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11 (also erroneously sued herein as Sacramento
12 County Sheriff’s Department); Lou Blanas,
13 John McGinness, Timothy Sheehan
14

15 **UNITED STATES DISTRICT COURT EASTERN DISTRICT**
16 **OF CALIFORNIA SACRAMENTO DIVISION**

17 JAMES ROTHERY, Esq.; ANDREA)
18 HOFFMAN,)
19 Plaintiffs,)
20 v.)
21 Former Sheriff LOU BLANAS; SHERIFF)
22 JOHN MCGINNESS; Detective TIM)
23 SHEEHAN; SACRAMENTO COUNTY)
24 SHERIFF’S DEPARTMENT, an independent)
25 branch of government of the COUNTY OF)
26 SACRAMENTO; COUNTY OF)
27 SACRAMENTO; STATE OF CALIFORNIA)
28 ATTORNEY GENERAL JERRY BROWN;)
DOES 1 through 25, unknown co-conspirators,)
Defendants.)

CASE NO. 2:08-CV-02064-JAM-KJM
[PROPOSED] ORDER

22 On July 15, 2009, the hearing on Defendants, County of Sacramento, Lou Blanas, Sheriff
23 John McGinness, and Timothy Sheehan’s Motion to Dismiss pursuant to FRCP 12(b)(6), was
24 held before the Honorable John A. Mendez.

25 Daniel Karalash appeared for Plaintiffs James Rothery and Andrea Hoffman. Geoffrey
26 Graybill appeared on behalf of the State of California Attorney General Jerry Brown. John A.
27 Lavra of Longyear, O’Dea and Lavra appeared on behalf of the Defendants, County of
28 Sacramento, Lou Blanas, Sheriff John McGinness, and Timothy Sheehan, hereinafter “County

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1 Defendants”.

2 After consideration of the Defendants’ moving papers, Plaintiffs’ opposition brief, and
3 Defendants’ reply brief, together with oral argument presented at the hearing, and good cause
4 appearing therefore, the court hereby rules as follows:

5 The County Defendants’ Motion to Dismiss the first claim for relief alleging violation of
6 the RICO statute (18 U.S.C. §§1961-1968) is granted. Plaintiffs’ complaint fails to state a claim
7 upon which relief can be granted. The court hereby adopts the findings made at the time of the
8 hearing as set forth in the transcript of the proceedings. Excerpts of the transcript are attached to
9 this order as Exhibit 1, and incorporated herein.

10 The County Defendants’ Motion to Dismiss the second claim for relief alleging a
11 violation of Equal Protection Clause pursuant to 42 U.S.C. § 1983 is granted. Plaintiffs’
12 complaint fails to state a claim upon which relief can be granted. The court hereby adopts the
13 findings made at the time of the hearing as set forth in the transcript of the proceedings. Excerpts
14 of the transcript are attached to this order as Exhibit 1, and incorporated herein.

15 The County Defendants’ Motion to Dismiss the third claim, brought under the First and
16 Fourteenth Amendments pursuant to 42 U.S.C. § 1983 is granted. Plaintiffs’ complaint fails to
17 state a claim upon which relief can be granted. The court hereby adopts the findings made at the
18 time of the hearing as set forth in the transcript of the proceedings. Excerpts of the transcript are
19 attached to this order as Exhibit 1, and incorporated herein.

20 The County Defendants’ Motion to Dismiss the fourth claim alleging violation of Second
21 Amendment on the grounds that the denial of CCW permits violates Plaintiffs’ right to bear arms
22 under the Second Amendment, is granted. Plaintiffs’ complaint fails to state a claim upon which
23 relief can be granted. The court hereby adopts the findings made at the time of the hearing as set
24 forth in the transcript of the proceedings. Excerpts of the transcript are attached to this order as
25 Exhibit 1, and incorporated herein.

26 The County Defendants’ Motion to Dismiss the fifth claim brought under the Privileges
27 and Immunities Clause pursuant to 42 U.S.C. § 1983 is granted. Plaintiffs’ complaint fails to
28 state a claim upon which relief can be granted. The court hereby adopts the findings made at the

1 time of the hearing as set forth in the transcript of the proceedings. Excerpts of the transcript are
2 attached to this order as Exhibit 1, and incorporated herein.

3 The County Defendants' Motion to Dismiss the sixth claim brought under Ninth and
4 Fourteenth Amendments pursuant to 42 U.S.C. § 1983, alleging that those amendments provide a
5 constitutional right to carry a concealed weapon, is granted. Plaintiffs' complaint fails to state a
6 claim upon which relief can be granted. The court hereby adopts the findings made at the time of
7 the hearing as set forth in the transcript of the proceedings. Excerpts of the transcript are attached
8 to this order as Exhibit 1, and incorporated herein.

9 The County Defendants' Motion to Dismiss the seventh claim, which is purportedly a
10 claim for injunctive relief and declaratory relief is granted. The declaratory and injunctive relief
11 claim is not a separate claim for relief upon which relief may be based and therefore, Plaintiffs'
12 complaint fails to state a claim upon which relief can be granted. The court hereby adopts the
13 findings made at the time of the hearing as set forth in the transcript of the proceedings. Excerpts
14 of the transcript are attached to this order as Exhibit 1, and incorporated herein.

15 The court further orders that this case, and each and every claim, be dismissed with
16 prejudice and without leave to amend, for the reasons as set forth in both the Attorney General's
17 and the County Defendants' briefs. There is no legal basis for the Plaintiffs' claims, and even if
18 given the opportunity to amend, Plaintiffs would be unable to plead a legally cognizable
19 complaint. The court finds this lawsuit to be almost frivolous, if not frivolous. There is no
20 support in the law for this lawsuit. And even if the Court gave the Plaintiffs an opportunity to
21 amend, they would be unable to. These are all solid, well-founded legal reasons set forth in the
22 defendants' briefs as to why this case should not go forward. This lawsuit is just a rehash of
23 David K. Mehl, et al. v. Lou Blanas, et al., U.S. District Court for the Eastern District of
24 California, Civ. No. S03-2682 MCE KJM, and the findings and orders of Judge England from
25 that case are incorporated herein in full.

26 ///

27 ///

28 ///

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1 **APPROVED AS TO FORM :**

/s/ Gary W. Gorski

2 DATED: July 24, 2009

3 _____
DANIEL M. KARALASH or GARY GORSKI
4 COUNSEL FOR PLAINTIFFS

/s/ Geoffrey L. Graybill

6 DATED: July 24, 2009

7 _____
GEOFFREY LLOYD GRAYBILL
8 DEPUTY ATTORNEY GENERAL

/s/ John A. Lavra

11 DATED: July 24, 2009

12 _____
JOHN A. LAVRA
13 ATTORNEY FOR COUNTY DEFENDANTS

14 **IT IS SO ORDERED:**

17 Dated: _____

18 _____
HONORABLE JOHN A. MENDEZ
19 UNITED STATES DISTRICT JUDGE

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28

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

---oOo---

BEFORE THE HONORABLE JOHN A. MENDEZ, JUDGE

---oOo---

JAMES ROTHERY, Esq. ;
ANDREA HOFFMAN,

Plaintiffs,

No. Civ. S-08-2064

vs.

Former Sheriff LOU BLANAS,
et al.,

Defendants.

_____ /

---oOo---

REPORTER'S TRANSCRIPT

COURT'S RULINGS ON MOTIONS TO DISMISS

WEDNESDAY, JULY 15, 2009

---oOo---

Reported by: KELLY O'HALLORAN, CSR #6660

APPEARANCES

For the Plaintiff:

DANIEL M. KARALASH
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For the Defendant County of Sacramento:

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BY: JOHN A. LAVRA

For the Defendant Attorney General Edmund G. Brown, Jr.:

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
1300 I Street
Sacramento, CA 95814
BY: GEOFFREY L. GRAYBILL

1 SACRAMENTO, CALIFORNIA

2 WEDNESDAY, JULY 15, 2009, 9:00 A.M.

3 ---oOo---

4 * * * * (Excerpt of proceedings.)

5 THE COURT: Okay. Let me begin by focusing on the
6 complaint itself. And I want this record to be clear because
7 I assume this may end up in the Ninth Circuit, and so I want
8 my comments to be clear as well.

9 In terms of the complaint itself, it is for the most
10 part a rehash of the 2003 lawsuit, although it adds or
11 attempts to add a RICO claim. It is a rehash of the prior
12 lawsuit that was before Judge England. And the defendants
13 request the Court take judicial notice of that prior lawsuit.
14 In fact, I will make reference to that prior lawsuit
15 throughout my comments, even in the context of a motion to
16 dismiss.

17 The complaint itself is an example that more is not
18 better. It's 808 paragraphs. It's 78 pages long. And it is
19 a mishmash of thoughts, legal argument, speculation, with
20 some allegations thrown in. Quite frankly, Mr. Karalash,
21 it's Exhibit A of what you should not do in terms of pleading
22 a complaint in federal court.

23 And to the defendants' credit, you filed motions to
24 dismiss. I don't know how you would have answered this
25 complaint given that there were paragraphs that don't allege

1 anything. They're simply statements. There's one paragraph
2 in here where it just contains -- there it is, paragraph 784.
3 "See Melendez vs. City of Los Angeles." How do you respond
4 to an allegation like that in a complaint?

5 It contains a cause of action for declaratory and
6 injunctive relief that is almost identical to the same cause
7 of action in the 2003 case involving other plaintiffs which
8 Judge England clearly set forth that you can't maintain a
9 cause of action for declaratory and injunctive relief. It
10 should have been included in the prayer for relief.

11 So the complaint itself, if I wasn't, as you see where
12 I'm headed, going to grant the motions to dismiss, I clearly
13 would have granted the motions to strike, and we would have
14 started all over. We're not going to go there.

15 In terms of the lawsuit itself, it is apparent to the
16 Court that the plaintiffs are misreading cases. That they,
17 in particular, have misread both the Heller case and the
18 Nordyke case. Those cases in no way support this lawsuit or
19 maintaining this lawsuit. They have not done the necessary
20 legal research in terms of maintaining a RICO claim. And
21 nearly all of the other claims in this case, the 1983 claims,
22 were dealt with by Judge England in his order dismissing the
23 2003 case. And I'll go through that.

24 In terms of the RICO claim, that, as Mr. Graybill, you
25 point out, that allegation is only against the county

1 defendants, as we'll call them. So it does not involve the
2 Attorney General. In terms of the county defendants, they
3 provided at least seven reasons why the RICO claim should be
4 dismissed. I don't need to reach all seven reasons raised by
5 the county defendants, but the record should reflect that, in
6 fact, I agree with all seven reasons for the dismissal of the
7 first cause of action.

8 The seven reasons that they provided are as follows:
9 I'm sorry. It's the AG's brief. Here it is. Okay.

10 One, that these plaintiffs do not have standing to
11 maintain a RICO claim.

12 Two, that they failed to establish, in particular,
13 that the defendant Sheehan engaged in any required conduct to
14 constitute a violation of RICO laws. And I would note that
15 plaintiffs in their opposition don't address that argument
16 specifically.

17 Three, that the plaintiffs failed to establish that
18 the defendant Blanas and defendant McGinness are distinct
19 from the enterprise.

20 Four, that the plaintiffs failed to establish that the
21 enterprise engaged in interstate commerce.

22 Five, that the plaintiffs failed to establish that any
23 alleged predicate act under 18 USC Section 1951 had any
24 effect on interstate commerce.

25 Sixth, that the plaintiffs failed to establish any

1 predicate acts by defendants subject to liability under
2 29 USC Section 186.

3 And, seven, that these civil rights violations do not
4 constitute racketeering activity.

5 All meritorious arguments. And for all the reasons
6 set forth in the county's brief, the Court clearly agrees
7 that the RICO claim cannot be maintained.

8 In the complaint, the plaintiffs have alleged that the
9 sheriff's department is an enterprise for the purpose of
10 RICO, and then they allege in detail that both sheriffs gave
11 out concealed weapon permits, CCW permits, in exchange for
12 campaign contributions and other perks. That's the
13 allegation.

14 The defendants have argued, as I indicated, seven
15 reasons why I should dismiss this claim. I want to focus on
16 some of those in particular. One, that the plaintiffs do not
17 have standing to bring a RICO claim. To bring a RICO claim,
18 a person must show that he was injured in his business or
19 property under 18 USC Section 1964(c), which reads that "Any
20 person injured in his business or property by reason of a
21 violation of Section 1962 of this chapter may sue therefor in
22 any appropriate United States district court," citing also
23 *Sedima vs. Imrex Co.*, a U.S. Supreme Court case, 473 U.S.
24 479. "The plaintiff only has standing if, and can only
25 recover to the extent that, he has been injured in his

1 business or property by the conduct constituting the
2 violation." The Ninth Circuit has also stated that the harm
3 must be economic in nature, citing Guerrero vs. Gates, 442
4 F.3d 697, a 2006 Ninth Circuit case, which provides that "To
5 recover under RICO, the individual must show proof of
6 concrete financial loss and must demonstrate that the
7 racketeering activity proximately caused the loss."

8 In this case, plaintiffs do not have a property
9 interest in a CCW permit. They have not alleged that they
10 have suffered any harm to their business. Therefore, they do
11 not have standing to bring a RICO claim.

12 Defendants also argue, among other things, that the
13 RICO claim should fail, as I indicated, because the sheriffs
14 are not distinct from the enterprise because they were sued
15 in their official capacity, that the enterprise was not
16 engaged in interstate commerce, and there's statute of
17 limitations arguments as well. Again, all those arguments
18 the Court finds to be meritorious and give the Court basis to
19 dismiss the RICO claim.

20 Throughout this discussion, you'll see that the Court
21 completely disagrees with the plaintiffs' reading of Heller.
22 Under no circumstances can Heller be read that an individual
23 now has a fundamental right to carry a concealed weapon.
24 That case has been completely misread by the plaintiffs. And
25 as I indicated, so the record's clear, there is no basis in

1 law for the plaintiffs to maintain their claims under that
2 theory.

3 Count 2 is an equal protection claim brought under
4 42 USC Section 1983. In that second cause of action, which
5 does include the Attorney General, the plaintiffs have
6 alleged that they were denied CCW permits, whereas retired
7 peace officers were granted permits without having to
8 demonstrate good cause. And plaintiffs argue that this
9 violates the 14th Amendment right to equal protection.

10 Again, both the Attorney General and the county
11 defendants provided the Court with sound legal reasons why
12 that second cause should be dismissed as well. And
13 Judge England also addressed this argument as well in his
14 2004 order in the Mehl vs. Blanas case. That's case 03-2682.

15 I'm going to take a quick break because I left my
16 notes in chambers, and I want to make sure, again, that we
17 make a complete record here. So I'll be right back.

18 (Brief recess taken.)

19 THE COURT: Okay. Back on the record. And this gets
20 to Mr. Karalash's strict scrutiny versus rational basis
21 review. And I'm going to adopt, because I agree with it
22 completely, Judge England's opinion with respect to this
23 claim. As written by Judge England, in the case before me as
24 well as the case in 2003, the plaintiffs did contend that the
25 statutes that are being challenged here are unconstitutional

1 because they grant retired law enforcement officers special
2 treatment in allowing them to carry concealed weapons without
3 having to show good cause for a permit. They specifically
4 argue that California Penal Code Section 12027 and 12031(b)
5 state that the statutes prohibiting the carrying of concealed
6 weapons, which is Section 12025 of the Penal Code, and loaded
7 weapons, which is Section 12031(a), do not apply to peace
8 officers or to honorably retired peace officers.

9 Plaintiffs contend, as they do in this case, that
10 *Silveira vs. Lockyer* compels judgment on the pleadings in
11 their favor. And I'll get to that, by the way, as well.
12 That the plaintiffs are asking for judgment on the pleadings.
13 *Silveira vs. Lockyer* does not compel that. *Silveira*
14 concerned California's ban on assault rifles, and the court
15 upheld the statute in every respect save one. The court
16 found no rational basis for allowing retired peace officers
17 to possess assault weapons without any restriction on use
18 when active peace officers were permitted to possess and use
19 such weapons when off-duty only for law enforcement purposes.
20 The basis for allowing active off-duty officers to possess
21 and use assault weapons was that a peace officer is on call
22 24 hours a day, and may be called upon at any time to respond
23 to a call for help. The same is not true of retired
24 officers. Because they are not on call at all after
25 retirement, there was no rational basis in allowing retired

1 officers to keep assault weapons.

2 The justification and rationale for exempting retired
3 peace officers from the CCW is not the same as for the
4 exception to the assault weapon ban in *Silveira*. The
5 justification for a CCW is personal protection, not public
6 protection. Peace officers were entitled to carry assault
7 weapons so that they would not be inadequately armed to
8 confront criminals while protecting the public. On the other
9 hand, they are entitled to carry concealed weapons to protect
10 themselves from the enemies they have made in performing
11 their duties. While an officer's duty to respond to the
12 public's calls for help stops when he retires, the threat of
13 danger from enemies he might have made during his service
14 does not. Therefore, there is a rational basis for allowing
15 a retired officer to continue to carry a concealed weapon,
16 even though there was no rational basis for allowing the same
17 officer to keep an assault weapon. Because "plaintiffs have
18 no constitutional right to own or possess weapons, heightened
19 scrutiny does not apply," and the statute need meet only
20 rational basis review. That's a quote from *Silveira*, 312
21 F.3d at 1088.

22 And again, there is nothing in *Heller* that changes
23 that analysis, despite plaintiffs' arguments to the contrary.

24 Having concluded that the statutory exception allowing
25 retired officers to carry concealed weapons is rationally

1 related to a legitimate governmental interest, protecting
2 retired law enforcement officers, it follows that this claim
3 in this case, which is the second claim, fails to state a
4 claim upon which relief may be granted. Plaintiffs'
5 arguments to the contrary are without merit.

6 Plaintiff contends in this case before this Court, as
7 they did in the 2003 case, that all one must do is "join the
8 club," that is, become a law enforcement officer and quit the
9 following day to secure the right to carry a concealed
10 weapon. Becoming a law enforcement officer is not a club one
11 joins. Furthermore, the statute gives preference only to
12 those officers "who have qualified for, and accepted a
13 service or disability retirement." Thus, one who works for
14 one day as a law enforcement officer and quits would not
15 become exempt from the requirement to apply for a permit to
16 carry a concealed weapon.

17 There was some argument in the 2003 case concerning
18 officers who may have psychological issues or alcohol issues.
19 And again, the law deals with that. In short, just as in
20 2003, it's clear that the statutory scheme allowing retired
21 officers to carry concealed weapons passes a rational basis
22 review. And therefore defendants motion on this cause of
23 actions, as in 2003, must be dismissed.

24 I also want to make reference in the case before the
25 Court to the fact that under another recent Supreme Court

1 case, Ashcroft vs. Iqbal, a plaintiff is required in a
2 complaint to state a plausible claim for relief in order to
3 survive a motion to dismiss. "Determining whether a case
4 states a plausible claim for relief will be a context
5 specific task that requires the reviewing court to draw on
6 its judicial experience and common sense. Where the
7 well-pleaded facts do not permit the court to infer more than
8 the mere possibility of misconduct, the complaint has
9 alleged -- but it has not shown -- that the pleader is
10 entitled to relief."

11 In this case plaintiff has not sufficiently shown that
12 allowing retired peace officers to carry concealed weapons
13 has no rational basis. And without that, without stating a
14 plausible claim for relief, that second cause of action
15 cannot be maintained as well.

16 In terms of Court 3, Count 3 alleges a claim under,
17 again, 42 USC Section 1983, brought under the First and
18 Fourteenth Amendments. And that claim and the allegation, as
19 best as we can decipher from the complaint, is that plaintiff
20 is arguing that because those who contribute to campaigns are
21 given CCW permits, plaintiffs' First Amendment rights were
22 somehow violated. As both defendants -- actually, this one
23 also only applies to the county; correct?

24 MR. LAVRA: Yes.

25 THE COURT: As the county points out, there are no

1 cases stating that not contributing to a campaign violates
2 the First Amendment. The cases dealing with the effect of
3 campaign contributions on First Amendment rights deal with
4 campaign contribution limits. And again, plaintiffs don't
5 address the First Amendment claim in their opposition. And
6 there simply is no precedent for a First Amendment violation
7 based on failure to make a campaign contribution.

8 For those reasons, and for the reasons set forth in
9 the county's opposition, the third claim for relief should be
10 dismissed and will be dismissed as well.

11 All right. Let's turn to the fourth cause of action
12 which is a new cause of action, in effect, somewhat different
13 from the prior claim. And that's the Second Amendment
14 argument. Again, specifically it's pled as a violation of
15 42 USC Section 1983. The violation in particular is under
16 the Second and Fourteenth Amendments. In the complaint, the
17 plaintiffs allege that the denial of the CCW permits violate
18 their right to bear arms under the Second Amendment. As
19 pointed out, however, by both the Attorney General and the
20 county defendants, there is no constitutional right to carry
21 a concealed weapon. That is the *Nordyke vs. King* case,
22 563 F.3d 439, which upheld regulation of gun possession in
23 public places post-*Heller*. Even in the District of Columbia
24 vs. *Heller* case, 128 S. Ct. 2783, a 2008 Supreme Court case,
25 the Supreme Court noted, "Like most rights, the rights

1 secured by the Second Amendment is not unlimited." The court
2 went on to say that "The majority of the 19th-Century courts
3 to consider the question held that prohibitions on carrying
4 concealed weapons were lawful under the Second Amendment or
5 state analogues." Heller is distinguishable because in that
6 case, the D.C. ordinance banned the use of firearms in the
7 home. That's not what's involved in this case. This case
8 involves an attempt to get a permit to carry a concealed
9 weapon. In Heller, the Supreme Court found the right to use
10 firearms in self-defense to protect one's home was guaranteed
11 by the Constitution. On the other hand, the right to carry a
12 concealed weapon is not guaranteed by the Constitution. And
13 because plaintiffs do not have a Second Amendment right to
14 carry a concealed weapon, and no court has so held, this
15 claim also should be and will be denied.

16 Count 5 in the complaint is again brought under
17 42 USC Section 1983, under the Privileges and Immunities
18 Clause. This is an identical claim to that which was brought
19 back in the case before Judge England. He dealt with that at
20 length in his order dismissing that case. And again, I'm
21 going to adopt his analysis as well with respect to that
22 claim.

23 Under Article IV, Section 2, of the United States
24 Constitution, the citizens of each state are entitled to all
25 privileges and immunities of citizens in the several states.

1 In this case before this Court, the plaintiffs are claiming
2 that by being denied a CCW permit, they were denied the
3 ability to travel with a concealed weapon to other states
4 that honor California's CCW permits. As again argued by the
5 defendants in this case and as discussed by Judge England in
6 his opinion, plaintiffs do not have a right to carry a
7 concealed weapon. It's Erdelyi vs. O'Brien, 680 F.2d 61, a
8 Ninth Circuit case from 1982, which holds that there is no
9 liberty or property interest in carrying a concealed weapon.
10 Therefore, plaintiffs were not denied the right to travel
11 with concealed weapons.

12 This was the portion of the opposition brief in which
13 the arguments concerning Freedmen and the effect on Freedmen
14 somehow should lead this Court to allow this case to go
15 forward, which are, the best way I can put it, nonsensical
16 arguments that really have little or anything to do with this
17 case. Those same arguments were made before Judge England
18 back in 2003. And they failed back then, and they fail this
19 time as well.

20 I want to read from Judge England's opinion. In
21 dismissing the claim, the identical claim in the 2003 case,
22 Judge England writes: "Plaintiffs proclaim that for the
23 first time, this Court, and the Ninth Circuit, will be asked
24 to define whether the 14th Amendment's Privileges and
25 Immunities Clause includes the fundamental right to keep and

1 bear arms. Thus, it is finally clear to the Court that
2 plaintiffs' errors are twofold. First, plaintiffs equate the
3 right to keep and bear arms with the right to carry firearms
4 concealed, without ever analyzing, or even acknowledging, a
5 possible difference between the two. In their opposition,
6 plaintiffs do not even address the particular subject of
7 their lawsuit, which is the denial of a permit to carry
8 concealed weapons. Even if the Court were to assume that if
9 plaintiffs were prevented from possessing firearms a
10 privileges and immunities violation would be found, it does
11 not follow that merely being denied a permit to carry those
12 firearms concealed amounts to such a violation. Plaintiffs
13 have done nothing to persuade, indeed, they have not
14 attempted to persuade, the Court that possession of a firearm
15 equates to carrying that firearm concealed.

16 "Second, plaintiffs label the right to keep and bear
17 arms as a fundamental right. In doing so, plaintiffs claim
18 support from some 35 Supreme Court cases, while only citing
19 strong dictum from one case."

20 Now, I recognize that this was written before the
21 Heller decision. But Judge England does go on to discuss
22 *Silveira vs. Lockyer*. And Judge England writes, "Plaintiffs
23 completely ignore the clear holding of *Silveira vs. Lockyer*,
24 a 2002 Ninth Circuit case, which represents binding authority
25 on this Court. In *Silveira*, the court analyzed rights

1 guaranteed under the Second Amendment and held that the
2 Second Amendment right to keep and bear arms is a collective
3 right that 'guarantees the right of the people to maintain
4 effective state militias, but does not provide any type of
5 individual right to own or possess weapons.'"

6 Admittedly, Heller has changed that somewhat. But
7 again, Heller didn't deal with carrying weapons concealed.

8 "In *Silveira*, the court went on to say that 'the
9 federal and state governments have the full authority to
10 enact prohibitions and restrictions on the use and possession
11 of firearms, subject only to generally applicable
12 constitutional constraints, such as due process, equal
13 protection, and the like.' Plaintiffs' failure to confront
14 *Silveira* is even more egregious when the Court considers that
15 Mehl was a plaintiff in *Silveira*, and Gary Gorski,
16 plaintiffs' current counsel, represented the plaintiffs in
17 *Silveira*."

18 Again, the bottom line is that nothing in Heller
19 changes that analysis with respect to that privileges and
20 immunities cause of action, Count 5 in this complaint. There
21 is no constitutional right to carry a concealed weapon. And
22 because plaintiffs do not have a right to carry concealed
23 weapons, their right to travel to other states has not been
24 violated, and the privileges and immunities claim must be
25 dismissed as well.

1 And then the sixth cause of action is also brought
2 under 42 USC Section 1983, alleging violations of the Ninth
3 and Fourteenth Amendments. The Ninth Amendment provides that
4 "The enumeration in the Constitution, of certain rights,
5 shall not be construed to deny or disparage others retained
6 by the people." Plaintiffs argue that their natural right to
7 self-preservation has been violated.

8 And as the defendants again point out in their briefs
9 in support of the motion to dismiss and in the reply, that
10 the Ninth Amendment does not encompass an individual right to
11 bear arms. That's San Diego County Gun Rights Committee vs.
12 Reno, 98 F.3d 1121, a 1996 Ninth Circuit case, in which the
13 court wrote "We join our sister circuits in holding that the
14 Ninth Amendment does not encompass an unenumerated,
15 fundamental, individual right to bear firearms." Plaintiffs
16 therefore lack standing to bring a claim under the Ninth
17 Amendment. And because they lack standing to bring a claim
18 under the Ninth Amendment, this sixth cause of action must be
19 dismissed as well.

20 In terms of the seventh cause of action, which is a
21 claim for injunctive relief and declaratory relief, it is
22 almost identical to the claim that was filed in the Mehl case
23 back in 2003. Again, I adopt Judge England's reasoning when
24 he dismissed that claim as well. He wrote as follows:
25 "Plaintiffs' first amended complaint contains a seventh claim

1 seeking a preliminary injunction. The claim contains two
2 paragraphs."

3 In this case before this Court, before me, there are
4 more paragraphs. But there is the same allegation.

5 In the 2003 case, the allegation was "Plaintiff seeks
6 a declaration from the court regarding the constitutionality
7 of the CCW statutes and policies enforced and promulgated by
8 defendants."

9 In this complaint, it's paragraph 802. And that reads
10 "Plaintiffs seek a declaration from the court regarding the
11 constitutionality of the CCW statutes and policies, enforced
12 and promulgated by defendants," and then they've added in
13 this case, "providing preferential treatment to those
14 associated with law enforcement."

15 The declaratory and injunctive relief claim is not a
16 separate claim for relief upon which relief may be based. It
17 is, in fact, nothing more than a request for a remedy based
18 upon a favorable finding on the first six claims. It should
19 have been included as part of the prayer for relief, not pled
20 as a separate cause of action. And for those reasons, it
21 should be dismissed.

22 As the defendants point out in their reply briefs, the
23 plaintiff has requested that the Court grant judgment on the
24 pleadings under Federal Rule of Civil Procedure 12(c).
25 Again, the plaintiffs' request evidences just a fundamental

1 lack of understanding of the Federal Rules of Civil
2 Procedure. And as both defendants point out, Federal Rule of
3 Civil Procedure 12(c) authorizes a motion for judgment on the
4 pleadings only "after pleadings are closed." None of the
5 defendants have filed answers to this amended complaint.
6 They filed motions to dismiss. Accordingly, pleadings are
7 not closed in this case, and therefore a motion for judgment
8 on the pleadings is not authorized. And then as cited by the
9 Attorney General in its brief, a third circuit case also
10 confirms that, Season-All Industries, Inc. vs. Turkiye Sise
11 Ve Cam Fabrikalari, A.S., 425 F.2d 34, a Third Circuit case
12 1970. There's no basis for that request. It should not have
13 been made. And, of course, it is denied as well.

14 There are a number of other arguments, Mr. Graybill, I
15 knowledge that you raised on behalf of the Attorney General.
16 I'm not going to reach those and don't need to reach those,
17 including that the Attorney General has sovereign immunity,
18 that he, in fact, has no authority to issue CCWs, and
19 therefore the case should be dismissed on those grounds.
20 Those weren't even addressed in the opposition. I'm not
21 going to specifically reach those arguments, other than --
22 and I don't have to -- other than to say, again, I think
23 they're meritorious. I'm just not specifically going to
24 reach a finding on those arguments as well. I don't need to,
25 and I'm not going to.

1 The final issue is whether I should for some reason
2 allow the plaintiffs leave to amend or whether I should
3 dismiss this with prejudice. The Court is going to order
4 that this case, and each and every claim, be dismissed with
5 prejudice for the reasons set forth in both the Attorney
6 General and the county defendants' briefs. And that is there
7 is no legal basis for this lawsuit. There is no support in
8 the law for this lawsuit. And even if I gave the plaintiffs
9 an opportunity to try to amend, they would be unable to.
10 These are all solid, well-founded legal reasons set forth in
11 the defendants' briefs as to why this case should not go
12 forward.

13 I'm not sugarcoating this, obviously,
14 Mr. Karalash. I find this lawsuit to be almost frivolous, if
15 not frivolous. I recognize you disagree. But it seems to me
16 that your clients had their shot in 2003. I believe there
17 also may be another case before Judge Karlton that was
18 dismissed. I'm not sure if I'm correct about that. But I
19 know at least -- is that true, there's a similar case before
20 Judge Karlton? I thought I read somewhere in somebody's
21 brief. Maybe I'm wrong.

22 MR. LAVRA: Not with respect to Mr. Gorski. There may
23 be another CCW case out there.

24 THE COURT: Okay. But at least it just seems to me to
25 be a rehash of this lawsuit that was dismissed back in 2004

1 by Judge England. And Heller has not in any way changed
2 that. And Heller has been seriously misread by you, as well
3 as the Nordyke case. Those two cases do not give your
4 clients a right to maintain this lawsuit.

5 Those comments being made, I'm not sure, since 1983
6 actions obviously sometimes raise issues of attorney's fees,
7 whether you're going to seek that. Speaking to the defense
8 counsel, if you do seek that, there are obviously local rules
9 that govern those motions. You should follow those. I'm not
10 going to take that up this morning. But I am, for all the
11 reasons stated, going to dismiss this complaint in its
12 entirety with prejudice against all defendants.

13 Did both of you submit proposed orders?

14 MR. GRAYBILL: The state didn't, your Honor, but we
15 will.

16 THE COURT: Did you?

17 MR. LAVRA: No, we didn't, but we will.

18 THE COURT: Okay. I'm going to order both defendants
19 to submit proposed orders. Run them by Mr. Karalash for
20 approval as to form, and get those to me, if you can, within
21 the next week. Okay?

22 MR. LAVRA: All right.

23 THE COURT: Anything further?

24 MR. KARALASH: Will the statement of reasons be
25 reduced to an order and put into the record?

1 THE COURT: They're going to prepare the proposed
2 order. If someone wants to order a transcript and adopt
3 that, that's fine with me, but I'm not going to send out a
4 separate written order.

5 MR. KARALASH: Thank you.

6 THE COURT: Okay. Thank you.

7 MR. LAVRA: Thank you, your Honor.

8 (Proceedings were concluded.)
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I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

/s/ Kelly O'Halloran

KELLY O'HALLORAN, CSR #6660