The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

DANIEL MITCHELL, ROBIN BALL, LUKE RETTMER, ARMEN TOOLOEE, NATHANIEL CASEY, MATTHEW WALD, SECOND AMENDMENT FOUNDATION, and NATIONAL RIFLE ASSOCIATION,

Plaintiffs,

v.

CHUCK ATKINS, in his official capacity as the Sheriff of Clark County, Washington; CRAIG MEIDL, in his official capacity as the Chief of Police of Spokane, Washington; and TERESA BERNTSEN, in her official capacity as the Director of the Washington State Department of Licensing,

Defendants,

SAFE SCHOOLS SAFE COMMUNITIES,

Intervenor Defendant.

No. 3:19-cv-05106 RBL

DEFENDANTS CHUCK ATKINS' AND CRAIG MEIDL'S REPLY IN SUPPORT OF THEIR MOTIONS TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT PURSUANT TO FRCP 12(b)(1) and (6)

NOTED ON MOTION CALENDAR:
April 26, 2019

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Defendants Sheriff Chuck Atkins and Chief Craig Meidl submit this reply in support of their Motions to Dismiss Plaintiffs' First Amended Complaint (FAC) Pursuant to FRCP 12(b)(1) and (6) (Dkt. Nos. 32 and 34). Atkins and Meidl incorporate their Briefs and Motions as though set forth fully herein.

I. INTRODUCTION

Plaintiffs are correct that Atkins and Meidl misunderstand their claims. This is because their claims against Atkins and Meidl are not plausible, as is required in order to survive a motion to dismiss.

Although not clearly pled in the FAC, from a reading of Plaintiffs' Opposition (Dkt. No. 42), it is apparent Plaintiffs' entire case against Atkins and Meidl is based on their alleged enforcement of theoretic violations of portions of I-1639 that have not yet occurred. Specifically, Plaintiffs allege they have been denied the right to purchase/sell semi-automatic rifles because Atkins and Meidl are obliged by state law to *revoke* the license of any dealer who sells them. (Dkt. No. 42, p. 5)

Plaintiffs' theory against Atkins and Meidl, however, is fatally flawed. Contrary to Plaintiffs' allegations and unsupported arguments, the law is clear that it is the Department of Licensing that has the authority to *revoke* licenses and, such revocation involves due process; i.e., notice and a hearing. RCW 9.41.137. For this reason alone, Plaintiffs' claims fail against Atkins and Meidl and they should be dismissed from this lawsuit.

Further, the question Plaintiffs seek to have answered by this Court is whether the provisions of I-1639 they complain of are constitutional. This is not a question answered by a finding against Atkins and Meidl. Rather, questions regarding the constitutionality of a statute or ordinance involve state defendants rather than local law enforcement. Plaintiffs appear to agree since the cases they rely on involve state defendants, not local law enforcement.[1] See *Jackson v.*

[1] The single case Plaintiffs cite involving local law enforcement is distinguishable as discussed in Section II(A)(1) of this brief.

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1 *City & Cty. Of San Francisco*, 829 F.Supp.2d 867, 871 (N.D. Cal. 2011) (Gun owners brought
2 action against City and County, asserting that their Second Amendment individual right to keep
3 and bear arms was violated by ordinances relating to storage and discharges of firearms); *D.C. v.*
4 *Heller*, 554 U.S. 570 (2008) (special police officer and others brought an action seeking, on
5 Second Amendment grounds, to enjoin the District of Columbia from enforcing gun-control
6 statutes); *Susan B. Anthony v. Driehaus*, 573 U.S. 149, 158 (2014) (Advocacy organizations
7 brought actions against the Ohio Election Commission, Ohio Secretary of State, and a political
8 candidate, challenging an Ohio statute criminalizing false statements about candidates during
9 political campaigns); *Roe v. Wade*, 410 U.S. 113 (1973) (naming the Dallas County District
10 Attorney in a suit seeking access to abortion); *Whole Woman's Health v. Hellerstedt*, 136 S.Ct.
11 2292 (2016) (naming the Commissioner of the Texas Department of State Health Services in a
12 suit seeking access to abortion); *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833
13 (1992) (naming the Pennsylvania Governor, Secretary of Health, Attorney General, and a county
14 attorney general in a case seeking access to abortion).

15 In addition, any alleged *enforcement* of a statute, as here, is dependent on whether the
16 statute in question is *constitutional*. If the statute is deemed constitutional, any enforcement is
17 lawful. If, on the other hand, this Court ultimately determines the statutes at issue are
18 unconstitutional, law enforcement agencies will be prohibited from enforcing the statutes,
19 making Plaintiffs' claims against Atkins and Meidl moot.

20 As discussed in more detail below and in Atkins' and Meidl's Memorandums, these
21 motions to dismiss should be granted. Further, because Plaintiffs' claims against Atkins and
22 Meidl are not supported by legal authority, no amendment can cure their fatally flawed claims.
23 Accordingly, Plaintiffs' request for leave to amend their complaint should be denied.

24 ## II. ARGUMENT

25 ### A. All of the Plaintiffs fail to state a claim against Atkins and Meidl.

26 The standard in determining a motion to dismiss is whether a plaintiff's claims are

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plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A standard to which Plaintiffs agree. (Dkt. No. 42, 15:20-22) Here, Plaintiffs have failed to state a plausible claim against Atkins and Meidl.

The linchpin holding Plaintiffs' tenuous claims against Atkins and Meidl is the theory that they are required to revoke Mitchell's and Ball's firearm dealers' licenses for any violations of Washington laws governing sales of firearms. Plaintiffs attribute this theory to all of their claims (Dkt. No. 42, pp. 5-7; FAC, ¶¶ 35-36, 47, 52-54, 65, 78, 91, 104) Yet, the statute cited by Plaintiffs does not support this theory. RCW 9.41.110(4) does not contain the provision that the law enforcement agency who *grants* the license, in the *form prescribed by the State*, is also the agency that is required to *revoke* the license:

> The duly constituted licensing authorities of any city, town, or political subdivision of this state shall *grant* licenses in forms *prescribed by the director of licensing* effective for not more than one year from the date of issue permitting the licensee to sell firearms within this state subject to the following conditions, for breach of any of which the license shall be forfeited and the license subject to punishment as provided in RCW 9.41.010 through 9.41.810. *A licensing authority shall forward a copy of each license granted to the department of licensing*. The department of licensing shall notify the department of revenue of the name and address of each dealer licensed under this section.

RCW 9.41.110(4) (emphasis added).

Rather, another statute contained within Chapter 9.41 plainly states the agency who *revokes* the license is the State Department of Licensing:

> The department of licensing shall have the authority to adopt rules for the implementation of this chapter as amended. In addition**, the department of licensing** shall report any violation of this chapter by a licensed dealer to the bureau of alcohol, tobacco, firearms, and explosives within the United States department of justice and **shall have the authority, after notice and a hearing, to revoke the license of any licensed dealer found to be in violation of this chapter.**

RCW 9.41.137 (emphasis added).

Therefore, not only is it the Department of Licensing that has the power to revoke a license, it is not automatic, and can only be done after notice and a hearing. In the event Mitchell

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or Ball is cited for violating RCW 9.41.124 or 9.41.240(1), they will be given an opportunity to argue the constitutionality of those statutes during a revocation hearing by the Department of Licensing.

Simply put, Plaintiffs appear to have stated a claim against the State (for purposes of a motion to dismiss) but have failed to state a claim against Atkins and Meidl. Plaintiffs appear to agree as such since they have indicated they intend to seek discovery against the State defendant and not Atkins or Meidl. (Dkt. No. 39, 5:9-16) Further, and importantly, Plaintiffs' arguments in their Opposition are directed generally, rather than specifically at Atkins and Meidl.

1. The Young Adult Plaintiffs fail to state a claim against Atkins or Meidl.

Even if this Court determines Atkins and Meidl have the power to revoke Mitchell's or Ball's firearm dealer's licenses, Plaintiffs' "theory" does not make sense in relation to the Young Adults' claims and is too tenuous of a leap to be plausible. The Young Adults argue "[b]ut for the LEOs' [Atkins' and Meidl's] obligation to revoke Dealers' licenses, the Dealers would have sold specific guns to the Young Adults on identified dates in the past. It is the direct connection of the LEOs to the challenged law that has resulted in the harm to the Young Adults." (Dkt. No. 42, 17:13-15) This makes no sense.

It is not the enforcement of I-1639 that prevents the Young Adult Plaintiffs from buying a semi-automatic assault rifle or the Dealer Plaintiffs from selling semi-automatic assault rifles. It is the law itself that prevents such a sale. Therefore, the only remedy to such a situation is to determine whether the law, not the enforcement, is constitutional.

Plaintiffs cite to *Moore v. Urquhart*, 899 F.3d 1094, 1103 (9th Cir. 2018), for the proposition that they can state this particular claim against Atkins and Meidl, however, that case is inapposite to this one. In *Moore*, the ONLY defendant was the Sheriff. Although the State was invited to intervene to defend the statute, before the State entered an appearance, the Court granted the Sheriff's Motion to Dismiss. *Id.* at 1099. Further, the question was not whether the claim could be brought against the Sheriff but whether the plaintiffs had stated a claim at all. The

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plaintiffs "(1) . . . faced a concrete, particularized, and imminent injury (being evicted from their home); (2) . . . the injury was fairly traceable to the conduct they sought to enjoin (the Sheriff's execution of a writ of restitution issued under § 375); and . . . the injury would likely be redressed by a favorable ruling (invalidating § 375 would void the writ authorizing their eviction)." *Id.*

By contrast, here, neither Atkins nor Meidl have taken ANY action against ANY of the Plaintiffs, let alone the Young Adult Plaintiffs.

Further, and importantly, Atkins and Meidl are not the only defendants in this action. If the Plaintiffs are truly seeking an order as to the constitutionality of the statute in question, they will get their answer by proceeding with their lawsuit against Teresa Berntsen, the State defendant. Plaintiffs appear to agree with this proposition as they have stated they do not seek any discovery against Atkins or Meidl but will seek discovery against the State. (Dkt. No. 39, 5:9-16)

Plaintiffs agree "*Ex Parte Young* requires 'some connection' between a named state officer and enforcement of a challenged state law . . . This connection must be fairly direct; *a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit.*" (Dkt. No. 42, 17:5-10 *citing Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004) (internal citation omitted))

This is exactly what we have here. Atkins and Meidl, as local law enforcement, have a *generalized duty* to enforce state law. In *Moore*, the Sheriff had a *direct duty* to execute the writ. He took a step to execute the writ. Here, Atkins and Meidl, by statute, are not the authorities mandated with revoking a firearm dealer's license. Rather, it is the State. Further, contrary to Plaintiffs' arguments, the revocation is not non-discretionary. Rather, the firearms dealers are given due process including a notice and hearing to discuss the revocation. If Plaintiffs decide to violate the law, they will receive their due process and can argue the constitutionality of I-1639

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at that time.

2. The Organizational Plaintiffs fail to state a claim against Atkins or Meidl.

Contrary to Plaintiffs' arguments, Atkins and Meidl have not waived their arguments against the Organizational Plaintiffs (Second Amendment Foundation and National Rifle Association) simply because they have referred to these Plaintiffs in a footnote. (Dkt. No. 42, 17:18-23) It is clear Atkins and Meidl have successfully argued that each and every claim by each and every Plaintiff fails for the same reasons as discussed above, and in their Memorandums. *See* Dkt. Nos. 32 and 34. Plaintiffs' theory of enforcement/revocation of a firearm dealer's license is flawed and cannot state a claim against Atkins and Meidl. Further, the Organizational Plaintiffs are only alleging a claim seeking the Court to declare portions of I-1639 unconstitutional. (Dkt. No. 42, pp. 17-18) By reason, this claim cannot be against Atkins and Meidl because any enforcement of I-1639, which has not happened, has nothing to do with the question of whether the law is constitutional. This is too tenuous a theory and is simply not plausible.

3. Mitchell fails to allege a Commerce Clause claim against Atkins.

Plaintiffs' Opposition only addresses this claim as related to Atkins. Plaintiffs do not address and appear to concede that their FAC fails to allege any facts to support a Commerce Clause claim against Meidl. As such, Plaintiffs waive the claim as related to Meidl and this Court is respectfully requested to grant Meidl's motion relative to this cause of action.

Relative to Atkins, Mitchell argues the interstate sales ban of I-1639 is the very kind of economic protectionism that the Commerce Clause forbids. (Dkt. No. 42, 14:22-24) However, Mitchell is unable to connect this claim to Atkins' alleged enforcement. First, no enforcement has occurred. This section of I-1639 isn't even in effect yet. (Dkt. No. 42, 7:7-8) Second, as Mitchell states, it is the law itself that allegedly violates the Commerce Clause. Nowhere in Mitchell's argument does he cite authority for the proposition that *enforcement* of I-1639 provides for a Commerce Clause claim.

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Rather, it is the law contained in I-1639 that prevents the desired sales; not the act of enforcing it. Plaintiffs explain this concept perfectly: "Finally, if the challenged act is declared unconstitutional and enjoined, the harm is relieved, and the desired sales and purchases can proceed." (Dkt. No. 42, 11:27-12:2)

B. Notwithstanding Plaintiffs' failure to state a claim, Plaintiffs' claims against Atkins and Meidl should also be dismissed because Plaintiffs lack standing to assert their claims and their claims are not ripe.

Contrary to Plaintiffs' arguments, Atkins and Meidl properly filed their motion to dismiss under Fed. R. Civ. P. 12(b)(1) as well as 12(b)(6). Rule 12(b)(1) concerns whether the Court has subject matter jurisdiction over Plaintiffs' alleged claims. Issues of standing and ripeness are intertwined with issues of subject matter jurisdiction.

Atkins and Meidl rely on the arguments in their Memorandum to support a finding Plaintiffs lack standing and ripeness in their claims against Atkins and Meidl. *See* Dkt. No. 32, pp. 12-16 and Dkt. No. 34, pp. 12-16. However, in order to clarify the issues brought before this Court, Atkins and Meidl are not asserting Eleventh Amendment immunity.

Plaintiffs are incorrect that the cases cited by Atkins and Meidl do not apply because they involve criminal prosecution. RCW 9.41.810 specifically provides that "[a]ny violation of any provision of this chapter, except as otherwise provided, shall be a misdemeanor and punishable accordingly." *See also* Wash. State Dept. of Licensing "About firearms dealer licenses; Related Laws; RCW 9.41.810 Penalties; https://www.dol.wa.gov/business/firearms/fadealerreq.html. Hence, the criminal prosecution cases apply. Regardless, Atkins and Meidl are not prohibited from the application of analogous authority in this situation.

Plaintiffs incredulously argue "[b]ut equally important, local officials may elect to enforce or not enforce criminal statutes in a virtually unchallenged exercise of prosecutorial discretion." (Dkt. No. 42, 9:16-18) Law enforcement does not have the authority to elect which criminal statutes to enforce and which not to enforce. Rather, they are required to enforce all laws as evidenced by their oath of office to uphold the law. Plaintiffs cite no legal authority

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1 stating a Sheriff or Chief can simply look away and allow violations of law to occur without
2 enforcement. Until a law is deemed unconstitutional, law enforcement is required to enforce it.

3 **C. Plaintiffs fail to state an official capacity/*Monell* claim against Atkins and Meidl**
4 **because any future mandatory state legal obligation to revoke a firearm dealer's**
license is not a matter of local decision-making authority and therefore does not
5 **qualify as a § 1983 municipal policy.**

6 Plaintiffs present a distorted interpretation of civil rights municipal liability law in their
7 Opposition Memorandum. They do so by incorrectly arguing that when a state law imposes a
8 mandatory legal obligation on a local government official to enforce that state law (here, the state
9 firearms licensing law), the state law is really conferring mere decision-making/policymaking
10 authority to enforce the mandatory law. Hence, Plaintiffs argue, when the local official complies
11 with the state law, the official is actually making a policy decision triggering potential *Monell*
12 civil rights liability. (Dkt. No. 42, p. 8) That the so-called statutorily designated "policymaker"
13 lacks any freedom to exercise judgment by, for example, considering alternatives in his so-called
14 decision-making authority, makes no difference under plaintiff's theory. Plaintiffs' argument
15 mutates a state mandatory duty on a local government official into a policy of the municipality.
16 The argument also ignores the legal principal that where a plaintiff seeks to hold a municipality
17 liable in a § 1983 action, the plaintiff must show that the violation was caused by the
18 municipality's policy, custom or usage. *Monell v. Dep't of Soc. Servs. of City of New York*, 436
19 U.S. 658, 691 (1978) (emphasis supplied).

20 Nevertheless, Plaintiffs argue *Menotti v. City of Seattle,* 409 F.3d 1113, 1147 (9th
21 Cir.2005) and *Mabe v. San Bernardino Cty., Dep't of Pub. Soc. Servs.*, 237 F.3d 1101 (9th Cir.
22 2000), two cases supporting Defendants' argument against *Monell* liability, stand for this legal
23 proposition. Neither case does.

24 First, *Menotti* exclusively involved a local government mayor (Seattle mayor), exercising
25 discretionary emergency powers conferred upon him by local law (Seattle Municipal Code §
26 10.02), to declare a civil emergency within the city, and impose an order restricting entry into an

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area of the city where an international conference was taking place (Order No. 3). *Menotti* at 1125.[2] *Menotti* also involved a local police chief's exercise of mayoral delegated authority to implement the mayor's Order 3 which the chief did by adopting a supplemental order called the "Operations Order." *Menotti* at 1147. Clearly, both Orders materialized as the product of local government policymaking authority.

> A municipal "policy" exists when "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur v. City of Cincinnati,* 475 U.S. 469, 483, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) (plurality opinion); *Fairley v. Luman,* 281 F.3d 913, 918 (9th Cir.2002) (per curiam).

Menotti at 1147.

In contrast, in this case, there is no similar opportunity for Atkins or Meidl to make any choices in the face of a statute requiring them to exercise firearm dealer licensing requirements. Indeed, Plaintiffs concede as much in their factual allegations. *See* Dkt. No. 42, 7:25-27 ("[The FAC] alleges that long-standing state law requires them [the LEOs], as a non-discretionary obligation, to revoke that license when presented with evidence of sales made in violation of state firearms laws. FAC ¶¶ 35-36") and Dkt. No. 42, 8:12-14 ("The FAC alleges that each LEO has a mandatory, non-discretionary obligation imposed by state law that he revoke the Dealers' licenses when the Dealers and Young Adults engage in constitutionally protected conduct."). Given the complete absence in *Menotti* of any reference to state law assignment of mandatory obligations on local government, *Menotti* in no way supports the drastic extension of *Monell* liability Plaintiffs seek to impose on the Defendants vis-à-vis alleged official capacity liability of Atkins and Meidl for Second Amendment and Commerce Clause violations.

The *Menotti* court ultimately denied summary judgment on the issue of municipal liability for alleged First Amendment as applied claims against the city.[3] The court based its

[2] The international conference involved was the World Trade Organization (WTO) Conference.

[3] *Menotti v. City of Seattle,* 409 F.3d 1113, 1147 (9th Cir.2005) (holding a triable issue of fact existed as to whether Seattle had an unconstitutional policy or custom of suppressing certain political speech based on the testimony of several individuals that their entry to a particular area

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decision on evidence of repeated First Amendment discrimination against anti-WTO in law enforcement's actual implementation of Order 3. *Menotti* at 1148. Viewing the evidence in the light most favorable to the non-moving plaintiffs, and correctly applying civil rights municipal liability law, the court found there was a genuine issue of material fact concerning whether the city had a municipal policy of discriminatorily implementing Order 3 (neutral on its face) that could be inferred due to "widespread practices or evidence of repeated constitutional violations," one of the bases for finding *Monell* municipal policy. *Menotti* at 1147 quoting *Nadell v. Las Vegas Metro. Police Dept.,* 268 F.3d 924, 929 (9th Cir.2001) (internal quotation marks and citation omitted). But the municipal policy potentially supported by the offered evidence in *Menotti* was a policy of local government permitting (and not reprimanding) law enforcement repeated discriminatory implementation of municipal policy embodied in Order 3.

In contrast, Plaintiffs' factual allegations in this case do not establish a valid legal claim for relief given their misinterpretation of the law. Indeed, as long as Plaintiffs advance their misguided interpretation of civil rights municipal liability law, no subsequent pleading amendments restating facts can support a claim for relief against Atkins or Meidl and therefore the complaint against both should be dismissed. A court should "dismiss any claim that, even when construed in the light most favorable to plaintiff, fails to plead sufficiently all required elements of a cause of action." *Student Loan Marketing Ass'n v. Hanes,* 181 F.R.D. 629, 634 (S.D.Cal.1998). In practice, "a complaint ... must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 562 (2007).

For the same reasons that Plaintiffs' reliance on *Menotti* is misplaced, their reliance on *Mabe* is equally unavailing. The case does not support the proposition that a clear state law imposing mandatory, non-discretionary legal obligations on a local government official confers

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was permitted by police only after they removed offending buttons and stickers, coupled with the testimony of the officer in charge that the City would not permit "demonstrations" in the area).

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decision-making, policy-making authority on that government official. *Mabe* supports Defendants Atkins and Meidl because like *Mabe*, there is no allegation of a local government policy in this case, only a mandatory state law obligation.

D. Qualified Immunity

To the extent this Court determines Plaintiffs are not seeking any monetary damages, but only seeking declaratory and injunctive relief, Atkins and Meidl agree they are not entitled to qualified immunity.

III. CONCLUSION

For the foregoing reasons, Defendants Sheriff Chuck Atkins and Chief Craig Meidl respectfully request the Court grant their Motions to Dismiss and dismiss Atkins and Meidl from this matter, with prejudice. Further, Atkins and Meidl request Plaintiffs' request for leave to amend their complaint be denied.

Respectfully submitted this 26th day of April, 2019.

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1
CERTIFICATE OF SERVICE

2 I hereby certify that on April 26, 2019, I electronically filed the foregoing DEFENDANT
3 CHUCK ATKINS' AND CRAIG MEIDL'S REPLY IN SUPPORT OF THEIR MOTIONS TO
4 DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT PURSUANT TO FRCP 12(b)(1)
5 and (6) with the Clerk of the Court using the CM/ECF system which will send notification of
6 such filing to the following:

7–20

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