Appellate Case No. 09-16852

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES ROTHERY, Esq.; ANDREA HOFFMAN

Appellants/Plaintiffs,

vs.

Former Sheriff LOU BLANAS; SHERIFF JOHN MCGINNIS; Detective TIM SHEEHAN; SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, an independent branch of government of the COUNTY OF SACRAMENTO; COUNTY OF SACRAMENTO; STATE OF CALIFORNIA ATTORNEY GENERAL JERRY BROWN

Appellees/Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
No. 2:08-cv-02064 JAM KJM

ANSWERING BRIEF OF APPELLEES Former Sheriff LOU BLANAS; Former Sheriff JOHN MCGINNIS; TIM SHEEHAN; COUNTY OF SACRAMENTO

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STATEMENT OF JURISDICTION

Defendants/Appellees Lou Blanas, John McGinness (improperly sued as John McGinnis), Tim Sheehan, and County of Sacramento (also erroneously sued as Sacramento County Sheriff's Department) (herein "County Appellees"), agree with Plaintiffs/Appellants' Statement of Jurisdiction pertaining to the jurisdiction of the Ninth Circuit Court of Appeals and the jurisdiction of the United States District Court for the Eastern District of California.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the District Court correctly dismissed Plaintiffs'/Appellants' First Amended Complaint for failure to state a claim upon which relief could be granted.

STATEMENT OF THE CASE

Plaintiffs/Appellants James Rothery and Andrea Hoffman (herein "Appellants") brought this lawsuit alleging violations of their Federal Constitutional rights when their respective applications for a permit to carry a concealed weapon (herein "CCW") were denied. They now appeal the District Court's dismissal of their First Amended Complaint in its entirety without leave to amend.

Appellant Rothery submitted his first application for a CCW permit in 2003, which was denied. ER 67 at ¶¶ 9-10. He submitted his third and final application

on August 31, 2006, which was also denied. ER 67 at ¶ 11. He did not appeal the denial of the third application. ER 67 at ¶ 12.

Appellant Hoffman applied for a CCW permit in November 2007, which was denied. Her appeal of that decision was denied in 2008. ER 66 at ¶ 8.

On May 1, 2009, Appellants filed their First Amended Complaint ("FAC") against former Sheriff Lou Blanas, the then current Sheriff John McGinness (incorrectly sued as John McGinniss), Detective Tim Sheehan, and the County of Sacramento (also erroneously sued as the Sacramento County Sheriff's Department) (herein "County Appellees"), as well as the California Attorney General Jerry Brown. ER 65. The FAC asserted seven (7) causes of action against County Appellees for violations of the Racketeer Influenced and Corrupt Organizations statute (RICO), First Amendment Free Speech and Association, Second Amendment right to bear arms, Fourteenth Amendment Equal Protection and Privileges and Immunities Clause, and Ninth Amendment Right to Self-Preservation, and for declaratory and injunctive relief. ER 65-142. On May 11, 2009, County Appellees moved to dismiss the FAC for failure to state a claim upon which relief could be granted for various reasons including that Appellants failed to state proper claims, did not have standing to assert their claims, the claims were barred by the statute of limitations, and/or their claims failed as a matter of law. ER 148 and 13-40. Following briefing

and oral argument on both County Appellees' and the State's Motions to Dismiss the FAC, the District Court granted the motions, dismissing the FAC in its entirety and without leave to amend. ER 13-40.

SUMMARY OF THE ARGUMENTS

I. STANDARD OF REVIEW

An appellate court reviews *de novo* a district court's order granting a motion to dismiss. Blantz v. Cal. Dep't of Corr. & Rehab., 727 F.3d 917, 922 (9th Cir. Cal. 2013) (citing Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1030 (9th Cir. 2008)).

II. LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) may be granted if "it appears to be a certainty that (the pleader) would be entitled to no relief under any state of facts which could be proven," or where a plaintiff has included allegations disclosing some absolute defense or bar to recovery. FRCP 12(b)(6).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "Determining whether a complaint states a plausible

claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 679. A plaintiff must plead "sufficient facts to allow the Court to draw a reasonable inference of misconduct…" Harris v. County of Orange, 682 F.3d 1126, 1131 (9th Cir. Cal. 2012) (citing Iqbal, 556 U.S. at 678). Although the Court is required to accept all of the facts alleged in the complaint as true and construe them in the light most favorable to the plaintiff, it is not required "to accept as true a legal conclusion couched as a factual allegation." Id.

III. ARGUMENTS

A. Appellants Fail to State a Claim for Violation of the Second Amendment as They Have No Constitutional Right to Carry a Concealed Firearm

Appellants claim their Second Amendment right to keep and bear arms has been violated by the State's statutory scheme, and the County's application of that scheme, for issuance of CCW permits. Mainly, Appellants contend that the County Appellees' denial of their applications for a CCW permit violated their constitutional rights.

The Ninth Circuit recently held that "there is no Second Amendment right for members of the general public to carry concealed firearms in public." Peruta v. Cnty. of San Diego, 824 F.3d 919, 927 (9th Cir. 2016). As Appellants do not have

a Second Amendment right to a CCW permit, County Appellees could not have violated this right by denying their permit applications.

Therefore, Appellants fail to assert a claim for violation of their Second Amendment rights against County Appellees, and County Appellees respectfully request that this Court affirm the dismissal of Appellants' Fourth Cause of Action.

B. Appellants Fail to State a Claim for Violation of Equal Protection Pursuant to the Fourteenth Amendment

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws, 'which is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216 (1982)).

In general, Appellants claim that their right to equal protection has been violated by the County Appellees' system for issuing CCW permits. For the first time on appeal, Appellants delineate four (4) separate bases for this claim:

> "1) State law exempting honorably retired California peace officers from the laws applicable to Plaintiffs; 2) State law and County policy establishing a double standard between Plaintiffs and those affiliated with law enforcement, also known as the "Prima Facie Good Cause" standard for law enforcement affiliation; 3) Campaign contributors and political cronies receiving CCWs and not being subjected to the same CCW application process as Plaintiffs; and, 4) Precluding Plaintiffs

> from membership in the County of Sacramento Sheriff's Department Aerosquadron and Posse."

Opening Brief at 32; SER 87-88.

Before the lower court, Appellants only contended that (1) honorably retired peace officers were given preferential treatment in obtaining CCW permits because they are entitled to a presumption of "good cause," and (2) that contributing to the campaign of and/or being friends with Sheriff Blanas gave you a greater chance of receiving a CCW permit. See SER 88. Overwhelmingly, Appellants' claims regarding campaign contributions and membership in alleged organizations within the Sacramento County Sheriff's Department were made in regard to their now abandoned RICO cause of action. ER 65-127. Because of this, the District Court did not consider and/or provide a decision based on each of the four (4) bases now asserted by Appellants. ER 17-39. Based thereon, these additional bases now asserted by Appellants should be considered waived and not considered by the appellate court. Singleton v. Wulff, 428 U.S. 106, 120 (1976); See also Ramirez v. City of Buena Park, 560 F3d 1012, 1026 (9th Cir. 2009).

Should this court not consider these newly asserted bases waived, County Appellees address each below.

1. Exemption for Honorably Retired Peace Officers

The FAC challenges the constitutionality of the California Penal Code sections that allow county sheriffs to license individuals to carry concealed firearms and authorize qualified retired peace officers to carry concealed firearms.[1] Appellants allege that retired law enforcement officers are given special treatment in allowing them to carry concealed weapons without having to show good cause for a permit. Specifically, California Penal Code sections 25450 and 25900 states that the statutes prohibiting the carrying of concealed weapons, section 25400, and loaded weapons, section 25850, do not apply to peace officers or to honorably retired peace officers.

As cited above, this Court recently held that "there is no Second Amendment right for members of the general public to carry concealed firearms in public." Peruta v. Cnty. of San Diego, 824 F.3d at 927. Accordingly, Appellants cannot base their Equal Protection claim on alleged impingement of their Second Amendment rights. Further, there is no constitutionally recognized suspect

[1] At the time the FAC was filed, the relevant provisions were codified at Cal. Penal Code § 12025, §§ 12050 *et seq.*, and §§ 12027, *et seq*. Pursuant to the Deadly Weapons Recodification Act of 2010, the provisions were recodified effective January 1, 2012. *See* Cal. Penal Code § 16005. The recodification was not "intended to substantively change the law relating to deadly weapons." Id. County Appellees' answering brief will cite to the recodified Penal Code.

classification for people who are not "honorably retired peace officers." When "a legislative act neither affects the exercise of a fundamental right, nor classifies persons based on protected characteristics, then that statute will be upheld 'if the classification drawn by the statute is rationally related to a legitimate state interest.'" Silveira v. Lockyer, 312 F.3d 1052, 1088 (9th Cir. 2002) (quoting Schweiker v. Wilson, 450 U.S. 221, 230 (1981)).

"The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." City of Cleburne, 473 U.S. at 440. "A legislative classification subject to rational basis scrutiny 'must be wholly irrational to violate equal protection.'" Fields v. Legacy Health Sys., 413 F.3d 943, 955 (9th Cir. 2005) (quoting De Martinez v. Ashcroft, 374 F.3d 759, 764 (9th Cir. 2004)). In "applying rational basis review . . ., any hypothetical rationale for the law [will] do." Witt v. Dep't of Air Force, 527 F.3d 806, 817 (9th Cir. 2008). Additionally, legislative action can pass rational basis review "even when there is an imperfect fit between means and ends." Heller v. Doe, 509 U.S. 312, 321 (1993).

Appellants argue that Appellees are unable to "articulate a tangible and legitimate reason why" law-abiding, trained citizens are treated differently from retired peace officers in terms of receiving CCW permits. Opening Brief at 35.

However, it is Appellants' burden to establish that there is not a reasonable, conceivable state of facts that could provide a rational basis for the classification. Silveira v. Lockyer, 312 F.3d at 1089. More specifically, Appellants must "negative every conceivable basis which might support [the legislative classification]." Id. (citing Heller, 509 U.S. at 320 (1993)). They fail to do so.

Appellants allege that Silveira v. Lockyer, *supra*, applies in their favor here. Silveira dealt with California's ban on assault rifles, and the court upheld the statute in every respect, except one. The court found no rational basis existed for allowing retired peace officers to possess assault weapons without any restriction on use, when active peace officers were permitted to possess and use such weapons when off-duty only for law enforcement purposes. Id. at 1090-92. The basis for allowing active off-duty officers to possess and use assault weapons was that a peace officer is on call 24-hours a day, and may be called upon at any time to respond to a call for help. The same is not true of retired officers. Because they are not on call at all after retirement, there was no rational basis in allowing retired officers to keep assault weapons. Id. As the District Court explained,

> "The justification and rationale for exempting retired peace officers from the CCW [permit requirements] is not the same as for the exception to the assault weapon ban in Silveira. The justification for a CCW is personal protection, not public protection. Peace officers were entitled to carry assault weapons

> so that they would not be inadequately armed to confront criminals while protecting the public. On the other hand, they are entitled to carry concealed weapons to protect themselves from the enemies they have made in performing their duties. While an officer's duty to respond to the public's calls for help stops when he retires, the threat of danger from enemies he might have made during his service does not. Therefore, there is a rational basis for allowing a retired officer to continue to carry a concealed weapon, even though there was no rational basis for allowing the same officer to keep an assault weapon."

ER 26:2-17; See also Silveira, *supra*; Mehl v. Blanas, 2004 U.S. Dist. LEXIS 32503, at *12-13 (E.D. Cal. Sep. 2, 2004); Peterson v. Farrow, No. 2:15-cv-00801-JAM-EFB, 2016 U.S. Dist. LEXIS 89029, at *17 (E.D. Cal. July 7, 2016) ("it would also be reasonable for the legislature to conclude that former police officers face heightened personal security risks.").

Appellants attack the rationale that retired peace officers may require a CCW to protect themselves from the enemies they have made in performing their duties while in active law enforcement by arguing that a "hypothetical grudge is farfetched" in general, and would definitely not exist if a retired officer moved to a different jurisdiction or only worked as active law enforcement for a short period of time. See Opening Brief at 36. Regardless of the merits of these contentions, they fail to meet Appellants' burden to establish **no** rational reason for the classification. See Clements v. Fashing, 457 U.S. 957, 963 (1982) (classifications

may be set aside "only if they are based on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them"). Further, a hypothetical rationale will suffice whether or not that rationale actually motivated the legislature. See Witt v. Dep't of Air Force, supra; FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

Based on the foregoing, County Appellees respectfully request that this Court affirm the District Court's determination that there is a rational basis for the classification between honorably retired peace officers and other citizens, and the dismissal without leave to amend of Appellants' equal protection claim asserted on that basis.

2. Alleged Preferential Treatment for Campaign Contributors

Appellants allege that issuance of a CCW permit was dependent on contributing to the Sheriff's election campaign. Presumably, Appellants were not campaign contributors, although they have not specifically pled one way or the other. Assuming Appellants' allegations are true, that those who did contribute were "summarily" granted CCW permits, evidence that some individuals who contributed to a campaign were issued permits does not implicate a violation of Appellants' rights by virtue of the denial of their applications, and is not

necessarily indicative of a situation wherein issuance of CCW permits was done in exchange for campaign contributions. See Buckley v. Valeo, 424 U.S. 1 (1976).

Moreover, based on the same allegations involving the same defendants, the Ninth Circuit has already determined that there was not a question of material fact as to whether County Appellees were issuing CCW permits in exchange for campaign contributions. Mehl v. Blanas, 532 F. App'x 752, 754 (9th Cir. 2013). In Mehl, the plaintiffs also alleged that the Sacramento County Sheriff's Department violated their equal protection rights by issuing concealed-carry licenses to Sheriff Blanas' political supporters while denying them to non-supporters. Id. Although the plaintiffs offered evidence that some supporters of Sheriff Blanas received concealed-carry licenses, they did not present evidence that applications of similarly situated non-supporters were routinely rejected. In fact, the evidence in the record in Mehl, the same evidence that was also before the lower court in this matter, showed that over 200 non-contributors received licenses during Sheriff Blanas' tenure, while several Blanas donors had their applications denied or, when they made inquiries to Blanas directly, were told they must apply through the regular application process. Id.; SER 4-6, 69-78.

Based on the foregoing, County Appellees respectfully request that this Court determine that Appellants are unable to establish that individuals who

contributed to the Sheriff's campaign were given special treatment, and that any equal protection claim asserted by Appellants on that basis must fail as a matter of law.

3. Membership in Sheriff's Department Aerosquadron and Posse

It is unclear exactly what Appellants' are claiming in regard to membership in alleged groups they identify as the Sheriff's Aerosquadron and Posse. In their Opening Brief, they state that "others similarly situated have been provided exclusive governmental membership in these organizations, to the exclusion of Plaintiffs." Opening Brief at 41. Throughout the FAC they make mention of these groups only in relation to their now abandoned RICO claim. ER 65-127.

The FAC asserts that only Appellant Hoffman ever requested to be a member of either of these alleged groups. ER 66 at ¶ 7. Therefore, Appellant Rothery has no standing to assert an equal protection claim on this basis. Neither the FAC, nor the Opening Brief, provide information as to when or to whom Appellant Hoffman made this oral request or whether that individual was an employee of the Sheriff's Department and/or had any authority or ability to grant her membership in either of these alleged organizations. Further, Appellants have not pled or provided any information that they own private planes and/or horses that would presumably be a requirement to membership. The Opening Brief

provides no further information or allegations that indicate either Appellant could adequately state an equal protection claim on this basis. Appellants have had their opportunity to do so and have failed.

Based on the foregoing, County Appellees respectfully request that this Court determine that Appellants failed to state a claim for violation of their right to equal protection on the basis of being denied membership in certain alleged Sheriff's Department organizations or groups.

4. Good Cause Requirement

Although not clearly articulated in Appellants' briefing, there is some indication that they generally challenge the discretionary process permitted by the State scheme for issuance of CCW permits. Specifically, they take issue with the provision in the law that an applicant must show good cause to carry a concealed weapon, and the authorization given county sheriffs to define good cause. The Peruta decisions resolves this issue. Therein, the court determined that a county sheriff,

> "has an important and substantial interest in public safety and in reducing the rate of gun use in crime. In particular, the government has an important interest in reducing the number of concealed weapons in public in order to reduce the risks to other members of the public who use the streets and go to public accommodations. The government also has an important interest in reducing the number of concealed handguns in public because of their disproportionate involvement in life-threatening crimes of violence, particularly in streets and other public places."

Peruta v. Cnty. of San Diego, 758 F. Supp. 2d 1106, 1117 (S.D. Cal. 2010), *rev'd and remanded*, 742 F.3d 1144 (9th Cir. 2014), *vacated by* 781 F.3d 1106 (9th Cir. 2015) (granting en banc hearing). Further, the Ninth Circuit held that

> "[b]ecause the Second Amendment does not protect in any degree the right to carry concealed firearms in public, any prohibition or restriction a state may choose to impose on concealed carry — including a requirement of "good cause," however defined — is necessarily allowed by the Amendment."

Peruta v. Cnty. of San Diego, 824 F.3d at 939 (9th Cir. 2016).

Based on the foregoing, County Appellees respectfully request that this Court find that there is a rational basis for regulating the issuances of CCW permits, including a good cause requirement, and that any equal protection claim asserted by Appellants on that basis must fail as a matter of law.

C. Appellants Fail to State a Claim Against County Appellees for Violation of the Privileges and Immunities Clause of the Fourteenth Amendment

Appellants contend that the denial of their applications for CCW permits constitute a violation of their rights under the Fourteenth Amendment's Privileges and Immunities Clause. They further assert that the right to keep and bear arms for purposes of self-defense and travel should be considered a privilege or immunity protected by the Fourteenth Amendment and compare it to the right to travel upheld in Saenz v. Roe, 526 U.S. 489 (1999). Opening Brief at 45. Based thereon,

Appellants contend that by being denied a CCW permit, they were denied the ability to travel with a concealed weapon to other states that honor California's CCW permits.

The "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. In Supreme Court of Virginia v. Friedman, 487 U.S. 59 (1988), the Supreme Court set forth a two-prong test to determine whether a statute violates the Privileges and Immunities Clause. First, a court asks whether the restricted activity is

> sufficiently basic to the livelihood of the Nation . . . as to fall within the purview of the Privileges and Immunities Clause. For it is only with respect to those "privileges" and "immunities" bearing on the vitality of the Nation as a single entity that a State must accord residents and nonresidents equal treatment.

Id. at 64-65 (quotations and citations omitted). "Second, if the challenged restriction deprives nonresidents of a protected privilege, [the Court] will invalidate it only if [it concludes] that the restriction is not closely related to the advancement of a substantial state interest." Id. at 65 (citation omitted). Only those distinctions that "hinder the formation, the purpose, or the development of a single Union of those States" are barred. Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 383 (1978).

The Saenz case deals specifically with the right to travel between states and the receipt of welfare benefits and the establishment of state residency in order to qualify for those state benefits. There is no identification of the right to a permit to carry a concealed weapon as a "personal right," nor any discussion of the subject matter of this lawsuit, including the issuance or non-issuance of a CCW permit, in the Saenz case.

Appellants' claim does not implicate any of the privileges recognized previously by the Supreme Court. The concealed carry of a firearm does not impact their ability to pursue a common calling or other employment, result in unfavorable tax consequences, or limit their access to the courts. Saenz, 526 U.S. at 502 (common calling); Austin v. New Hampshire, 420 U.S. 656, 661 (1975) (tax consequences); McKnett v. St. Louis & S. F. R. Co., 292 U.S. 230, 233 (1934) (court access). Appellants do not "have a property or liberty interest in a concealed weapons license." Erdelyi v. O'Brien, 680 F. 2d 61, 64 (9th Cir. 1982). Moreover, "there is no Second Amendment right for members of the general public to carry concealed firearms in public." Peruta v. Cnty. of San Diego, 824 F.3d at 927.

Given that the concealed carrying of firearms is not recognized as a right, it is not an activity "sufficiently basic to the livelihood of the Nation." Friedman, 487 U.S. at 64 (quotation omitted). Further, Appellants have not made an argument that

the prohibition on the carrying of a concealed weapon might "hinder the formation, the purpose, or the development of a single Union." Baldwin, 436 U.S. at 383. Accordingly, Appellants' privileges and immunities claim should fail.

Based on the foregoing, County Appellees respectfully request that this Court affirm the District Court's determination that Appellants failed to assert a claim for violation of the Privileges and Immunities Clause and the dismissal of that claim without leave to amend.

D. Appellants Do Not Have Standing to Assert a Claim Pursuant to the Ninth Amendment

The Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Appellants contend that their natural right to self-preservation pursuant to the Ninth Amendment was violated by denial of their applications for a CCW permit.

The Ninth Amendment does not encompass an individual right to bear arms, and a plaintiff lacks standing to challenge local government regulations dealing with fire arm possession on Ninth Amendment grounds. San Diego Gun Rights Committee v. Reno, 98 F. 3d 1121 (9th Cir. 1996). As a matter of law, Appellants do not have standing to assert a Ninth Amendment claim.

Based on the foregoing, County Appellees respectfully request that this Court affirm the District Court's determination that Appellants failed to assert a claim for violation of their rights pursuant to the Ninth Amendment and the dismissal of that claim without leave to amend.

E. Appellant Rothery Lacks Standing to Pursue This Litigation

In order to proceed with a federal lawsuit alleging violations of the United States Constitution, a plaintiff must identify an injury "fairly traceable" to conduct on the part of the defendant that is unlawful. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 472 (1982). Because this requirement of causal connection has been deemed an indispensable part of any action challenging such violations under 42 U.S.C. section 1983 (see Arnold v. Int'l Bus. Machs. Corp., 637 F.2d 1350, 1355 (9th Cir. 1981)), a plaintiff bears the burden of establishing causation in order to invoke federal jurisdiction under section 1983. Accordingly, Appellants lack standing to seek redress in federal court unless they can make an initial showing that an unconstitutional policy, practice or custom motivated County Appellees' denial of their CCW permit applications.

Appellant Rothery cannot make that showing in this case, and therefore is unable to proceed with this lawsuit. See FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231

(1990) (burden of proof in demonstrating standing rests with party asserting jurisdiction). The FAC states that Appellant Rothery did not fully complete the application process available to him in that he never filed an appeal to the denial of his last application for a permit. ER 67 at ¶ 12. Additionally, Appellant Rothery does not claim to have requested or applied for membership in the Sheriff's Aerosquadron or Posse.

Appellant Rothery cannot establish standing to assert claims that had no role in the disposition of his particular application, e.g., not contributing to an election campaign. The Ninth Circuit's decision in Madsen v. Boise State Univ., 976 F.2d 1219 (9th Cir. 1992) supports this conclusion. In Madsen, the plaintiff complained about unconstitutional discrimination in the issuance of disabled parking permits on the Boise State campus. Like Appellant Rothery, Madsen filed a civil rights suit under 42 U.S.C. section 1983. The facts, however, revealed that Madsen never completed the formal permit application for obtaining a disabled parking permit. The Court ruled that since he did not complete the formal application process, Madsen was precluded from making a constitutional challenge. As the Ninth Circuit stated: "[a] plaintiff lacks standing to challenge a rule or policy to which he has not submitted himself by actually applying for the desired benefit." Id. at 1220.

While Madsen may be distinguishable because the plaintiff is that case submitted no written application at all (instead making only oral inquiries about handicap parking), the rationale for the Ninth Circuit's decision is nonetheless applicable here. Both this case and Madsen involved the plaintiff's failure to fully avail himself of the administrative application process before escalating his grievance to the Court. Without completing the administrative process, it would be sheer speculation to guess at what the decision on Appellant Rothery's last application would have been or what policies (constitutional or otherwise) may have been implicated in the decision. Further, since he never requested membership in the Sheriff's Aerosquadron or Posse it is absolute speculation as to what the County Appellees' actions would have been. In the absence of completing those processes, Appellant Rothery cannot show that any unconstitutional policy played any role in the denial of his CCW application or membership in certain Sheriff's Department organizations.

Based on the foregoing, County Appellees respectfully request that this Court determine that Appellant Rothery lacks standing and that his complaint against County Appellees was properly dismissed without leave to amend.

F. Appellants' Claim for Declaratory/Injunctive Relief Cannot Be Maintained Against County Appellees

Appellants Seventh Cause of Action requests this Court to declare that various sections of the California Penal Code dealing with the possession of firearms, carrying of concealed firearms, and exemptions from those laws, are unconstitutional and in violation of the Second Amendment and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Further, Appellants seek a declaration from the Court that the County of Sacramento's policies with respect to those statutes are likewise unconstitutional. However, Appellants also allege that the County's policies with respect to these statutes mirror the statutes themselves. ER 128-29 at ¶ 688.

The County of Sacramento did not enact the legislation Appellants complain of, and cannot change that legislation. County Appellees are to abide by the legislation, and according to Appellants' FAC, are doing so. Further, with respect to any individual decisions in the application of the statutes, County Appellees are entitled to the discretionary immunities provided in California Government Code section 820.2, which states:

> Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.

As discussed above, court after court, including the United States Supreme Court, have declared that reasonable restrictions of the possession and use of guns, including restricting the ability to carry a concealed weapon in public, are not in violation of the United States Constitution, and in particular the Second Amendment thereto.

Based thereon, County Appellees respectfully request that this Court determine that Appellants request for declaratory and/or injunctive relief is inappropriate and affirm the District Court's dismissal of said claim without leave to amend.

G. Appellants Are Not Entitled to Interim Litigation Expenses and Counsel Fees Pursuant to 42 U.S.C. § 1988

Appellants request that this Court award them costs, fees, and litigation expenses pursuant to 42 U.S.C. section 1988 if they should prevail on appeal. This request is premature and inappropriate. Should this Court reverse the District Court's decision and remand the case for further proceedings, Appellants would be able to raise that issue then for an initial determination by the District Court. Even if Appellants were to be successful at this stage in the litigation, e.g., causing this action to be remanded for further proceedings, that would not in itself be considered prevailing on the merits of any of their claims or be a determination of

the substantial rights of the parties. See Hanrahan v. Hampton, 446 U.S. 754, 757-58 (1980).

In Hanrahan, the Supreme Court reversed the fee award because plaintiffs had not prevailed on the merits of any of their claims and had established only that they were entitled to a trial. Id. at 758-59. In that case,

> "The Court noted that the Congressional Committee Reports to section 1988 made reference to two cases which presented appropriate circumstances for an interim fee award. In both cases the party to whom fees were awarded had established the liability of the opposing party, although final remedial orders had not been entered."

Proctor v. Consol. Freightways Corp., 795 F.2d 1472, 1478 (9th Cir. 1986) (citing Hanrahan, 446 U.S. at 757). Any success by Appellants in this case would lead to the same result, a determination that further proceedings are required.

Based thereon, County Appellees respectfully request that this Court deny Appellants' request and not award them interim costs, fees, and/or expenses if they are successful on their appeal.

IV. CONCLUSION

As shown above, Appellants' claims were properly dismissed by the District Court for failure to state claims upon which relief could be granted. Appellants believe that they should have received CCW permits, and that their civil rights

were violated when they did not get the desired permit. However, the law is clear that an individual has no constitutional right to receive a permit to carry a concealed weapon. Peruta v. Cnty. of San Diego, 824 F.3d at 927; Erdelyi v. O'Brien, 680 F.2d 61 (9th Cir. 1982).

Appellants have either waived, failed to properly plead, and/or failed to establish no rational basis for the legislative classification challenged in order to support their claims for violation of equal protection pursuant to the Fourteenth Amendment. Further, Appellants fail to establish any basis for their claims pursuant to the Privileges and Immunities Clause of the Fourteenth Amendment or the Ninth Amendment.

For the foregoing reasons, the District Court properly dismissed Appellants' FAC without leave to amend. County Appellees respectfully request that this Court affirm the District Court's ruling.

Dated: November 10, 2016

LONGYEAR, O'DEA & LAVRA, LLP

/s/ John A. Lavra

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellees Lou Blanas, John McGinness, Tim Sheehan, and County of Sacramento state that they are not aware of any related cases pending in this Court.

Dated: November 10, 2016

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/s/ John A. Lavra

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Date Nov 10, 2016

9th Circuit Case Number(s) 09-16852

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ADDENDUM

STATUTES

California Penal Code § 25400
California Penal Code § 25450
California Penal Code § 25850
California Penal Code § 25900
California Penal Code § 26150

California Penal Code § 25400

PENAL CODE
Part 6. Control of Deadly Weapons
Title 4. Firearms
Division 5. Carrying Firearms
Chapter 2. Carrying a Concealed Firearm
Article 1. Crime of Carrying a Concealed Firearm

§ 25400. Carrying concealed firearm; Carrying firearm openly in belt holster; Punishment

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

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

(2) Carries concealed upon the 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 the person is an occupant any pistol, revolver, or other firearm capable of being concealed upon the person.

(b) A firearm carried openly in a belt holster is not concealed within the meaning of this section.

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

(1) If the person previously has been convicted of any felony, or of any crime made punishable by a provision listed in Section 16580, as a felony.

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

(3) If 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) If the person is not in lawful possession of the firearm or the person is within a class of persons prohibited from possessing or acquiring a firearm pursuant to Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9 of this title, or Section 8100 or 8103 of the Welfare and Institutions Code, as a felony.

(5) If the person has been convicted of a crime against a person or property, or of a narcotics or dangerous drug violation, by imprisonment pursuant to subdivision (h) of Section 1170, 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) If both of the following conditions are met, by imprisonment pursuant to subdivision (h) of Section 1170, 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:

(A) The pistol, revolver, or other firearm capable of being concealed upon the person is loaded, or both it and the unexpended ammunition capable of being discharged from it are in the immediate possession of the person or readily accessible to that person.

(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.

(d)

(1) Every person convicted under this section who previously has been convicted of a misdemeanor offense enumerated in Section 23515 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 the person 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 a provision listed in Section 16580, if probation is granted, or if the execution or imposition of sentence is suspended, it shall be a condition thereof that the person 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) A peace officer may arrest a person for a violation of paragraph (6) of subdivision (c) 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 (c) is met.

California Penal Code § 25450

PENAL CODE
Part 6. Control of Deadly Weapons
Title 4. Firearms
Division 5. Carrying Firearms
Chapter 2. Carrying a Concealed Firearm
Article 2. Peace Officer Exemption

§ 25450. Peace officers exempted from crime

As provided in this article, Section 25400 does not apply to, or affect, any of the following:

(a) Any peace officer, listed in Section 830.1 or 830.2, or subdivision (a) of Section 830.33, whether active or honorably retired.

(b) Any other duly appointed peace officer.

(c) Any honorably retired peace officer listed in subdivision (c) of Section 830.5.

(d) Any other honorably retired peace officer who during the course and scope of his or her appointment as a peace officer was authorized to, and did, carry a firearm.

(e) Any full-time paid peace officer of another state or the federal government who is carrying out official duties while in California.

(f) Any person summoned by any of these officers to assist in making arrests or preserving the peace while the person is actually engaged in assisting that officer.

California Penal Code § 25850

PENAL CODE
Part 6. Control of Deadly Weapons
Title 4. Firearms
Division 5. Carrying Firearms
Chapter 3. Carrying a Loaded Firearm
Article 2. Crime of Carrying a Loaded Firearm in Public

§ 25850. Carrying loaded firearm in public; Punishment; Previous conviction; Prosecution under other section; Arrest without warrant

(a) A person is guilty of carrying a loaded firearm when the person carries a loaded firearm on the 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.

(b) 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 the 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.

(c) Carrying a loaded 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 a provision listed in Section 16580, 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, or is within a class of persons prohibited from possessing or acquiring a firearm pursuant to Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9 of this title, 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 pursuant to subdivision (h) of Section 1170, 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) Where the person is not listed with the Department of Justice pursuant to Section 11106 as the registered owner of the handgun, by imprisonment pursuant to subdivision (h) of Section 1170, 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.

(7) In all cases other than those specified in paragraphs (1) to (6), 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.

(d)

(1) Every person convicted under this section who has previously been convicted of an offense enumerated in Section 23515, or of any crime made punishable under a provision listed in Section 16580, 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 the person be imprisoned for a period of at least three months.

(2) 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 section or by granting probation or suspending the imposition or execution of sentence with conditions other than those set forth in this section, 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.

(e) A violation of this section that 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.

(f) Nothing in this section, or in Article 3 (commencing with Section 25900) or Article 4 (commencing with Section 26000), shall preclude prosecution under Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9 of this title, Section 8100 or 8103 of the Welfare and Institutions Code, or any other law with a greater penalty than this section.

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

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

(2) 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.

(h) A peace officer may arrest a person for a violation of paragraph (6) of subdivision (c), if the peace officer has probable cause to believe that the person is carrying a 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.

California Penal Code § 25900

PENAL CODE
Part 6. Control of Deadly Weapons
Title 4. Firearms
Division 5. Carrying Firearms
Chapter 3. Carrying a Loaded Firearm
Article 3. Peace Officer Exemption to the Crime of Carrying a Loaded Firearm in Public

§ 25900. Peace officers exempted from crime

As provided in this article, Section 25850 does not apply to any of the following:

(a) Any peace officer, listed in Section 830.1 or 830.2, or subdivision (a) of Section 830.33, whether active or honorably retired.

(b) Any other duly appointed peace officer.

(c) Any honorably retired peace officer listed in subdivision (c) of Section 830.5.

(d) Any other honorably retired peace officer who during the course and scope of his or her appointment as a peace officer was authorized to, and did, carry a firearm.

(e) Any full-time paid peace officer of another state or the federal government who is carrying out official duties while in California.

(f) Any person summoned by any of these officers to assist in making arrests or preserving the peace while the person is actually engaged in assisting that officer.

California Penal Code § 26150

PENAL CODE
Part 6. Control of Deadly Weapons
Title 4. Firearms
Division 5. Carrying Firearms
Chapter 4. License to Carry a Pistol, Revolver, or Other Firearm Capable of Being Concealed Upon the Person

§ 26150. License to carry concealed weapon; Issuance by sheriff

(a) When a person applies for a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person, the sheriff of a county may issue a license to that person upon proof of all of the following:

(1) The applicant is of good moral character.

(2) Good cause exists for issuance of the license.

(3) The applicant is a resident of the county or a city within the county, or the applicant's principal place of employment or business is in the county or a city within the county and the applicant spends a substantial period of time in that place of employment or business.

(4) The applicant has completed a course of training as described in Section 26165.

(b) The sheriff may issue a license under subdivision (a) in either of the following formats:

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

(2) 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.

(c)

(1) Nothing in this chapter shall preclude the sheriff of the county from entering into an agreement with the chief or other head of a municipal police department of a city to process all applications for licenses, renewals of licenses, or amendments to licenses pursuant to this chapter, in lieu of the sheriff.

(2) This subdivision shall only apply to applicants who reside within the city in which the chief or other head of the municipal police department has agreed to process applications for licenses, renewals of licenses, and amendments to licenses, pursuant to this chapter.