No. 10-56971

In The United States Court of Appeals
For The Ninth Circuit

EDWARD PERUTA, ET AL.,

Plaintiffs-Appellants,

v.

COUNTY OF SAN DIEGO, ET AL.,

Defendants-Appellees.

Appeal from a Judgment of the United States District Court
for the Southern District of California
Hon. Irma E. Gonzalez
(CV-09-02371-IEG)

BRIEF OF SECOND AMENDMENT FOUNDATION, INC., THE CALGUNS FOUNDATION, INC., ADAM RICHARDS, AND BRETT STEWART AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS SEEKING REVERSAL

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May 31, 2011

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CORPORATE DISCLOSURE STATEMENT

The Second Amendment Foundation, Inc., and the Calguns Foundation, Inc., have no parent corporations. No publicly traded company owns 10% or more of *amici* corporations' stock.

Dated: May 31, 2011

Respectfully submitted,
Second Amendment Foundation, Inc.
The Calguns Foundation, Inc.
Amicus Curiae

By: /s/ Alan Gura
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Counsel for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTERESTS OF *AMICUS CURIAE*[1]

Amici Curiae are the Appellants in the related case of *Richards* v. *Prieto*, No. 11-16255. A motion to have *Richards* argued before this panel on the same day is concurrently filed today. However, in an abundance of caution, considering *amici*'s substantial interest in this matter and their unique position, this brief is submitted as well.[2]

Second Amendment Foundation, Inc. ("SAF"), a non-profit educational foundation, seeks to preserve the effectiveness of the Second Amendment through educational and legal action programs. SAF has over 650,000 members and supporters residing in every State of the Union, including thousands in California. SAF organized, and prevailed, in *McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010).

The Calguns Foundation, Inc. ("Calguns"), is a non-profit organization incorporated under the laws of California with its

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[1]No party's counsel authored this brief in whole or in part. No party, party's counsel, or any other person other than *amici*, their members, and counsel, contributed money intended to fund preparation and submission of this brief.

[2]The District Court's opinion in *Richards* was issued May 16, not allowing sufficient time to prepare and await the outcome of the motion prior to the deadline for submitting this brief.

principal place of business in San Carlos, California. The purposes of CGF include supporting the California firearms community by promoting education for all stakeholders about California and federal firearm laws, rights and privileges; and defending and protecting the civil rights of California gun owners.

Adam Richards and Brett Stewart are law-abiding Yolo County, California residents whose attempts to obtain permits to carry functional handguns for self-defense have been frustrated by their local Sheriff"s arbitrary policies under the same California statutes at issue in this case.

The Court's decision here could directly impact the individual and organizational *amici*, as well as SAF and Calguns' members and supporters, who enjoy exercising Second Amendment rights. SAF and Calguns have substantial expertise in the field of Second Amendment rights that would aid the Court.

CONSENT TO FILE

All parties have consented to the filing of this brief.

INTRODUCTION

Although their cases are closely related, and *amici* generally endorse the Appellants' position, *amici* submit that the answers to the constitutional questions posed by handgun carry licensing restrictions are found in doctrines Appellants only lightly touch upon for the first time on appeal.

Amici Richards, SAF, and Calguns originally filed their case, then styled *Sykes* v. *McGinness*, on May 5, 2009, in the United States District Court for the Eastern District of California. *Amici* were joined by two Sacramento County residents, Deanna Sykes and Andrew Witham, and challenged not only the implementation of California's handgun carry permit system by Yolo County Sheriff Ed Prieto, but also by then-Sacramento County Sheriff John McGinness.

Nearly six months later, on October 23, 2009, Appellant Edward Peruta brought this action, copying large portions of *amici*'s complaint verbatim without advance notice to *amici*. That initial complaint withstood Appellees' motion to dismiss in *Peruta* v. *County of San Diego*, 678 F. Supp. 2d 1046 (S.D. Cal. 2010).

On October 21, 2010, *amici* favorably resolved their case with the Sacramento County defendants. Sheriff McGinness adopted a constitutional "shall issue" policy for the issuance of handgun carry permits, a policy continued by his successor, Sheriff Scott Jones. Plaintiffs Sykes and Witham, and many of *amici* SAF and Calguns' members and supporters who live and work in Sacramento County have since obtained permits to carry functional handguns for self-defense.[3] *Amicus* Stewart thereafter joined the litigation, which continued against Sheriff Prieto and Yolo County.

On May 16, 2011, presented with competing motions for summary judgment, the District Court in *amici*'s case ruled in the Defendants' favor. *Amici* immediately noticed their appeal.

Notwithstanding this case's genesis in *amici*'s complaint, Appellants' arguments diverged significantly from *amici*'s as the litigation

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[3] *Amici* respectfully suggest that two cases pending in this Court, alleging malfeasance on the part of Sacramento County and its former Sheriffs by disgruntled handgun carry permit applicants, *Mehl* v. *Blanas*, No. 08-15773 and *Rothery* v. *County of Sacramento*, No. 09-16852, are mooted by the very different practices which now prevail in Sacramento County. In any event, *amici*'s theory of their case is starkly different from the sort of allegations leveled in *Mehl* and *Blanas*.

advanced. Appellants view discretionary policies for the issuance of handgun carry permits primarily as regulations to be tested under some level of means-ends scrutiny—in their view, strict scrutiny or this Court's "substantial burden" test announced in *Nordyke* v. *King*, 2011 U.S. App. LEXIS 8906 (9th Cir. May 2, 2011). *Amici* agree that this is one way to analyze the case, particularly to the extent that discretionary licensing implicates the Equal Protection Clause. With respect to the equal protection issues, *amici*'s arguments mirror those of Appellants.

But far more logical, simpler, and firmly established options exist to resolve the core Second Amendment question at the heart of this dispute. While federal courts are only starting to explore the application of means-ends scrutiny in the Second Amendment context, courts are highly experienced in applying a clear law of licensing standards for the exercise of constitutional rights—one that takes into account the nature and function of licensing, and which does not involve any problematic level of scrutiny selection or balancing exercises.

Amici respectfully call the Court's attention to that mode of analysis, which has long served to meaningfully protect the exercise of fundamental rights while still allowing for appropriate regulation in the interest of public safety.

SUMMARY OF ARGUMENT

Appellants and their other *amici* demonstrate that the Second Amendment secures a right to publicly carry handguns for self-defense. The District Court accepted as much. *Peruta*, 678 F. Supp. 2d at 1051.

Indeed, the Supreme Court found the notion unremarkable in its first foray into the Second Amendment, *United States* v. *Miller*, 307 U.S. 174 (1939), when it remanded for further proceedings the question of whether a sawed-off shotgun qualified as a constitutionally-protected arm. The shotgun came within federal purview because Miller had allegedly transported it from Claremore, Oklahoma to Siloam Springs, Arkansas, *id.* at 175—obviously outside his home— yet according to the Supreme Court, potentially within the Second Amendment's protection.

The Supreme Court recently confirmed that this right is, indeed, a fundamental individual right on par with the others enumerated in the

Bill of Rights. And while each right is unique, bringing with it different types of questions and constitutional tests, all rights share the essential attributes of a "right"—by definition, they secure some form of individual autonomy or entitlement against government interference.

Accordingly, when the exercise of a right is licensed—subjected, in constitutional parlance, to a "prior restraint"—that prior restraint must be permitted *only* pursuant to objective, well-defined standards that eliminate the exercise of personal discretion. All subjective, free-floating licensing "standards" are barred from application against the exercise of constitutional rights. And the standards most readily identifiable as improper are those of the type present in California Penal Code § 12050—"standards" that allow officials to determine whether the exercise of a constitutional right is a good idea, and "standards" that place the police in charge of evaluating an individual's moral character. An official's personal views of someone's suitability to enjoy constitutional rights, or of an individual's moral virtue, simply cannot be factors in regulating the exercise of constitutional rights.

The prior restraint issue noted in passing by Appellants' opening brief appears to have been unexplored below. Moreover, Appellants

apparently assume the propriety of a moral character inquiry. *See, e.g.* Appellants' Br. at 53 (urging the Court to construe "[Penal Code §] 12050's 'good cause' criterion to be satisfied where CCW applicants of good moral character assert 'self-defense' as their basis."). Under this view, Appellants could obtain no relief, as licensing officials would simply shift their discretion from inquiring whether applicants have "good cause" to want a gun permit, to whether applicants possess adequate "moral character"—an inquiry Appellants would probably not wish to leave to Appellees' exclusive judgment.

To be sure, Appellees are able to license the carrying of handguns in the interest of public safety. But they must not be in the business of judging people's character, or forcing individuals to prove a sufficiently good reason for wanting to exercise something that is their *right*. Adherence to established prior restraint law, not some amorphous means-ends scrutiny tier, achieves this balance.

ARGUMENT

I. "GOOD CAUSE" AND "GOOD MORAL CHARACTER" ARE INVALID STANDARDS FOR LICENSING THE EXERCISE OF FUNDAMENTAL SECOND AMENDMENT RIGHTS.

A. Prior Restraints Against the Exercise of Fundamental Rights Must Be Objectively and Narrowly Defined, and Cannot Sanction Unbridled Discretion.

"Rules that grant licensing officials undue discretion are not constitutional." *Berger* v. *City of Seattle*, 569 F.3d 1029, 1042 n.9 (9th Cir. 2009) (en banc) (citation omitted). Because the practice of bearing arms is secured by the Second Amendment—and, as Appellants demonstrate, a license to carry a concealed handgun is the only avenue allowed by California law for the practical exercise of this right—the decision to issue a license to bear arms cannot be left to the government's unbridled discretion.

> It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Staub v. *City of Baxley*, 355 U.S. 313, 322 (1958) (citations omitted); *see*

also FW/PBS v. *City of Dallas*, 493 U.S. 215, 226 (1990) (plurality opinion); *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 151 (1969).

"While prior restraints are not unconstitutional per se, any system of prior restraint comes to the courts bearing a heavy presumption against its constitutional validity." *Clark* v. *City of Lakewood*, 259 F.3d 996, 1005 (9th Cir. 2001) (citations omitted).

In *Staub*, the Supreme Court struck down an ordinance authorizing a mayor and city council "uncontrolled discretion," *Staub*, 355 U.S. at 325, to grant or refuse a permit required for soliciting memberships in organizations. Such a permit, held the Court,

> makes enjoyment of speech contingent upon the will of the Mayor and Council of the City, although that fundamental right is made free from congressional abridgment by the First Amendment and is protected by the Fourteenth from invasion by state action. For these reasons, the ordinance, on its face, imposes an unconstitutional prior restraint upon the enjoyment of First Amendment freedoms and lays "a forbidden burden upon the exercise of liberty protected by the Constitution."

Staub, 355 U.S. at 325 (quoting *Cantwell* v. *Connecticut*, 310 U.S. 296, 307 (1940)); *see also Largent* v. *Texas*, 318 U.S. 418, 422 (1943) (striking down ordinance allowing speech permit where mayor "deems it proper or advisable."); *Louisiana* v. *United States*, 380 U.S. 145, 153 (1965)

("The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws . . . which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar.").

"Traditionally, unconstitutional prior restraints are found in the context of judicial injunctions or a licensing scheme that places 'unbridled discretion in the hands of a government official or agency.'" *Nat'l Fed'n of the Blind* v. *FTC*, 420 F.3d 331, 350 n. 8 (4th Cir. 2005) (quoting *FW/PBS*, 493 U.S. at 225-26). "Unbridled discretion naturally exists when a licensing scheme does not impose adequate standards to guide the licensor's discretion." *Chesapeake B & M, Inc.* v. *Harford County*, 58 F.3d 1005, 1009 (4th Cir. 1995) (en banc).

Standards governing prior restraints must be "narrow, objective and definite." *Shuttlesworth*, 394 U.S. at 151. Standards involving "appraisal of facts, the exercise of judgment, [or] the formation of an opinion" are unacceptable. *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 131 (1992) (quoting *Cantwell*, 310 U.S. at 305).

> Regulations must contain narrow, objective, and definite standards to guide the licensing authority, and must require the official to provide an explanation for his decision. The standards must be

> sufficient to render the official's decision subject to effective judicial review.

Long Beach Area Peace Network v. *City of Long Beach*, 574 F.3d 1011, 1025 (9th Cir. 2009) (citations and internal punctuation marks omitted). In *Gaudiya Vaishnava Society* v. *City of San Francisco*, 952 F.2d 1059 (9th Cir. 1990), this Court considered the constitutionality of a permitting system under which "the Chief of Police *may* issue a permit . . ." to peddle constitutionally-protected articles (emphasis supplied by opinion). *Id.* at 1065. "Because the Chief of Police is granted complete discretion in denying or granting such permits, we hold that the City's ordinance is not saved from constitutional infirmity by its commercial peddler's permit system." *Id.* at 1066.

Public safety is invoked to justify most laws, but where a fundamental right is concerned, the mere incantation of a public safety rationale does not save arbitrary licensing schemes. In the First Amendment arena, where the concept has been developed extensively,

> [W]e have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places . . . There are appropriate public remedies to protect the peace and

> order of the community if appellant's speeches should result in disorder or violence.

Kunz v. *New York*, 340 U.S. 290, 294 (1951); *Shuttlesworth*, 394 U.S. at 153. "[U]ncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right." *Hague* v. *Committee for Indus. Org.*, 307 U.S. 496, 516 (1937) (plurality opinion).

> Even when the use of its public streets and sidewalks is involved, therefore, a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question on the "welfare," "decency," or "morals" of the community.

Shuttlesworth, 394 U.S. at 153. Accordingly, this Court rejects alleged public health and safety concerns as a substitute for objective standards and due process. *Desert Outdoor Advertising* v. *City of Moreno Valley*, 103 F.3d 814, 819 (9th Cir. 1996).

For an example of these prior restraint principles applied in the Second Amendment context, the Court need look no further than *District of Columbia* v. *Heller*, 554 U.S. 570 (2008). Among other provisions, Heller challenged application of the District of Columbia's

requirement that handgun registrants obtain a discretionary (but never issued) permit to carry a gun inside the home. The Supreme Court held that the city had no discretion to refuse issuance of the permit: "Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home." *Heller*, 554 U.S. at 635.[4] In other words, the city could deny Heller a permit if it could demonstrate there was some constitutionally valid reason for denying him Second Amendment rights. But the city could not otherwise refuse to issue the permit. The city repealed its home carry permit requirement.[5]

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[4]This passage is often cited by anti-gun rights advocates for the proposition that *Heller*'s application is limited to the home. That claim is misleading. Former D.C. Code § 22-4504(a) (2008) provided that carrying a gun inside one's home without a permit constituted a misdemeanor offense. Former D.C. Code § 22-4506 (2008) provided for a license to carry issued at the police chief's discretion, although licenses were never issued. Heller did not seek a permit to carry a handgun in public. *Parker* v. *District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007), *aff'd sub nom Heller*. The Supreme Court was merely tracking Heller's prayer for relief. *Heller*, 554 U.S. at 630-31.

[5]The city also adopted a complete ban on carrying handguns in public, prompting additional litigation. *Palmer* v. *District of Columbia*, U.S. Dist. Ct. D.C. No. 09-CV-1482-HHK.

B. Penal Code § 12050's "Good Moral Character" and "Good Cause" Requirements Easily Fail Prior Restraint Analysis.

California's "good moral character" and "good cause" requirements for issuance of a handgun carry permit fail constitutional scrutiny as an impermissible prior restraint. The right to carry a firearm for self-defense is plainly among the "freedoms which the Constitution guarantees." *Staub*, 355 U.S. at 322. The government thus bears the burden of proving that the an applicant may not have a permit, for a constitutionally-compelling reason defined by standards that are "narrow, objective and definite." *Shuttlesworth*, 394 U.S. at 151.

"Good cause," as used in California Penal Code § 12050, is plainly among the impermissible "illusory 'constraints'" amounting to "little more than a high-sounding ideal." *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 769-70 (1988); *see, e.g. Largent*, 318 U.S. at 422 ("proper or advisable"); *Diamond* v. *City of Taft*, 29 F. Supp. 2d 633, 650 (C.D. Cal. 1998) (rejecting condition that license be "essential or desirable to the public convenience or welfare"), *aff'd*, 215 F.3d 1052 (9th Cir. 2000).

Even less defensible is the requirement of "good moral character." The Supreme Court long ago rejected the constitutionality of an ordinance demanding "good character" as a prerequisite for a canvassing license. *Schneider* v. *New Jersey (Town of Irvington)*, 308 U.S. 147, 158 (1939). Absent further definition, courts typically reject all forms of "moral character" standards for the licensing of fundamental rights. *See MD II Entertainment* v. *City of Dallas*, 28 F.3d 492, 494 (5th Cir. 1994); *Genusa* v. *Peoria*, 619 F.2d 1203, 1217 (7th Cir. 1980); *N.J. Envtl. Fed'n* v. *Wayne Twp.*, 310 F. Supp. 2d 681, 699 (D.N.J. 2004); *Ohio Citizen Action* v. *City of Mentor-On-The-Lake*, 272 F. Supp. 2d 671, 682 (N.D. Ohio 2003); *Tom T., Inc.* v. *City of Eveleth*, 2003 U.S. Dist. LEXIS 3718 at *14-15 (D. Minn. March 11, 2003); *R.W.B. of Riverview, Inc.* v. *Stemple*, 111 F. Supp. 2d 748, 757 (S.D.W.Va. 2000); *Elam* v. *Bolling*, 53 F. Supp. 2d 854, 862 (W.D.Va. 1999); *Ohio Citizen Action* v. *City of Seven Hills*, 35 F. Supp. 2d 575, 579 (N.D. Ohio 1999); *Broadway Books, Inc.* v. *Roberts*, 642 F. Supp. 486, 494-95 (E.D.Tenn. 1986); *Bayside Enterprises, Inc.* v. *Carson*, 450 F. Supp. 696, 707 (M.D. Fla. 1978).

An argument may be advanced that because Penal Code § 12050 permits Sheriffs to define their licensing standards, the provision can only be challenged in light of such actual policies and practices. And as a secondary argument, Appellants (and *amici*) argue that Section 12050 may be applied constitutionally if the "good cause" requirement were interpreted to require only a constitutional purpose for the bearing of arms, e.g., self-defense.[6] Sacramento County's response to *amici*'s lawsuit supplies an example of this accommodation.

But Section 12050 nonetheless remains subject to a facial attack, as it is not enough to claim that the licensing official will not act arbitrarily. "A presumption that a city official 'will act in good faith and adhere to standards absent from the ordinance's face . . . is the very presumption that the doctrine forbidding unbridled discretion disallows.'" *Long Beach*, 574 F.3d at 1044 (quoting *Lakewood*, 486 U.S. at 770).

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[6] *Amici* go further and would argue that to withstand scrutiny, the "good moral character" requirement would have to be ascribed some objective meaning, perhaps the passing of a criminal background check.

II. PRIOR RESTRAINT DOCTRINE PROVIDES A SUPERIOR METHOD OF EVALUATING THE CONSTITUTIONALITY OF DISCRETIONARY HANDGUN LICENSING.

Means-ends levels of scrutiny provide a relatively poor method to test the constitutionality of a discretionary licensing system. Such levels of scrutiny, whatever they may be in a particular case, are only useful in evaluating laws that restrict a constitutional right upon the existence of some *specific* condition. In such cases, a court may examine the condition and weigh it against the right at issue through whichever scrutiny-lens is most apt. In the Second Amendment context, a felon disarmament law, or some condition upon the purchase or sale of firearms, would fit comfortably into this sort of analysis.

But here, the issue is whether Appellees may bar individuals from exercising the right at all by use of a permitting scheme. This comes literally within the definition of a prior restraint—there is no better, indeed, there may be no other, logical interpretive tool. After all, the right to carry firearms is a "freedom which the Constitution guarantees," and "an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official" is "an unconstitutional

censorship *or* prior restraint upon the enjoyment of those freedoms." *Staub*, 355 U.S. at 322 (citations omitted) (emphasis added).

The time to apply means-ends scrutiny is when a court is presented with an *objective* licensing standard. A court can evaluate objective standards by examining their purpose and impact under whichever means-ends rubric should be applied. But it is difficult to tell exactly what public interest is being served by a policy of unbridled discretion. Since the activity being regulated is the exercise of a fundamental right, its general suppression cannot be in the public interest. And the idea of an official dispensing permission to exercise a "right" is inherently incongruent with the concept of rights.

That prior restraint doctrine has been almost entirely developed within the First Amendment indicates that it is especially suitable for application in a Second Amendment context. The trend among federal courts is to look to the First Amendment in seeking interpretive guidelines for the Second. "[W]e agree with those who advocate looking to the First Amendment as a guide in developing a standard of review for the Second Amendment." *United States* v. *Chester*, 628 F.3d 673,

682 (4th Cir. 2010) (citations omitted); *cf. United States* v. *Masciandaro*, 2011 U.S. App. LEXIS 5964 at *32 (4th Cir. March 24, 2011) ("[A]s has been the experience under the First Amendment, we might expect that courts will employ different types of scrutiny in assessing burdens on Second Amendment rights, depending on the character of the Second Amendment question presented."). "The protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment." *Parker*, 478 F.3d at 399.

> Because *Heller* is the first Supreme Court case addressing the scope of the individual right to bear arms, we look to other constitutional areas for guidance in evaluating Second Amendment challenges. We think the First Amendment is the natural choice. *Heller* itself repeatedly invokes the First Amendment in establishing principles governing the Second Amendment. We think this implies the structure of First Amendment doctrine should inform our analysis of the Second Amendment.

United States v. *Marzzarella*, 614 F.3d 85, 89 n.4 (3d Cir. 2010).

This Court appears to be in accord, looking to answer Second Amendment questions by resort to First Amendment doctrine. In *Nordyke*, this Court based its "substantial burden" Second Amendment test on First Amendment precedent relating to alternative avenues of

communication. *Nordyke*, at *24-*25 and *33-*34 ("[d]rawing from these cases . . .").

The analogies between these two amendments are unsurprising: the First and Second Amendments are the only provisions of the Bill of Rights that secure some substantive individual conduct—speech, worship, the keeping and bearing of arms—against government infringement. Indeed, concerns regarding the abuse of First and Second Amendment protected activities have long been viewed as similar. *See Commonwealth* v. *Blanding*, 20 Mass. 304, 314 (1825) ("The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction."); *Respublica* v. *Oswald*, 1 U.S. (1 Dall.) 319, 330 n.* (Pa. 1788) ("The right of publication, like every other right, has its natural and necessary boundary; for, though the law allows a man the free use of his arm, or the possession of a weapon, yet it does not authorize him to plunge a dagger in the breast of an inoffensive neighbour.").

Of course the two amendments relate to different subjects. But the issue is whether the First Amendment frameworks are practical in a Second Amendment context.[7] The Supreme Court, the D.C., Third, and Fourth Circuits, and in *Nordyke*, this Court, have expressly adopted these frameworks as a guide in Second Amendment cases.

It will not do to respond that prior restraint has never been applied to Second Amendment rights. Second Amendment law is in its infancy. Three years ago, municipal handgun bans had never been struck down under the Second Amendment, either. And until this Court's opinion in *Nordyke* v. *King*, 563 F.3d 439 (9th Cir. 2009), no federal court had applied the Second Amendment to the States. Within a year of *McDonald*, many if not most Second Amendment cases will require unprecedented analysis. But while other emerging Second Amendment

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[7]There is nothing about the prior restraint doctrine rendering it uniquely applicable to the First Amendment values. In the First Amendment context, the presumption against prior restraints is not aimed exclusively at preventing content-based decision-making. "[W]hether or not the review is based upon content, a prior restraint arises where administrative discretion involves judgment over and beyond applying classifying definitions." *Mom N Pops, Inc.* v. *City of Charlotte*, 979 F. Supp. 372, 387 (W.D.N.C. 1997) (citations omitted); *Beal* v. *Stern*, 184 F.3d 117, 124 (2d Cir. 1999).

challenges require the development of new doctrines, this case can and should be resolved by the time-tested, straightforward logic of prior restraint law.

CONCLUSION

Instead of fretting about whether discretionary licensing is related in some manner to some level of government interest, or whether it substantially burdens exercise of the Second Amendment right, the Court should recognize that Penal Code § 12050's "good cause" and "good moral character" requirements are classic specimens of unconstitutional prior restraints. These provisions plainly condition the exercise of a fundamental right upon the unbridled discretion of a licensing official. Accordingly, they must be struck down as such.

Dated: May 31, 2011

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CERTIFICATE OF COMPLIANCE
TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32-3(3) because this brief contains 4,350 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionately spaced typeface using WordPerfect X4 in 14 point Century Schoolbook font.

/s/ Alan Gura
Alan Gura
Counsel for Amicus Curiae
Dated: May 31, 2011

CERTIFICATE OF SERVICE

On this, the 31st day of May, 2011, I served the foregoing Amicus Curiae Brief by electronically filing it with the Court's CM/ECF system, which generated a Notice of Filing and effects service upon counsel for all parties in the case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 31st day of May, 2011

/s/ Alan Gura
Alan Gura