

EXHIBIT A

1 C. D. Michel – SBN 144258
Clint B. Monfort - SBN 255609
2 Sean A. Brady - SBN 262007
cmichel@michellawyers.com
3 MICHEL & ASSOCIATES, P.C.
180 E. Ocean Blvd., Suite 200
4 Long Beach, CA 90802
Telephone: (562) 216-4444
5 Facsimile: (562) 216-4445
www.michellawyers.com
6 Attorneys for Plaintiffs / Petitioners

7 Paul Neuharth, Jr. (State Bar #147073)
pneuharth@sbcglobal.net
8 PAUL NEUHARTH, JR., APC
1440 Union Street, Suite 102
9 San Diego, CA 92101
Telephone: (619) 231-0401
10 Facsimile: (619) 231-8759
Attorney for Plaintiffs / Petitioners
11

12 **IN THE UNITED STATES DISTRICT COURT**
13 **SOUTHERN DISTRICT OF CALIFORNIA**

14 EDWARD PERUTA, MICHELLE)
15 LAXSON, JAMES DODD, DR. LESLIE)
16 BUNCHER, MARK CLEARY, and)
CALIFORNIA RIFLE AND PISTOL)
ASSOCIATION FOUNDATION)

17 Plaintiffs,)
18)

19 v.)

20 COUNTY OF SAN DIEGO, WILLIAM D.)
GORE, INDIVIDUALLY AND IN HIS)
CAPACITY AS SHERIFF,)

21 Defendants.)
22)

CASE NO: 09-CV-2371 IEG (BGS)
PLAINTIFFS’ SUR-REPLY IN
OPPOSITION TO DEFENDANT’S REPLY
IN SUPPORT OF DEFENDANTS’ MOTION
FOR SUMMARY JUDGMENT
[PROPOSED]

Date: November 15, 2010
Time: 10:30 a.m.
Location: Courtroom 1
Judge: Hon. Irma E. Gonzalez
Date Action Filed: October 23, 2009

23
24
25
26
27
28

ARGUMENT

I. UNLOADED AND OPEN CARRY IS *NOT* A CONSTITUTIONAL METHOD OF CARRY UNDER THE SECOND AMENDMENT, NOR IS IT VIABLE FOR SELF-DEFENSE PURPOSES

In their Motion for Partial Summary Judgment, Plaintiffs explained that they: “do not claim a right to publicly carry handguns in a concealed manner *per se*, only a right to carry handguns in a manner specified by the Legislature, which, in California, is licensed, concealed carry.” Pls.’ Mot. Partial Summ. J. at 23:5-8. Despite this clear statement, the County repeatedly argued why bans on *concealed* carry of firearms are constitutional. The County now apparently realizes that those arguments are irrelevant, and that its claim that *Heller* limits Second Amendment rights to the home is unpersuasive. So now the County argues that carrying a firearm *unloaded* and openly (“UOC”) with the ammunition nearby – which California allows in *some* places under *some* conditions¹ – is a method of carrying that satisfies the Second Amendment requirement that people be allowed to carry a firearm for self-defense in *some* manner. The County contends that Plaintiffs should have explained why UOC “combined with the exceptions in [Penal Code §] 12031” is inadequate for self-defense. *See* Defendant’s Reply in Support of Defendant’s Motion for Summary Judgment at 2:4-6. But, the County never raised this argument in its Opposition/Cross-Motion, and this is the County’s burden to establish that this method satisfies the Second Amendment. Nonetheless, the argument is easily dismissed.

A. *Heller* Makes Clear that Requiring UOC for Bearing Arms Is Inadequate for Immediate Self-Defense

The ordinance struck down in *Heller* required firearms in the home to be “unloaded and disassembled or bound by a trigger lock or similar device.” *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (U.S. 2008). The Supreme Court ruled that requirement as violative of the Second Amendment because it renders a firearm inoperable “for the purpose of *immediate* self-defense” (emphasis added). *Id.* at 2821-2822. A requirement that firearms be carried unloaded – even if

¹ Penal Code § 12025 prohibits the possession of concealed weapons in public, and Penal Code § 12031 prohibits the possession of loaded weapons in public. So unloaded, completely unconcealed firearms, or firearms carried in an exposed belt holster, are legal to carry in certain public places in limited circumstances.

1 ammunition is accessible to the carrier – would likewise render those firearms inoperable “for the
2 purpose of *immediate* self-defense.”

3 It takes nearly the same amount of time and effort, and in some cases more, to remove a
4 handgun from a holster, remove either a magazine (for a semi-automatic handgun) or a speed-loader
5 (for a revolver), open the action, load the firearm, close the action and engage the target, as it does to
6 remove a trigger lock and engage a target. (*See generally* Declaration of Stephen Helsley). Even without
7 expert opinion, this is common sense. A need to exercise the fundamental right to self-defense can arise
8 in a split second. Loading a firearm under life and death pressure is difficult and - even for the trained
9 and well-practiced - time-consuming; taking precious seconds when they count most. Would police or
10 private security submit to such a restriction? An unloaded firearm is essentially useless for self-defense,
11 except perhaps as a club.

12 The County provides no testimony, reference material, or legal authority to support its
13 proposition that carrying a firearm unloaded with ammunition nearby is a constitutionally sufficient
14 alternative to carrying a loaded firearm as a means of self-defense. But *Heller* itself cites several state
15 court cases which upheld prohibitions on carrying firearms *concealed*, as long as carrying firearms
16 *openly* was permitted. *Heller* at 2794, n.9. None of those cases even suggest that *unloaded*, open carry
17 fulfills the requirement that law-abiding persons be allowed to carry arms for self-defense. (*See State v.*
18 *Chandler*, 5 La. Ann. 489 (1850); *Nunn v. State*, 1Ga. 243 (1846); *Andrews*, 50 Tenn. 165 (1871); and
19 *State v. Reid*, 1 Ala. 612 (1840). In fact, *Reid* suggests the exact opposite, stating: “A statute which,
20 under the pretence of regulating, amounts to a destruction of the right, *or which requires arms to be so*
21 *borne as to render them wholly useless for the purpose of defence*, would be clearly unconstitutional.”
22 *Id.* at 616-17 (emphasis added).

23 **B. UOC Has Many Statutory Limitations That Make it Impractical**

24 **1. Those Who UOC Are Statutorily Subject to Suspicionless Search**

25 Penal Code § 12031(e) expressly authorizes law enforcement to stop any person an officer sees
26 in possession of a firearm in a public place² and to inspect the firearm to determine whether it is loaded.
27 If an officer has reasonable cause to believe a firearm carried in a public place is loaded, the officer can
28

² See Penal Code § 12031(f) and *People v. Vega* (1971) 18 Cal. App.3d 954, 958, for the definition of “public place.”

1 arrest the person carrying the firearm, even if no crimes is actually committed. (Penal Code §
 2 12031(a)(5)(A)(ii).)³ Those carrying firearms pursuant to a CCW are not subject to such statutory
 3 searches.

4 **2. There Are Many Places Where UOC is Not Allowed**

5 Both California (Penal Code § 626.9) and federal (18 U.S.C. §§ 921(a)(25); 922(q) & 924(a))
 6 law make it generally illegal to possess a firearm, that is not in a locked container and unloaded, in any
 7 place the person knows, or reasonably should know, is within 1,000 feet of the grounds of any public or
 8 private school that teaches any grade between kindergarten through 12. Violation of either the state or
 9 the federal version of this law can be charged as a felony. (*See* Penal Code § 626.9(f); 18 U.S.C. §
 10 924(a)(4).) Those carrying a firearm pursuant to a valid CCW are exempted from these laws. (*See*
 11 Penal Code § 626.9(l); 18 U.S.C. §§ 921(a)(25); 922(q).)

12 Also, many cities and counties have ordinances prohibiting firearms in certain areas, most
 13 commonly in public parks. Alameda County has banned firearms on all county owned property. *See* Ex.
 14 “A” Supp. Pls.’ Consolidated Opp/Reply. Those carrying a firearm pursuant to a valid CCW are
 15 typically exempted from these local restrictions. (*e.g., Id.*).

16 **3. UOC is Impractical**

17 Those who UOC must either possess the firearm *completely* unconcealed, or carry it in a belt
 18 holster, lest they violate Penal Code § 12025. And under Penal Code § 12031(e), they must submit to
 19 an inspection of their firearm by every law enforcement officer they come into contact with who
 20 requests one. They must also research the location of every school zone, and plan routes of travel
 21 around them (which in metropolitan areas is virtually impossible) or risk felony prosecution (and thus a
 22 loss of *all* firearms rights); they must research and comply with the local ordinances relating to carrying
 23 firearms for every city and county they visit or risk prosecution thereunder; then they have to take the
 24 precious time to load their firearm (no easy task if involved in a life and death confrontation, provided it
 25 is possible at all). Contrary to the County’s assertion, UOC is an unwieldy practice hardly befitting of a
 26 fundamental, enumerated right the *Heller* Court referred to as “the true palladium of liberty,” (*See*
 27 *Heller*. at 2805 (quoting St. George Tucker’s version of Blackstone’s Commentaries), and is not an
 28

³ Probable cause exists if the person carrying the firearm refuses to allow a requesting officer to inspect it. (Penal Code § 12031(e) .)

1 adequate substitute for CCW under the Second Amendment.

2
3 **II. THE CCW CASES PENDING BEFORE THE NINTH CIRCUIT ARE NOT INSTRUCTIVE**

4 The County cites to unpublished district court decisions and mischaracterizes them as: “two
5 recent California federal cases” (emphasis added) that have rejected challenges to “concealed weapons
6 regulations” at the trial level: *Mehl v. Blanas*, 2008 U.S. Dist. LEXIS 8349 (E.D. Cal. 2008) and *Rothery*
7 *v. Blanas*, U.S. District Court for the Eastern District of California, No. CIV. S 08-02064. See Def.’s
8 Reply Supp. Mot. Summ. J. at 3:18-24. But, only one of those cases, *Rothery*, addressed a Second
9 Amendment question. Both case were pre-*McDonald*, *Mehl* was even pre-*Heller*. These are not “recent”
10 cases. Nor are they particularly instructive.

11 The plaintiffs’ Second Amendment claim in *Mehl* was never decided by that court because the
12 plaintiffs in that case, it being pre-*Heller* (February of 2008), conceded that Ninth Circuit precedent
13 barred any Second Amendment claim prior to Sacramento County’s motion to dismiss being ruled on.⁴
14 Thus, *Mehl* did not address any Second Amendment question, and even if it had, it would have been of
15 little value, being decided pre-*Heller*.

16 *Rothery* involved an almost identical challenge to that in *Mehl*, even the defendants and the
17 attorneys were the same.⁵ Also, like *Mehl*, Sacramento County’s motion to dismiss was granted. But
18 unlike *Mehl*, the court did decide the Second Amendment issue, opining that no such claim is available.
19 But the ruling on the Second Amendment claim was pre-*McDonald*, and the judge relied almost
20 exclusively on *Nordyke v. King*⁶ in concluding “there is no constitutional right to carry a concealed
21 weapon.”⁷ But, the *Nordyke* case has been vacated, and is no longer good law. See Pls.’ Consolidated
22 Opp./Reply 5:15-22 & n.9.

23
24 ⁴ See Memorandum and Order Granting Defendant’s Motion for Summary Judgment, *Mehl v. Blanas*,
(No. 03-2682) (E.D. Cal. Feb. 5, 2008).

25 ⁵ See Transcript of Court’s Rulings on Motions to Dismiss, *Rothery v. Blanas*, at 1:9-16 (No. 08-
26 2064) (July 15, 2009).

27 ⁶ See Mem. and Order Granting Def.’s Mot. Summ. J., at 2:15-19 and 6:10-14 and 11:15-23, *Mehl v.*
28 *Blanas*, (No. 03-2682) (E.D. Cal. Feb. 5, 2008)

⁷ See Tr. Ct.’s Rulings on Mots. to Dismiss, *Rothery v. Blanas*, at 8:17-21 (No. 08-2064) (July 15,
2009).

1 Further, in granting Sacramento's motion to dismiss, the judge repeatedly said there is no
 2 constitutional right to carry a "concealed" weapon, basing his decision on the language from *Heller* that
 3 most 19th-Century courts held prohibitions on carrying concealed weapons to be lawful, and taking the
 4 position that the right to arms is limited to the home.⁸ This Court has already correctly rejected both of
 5 those propositions, appropriately so in light of *McDonald*. See Order Denying Defendant's Motion to
 6 Dismiss, *Peruta v. County of San Diego*, 678 F. Supp. 2d 1046, at 1051 (No. 09-2371) ("*Heller* does not
 7 preclude Second Amendment challenges to laws regulating firearm possession outside of home.") and
 8 1053-1054 (where this Court recognized *Heller's* distinction between presumptively lawful restrictions,
 9 like concealed carry bans when alternative methods of carry are allowed, and unconstitutional total bans
 10 on carrying firearms outside the home for self-defense.).

11 **III. FOR SUMMARY JUDGMENT PURPOSES THERE ARE AT BEST**
 12 **DISPUTED MATERIAL FACTS STILL UNRESOLVED**

13 Discovery in this case has not concluded. No depositions have been taken. Plaintiffs believe
 14 there are minimal factual issues involved in establishing the Second Amendment violation alleged. By
 15 this motion they sought to avoid protracted and expensive litigation and discovery on factual issues that
 16 may have less significance depending on the Court's ruling on the Second Amendment claim. But the
 17 Court may disagree, or find that there are factual issues left to be resolved relating to the other claims.
 18 In which case, and considering the minimal discovery completed so far, if the court is inclined to deny
 19 Plaintiffs' motion it should do so wholly, or in part, *without* prejudice.

20 **Date:** November 8, 2010

21 **MICHEL & ASSOCIATES, P.C.**

21 **PAUL NEUHARTH, JR., A.P.C.**

22
 23 /s/ C. D. Michel

22
 23 /s/ Paul Neuharth, Jr. *as authorized on 10/8/10*

24 C. D. Michel
 25 E-mail: cmichel@michellawyers.com
 Attorneys for Plaintiffs

24 Paul Neuharth, Jr. A.P.C.
 25 E-mail: pneuharth@sbcglobal.net
 Attorneys for Plaintiffs

26
 27
 28 ⁸ See Tr. Ct.'s Rulings on Mots. to Dismiss, *Rothery v. Blanas*, at 12 (No. 08-2064) (July 15, 2009).

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

EDWARD PERUTA, MICHELLE)
LAXSON, JAMES DODD, DR.) CASE NO. 09-CV-2371 IEG (BGS)
LESLIE BUNCHER, MARK CLEARY,) CERTIFICATE OF SERVICE
and CALIFORNIA RIFLE AND)
PISTOL ASSOCIATION)
FOUNDATION)

Plaintiffs,

v.

COUNTY OF SAN DIEGO, WILLIAM)
D. GORE, INDIVIDUALLY AND IN)
HIS CAPACITY AS SHERIFF,)

Defendants.

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 E. Ocean Blvd., Suite 200, Long Beach, California, 90802.

I am not a party to the above-entitled action. I have caused service of:

**PLAINTIFFS' SUR-REPLY IN OPPOSITION TO DEFENDANT'S REPLY
IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
[PROPOSED]**

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

James M. Chapin
County of San Diego
Office of County Counsel
1600 Pacific Highway
Room 355
San Diego, CA 92101-2469
(619) 531-5244
Fax: (619-531-6005
james.chapin@sdcounty.ca.gov

Paul Neuharth, Jr. (State Bar #147073)
PAUL NEUHARTH, JR., APC
1140 Union Street, Suite 102
San Diego, CA 92101
Telephone: (619) 231-0401
Facsimile: (619) 231-8759
pneuharth@sbcglobal.net

I declare under penalty of perjury that the foregoing is true and correct.
Executed on November 8, 2010.

/s/ C.D. Michel
C. D. Michel
Attorney for Plaintiffs