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UNITED STATES DISTRICT COURT  
FOR THE 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.*

The Honorable Ronald B. Leighton

No. 3:19-cv-05106-RBL

OPPOSITION TO ATKINS AND MEIDL  
MOTIONS TO DISMISS

ORAL ARGUMENT REQUESTED

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## I. INTRODUCTION

1 Initiative No. 1639 (“I-1639”) amends Washington firearms law to make certain sales of  
2 self-loading rifles illegal. Plaintiffs have challenged the ban as an unconstitutional infringement of  
3 their Second Amendment rights. They seek only prospective relief from Defendants Atkins and  
4 Meidl, both sued in their official capacities. That prospective relief, both declaratory and  
5 injunctive, will allow constitutionally permissible sales to go forward in full compliance with state  
6 law, eliminating the now-existing threat that Plaintiffs Mitchell and Ball will lose their businesses  
7 if they make certain rifle sales.

8 Plaintiffs’ First Amended Complaint (“FAC”) alleges facts that show, in light of governing  
9 state law, all Plaintiffs have suffered harm because of the enforcement threat posed by Defendants  
10 Clark County Sheriff Chuck Atkins and Spokane Chief of Police Craig Meidl (the “LEOs”).  
11 Plaintiffs Luke Rettmer, Armen Tooloee, Nathaniel Casey, and Matthew Wald (the “Young  
12 Adults”) have all been denied the right to purchase certain rifles because the LEOs are obliged by  
13 state law to revoke the license of any dealer who sells to them. Plaintiffs Dan Mitchell and Robin  
14 Ball (the “Dealers”) have both lost potential sales, again because the LEOs will revoke their  
15 licenses if they make those sales. And Plaintiffs National Rifle Association and Second Amendment  
16 Foundation (the “Organizations”), of which various among the Young Adults and Dealers are  
17 members, stand in the shoes of these and other members who similarly want to make now-banned  
18 firearms sales and purchases but cannot because of the LEOs’ enforcement threat. The FAC states  
19 claims by all Plaintiffs against the LEOs in their official capacities, seeking prospective declaratory  
20 and injunctive relief, against which the LEOs cannot assert qualified immunity.

## II. STANDARD OF REVIEW

21 Determining the merits of a motion to dismiss for failure to state a claim requires that the  
22 facts alleged in the complaint are taken as true, and all reasonable inferences are drawn in the  
23 plaintiff’s favor. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544  
24 (2007). “A plaintiff’s complaint must allege facts to state a claim for relief that is plausible on its  
25 face.” *Rodriguez v. Prudential Insurance Company of America*, Slip Copy at \*1, 2019 WL 1040406  
26  
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1 (W.D. Wash. 2019). Viewed in this light, the FAC clearly states a claim by at least one Dealer, at  
2 least one Young Adult, and both Organizations against each LEO. Notably, in reviewing the LEOs’  
3 Motions to Dismiss, it is apparent that both motions ask the Court to make only inferences against  
4 the Plaintiffs and FAC, and that most of the requested inferences are not reasonable, but  
5 unreasonably tilt away from reading the FAC as stating any claim.

### 6 **III. RELEVANT FACTS AND LAW GOVERNING PLAINTIFFS AND THE LEOs**

7 Three relevant portions of state law govern the actions of the parties to this case, and  
8 require the LEOs to remain parties in their official capacities, so that the plaintiffs can secure the  
9 complete declaratory and injunctive relief they seek.

10 First, I-1639 bans selling self-loading rifles to young adults. RCW 9.41.240(1). Second, I-  
11 1639 bans selling self-loading rifles to residents of other states, effective July 1, 2019. RCW  
12 9.41.124. State law requires every firearms dealer to have a license, to self-report details of every  
13 sale to the official who issues that license, and requires that official to revoke the license for any  
14 violations of state law. RCW 9.41.110(4).

15 The LEOs are proper defendants in their official capacities due to their roles defined in  
16 state law. “The duly constituted licensing authorities of any city, town, or political subdivision of  
17 this state shall grant licenses in forms prescribed by the director of licensing effective for not more  
18 than one year from the date of issue permitting the licensee to sell firearms within this state *subject*  
19 *to the following conditions*, for breach of any of which the license *shall be forfeited* and the licensee  
20 subject to punishment as provided in RCW 9.41.010 through 9.41.810.” RCW 9.41.110(4)  
21 (emphasis added). Pursuant to this statute, Atkins issues a license to Mitchell, FAC ¶ 44, and  
22 Meidl issues a license to Ball. FAC ¶ 49.

23 Among the “following conditions” to which the Dealers’ licenses are subject is that “[n]o  
24 pistol or semiautomatic assault rifle may be sold: (i) In violation of any provisions of RCW 9.41.010  
25 through 9.41.810; nor (ii) may a pistol or semiautomatic assault rifle be sold under any  
26 circumstances unless the purchaser is personally known to the dealer or shall present clear  
27 evidence of his or her identity.” RCW 9.41.110(8)(a). In other words, if Mitchell or Ball sells a self-

1 loading rifle in violation of any provision of RCW 9.41.010 through 9.41.810, the LEO who issued  
2 the license requires them to forfeit it.

3 RCW 9.41.240, as amended by I-1639, forbids sales of self-loading rifles to young adults. If  
4 Mitchell or Ball makes such a sale, Atkins or Meidl must revoke the license he granted. Mitchell  
5 and Ball would lose their businesses because the license is required for them to operate. RCW  
6 9.41.110. For that reason, the Dealers refused to sell self-loading rifles to the Young Adults. FAC  
7 ¶¶ 64, 103. Similarly, as of July 1, 2019, RCW 9.41.124, as amended by I-1639, forbids a dealer from  
8 selling self-loading rifles to residents of other states. Just as with banned sales to Young Adults, if  
9 Mitchell makes such a sale on or after July 1, 2019, Atkins is required by state law to revoke  
10 Mitchell's license. As such, Mitchell has already stopped placing orders for firearms that he would  
11 otherwise order and stock in anticipation of sales beginning July 1. Those foregone orders now  
12 constitute foregone sales that he will never be able to make. FAC ¶¶ 109, 115.

13 Taken together, these allegations of the FAC and relevant state laws show that the FAC  
14 states claims by Rettmer, Tooloe, Wald, Mitchell, and the Organizations for three causes of action  
15 against Sheriff Atkins. It states claims for two causes of action wo against Chief Meidl, by Casey,  
16 Ball, and the Organizations.

#### 17 IV. ARGUMENT

##### 18 A. The FAC States Proper Official Capacity Claims

19 In support of their arguments that the Complaint does not state "official capacity" claims  
20 against the LEOs, both LEOs rely on two cases that demonstrate that the allegations of the FAC  
21 meet the standards for claims against the LEOs in their official capacities. First, the FAC's  
22 allegations show that the two LEOs exactly fit the first and second prongs of the test cited by the  
23 LEOs in *Menotti v. City of Seattle*, 409 F.3d 1113, 1147 (9th Cir. 2005). Specifically, the FAC alleges  
24 that each LEO defendant issues a required firearms dealer license to Mitchell and Ball. FAC ¶¶  
25 44, 49. It alleges that long-standing state law requires them, as a non-discretionary obligation, to  
26 revoke that license when presented with evidence of sales made in violation of state firearms laws.  
27 FAC ¶¶ 35-36. Furthermore, under state law, each Dealer is required to self-report all details of

1 sales to their respective license-issuing LEO. RCW 9.41.110. This alleges sufficient facts that, if  
2 proven, will demonstrate “a longstanding practice or custom which constitutes the standard  
3 operating procedure of the local government entity;” and alleges “that the decision-making official  
4 was, as a matter of state law, a final policymaking authority whose edicts or acts may fairly be said  
5 to represent official policy in the area of decision . . .” *Menotti*, 409 F.3d at 1147.

6 *Mabe v. San Bernardino Cty., Dep’t of Pub. Soc. Servs.*, 237 F.3d 1101 (9th Cir. 2000) does  
7 not help the LEOs’ case. There, the Ninth Circuit evaluated the grant of summary judgment in a  
8 challenge to an alleged *unwritten* policy. The plaintiff—having survived the pleading stage and  
9 given the opportunity for discovery—thereafter “adduced no evidence that the County had a  
10 policy that both amounted to deliberate indifference to Mabe’s constitutional rights and was the  
11 moving force behind a violation of those rights.” *Mabe*, 237 F.3d at 1111. But these are the precise  
12 fact allegations of the FAC as to each LEO. The FAC alleges that each LEO has a mandatory, non-  
13 discretionary obligation imposed by state law that he revoke the Dealers’ licenses when the Dealers  
14 and Young Adults engage in constitutionally protected conduct.

15 As the Supreme Court held when it ensured that municipal actors like the LEOs can be  
16 called to account for violations of constitutional rights, “it is when execution of a government’s  
17 policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be  
18 said to represent official policy, inflicts the injury that the government as an entity is responsible  
19 under § 1983.” *Monell v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978). Here,  
20 the FAC alleges specific existing, written state laws of which the LEOs are the official and non-  
21 discretionary enforcers, and that have injured Plaintiffs. As required, the allegations of the FAC  
22 show “that the decision-making official was, as a matter of state law, a final policymaking authority  
23 whose edicts or acts may fairly be said to represent official policy in the area of decision.” *Menotti*,  
24 409 F.3d at 1147.

## 25 **B. The Dealers And Young Adults Have Standing**

26 The LEOs assert that neither Dealer has standing to bring a claim against him because the  
27 Dealers “cannot show a genuine threat of imminent prosecution.” Atkins Motion 12:7-8; Meidl



1 Motion 7:9-10. They cite the wrong standard, which is met in any event. First and foremost, the  
 2 source of the harm to all Plaintiffs that has already occurred, as alleged in the FAC, *does not* result  
 3 from the potential for criminal prosecution. For that alleged harm, criminal prosecution cases are  
 4 irrelevant to the analysis. The harm alleged in the FAC results from the fact that a banned sale  
 5 results in automatic forfeiture of the LEO-issued license that Dealers must have to operate their  
 6 businesses—in other words, mandatory and automatic loss of the business. This prevents sales to  
 7 the Young Adults, who are thereby harmed just as the Dealers are harmed.

8 Second, the FAC alleges that the LEOs will, in fact, enforce this unconstitutional statute,  
 9 as required by law. FAC ¶¶ 49-53. The FAC thus alleges that Plaintiffs do not merely desire to  
 10 engage in the forbidden conduct, they would have done so already but for the challenged law. It  
 11 alleged specific sales transactions that Plaintiffs would engage in, but for the threat of enforcement.  
 12 FAC ¶¶ 90, 102. These detailed allegations of the FAC go far beyond the allegations in the cases  
 13 cited by the LEOs, and are sufficient to establish standing.

14 The LEOs rely on two cases involving criminal statutes, one of which, *San Diego Cty. Gun*  
 15 *Rights Comm. v. Reno*, 98 F.3d 1121, 1127 (9th Cir. 1996), has been recognized by sister courts in  
 16 this Circuit as overruled as to every relevant holding.<sup>1</sup> But equally important, local officials may  
 17 elect to enforce or not enforce criminal statutes in a virtually unchallengeable exercise of  
 18 prosecutorial discretion. Here, the LEOs are required by state law to revoke licenses upon  
 19 receiving the mandatory self-reporting from Dealers of any violations of state firearms laws,  
 20 including the challenged sales bans. According to the FAC and the relevant state law, the  
 21 revocation is non-discretionary. FAC ¶¶ 47, 52; RCW 9.41.110(4).

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 24 <sup>1</sup> *Gun Rights Committee* was overruled in part by *D.C. v. Heller*, 554 U.S. 570 (2008), inasmuch as the Court in *Gun*  
 25 *Rights Committee* rested its decision on the long-discredited theory that the Second Amendment “does not protect  
 26 the possession of a weapon by a private citizen.” *Gun Rights Comm.*, 98 F.3d at 1124. This is, of course, not true.  
 27 “There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an  
 individual right to keep and bear arms.” *Heller*, 554 U.S. at 595. The standing rules of *Gun Rights Committee* also  
 were recognized as apparently overruled by *MedImmune v. Genentech*, 549 U.S. 118 (2007), discussed *infra*, by the  
 Northern District of California in *Jackson v. City & Cty. of San Francisco*, 829 F. Supp. 2d 867, 871 (N.D. Cal. 2011)  
 (“The continued vitality of *Gun Rights Committee* is also questionable in light of *MedImmune* . . .”).

1 Furthermore, unlike *Gun Rights Comm.*, 98 F.3d at 1127, where the court held that plaintiffs  
2 “have not articulated concrete plans to violate” the challenged Act, here the Plaintiffs cited  
3 specific dates on which they would have made banned sales but for the existence of I-1639. FAC  
4 ¶¶ 64, 104. Similarly, in *Nw. Sch. of Safety v. Ferguson*, 699 F. App’x 707, 709 (9th Cir. 2017), an  
5 unpublished memorandum decision, the Court indicated that the plaintiffs had no concrete plan to  
6 violate the challenged act, and may not even have alleged past activities within the ambit of the  
7 statute. Here, by contrast, the Dealers and Young Adults specifically alleged dates on which they  
8 would have engaged in prohibited conduct but for the ban enacted by I-1639.

9 Moreover, while the LEOs’ recitation of the constitutional standard for standing from  
10 *Scott, Thomas*, and *Stoianoff* is correct, it actually reveals that the FAC alleges sufficient facts to  
11 demonstrate standing. In *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646 (9th Cir. 2002), the  
12 plaintiff filed suit to challenge the use of racial classifications in enrollment decisions, but did so  
13 before the process for enrollment decisions had even begun. In the event, no racial classifications  
14 were used in decisions, and the Court concluded that the plaintiff had lacked standing at the outset.  
15 *Id.* at 655. And in *Stoianoff*, the court held that “appellant had no standing to challenge this  
16 advertising prohibition . . . [where] Appellant admitted, in his brief and at oral argument, that he  
17 has no plans to advertise and that he does not fear prosecution under this portion of the statute.”  
18 *Stoianoff v. State of Mont.*, 695 F.2d 1214, 1223 (9th Cir. 1983). Finally, in *Thomas*, also cited by the  
19 LEOs, although the plaintiffs challenged a 25-year-old law, the only concrete harm they claimed  
20 was that they violated the law to support one set of their beliefs, yet in contravention of another set  
21 of beliefs requiring compliance with laws. The Ninth Circuit regarded this as “essentially another  
22 way of saying that the mere existence of a statute can create a constitutionally sufficient direct  
23 injury, a position that we have rejected before and decline to adopt now.” *Thomas v. Anchorage*  
24 *Equal Rights Comm’n*, 220 F.3d 1134, 1139 (9th Cir. 2000).<sup>2</sup> Here, by contrast, the Dealers have

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27 <sup>2</sup> As in *Stoianoff*, the *Thomas* plaintiffs also challenged an advertising ban, but admitted that they had never violated it  
nor intended ever to violate it in the future. *Thomas*, 220 F.3d at 1140 n.5.

1 already suffered financial harm by forgoing banned sales, which they would otherwise undertake  
2 but for the required forfeiture of their entire businesses. FAC ¶¶ 64, 104.

3 LEOs cite both *Thomas* and *Gun Rights Committee* for the principal that a plaintiffs’  
4 “general intent to violate a statute at some unknown date in the future” is insufficient for standing.  
5 *Atkins* 13:8-9; *Meidl*, 8:14-15. But the FAC does not allege such vague generalities. Instead, it  
6 alleges exact dates and times in the recent past that Young Adults sought to purchase banned  
7 firearms from Dealers, and Dealers refused because to make that sale would require them each to  
8 forfeit their business licenses to the LEOs who issue them. FAC ¶¶ 64, 104. This is no “vague  
9 generality,” but a concrete harm that each Young Adult and each Dealer has already suffered  
10 because of the mandate on the LEOs that they revoke Dealers’ licenses if they engage in conduct  
11 that the Plaintiffs challenge as constitutionally protected.

12 Two Supreme Court cases demonstrate that the allegations of the FAC are sufficient to  
13 demonstrate standing. The leading Supreme Court case on standing, *Lujan v. Defenders of Wildlife*,  
14 504 U.S. 555 (1992), requires plaintiffs to allege “an invasion of a legally protected interest which  
15 is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.  
16 Second, there must be a causal connection between the injury and the conduct complained of—  
17 the injury has to be fairly traceable to the challenged action of the defendant, and not the result of  
18 the independent action of some third party not before the court. Third, it must be likely, as opposed  
19 to merely speculative, that the injury will be redressed by a favorable decision.” *Lujan*, 504 U.S. at  
20 560–61 (internal citations and alterations omitted). Each of these elements is alleged as fact in the  
21 FAC. The Dealers have a legally protected interest in selling, and the Young Adults a legally  
22 protected interest in buying, the banned rifles. That interest is invaded by I-1639 and the LEOs’  
23 mandatory state law obligation to revoke the Dealers’ licenses if such sales occur. This is not  
24 hypothetical; the FAC cites dates on which such sales would have occurred but for the ban and  
25 enforcement mechanisms that threatens the very livelihood of the Dealers. That also creates the  
26 causal connection, as alleged in the FAC: the enforcement mechanism of state law, which  
27 mandates license forfeiture by the LEOs, is the sole reason those sales did not go forward. Finally,

1 if the challenged act is declared unconstitutional and enjoined, the harm is relieved, and the desired  
2 sales and purchases can proceed.

3 *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), also demonstrates that Plaintiffs  
4 here have alleged sufficient injury for standing in this case under the Declaratory Judgment Act. In  
5 that case, MedImmune, a multi-million dollar drug company, challenged the validity of a patent it  
6 licensed, without first breaching the license and incurring some degree of financial harm from  
7 breach of contract. The Supreme Court agreed that it had standing, even without first electing to  
8 incur some modicum of financial harm. In that case, a contract dispute between private parties, the  
9 Court noted that it was merely applying the existing rule governing standing in litigation between  
10 a citizen and its government: “where threatened action by government is concerned, we do not  
11 require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the  
12 threat—for example, the constitutionality of a law threatened to be enforced. The plaintiff’s own  
13 action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but  
14 nonetheless does not eliminate Article III jurisdiction.” *MedImmune*, 549 U.S. at 128–29.

15 There could hardly be a more precise description of the case presented by the FAC. The  
16 government, through the offices of Sheriff Atkins and Chief Meidl, threaten to revoke the required  
17 business licenses of Mitchell and Ball. Plaintiffs are not required to expose themselves to the  
18 threatened liability before bringing suit to challenge the law. If a multibillion dollar company like  
19 MedImmune need not risk modest money damages for breach of contract in order to have standing  
20 to challenge a patent it licenses, similarly the Dealers need not risk losing their entire businesses  
21 before challenging the law that precludes them from making sales they otherwise would make.

22 Indeed, in *MedImmune*, the Court specifically addressed the topic of the LEOs’ challenge  
23 to standing in this case. The LEOs argue that the Dealers lack standing specifically because they  
24 continue to comply with the challenged law, albeit under threat of license revocation. Atkins 14:3-  
25 6; Meidl 9:11-14. Citing a series of cases including the seminal *Ex parte Young*, 209 U.S. 123 (1908),  
26 the *MedImmune* Court said: “the declaratory judgment procedure is an alternative to pursuit of the  
27 arguably illegal activity. . . In each of these cases, the plaintiff had eliminated the imminent threat

1 of harm by simply not doing what he claimed the right to do (enter into a lease, or distribute  
2 handbills at the shopping center). That did not preclude subject-matter jurisdiction because the  
3 threat-eliminating behavior was effectively coerced.” *MedImmune*, 549 U.S. at 129. So too, in this  
4 case, the FAC plainly alleges that the “threat-eliminating behavior” is coerced under threat of the  
5 Dealers losing their business licenses.

6 Similarly, in *D.C. v. Heller*, 554 U.S. 570 (2008), the Supreme Court entertained a  
7 challenge to a licensing regime even though the plaintiff had not violated the regulations and  
8 incurred a criminal penalty. It was sufficient for the Court’s jurisdiction that Heller had been  
9 denied a license; he was not required to then violate the law and incur prosecution. Here, where  
10 both Dealers have alleged that their respective licenses are subject to mandatory forfeiture, they  
11 need not take the ultimate step of sacrificing their licenses and businesses to the LEOs before  
12 challenging the unconstitutional law. This follows a long line of Supreme Court case law  
13 demonstrating beyond dispute that a plaintiff need not commit a criminal act in order to challenge  
14 the constitutionality of a criminal law, nor put his or her business at risk of termination to challenge  
15 the civil enforcement provisions. *See, e.g., Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158  
16 (2014) (“One recurring issue in our cases is determining when the threatened enforcement of a  
17 law creates an Article III injury. When an individual is subject to such a threat, an actual arrest,  
18 prosecution, or other enforcement action is not a prerequisite to challenging the law”); *Steffel v.*  
19 *Thompson*, 415 U.S. 452, 459 (1974) (for a plaintiff challenging the constitutionality of a criminal  
20 statute, “it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution  
21 to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional  
22 rights”); *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) (“[w]hen the  
23 plaintiff has alleged an intention to engage in a course of conduct arguably affected with a  
24 constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution  
25 thereunder, he ‘should not be required to await and undergo a criminal prosecution as the sole  
26 means of seeking relief’”) (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)).

1 In light of this long line of Supreme Court precedent, the Northern District of California in  
2 *Jackson*, 829 F. Supp. 2d 867, found that the plaintiffs had standing to challenge gun restrictions.  
3 “Ultimately, though, even to the extent that at least some aspects of *Gun Rights Committee* remain  
4 good law, it simply is distinguishable. Plaintiffs have not merely alleged that they ‘wish and intend’  
5 to violate the ordinances in some vague and unspecified way, at some unknown point in the  
6 future.” *Jackson*, 829 F. Supp. 2d at 871–72. So too here, Plaintiffs have alleged far more than a  
7 vague wish and intent, but cited dates on which banned sales would have gone forward, and a  
8 mandatory enforcement regime that would end the Dealers’ businesses if they proceed.

9 **C. Mitchell States A Commerce Clause Claim Against Atkins**

10 Defendant Atkins asserts that Mitchell lacks standing to bring a commerce clause challenge  
11 to the interstate sales ban on the grounds that the commerce clause does not affect laws that  
12 burden, rather than favor, in-state interests. Atkins Motion at 18. Atkins also challenges the merits  
13 of the claim, asserting that the FAC fails to allege that the blatant, blanket ban on interstate  
14 commerce is “clearly excessive” or a “significant burden.” *Id.* Both challenges fail.

15 First, contrary to Atkins’ theory, the interstate commerce clause and the Supreme Court’s  
16 dormant commerce clause jurisprudence hold that “[s]tate laws discriminating against interstate  
17 commerce on their face are virtually per se invalid.” *Camps Newfound/Owatonna, Inc. v. Town of*  
18 *Harrison, Me.*, 520 U.S. 564, 575 (1997) (internal citation omitted). This includes laws that favor  
19 out-of-state businesses over in-state businesses, like the tax law in *Town of Harrison* that taxed in  
20 state businesses more heavily if they catered to out-of-state residents. “By encouraging economic  
21 isolationism, prohibitions on out-of-state access to in-state resources serve the very evil that the  
22 dormant Commerce Clause was designed to prevent.” *Town of Harrison*, 520 U.S. at 578. The  
23 interstate sales ban of I-1639 is the very kind of economic protectionism that the commerce clause  
24 forbids. “Economic protectionism is not limited to attempts to convey advantages on local  
25 merchants; it may include attempts to give local consumers an advantage over consumers in other  
26 States.” *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 580 (1986).

27

1 This is hardly a new rule. “A state is without power to prevent privately owned articles of  
2 trade from being shipped and sold in interstate commerce on the ground that they are required to  
3 satisfy local demands or because they are needed by the people of the state.” *Foster-Fountain*  
4 *Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928). Whatever reason the state may eventually produce for  
5 why it has banned residents of Oregon from buying self-loading rifles from a Washington merchant,  
6 it has enacted a ban on “privately owned articles of trade from being shipped and sold in interstate  
7 commerce,” a ban the state lacks the power to create. *See also New England Power Co. v. New*  
8 *Hampshire*, 455 U.S. 331, 338 (1982) (“Our cases consistently have held that the Commerce Clause  
9 of the Constitution, Art. I, § 8, cl. 3, precludes a state from mandating that its residents be given a  
10 preferred right of access, over out-of-state consumers, to natural resources located within its  
11 borders or to the products derived therefrom”).

12 Second, the FAC alleges that Mitchell has already been harmed by the forthcoming  
13 unconstitutional ban, specifically, his orders for rifles that he would otherwise expect to sell in  
14 interstate commerce have already ceased. FAC ¶ 115. This is sufficient to state a claim, and the  
15 two summary judgment cases cited by Atkins do not support his proposed Fed. R. Civ. P. 12(b)(6)  
16 standard. Atkins at 17-18. Instead, they show that the question of balancing burdens and benefits  
17 can be fact-specific, and not appropriate to resolve on a Rule 12(b)(6) motion. Certainly neither  
18 *National Ass’n of Optometrists & Opticians v. Harris*, 682 F.3d 1144 (9th Cir. 2012) nor *Pac. Nw.*  
19 *Venison Producers v. Smitch*, 20 F.3d 1008 (9th Cir. 1994) provides any support for the argument  
20 that the FAC must allege the degree of final proof discussed in those opinions. Instead, “[t]o  
21 survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true,  
22 to state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678. Myriad cases describe  
23 the difference between this and a summary judgment standard, where a plaintiff bears the burden  
24 of proving those facts. Here, the FAC easily meets the pleading standard in raising a challenge to  
25 a law that is “virtually per se invalid.” *Town of Harrison*, 520 U.S. at 575.



1 **D. The FAC States Claims By Young Adults Against The LEOs**

2 Both LEOs assert in passing that no Young Adult has plausibly pled a claim against them  
 3 because neither one has personally declined to sell a banned rifle. Atkins 10:18-19; Meidl 5:9-11.  
 4 They cite no support for this assertion, because none exists. One need look no further than the  
 5 caption on practically every lawsuit challenging the constitutionality of government restrictions on  
 6 the exercise of protected rights to see that a proper party defendant does not need to personally  
 7 engage with the plaintiffs in the protected activity in order to be liable for the constitutional  
 8 violation. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (naming the Dallas County District Attorney  
 9 in a suit seeking access to abortion); *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016)  
 10 (naming the Commissioner of the Texas Department of State Health Services in a suit seeking  
 11 access to abortion); *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992) (naming  
 12 the Pennsylvania Governor, Secretary of Health, Attorney General, and a county attorney general  
 13 in a case seeking access to abortion); *Lujan*, 504 U.S. 555 (naming the U.S. Secretary of the Interior  
 14 to redress the injury of not being able to look at wild animals in foreign countries); *Gun Rights*  
 15 *Comm.*, 98 F.3d 1121 (naming the Attorney General and acting Secretary of the Treasury in suit  
 16 seeking to vindicate right to purchase certain guns).

17 Instead, as described in detail above, the LEOs plainly have the obligation to enforce the  
 18 statute, and that obligation prevents the Young Adults from buying firearms legally in Washington,  
 19 as they have expressly stated they desire to do and recently attempted to do. “Defendants are not  
 20 required to have a ‘special connection’ to the unconstitutional act or conduct. Rather, state  
 21 officials must have a particular duty to ‘enforce’ the statute in question and a demonstrated  
 22 willingness to exercise that duty . . .” *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 828  
 23 (10th Cir. 2007). Similarly, the Ninth Circuit recently held that Washington sheriffs can be proper  
 24 parties in *Ex parte Young* actions where they are responsible for action under the challenged statute:

25 Actions under *Ex parte Young* can be brought against both state and county officials, so it is  
 26 unnecessary for us to resolve the parties’ dispute over whether the Sheriff acts on behalf of  
 27 King County or the State of Washington when he executes writs of restitution. The only  
 issue is whether the Sheriff has at least some connection to enforcement of the allegedly  
 unconstitutional eviction procedure authorized by § 375. He does, because Washington law  
 assigns county sheriffs the power and duty to serve and execute writs of restitution issued



1 under § 375. The Sheriff's role in executing those writs makes him a proper defendant in  
2 an *Ex parte Young* suit seeking to enjoin enforcement of § 375.

3 *Moore v. Urquhart*, 899 F.3d 1094, 1103 (9th Cir. 2018) (internal citations omitted). Similarly, the  
4 Ninth Circuit has noted the proper party is the state officer who has a "fairly direct" connection  
5 to the challenged law, just as the LEOs do here. "*Ex parte Young* requires 'some connection'  
6 between a named state officer and enforcement of a challenged state law. . . This connection must  
7 be fairly direct; a generalized duty to enforce state law or general supervisory power over the  
8 persons responsible for enforcing the challenged provision will not subject an official to suit."  
9 *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004) (internal citation  
10 omitted).

11 Because each LEO has a direct connection to enforcement of the challenged law, the Young  
12 Adults have properly named them as defendants to vindicate their rights to make the banned  
13 purchases they seek to make. But for the LEOs obligation to revoke Dealers' licenses, the Dealers  
14 would have sold specific guns to the Young Adults on identified dates in the past. It is the direct  
15 connection of the LEOs to the challenged law that has resulted in the harm to the Young Adults.  
16 As such, Casey has stated a claim against Meidl and the other three Young Adults against Atkins.

#### 17 **E. The Organizations Have Stated A Claim Against The LEOs**

18 The LEOs do not address the Organizations' standing and claims, and thereby waive any  
19 argument that the Organizations are not proper parties with valid claims against each LEO. Atkins  
20 simply asserts that only other plaintiffs have asserted claims. Atkins 7:13-17. Meidl footnotes an  
21 assertion that the Organizations have no claims. Meidl at 4 n.6. He thereby waives it. *See, e.g.,*  
22 *Matson v. United Parcel Servs., Inc.*, No. C10-1528 RAJ, 2018 WL 3608396, at \*8 (W.D. Wash. July  
23 26, 2018) ("Arguments raised only in footnotes, or only on reply, are generally deemed waived.").

24 In any event, even if argued, it fails. The FAC alleges sufficient facts to show that the  
25 organizations have stated claims in their own right and for the benefit of their members against  
26 both LEOs. As the Supreme Court held in describing the test for associational standing, "an  
27 association has standing to bring suit on behalf of its members when: (a) its members would

1 otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane  
 2 to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires  
 3 the participation of individual members in the lawsuit.” *Hunt v. Washington State Apple Advert.*  
 4 *Comm’n*, 432 U.S. 333, 343 (1977). Each of those factors is met by the fact allegations of the FAC:  
 5 (a) the FAC alleges that the young adult plaintiffs and dealer plaintiffs are members of the  
 6 organizations (FAC ¶¶ 24, 32), and the foregoing discussion demonstrates that they have standing  
 7 in their own right; (b) the interests that the organizations seek to protect—the protection of  
 8 constitutional rights—are germane to the organizations’ purpose; and (c) while the young adult  
 9 and dealer plaintiffs have individual interests that give them standing, their participation in the  
 10 lawsuit is not required in order to adjudicate the claims brought by the organizations..

11 The Organizations have also alleged direct standing injury, which is sufficient to support  
 12 standing for claims against both LEOs.

13 We have thus held that, under *Havens Realty*, “a diversion-of-resources injury is sufficient  
 14 to establish organizational standing” for purposes of Article III, if the organization shows  
 15 that, independent of the litigation, the challenged “policy frustrates the organization’s  
 goals and requires the organization ‘to expend resources in representing clients they  
 otherwise would spend in other ways.’”

16 *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1241 (9th Cir. 2018) (internal citations  
 17 omitted).

#### 18 **F. All Plaintiffs’ Claims Are Ripe**

19 The LEOs’ challenge to ripeness essentially mimics the challenge to standing, citing  
 20 *Thomas*. Because neither LEO has yet charged any plaintiff with a crime, they assert that claims are  
 21 not ripe. But as shown above, the injury complained of has already occurred: lawful constitutionally  
 22 protected sales have not gone forth that otherwise would have, but for the LEOs’ obligation to  
 23 revoke the Dealers’ business licenses when the Dealers self-report those sales to the LEOs, as  
 24 required by law. The ripeness argument fails for the same reason as the standing argument. “The  
 25 constitutional component of the ripeness inquiry is often treated under the rubric of standing and,  
 26 in many cases, ripeness coincides squarely with standing’s injury in fact prong.” *Thomas*, 220 F.3d  
 27 at 1138. The LEOs make no argument that the Court ought to decline to exercise proper

1 jurisdiction on prudential grounds, and it should not. Plaintiffs are unable to make lawful  
 2 constitutionally protected, and profitable, transactions in firearms due to the LEOs' obligation to  
 3 revoke the Dealers' licenses if those transactions proceed. The case is ripe.

4 **G. Qualified Immunity Is Irrelevant In A Suit Seeking Prospective Relief Against State**  
 5 **Actors Named In Their Official Capacities**

6 Atkins and Meidl argue they should be dismissed under the doctrine of qualified immunity,  
 7 on the grounds that no official capacity claim is alleged, and they have qualified immunity against  
 8 any personal-capacity claim. Meidl 15-16; Atkins 19-20. First, neither LEO is named in an  
 9 individual capacity, and, as shown above, the official-capacity claims are proper. Second, qualified  
 10 immunity only shields state officials from suits seeking money damages against them personally.  
 11 As the Supreme Court stated in the case establishing the modern doctrine of qualified immunity,  
 12 “We therefore hold that government officials performing discretionary functions generally are  
 13 *shielded from liability for civil damages* insofar as their conduct does not violate clearly established  
 14 statutory or constitutional rights of which a reasonable person would have known.” *Harlow v.*  
 15 *Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added). *See also Jessop v. City of Fresno*, 918 F.3d  
 16 1031, 1034 (9th Cir. 2019) (holding that “[t]he doctrine of qualified immunity protects government  
 17 officials from ‘*liability for civil damages* insofar as their conduct does not violate clearly  
 18 established statutory or constitutional rights of which a reasonable person would have known’”)  
 19 (emphasis added) (*quoting Pearson v. Callahan*, 555 U.S. 223, 231 (2009), in turn quoting *Harlow*);  
 20 *Morales v. Fry*, 873 F.3d 817, 822 (9th Cir. 2017) (noting that “the doctrine of qualified  
 21 immunity . . . protects public officials from *liability for civil damages* . . .”). This case seeks no  
 22 money damages, only prospective injunctive and declaratory relief from Atkins and Meidl in their  
 23 official capacities as law enforcement officers and licensors of Plaintiffs Mitchell and Ball.

24 **H. The LEOs Passing Remarks On Subject Matter Jurisdiction Neither Preserve An**  
 25 **Argument Nor Withstand Scrutiny**

26 The Motions are captioned as raising challenges under Fed. R. Civ. P. 12(b)(1), questioning  
 27 the Court's subject matter jurisdiction. No arguments are developed from which the Court could

1 conclude that it lacks subject matter jurisdiction for this 42 U.S.C. § 1983 challenge, which raises  
2 federal constitutional challenges to state law. If the LEOs intend to suggest that their immunity  
3 argument calls the Court’s jurisdiction into question, they are wrong for two reasons. First, as  
4 shown above, they are not entitled to qualified immunity. Second, even successful claims of  
5 sovereign or qualified immunity do not alter the subject matter jurisdiction of a federal court.  
6 “[T]he Eleventh Amendment is not a true limitation upon the court’s subject matter jurisdiction,  
7 but rather a personal privilege that a state may waive” *Hill v. Blind Indus. & Servs. of Maryland*, 179  
8 F.3d 754, 760 (9th Cir.), *opinion amended on denial of reh’g*, 201 F.3d 1186 (9th Cir. 1999).

9 To the extent the LEOs intend the Court to consider sovereign immunity, the Court should  
10 consider that they waived the argument by not raising it. In any event, the argument fails under *Ex*  
11 *parte Young*, 209 U.S. 123. “In determining whether the doctrine of *Ex parte Young* avoids an  
12 Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether  
13 [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized  
14 as prospective.” *Verizon Md., Inc. v. Public Serv. Comm’n of Md.*, 535 U.S. 635, 645 (2002)  
15 (alteration in original) (citations omitted). “This is in line with our traditional conception of the  
16 *Young* exception, which has always distinguished between a suit against a State *qua* State and a suit  
17 against a state official to enjoin the enforcement of a state act that violates federal law: the *Young*  
18 doctrine has always permitted the latter to avoid the sovereign immunity bar.” *Agua Caliente Band*  
19 *of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1048 (9th Cir. 2000).

20 **I. If the FAC Is Not Adequately Pled, Plaintiffs Must Be Granted Leave to Amend**

21 If the Court considers any of the LEOs’ arguments about deficiencies in the FAC well-  
22 taken, then “court should freely give leave [to amend] when justice so requires.” Fed. R. Civ. P.  
23 15. Where the LEOs claim to have identified specific omissions in alleging supposedly required  
24 facts, plaintiffs must be given the opportunity to allege those facts if the Court concludes that they  
25 are not sufficiently alleged already.

26 ///

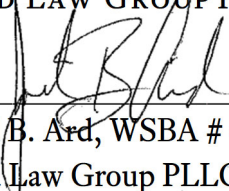
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V. CONCLUSION


The LEOs' motion to dismiss is based upon a misunderstanding of the nature of the claims that Plaintiffs have asserted against them. Instead of directing the Court toward cases in which the plaintiffs sought injunctive relief from the enforcement of regulations that burden constitutional rights, the LEOs have relied upon cases that address the limited circumstances in which a court can enjoin the enforcement of a criminal statute. Moreover, the detailed factual allegations of the complaint more than amply state causes of action that are plausible on their face. Even if this Court should require additional pleading to clarify Plaintiffs' claims, leave to amend should be granted.

April 22, 2019.

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the United States of America that on April 22, 2019, I filed the foregoing with the Court’s CM/ECF system, which will give notice to all parties and counsel of record.

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