good cause." AER 1507:8-18; AOB 17-20. Applicants claimed the different requirements

applicable to retired peace officers deny non-peace officers equal protection of the law because non-peace officers must convince the licensing authority of “good cause” to obtain the license. AER 1520-1521. The Equal Protection Clause of the Fourteenth Amendment commands that all persons similarly situated should be treated alike. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). Here, however, the groups receiving different treatment are not similarly situated, and any differential treatment is well-justified under the governing rational basis review.

A. Peace Officers and Non-Peace Officers Are Not Similarly Situated

“[I]n order for a state action to trigger equal protection review at all, that action must treat similarly situated persons disparately.” *Silveira*, 312 F.3d at 1088. A threshold defect in Applicants’ equal protection claim is that non-peace officers are *not* similarly situated with retired peace officers who were authorized and did carry firearms in the course of their duties, in regard to screening for CCW licenses. First, the mandatory training and experience received by honorably retired peace officers when they were employed as peace officers, means that they already meet the qualifications for CCWs. The screening process prescribed for non-peace officers by California Penal Code

§ 12050 et seq., serves to approximate the background California peace officers acquire and maintain by qualifying to be peace officers authorized to carry firearms. A person cannot qualify as a peace officer without completing rigorous training in procedures and conduct. Cal. Penal Code §§ 832, 832.4, 13510 et seq.; *see also* Cal. Code Regs., tit. 11, § 1000, et seq. In order to carry a firearm, a peace officer must undergo meticulous training in firearm proficiency, safety and rules of engagement. Cal. Penal Code § 832; *see also* Cal. Code Regs., tit. 11, § 1005. Moreover, one cannot become a peace officer without obtaining a psychiatric clearance. Cal. Gov. Code § 1031(f); *see also* Cal. Penal Code § 832.05.

A retired California peace officer cannot qualify to carry a loaded concealable firearm unless the employing agency at the time of retirement issues an identification certificate indicating the officer was honorably retired. Cal. Penal Code § 12031(b)(1). Moreover, the retired peace officer is not entitled to carry a concealed weapon unless the employing agency, presumably in the position to be most knowledgeable about the peace officer's status and qualifications, certifies on the identification that it approves the officer's carrying a loaded, concealed firearm. Cal. Penal Code § 12027.1(a). The employing agency is prohibited from providing an endorsement for a peace

officer who is retired for psychiatric disability. Cal. Penal Code § 12027.1(e). Additionally, that agency is authorized to deny or revoke for cause the retired officer's privilege to carry a loaded concealed firearm. Cal. Penal Code §§ 12027.1(a)(1)(B), 12031(b)(2).

Retired peace officers are also differently situated in that they are presumed to need a concealed weapon because of the obvious risk of retaliation from dangerous felons whom he or she has pursued, arrested and incarcerated while on active duty.

B. The CCW Application Process Is Necessary To Determine Whether Non-Peace Officers Meet Approximately The Same Qualifications for Carrying Loaded Concealed Weapons in Public as Peace Officers

If the threshold for equal protection review is passed, “the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” *City of Cleburne*, 473 U.S. at 439; *see also Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). As described above in Section I.A.1., Applicants' claim does not implicate a fundamental constitutional right because a CCW license is not necessary for Applicants to exercise the rights encompassed within the Second Amendment, as defined by *Heller*. Therefore, their equal protection claim is reviewed pursuant to the

rational basis test. *Silveira*, 312 F.3d at 1088.

When assessing the validity of legislation under the rational-basis test, “the burden falls upon the party attacking a legislative classification reviewed under the rational-basis standard to demonstrate that there is no reasonable basis for the challenged distinction.” *Id.* “When a statute is reviewed under the rational-basis test, ‘the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.’ *Heller v. Doe*, 509 U.S. 312, 320 (1993) (citation and quotation marks omitted).” *Id.*

The CCW license application process provides the mechanism by which a non-peace officer can establish, to the satisfaction of the head of a local law enforcement agency, that he or she has training and qualifications that approximate the background of a peace officer regarding the safe use of and need for carrying concealed firearms. Cal. Penal Code § 12050. The applicant must demonstrate good moral character and may be subject to the same psychological evaluation applied to a peace officer. Cal. Penal Code § 12054(c).

It is important to bear in mind that persons engaged in lawful businesses may have a loaded firearm within their place of business. Cal. Penal Code

§ 12031(h). Any person in lawful possession of private property may keep a loaded firearm on that property. *Id.* Provided it is not prohibited by local ordinance, a person may carry a loaded firearm within a city while engaged in hunting. *Id.* § 12031(i). Unless he or she is disqualified by law from possessing a firearm, a person may carry a loaded firearm if he or she reasonably believes his or her person or property or that of another is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property. *Id.* § 12031(j). Having a loaded firearm in one's residence is not a violation of section 12031(a). *Id.* § 12031(l).

Retired peace officers are presumed to need a concealed weapon because of the obvious risk of retaliation from dangerous felons whom he or she has pursued, arrested and incarcerated while on active duty.

For all of the reasons described above in Section I.B., California CCW provisions reasonably relate to the legitimate government interest in protecting the public from sudden attack by use of concealed weapons, and Applicants cannot meet their burden of showing the different requirements for certain current and former peace officers are without any conceivable basis. *Id.* § 12031(l).

III. APPLICANTS HAVE NOT MET THE CASE OR CONTROVERSY REQUIREMENT OF ARTICLE III

**AS TO ANY DEFENDANT AT ALL, LET ALONE AS
TO THE ATTORNEY GENERAL**

The judicial power of the United States is restricted by the requirement found in Article III of the U.S. Constitution that confines federal courts' jurisdiction "to the resolution of cases and controversies." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 471 (1982) (internal quotation marks omitted). A plaintiff's standing is "an essential and unchanging part of the case-or-controversy requirement." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "As an aspect of justiciability, the standing question is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-499 (1975) (internal quotation marks and citations omitted). A plaintiff's standing is made of three separate elements: (1) he or she may allege an injury in fact; (2) he or she must be able to trace the causation of his injury to the named defendant; and (3) the federal court must have the ability to redress the plaintiff's grievance. *Lujan*, 504 U.S. at 560-561. Applicants' action here meets *none* of these elements, and the District Court thus properly dismissed the action below.

A. Applicants Lack Standing Because They Allege No Legally

Recognized Injury

To satisfy the first element of standing, an injury in fact, a plaintiff must show “an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560-561. The “threatened injury must be certainly impending” (*Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (internal quotation marks and citations omitted)), and “immediate and real” (*City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). This is also true for declaratory relief actions. *Aydin Corp. v. Union of India*, 940 F.2d 527, 528 (9th Cir. 1991) (“Article III requires that there be a substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment”); *Thomas v. Anchorage Equal Rights Comm.*, 220 F.3d 1134, 1139 (9th Cir. 2000) (*en banc*) (in declaratory relief actions plaintiff must show “a realistic danger of sustaining a direct injury as a result of the statute’s operation or enforcement”) (internal quotation marks omitted). This requirement of immediacy has also been addressed under the federal courts’ prudential concerns with respect to “ripeness.” *Thomas*, 220 F.3d at 1138; *Scott v. Pasadena Unified School Dist.*, 306 F.3d 646, 662 (9th Cir. 2002).

In the District Court Applicants sought “injunctive relief in either having

a CCW issued, or having the statutes and County's written policy declared unconstitutional." AER 1522:18-20. In sum, Applicants were seeking an injunction requiring the granting of their applications for CCWs or the elimination of any statutory or local restrictions on their carrying concealed handguns.

On appeal Applicants' allegations of injury consist of misstatements of California law and a misunderstanding of the Second Amendment right identified in *Heller*. AOB 40-45. They allege that California has an absolute ban "on both the open carry and concealment of handguns" citing Penal Code sections 12025 and 12031, and look to the *Heller* decision for ostensible relief. AOB 40. However, as explained in Section I.A.1., of this brief, there are basic exceptions to California's Penal Code provisions which allow possession of loaded, concealable firearms in homes, businesses and occupied property without a CCW license. In a nutshell, the *Heller* decision identified a Second Amendment right to have firearms to defend one's self in one's home. Applicants' demand for more, an unfettered right to carry a concealed weapon at any time and in any place, finds no support in *Heller*.

In the absence of a federal right infringed by the alleged injury for which relief is sought, there is no standing to seek such relief in federal court.

Silveira, 312 F.3d at 1066-1067 (“Because we hold that the *Second Amendment* does not provide an individual right to own or possess guns or other firearms, plaintiffs lack standing to challenge the [Assault Weapons Control Act].”) (footnotes omitted); accord *Hickman v. Block*, 81 F.3d at 101 (no standing to challenge California CCW statutes because Second Amendment is inapplicable). *Silveira* followed *Hickman* on this point after analyzing “extensive developments in the area of Second Amendment law” occurring thereafter and concluding that the result in *Hickman* was not changed by the intervening developments. *Silveira*, 312 F.3d. at 1067 n.18.

Accordingly, Applicants lack standing to proceed against any defendant on a facial challenge to the CCW license statutes.

B. Applicants Lack Standing as to the Attorney General in Particular Because Their Alleged Injuries Are Not Traceable To Any Action or Authority of the Attorney General

To demonstrate the second required standing element, a plaintiff must prove that there is a causal connection between plaintiff’s injury and the conduct complained of; in other words, the plaintiff must show that his injury is “fairly traceable to the challenged action of the defendant.” *Lujan*, 504 U.S. at

560-561 (internal quotation marks and alterations omitted). Applicants here cannot satisfy this second element because the Attorney General has no role in applying the challenged statutes to Applicants.

Applicants contend they have established standing regarding the Attorney General because “the AG is really charged with ensuring uniform enforcement of state laws, especially CCWs, and is thus a proper party for the case and controversy requirement.” AOB 15-17; *see also* AER 1512-1513. But this conclusory argument understates the standing requirement – the Attorney General has no statutory authority to grant, deny or revoke CCW licenses. Only sheriffs and chiefs of police are authorized to perform these functions. Cal. Penal Code § 12050. Review of CCW license decisions by the sheriffs and chiefs of police is available from state courts. *See, e.g., Gifford v. City of Los Angeles*, 88 Cal. App. 4th 801 (2001). Contrary to Applicants’ implication, the Attorney General is not authorized by the CCW statutes to review the decisions of the sheriffs and chiefs of police. Because Applicants’ alleged injury can occur only through the actions of the Sheriff, independent of the authority of the Attorney General, any ostensible harm cannot be traced to the Attorney General.

This Court has been very clear that suits cannot be brought in federal

court against an attorney general to challenge the validity of statutes that he has no authority to enforce because there is no Article III jurisdiction and because the action would be barred by the Eleventh Amendment. It has repeatedly rejected actions against attorneys general on these grounds. *See Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir.1992) (the general supervisory powers of the California Attorney General are insufficient to establish the connection with enforcement required by Article III and *Ex parte Young*, 209 U.S. 123, 160 (1908)); *Southern Pac. Transp. Co. v. Redden*, 651 F.2d 613, 615 (1980) (attorney general's stated intention to advise and direct the district attorneys to prosecute is insufficient to establish a justiciable controversy where they are not obligated to comply).

Since only sheriffs and chiefs of police have authority under the CCW statutes to grant, deny or revoke licenses, Applicants cannot establish Article III jurisdiction over the Attorney General with regard to their facial challenges to the validity of the statutes or for review of the Sheriff's refusal to grant their CCW licenses.

C. Applicants Lack Standing As to the Attorney General Because Any Hypothetical Relief to Redress Applicant's

Alleged Injuries Could Only Be Addressed To The Sheriff

To satisfy the third required standing element, a plaintiff must show that it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Lujan*, 504 U.S. at 560-561. Even if there were a recognized federal right at issue, no injunction or declaratory relief ordered against the Attorney General preventing him from enforcing the CCW statutes could redress Applicants’ core grievances – those against the Sheriff for denying their CCW applications in implementation of his authority pursuant to California Penal Code section 12050.

Of course, if a plaintiff cannot show that his injury is “fairly traceable” to the named defendant under the second causation prong of the case or controversy requirement of Article III, they generally cannot satisfy the third prong articulated in *Lujan*, that the relief requested must redress their alleged injuries. *See Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1517 (9th Cir. 1992) (the “two components together . . . are both alike in focusing on the question of causation”) (internal quotations omitted). Just as Applicants cannot show that their alleged injury was caused by the Attorney General, nor can they show how an injunction against him would provide the redress they seek. Applicants’ alleged harm comes from exercise of prerogatives vested by law in

the Sheriff exclusively, and thus the only effective remedy for any ostensible deprivation of rights would have to be directed to the Sheriff.

Failure to establish *any* of the three elements necessary for standing would deprive the Court of Article III jurisdiction, and Applicants have failed to demonstrate all three.

IV. THE ELEVENTH AMENDMENT LIKEWISE BARS THIS ACTION AS TO THE ATTORNEY GENERAL

For all of the same reasons Applicants cannot meet the required second element for standing, the sovereign immunity under the Eleventh Amendment of the United States Constitution requires dismissal of all claims against the Attorney General. *See Long v. Van de Kamp*, 961 F.2d at 152; *Southern Pac. Transp. Co. v. Redden*, 651 F.2d at 615.

The Eleventh Amendment states that “[t]he judicial power . . . shall not . . . extend to any suit in law or equity . . . against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI. The immunity extended by the Eleventh Amendment to states also prohibits lawsuits in federal court by the state’s own citizens. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984).

Since the Attorney General is sued in his official capacity, the claims alleged against him are really against the State since any judgment or remedy

would necessarily be against the State, not the Attorney General who has no direct duties or responsibilities regarding the claims alleged by Applicants. *See, e.g., Pennhurst*, 465 U.S. at 100; *Demery v. Kupperman*, 735 F.2d 1139, 1146 (9th Cir. 1984) (“[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter”).

There is an exception to Eleventh Amendment immunity applicable to certain claims for injunctive relief, found in the case of *Ex parte Young*. *Ex parte Young*, 209 U.S. at 160. The *Ex parte Young* exception allows for a lawsuit against a state official in his individual capacity – that is, outside the scope of his official duties – to be prosecuted in federal court if the claim is limited to an injunction against the official to prevent him from enforcing an unconstitutional state law. *Id.* at 166. The *Ex parte Young* exception rests on a “fictional distinction” between the state and a state official such that if the official is enforcing an unconstitutional statute, he is considered to be operating outside his official capacity and can be enjoined from such enforcement. *Pennhurst*, 465 U.S. at 100, 114. In order to successfully employ the *Ex parte Young* exception, however, a plaintiff must allege that the state official has “some connection with the enforcement of the act.” *See Ex parte Young*, 209

U.S. at 157.

In this case, there is no direct connection between the Attorney General and the challenged statute, making Applicants' ability to utilize the *Ex parte Young* exception impossible. The only connection Applicants allege between the challenged state law and the Attorney General is that he is "responsible for ensuring that the laws of the State are uniformly and adequately enforced pursuant to California Constitution, Article V, Section 13." AOB 17 ("In sum, the AG is really charged with ensuring uniform enforcement of state laws, especially CCWs, and thus is a proper party for the case and controversy requirement."). This Circuit's precedent specifically holds that a general allegation of the Attorney General's duties does not suffice to make an *Ex parte Young* connection:

[T]here must be a connection between the official sued and enforcement of the allegedly unconstitutional statute, and there must be a threat of enforcement. We doubt that the general supervisory powers of the California Attorney General are sufficient to establish the connection with enforcement required by *Ex parte Young*.

Long v. Van de Kamp, 961 F.2d at 152 (citing *So. Pac. Trans. Co. v. Brown*, 651 F.2d at 614).

This connection must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit.

Los Angeles Co. Bar Assoc. v. Eu, 979 F.2d 697, 704 (9th Cir. 1992) (emphasis added, citations omitted).

Thus, a claim based on the Attorney General's generalized duties will not suffice as an adequate connection between the Attorney General and the challenged statutes, and consequently the *Ex parte Young* exception cannot help the Applicants' claims penetrate the immunity granted to the Attorney General by the Eleventh Amendment.

As described above in Section III.B., with respect to the "causal connection" element required to establish standing under Article III, the Attorney General has no involvement in decisions to grant, deny or revoke CCW licenses. It is the Sheriff who has the enforcement role here. For all the same reasons stated there with respect to standing, Applicants cannot satisfy the enforcement role prerequisite to the *Ex parte Young* exception to the Attorney General's Eleventh Amendment immunity from suit. For this additional reason, the District Court's dismissal of the Attorney General from this action was proper.

CONCLUSION

California's CCW license requirements would not violate the Second Amendment right afforded individuals identified in *Heller* even if it were applicable to the states. Nor are Applicants' arguments for finding a right to keep and bear arms in *other* provisions of the Constitution of any merit. Accordingly, Appellants' claims against the Attorney General fail as a matter of substance, and dismissal was proper.

Moreover, dismissal was likewise proper for lack of jurisdiction because Applicants lack standing to bring an action in federal court challenging the CCW license requirements based on any claim that the Constitution provides a right as against the states to keep and bear arms, and because of the absence of any enforcement role for the Attorney General with respect to the challenged provisions. That same lack of Attorney General enforcement role also means that Applicants' action against the Attorney General is subject to the Eleventh Amendment bar.

Applicants' equal protection arguments do not seriously challenge the reasonable bases for the different requirements applicable to retired peace officers.

For all of these reasons, the District Court's order dismissing this action

against the Attorney General should be affirmed.

Dated: October 16, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

CHRISTOPHER E. KRUEGER
Senior Assistant Attorney General

DOUGLAS J. WOODS
Supervising Deputy Attorney General

s/ Geoffrey Graybill

GEOFFREY GRAYBILL
Deputy Attorney General
Attorneys for Appellee Attorney General
of the State of California

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellee Edmund G. Brown Jr., Attorney General of the State of California, is not aware of any related cases pending before this Court.

Dated: October 16, 2008

EDMUND G. BROWN JR.
Attorney General of the State of California

CHRISTOPHER E. KRUEGER
Senior Assistant Attorney General

DOUGLAS J. WOODS
Supervising Deputy Attorney General

/s Geoffrey Graybill

GEOFFREY GRAYBILL
Deputy Attorney General
Attorneys for Appellee Attorney General
of the State of California

**CERTIFICATE OF COMPLIANCE PURSUANT TO
FED. R. APP. P. 32(a)(7)(C) and CIRCUIT RULE 32-1**

I, Geoffrey Graybill, certify that:

1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Answering Brief is proportionally spaced, has a typeface of 14 points or more and contains 10,129 words.

Dated: October 16, 2008

EDMUND G. BROWN JR.
Attorney General of the State of California

CHRISTOPHER E. KRUEGER
Senior Assistant Attorney General

DOUGLAS J. WOODS
Supervising Deputy Attorney General

/s Geoffrey Graybill

GEOFFREY GRAYBILL
Deputy Attorney General
Attorneys for Appellee Attorney General
of the State of California

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for
the Appellate CM/ECF System

Case Name: **David K. Mehl v. Lockyer (Appeal)**
Ninth Circuit Court of Appeal Case No.: 08-15773

I declare and certify:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

I declare and certify that on October 15, 2008, I electronically filed **ANSWERING BRIEF OF APPELLEE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA**; with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing documents by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Gary W. Gorski
Law Offices of Gary W. Gorski
8549 Nephi Way
Fair Oaks, CA 95628
Attorney for Plaintiffs/Appellants
2 Copies

Daniel M. Karalash
Law Offices of Daniel M. Karalash
1207 Front Street, #15
Sacramento, CA 95814
Attorney for Plaintiffs/Appellants
2 Copies

The Honorable Morrison C. England, Jr.
United States District Court
Eastern District of California
501 I Street, #4-200
Sacramento, CA 95814

1 Copy

I declare and certify under penalty of perjury according to the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 15, 2008, at Sacramento, California.

Christine A. McCartney

Declarant



Signature