No. 11-16255

# In The United States Court of Appeals For The Ninth Circuit

ADAM RICHARDS, BRETT STEWART, SECOND AMENDMENT FOUNDATION, INC., AND THE CALGUNS FOUNDATION, INC.,

Plaintiffs-Appellants,

v.

COUNTY OF YOLO AND ED PRIETO,

Defendants-Appellees.

Appeal from a Judgment of the United States District Court
for the Eastern District of California
Hon. Morrison C. England, District Judge
(2:09-CV-01235-MCE-DAD)

## APPELLANTS' BRIEF

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August 24, 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 appellant corporations' stock.

Dated: August 24, 2011

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

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# TABLE OF CONTENTS

Table of Authorities.. . . . . iii

Jurisdictional Statement.. . . . . 1

Statement of Issues.. . . . . 1

Reviewability and Standard of Review.. . . . . 2

Statement of the Case.. . . . . 2

Statement of Facts. . . . . 5

1. *The Regulatory Framework*.. . . . . 5

2. *Defendants' Licensing Policies*. . . . . 7

3. *Defendants' Application of the Law to Plaintiffs*. . . . . 8

Summary of Argument .. . . . . 12

Argument.. . . . . 15

I. THE SECOND AMENDMENT SECURES THE RIGHT TO CARRY ARMS IN PUBLIC FOR SELF-DEFENSE.. . . . . 15

A. THE RIGHT TO BEAR ARMS, TRADITIONALLY UNDERSTOOD, EXTENDS BEYOND THE HOME. . . . . 15

B. *HELLER*'S INTERPRETATION OF "BEAR ARMS" CARRIES PRECEDENTIAL WEIGHT. . . . . 21

II. CALIFORNIA HAS SELECTED CONCEALED CARRYING AS THE PERMISSIBLE MODE OF EXERCISING THE RIGHT TO BEAR ARMS. . . . . 26

III. "GOOD CAUSE" AND "GOOD MORAL CHARACTER" ARE INVALID STANDARDS FOR LICENSING THE EXERCISE OF FUNDAMENTAL SECOND AMENDMENT RIGHTS. . . . . 36

A. PRIOR RESTRAINTS AGAINST THE EXERCISE OF FUNDAMENTAL RIGHTS MUST BE OBJECTIVELY AND NARROWLY DEFINED, AND CANNOT SANCTION UNBRIDLED DISCRETION. . . . . 36

B. PENAL CODE § 12050'S "GOOD MORAL CHARACTER" AND "GOOD CAUSE" REQUIREMENTS PLAINLY FAIL PRIOR RESTRAINT ANALYSIS. . . . . 42

C. PRIOR RESTRAINT DOCTRINE PROVIDES A SUPERIOR METHOD OF EVALUATING THE CONSTITUTIONALITY OF DISCRETIONARY HANDGUN LICENSING. . . . . 47

IV. THE "GOOD CAUSE" AND "GOOD MORAL CHARACTER" STANDARDS FAIL SECOND AMENDMENT MEANS-ENDS SCRUTINY. . . . . 52

Conclusion. . . . . 58

Related Cases. . . . . 59

# TABLE OF AUTHORITIES

Cases

*Andrews* v. *State*,
50 Tenn. 165 (1871). . . . . 17, 18, 28, 29

*Aramark Facility Servs.* v. *SEIU, Local 1877*,
530 F.3d 817 (9th Cir. 2008). . . . . 2

*Aymette* v. *State*,
21 Tenn. 154 (1840). . . . . 29

*Bayside Enterprises, Inc.* v. *Carson*,
450 F. Supp. 696 (M.D. Fla. 1978). . . . . 44

*Beal* v. *Stern*,
184 F.3d 117 (2d Cir. 1999). . . . . 52

*Berger* v. *City of Seattle*,
569 F.3d 1029 (9th Cir. 2009) (en banc). . . . . 36

*Broadway Books, Inc.* v. *Roberts*,
642 F. Supp. 486 (E.D.Tenn. 1986). . . . . 43

*Cantwell* v. *Connecticut*,
310 U.S. 296 (1940). . . . . 38, 39

*Chesapeake B & M, Inc.* v. *Harford County*,
58 F.3d 1005 (4th Cir. 1995). . . . . 39

*City of Lakewood* v. *Plain Dealer Publishing Co.*,
486 U.S. 750 (1988). . . . . 42, 44

*City of Las Vegas* v. *Moberg*,
485 P.2d 737 (N.M. Ct. App. 1971). . . . . 18

*Clark* v. *City of Lakewood*,
259 F.3d 996 (9th Cir. 2001) . . . . . 37

*Clark* v. *Jeter*,
486 U.S. 456 (1988) . . . . . 54

*Commonwealth* v. *Blanding*,
20 Mass. 304 (1825) .. . . . . 51

*Desert Outdoor Advertising* v. *City of Moreno Valley*,
103 F.3d 814 (9th Cir. 1996). . . . . 41

*Diamond* v. *City of Taft*,
29 F. Supp. 2d 633 (C.D. Cal. 1998) . . . . . 42

*District of Columbia* v. *Heller*,
554 U.S. 570 (2008) . . . . . passim

*Elam* v. *Bolling*,
53 F. Supp. 2d 854 (W.D.Va. 1999). . . . . 43

*Erdelyi* v. *O'Brien*,
680 F.2d 61 (9th Cir. 1982). . . . . 27

*Ezell* v. *City of Chicago*,
2011 U.S. App. LEXIS 14108 (7th Cir. July 6, 2011). . . 21, 49, 55, 56

*Forsyth County* v. *Nationalist Movement*,
505 U.S. 123 (1992) . . . . . 39

*FW/PBS* v. *City of Dallas*,
493 U.S. 215 (1990) . . . . . 37, 38

*Gaudiya Vaishnava Society* v. *City of San Francisco*,
952 F.2d 1059 (9th Cir. 1990). . . . . 39, 40

*Genusa* v. *Peoria*,
619 F.2d 1203 (7th Cir. 1980). . . . . 43

*Gonzalez* v. *Vill. of W. Milwaukee*,
2010 U.S. Dist. LEXIS 46281 (D. Wis. May 11, 2010) . . . . . 31

*Guillory* v. *County of Orange*,
731 F.2d 1379 (9th Cir. 1984). . . . . 53

*Hague* v. *Committee for Indus. Org.*,
307 U.S. 496 (1937) . . . . . 40

*Harper* v. *Virginia Board of Elections*,
383 U.S. 663 (1966). . . . . 55

*Hussey* v. *City of Portland*,
64 F.3d 1260 (9th Cir. 1995). . . . . 55

*In re Application of McIntyre*,
552 A.2d 500 (Del. Super. 1988). . . . . 30

*In re Brickey*,
70 P. 609 (Idaho 1902) .. . . . . 18

*Kellogg* v. *City of Gary*,
562 N.E.2d 685 (Ind. 1990). . . . . 18

*Kunz* v. *New York*,
340 U.S. 290 (1951). . . . . 40

*Largent* v. *Texas*,
318 U.S. 418 (1943) . . . . . 38, 42

*Long Beach Area Peace Network* v. *City of Long Beach*,
574 F.3d 1011 (9th Cir. 2009). . . . . 39, 44

*Louisiana* v. *United States*,
380 U.S. 145 (1965) . . . . . 38

*McDonald* v. *City of Chicago*,
130 S. Ct. 3020 (2010) . . . . . 4, 19, 20, 22, 54

*MD II Entertainment* v. *City of Dallas*,
28 F.3d 492 (5th Cir. 1994). . . . . 43

*Mom N Pops, Inc.* v. *City of Charlotte*,
979 F. Supp. 372 (W.D.N.C. 1997) . . . . . 52

*Muscarello* v. *United States*,
524 U.S. 125 (1998) . . . . . 16

*N.J. Envtl. Fed'n* v. *Wayne Twp.*,
310 F. Supp. 2d 681 (D.N.J. 2004). . . . . 43

*Nat'l Fed'n of the Blind* v. *FTC*,
420 F.3d 331 (4th Cir. 2005) . . . . . 38

*Nordyke* v. *King*,
563 F.3d 439 (9th Cir. 2009). . . . . 52

*Nordyke* v. *King*,
644 F.3d 776,
2011 U.S. App. LEXIS 8906 (9th Cir. 2011). . . . . 4, 14, 50, 53, 54

*Nunn* v. *State*,
1 Ga. 243 (1846). . . . . 17, 18, 21, 28, 46

*Ohio Citizen Action* v. *City of Mentor-On-The-Lake*,
272 F. Supp. 2d 671 (N.D. Ohio 2003). . . . . 43

*Ohio Citizen Action* v. *City of Seven Hills*,
35 F. Supp. 2d 575 (N.D. Ohio 1999). . . . . 43

*Parker* v. *District of Columbia*,
478 F.3d 370 (D.C. Cir. 2007). . . . . 24, 50

*Peruta* v. *County of San Diego*,
678 F. Supp. 2d 1046 (S.D. Cal. 2010). . . . . 20

*Peruta* v. *County of San Diego*,
758 F. Supp. 2d 1106 (S.D. Cal. 2010) . . . . . 27

*R.W.B. of Riverview, Inc.* v. *Stemple*,
111 F. Supp. 2d 748 (S.D.W.Va. 2000). . . . . 43

*Respublica* v. *Oswald*,
1 U.S. (1 Dall.) 319 (Pa. 1788). . . . . 51

*Robertson* v. *Baldwin*,
165 U.S. 275 (1897). . . . . 26

*Sanchez* v. *County of San Diego*,
464 F.3d 916 (9th Cir. 2006). . . . . 2

*Sarnoff* v. *Am. Home Prods. Corp.*,
798 F.2d 1075 (7th Cir. 1986). . . . . 23

*Schneider* v. *New Jersey (Town of Irvington)*,
308 U.S. 147 (1939). . . . . 43, 54

*Seminole Tribe of Fla.* v. *Florida*,
517 U.S. 44 (1996) . . . . . 23

*Shuttlesworth* v. *Birmingham*,
394 U.S. 147 (1969). . . . . 37, 39-42

*State ex rel. City of Princeton* v. *Buckner*,
377 S.E.2d 139 (W. Va. 1988). . . . . 18

*State* v. *Rosenthal*,
55 A. 610 (Vt. 1903) . . . . . 18

*State* v. *Chandler*,
5 La. Ann. 489 (1850). . . . . 17, 29, 46

*State* v. *Delgado*,
692 P.2d 210 (Or. 1984) . . . . . 18

*State* v. *Kerner*,
107 S.E. 222 (N.C. 1921). . . . . 18

*State* v. *Reid*,
1 Ala. 612 (1840). . . . . 17, 28, 46

*Staub* v. *City of Baxley*,
355 U.S. 313 (1958) . . . . . 37, 38, 42

*Tom T., Inc.* v. *City of Eveleth*,
2003 U.S. Dist. LEXIS 3718 (D. Minn. March 11, 2003). . . . . 43

*United States* v. *Bloom*,
149 F.3d 649 (7th Cir. 1998). . . . . 23

*United States* v. *Chester*,
628 F.3d 673 (4th Cir. 2010). . . . . 20, 49, 56

*United States* v. *Marzzarella*,
614 F.3d 85 (3d Cir. 2010) . . . . . 50

*United States* v. *Masciandaro,*
638 F.3d 458 (4th Cir. 2011). . . . . 22, 49, 55

*United States* v. *Miller*,
307 U.S. 174 (1939). . . . . 15, 21

*United States* v. *Skoien*,
614 F.3d 638 (7th Cir. 2010) (en banc) . . . . . 20, 56

*United States* v. *Vongxay*,
594 F.3d 1111 (9th Cir. 2010). . . . . 24

Constitutional Provisions

U.S. Const. amend. II. . . . . 15

U.S. Const. amend. VI.. . . . . 15

U.S. Const. amend. VIII. . . . . 15

Statutes

28 U.S.C. § 1291. . . . . 1

28 U.S.C. § 1343. . . . . 1

28 U.S.C. §1331. . . . . 1

42 U.S.C. § 1983. . . . . 1

Cal. Elections Code § 9005. . . . . 32

Cal. Penal Code § 12023(a) . . . . . 35

Cal. Penal Code § 12025. . . . . 5

Cal. Penal Code § 12031. . . . . 5, 6, 33, 34

Cal. Penal Code § 12050. . . . . 1, 6, 42, 44, 47, 58

Cal. Penal Code § 12050.2.. . . . . 7

Cal. Penal Code § 12052 .. . . . . 6

D.C. Code § 22-4504(a) (2008).. . . . . 24

Tex. Gov't Code § 411.177(a).. . . . . 32

Tex. Penal Code § 46.035(a). . . . . 32

Other Authorities

BLACK'S LAW DICTIONARY (6th Ed. 1998). . . . . 16

Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytic Framework and a Research Agenda*, 56 UCLA L. Rev. 1443 (2009). . . . . 31

The American Students' Blackstone (G. Chase ed. 1884). . . . . 29, 30

# APPELLANTS' BRIEF

## JURISDICTIONAL STATEMENT

Plaintiffs-Appellants ("Plaintiffs") seek declaratory and injunctive relief barring a California Sheriff from conditioning issuance of permits to carry functional handguns upon subjective assessments of an applicants' need and/or moral character, pursuant to his policy and Cal. Penal Code § 12050. Plaintiffs seek relief pursuant to 42 U.S.C. § 1983, as the Sheriff's practices violate the Second and Fourteenth Amendments to the United States Constitution. The District Court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1343.

On May 16, 2011, the District Court granted Defendants-Appellees' ("Defendants") summary judgment motion, and denied Plaintiffs' summary judgment motion. Excerpts of Record ("ER") 1. This Court has jurisdiction per 28 U.S.C. § 1291 in this appeal from a final judgment. Plaintiffs timely noticed their appeal on May 16, 2011. ER 18.

## STATEMENT OF ISSUES

May a licensing authority condition the issuance of permits to exercise the fundamental Second Amendment right to bear arms, and

classify applicants with respect to the exercise of that right, upon that authority's discretionary assessment of need and moral character?

## REVIEWABILITY AND STANDARD OF REVIEW

The issue identified on appeal was the core issue in the case below. It was specifically raised in Plaintiffs' motion for summary judgment, and briefed extensively in support of that motion and in opposition to Defendants' cross-motion for summary judgment. The issue was ruled on in the District Court's opinion. ER 2-17.

This Court reviews the matter *de novo*. "Whether summary judgment was properly granted presents a question of law, to be reviewed de novo." *Sanchez* v. *County of San Diego*, 464 F.3d 916, 920 (9th Cir. 2006). "Here, the district court resolved the matter on the parties' cross-motions for summary judgment, which necessarily present questions of law." *Aramark Facility Servs.* v. *SEIU, Local 1877*, 530 F.3d 817, 822 (9th Cir. 2008).

## STATEMENT OF THE CASE

When individuals enjoy a constitutional "right" to engage in some activity, a license to engage in that activity cannot be conditioned on

the government's determination of their "good moral character" or "good cause" to exercise that right. Defendants must be enjoined from imposing this classic form of unconstitutional prior restraint against the fundamental right to keep and bear arms. Where fundamental rights are concerned, a system of prior restraint cannot employ unbridled discretion.

Of course, Defendants have an interest in regulating firearms in the interest of public safety, just as Defendants have an interest in regulating the time, place, or manner of speech or public assemblies. Nor do Plaintiffs question the state's ability to license the carrying of firearms, just as it might license parades. But the regulatory interest here is not absolute. Whatever else the state may do, it cannot reserve for itself the power to arbitrarily decide, in all cases, whether individuals deserve to carry guns for self-defense. That decision has already been made in the federal constitution, which guarantees law-abiding individuals their right to carry handguns for self-defense.

On May 5, 2009, Plaintiffs Adam Richards, the Second Amendment Foundation ("SAF"), and the Calguns Foundation ("Calguns"), brought this action against Defendants Yolo County and its Sheriff, Ed Prieto,

challenging Defendants' assertion of authority to deny handgun carry permits upon their assessment of an applicant's "moral character" and "good cause" for seeking the permit. Plaintiffs were joined by Sacramento County residents Deanna Sykes and Andrew Witham, who had also named as defendants Sacramento County and its then-Sheriff, John McGinness.

The District Court repeatedly stayed the matter pending the outcome of *McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010) and *Nordyke* v. *King*, 644 F.3d 776, 2011 U.S. App. LEXIS 8906 (9th Cir. 2011). On October 21, 2010, Plaintiffs 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 SAF and Calguns members and supporters who live and work in Sacramento County have since obtained permits to carry functional handguns for self-defense.[1]

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[1]Plaintiffs 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-

Accordingly, on November 3, 2010, the District Court entered a stipulation allowing Plaintiffs to file an amended complaint, which terminated the Sacramento County parties from the proceedings, added Yolo County resident Brett Stewart as a Plaintiff, and otherwise continued the action against the Yolo County Defendants.

On May 16, 2011, the District Court granted Defendants' motion for summary judgment and denied Plaintiffs' motion for summary judgment. ER 1. The appeal was noticed the same day. ER 18.

## STATEMENT OF FACTS

### 1. *The Regulatory Framework*

California law generally bars the open carrying of functional firearms, allowing the practice only in unincorporated areas or, with a special license, in select sparsely populated counties. Cal. Penal Code § 12031 *et seq*. California law also prohibits the concealed carrying of loaded, functional firearms without a license. Cal. Penal Code § 12025 *et seq*. Accordingly, for most people and throughout most of the state, a

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16852, are mooted by the very different practices which now prevail in Sacramento County. In any event, Plaintiffs' claims differ starkly from the sort of allegations leveled in *Mehl* and *Blanas*.

license to carry a concealed weapon provides the only legal option available to those who wish to carry functional firearms for self-defense. Cal. Penal Code §§ 12025 (banning unlicensed concealed carry), 12031 (banning unlicensed open carrying), 12050 (restricting open carry licenses to counties with fewer than 200,000 inhabitants).

Applicants seeking a license to carry a handgun must pass a criminal background check, and successfully complete a course of training in the proper use of handguns. Cal. Penal Code §§ 12050(a)(1)(E),12052 *et seq*. Applications for a permit to carry a handgun are made to the Sheriff of the county in which the applicant either resides or spends a substantial period of time in owing to the location of the applicant's principal place of employment or business in that county. Cal. Penal Code §§ 12050(a)(1)(A), 12050(a)(1)(D)(I), 12050(a)(1)(D)(ii). Alternatively, application may be made to the chief or other head of a municipal police department of any city or city and county in which the applicant resides. Cal. Penal Code §§ 12050(a)(1)(B), 12050(a)(1)(D)(I), 12050(a)(1)(D)(ii).

Following successful training and background checks, the issuance of a permit to carry a handgun is left to the discretion of the issuing

authority, based upon that authority's determination that an applicant "is of good moral character, [and] that good cause exists for the issuance" of the permit. Cal. Penal Code §§ 12050(a)(1)(A), 12050(a)(1)(B). Issuing authorities must publish policies regarding the issuance of handgun carry permits. Cal. Penal Code § 12050.2.

2. *Defendants' Licensing Policies.*

Defendant Ed Prieto is the Sheriff of Yolo County. ER 63 ¶3. Prieto's "Concealed Weapons License Policy" provides that applicants "Be of good moral character," "Show good cause for the issuance of the license," and "Provide at least three letters of character reference,"ER 20, "from individuals other than relatives." ER 21. The application requires disclosure of "substantial personal information [that] may be subject public access under the Public Records Act." ER 20.

Defendants reject self-defense, without more, as a reason to even apply for a permit. Prieto's written policy regarding the issuance of gun carry permits includes among "examples of invalid reasons to request a permit" "self-protection and protection of family (without credible threats of violence)." ER 21. Applicants are not scheduled for

fingerprinting unless "the Sheriff or his designee *feels* there is sufficient reason to grant the license." ER 21 (emphasis added). Even if issued, Prieto reserves the right to impose "any and all reasonable restrictions and conditions" that he "has deemed warranted," the violation of which can lead to summary revocation of the permit. ER 22. Prieto maintains that "the issuance, amendment or revocation" of a gun carry license "remains exclusively within the discretion of the Sheriff." ER 24. Gun licenses may be renewed "[i]f the Sheriff or his designee *feels* there is sufficient reason to renew the license." ER 25 (emphasis added).

3. *Defendants' Application of the Law to Plaintiffs.*

Plaintiffs Adam Richards and Brett Stewart are law-abiding residents of Yolo County, fully qualified under federal and California law to purchase and possess firearms. ER 54, ¶¶1, 2; ER 56, ¶¶1, 2. In March, 2009, Richards contacted Defendant Prieto's office to inquire about the process for obtaining a permit to carry a handgun. Defendant Prieto's office advised Richards that the desire to have a gun available for self-defense would not constitute "good cause" for the issuance of the permit, and that he should not apply because doing so would be a futile

act. ER 54-55, ¶4. Plaintiff Richards was further advised that as a matter of policy, his application would also not be considered unless he first applied to the Chief of Police in the City of Davis, where he resides. ER 55, ¶¶4, 5.

Richards subsequently applied to Davis Police Chief Lanny Black for a permit to carry a handgun. On April 1, 2009, Police Chief Black denied Plaintiff Richards' application for a permit to carry a handgun, stating that for budgetary reasons his department no longer processes handgun carry permit applications, and suggesting that Richards seek a permit from Prieto. ER 55 ¶5. Plaintiff Richards seeks to exercise his Second Amendment right to carry a handgun for personal protection. ER 54 ¶3. He seeks a handgun carry permit so that he might protect himself and his family. However, Richards has received no threats of violence and is unaware of any specific threat to him or his family. *Id.*

Richards has read Defendant Prieto's written policy declaring that "self-protection and protection of family (without credible threats of violence)" is among "examples of invalid reasons to request a permit," which is consistent with his experience in unsuccessfully seeking a handgun carry permit. ER 55 ¶¶6, 7. Richards thus understands that

he lacks "good cause" to obtain a permit as that term is defined and implemented by Defendants Prieto and Yolo County. ER 55 ¶8. Richards fears arrest, prosecution, fines and imprisonment were he to carry a handgun without a permit. But for the lack of a handgun carry permit and fear of prosecution, Richards would carry a handgun in public for self-defense. ER 55 ¶10.

On or about March 17, 2010, Stewart applied to Davis Police Chief Lanny Black for a permit to carry a handgun. On March 18, 2010, Police Chief Black denied Plaintiff Stewart's application for a permit to carry a handgun, stating that for budgetary reasons his department no longer processes handgun carry permit applications, but suggested that Stewart seek a permit from Prieto. ER 57 ¶5. On or about March 23, 2010, Plaintiff Stewart applied to Defendant Prieto for a permit to carry a handgun. On April 27, 2010, Stewart was informed that his application was denied, because "the reasons listed in your application do not meet the criteria in our policy." ER 29, 57 ¶6. Plaintiff Stewart seeks to exercise his Second Amendment right to carry a handgun for personal protection. He seeks a handgun carry permit so that he might protect himself and his family. However, Stewart has received no

threats of violence and is unaware of any specific threat to him or his family. ER 56 ¶3. Stewart fears arrest, prosecution, fines and imprisonment were he to carry a handgun without a permit. But for the lack of a permit to do so, Stewart would carry a handgun in public for self-defense. ER 57 ¶7.

Plaintiff SAF is a non-profit membership organization incorporated under the laws of Washington with its principal place of business in Bellevue, Washington. ER 58 ¶2. SAF has over 650,000 members and supporters nationwide, including many in California. ER 58 ¶2. The purposes of SAF include education, research, publishing and legal action focusing on the Constitutional right to privately own and possess firearms, and the consequences of gun control. *Id.*

Plaintiff Calguns is a California non-profit organization. ER 60 ¶2. The purposes of Calguns include supporting the California firearms community by promoting education for all stakeholders about firearm laws, rights and privileges, and securing the civil rights of California gun owners, who are among its members and supporters. *Id.*

SAF and Calguns expend their resources encouraging exercise of the right to bear arms, and advising and educating people about the varying policies with respect to the public carrying of handguns in California, including in Yolo County. Defendants' policies regularly cause the expenditure of resources by SAF and Calguns as people turn to these organizations for advice and information. The issues raised by, and consequences of, Defendants' policies, are of great interest to SAF and Calguns' constituencies. SUF 59 ¶3, 61 ¶3. Defendants' policies bar the members and supporters of SAF and Calguns from obtaining permits to carry handguns. ER 59 ¶4, 61 ¶4. SAF and Calguns members regularly carry functional handguns for self-defense where that activity is legal. SAF and Calguns' members and supporters in Yolo County would carry firearms for self-defense, but refrain from doing so because they fear arrest, prosecution, fine, and imprisonment for lack of a license to carry a handgun. ER 59 ¶5, 61 ¶4.

## SUMMARY OF ARGUMENT

Americans plainly enjoy a fundamental right to publicly carry handguns—loaded, functional handguns—for self-defense. Of course, the right is not absolute. The state may regulate and restrict the right

to bear arms in any number of ways not relevant here. But there is no disputing the fact that the Supreme Court held just three years ago that "[a]t the time of the founding, as now, to 'bear' meant to 'carry.'" *District of Columbia* v. *Heller*, 554 U.S. 570, 584 (2008) (citations omitted). Defendants might pretend that *Heller*'s holding is optional or unclear, but they offer no alternative definition for the constitutional text, if it does not mean what the Supreme Court held it means.

And since the Supreme Court has added that this right to bear arms is fundamental, the case is controlled in the first instance by the long-standing and not overly controversial doctrine that however else the government might regulate the exercise of a fundamental right, it must do so pursuant to objective, well-defined standards. Prior restraints cannot turn on the personal whims and, as Defendant Prieto's policy repeatedly asserts, "feelings" of a licensing official.

To the extent that Defendants' discretionary licensing implicates the Equal Protection Clause, by classifying individuals in the exercise of a fundamental right based upon the Sheriff's "feelings," the case might well be decided under some level of means-ends scrutiny as recently set

forth in *Nordyke*. And on this count, *Nordyke* is plainly dispositive in Plaintiffs' favor, as the interposition of Sheriff Prieto's "feelings" between responsible individuals and their fundamental rights constitutes a substantial burden on the right to bear arms, triggering heightened judicial scrutiny that the Sheriff's whims cannot satisfy.

But far simpler options exist to resolve this dispute. While courts are only starting to explore the application of means-ends scrutiny in the Second Amendment context, courts are highly experienced in applying standards for licensing the exercise of constitutional rights—standards that account for the nature and function of licensing, without involving any scrutiny-level selection or balancing exercises.

To decide this case, it is enough to acknowledge what has long been established in our legal system: access to fundamental rights does not turn on some official's unlimited discretion. There is no need to opine further about what regulations may or may not be acceptable.

# ARGUMENT

## I. THE SECOND AMENDMENT SECURES THE RIGHT TO CARRY ARMS IN PUBLIC FOR SELF-DEFENSE.

### A. THE RIGHT TO BEAR ARMS, TRADITIONALLY UNDERSTOOD, EXTENDS BEYOND THE HOME.

The Second Amendment protects the right "to keep and bear arms." U.S. Const. amend. II. This syntax is not unique within the Bill of Rights. For example, the Sixth Amendment guarantees the right to a "speedy and public trial," U.S. Const. amend. VI, while the Eighth Amendment secures individuals from "cruel and unusual" punishment. U.S. Const. amend. VIII. Just as the Sixth Amendment does not sanction secret, speedy trials or public, slow trials, and the Eighth Amendment does not allow the usual practice of torture, the Second Amendment's reference to "keep and bear" refers to two distinct concepts.

The Supreme Court's first foray into Second Amendment law centered around the question of whether individuals had the right to transport a sawed-off shotgun between Claremore, Oklahoma and Siloam Springs, Arkansas—plainly, an activity that took place outside the home. *United States* v. *Miller*, 307 U.S. 174, 175 (1939). Whatever

else it might have held, *Miller* indicated that the Second Amendment has operative relevance on the highways.

Nearly seventy years later, the Supreme Court held that the Second Amendment's "words and phrases were used in their normal and ordinary as distinguished from technical meaning." *Heller*, 554 U.S. at 576. Rejecting an argument that the term "bear arms" indicates an exclusively military undertaking, this Court held that "[a]t the time of the founding, as now, to 'bear' meant to 'carry.'" *Heller*, 554 U.S. at 584 (citations omitted).

> To "bear arms," as used in the Second Amendment, is to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person."

*Id*. (quoting *Muscarello* v. *United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting); BLACK'S LAW DICTIONARY 214 (6th Ed. 1998)). Accordingly, the Court repeatedly referred to "the Second Amendment right, protecting only individuals' liberty to keep and carry arms." *Heller*, 554 U.S. at 604; *id.*, at 626.

Having defined the Second Amendment's language as including a right to "carry" guns for self-defense, the Court helpfully noted several

exceptions that prove the rule. Explaining that this right is "not unlimited," in that there is no right to "carry any weapon whatsoever in any manner whatsoever and for whatever purpose," *Heller*, 554 U.S. at 626 (citations omitted), the Court confirmed that there is a right to carry at least some weapons, in some manner, for some purpose. The Court then listed as "presumptively lawful," *Heller*, 554 U.S. at 627 n.26, "laws forbidding the carrying of firearms in sensitive places," *id.*, at 626, confirming both that such "presumptions" may be overcome in appropriate circumstances, and that carrying bans are not presumptively lawful in non-sensitive places.

Eliminating any doubt that it reached the issue of "bearing arms," *Heller* discussed with approval four nineteenth-century right to arms opinions explicating the rule that a manner of carrying guns may be forbidden, but not the entire practice itself. *See Heller*, 554 U.S. at 629 (discussing *Nunn* v. *State*, 1 Ga. 243 (1846); *Andrews* v. *State*, 50 Tenn. 165 (1871), and *State* v. *Reid*, 1 Ala. 612, 616-17 (1840)); 554 U.S. at 613 (citing *State* v. *Chandler*, 5 La. Ann. 489, 490 (1850)); *see discussion, infra.*

In upholding the right to carry a handgun under the Second Amendment, the *Heller* court broke no new ground. As early as 1846, Georgia's Supreme Court, applying the Second Amendment, quashed an indictment for the carrying of a handgun that failed to allege whether the handgun was being carried in a constitutionally-protected manner. *Nunn*, 1 Ga. at 251; *see also In re Brickey*, 70 P. 609 (Idaho 1902) (Second Amendment right to carry handgun). Numerous state constitutional right to arms provision have likewise been interpreted as securing the right to carry a gun in public, albeit often, to be sure, subject to some regulation. *See, e.g. Kellogg* v. *City of Gary*, 562 N.E.2d 685 (Ind. 1990); *State ex rel. City of Princeton* v. *Buckner*, 377 S.E.2d 139 (W. Va. 1988); *City of Las Vegas* v. *Moberg*, 485 P.2d 737 (N.M. Ct. App. 1971); *State* v. *Kerner*, 107 S.E. 222 (N.C. 1921); *State* v. *Rosenthal*, 55 A. 610 (Vt. 1903) (striking down ban on concealed carry); *Andrews*, *supra*, 50 Tenn. 165; *see also State* v. *Delgado*, 692 P.2d 210 (Or. 1984) (right to carry a switchblade knife).

Indeed, the Supreme Court extolled various traditional outdoor firearms activities. The right was valued "for self-defense *and hunting*."

*Heller*, 554 U.S. at 599 (emphasis added). "The settlers' dependence on game for food and economic livelihood, moreover, undoubtedly undergirded . . . state constitutional guarantees [of the right to arms]." *McDonald*, 130 S. Ct. at 3042 n.27. "No doubt, a citizen who keeps a gun or pistol under judicious precautions, *practices in safe places the use of it*, and in due time teaches his sons to do the same, exercises his individual right [to bear arms]." *Heller*, 554 U.S. at 619 (citation omitted) (emphasis added). Hunting and target practice, at least with firearms, are activities not typically pursued at home.

Even Justice Stevens foresaw the Second Amendment's application beyond the home:

> Given the presumption that most citizens are law abiding, and the reality that the need to defend oneself may suddenly arise in a host of locations outside the home, I fear that the District's policy choice may well be just the first of an unknown number of dominoes to be knocked off the table.

*Heller*, 554 U.S. at 679-80 (Stevens, J., dissenting); *see also id.* at 677 n.38 (majority secures right to arms for "self-defense, recreation, and other lawful purposes") (Stevens, J., dissenting).[2]

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[2]Justice Stevens offered that the Amendment "*does* encompass the right to use weapons for certain military purposes," *Heller*, 554 U.S. at

Courts sometimes do heed the Supreme Court's admonition that while the right to arms is secured "most notably for self-defense within the home," *McDonald*, 130 S. Ct. at 3044, "where the need for defense of self, family, and property is most acute," *Heller*, 554 U.S. at 628, it is not so limited. "[T]he core right identified in *Heller* [is] the right of a law-abiding, responsible citizen to possess and carry a weapon for self-defense." *United States* v. *Chester*, 628 F.3d 673, 683 (4th Cir. 2010). "*Heller* does not preclude Second Amendment challenges to laws regulating firearm possession outside of home." *Peruta* v. *County of San Diego*, 678 F. Supp. 2d 1046, 1051 (S.D. Cal. 2010).

Rejecting the limitation of *Heller* to its facts, the Seventh Circuit sitting *en banc* observed: "the Second Amendment creates individual rights, *one of which* is keeping operable handguns at home for self-defense. What other entitlements the Second Amendment creates, and what regulations legislatures may establish, were left open." *United States* v. *Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (emphasis added). Less than a year later, the Seventh Circuit applied

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636 (Stevens, J., dissenting), presumably, outside the home.

the right to keep and bear arms outside the home, enjoining Chicago's ban on the operation of gun ranges by recognizing a Second Amendment right to practice shooting. "The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective." *Ezell* v. *City of Chicago*, 2011 U.S. App. LEXIS 14108 at *48 (7th Cir. July 6, 2011).

The right to keep and bear arms plainly applies outside the home.

### B. *HELLER*'S INTERPRETATION OF "BEAR ARMS" CARRIES PRECEDENTIAL WEIGHT.

Notwithstanding courts' traditional application of the right to bear arms beyond the home, including in Second Amendment cases such as *Miller* and *Nunn*, and the fact that *Heller* specifically held "bear arms" means publicly-carrying arms for self-defense, the lower court believed *Heller* is limited to its specific facts—as though the majority needlessly filled 66 pages of the U.S. Reports for its own edification where a one-line holding would have sufficed to deliver the same precedential value. Apparently rejecting the idea that it should seek guidance in the reasoning offered by a higher court's opinion, the lower court explained,

"*Heller*'s ultimate holding is not the Court's interpretation of the historical significance of the Second Amendment's language." ER 9 n.4; *contra United States* v. *Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) ("historical meaning enjoys a privileged interpretative role in the Second Amendment context") (citations omitted).[3]

In other words, the Supreme Court's "interpretation of the historical significance of the Second Amendment's language" is meaningless. Although review here is in any event de novo, Plaintiffs stress the lower court's opinion is unusually devoid of persuasive merit, as among its many errors, it appeared to reject the very notion that the Supreme Court's considered views of the Constitution offered it any guidance.

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[3]But this was not to say that the Second Amendment even means what *Heller*'s literal holding would provide, for the lower court held the Second Amendment lacks fixed meaning. "Compared to many of this country's constitutional protections, the scope of rights under the Second Amendment is ambiguous and no doubt subject to change and evolution over time." ER 16; *contra Heller*, 554 U.S. at 576 (Second Amendment interpreted according to its original public meaning); *id.* at 629 n.27 (Second Amendment treated like other enumerated rights); *McDonald*, 130 S. Ct. at 3045 (emphatically rejecting argument that "the Second Amendment differs from all of the other provisions of the Bill of Rights . . .").

Nonetheless, because the claim that *Heller* must be limited to its facts is often invoked, including by Defendants, it merits Plaintiffs' discussion. Of course, lower courts *are* bound by the decisional law of the Supreme Court—and the Supreme Court's extensive discussion of carrying firearms outside the home in *Heller* was not dictum. It is well established that

> When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound . . . the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law . . .

*Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 67 (1996) (citations and internal quotation marks omitted). Thus, a statement that "explains the court's rationale . . . is part of the holding." *United States* v. *Bloom*, 149 F.3d 649, 653 (7th Cir. 1998). In contrast,

> [a] dictum is a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding—that, being peripheral, may not have received the full and careful consideration of the court that uttered it.

*Sarnoff* v. *Am. Home Prods. Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986).

Considering its need to address the District of Columbia's collectivist interpretation, the Court's conclusion that the right to "bear arms" is

the right to "carry weapons in case of confrontation" was essential to its resolution of *Heller*. Accordingly, it is part of *Heller*'s holding. The numerous pages describing how that right would be applied outside the home in different contexts only underscore the fact that the matter received the Court's exhaustive consideration, even if it was not literally memorialized in the awarded relief.[4]

Ironically, the lower court invoked *United States* v. *Vongxay*, 594 F.3d 1111 (9th Cir. 2010), for the proposition that *Heller* must be limited to its facts, notwithstanding the Supreme Court's definition of the term "bear arms." But *Vongxay* suggested the *opposite* proposition, specifically turning away a challenge to the federal felony firearms prohibition based upon the claim that *Heller*'s approval of that restriction was, in that case, dicta. *Vongxay*, 594 F.3d at 1115.

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[4]The Supreme Court ordered that the District of Columbia "must issue [Heller] a license to carry [his handgun] in the home." *Heller*, 554 U.S. at 635. But using this language to suggest a home-limitation would be seriously misleading. Heller challenged, among other provisions, former D.C. Code § 22-4504(a) (2008), that had provided that the carrying of handguns inside one's home without a permit constituted a misdemeanor offense. 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). The reference to an in-home carry permit merely tracked Heller's prayer for relief. *Heller*, 554 U.S. at 630-31.

In other words, *Heller*'s definition of a disputed constitutional provision, necessary to resolve the core legal claims in the case, is a careless musing. But *Heller*'s actual dicta, its discussion of a host of laws not remotely at issue in the case, is deemed unshakeable. Respectfully, this is not the way to read precedent. Right or wrong, and in any event binding, *Heller* functions like a normal judicial opinion—it is not "all exceptions, no holding."

Missing from the lower court's analysis is any reasoning for *why* *Heller* must be limited to its facts. Or more critically, even if the Supreme Court's definition of "bear arms" is to be ignored as dicta, what other meaning might that constitutional text hold? Until recently, opponents of the individual right to bear arms offered a militaristic, state-directed definition, but *Heller* dispensed with that option. Plaintiffs aver that the definition offered by the Supreme Court comports with the Second Amendment's original public meaning. Defendants, and the lower court, have offered no alternative definition. Merely pretending that the opinion leaves no instruction as to the bearing of arms does not advance the resolution of the case.

## II. CALIFORNIA HAS SELECTED CONCEALED CARRYING AS THE PERMISSIBLE MODE OF EXERCISING THE RIGHT TO BEAR ARMS.

Fully consistent with the right to bear arms, state actors have traditionally been allowed broad leeway in prescribing the manner in which guns are carried. Accordingly, "the right of the people to keep and bear arms (Article 2) is not infringed by laws prohibiting the carrying of *concealed* weapons . . . ." *Robertson* v. *Baldwin*, 165 U.S. 275, 281-82 (1897) (emphasis added). Plaintiffs have never argued for a right to carry handguns in, specifically, a concealed manner. The right is to carry arms, generally, subject to the state's regulatory authority allowing for outright bans on particular modes of carry.

Accordingly, it is not an accurate statement of Plaintiffs' claims that they seek a right to carry concealed weapons as such—something that Plaintiffs have disclaimed time and again before the lower court, to no avail. ER 9 n.4. Nor is it an accurate statement of the law to hold that all restrictions on the concealed carrying of arms are constitutional, simply because the practice may be entirely prohibited. The Supreme Court has cautioned that concealed carry bans are only "presumptively" constitutional. *Heller*, 554 U.S. at 627 n.26. As one court observed,

> [N]ot *all* concealed weapons bans are presumptively lawful. *Heller* and the 19th-century cases it relied upon instruct that concealed weapons restrictions cannot be viewed in isolation; they must be viewed in the context of the government's overall scheme.

*Peruta* v. *County of San Diego*, 758 F. Supp. 2d 1106, 1114 (S.D. Cal. 2010) (emphasis in original).[5]

Surveying the history of concealed carry prohibitions, it appears time and again that such laws have been upheld as mere regulations of the manner in which arms are carried—with the understanding that a complete ban on the carrying of handguns is unconstitutional.

As noted *supra*, *Heller* discussed, with approval, four state supreme court opinions that referenced this conditional rule. Upholding a ban on the carrying of concealed weapons, Alabama's high court explained:

> We do not desire to be understood as maintaining, that in regulating the manner of bearing arms, the authority of the Legislature has no other limit than its own discretion. A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional. But a

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[5]Although this Court once held that there is no liberty interest in obtaining a concealed carry permit, *Erdelyi* v. *O'Brien*, 680 F.2d 61 (9th Cir. 1982), the Second Amendment was not considered in that case. *Erdelyi* does not mention, let alone discuss, the Second Amendment, and was decided long before the Second Amendment was clarified to protect a fundamental right.

> law which is merely intended to promote personal security, and to put down lawless aggression and violence, and to this end prohibits the wearing of certain weapons in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others, does not come in collision with the Constitution.

*Reid*, 1 Ala. at 616-17.

The *Nunn* court followed *Reid*, quashing an indictment for publicly carrying a pistol for failing to specify how the weapon was carried:

> so far as the act . . . seeks to suppress the practice of carrying certain weapons *secretly*, that it is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void*.

*Nunn*, 1 Ga. at 251 (emphasis original).

*Andrews* presaged *Heller* by finding that a revolver was a protected arm under the state constitution's Second Amendment analog. It therefore struck down as unconstitutional the application of a ban on the carrying of weapons to a man carrying a revolver, declaring:

> If the Legislature think proper, they may by a proper law regulate the carrying of this weapon publicly, or abroad, in such a manner as may be deemed most conducive to the public peace, and the protection and safety of the community from lawless violence. We only hold that, as to this weapon, the prohibition is too broad to be sustained.

*Andrews*, 165 Tenn. at 187-88.[6]

Finally, in *Chandler,*

> the Louisiana Supreme Court held that citizens had a right to carry arms openly: "This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations."

*Heller*, 554 U.S. at 613 (quoting *Chandler*, 5 La. Ann. at 490).

The legal treatises relied upon by the *Heller* court explained the rule succinctly. For supporting the notion that concealed carrying may be banned, *Heller* further cites to THE AMERICAN STUDENTS' BLACKSTONE, 84 n.11 (G. Chase ed. 1884), *Heller*, 554 U.S. at 626, which provides:

> [I]t is generally held that statutes prohibiting the carrying of *concealed* weapons are not in conflict with these constitutional provisions, since they merely forbid the carrying of arms in a particular manner, which is likely to lead to breaches of the peace and provoke to the commission of crime, rather than contribute to public or personal defence. In some States, however, a contrary doctrine is maintained.

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[6] *Andrews* appeared to abrogate in large part *Aymette* v. *State*, 21 Tenn. 154 (1840), upholding the prohibition on the concealed carry of daggers. But even *Aymette*, which found a state right to bear arms limited by a military purpose, deduced from that interpretation that the right to bear arms protected the open carrying of arms. *Aymette*, 21 Tenn. at 160-61.

AMERICAN STUDENTS' BLACKSTONE, 84 n.11 (emphasis original); *see* ER 34. This understanding survives today. *See, e.g. In re Application of McIntyre*, 552 A.2d 500, 501 n.1 (Del. Super. 1988) ("'the right to keep and bear arms' does not of necessity require that such arms may be kept concealed").

It is important, then, to recall that (1) the Supreme Court's definition of "bear arms" as that language is used in the Second Amendment includes the concealed carrying of handguns: "wear, bear, or carry . . . *in the clothing or in a pocket* . . ." *Heller*, 554 U.S. at 584 (citations omitted) (emphasis added); (2) the legality of bans on concealed carrying is only presumptive, *Heller*, 554 U.S. at 627 n.26, and (3) the cases supporting concealed carry prohibition explain that no abrogation of the right to carry arms is effected because open carrying is still permitted.

Legislatures might well prefer one form of carrying over another. Precedent relied upon by *Heller* reveals an ancient suspicion of weapons concealment where social norms viewed the wearing of arms as virtuous. But today, the open carrying of a handgun may be

mistakenly viewed as provocative or alarming by individuals unfamiliar with firearms. *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytic Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1523 (2009); *cf. Gonzalez* v. *Vill. of W. Milwaukee*, 2010 U.S. Dist. LEXIS 46281 at *8-*9 (D. Wis. May 11, 2010) ("No reasonable person would dispute that walking into a retail store openly carrying a firearm is highly disruptive conduct which is virtually certain to create a disturbance").[7]

California's mode of regulating the carrying of handguns thus makes perfect sense. In rural, sparsely populated areas, Sheriffs are allowed to issue permits to carry handguns openly. But in more populous areas, the state deprives Sheriffs of this ability, and specifies that permits to carry must be limited to concealed handguns. This manner of regulation is not unusual, and has been adopted by some jurisdictions where the public acceptance of gun rights is relatively high. For

[7]Although *Gonzalez* erred in its unexamined statement that the Second Amendment does not secure the bearing of arms, the case is nonetheless instructive as it probably described accurately its community's modern sentiment regarding the open carrying of arms. Notably, Wisconsin just enacted a "shall issue" system for the issuance of concealed handgun carrying licenses.

example, in Texas, where concealed handgun permits are readily available on a "shall issue" basis, Tex. Gov't Code § 411.177(a), a permit holder who "intentionally fails to conceal the handgun" commits a misdemeanor. Tex. Penal Code § 46.035(a).

*Heller*'s recognition of a right to carry a handgun does not force states such as California and Texas to allow the carrying of handguns in a manner they understandably perceive may cause needless public alarm, so long as a more socially-conducive option exists to allow people to exercise the right to bear arms. But *Heller* confirms that once a choice has been made by the legislature as to which manner of carrying will be permitted, that choice must be honored.

Support for this view comes not merely from the plain language of *Heller* and other precedent, but also from the California Legislature's Legislative Analyst. In 1999 and again in 2001, efforts were made to qualify for the California ballot an initiative constitutional amendment securing a "right to keep and bear arms." Pursuant to Cal. Elections Code § 9005, the proposed amendment was submitted for review by the Joint Budget Committee. The Legislative Analyst twice concluded that

if the state were to adopt a right to keep and bear arms constitutional amendment, existing state law regulating the carrying of guns would not likely be impacted save for limiting discretion in issuing permits:

> While individuals may possess and carry firearms, many of the state's existing systems for . . . weapons permits . . . would likely not change . . . However, local jurisdictions would not be able to limit who obtains concealed weapons permits unless the applicant does not meet federal or state criteria.

ER 42, 51.

Plaintiffs seek permits to carry concealed handguns because concealed handgun permits afford the only available method under California law to bear arms as that right is secured by the Second Amendment. The lower court disagreed, finding Plaintiffs "are still more than free to keep an unloaded weapon nearby their person, load it, and use it for self-defense in circumstances that may occur in a public setting." ER 11. At least in theory, California law allows an individual to publicly carry an *unloaded* handgun, Cal. Penal Code § 12031(e), and to load the handgun when practically under attack, during "the brief interval before and after the local law enforcement agency, when reasonably possible, has been notified of the danger and before the arrival of its assistance." Cal. Penal Code § 12031(j)(1).

Yet the open carrying of an unloaded handgun is an open invitation to criminals to rob an individual of his or her *unloaded* and thus indefensible handgun. Nor does it seriously afford an individual time to react to a sudden criminal attack. Criminal attacks are frequently sudden, and by their nature impose a great deal of stress and difficulty on their victims. Violent criminals are not so chivalrous as to afford their prey time to load their firearms. Defendants' employees do not carry unloaded firearms for a reason.

Moreover, anyone who manages to load their handgun under the narrow timeframe afforded by Section 12031(j)(1) still risks arrest, incarceration, trial—and a criminal fact-finder's determination that the individual did not reasonably perceive a grave threat.

Alas, the Second Amendment right to bear arms is not the right to invite robbery, carry a non-functional weapon, or assert an affirmative defense at a criminal trial. The right to bear arms is the right to be "*armed and ready* for offensive or defensive action in a case of conflict with another person." *Heller*, 554 U.S. at 584 (citation omitted) (emphasis added). "A statute which, under the pretence of regulating . .

. requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional." *Id.* at 629 (citation omitted). For its part, California law distinguishes the fundamental character of loaded from unloaded guns. A person is only considered "armed" if carrying a functional handgun. *See, e.g.* Cal. Penal Code § 12023(a) ("[e]very person who carries a *loaded* firearm with the intent to commit a felony is guilty of armed criminal action") (emphasis added).

In *Heller*, the Supreme Court struck down a requirement that firearms in the home be rendered inoperable, as that "makes it impossible for citizens to use [firearms] for the core lawful purpose of self-defense." *Heller*, 554 U.S. at 630. The ability to possess a non-functional firearm does not satisfy the Second Amendment interest here, either.

It is not the Court's role to question the California Legislature's choice of firearms policies where that choice is one of several constitutionally-valid alternatives. California validly chose to render the open carrying of handguns for self-defense largely impossible, while

licensing the concealed carrying of functional handguns for self-defense. Accordingly, Plaintiffs are entitled to a concealed handgun license—not because *concealed* carrying is specifically protected by the Second Amendment regardless of other regulatory requirements, but because concealed carrying is the only method of bearing arms the state approves pursuant to its authority to elect such a preference.

And even this is not to say that Plaintiffs' entitlement to the permit is unqualified. But the question here is whether access to the state's handgun carry permit can be qualified by "good cause" and "good moral character" requirements as determined at the Sheriff's sole discretion. Most assuredly, the answer to that question is "no."

## III. "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 Plaintiffs 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 *Heller*. 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. 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.

### B. PENAL CODE § 12050'S "GOOD MORAL CHARACTER" AND "GOOD CAUSE" REQUIREMENTS PLAINLY FAIL PRIOR RESTRAINT ANALYSIS.

California's "good moral character" and "good cause" requirements for issuance of a handgun carry permit, and the manner in which Defendants apply these provisions, 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. Sacramento County's response to Plaintiffs' 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).

And Prieto cannot reasonably claim that his policy cabins his discretion in any sort of meaningful, constitutionally-acceptable way. To the contrary, Prieto's written policy repeatedly confirms his exclusive and absolute discretion to adjudicate applicants' moral

character and good cause, and even goes so far as to declare that gun carry permits will be issued or renewed only when "the Sheriff or his designee *feels*" like it. ER 21, 25. Worse still, the Sheriff's written policy provides that "self-protection and protection of family (without credible threats of violence)" are "invalid reasons to request a permit." ER 21. This position categorically violates the Second Amendment. As the Supreme Court has made clear, self-defense is at the core of the Second Amendment right to bear arms.

"[T]he inherent right of self-defense has been central to the Second Amendment right." *Heller*, 554 U.S. at 628. Self-defense "was the *central component* of the right itself." *Heller*, 554 U.S. at 599 (emphasis original) (citation omitted). The English right to arms "has long been understood to be the predecessor to our Second Amendment . . . . It was, [Blackstone] said, 'the natural right of resistance and self-preservation,'and 'the right of having and using arms for self-preservation and defence.'"*Id.*, at 594 (citations omitted). "[T]he right secured in 1689 as a result of the Stuarts' abuses was by the time of the

founding understood to be an individual right protecting against both public and private violence." *Id.*

It bears recalling here that the various cases discussed by *Heller* with respect to carrying guns approved of the practice *for the purpose of self-defense*. *See Heller*, 554 U.S. at 613 ("citizens had a right to carry arms openly [for] 'manly and noble defence of themselves'") (quoting *Chandler*, 5 La. App. at 490); *Heller*, 554 U.S. at 629 ("A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional.") (quoting *Reid*, 1 Ala. at 616-17); *Nunn*, 1 Ga. at 251 (carrying restriction "valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms") (emphasis original). In rejecting self-defense as good cause for a carry license, Defendants' policy all but confirms its unconstitutionality.

Incredibly, the lower court posited that

> Yolo County's policy does contain a standard of conduct; applicants are clearly instructed to be of good moral character (and submit application documents corroborating such character), and demonstrate good cause for requiring the license.

ER 14. And without any apparent sense of irony, this statement immediately followed the court's derision of facial challenges as involving undue speculation.

Respectfully, the uniform weight of precedent does not tolerate rationing the exercise of fundamental rights pursuant to some Sheriff's feelings about good moral character and good cause. The good moral character and good cause provisions of Penal Code § 12050, and Defendants' manner of implementing these requirements, vest unbridled discretion in the Sheriff's authority to license the exercise of fundamental rights. They must be enjoined.

### C. 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 Defendants 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.

> Both *Heller* and *McDonald* suggest that First Amendment analogues are more appropriate [than abortion analogues], *see Heller*, 554 U.S. at 582, 595, 635; *McDonald*, 130 S. Ct. at 3045, and on the strength of that suggestion, we and other circuits have already begun to adapt First Amendment doctrine to the Second Amendment context.

*Ezell*, 2011 U.S. App. LEXIS 14108 at *55. "[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." *Chester*, 628 F.3d at 682 (citations omitted); cf. *Masciandaro*, 638 F.3d at 470 ("[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.[8] The Supreme Court, the D.C., Third,

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[8]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

Fourth, and Seventh Circuits, and in *Nordyke*, this Court, have expressly adopted these concepts to guide 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. But while other emerging Second Amendment challenges require the development of new doctrines, this case can and should be resolved by the time-tested, straightforward logic of prior restraint law.

## IV. THE "GOOD CAUSE" AND "GOOD MORAL CHARACTER" STANDARDS FAIL SECOND AMENDMENT MEANS-ENDS SCRUTINY.

Although prior restraint provides a superior approach to determining this case, it is nonetheless also true that Defendants' challenged practices violate the Second and Fourteenth Amendments when analyzed under a means-ends level of scrutiny. Whether viewed

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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).

as direct infringements of the right to bear arms, or as equal protection violations insofar as they improperly classify individuals in the exercise of a fundamental right, Defendants' "good cause" and "good moral character" standards fail any level of scrutiny.

In this circuit, the precise level of means-ends scrutiny applied in appropriate Second Amendment cases is not fixed. "[O]nly regulations which substantially burden the right to keep and to bear arms trigger heightened scrutiny under the Second Amendment," *Nordyke*, 2011 U.S. App. LEXIS 8906 at *22, although "precisely what type of heightened scrutiny applies to laws that substantially burden Second Amendment rights" remained an open question. *Id.* n.9.[9]

Neither the question of whether Defendants substantially burden the right to arms, nor the determination of a precise standard of review, need long detain this Court. That Plaintiffs are severely burdened in their efforts to bear arms is manifest. Indeed, Plaintiffs are completely forbidden from exercising the right to carry a gun for self-

[9]Even absent a Second Amendment right, handgun carry permit policies may be restrained by the Equal Protection Clause. *Guillory* v. *County of Orange*, 731 F.2d 1379 (9th Cir. 1984).

defense within the meaning of the Second Amendment, as that right is held hostage to Defendants' unfettered discretion. Plaintiffs have no other avenue of relief, and even those who today enjoy Sheriff Prieto's good graces exercise their fundamental right at his pleasure. This contrasts sharply with *Nordyke*, where the plaintiffs were allowed leave to amend their complaint as it was unclear whether they had ample alternative opportunities to exercise their rights. *Nordyke*, at *29-*30.

As for "precisely what type of heightened scrutiny" to apply to this most substantial of Second Amendment burdens, Plaintiffs maintain that strict scrutiny remains the most obvious choice. The Second Amendment secures a fundamental right. *McDonald*, 130 S. Ct. at 3042 (plurality opinion) & 3059 (Thomas, J., concurring).

> The phrase [fundamental personal rights and liberties] is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.

*Schneider*, 308 U.S. at 161.

"[C]lassifications affecting fundamental rights are given the most exacting scrutiny." *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988) (citation

omitted). "Where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized." *Hussey* v. *City of Portland*, 64 F.3d 1260, 1265 (9th Cir. 1995) (quoting *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 670 (1966)).

Of course, the nature of the restriction or violation may impact the standard of review. "Borrowing from the Court's First Amendment doctrine, the rigor of this judicial review will depend on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right." *Ezell*, 2011 U.S. App. 14108 at *43-*44 (citations omitted). "[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." *Masciandaro,* 638 F.3d at 470. For example, where a Second Amendment right was asserted on behalf of a violent family-abuser, the Fourth Circuit applied intermediate as opposed to strict scrutiny because the Second Amendment is primarily concerned with the rights

of "*law-abiding*, responsible" people. *Chester*, 628 F.3d at 683.

> Labels aside, we can distill this First Amendment doctrine and extrapolate a few general principles to the Second Amendment context. First, a severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end. Second, laws restricting activity lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified. How much more easily depends on the relative severity of the burden and its proximity to the core of the right.

*Ezell*, 2011 U.S. App. LEXIS at *59. Enjoining Chicago's gun range ban, the Seventh Circuit concluded that "a more rigorous showing than that applied in *Skoien* should be required, if not quite 'strict scrutiny.'" *Ezell*, at *60.

However, regardless of the standard utilized, "good cause" and "moral character" pre-requisites to the exercise of a fundamental right fail for the simple reason that there is no legitimate governmental interest at stake. To be sure, Defendants have a compelling governmental interest in regulating firearms in the interest of public safety. But if there is a *right* to carry a handgun for self-defense, Defendants cannot deny that right to anyone on grounds that the right itself is too dangerous to permit. The very idea that individuals enjoy a

right means that the state lacks an interest, without more, in preventing them from enjoying it.

Nor is the arbitrary licensing practice even rationally tailored to any interest in public safety. Defendants are plainly incapable of predicting crime. Defendants cannot predict who will face, much less when or where, a situation in which the right to self-defense would be desperately needed. Crime is largely random and unpredictable. Individuals victimized once may never be victimized again, while an individual's first encounter with a violent criminal often leads to death or seriously bodily harm. The very existence of crime is an argument against its predictability, as prospective victims, with foreknowledge, would take preventive measures. The right to self-defense at the Second Amendment's core does not depend for its existence on a history of previous victimization.

There is something deeply illogical about Defendants' refusal to issue a permit to carry a handgun until *after* a threat to one's life and/or loved ones has materialized. Individuals enjoy a right to carry handguns "for the purpose . . . of being armed and ready for offensive or

defensive action in a case of conflict with another person." *Heller*, 554 U.S. at 584 (citations omitted). The Second Amendment does not exist merely to increase the security of previously victimized individuals.

## CONCLUSION

The Second Amendment plainly secures a right to carry handguns for self-defense. That right is not satisfied by openly carrying unloaded handguns. California has opted to regulate this right by allowing the licensed carrying of concealed handguns. It follows that such licensing must satisfy constitutional standards.

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, these provisions, and their application by Defendants, must be struck down.

In the alternative, the "good cause" and "good moral character" licensing pre-requisites fail to satisfy any means-ends level of scrutiny appropriate to the security of fundamental rights, or even rational basis review, as Defendants have no interest in preventing the exercise of

constitutional rights, and cannot pre-determine when someone might need to exercise their right of self-defense.

The judgment below should be reversed, and the case remanded with instructions to enter summary judgment for Plaintiffs.

## RELATED CASES

*Peruta* v. *County of San Diego*, 10-56971.

Dated: August 24, 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 11,653 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
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Dated: August 24, 2011

## CERTIFICATE OF SERVICE

On this, the 24th day of August, 2011, I served the foregoing 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 24th day of August, 2011

/s/ Alan Gura
Alan Gura

ADDENDUM

Addendum

U.S. Const. amend. II. . . . . 1

Cal. Penal Code § 12023 .. . . . . 1

Cal. Penal Code § 12025. . . . . 1

Cal. Penal Code § 12031. . . . . 3

Cal. Penal Code § 12050. . . . . 10

Cal. Penal Code § 12050.2.. . . . . 15

Cal. Penal Code § 12052 .. . . . . 15

**U.S. Const. amend. II**:

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

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**Cal. Penal Code § 12023.** (Repealed January 1, 2012) Armed criminal action; Punishment

(a) Every person who carries a loaded firearm with the intent to commit a felony is guilty of armed criminal action.

(b) Armed criminal action is punishable by imprisonment in a county jail not exceeding one year, or in the state prison.

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**Cal. Penal Code § 12025.** (First of two; Operative until October 1, 2011; Repealed January 1, 2012) Carrying concealed firearm; Misdemeanor or felony offense; Sentencing

(a) A person is guilty of carrying a concealed firearm when he or she does any of the following:

(1) Carries concealed within any vehicle which is under his or her control or direction any pistol, revolver, or other firearm capable of being concealed upon the person.

(2) Carries concealed upon his or her person any pistol, revolver, or other firearm capable of being concealed upon the person.

(3) Causes to be carried concealed within any vehicle in which he or she is an occupant any pistol, revolver, or other firearm capable of being concealed upon the person.

(b) Carrying a concealed firearm in violation of this section is punishable, as follows:

(1) Where the person previously has been convicted of any felony, or of any crime made punishable by this chapter, as a felony.

(2) Where the firearm is stolen and the person knew or had reasonable cause to believe that it was stolen, as a felony.

(3) Where the person is an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22, under the Street Terrorism Enforcement and Prevention Act (Chapter 11

(commencing with Section 186.20) of Title 7 of Part 1), as a felony.

(4) Where the person is not in lawful possession of the firearm, as defined in this section, or the person is within a class of persons prohibited from possessing or acquiring a firearm pursuant to Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code, as a felony.

(5) Where the person has been convicted of a crime against a person or property, or of a narcotics or dangerous drug violation, by imprisonment in the state prison, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($1,000), or by both that imprisonment and fine.

(6) By imprisonment in the state prison, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($1,000), or by both that fine and imprisonment if both of the following conditions are met:

(A) Both the pistol, revolver, or other firearm capable of being concealed upon the person and the unexpended ammunition capable of being discharged from that firearm are either in the immediate possession of the person or readily accessible to that person, or the pistol, revolver, or other firearm capable of being concealed upon the person is loaded as defined in subdivision (g) of Section 12031.

(B) The person is not listed with the Department of Justice pursuant to paragraph (1) of subdivision (c) of Section 11106, as the registered owner of that pistol, revolver, or other firearm capable of being concealed upon the person.

(7) In all cases other than those specified in paragraphs (1) to (6), inclusive, by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($1,000), or by both that imprisonment and fine.

(c) A peace officer may arrest a person for a violation of paragraph (6) of subdivision (b) if the peace officer has probable cause to believe that the person is not listed with the Department of Justice pursuant to paragraph (1) of subdivision (c) of Section 11106 as the registered owner of the pistol, revolver, or other firearm capable of being concealed upon the person, and one or more of the conditions in subparagraph (A) of paragraph (6) of subdivision (b) is met.

(d)

(1) Every person convicted under this section who previously has been convicted of a misdemeanor offense enumerated in Section 12001.6 shall be punished by imprisonment in a county jail for at least three months and not exceeding six months, or, if granted probation, or if the execution or imposition of sentence is suspended, it shall be a condition thereof that he or she be imprisoned in a county jail for at least three months.

(2) Every person convicted under this section who has previously been convicted of any felony, or of any crime made punishable by this chapter, if probation is granted, or if the execution or imposition of sentence is suspended, it shall be a condition thereof that he or she be imprisoned in a county jail for not less than three months.

(e) The court shall apply the three-month minimum sentence as specified in subdivision (d), except in unusual cases where the interests of justice would best be served by granting probation or suspending the imposition or execution of sentence without the minimum imprisonment required in subdivision (d) or by granting probation or suspending the imposition or execution of sentence with conditions other than those set forth in subdivision (d), in which case, the court shall specify on the record and shall enter on the minutes the circumstances indicating that the interests of justice would best be served by that disposition.

(f) Firearms carried openly in belt holsters are not concealed within the meaning of this section.

(g) For purposes of this section, "lawful possession of the firearm" means that the person who has possession or custody of the firearm either lawfully owns the firearm or has the permission of the lawful owner or a person who otherwise has apparent authority to possess or have custody of the firearm. A person who takes a firearm without the permission of the lawful owner or without the permission of a person who has lawful custody of the firearm does not have lawful possession of the firearm.

(h)

(1) The district attorney of each county shall submit annually a report on or before June 30, to the Attorney General consisting of profiles by race, age, gender, and ethnicity of any person charged with a felony or a misdemeanor under this section and any other offense charged in the same complaint, indictment, or information.

(2) The Attorney General shall submit annually, a report on or before December 31, to the Legislature compiling all of the reports submitted pursuant to paragraph (1).

(3) This subdivision shall remain operative until January 1, 2005, and as of that date shall be repealed.

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**Cal. Penal Code § 12031.** (Repealed January 1, 2012) Felony or misdemeanor of carrying loaded firearm in public place or on public street; Exceptions

(a)

(1) A person is guilty of carrying a loaded firearm when he or she carries a loaded firearm on his

or her person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory.

(2) Carrying a loaded firearm in violation of this section is punishable, as follows:

(A) Where the person previously has been convicted of any felony, or of any crime made punishable by this chapter, as a felony.

(B) Where the firearm is stolen and the person knew or had reasonable cause to believe that it was stolen, as a felony.

(C) Where the person is an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22, under the Street Terrorism Enforcement and Prevention Act (Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1), as a felony.

(D) Where the person is not in lawful possession of the firearm, as defined in this section, or is within a class of persons prohibited from possessing or acquiring a firearm pursuant to Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code, as a felony.

(E) Where the person has been convicted of a crime against a person or property, or of a narcotics or dangerous drug violation, by imprisonment in the state prison, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($1,000), or by both that imprisonment and fine.

(F) Where the person is not listed with the Department of Justice pursuant to Section 11106, as the registered owner of the handgun, by imprisonment in the state prison, or by imprisonment in a county jail not to exceed one year, or by a fine not to exceed one thousand dollars ($1,000), or both that fine and imprisonment.

(G) In all cases other than those specified in subparagraphs (A) to (F), inclusive, as a misdemeanor, punishable by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($1,000), or by both that imprisonment and fine.

(3) For purposes of this section, "lawful possession of the firearm" means that the person who has possession or custody of the firearm either lawfully acquired and lawfully owns the firearm or has the permission of the lawful owner or person who otherwise has apparent authority to possess or have custody of the firearm. A person who takes a firearm without the permission of the lawful owner or without the permission of a person who has lawful custody of the firearm does not have lawful possession of the firearm.

(4) Nothing in this section shall preclude prosecution under Sections 12021 and 12021.1 of this code, Section 8100 or 8103 of the Welfare and Institutions Code, or any other law with a greater

penalty than this section.

(5)

(A) Notwithstanding paragraphs (2) and (3) of subdivision (a) of Section 836, a peace officer may make an arrest without a warrant:

(i) When the person arrested has violated this section, although not in the officer's presence.

(ii) Whenever the officer has reasonable cause to believe that the person to be arrested has violated this section, whether or not this section has, in fact, been violated.

(B) A peace officer may arrest a person for a violation of subparagraph (F) of paragraph (2), if the peace officer has probable cause to believe that the person is carrying a loaded handgun in violation of this section and that person is not listed with the Department of Justice pursuant to paragraph (1) of subdivision (c) of Section 11106 as the registered owner of that handgun.

(6)

(A) Every person convicted under this section who has previously been convicted of an offense enumerated in Section 12001.6, or of any crime made punishable under this chapter, shall serve a term of at least three months in a county jail, or, if granted probation or if the execution or imposition of sentence is suspended, it shall be a condition thereof that he or she be imprisoned for a period of at least three months.

(B) The court shall apply the three-month minimum sentence except in unusual cases where the interests of justice would best be served by granting probation or suspending the imposition or execution of sentence without the minimum imprisonment required in this subdivision or by granting probation or suspending the imposition or execution of sentence with conditions other than those set forth in this subdivision, in which case, the court shall specify on the record and shall enter on the minutes the circumstances indicating that the interests of justice would best be served by that disposition.

(7) A violation of this section which is punished by imprisonment in a county jail not exceeding one year shall not constitute a conviction of a crime punishable by imprisonment for a term exceeding one year for the purposes of determining federal firearms eligibility under Section 922(g)(1) of Title 18 of the United States Code.

(b) Subdivision (a) shall not apply to any of the following:

(1) Peace officers listed in Section 830.1 or 830.2, or subdivision (a) of Section 830.33, whether active or honorably retired, other duly appointed peace officers, honorably retired peace officers listed in subdivision (c) of Section 830.5, other honorably retired peace officers who during the

course and scope of their employment as peace officers were authorized to, and did, carry firearms, full-time paid peace officers of other states and the federal government who are carrying out official duties while in California, or any person summoned by any of those officers to assist in making arrests or preserving the peace while the person is actually engaged in assisting that officer. Any peace officer described in this paragraph who has been honorably retired shall be issued an identification certificate by the law enforcement agency from which the officer has retired. The issuing agency may charge a fee necessary to cover any reasonable expenses incurred by the agency in issuing certificates pursuant to this paragraph and paragraph (3).

Any officer, except an officer listed in Section 830.1 or 830.2, subdivision (a) of Section 830.33, or subdivision (c) of Section 830.5 who retired prior to January 1, 1981, shall have an endorsement on the identification certificate stating that the issuing agency approves the officer's carrying of a loaded firearm.

No endorsement or renewal endorsement issued pursuant to paragraph (2) shall be effective unless it is in the format set forth in subparagraph (D) of paragraph (1) of subdivision (a) of Section 12027, except that any peace officer listed in subdivision (f) of Section 830.2 or in subdivision (c) of Section 830.5, who is retired between January 2, 1981, and on or before December 31, 1988, and who is authorized to carry a loaded firearm pursuant to this section, shall not be required to have an endorsement in the format set forth in subparagraph (D) of paragraph (1) of subdivision (a) of Section 12027 until the time of the issuance, on or after January 1, 1989, of a renewal endorsement pursuant to paragraph (2).

(2) A retired peace officer, except an officer listed in Section 830.1 or 830.2, subdivision (a) of Section 830.33, or subdivision (c) of Section 830.5 who retired prior to January 1, 1981, shall petition the issuing agency for renewal of his or her privilege to carry a loaded firearm every five years. An honorably retired peace officer listed in Section 830.1 or 830.2, subdivision (a) of Section 830.33, or subdivision (c) of Section 830.5 who retired prior to January 1, 1981, shall not be required to obtain an endorsement from the issuing agency to carry a loaded firearm. The agency from which a peace officer is honorably retired may, upon initial retirement of the peace officer, or at any time subsequent thereto, deny or revoke for good cause the retired officer's privilege to carry a loaded firearm. A peace officer who is listed in Section 830.1 or 830.2, subdivision (a) of Section 830.33, or subdivision (c) of Section 830.5 who is retired prior to January 1, 1981, shall have his or her privilege to carry a loaded firearm denied or revoked by having the agency from which the officer retired stamp on the officer's identification certificate "No CCW privilege."

(3) An honorably retired peace officer who is listed in subdivision (c) of Section 830.5 and authorized to carry loaded firearms by this subdivision shall meet the training requirements of Section 832 and shall qualify with the firearm at least annually. The individual retired peace officer shall be responsible for maintaining his or her eligibility to carry a loaded firearm. The Department of Justice shall provide subsequent arrest notification pursuant to Section 11105.2

regarding honorably retired peace officers listed in subdivision (c) of Section 830.5 to the agency from which the officer has retired.

(4) Members of the military forces of this state or of the United States engaged in the performance of their duties.

(5) Persons who are using target ranges for the purpose of practice shooting with a firearm or who are members of shooting clubs while hunting on the premises of those clubs.

(6) The carrying of handguns by persons as authorized pursuant to Article 3 (commencing with Section 12050) of Chapter 1 of Title 2 of Part 4.

(7) Armored vehicle guards, as defined in Section 7521 of the Business and Professions Code, (A) if hired prior to January 1, 1977, or (B) if hired on or after that date, if they have received a firearms qualification card from the Department of Consumer Affairs, in each case while acting within the course and scope of their employment.

(8) Upon approval of the sheriff of the county in which they reside, honorably retired federal officers or agents of federal law enforcement agencies, including, but not limited to, the Federal Bureau of Investigation, the Secret Service, the United States Customs Service, the Federal Bureau of Alcohol, Tobacco, and Firearms, the Federal Bureau of Narcotics, the Drug Enforcement Administration, the United States Border Patrol, and officers or agents of the Internal Revenue Service who were authorized to carry weapons while on duty, who were assigned to duty within the state for a period of not less than one year, or who retired from active service in the state.

Retired federal officers or agents shall provide the sheriff with certification from the agency from which they retired certifying their service in the state, the nature of their retirement, and indicating the agency's concurrence that the retired federal officer or agent should be accorded the privilege of carrying a loaded firearm.

Upon approval, the sheriff shall issue a permit to the retired federal officer or agent indicating that he or she may carry a loaded firearm in accordance with this paragraph. The permit shall be valid for a period not exceeding five years, shall be carried by the retiree while carrying a loaded firearm, and may be revoked for good cause.

The sheriff of the county in which the retired federal officer or agent resides may require recertification prior to a permit renewal, and may suspend the privilege for cause. The sheriff may charge a fee necessary to cover any reasonable expenses incurred by the county.

(c) Subdivision (a) shall not apply to any of the following who have completed a regular course in firearms training approved by the Commission on Peace Officer Standards and Training:

(1) Patrol special police officers appointed by the police commission of any city, county, or city and county under the express terms of its charter who also, under the express terms of the charter, (A) are subject to suspension or dismissal after a hearing on charges duly filed with the commission after a fair and impartial trial, (B) are not less than 18 years of age or more than 40 years of age, (C) possess physical qualifications prescribed by the commission, and (D) are designated by the police commission as the owners of a certain beat or territory as may be fixed from time to time by the police commission.

(2) The carrying of weapons by animal control officers or zookeepers, regularly compensated as such by a governmental agency when acting in the course and scope of their employment and when designated by a local ordinance or, if the governmental agency is not authorized to act by ordinance, by a resolution, either individually or by class, to carry the weapons, or by persons who are authorized to carry the weapons pursuant to Section 14502 of the Corporations Code, while actually engaged in the performance of their duties pursuant to that section.

(3) Harbor police officers designated pursuant to Section 663.5 of the Harbors and Navigation Code.

(d) Subdivision (a) shall not apply to any of the following who have been issued a certificate pursuant to Section 12033. The certificate shall not be required of any person who is a peace officer, who has completed all training required by law for the exercise of his or her power as a peace officer, and who is employed while not on duty as a peace officer.

(1) Guards or messengers of common carriers, banks, and other financial institutions while actually employed in and about the shipment, transportation, or delivery of any money, treasure, bullion, bonds, or other thing of value within this state.

(2) Guards of contract carriers operating armored vehicles pursuant to California Highway Patrol and Public Utilities Commission authority (A) if hired prior to January 1, 1977, or (B) if hired on or after January 1, 1977, if they have completed a course in the carrying and use of firearms which meets the standards prescribed by the Department of Consumer Affairs.

(3) Private investigators and private patrol operators who are licensed pursuant to Chapter 11.5 (commencing with Section 7512) of, and alarm company operators who are licensed pursuant to Chapter 11.6 (commencing with Section 7590) of, Division 3 of the Business and Professions Code, while acting within the course and scope of their employment.

(4) Uniformed security guards or night watch persons employed by any public agency, while acting within the scope and course of their employment.

(5) Uniformed security guards, regularly employed and compensated in that capacity by persons engaged in any lawful business, and uniformed alarm agents employed by an alarm company operator, while actually engaged in protecting and preserving the property of their employers or

on duty or en route to or from their residences or their places of employment, and security guards and alarm agents en route to or from their residences or employer-required range training. Nothing in this paragraph shall be construed to prohibit cities and counties from enacting ordinances requiring alarm agents to register their names.

(6) Uniformed employees of private patrol operators and private investigators licensed pursuant to Chapter 11.5 (commencing with Section 7512) of Division 3 of the Business and Professions Code, while acting within the course and scope of their employment.

(e) In order to determine whether or not a firearm is loaded for the purpose of enforcing this section, peace officers are authorized to examine any firearm carried by anyone on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or prohibited area of an unincorporated territory. Refusal to allow a peace officer to inspect a firearm pursuant to this section constitutes probable cause for arrest for violation of this section.

(f) As used in this section, "prohibited area" means any place where it is unlawful to discharge a weapon.

(g) A firearm shall be deemed to be loaded for the purposes of this section when there is an unexpended cartridge or shell, consisting of a case that holds a charge of powder and a bullet or shot, in, or attached in any manner to, the firearm, including, but not limited to, in the firing chamber, magazine, or clip thereof attached to the firearm; except that a muzzle-loader firearm shall be deemed to be loaded when it is capped or primed and has a powder charge and ball or shot in the barrel or cylinder.

(h) Nothing in this section shall prevent any person engaged in any lawful business, including a nonprofit organization, or any officer, employee, or agent authorized by that person for lawful purposes connected with that business, from having a loaded firearm within the person's place of business, or any person in lawful possession of private property from having a loaded firearm on that property.

(i) Nothing in this section shall prevent any person from carrying a loaded firearm in an area within an incorporated city while engaged in hunting, provided that the hunting at that place and time is not prohibited by the city council.

(j)

(1) Nothing in this section is intended to preclude the carrying of any loaded firearm, under circumstances where it would otherwise be lawful, by a person who reasonably believes that the person or property of himself or herself or of another is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property. As used in this subdivision, "immediate" means the brief interval before and after the local law enforcement agency, when reasonably possible, has been notified of the danger and before the arrival of its

assistance.

(2) A violation of this section is justifiable when a person who possesses a firearm reasonably believes that he or she is in grave danger because of circumstances forming the basis of a current restraining order issued by a court against another person or persons who has or have been found to pose a threat to his or her life or safety. This paragraph may not apply when the circumstances involve a mutual restraining order issued pursuant to Division 10 (commencing with Section 6200) of the Family Code absent a factual finding of a specific threat to the person's life or safety. It is not the intent of the Legislature to limit, restrict, or narrow the application of current statutory or judicial authority to apply this or other justifications to defendants charged with violating Section 12025 or of committing other similar offenses.

Upon trial for violating this section, the trier of fact shall determine whether the defendant was acting out of a reasonable belief that he or she was in grave danger.

(k) Nothing in this section is intended to preclude the carrying of a loaded firearm by any person while engaged in the act of making or attempting to make a lawful arrest.

(l) Nothing in this section shall prevent any person from having a loaded weapon, if it is otherwise lawful, at his or her place of residence, including any temporary residence or campsite.

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**Cal. Penal Code § 12050.** (Repealed January 1, 2012) Issuance; Restrictions; Revocation; Amendment

(a)

(1)

(A) The sheriff of a county, upon proof that the person applying is of good moral character, that good cause exists for the issuance, and that the person applying satisfies any one of the conditions specified in subparagraph (D) and has completed a course of training as described in subparagraph (E), may issue to that person a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person in either one of the following formats:

(i) A license to carry concealed a pistol, revolver, or other firearm capable of being concealed upon the person.

(ii) Where the population of the county is less than 200,000 persons according to the most recent federal decennial census, a license to carry loaded and exposed in only that county a pistol, revolver, or other firearm capable of being concealed upon the person.

(B) The chief or other head of a municipal police department of any city or city and county,

upon proof that the person applying is of good moral character, that good cause exists for the issuance, and that the person applying is a resident of that city and has completed a course of training as described in subparagraph (E), may issue to that person a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person in either one of the following formats:

(i) A license to carry concealed a pistol, revolver, or other firearm capable of being concealed upon the person.

(ii) Where the population of the county in which the city is located is less than 200,000 persons according to the most recent federal decennial census, a license to carry loaded and exposed in only that county a pistol, revolver, or other firearm capable of being concealed upon the person.

(C) The sheriff of a county or the chief or other head of a municipal police department of any city or city and county, upon proof that the person applying is of good moral character, that good cause exists for the issuance, and that the person applying is a person who has been deputized or appointed as a peace officer pursuant to subdivision (a) or (b) of Section 830.6 by that sheriff or that chief of police or other head of a municipal police department, may issue to that person a license to carry concealed a pistol, revolver, or other firearm capable of being concealed upon the person. Direct or indirect fees for the issuance of a license pursuant to this subparagraph may be waived. The fact that an applicant for a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person has been deputized or appointed as a peace officer pursuant to subdivision (a) or (b) of Section 830.6 shall be considered only for the purpose of issuing a license pursuant to this subparagraph, and shall not be considered for the purpose of issuing a license pursuant to subparagraph (A) or (B).

(D) For the purpose of subparagraph (A), the applicant shall satisfy any one of the following:

(i) Is a resident of the county or a city within the county.

(ii) Spends a substantial period of time in the applicant's principal place of employment or business in the county or a city within the county.

(E)

(i) For new license applicants, the course of training may be any course acceptable to the licensing authority, shall not exceed 16 hours, and shall include instruction on at least firearm safety and the law regarding the permissible use of a firearm. Notwithstanding this clause, the licensing authority may require a community college course certified by the Commission on Peace Officer Standards and Training, up to a maximum of 24 hours, but only if required uniformly of all license applicants without exception.

(ii) For license renewal applicants, the course of training may be any course acceptable to the licensing authority, shall be no less than four hours, and shall include instruction on at least firearm safety and the law regarding the permissible use of a firearm. No course of training shall be required for any person certified by the licensing authority as a trainer for purposes of this subparagraph, in order for that person to renew a license issued pursuant to this section.

(2)

(A)

(i) Except as otherwise provided in clause (ii), subparagraphs (C) and (D) of this paragraph, and subparagraph (B) of paragraph (4) of subdivision (f), a license issued pursuant to subparagraph (A) or (B) of paragraph (1) is valid for any period of time not to exceed two years from the date of the license.

(ii) If the licensee's place of employment or business was the basis for issuance of the license pursuant to subparagraph (A) of paragraph (1), the license is valid for any period of time not to exceed 90 days from the date of the license. The license shall be valid only in the county in which the license was originally issued. The licensee shall give a copy of this license to the licensing authority of the city, county, or city and county in which he or she resides. The licensing authority that originally issued the license shall inform the licensee verbally and in writing in at least 16-point type of this obligation to give a copy of the license to the licensing authority of the city, county, or city and county of residence. Any application to renew or extend the validity of, or reissue, the license may be granted only upon the concurrence of the licensing authority that originally issued the license and the licensing authority of the city, county, or city and county in which the licensee resides.

(B) A license issued pursuant to subparagraph (C) of paragraph (1) to a peace officer appointed pursuant to Section 830.6 is valid for any period of time not to exceed four years from the date of the license, except that the license shall be invalid upon the conclusion of the person's appointment pursuant to Section 830.6 if the four-year period has not otherwise expired or any other condition imposed pursuant to this section does not limit the validity of the license to a shorter time period.

(C) A license issued pursuant to subparagraph (A) or (B) of paragraph (1) is valid for any period of time not to exceed three years from the date of the license if the license is issued to any of the following individuals:

(i) A judge of a California court of record.

(ii) A full-time court commissioner of a California court of record.

(iii) A judge of a federal court.

(iv) A magistrate of a federal court.

(D) A license issued pursuant to subparagraph (A) or (B) of paragraph (1) is valid for any period of time not to exceed four years from the date of the license if the license is issued to a custodial officer who is an employee of the sheriff as provided in Section 831.5, except that the license shall be invalid upon the conclusion of the person's employment pursuant to Section 831.5 if the four-year period has not otherwise expired or any other condition imposed pursuant to this section does not limit the validity of the license to a shorter time period.

(3) For purposes of this subdivision, a city or county may be considered an applicant's "principal place of employment or business" only if the applicant is physically present in the jurisdiction during a substantial part of his or her working hours for purposes of that employment or business.

(b) A license may include any reasonable restrictions or conditions which the issuing authority deems warranted, including restrictions as to the time, place, manner, and circumstances under which the person may carry a pistol, revolver, or other firearm capable of being concealed upon the person.

(c) Any restrictions imposed pursuant to subdivision (b) shall be indicated on any license issued.

(d) A license shall not be issued if the Department of Justice determines that the person is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm.

(e)

(1) The license shall be revoked by the local licensing authority if at any time either the local licensing authority is notified by the Department of Justice that a licensee is prohibited by state or federal law from owning or purchasing firearms, or the local licensing authority determines that the person is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm.

(2) If at any time the Department of Justice determines that a licensee is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm, the department shall immediately notify the local licensing authority of the determination.

(3) If the local licensing authority revokes the license, the Department of Justice shall be notified of the revocation pursuant to Section 12053. The licensee shall also be immediately notified of the revocation in writing.

(f)

(1) A person issued a license pursuant to this section may apply to the licensing authority for an amendment to the license to do one or more of the following:

(A) Add or delete authority to carry a particular pistol, revolver, or other firearm capable of being concealed upon the person.

(B) Authorize the licensee to carry concealed a pistol, revolver, or other firearm capable of being concealed upon the person.

(C) If the population of the county is less than 200,000 persons according to the most recent federal decennial census, authorize the licensee to carry loaded and exposed in only that county a pistol, revolver, or other firearm capable of being concealed upon the person.

(D) Change any restrictions or conditions on the license, including restrictions as to the time, place, manner, and circumstances under which the person may carry a pistol, revolver, or other firearm capable of being concealed upon the person.

(2) When the licensee changes his or her address, the license shall be amended to reflect the new address and a new license shall be issued pursuant to paragraph (3).

(3) If the licensing authority amends the license, a new license shall be issued to the licensee reflecting the amendments.

(4)

(A) The licensee shall notify the licensing authority in writing within 10 days of any change in the licensee's place of residence.

(B) If the license is one to carry concealed a pistol, revolver, or other firearm capable of being concealed upon the person, then it may not be revoked solely because the licensee changes his or her place of residence to another county if the licensee has not breached any conditions or restrictions set forth in the license and has not become prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm. However, any license issued pursuant to subparagraph (A) or (B) of paragraph (1) of subdivision (a) shall expire 90 days after the licensee moves from the county of issuance if the licensee's place of residence was the basis for issuance of the license.

(C) If the license is one to carry loaded and exposed a pistol, revolver, or other firearm capable of being concealed upon the person, the license shall be revoked immediately if the licensee changes his or her place of residence to another county.

(5) An amendment to the license does not extend the original expiration date of the license and the license shall be subject to renewal at the same time as if the license had not been amended.

(6) An application to amend a license does not constitute an application for renewal of the license.

(g) Nothing in this article shall preclude the chief or other head of a municipal police department of any city from entering an agreement with the sheriff of the county in which the city is located for the sheriff to process all applications for licenses, renewals of licenses, and amendments to licenses, pursuant to this article.

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**Cal. Penal Code § 12050.2**. (Repealed January 1, 2012) Written policy

Within three months of the effective date of the act adding this section, each licensing authority shall publish and make available a written policy summarizing the provisions of subparagraphs (A) and (B) of paragraph (1) of subdivision (a) of Section 12050.

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**Cal. Penal Code § 12052.** (Repealed January 1, 2012) Fingerprinting of applicants

(a) The fingerprints of each applicant shall be taken and two copies on forms prescribed by the Department of Justice shall be forwarded to the department. Upon receipt of the fingerprints and the fee as prescribed in Section 12054, the department shall promptly furnish the forwarding licensing authority a report of all data and information pertaining to any applicant of which there is a record in its office, including information as to whether the person is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm. No license shall be issued by any licensing authority until after receipt of the report from the department.

(b) However, if the license applicant has previously applied to the same licensing authority for a license to carry firearms pursuant to Section 12050 and the applicant's fingerprints and fee have been previously forwarded to the Department of Justice, as provided by this section, the licensing authority shall note the previous identification numbers and other data that would provide positive identification in the files of the Department of Justice on the copy of any subsequent license submitted to the department in conformance with Section 12053 and no additional application form or fingerprints shall be required.

(c) If the license applicant has a license issued pursuant to Section 12050 and the applicant's fingerprints have been previously forwarded to the Department of Justice, as provided in this section, the licensing authority shall note the previous identification numbers and other data that would provide positive identification in the files of the Department of Justice on the copy of any subsequent license submitted to the department in conformance with Section 12053 and no additional fingerprints shall be required.

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