C.A. No. 10-56971

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD PERUTA, et al.,

Plaintiffs/Appellants,

v.

COUNTY OF SAN DIEGO, et al.,

Defendants/Appellees.

On Appeal from the United States District Court
for the Southern District of California

Honorable Irma E. Gonzalez, Presiding Judge

APPELLEE'S BRIEF

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TOPICAL INDEX

TOPICAL INDEX

TOPICAL INDEX

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

Statutes

Other

TABLE OF AUTHORITIES

Page(s)

Other

INTRODUCTION

Appellants challenge the San Diego County Sheriff's implementation of the California statutes governing the licensing of persons to carry loaded, concealed weapons in public. (Penal Code §§ 12050-12054.) The primary focus of the challenge is on Second Amendment grounds, based on the argument that the right to "keep and bear arms" includes the right to carry a loaded, concealed handgun in public. This case is an indirect effort to change California's statutory limitations on the public carry of loaded firearms by attacking the concealed carry licensing policy of a single county sheriff. Appellants' argument is, at its a core, a challenge to Penal Code section 12031 rather than this Sheriff's administration of concealed carry licensing.

STATEMENT OF JURISDICTION

Appellee agrees with the Statement of Jurisdiction submitted by Appellants.

STATEMENT OF THE CASE

Appellee agrees with the Statement of the Case submitted by Appellants, except for the allegation that some applicants for concealed carry licenses are exempted from the "good cause" requirement.

STATEMENT OF FACTS

California law makes it a misdemeanor to carry a loaded, concealed weapon in public places (Penal Code §§ 12025 and 12031), although numerous exceptions are contained in the relevant Penal Code provisions. The several Appellants make somewhat different allegations. Peruta and Buncher allege that they were denied concealed carry permits because they failed to establish "good cause" as defined by the Sheriff; Cleary alleges that he was initially denied a permit, but appealed the decision and the permit was granted; Dodd and Laxson allege they did not apply for permits because they were told they would not meet the "good cause" requirement and decided not to pursue the permit. The Foundation alleges that it

has members who are County residents who have been denied permits for lack of good cause or have been told that they would not meet the good cause requirement.

The First Amended Complaint challenges California Penal Code section 12050 facially and as applied on grounds pursuant to the Second Amendment, the Equal Protection Clause, the Privileges and Immunities Clause, Procedural Due Process and the constitutional right to travel. The allegations are focused on the "good cause" requirement of Penal Code section 12050.

A. California Law.

Penal Code section 12050(a)(1) provides in relevant part:

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

The licensing statute authorizes a procedure for a limited number of persons who meet the statutory criteria to be excepted from California's prohibition on the concealed carry of firearms.[1] "Section 12050 gives 'extremely broad discretion' to the sheriff concerning the issuance of concealed weapons licenses." *Gifford v. City of Los Angeles*, 88 Cal. App. 4th 801, 805 (2001) quoting *Nichols v. County of Santa Clara*, 223 Cal. App. 3d 1236, 1241 (1990), and "explicitly grants discretion

[1] Penal Code section 12025(a) states "A person is guilty of carrying a concealed firearm when he or she does any of the following: (1) Carries concealed within any vehicle which is under his or her control or direction any pistol, revolver, or other firearm capable of being concealed upon the person. (2) Carries concealed upon his or her person any pistol, revolver, or other firearm capable of being concealed upon the person. (3) Causes to be carried concealed within any vehicle in which he or she is an occupant any pistol, revolver, or other firearm capable of being concealed upon the person."

to the issuing officer to issue or not issue a license to applicants meeting the minimum statutory requirements." *Erdelyi v. O'Brien*, 680 F.2d 61, 63 (9th Cir. 1982.) Under state law, this discretion must be exercised in each individual case. "It is the duty of the sheriff to make such an investigation and determination, on an individual basis, on every application under section 12050." *Salute v. Pitchess*, 61 Cal. App. 3d 557, 560-561 (1976).

B. San Diego County Licensing Program.

Under the statutory framework, the San Diego County Sheriff administers the licensing program for all of San Diego County with the concurrence of all police chiefs in the County as members of the Police Chiefs and Sheriffs Association. (Pelowitz Decl. ¶¶ 2, 6, ER Vol. III, Tab 31 at 437, 438-439.) The Sheriff has delegated to the License Division, under the Law Enforcement Service Bureau, the sole responsibility for all regulatory licensing, including the processing of all carry concealed weapon (CCW) licenses in the County of San Diego. Blanca Pelowitz, as the Manager of the License Division, has been the Sheriff's authorized representative for reviewing CCW applications and making the final determination for the issuance of all CCW licenses since 2002. (Pelowitz Decl. ¶¶ 1-2, ER Vol. III, Tab 31 at 436-437.)

California is a "may issue" state, meaning that law enforcement officials are given discretion to grant or deny a permit based on a number of statutory factors. "Shall issue" states, in contrast, require the issuance of a permit to anyone who meets certain minimum requirements (e.g., that the applicant is eligible to possess firearms). Penal Code §§12050-12054 set forth the general criteria that applicants for concealed weapons licenses must meet in this state. Applicants must be of good moral character, be a resident of or spend substantial time in the County in which they apply, demonstrate good cause and take a firearms course. The long-standing policy of this Sheriff is generally to approve applications unless the

applicant does not meet residency requirements, has had numerous negative law enforcement contacts or is on probation of any sort, or cannot demonstrate good cause. At the time of the motion hearing in the District Court, there were 1,223 active CCW licenses in San Diego County. (Pelowitz Decl. ¶ 6, ER Vol. III, Tab 31 at 438-439.)

1. The Application Process.

In 1999, AB2022 standardized the CCW license application process statewide. In 2006, as a courtesy to applicants, the Department initiated an interview process to assist applicants and staff in determining pre-eligibility and to avoid applicants having to pay application fees and firearms safety course fees when they would not qualify for the license. The interview is voluntary and any person can submit an application without the assistance offered by the interview. Based on what the applicant outlines during the interview, the information will assist staff in determining what documentation may be required. Counter clerks are permitted to offer an educated guess based on the scenarios described by applicants.

After the interview, applicants will typically gather their documentation, attend the firearms course and return to submit the written application, fees, and documentation. Applicants are then fingerprinted, photographed and instructed to go to the Sheriff's range to have their weapons safety checked and to complete a final qualify-shoot. The file and all documents are forwarded to the Background Unit for the comprehensive background and verification process. Investigators prepare notifications to other law enforcement agencies throughout the County or State for input, clear weapons through AFS (automated firearms systems), conduct a local criminal history check, DMV check, wait for fingerprint results and DOJ

firearms eligibility, conduct residence verifications, verify character reference letters and verify documents. (Pelowitz Decl. ¶ 11, ER Vol. III, Tab 31 at 441-442.)

Once everything has been received and verified, the investigator will provide a recommendation to issue or recommend disapproval and forward to the License Division Manager for final review. During the final review, the Manager will review the entire application packet, supporting documents, the good cause reasons and results of the background investigation, and will make the decision to issue or deny. If issued, the decision will include any reasonable restrictions and/or instructions to staff. The applicant will be contacted to complete the process and receive the license. (Pelowitz Decl. ¶ 11, ER Vol. III, Tab 31 at 441-442.)

All renewals require completion of the four-hour firearms course, the Sheriff's qualify-shoot and a firearm safety inspection. Renewals are issued if there are no negative law enforcement contacts and if there no changes from the initial application. (Pelowitz Decl. ¶ 12, ER Vol. III, Tab 31 at 442-443.)

Although there are no provisions in the Penal Code for an appeal process involving administrative action from the issuing agency, the Sheriff's Department in 1998-99 implemented an administrative/reconsideration process for CCW applicants. When taking administrative action to deny, suspend or revoke a CCW license, an upper command concurrence through the Law Enforcement Service Bureau is required before taking action. The individual is given the opportunity to request an appeal of the decision by writing to the Assistant Sheriff of the Law Enforcement Service Bureau. The appeal is heard by the Assistant Sheriff of the Bureau who will make the determination to overturn or uphold the decision. (Pelowitz Decl. ¶¶ 11-14, ER Vol. III, Tab 31 at 441-444.)

2. The Good Cause Requirement.

"Good cause" under Penal Code section 12050 is defined by this County to be a set of circumstances that distinguish the applicant from other members of the general public and causes him or her to be placed in harm's way. Generalized fear for one's personal safety is not, standing alone, considered good cause. Good cause is evaluated on an individual basis and applicants will generally fall into one of four categories originally set by a superior court order in 1987 in the context of a Public Records Act lawsuit: (1) protected law enforcement personnel, which includes active and retired reserves, federal agents, police department evidence technicians, Deputy District Attorneys, etc.; (2) personal protection, which includes persons with documented threats, restraining orders, and other related situations where an applicant can demonstrate that he or she is a specific target presently at risk of harm; (3) security/investigative personnel, which includes plain clothes security, private investigators, private patrol operators, bail bondsmen, etc.; and (4) business owners/employees, which includes any high risk business or occupation which places an individual at risk of harm. All new applicants must provide supporting documentation. If applying for business purposes, proof of a legitimate and fully credentialed business is required, as well as having to demonstrate and elaborate good cause for carrying a firearm; if for specific personal protection, the required documentation may include restraining orders or letters from law enforcement agencies or other persons in order to document the specific threat. (Pelowitz Decl. ¶¶ 3, 7, ER Vol. III, Tab 31 at 437, 439.)

3. The Residency Requirement.

Residency under Penal Code section 12050 is generally defined by this County to include a person who maintains a permanent residence in the County, or spends more than six months of the taxable year within the County if the applicant claims dual residency. San Diego County uses the term "resident" as set forth in

Penal Code section 12050(D), not "domicile." Part-time residents who spend less than six months in the County or otherwise fall within section 12050(D)(ii) are considered on a case-by-case basis and CCW licenses have been issued to part-time residents. (Pelowitz Decl. ¶ 8, ER Vol. III, Tab 31 at 439.)

C. Appellants' Claims.

1. Edward Peruta.

Edward Peruta alleges that he was denied a license to carry a concealed weapon by the Sheriff's Department because he was not a resident of San Diego County and because he did not demonstrate good cause. In his declaration submitted in support of Plaintiffs' Motion for Partial Summary Judgment, he states that his need for a CCW license is not different from anyone else's need for a CCW license. (Peruta Decl. ¶ 6, ER Vol. IV, Tab 39 at 1068-1069.) He states that he provided as good cause "the protection of myself and my wife from criminal attack, because we spend substantial amounts of time in our motor home, often in remote areas, and we often carry large sums of cash and valuables in the motor-home." He also states that his work "gathering breaking news and conducting legal investigations often requires me to enter dangerous locations." (Peruta Decl. ¶ 9, ER Vol. IV, Tab 39 at 1069.) He does not state that he provided any documentation supporting his "good cause" statement.

Peruta's CCW license application was denied solely because he provided no documentation supporting his statement of "good cause." Residency was not a factor in the denial. In addition, his alleged "business" is not licensed to do business in the State of California. (Plaintiffs' Exhibit G, ER Vol. XIII, Tab 38 at 890; Pelowitz Decl. ¶17, ER Vol. III, Tab 31 at 444.) The only effort Peruta made to support his CCW application was to provide a single photograph of a sign from a mobile home park. (Pelowitz Decl. ¶17, ER Vol. III, Tab 31 at 444.)

2. Michelle Laxson.

Michelle Laxson did not apply for a CCW license. She was interviewed by line staff, but after a discussion, she stated that she probably wouldn't qualify for license. She did not return. (Pelowitz Decl. ¶18, ER Vol. III, Tab 31 at 444.)

3. James Dodd.

James Dodd applied for a license and his application was pending at the time of the District Court's ruling. (Pelowitz Decl. ¶19, ER Vol. III, Tab 31 at 444.)

4. Mark Cleary.

Mark Cleary's license was renewed after the appeal of his denial, when the hearing officer was able to verify his employment. He had not previously provided verification of employment to the staff. (Pelowitz Decl. ¶20, ER Vol. III, Tab 31 at 445.)

5. Leslie Buncher.

Leslie Buncher's application was denied because he is retired and no longer can establish good cause. (Pelowitz Decl. ¶21, ER Vol. III, Tab 31 at 445.)

ARGUMENT

I

THE PREVAILING JUDICIAL INTERPRETATION OF THE SCOPE OF THE SECOND AMENDMENT DOES NOT SUPPORT APPELLANTS' POSITION

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court considered "whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution." *Id.* at 573-576. A majority of the court held "that the District's ban on handgun possession *in the home* violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Id.* at 635 (italics added).

The court emphasized: "Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right [to keep and bear arms] was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. Thus, the Court has specifically stated that the "core right" embodied in the Second Amendment does not include the right to keep and carry in any manner.

Although the Court declined to adopt a level of scrutiny to be imposed upon laws regulating the "core" Second Amendment right it identified, or specify the limitations the government may place on an individual's right to possess firearms in public, a nonexclusive list of the many "presumptively lawful regulatory measures" was enumerated. *Heller*, 554 U.S. at 627, n. 26 ("We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive"). The Court declared:

> [T]he majority of the 19th-century courts to consider the question held that *prohibitions on carrying concealed weapons were lawful* under the Second Amendment or state analogues. [Citations.] Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 554 U.S. at 626-627 (fn. omitted, italics added).

Appellants' argument is premised on the notion that *Heller* stands for the general right to carry a loaded weapon in public for self-defense purposes. To the contrary, the Court in both *Heller*, and later in *McDonald v. City of Chicago*, ___ U.S. ___, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), went to great lengths to explain that the scope of *Heller* extends only to the right to keep a firearm in the home for self-defense. This Court has indicated support for that limited scope in *United*

States v. Vongxay, 594 F.3d 1111 (9th Cir. 2010), as has a California district court in *Richards v. County of Yolo*, 2011 U.S. Dist. LEXIS 51906 (E.D. Cal. 2011). California state courts have uniformly reached the same conclusion. *People v. Flores*, 169 Cal. App. 4th 568, 576-577 (2008); *People v. Yarbrough*, 169 Cal. App. 4th 303, 312-314. (2008); *People v. Ellison*, 196 Cal. App. 4th 1342, 1350-1351 (2011).

Contrary to Appellants' argument, the Court in *Heller* did not hold the right to "bear" as anything more than the right to defend "hearth and home." The Second Amendment does not say the right is "to bear a loaded, concealed firearm in public places." The Seventh Circuit cautions that the language of *Heller* "warns readers not to treat *Heller* as containing broader holdings than the Court set out to establish . . . . The opinion is not a comprehensive code; it is just an explanation of the Court's disposition. Judicial opinions must not be confused with statutes, and general expressions must be read in light of the subject under consideration." *United States v. Skoien*, 614 F.2d 638, 640 (7th Cir. 2010). The prevailing judicial interpretation of the scope of the Second Amendment after *Heller* is limited to self-defense in the home. The Court in *Heller* did not go beyond the limited facts of the case for a very good reason – there were not five votes to do anything else.

While Appellants describe the District Court's decision as reflecting a "minimalist approach," notably they cite no cases post-*Heller* which adopt their view. In fact, the District Court follows the approach of every other court called upon to interpret *Heller*. And Appellants continue to describe the "presumptively lawful" restrictions outlined in *Heller* as *dicta*, a notion that this Court has explicitly rejected. *United States v. Vongxay*, 594 F.3d at 1115.

II

CONCEALED CARRY LICENSING DOES NOT BURDEN SECOND AMENDMENT RIGHTS

A. The Good Cause Requirement Does Not Burden The Core Right.

Appellants challenge the concealed carry permit policy of the San Diego County Sheriff without challenging the Penal Code sections regulating the carrying of concealed and loaded firearms. It is not the licensing of a limited number of persons for concealed carry that burdens the bearing of arms -- it is the state statutes prohibiting loaded and concealed carry. Penal Code sections 12025(a) and 12031(a), which contain those prohibitions, have been upheld in California against Second Amendment challenges after *Heller*. *People v. Flores*, 169 Cal. App. 4th 568, 575-576; *People v. Yarbrough*, 169 Cal. App. 4th 303, 312-314.

In *People v. Yarbrough*, the defendant was convicted of violating Penal Code section 12025(a)(2), for carrying a concealed weapon on residential property that was fully accessible to the public. Noting *Heller* had "specifically expressed constitutional approval of the accepted statutory proscriptions against carrying concealed weapons," (*People v. Yarbrough* at p. 314), *Yarbrough* held:

> we find nothing in Penal Code section 12025, subdivision (a), that violates the limited right of the individual established in *Heller* to possess and carry weapons in case of confrontation. Section 12025, subdivision (a), does not broadly prohibit or even regulate the possession of a gun in the home for lawful purposes of confrontation or self-defense, as did the law declared constitutionally infirmed in *Heller*. Rather, section 12025, subdivision (a), in much more limited fashion, specifically defines as unlawful carrying concealed within a vehicle or "concealed upon his or her person any pistol, revolver, or other firearm capable of being concealed upon the person." Further, carrying a firearm concealed on the person or in a vehicle in violation of section 12025, subdivision (a), is not in the nature of a common use of a gun for lawful purposes which the court declared to be protected by the Second Amendment in *Heller*. (See *People v. Wasley* (1966) 245 Cal.App.2d 383, 386.) Unlike possession of a gun for protection within a residence, carrying a concealed firearm presents a recognized "threat to public order," and is "'prohibited as a means of preventing physical harm to persons other than the offender.' [Citation.]" (*People v. Hale* (1974) 43 Cal.App.3d 353, 356.) A person who carries a concealed firearm on his person or in a

> vehicle, "which permits him immediate access to the firearm but impedes others from detecting its presence, poses an 'imminent threat to public safety … .' [Citation.]" (*People v. Hodges*, *supra*, 70 Cal.App.4th 1348, 1357.)

Id. at 313-314.

People v. Flores affirmed convictions under sections 12025 and 12031 in the face of a *Heller* challenge. With regard to the section 12031 conviction, the Court in *Flores* reasoned:

> Section 12031 prohibits a person from "carr[ying] a loaded firearm on his or her person . . . while in any public place or on any public street." [Citation.]. The statute contains numerous exceptions. There are exceptions for security guards (*id.*, subd. (d)), police officers and retired police officers (*id.*, subd. (b)(1) & (2)), private investigators (*id.*, subd. (d)(3)), members of the military (*id.*, subd. (b)(4)), hunters (*id.*, subd. (i)), target shooters (id., subd. (b)(5)), persons engaged in 'lawful business' who possess a loaded firearm on business premises and persons who possess a loaded firearm on their own private property (*id.*, subd. (h)). A person otherwise authorized to carry a firearm is also permitted to carry a loaded firearm in a public place if the person 'reasonably believes that the person or property of himself or herself or of another is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property.' (*Id.*, subd. (j)(1).) Another exception is made for a person who 'reasonably believes that he or she is in grave danger because of circumstances forming the basis of a current restraining order issued by a court against another person or persons who has or have been found to pose a threat to his or her life or safety.' (*Id.*, subd. (j)(2).) Finally, the statute makes clear that '[n]othing in this section shall prevent any person from having a loaded weapon, if it is otherwise lawful, at his or her place of residence, including any temporary residence or campsite.' (*Id.*, subd. (l).)

People v. Flores, 169 Cal. App. 4th at p 576.

"This wealth of exceptions creates a stark contrast between section 12031 and the District of Columbia statutes at issue in *Heller*. In particular, given the exceptions for self-defense (both inside and outside the home), there can be no claim that section 12031 in any way precludes the use 'of handguns held and used for self-defense in the home.' [Citation.] Instead, section 12031 is narrowly tailored to reduce the incidence of unlawful *public* shootings, while at the same time respecting the need for persons to have access to firearms for lawful purposes,

including self-defense. [Citation.] Consequently, section 12031 does not burden the core Second Amendment right announced in *Heller* – the right of law-abiding, responsible citizens to use arms in defense of hearth and home – to any significant degree." *People v. Flores*, 169 Cal .App. 4th at pp. 576-577, fn. omitted; *accord People v. Villa*, 178 Cal. App. 4th 443, 450 (2009).

Rather than challenge sections 12025 and 12031, Appellants instead press their challenge to the concealed weapons "licensing" statute by claiming that the Sheriff must accept as "good cause" for the purpose of Penal Code section 12050 the constitutional "right to keep and bear arms" under the Second Amendment. In essence, Appellants are asking the Court to strike the "good cause" language from the statute on the theory that *Heller* provides that everyone has a constitutional right to carry a loaded, concealed weapon in public. There is no such constitutional right. *Heller* does not support such a theory nor has any court since *Heller*.

Penal Code section 12050 does not regulate the possession of a gun in the home for lawful purposes of confrontation or self-defense, as did the law declared unconstitutional in *Heller*. Rather, it involves the licensing of persons in the context of the regulation of the carrying of concealed weapons in public places. Further, carrying a firearm concealed on the person or in a vehicle is not in the nature of a common use of a gun for lawful purposes which the court declared to be protected by the Second Amendment in *Heller*. Unlike possession of a gun for protection within a residence, carrying a concealed firearm presents a recognized "threat to public order," and is "'prohibited as a means of preventing physical harm to persons other than the offender.' [Citation.]" *People v. Hale*, 43 Cal. App. 3d 353, 356 (1974). A person who carries a concealed firearm on his person or in a vehicle, "which permits him immediate access to the firearm but impedes others from detecting its presence, poses an 'imminent threat to public safety ….'

[Citation.]" *People v. Hodges*, 70 Cal. App. 4th 1348, 1357 (1999). (Declaration of Franklin Zimring, ER Vol. III, Tab 30.)

Rather than cast any doubt upon the continued constitutional validity of concealed weapons bans, the *Heller* opinion expressed apparent constitutional approval of the historically accepted statutory proscriptions against carrying concealed weapons. *Heller*, 554 U.S. at 626. Thus, in the aftermath of *Heller*, the prohibition "on the carrying of a concealed weapon without a permit, continues to be a lawful exercise by the state of its regulatory authority notwithstanding the Second Amendment." *United States v. Hall* 2008 U.S.Dist. Lexis 59641, *3 (S.D.W.Va., Aug. 4, 2008); *People v. Yarbrough*, 169 Cal. App. 4th at 309.

The Court's recognition in *Heller* that prohibitions on carrying concealed weapons were lawful was in full accord with long-standing Supreme Court precedent. Over a century ago, the Supreme Court recognized that "the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons." *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897).

Here, California law does not impede the ability of individuals to defend themselves with firearms in their homes. Accordingly, a right to carry a concealed weapon in public under the Second Amendment has not been recognized and California's regulation of both concealed carry of firearms and carry of loaded firearms in public do not infringe on the Second Amendment "core right" that has been held to be fundamental by the Supreme Court. The Sheriff's policies and practices in limiting concealed carry *licensing* to individuals with specifically identifiable and documented needs for concealed carry have no impact on the Second Amendment's core right of self-defense in the home.

Appellants insist that the ability to carry an unloaded firearm in public, with ammunition readily available, renders self-defense impossible. They contend that

Heller approves bans on carrying concealed firearms only when the law allows for an alternative method of carrying. And then they assert that the Second Amendment protects a fundamental right to carry a loaded firearm "in some manner" for self defense in public places, while incredibly claiming that the *only* means of exercising that right in San Diego County is by having a concealed carry license. There is no support for this notion legally or factually. The concealed carry licensing statute is a corollary to the relevant Penal Code sections that govern firearm carry. Sections 12025 and 12031 prohibit only the concealed carry of loaded firearms; they do not eliminate the carry of firearms.

In the end, describing California's statutory scheme as a "blanket ban" or "near ban" on carrying firearms is melodramatic and dishonest. Appellants offer no credible explanation as to why open carry with readily available ammunition, combined with the exceptions in 12031, is inadequate for self-defense. Nor do they offer any legal support whatsoever in the aftermath of *Heller* for the claim that the Second Amendment protects a fundamental right to carry a loaded firearm in public or that an "alternative method of carrying" means that the carry of a loaded firearm is a constitutional requirement in "may issue" concealed carry states.

B. The Substantial Burden Approach.

This Court has determined that only regulations that "substantially burden the right to keep and bear arms trigger heightened scrutiny under the Second Amendment." *Nordyke v. King*, 2011 U.S. App. LEXIS 8906 (9th Cir. May 2, 2011)(evaluating whether a restriction on gun sales substantially burdens Second Amendment rights). If a regulation does not place a substantial burden on an individual's fundamental right, then rational basis review applies. *Nordyke*, 2011 U.S. App. LEXIS 8906 at *20-22. Heightened scrutiny is only appropriate for claims that substantially burden the right to keep and bear arms. *Id*. at *22. Since

concealed carry outside the home is not a Second Amendment right and the licensing practice does not burden the right of self-defense in the home, no heightened scrutiny is appropriate in this case.

Even if the Second Amendment protects carry of firearms outside the home, the appropriate inquiry, under a substantial burden analysis, is whether the licensing policy leaves "reasonable alternative means" to bear a firearm sufficient for self-defense purposes. *Nordyke*, 2011 U.S. App. LEXIS 8906 at *25. A regulation or policy "does not substantially burden a constitutional right simply because it makes the right more expensive or more difficult to exercise." *Id.* at *26.

Open carry of unloaded firearms is lawful without a CCW license and the ammunition may be carried in a clip ready for instant loading. (Penal Code §12031(g).) This allows for the "bearing" of arms for self-defense and offers an adequate "alternative method of carrying." But section 12031 goes even further than that and offers a host of exceptions that allow for carrying a loaded firearm: at one's place of business (subdivision h), while hunting (subdivision i), at any temporary residence or campsite (subdivision l), and, significantly, "by a person who reasonably believes that the person or property of himself or herself or of another is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property." (Subdivision j.)

There is no substantial burden on the exercise of Second Amendment rights by the good cause requirement in Penal Code section 12050 or the Sheriff's policy requiring a showing of good cause. *See*, *Richards v. County of Yolo*, 2011 U.S. Dist. LEXIS 51906, *12-13 (E.D. Cal. 2011); *People v. Ellison*, 196 Cal. App. 4th 1342, 1350-1351 (2011); *People v. Flores*, 169 Cal. App. 4th 568, 576-577 (2008); *People v. Yarbrough*, 169 Cal. App. 4th 303, 312-314 (2008).

III

THE SHERIFF'S LICENSING PRACTICES MEET ANY STANDARD OF SCRUTINY

Even if this Court finds that the core right to keep and bear arms under the Second Amendment is infringed and that *Heller's* narrow holding does not reach or decide the issue in this case, the Sheriff's implementation of the licensing statute withstands any level of constitutional scrutiny. In this respect, strict scrutiny requires that a statute or regulation "be narrowly tailored to serve a compelling governmental interest" in order to survive a constitutional challenge. *Abrams v. Johnson*, 521 U.S. 74, 91 (1997). Intermediate scrutiny requires that the challenged statute or regulation "be substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). A regulation survives rational basis review if it bears "a reasonable relationship to a legitimate government interest." *United States v. LeMay*, 260 F.3d 1018, 1031 (9th Cir. 2001).

Regardless of the level of constitutional scrutiny, this as-applied challenge fails. The governmental interest furthered by Penal Code sections 12025, 12031 and 12050 as administered by the Sheriff -- the safety of the public from unknown persons carrying concealed, loaded firearms -- is both important and compelling. *United States v. Salerno*, 481 U.S. 739, 754 (1987); *People v. Yarbrough*, 169 Cal. App. 4th 303, 312-314. (2008); *People v. Ellison*, 196 Cal. App. 4th 1342, 1350-1351 (2011); Frank Zimring Declaration, ER Vol III, Tab 30.

In addition, the Penal Code provisions are narrowly tailored and substantially related to furthering public safety. The reach of the statutes, which encompass only public carry, along with the numerous enumerated exceptions which allow for keeping and bearing arms for self-defense in a host of

circumstances, do not interfere with any concept of Second Amendment rights as announced in *Heller*, "to use arms in defense of hearth and home." *Heller*, U.S. at 635.

A. Strict Scrutiny is not the Appropriate Standard.

Appellants argue that the Second Amendment guarantees a "fundamental right," hence "strict scrutiny" should apply. While the Supreme Court in *McDonald v. City of Chicago*, __ U.S. __, 130 S.Ct. 3020 (2010), has now held that the Second Amendment right to keep and bear arms is a fundamental right that is applicable to the States, that decision did not extend the Court's interpretation of the core right set forth in *Heller*.

The Supreme Court expressly declined to establish what standard of review was appropriate in Second Amendment cases, only ruling out "rational basis" review. *Heller*, 554 U.S. at 628 & n. 27; *See also*, *e.g.*, *United States v. Miller*, 604 F.Supp.2d 1162, 1170 (W.D. Tenn. 2009). The Supreme Court found that many traditional types of firearm regulation would pass muster but did not establish the standard to be used. *Heller*, 554 U.S. at 626-627 & n. 26. As Justice Breyer noted in dissent, strict scrutiny apparently was rejected by the majority:

> Respondent proposes that the Court adopt a "strict scrutiny" test, which would require reviewing with care each gun law to determine whether it is "narrowly tailored to achieve a compelling governmental interest." But the majority implicitly, and appropriately, rejects that suggestion by broadly approving a set of laws—prohibitions on concealed weapons, forfeiture by criminals of the Second Amendment right, prohibitions on firearms in certain locales, and governmental regulation of commercial firearm sales—whose constitutionality under a strict scrutiny standard would be far from clear.

Heller, 554 U.S. at 688 (Breyer, J., dissenting) (citations omitted).

Justice Breyer comments further on the strict scrutiny standard:

> Indeed, adoption of a true strict-scrutiny standard for evaluating gun regulations would be impossible. That is because almost every

> gun-control regulation will seek to advance (as the one here does) a "primary concern of every government--a concern for the safety and indeed the lives of its citizens." [citation.] The Court has deemed that interest, as well as "the Government's general interest in preventing crime," to be "compelling," [citation.], and the Court has in a wide" variety of constitutional contexts found such public-safety concerns sufficiently forceful to justify restrictions on individual liberties, see *e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam*) (First Amendment free speech rights); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (First Amendment religious rights); *Brigham City v. Stuart*, 547 U.S. 398, 403-404 (2006) (Fourth Amendment protection of the home); *New York v. Quarles*, 467 U.S. 649, 655 (1984) (Fifth Amendment rights under *Miranda v. Arizona*, 384 U.S. 436 (1966)); *Salerno*, *supra*, at 755 (Eighth Amendment bail rights). Thus, any attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.

Heller, 554 U.S. at 689 (Breyer, J., dissenting) (extended citations omitted).

In addition, *Heller's* list of "presumptively lawful regulatory measures" points persuasively to rejection of strict scrutiny. *Id.* at 626-627 & n.26. Unlike a home or other private property, where the "need for defense of self, family, and property is most acute," the need to carry a concealed firearm in public places is not nearly so dire. "Even in jurisdictions that have declared the right to keep and bear arms to be a fundamental constitutional right, a strict scrutiny analysis has been rejected in favor of a reasonableness test . . . ." *Mosby v. Devine*, 851 A.2d 1031, 1044 (R.I. 2004) (citing cases).

All incorporated rights may be fundamental, but not all incorporated rights trigger strict scrutiny. *See generally*, Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 Const. Comment 227 (2006). For instance, strict scrutiny is not always applied to restrictions on free speech and the free exercise of religion. *Id.* It thus would not necessarily follow that strict scrutiny is always (or even usually) proper under the Second Amendment, even if the right it protects is fundamental. As one court has explained, the constitutional text is subject to a rule

of reason because the common law right to self-defense is subject to that rule. *Benjamin v. Bailey*, 662 A.2d 1226, 1232–35 (Conn. 1995).

State courts interpreting right-to-bear-arms provisions in state constitutions have uniformly applied a deferential reasonableness standard in decisions going back decades. It does not appear that any state's courts apply strict scrutiny or another type of heightened review to firearms laws. Winkler, *Scrutinizing the Second Amendment*, 105 Mich.L.Rev. 683, 686–87 (2007) (fn. 7: "hundreds of opinions" by state supreme courts with "surprisingly little variation" that have adopted the "reasonableness" standard of review for right-to-bear-arms cases); *See, e.g.*, *Bleiler v. Chief, Dover Police Dep't.*, 927 A.2d 1216, 1222 (N.H. 2007) ("We agree with every other state court that has considered the issue: strict scrutiny is not the proper test to apply" and "the New Hampshire state constitutional right to bear arms 'is not absolute and may be subject to restriction and regulation.'") (quoting *State v. Smith*, 571 A.2d 279, 281 (N.H. 1990)); *Mosby*, 851 A.2d at 1044 (strict scrutiny not appropriate; "the right to possess a handgun, whether a fundamental liberty interest or not, is not absolute and subject to reasonable regulation."); *State v. Cole*, 665 N.W.2d 328, 337 (Wis. 2003) (applying reasonableness test; "If this court were to utilize a strict scrutiny standard, Wisconsin would be the only state to do so."); *Robertson v. City & County of Denver*, 874 P.2d 325, 331 (Colo. 1994) (*en banc*) (strict scrutiny not appropriate; "The right to bear arms may be regulated by the state under its police power in a reasonable manner."); *Cf. McIntosh v. Washington*, 395 A.2d 744, 756 (D.C. 1978) ("The Supreme Court has indicated that dangerous or deleterious devices or products are the proper subject of regulatory measures adopted in the exercise of a state's 'police powers.'") (citations omitted).

It appears that only one federal decision after *Heller* has applied strict scrutiny – where the defendant was in possession of a firearm in his own home --

but it still upheld the challenged regulation. *See United States v. Engstrum*, 609 F.Supp.2d 1227, 1231 (D.Utah 2009) (applying strict scrutiny, but rejecting challenge to federal statute prohibiting possession of firearms by those with domestic violence convictions). The Sheriff's practices here have no regulatory effect on guns in the home and do not rise to the level of burdening a fundamental right that would require strict scrutiny.

In fact, no district or appellate court case that actually cites to *McDonald* uses strict scrutiny. Every case uses either the "presumptively lawful" categorical approach from *Heller* or intermediate scrutiny. *United States v. Hart*, 2010 U.S. Dist. LEXIS 77160 (D. Mass. July 30, 2010) puts concealed weapons restrictions into the *Heller* "presumptively lawful" category. Other cases using the categorical approach are either felon or mental illness cases. *Yohe v. Marshall*, 2010 U.S. Dist. LEXIS 109415 (D. Mass. Oct. 14, 2010); *United States v. Roy*, 2010 U.S. Dist. LEXIS 107620 (D. Me. Oct. 6, 2010); *Dority v. Roy*, 2010 U.S. Dist. LEXIS 84403 (E.D. Tex. Aug. 17, 2010); *United States v. Seay*, 2010 U.S. App. LEXIS 18738 (8th Cir. S.D. Sept. 8, 2010).

Where regulations do not affect the possession of firearms in the home, such as the subject licensing procedures, there is no trend toward any heightened level of scrutiny.

B. Intermediate Scrutiny is Applied When Firearm Possession in The Home is Involved.

To survive intermediate scrutiny, the challenged provision must be substantially related to the achievement of important government interests. *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *See also Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("To withstand intermediate scrutiny, a statutory classification must be substantially related to an important government objective.").

Some courts have applied intermediate scrutiny in cases after *Heller*. In *Heller v. D.C.*, 698 F. Supp. 2d 179 (D.C. Cir. 2010) (*Heller II*), it was applied because the firearms registration required the registration of guns for possession *in the home* which clearly touched upon the core right identified by *Heller*. In *U.S. v. Miller* 604 F. Supp. 2d 1162 (W.D. Tenn. 2009), the defendant challenged a penal statute relating to possession of a firearm *in the home* by a felon. *See also, U.S. v. Schultz*, 2009 U.S. Dist. LEXIS 234 (N.D. Ind. Jan 5 2009); *U.S. v. Radencich, 2009 WL 12648 (N.D. Ind. Jan 20, 2009).* In *U.S. v. Marzzarella*, 595 F. Supp. 2d 596 (W.D. Pa. 2009) the defendant challenged an indictment for possessing a firearm with an obliterated serial number *in his home*. In *U.S. v. Walker*, 2010 WL 1640340 (E.D. Va. 2010) and *U.S. v. Tooley*, 2010 WL 2842915 (S.D.W.Va. May 4, 2010), defendants challenged charges for possessing a firearm *in the home* after having been previously convicted of domestic violence. In all cases, the regulations were upheld.

Thus, the cases that have adopted intermediate scrutiny have been those where the "core right" of possession in the home is in some way infringed. That is not the case here where there is no effect on possession in the home.

In any event, maintaining public safety and preventing crime are clearly important (if not paramount) government interests and the regulation of concealed firearms in public is a critical factor in accomplishing that interest. (Zimring Declaration ER Vol. III, Tab 30) *See, e.g., Salerno*, 481 U.S. at 750; *Schall v. Martin*, 467 U.S. 253, 264 (1984); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) ("The promotion of safety of persons and property is unquestionably at the core of the State's police power . . . ."); *People v. Yarbrough*, 169 Cal. App. 4th 303, 312-314. (2008).

Here, the District Court followed that majority in finding that strict scrutiny review was not appropriate and found that the Sheriff's policy, in any event, satisfied intermediate scrutiny.

C. "Reasonableness" Review Has Often Been Applied.

One other method of review that has been suggested is a "reasonable regulation standard. Under this standard of review, a firearm regulation should be upheld where the regulation or law does not interfere with the "core right" the Second Amendment protects by depriving the people of reasonable means to defend themselves in their homes. Even where a fundamental right is involved, the test is "whether or not the restriction upon the carrying of concealed weapons is a reasonable exercise of the State's inherent police powers.

"The protections of the Second Amendment are subject to the same sort of *reasonable restrictions* that have been recognized as limiting, for instance, the First Amendment." *Parker v. District of Columbia*, 478 F.3d 370, 399 (D.C. Cir. 2007) (emphasis added) (*citing Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). "[R]easonable regulations" of firearms "promote the government's interest in public safety consistent with our common law tradition. Just as importantly, however, they do not impair the core conduct upon which the right was premised." *Id.* The rights protected by the Bill of Rights have "from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case." *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897). There can be little question that preventing crime and promoting public safety are important government goals. *See, e.g.*, *Salerno*, 481 U.S. at 750; *Schall v. Martin*, 467 U.S. 252, 264 (1984).

State courts interpreting right-to-bear-arms provisions in state constitutions have uniformly applied a deferential reasonableness standard. Winkler, *Scrutinizing the Second Amendment*, 105 Mich.L.Rev. 683, 686–87 (2007). The

deference due to legislative judgments inherent in reasonableness review is particularly appropriate given the intensity of views about gun control. As one court explained:

> [M]ost legislation will assert broad safety concerns and broad gun control measures to match, covering both 'good' and 'bad' gun possessors and 'good' and 'bad' guns. Such legislation cannot be narrowly tailored to reach only the bad people who kill with their innocent guns. [D]ue to the intensity of public opinion on guns, legislation is inevitably the result of hard-fought compromise in the political branches. To expect such legislation to reflect a tight fit between ends and means is unrealistic.

United States v. Miller, 604 F.Supp.2d at 1172 n.13 (quotation marks and citations omitted).

The Second Amendment must leave the judgment of whether and how to regulate firearms to the legislature, not the judiciary. *Heller*, 554 U.S. at 626-627. In reviewing the constitutionality of a statute, "courts must accord substantial deference to the predictive judgments" of the legislature. *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994)). Such deference is due because the legislature "'is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon' legislative questions." *Id.* (quoting *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 331, n.12 (1985)); *see also Gonzalez v. Carhart*, 550 U.S. 124, 163–64 (2007) (legislature should receive deference in absence of expert consensus). "Even in the realm of First Amendment questions . . . deference must be accorded to [the legislature's] findings as to the harm to be avoided and to the remedial measures adopted for that end . . . ." *Turner*, 520 U.S. at 665. "Local officials, by virtue of their proximity to, and their expertise with, local affairs, are exceptionally well qualified to make determinations of public good 'within their respective spheres of authority.'"

Richmond v. J.A. Croson Co., 488 U.S. 469, 544 (1989) (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 244 (1984)).

D. Rational Basis Review Would Be Appropriate after *Nordyke*.

Only regulations that "substantially burden the right to keep and bear arms trigger heightened scrutiny under the Second Amendment." *Nordyke v. King*, 2011 U.S. App. LEXIS 8906 (9th Cir. May 2, 2011). If a regulation does not place a substantial burden on an individual's fundamental right, then rational basis review applies. *Id*. at *20-22. Heightened scrutiny is only appropriate for claims that substantially burden the right to keep and bear arms. *Id*. at *22. Since concealed carry outside the home is not a Second Amendment right and the licensing practice does not burden the right of self-defense in the home, no heightened scrutiny is appropriate in this case, therefore rational basis review should be applied. (See Argument II above.)

A regulation survives rational basis review if it bears "a reasonable relationship to a legitimate government interest." *United States v. LeMay*, 260 F.3d 1018, 1031 (9th Cir. 2001). Since the Sheriff's policy requiring a specific showing of good cause does not substantially burden the right to bear arms, and since regulating concealed firearms is an essential part of San Diego County's efforts to maintain public safety and reduce gun-related crime, the policy is more than rationally related to legitimate governmental goals. (See Argument III E below.)

E. The Sheriff's Licensing Practices Survive Any Standard of Review.

The governmental interest furthered by limiting the licensing of concealed carry of firearms is both important and compelling. (Zimring Declaration, ER Vol. III, Tab 30.) The relevant Penal Code provisions are narrowly tailored and substantially related to furthering public safety and reducing crime. Concealed

handguns are the priority of law enforcement everywhere because of the use of the concealed handgun in vast numbers of criminal offenses. (Zimring Declaration, ER Vol. III, Tab 30.) Concealed carry of handguns allows for stealth and surprise. Limiting the number of loaded and concealed firearms in public places helps to keep the balance in favor of law enforcement and avoids the necessity for every place that is open to the public – restaurants, malls, theaters, parks, etc. – to be equipped with metal detectors, fencing and other forms of security, in order to protect patrons from the fear of widespread and unchecked concealed firearms.

Numerous courts have discussed the need for firearm regulation and the need for imposing restrictions on their use:

> [A]ccidents with loaded guns on public streets or the escalation of minor public altercations into gun battles or, as the legislature pointed out, the danger of a police officer stopping a car with a loaded weapon on the passenger seat. [T]hus, otherwise "innocent" motivations may transform into culpable conduct because of the accessibility of weapons as an outlet for subsequently kindled aggression. [T]he underlying activity of possessing or transporting an accessible and loaded weapon is itself dangerous and undesirable, regardless of the intent of the bearer since it may lead to the endangerment of public safety. [A]ccess to a loaded weapon on a public street creates a volatile situation vulnerable to spontaneous lethal aggression in the event of road rage or any other disagreement or dispute. The prevention of the potential metamorphosis of such "innocent" behavior into criminal conduct is rationally related to the purpose of the statute, which is to enhance public safety. Because the legislature has a compelling interest in preventing the possession of guns in public under any such circumstances, the statute is reasonably related to the legislature's purpose of "mak[ing] communities in this state safer and more secure for their inhabitants."

People v. Marin, 795 N.E.2d 953, 958–59 (Ill. App. 2003)(citations omitted); *see also Marshall v. Walker*, 958 F.Supp. 359, 365 (N.D. Ill. 1997) (individuals should be able to walk in public "without apprehension of or danger from violence which develops from unauthorized carrying of firearms and the

policy of the statute to conserve and maintain public peace on sidewalks and streets within the cities . . .") (quoting *People v. West*, 422 N.E.2d 943, 945 (Ill.App. 1981).)

The concept of protection of the public peace is a fundamental competing right that appears consistently in all similar firearm regulation. "The possession and use of weapons inherently dangerous to human life constitutes a sufficient hazard to society to call for prohibition unless there appears appropriate justification created by special circumstances." *People v. Price*, 873 N.E.2d 453, 460 (Ill. App. 2007) (quoting 720 ILL. COMP. STAT. ANN. 5/24, Committee Comments—1961, at 7 (2003); *People v. Smythe*, 817 N.E.2d 1100, 1103–1104 (2004) ("this statute was designed to prevent the situation where one has a loaded weapon that is immediately accessible, and thus can use it at a moment's notice and place other unsuspecting citizens in harm's way.")

The Sheriff's practices in limiting CCW licenses to those with specific and documented needs is consistent with the compelling and significant legislative goals underlying sections 12025 and 12031, i.e. the protection of the general public from widespread and unchecked public carry of concealed and loaded firearms. There is a "compelling state interest in protecting the public from the hazards involved with certain types of weapons, such as guns." *State v. Cole*, 665 N.W.2d at 344. Under any standard of review, the Sheriff's licensing practices survive constitutional scrutiny.

IV

EQUAL PROTECTION

A. The Sheriff's Licensing Policy Does Not Violate Equal Protection.

Appellants claim a violation of the Equal Protection Clause in that the "good cause" requirement of the statute creates two unequal classes of: (1) those who

cannot prove "good cause" because they lack a specific threat; and (2) those who can prove "good cause" by displaying a special need for concealed carry. The Equal Protection Clause "is essentially a directive that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). To identify the proper classification, both groups must be comprised of similarly situated persons so that the factor motivating the alleged discrimination can be identified. *Thornton v. City of Helens*, 425 F.3d 1158, 1166 (9th Cir. 2005). The District Court correctly rejected this claim since "those who can document circumstances demonstrating 'good cause' are situated differently than those who cannot." (Order, ER Vol. I, Tab 1 at 13.)

The class of similarly situated individuals is more properly defined as all persons who applied to the Sheriff's Department for a concealed weapons permit, regardless of whether they were approved or denied. As this Court has previously held, "[a]n equal protection claim will not lie by 'conflating all persons not injured into a preferred class receiving better treatment' than the plaintiff." *Thornton*, 425 F.3d at 1166 (quoting *Joyce v. Mavromatis*, 783 F.2d 56, 57 (6th Cir. 1986). Appellants failed to provide any evidence from which such an inference can be drawn. Similarly, self-defense-based applications may be denied for lack of "good cause" even with documentation; however, Appellants offered no evidence that they were treated any differently than those who did submit evidence.

Even if Appellants were similarly situated and treated differently, requiring documentation showing good cause for self-defense would not violate the Equal Protection Clause. The Supreme Court has held that because most legislation classifies for one purpose or another, with resulting disadvantage to various groups, the Court will uphold a legislative classification so long as it "neither burdens a fundamental right nor targets a suspect class," and "bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996); *see*

also Nordyke, 2011 U.S. App. LEXIS 8906 at *45 (where an ordinance does not "purposefully operate to the detriment of a suspect class, the only requirement of equal protection is that [the ordinance] be rationally related to a legitimate government interest." (quoting *Harris v. McRae*, 448 U.S. 297, 326 (1980).) In the present case, the burdened class of those who do not have evidence of a specific threat is not a suspect class. And, as held in *Nordyke*, the fundamental right to keep and bear arms for self-defense is "more appropriately analyzed under the Second Amendment." *Nordyke*, 2011 U.S. App. LEXIS 8906 at *45 (citing Cf. *Albright v. Oliver*, 510 U.S. 266, 273 (1994); (*see generally* Argument II above arguing that the "good cause" policy does not unreasonably or substantially burden the fundamental right to self-defense under the Second Amendment.)

Therefore, an equal protection claim also would fail because the requirement of proving "good cause" is rationally related to a legitimate government interest. The governmental interest furthered by Penal Code sections 12025, 12031 and the permit process set forth in 12050 as administered by the Sheriff is not only legitimate, it is important and compelling. (See Argument III E above.)

1. Compelling Interest.

The Supreme Court has deemed the interest behind almost every gun-control regulation - advancing safety and the lives of its citizens as well as "the government's general interest in preventing crime," - to be "compelling." *Heller*, 554 U.S. at 689 (Breyer, J., dissenting); *See U.S. v. Salerno*, 481 U.S. at 750, 754 (1987).

The Sheriff's purpose in requiring proof of "need" for a CCW license is no less compelling as that which has been held constitutional throughout our nation's history – protecting *the public* from "the evil practice of carrying weapons secretly" and "preventing harm to persons other than the offender." *State v. Reid*, 1 Ala. 612, 616 (1840); *People v. Hale*, 43 Cal. App. 3d 353, 356 (1974). The

Sheriff's goal is to reduce the number of secretly armed citizens on the streets and sidewalks of one of the biggest urban areas in the United States. *Id.* Use of concealed weapons in streets and public places poses a greater threat to public safety. (*See generally* Zimring Declaration, ER Vol. III, Tab 30; the problem of gun robbery in American cities is almost exclusively a problem of concealable handguns.)

2. Necessarily Related.

California law has consistently found concealed weapons restrictions to be necessarily related to this compelling government interest of advancing public safety. California courts have found that "the habit of carrying concealed weapons was one of the most fruitful sources of crime" *Ex part Luening*, 3 Cal. App. 76 (1906). Thus, limiting CCW licenses to only those with verifiable good reason reduces "one of the most fruitful sources of crime" in society.

Handguns are common concealed weapons for similar reasons the Court explains in *Heller* for self-defense in the home – they are small and easy to hide under clothing, easy to use, cannot easily be wrestled away in self-defense, and pose a significant threat. *Heller*, 554 U.S. at 629. They are used in more than 75% of all killings and in even larger portions of robberies. (Zimring Decl. ¶ 3, ER Vol. III, Tab 30 at 406-407.) A concealed handgun is the dominant weapon of choice for gun criminals and a special danger to government efforts to keep public spaces safe and secure. (Zimring Decl. ¶¶ 4-5, ER Vol. III, Tab 30 at 407-411.) By requiring specific showings of good cause, the Sheriff is able to limit the number of permitted concealed weapons in public.

As the court stated in *Miller*, "[s]uch legislation cannot be narrowly tailored to reach only the bad people who kill with their innocent guns. . . . To expect such legislation to reflect a tight fit between ends and means is unrealistic." *Miller*, 604 F.Supp.2d at 1172 n.13 (quotation marks and citations omitted); *see also*

McDonald, 130 S.Ct at 3050 (assessing the costs and benefits of firearms restrictions requires difficult empirical judgments in an area which judges lack expertise); *Nordyke*, 2011 U.S. App. LEXIS 8906 at *17-18; (*see generally* Zimring Declaration, ER Vol. III, Tab 30.)

In addition, requiring applicants to prove a need for self-protection prevents the carrying of "arms for any sort of confrontation." *Heller*, 554 U.S. at 595 ("the Court does not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation."). As noted previously, the *Heller* Court states that "from Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. In order to protect its citizens, the Sheriff's Department must ensure that weapons are not used for an unlawful purpose. As supported by *Heller*, requiring evidence of a specific threat does not infringe upon the core Second Amendment right.

Therefore, requiring applicants to prove their need for a CCW license limits the number of concealed guns on the street for "whatever purpose" or for "any sort of confrontation." By reducing the number of concealed firearms in public, the government is able to advance its compelling interest of protecting the lives of its citizens and, in doing so, meeting its interest using narrowly tailored means.

3. Narrowly Tailored.

"There is no constitutional right to bear concealed weapons." *Klein v. Leis*, 99 Ohio St. 3d 537 (2003). Appellants' argument that requiring evidence to show good cause is a violation of equal protection must be read in unison with all of California's gun regulation laws because carrying a concealed, loaded weapon is not the only means of self-defense. In *Flores*, the Court held that Cal. Pen Code "section 12031 *is narrowly tailored* to reduce the incidence of unlawful public shootings, while at the same time respecting the need for persons to have access to

firearms for lawful purposes, including self-defense. *Flores*, 169 Cal. App. 4th at 576-577 (italics added).

Accordingly, because the relevant statutes are narrowly tailored, the Sheriff's policy of requiring evidence of "good cause" to carry a concealed weapon in public does not infringe on the Second Amendment "core right" that has been held to be fundamental by the Supreme Court.

B. The Sheriff Does Not Provide Preferential Treatment

Appellants claim that the Sheriff made an impermissible classification between applicants who were members of the Honorary Deputy Sheriff's Association (HDSA), and those who were not. The District Court properly rejected that claim. (Order, ER Vol. 1, Tab 1 at 13-15.) At the District Court, Appellants produced copies of renewal applications from twenty-two applicants and represented to the Court that no documentation had been presented supporting the renewals. (ER, Vol. VIII, Tab 38 at 934-1040.) The Sheriff produced, in response, the documentation for nearly all of those applicants, which they had submitted in support of the renewal applications. (ER Vols. 6 and 7, Tab 32.) Appellants continue to press this argument on appeal by claiming that four renewals did not have supporting documentation. But as the Sheriff has established and the District Court notes, the Sheriff did not require documentation in all instances for renewals and some applicants needed no documentation based on their status. (Order, ER, Vol 1, Tab 1, at 14-15; Pelowitz Decl. ¶¶12, 22, ER Vol. III, Tab 31 at 442-443, 445.)

A concealed weapons licensing program that is administered arbitrarily so as to unjustly discriminate between similarly situated people may be denied equal protection. *March v. Rupf*, 2001 WL 1112110 (N.D.Cal. 2001), citing *Guillory v.*

County of Orange, 731 F.2d 1379, 1383 (9th Cir. 1984).[2] At summary judgment, a plaintiff must show actual evidence that would allow a reasonable jury to conclude first, that others similarly situated generally have not been treated in a like manner; and second, that the denials of concealed weapons licenses to them were based on impermissible grounds. *See Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1349 (9th Cir. 1983)(applying this test to a claim of "selective prosecution" in zoning decision context).

Appellants merely attack what they believe to be unequal application of a policy even though, when their applications are viewed in isolation, the policy was acceptably applied as to them. However "without evidence of anything more than vagaries in its administration, their equal protection claim cannot survive summary judgment." *March*, 2001 WL 1112110 at *5, referring to *Accord, Falls v. Town of Dyer, Indiana*, 875 F.2d 146, 149 (7th Cir. 1989). This Court has found this to be "especially true in light of the 'extremely broad discretion' that the California Penal Code affords sheriffs and police departments in issuing concealed weapons licenses." *March*, 2001 WL 1112110 at *5, citing *Gifford v. City of Los Angeles*, 88 Cal.App.4th 801, 805 (2001).

The District Court properly found that no evidence established that those HDSA members who received licenses were in fact similarly situated to Appellants. The evidence presented in their motion as to HDSA member applications was erroneous and misleading. Absent any negative law enforcement

[2] Appellants contend that the district court erred in relying on *March v. Rupf* because the case was decided pre-*Heller*, before California was compelled to recognize a fundamental right to bear arms for self-defense. However, *March* is not used by the district court or the Sheriff for a fundamental right analysis. *March* is referenced as precedent for determining whether CCW applicants are "similarly situated to plaintiffs" in a purely as-applied challenge. All Equal Protection Claims require proof that the classes are similarly situated and treated differently. The district court found Plaintiffs not to be similarly situated and never even used *March* to determine which standard of review applied.

contacts or changes from the initial application, renewal applications are generally issued on the spot. (Pelowitz Decl. ¶ 12, ER Vol. III, Tab 31 at 442-443.) Review by a supervisor or manager is not needed for the renewal process unless there has been a change to the reason. *Id.* And, while documentation to support the renewal application is often provided, it is not as essential as in the initial application process. *Id.*

Peruta and Buncher claim a disparity in treatment based upon their initial applications. Dodd and Laxson state that they did not even apply for a license for potential lack of "good cause." Appellants did not present any evidence to prove the selected renewal applicants of HDSA members were more favorably treated during their initial application. Contrary to Appellants' representation on appeal, all County CCW application files were produced for inspection during discovery. (Transcript of Oral Argument, ER Vol I, Tab 2 at 61:12-20.) In addition, Sheriff Gore was elected in 2009. Each of the renewal applications presented were originally approved by a different administration. Peruta, Buncher, Dodd and Laxson, who are claiming disparate treatment based solely on their initial application, are not similarly situated.

Cleary is the only one who claims to have had his renewal application denied because he was no longer a part of the HDSA. However, Cleary cannot be classified as "similarly situated, treated differently" because he was in fact issued a CCW permit after appeal. In his original application process, Cleary successfully appealed to then Undersheriff Gore, who was the designated hearing officer. Cleary's renewal application was approved after his appeal, even though he was no longer a member of the HDSA. (Cleary Decl. ¶¶ 14-19, ER Vol. IV, Tab 41 at 1080-1081.) Therefore, Cleary did not prove he was treated differently as an HDSA member.

Appellants also infer a connection of preferential treatment to HDSA members due to notations on the applications. At no time, whether in the initial or renewal process, does the Sheriff's Department consider HDSA membership. (Pelowitz Decl. ¶¶ 11 and 22, ER Vol. III, Tab 31 at 441-442, 445.) While many HDSA members provide such information in their application, it is never required, insisted upon or considered by the Sheriff's Department. *Id.* Line staff are merely trained to note everything that is said by the applicant during the interview process. *Id*. Even with these select applications, Appellants introduced no facts sufficient for a reasonable juror to conclude that the Sheriff's concealed weapons license program has injured them in its purported discrimination among multiple "classes" of similarly-situated individuals. In *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1186 (9th Cir. 1995), this Court held that plaintiff's denial for a dance permit at her bar was, as applied to her, authorized under the city ordinance. The Court held that the "selective enforcement of valid laws, without more, does not make the defendants' actions irrational." *Id.* at 1188.

Appellants further contend that some applicants were awarded a CCW license for good cause reasons similar to Peruta without providing any documentation. Appellants only offer as support the application of Peter Q. Davis, a prominent San Diegan who recently ran for mayor. Mr. Davis did not need to document his status since it was common knowledge within the community that he was a "public figure."

The only other evidence presented to the District Court was a list of all denials since 2006 and a claim that "not one single HDSA member . . . has been denied, while 18 non-members have been denied." (Exhibit WW, ER Vol. VIII, Tab 38 at 1059.) There is no basis for that allegation and that exhibit does not in any way support the claim.

Appellants failed to show a causal connection and have offered at best nothing more than "vagaries" in the Sheriff's Department's administration of section 12050. The District Court thus correctly found that there was no genuine issue of material fact that Appellants were "treated differently than similarly situated others." (Order, ER Vol. 1, Tab 1 at 14:24-25.)

V

THE ADDITIONAL CLAIMS

It appears that Appellants are not pursuing on appeal their remaining claims of violations of due process, privileges and immunities, and the right to travel. While there is reference to these claims in their opening brief at pp. 61-62, there is no argument made. The parties stipulated that Peruta would have been considered a resident for the purpose of his CCW application and that issue was withdrawn. (Transcript of Oral Argument, ER Vol I, Tab 2 at 45:7-46:17; 60:16-25.)

CONCLUSION

California's regulation of public carry of concealed firearms embodies a strong and long-held legislative interest in protecting public safety and reducing crime, and the policy of the San Diego Sheriff in limiting concealed carry to those persons with unique and specific needs is a reasonable regulation of firearms that has no impact on the "right to keep and bear arms" as so far articulated by the Supreme Court. The decision of the District Court should be affirmed.

DATED: August 12, 2011

Respectfully submitted,

THOMAS E. MONTGOMERY, County Counsel

By s/ James M. Chapin
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CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

Case No. 10-56971

Pursuant to Federal Rules of Appellate Procedure, rule 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached Appellees' Brief is double-spaced, typed in Times New Roman proportionally spaced 14-point typeface, and the brief contains 11,688 words of text as counted by the Microsoft Word 2007 word-processing program used to generate the brief.

DATED: August 12, 2011 THOMAS E. MONTGOMERY, County Counsel

By: s/ *James M. Chapin*
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STATEMENT OF RELATED CASES

Appellee William D. Gore by and through his counsel of record, Thomas E. Montgomery, County Counsel by James M. Chapin, Senior Deputy County Counsel, pursuant to Federal Rules of Appellate Procedure, Ninth Circuit Rule 28-2.6 and hereby submit their Statement of Related Cases as follows:

1. The undersigned counsel certifies that, to the best of his knowledge and belief, there have been no prior appeals in this matter;

2. The undersigned counsel further certifies, to the best of his knowledge and belief, that there are no related appeals other than those identified by Appellants,

DATED: August 12, 2011 THOMAS E. MONTGOMERY, County Counsel

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UNITED STATES COURT OF APPEALS

IN AND FOR THE NINTH CIRCUIT

EDWARD PERUTA, et al., Plaintiffs – Appellants, v. COUNTY OF SAN DIEGO, et al., Defendants - Appellees.	No. 10-56971 [United States District Court, Southern District California Civil Case No. 09-CV-2371 IEG (BLM)] **CERTIFICATE OF SERVICE**

I hereby certify that on August 1, 2011, I electronically filed the foregoing **Appellee's Brief** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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I declare under penalty of perjury that the foregoing is true and correct and that this Certificate of Service is executed this 12th day of August 2011 at San Diego, California.

THOMAS E. MONTGOMERY, County Counsel

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