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6
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8
9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**

11 MICHELLE FLANAGAN, SAMUEL
12 GOLDEN, DOMINIC NARDONE,
13 JACOB PERKIO, and THE
CALIFORNIA RIFLE & PISTOL
ASSOCIATION,

14 Plaintiffs,

15 v.

16 CALIFORNIA ATTORNEY
17 GENERAL KAMALA HARRIS, in her
official capacity as Attorney General of
18 the State of California, SHERIFF
JAMES McDONNELL, in his official
19 capacity as Sheriff of Los Angeles
County, California AND DOES 1
20 THROUGH 10, inclusive,

21 Defendants.

CASE NO. CV 16-06164-JAK-AS

Honorable John A. Kronstadt

**DEFENDANT SHERIFF JAMES
MCDONNELL'S NOTICE OF
MOTION AND MOTION TO
DISMISS PLAINTIFFS'
COMPLAINT PURSUANT TO
F.R.C.P. RULE 12(B)(6);
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

*[[Proposed] Order filed concurrently
herewith]*

Hearing Date:

Date: February 13, 2017

Time: 8:30 a.m.

Ctrm: 750

Complaint Filed: August 17, 2016

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23
24 TO THE HONORABLE COURT, ALL PARTIES, AND TO THEIR
25 ATTORNEYS OF RECORD:

26 PLEASE TAKE NOTICE that on February 13, 2017 at 8:30 a.m., or as soon
27 thereafter as the matter may be heard in Courtroom 750, United States District
28 Court, located at 255 E. Temple Street, Los Angeles, California 90012, Defendant

1 Sheriff James McDonnell ("Defendant") will and hereby does move the Court to
2 dismiss Plaintiffs Michelle Flanagan, Samuel Golden, Dominic Nardone, Jacob
3 Perkio, and the California Rifle and Pistol Association's (collectively, "Plaintiffs")
4 Complaint against them pursuant to Fed. R. Civ. P. Rule 12(b)(6) on the following
5 grounds:

- 6 1. Plaintiffs' first claim for relief alleging violations of the Second
7 Amendment pursuant to 42 U.S.C. § 1983 fail as a matter of law in
8 light of the Ninth Circuit's decision in *Peruta v. County of San Diego*,
9 824 F.3d 919 (9th Cir. 2016);
- 10 2. Plaintiffs' second claim for relief fails as a matter of law because
11 Plaintiffs improperly attempt to bring a Second Amendment claim
12 under the Equal Protection Clause of the Fourteenth Amendment and,
13 even if Plaintiffs could allege such a claim under the Equal Protection
14 Clause, they have failed to allege such a claim here.

15 This Motion will be based upon this Notice, the attached Memorandum of
16 Points and Authorities, Plaintiffs' Complaint, the pleadings on file herein, and upon
17 such further evidence may be presented at or before the hearing on this Motion.

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1 This Motion is made following the conference of counsel pursuant to Local
2 Rule 7-3, which took place on October 5, 2016.

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DATED: October 14, 2016

Respectfully submitted,

MARY C. WICKHAM
County Counsel

By */s/ Alexandra B. Zuiderweg*

Alexandra B. Zuiderweg
Deputy County Counsel
Attorneys for Defendant Sheriff James
McDonnell

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Despite the fact that two recent Ninth Circuit decisions bar their claims,
4 Plaintiffs in this action allege that California's statutory scheme regulating the open
5 and concealed carry of firearms in public and Defendant's policy requiring good
6 cause for the issuance of a concealed carry permit violate their rights under the
7 Second Amendment and the Equal Protection Clause of the Fourteenth Amendment.
8 (Complaint, ¶¶ 8, 71-87.)

9 Plaintiffs' Complaint fails as a matter of law for several reasons. First, the
10 Ninth Circuit's *en banc* decision in *Peruta v. County of San Diego*, 824 F.3d 919 (9th
11 Cir. 2016) explicitly holding that there is no Second Amendment right to concealed
12 carry bars Plaintiffs' first claim under the Second Amendment. Second, Plaintiffs'
13 equal protection claim fails because the Ninth Circuit's decision in *Teixeira v.*
14 *County of Alameda*, 822 F.3d 1047 (9th Cir. 2016) established that a plaintiff cannot
15 allege a violation of the Equal Protection Clause based on a purported violation of
16 his or her Second Amendment rights. Third and finally, even if Plaintiffs could
17 allege such an Equal Protection claim, Plaintiffs' Complaint fails to do so, as the
18 statutes regulating the open and concealed carry of firearms in public are rationally
19 related to the legitimate state interest in minimizing the threat to public safety
20 presented by the open and concealed carry of firearms in public.

21 **LEGAL AND FACTUAL BACKGROUND**

22 **I. California Law and the Los Angeles County Sheriff's Department's**
23 **Concealed Weapons Permit Policy**

24 Consistent with California law, Defendant may issue concealed weapons
25 permits upon a showing of "good cause" and "good moral character." Penal Code
26 §§ 26150(a), 26155(a). Defendant has the authority to define "good cause" for
27 obtaining a concealed weapons permit. California Penal Code §§ 26150, 26155. As
28 Plaintiffs point out, Defendant defines good cause as "convincing evidence of a

1 clear and present danger to life, or of great bodily harm to the applicant, his spouse,
2 or dependent child, which cannot be adequately dealt with by existing law
3 enforcement resources, and which danger cannot be reasonably avoided by
4 alternative measures, and which danger would be significantly mitigated by the
5 applicant's carrying of a concealed firearm." (Complaint, ¶ 57.)

6 **II. Plaintiffs' Allegations**

7 Plaintiffs are four individual residents of Los Angeles County and the
8 California Rifle & Pistol Association ("CPRA"), an entity organized under Section
9 501(c)(4) of the Internal Revenue Code. The individual plaintiffs are members of
10 CPRA. Defendants are the Attorney General of California and Los Angeles County
11 Sheriff James McDonnell. (Complaint, ¶¶ 13-20, 45-25.)

12 The four individual plaintiffs all applied for and were denied concealed carry
13 permits by Defendant Sheriff McDonnell for lack of "good cause." (Complaint, ¶¶
14 15-19.) These plaintiffs allege that they "wish immediately to exercise their
15 constitutional right to carry a firearm in public for self-defense, but they are
16 precluded from doing so because they are unable to obtain a Carry License, which
17 would allow them to carry a firearm in a concealed manner, and because California
18 law prohibits them from carrying a firearm openly." (Complaint, ¶¶ 15-19, 23.)
19 The Complaint further alleges that other members of Plaintiff CPRA have also been
20 denied Carry Licenses by Defendant Sheriff McDonnell or "have refrained from
21 applying for Carry Licenses because they know that applying will be futile based on
22 Defendant McDonnell's official written 'good cause' policy, which they cannot
23 satisfy, and in light of the Defendant's commonly known practice of enforcing his
24 'good cause' policy in a manner that denies all applicants other than those with
25 evidence of the most specific and serious threats against them." (Complaint, ¶¶ 62-
26 63.)

27 With respect to the open carry of firearms, Plaintiffs allege that "Issuing
28 Authorities in counties with populations over 200,000, like Los Angeles County, can

1 only issue licenses to carry a concealed firearm. California law prohibits them from
 2 issuing licenses to carry a loaded handgun in an exposed, open manner (e.g., in a
 3 visible hip holster)." (Complaint, ¶ 53.) As such, Plaintiffs have not and cannot
 4 allege that Defendant Sheriff McDonnell is in any way responsible for California
 5 laws prohibiting open carry.

6 STANDARD

7 Dismissal under 12(b)(6) is appropriate where there is no cognizable legal
 8 theory or where there are insufficient facts alleged to support a cognizable legal
 9 theory. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988).

10 While a court must accept all factual allegations pleaded in the Complaint as true,
 11 the court need not accept as true unreasonable inferences or conclusory legal
 12 allegations cast in the form of factual allegations. *Western Mining Council v. Watt*,
 13 643 F.2d 618, 624 (9th Cir. 1981), cert. denied, 454 U.S. 1031 (1981).

14 ARGUMENT

15 I. Plaintiffs' First Claim for Relief is Barred by the Ninth Circuit's Decision 16 in Peruta.

17 The *Peruta* decision completely forecloses Plaintiffs' Second Amendment
 18 claim against Defendant. The *Peruta* court unequivocally held that a local law
 19 enforcement agency's requirement that a concealed weapons permit applicant
 20 demonstrate good cause does not violate the Second Amendment. The facts of
 21 *Peruta* are nearly identical to the allegations in this case. Plaintiff Edward Peruta, a
 22 resident of San Diego County, and Plaintiff Adam Richards, a resident of Yolo
 23 County, each applied for a license to carry a concealed firearm. Both applications
 24 were denied because Plaintiffs had not shown good cause as required under their
 25 respective county's policy. *Peruta*, 824 F.3d at 924. Like the Los Angeles County
 26 Sheriff's Department ("LASD"), both San Diego and Yolo County policies define
 27 "good cause" as requiring a particularized reason why an applicant needs a
 28 concealed firearm for self-defense. *Id.* And similarly, Plaintiffs' concealed weapons

1 permit applications were denied because they failed to show good cause as defined
2 by LASD policy. (Complaint, ¶¶ 15-19.)

3 Here, as in *Peruta*, Plaintiffs' challenge is to Defendant's policies governing
4 concealed carry and the denial of their applications for concealed carry permits.
5 (Complaint, ¶¶ 56-57, 72-79.) As alleged in the Complaint, the LASD defines
6 "good cause" as "convincing evidence of a clear and present danger to life, or of
7 great bodily harm to the applicant, his spouse, or dependent child, which cannot be
8 adequately dealt with by existing law enforcement resources, and which danger
9 cannot be reasonably avoided by alternative measures, and which danger would be
10 significantly mitigated by the applicant's carrying of a concealed firearm."
11 (Complaint, ¶ 57.) The LASD's policy requiring that the applicant demonstrate
12 good cause is nearly identical to the good cause requirement upheld in *Peruta*.
13 Plaintiffs' Complaint concedes this fact, specifically acknowledging that *Peruta*
14 "upheld a similarly restrictive 'good cause' policy enforced by the San Diego County
15 Sheriff." (Complaint, ¶ 7.) Also, as in *Peruta*, Plaintiffs' concealed carry permit
16 applications were denied because they failed to show good cause as defined by
17 LASD policy. (Complaint, ¶¶ 15-19, 59-60.)

18 After reviewing the history relevant to the Second Amendment and its
19 application to the States and localities via the Fourteenth Amendment, the *Peruta* en
20 banc court held: "We therefore conclude that the Second Amendment right to keep
21 and bear arms does not include, in any degree, the right of a member of the general
22 public to carry concealed firearms in public. In so holding, we join several of our
23 sister circuits that have upheld the authority of states to prohibit entirely or to limit
24 substantially the carrying of concealed or concealable firearms." *Peruta*, 824 F.3d
25 at 939 (citing cases). The *Peruta* court further held "[b]ecause the Second
26 Amendment does not protect in any degree the right to carry concealed firearms in
27 public, any prohibition or restriction a state may choose to impose on concealed
28

1 carry – including a requirement of 'good cause,' however defined – is necessarily
2 allowed by the Amendment." *Id.*

3 This holding "fully answered" the questions presented to the *Peruta* court,
4 which are identical to those presented in this case. *Id.* at 939. The Second
5 Amendment does *not* convey an absolute right to carry concealed weapons in public
6 places. As such, a county's requirement that a CCW permit applicant show good
7 cause for the issuance of that permit does *not* violate the Second Amendment.
8 Plaintiffs cannot invoke the Second Amendment to protect a right to carry a
9 concealed weapon, as that right "does not exist under the Amendment." *Id.* at 932.
10 Accordingly, because *Peruta* is binding authority, Plaintiffs' first claim for relief
11 should be dismissed with prejudice.

12 **II. Plaintiffs' Equal Protection Claim Fails As a Matter of Law.**

13 **A. Plaintiffs' Attempt to Circumvent *Peruta* By Alleging an Equal**
14 **Protection Claim Is Improper.**

15 Plaintiffs also allege that the LASD's good cause policy somehow violates the
16 Equal Protection Clause because it purportedly does not recognize self-defense
17 alone as good cause to obtain a CCW and thus "bar[s] law-abiding Los Angeles
18 County residents from publicly carrying a firearm for self-defense in any manner,
19 while allowing other law-abiding citizens to carry a firearm for self-defense."
20 (Complaint, ¶ 85.) Thus, according to Plaintiffs, "Defendants have created a
21 classification of persons, including Plaintiffs, who are treated unequally through the
22 denial of their Second Amendment rights to publicly bear arms for self-defense."
23 (Complaint, ¶ 85.) In *Teixeira v. County of Alameda*, 822 F.3d 1047, 1052 (9th Cir.
24 2016), however, the Ninth Circuit specifically rejected this argument, holding that
25 claims emanating from the right to bear arms for self-defense must be analyzed
26 under the Second Amendment and not the Equal Protection Clause.

27 In *Teixeira*, prospective gun store operators brought an action against
28 Alameda County alleging that a county ordinance prohibiting a gun store from being

1 located with 500 feet of any residential district, school, gun store, or establishment
2 that sold liquor violated equal protection and the Second Amendment. *Id.* The
3 plaintiffs alleged that there were no parcels of land that would qualify under the
4 ordinance to operate a gun store, and as such, the county was infringing on citizens'
5 right to keep and bear arms. *Id.* at 1064. The trial court dismissed the plaintiffs'
6 equal protection claim. *Id.* The Ninth Circuit affirmed the dismissal, holding that
7 the plaintiffs were merely dressing their Second Amendment claim in "equal
8 protection clothing." *Id.* at 1052. As such, the Ninth Circuit held that the plaintiff's
9 claim should be analyzed solely under the Second Amendment, not the Equal
10 Protection Clause. *Id.* at 1052. Here, Plaintiffs' equal protection claim similarly
11 fails as a matter of law, as it merely restates their Second Amendment claim of the
12 right to bear arms for self-defense. (Complaint, ¶ 84-86.) *See Orin v. Barclay*, 272
13 F.3d 1207, 1213 n.3 (9th Cir. 2001).

14 **B. Plaintiffs Fail to State An Equal Protection Claim Because There Is**
15 **No Fundamental Right to Carry a Concealed Weapon.**

16 Even if this court found that Plaintiffs' equal protection claim could somehow
17 co-exist with their Second Amendment claim, the equal protection claim fails
18 nonetheless. As set forth above, the Ninth Circuit has already held that there is no
19 fundamental right to carry a concealed weapon under the Second Amendment.
20 *Peruta*, 824 F.3d at 939. When a government's action does not implicate a
21 fundamental right, even intentional discrimination will survive constitutional
22 scrutiny for an equal protection violation as long as it bears a rational relation to a
23 legitimate state interest. *New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976);
24 *City of Cleburne v. Cleburne Living Center*, 473 U.S.432, 439 (1985); *Lockary v.*
25 *Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990). Defendant's good cause
26 requirement for the issuance of concealed carry permits easily satisfy this rational
27 basis test. *See Teixeira*, 822 F.3d at 1052.

28

1 Courts have found that the increased presence of firearms in public presents a
 2 tremendous danger to public safety. *See Nichols v. Brown*, 2013 WL 3368922*5
 3 (C.D. Cal. 2013) ("[T]he California Legislature could have rationally concluded that
 4 the open carrying of firearms presents a danger to public safety in more densely
 5 populated areas."); *People v. Flores*, 159 Cal.App.4th 568, 576 (2008) (explaining
 6 that the statutory regime regulating the carrying of loaded firearms in public was
 7 designed "to reduce the incidence of unlawful public shootings. . .") The LASD's
 8 good cause policy is certainly rationally related to this legitimate state interest of
 9 preserving public safety. As such, even if Plaintiff could plead its Second
 10 Amendment claims in "equal protection clothing," Plaintiff's equal protection claim
 11 would fail as a matter of law.

12 **CONCLUSION**

13 Based on the foregoing, Defendant respectfully requests that the Court grant
 14 the instant motion and dismiss Plaintiffs' claims with prejudice.

15
16 DATED: October 14, 2016

Respectfully submitted,

17
18 MARY C. WICKHAM
County Counsel

19 By */s/ Alexandra B. Zuiderweg*

20 _____
 21 Alexandra B. Zuiderweg
 22 Deputy County Counsel
 23 Attorneys for Defendant Sheriff James
 24 McDonnell