



1 was denied a license to carry a concealed weapon "arbitrarily,  
2 capriciously, and summarily" by the Santa Maria Police Department  
3 ("SMPD") and Chief Macagni in violation of the equal protection  
4 guarantees of the Fourteenth Amendment. (Comp., at 44.)  
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## 6 **II. Facts Alleged and Procedural Background**

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8 Plaintiff McCloud resides in Santa Maria, California and is  
9 employed as a Nuclear Security Officer by Pacific Gas and Electric  
10 Company at the Diablo Nuclear Power Plant. (Complaint, at 4.)

11 Plaintiff became concerned for his family and his own safety due to  
12 his possession of "detailed security knowledge regarding the tactical  
13 actions of the security forces in the event of an attack." (Comp., at  
14 5.) As a result, Plaintiff applied to Chief Macagni of the SMPD for a  
15 license to carry a concealed weapon under California Penal Code  
16 Section 12050 on July 31, 2006. (Comp., at 5-6, 11.)

17 Under California Penal Code Section 12050, a city chief of police  
18 may issue a "license to carry a pistol, revolver or other firearm  
19 capable of being concealed upon the person." In order to issue a  
20 license, the chief must receive "proof that the person applying is of  
21 good moral character, that good cause exists for the issuance, and the  
22 person applying is a resident of that city and has completed a course  
23 of training." Cal. Pen. Code ¶ 12050(a)(1)(B). In April 2004, Chief  
24 Macagni adopted a new policy titled Section 218 superseding past  
25 policies controlling the processing of licenses to carry a concealed  
26 weapon. (Comp., at 8.) The policy established a number of requirements  
27 for receiving a license not specifically listed in Cal. Pen. Code  
28

1 Section 12050. (Comp. at 8, Ex. 6.) On April 5, 2006, the SMPD adopted  
2 a further internal policy outlining the procedures for processing  
3 applications of a license to carry a concealed weapon. (Comp., at 10-  
4 11.)

5 On August 11, 2006 Chief Macagni sent a letter to Plaintiff  
6 denying his application for a license on the ground that "there is not  
7 enough evidence of a clear and present danger to life or of great  
8 bodily harm which cannot be adequately dealt with by existing law  
9 enforcement resources." (Comp. at 12) Plaintiff sent a letter to Chief  
10 Macagni on August 26, 2006 requesting reconsideration of his decision  
11 and attaching new materials. On August 30, 2006, Chief Macagni sent a  
12 letter denying this request. (Comp., at 14-15.)

13 Plaintiff alleges the standard used by Chief Macagni in rejecting  
14 his application and referenced in his letter was from a prior  
15 superseded policy of the SMPD not applied to other similarly situated  
16 applicants. Plaintiff further alleges that "it is the practice and  
17 policy of the SMPD and the Chief of Police to intentionally ignore the  
18 Department's Concealed Weapons License policy when the party applying  
19 for license is a well-known person, a friend of the Chief of Police,  
20 has political connections within the community, or for other non-  
21 statutory reasons." (Comp. at 45-46.)

22 On September 11, 2007 Plaintiff filed the present Complaint  
23 against Defendants. Plaintiff's sole cause of action is for violation  
24 of the Equal Protection Clause of the Fourteenth Amendment under 42  
25 U.S.C. Section 1983. Plaintiff alleges that the SMPD and Chief Macagni  
26 treated him differently than other similarly situated individuals for  
27 no rational reason and that such treatment was the SMPD's official  
28

1 policy and custom. (Comp., at 46.) Plaintiff seeks damages and  
2 declaratory and injunctive relief. Defendants filed the present Motion  
3 to Dismiss Complaint on October 9, 2007. The Court ordered  
4 supplemental briefing on November 28, 2007.

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6 **III. Analysis**

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8 A. Standard for Motion to Dismiss under 12(b)(6)

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10 In order to survive a motion to dismiss under Rule 12(b)(6), a  
11 plaintiff's complaint need not reach "heightened fact pleading of  
12 specifics, but only enough facts to state a claim to relief that is  
13 plausible on its face." Bell Atlantic v. Twombly, 127 S. Ct. 1955,  
14 1974 (2007). This standard requires that a plaintiff attach "more  
15 than labels and conclusions . . . . Factual allegations must be enough  
16 to raise a right to relief above the speculative level, on the  
17 assumption that all allegations in the complaint are true." Id. at  
18 1965. The Twombly standard replaces the Supreme Court's previous  
19 proclamation of Conley v. Gibson, 355 U.S. 41 (1957), and its progeny.

20 Even in light of the somewhat more stringent standard imposed by  
21 the Supreme Court in Twombly, it is well-established that a motion to  
22 dismiss under Rule 12(b)(6) is "viewed with disfavor and rarely  
23 granted." Gilligan v. Jamco Develop. Corp., 108 F.3d 246, 249 (9th  
24 Cir. 1997). Courts will not consider material outside the complaint  
25 in a Rule 12(b)(6) motion, unlike in a motion for summary judgment.  
26 See Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 925 (9th  
27 Cir. 2001). Documents attached to and referenced in a complaint are  
28 considered "a part thereof for all purposes." Fed. R. Civ. Pro. 10(c).

1 "Where a plaintiff attaches documents and relies on their contents to  
2 form the basis of a claim, dismissal is appropriate if the document  
3 negates the claim." Saunders v. Knight, 2006 WL 224426, at \*3 (E.D.  
4 Cal. Jan. 25, 2006) (citing Thompson v. Ill. Dep't of Prof'l  
5 Regulation, 300 F.3d 750, 754 (7th Cir. 2002)).

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7 B. Elements of "Class of One" Equal Protection Claim

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9 The Equal Protection Clause ensures that "all persons similarly  
10 situated should be treated alike." City of Cleburne v. Cleburne Living  
11 Ctr., Inc., 473 U.S. 432, 439(1985). This mandate requires that  
12 statutes not only treat similarly situated individuals equally on  
13 their face, but also that statutes be "evenhanded as actually  
14 applied". McQueary v. Blodgett, 924 F.2d 829, 835 (9th Cir. 1991)  
15 (emphasis in original). Plaintiff brings what is essentially a "class  
16 of one" equal protection claim against Defendants alleging he was as  
17 an individual treated differently from other similarly situated  
18 applicants for no rational reason. This form of equal protection claim  
19 was first recognized by the Supreme Court in Village of Willowbrook v.  
20 Olech, 528 U.S. 562 (2000) (per curiam). In cases such as these, the  
21 plaintiff is required to allege "that she has been intentionally  
22 treated differently from others similarly situated and that there is  
23 no rational basis for the difference in treatment." Olech, 528 U.S. at  
24 564. See also Squaw Valley Development Co. v. Goldberg, 375 F.3d 936,  
25 944 (9th Cir. 2004), overruled on other grounds by, Lingle v. Chevron  
26 U.S.A. Inc., 544 U.S. 528 (2005). The Court recognized in Olech "that  
27 allegations of irrational and wholly arbitrary treatment, even without  
28 allegations of improper subject motive, were sufficient to state a

1 claim for relief under equal protection analysis." Engquist v. Oregon  
2 Dept. of Agriculture, 478 F.3d 985, 992 -993 (9th Cir. 2007) (citing  
3 Olech, 528 U.S. at 565). While the Olech holding arose out of a  
4 dispute concerning a municipal easement, the Ninth Circuit has applied  
5 it to the billboard licensing context where the city's role is broadly  
6 analogous to its role in issuing concealed weapons licenses. Valley  
7 Outdoor, Inc. v. City of Riverside, 446 F.3d 948 (9th Cir. 2006).  
8 Furthermore, the Ninth Circuit recognized the possibility that the  
9 granting of concealed weapon licenses in arbitrary fashion under  
10 California Penal Code Section 12050 specifically could give rise to an  
11 equal protection violation if proven. Guillory v. Orange County, 731  
12 F.2d 1379, 1383 (1984).<sup>1</sup>

13 Defendants contend Plaintiff has failed to sufficiently allege  
14 any of the elements of this claim. Defendants first argue that  
15 Plaintiff's allegation of being similarly situated as other applicants  
16 granted licenses is refuted by Plaintiff's own exhibits. (Def. Mot.,  
17 at 6-7,) Plaintiff attached to the Complaint and discussed the  
18 application materials of seven other applicants who he claims were  
19 similarly situated as him and had licenses issued as of September 12,  
20 2006. (Comp. at 15-44) Defendants argue in their Motion that these  
21 applicants were not in fact similarly situated as Plaintiff because  
22 they, unlike the Plaintiff, each "either received actual threats or

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24 <sup>1</sup> The Ninth Circuit has also recently reaffirmed that: "In addition to  
25 the showing of discriminatory purpose and effect, plaintiffs seeking  
26 to enjoin alleged selective enforcement must demonstrate the police  
27 misconduct is part of a 'policy, plan, or a pervasive pattern.'" Rosenbaum v. City and County of San Francisco, 484 F.3d 1142, 1153  
28 (9th Cir. 2007) (quoting Thomas v. County of Los Angeles, 978 F.2d  
504, 509 (9th Cir. 1993)). Plaintiff is seeking injunctive relief and  
so will ultimately need to prove this element as well to get such  
relief.

1 [are] in fact required to confront potential threats in the public  
2 domain." (Def. Mot., at 5-7.) Defendants also contend that the  
3 Plaintiff failed to sufficiently allege there was no rational basis  
4 for treating him differently than the alleged similarly situated  
5 applicants. Defendants assert that the reasons stated in Chief  
6 Macagni's letter attached to Complaint form a rational basis for  
7 denial of Plaintiff's license. (Def. Mot., at 5.) Whatever the  
8 persuasiveness of Defendants' arguments concerning these two elements  
9 of Plaintiff's claim, Defendants cannot seek dismissal of Plaintiff's  
10 Complaint purely on this basis. Plaintiff essentially alleges in the  
11 Complaint that Chief Macagni's stated reasons for differentiating  
12 between Plaintiff and the seven discussed applicants was a pretext and  
13 that the actual reasons Plaintiff's application was denied were  
14 irrational and arbitrary. (Comp., at 44.) The Ninth Circuit has  
15 specifically recognized that a plaintiff making a "class of one" equal  
16 protection claim "may pursue [it] by raising a 'triable issue of fact  
17 as to whether the defendants' asserted [rational basis] . . . was  
18 merely a pretext' for differential treatment." Squaw Valley, 375 F.3d  
19 at 945-46 (quoting Armendariz v. Penman, 75 F.3d 1311, 1327 (9th Cir.  
20 1996)). Plaintiff has yet to complete key discovery, in particular  
21 the deposition of Chief Macagni, related to the pretext aspect of his  
22 claim. As such, the Court cannot at this time conclude that Plaintiff  
23 will not be able to prove his claim by bringing forth direct evidence  
24 that Chief Macagni's stated basis for his differential treatment of  
25 Plaintiff was pretextual. After relevant discovery is completed,  
26 Defendants may file an appropriate motion for summary judgment of  
27 Plaintiff's claim and the Court will assess the sufficiency of all the  
28 available evidence to prove the allegations of the Complaint.

1  
2 C. Defendants' Discretion  
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4 Defendants additionally argue that because "of the 'extremely  
5 broad discretion' that the California Penal Code awards sheriffs and  
6 police departments in issuing concealed weapons license," Defendants'  
7 denial of Plaintiff's application was an appropriate enforcement of  
8 the law. March v. Ruff, 2001 U.S. Dist. LEXIS 14708 at \*16 (Sept. 17,  
9 2001) (quoting Gifford v. City of Los Angeles, 88 Cal. App. 4th 801,  
10 805 (2001)). Therefore, Defendants argue, the denial of Plaintiff's  
11 application cannot create an equal protection claim because  
12 "[s]elective enforcement of valid laws, without more, does not make  
13 the defendants' action irrational." Freeman v. City of Santa Ana, 68  
14 F.3d 1180, 1188 (9th Cir. 1995). (Def. Mot. at 7) However, Plaintiff  
15 does merely allege selective enforcement, but also that the selective  
16 enforcement was based on factors "that bear little or no rational  
17 relationship to the statutory criteria." (Comp. at 44). Hence,  
18 Plaintiffs do not only allege selective enforcement, but arbitrary  
19 enforcement. This allegation complies with that required to state a  
20 claim under Olech, and to the extent that Freeman can be viewed as  
21 stating a different rule, it is clearly superseded by the later  
22 Supreme Court ruling in Olech.  
23

24 D. Exhaustion of Administrative Remedies  
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26 Defendants also assert that Plaintiff has not yet exhausted his  
27 state administrative remedies and therefore cannot bring a  
28 constitutional claim. (Def. Mot., at 2.) However, Defendants are

1 mistaken as the Supreme Court has clearly held that there is no  
2 general administrative or state remedy exhaustion requirement for 42  
3 U.S.C. 1983 claims in Patsy v. Board of Regents. 457 U.S. 496, 516  
4 (1982). Defendants do not discuss this case. Instead, the two primary  
5 cases upon which Defendants rely in arguing that an exhaustion  
6 requirement exists for Plaintiff's claims are Hudson v. Palmer, 468  
7 U.S. 517 (1984) and Parratt v. Taylor, 451 U.S. 527 (1981). Neither of  
8 these cases involves equal protection claims. Both only hold that a  
9 post-deprivation state administrative remedy can obviate a procedural  
10 due process violation under the Fourteenth Amendment. Hudson, 468 U.S.  
11 at 534; Parratt, 451 U.S. at 543-544. Defendants have not cited any  
12 case applying this rule to an equal protection violation. Furthermore,  
13 an equal protection violation results from the state engaging in  
14 invidious discrimination with regard to the application of law, not  
15 from a deprivation of property without sufficient process. It is not  
16 at all clear what state administrative remedy equivalent to a post-  
17 deprivation hearing would obviate such a violation. The only other  
18 case cited by Defendants in support of their exhaustion argument is  
19 Miller v. County of Santa Cruz, 39 F.3d 1030, 1034 (9th Cir. 1994).  
20 However, this case only deals with the preclusive effect that a  
21 federal court should give a state administrative judgment in deciding  
22 a federal civil rights claim and, in fact, explicitly recognizes that  
23 there is no administrative exhaustion requirement for Section 1983  
24 claims, something again Defendants fail to note. Id. at 1034 n.3.

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1 D. Qualified Immunity

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3 Defendants additionally raise the issue of qualified immunity,  
4 arguing that Chief Macagni and the other individual defendants cannot  
5 be held liable in their individual capacities. Qualified immunity is  
6 only a defense against public officials sued in their individual  
7 capacity. Brandon v. Holt, 469 U.S. 464, 473 (1985). Therefore, as  
8 Chief Macagni is the only defendant sued in his individual capacity,  
9 the defense is only appropriately raised as to him. A determination of  
10 qualified immunity involves a series of inquiries beginning with the  
11 question of whether a constitutional right has been violated. Saucier  
12 v. Katz, 533 U.S. 194, 201 (2001). If a right has been violated, then  
13 it must be determined whether the right was clearly established at the  
14 time of violation so that a reasonable officer would be aware of it.  
15 Id.

16 The Plaintiff has clearly alleged a violation of his  
17 constitutional right to equal protection under the Fourteenth  
18 Amendment by Chief Macagni.<sup>2</sup> Furthermore, it appears this right was  
19 clearly established at the time of the alleged conduct so that a  
20 reasonable public official would have been aware such conduct was  
21 unconstitutional. Olech established the general proposition that  
22 arbitrary application of a neutral law to individuals creates an equal  
23 protection violation. 528 U.S. at 564. Furthermore, Guillory  
24 explicitly recognized that the granting of concealed weapon licenses  
25 in an arbitrary fashion under California Penal Code Section 12050

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26 <sup>2</sup> Defendants' assertion that "there is no constitutionally protected  
27 property or liberty interest in a CCW permit" is inapposite as  
28 Plaintiff is claiming an equal protection violation, not a due process  
violation. (Def. Rep at 6.)

1 could lead to equal protection violation if proven in the Ninth  
2 Circuit. 731 F.2d at 1383. It is unclear what more specific precedent  
3 could be required. Certainly, these holdings would have been  
4 sufficient to give Chief Macagni "fair warning" that his alleged  
5 actions were unconstitutional. Hope v. Pelzer, 536 U.S. 730, 741  
6 (2002) ("[O]fficials can still be on notice that their conduct  
7 violates established law even in novel factual circumstances. . . .  
8 [T]he salient question . . . is whether the state of the law . . .  
9 gave respondents fair warning that their alleged treatment . . . was  
10 unconstitutional."). The fact that state law provides chiefs of police  
11 very broad discretion in granting licenses, as pointed out by  
12 Defendants, is irrelevant. (Def. Mot. at 9-10) Given the available  
13 federal law, it should have been clear to a reasonable chief of police  
14 that exercising that discretion in a truly arbitrary fashion would  
15 give rise to a constitutional violation.

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19 E. Liability of Defendant City Council Members

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21 Defendants also contest whether defendant city council members  
22 and Mayor Larry Lavagnino can be held liable for Chief Macagni's  
23 actions. Plaintiff's Complaint's only allegation as to these  
24 defendants is "that S.M.P.D. and the Chief of Police repeatedly and  
25 intentionally ignored California State law . . . and its own policies  
26 in the granting of licenses to those whom the S.M.P.D., the Chief of  
27 Police, and/or the Defendants found favor." (Comp. at 46.) This  
28 statement appears to allege that connections with city council members

1 may have been a factor in the issuing of licenses. Plaintiff, however,  
2 has not alleged that the city council member defendants or Mayor  
3 Lavagnino are direct supervisors of Chief Macagni or in any way  
4 actively influenced him and so it is entirely unclear on the basis of  
5 the Complaint from where their liability arises. Since Plaintiff is  
6 suing these defendants in their official capacity, his view may simply  
7 be that Chief Macagni's actions were done pursuant to city policy and  
8 it is from this that their liability derives. However, again, the  
9 Plaintiff makes no such specific allegation. As such, these defendants  
10 are dismissed from the suit with leave to amend so that Plaintiff can  
11 make more specific allegations as to the nature of their liability.

12  
13 F. Liability of City

14  
15 Defendants additionally challenge whether the City can be held  
16 liable for Chief Macagni's actions. Defendants' only basis for  
17 dismissal is that Chief Macagni did not inflict any constitutional  
18 injury on Plaintiff and any liability for the City must derive from  
19 Chief Macagni's actions. (Def. Mot. at 10.) However, as already  
20 discussed, Defendants have not adequately shown that Plaintiff's  
21 claims against Chief Macagni must be dismissed. Therefore, dismissal  
22 of suit against the City is not appropriate on this basis.

23 The Court would like to note, however, that neither party  
24 discusses the requirement under Monell v. Department of Social  
25 Services that a city may only be held liable under Section 1983 for  
26 actions implementing its decisions, official policies, or customs and  
27 not simply for any action of its employees through a *respondeat*  
28 *superior* theory. 436 U.S. 658, 690 (1978). The Complaint merely

1 alleges that the actions of Chief Macagni were done pursuant to SMPD  
2 policy and state policy. (Comp. at 45-46.) It is hence unclear whether  
3 Chief's Macagni's actions in issuing concealed weapon licenses can be  
4 considered done pursuant to city policy given that his authority in  
5 this area appears to derive from state law. This issue will need to be  
6 resolved in order for the Court to determine whether liability for the  
7 City exists and so should be briefed in the next filed dispositive  
8 motion.

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10 **IV. Conclusions**

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12 Defendants' Motion to Dismiss is GRANTED as to defendant city  
13 council members and Mayor Lavagnino with leave to amend and DENIED as  
14 to Defendant Chief Macagni and the City.

15


16 IT IS SO ORDERED.

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20 DATED:           *SW*  
          3/20/08          

  
JUDGE STEPHEN V. WILSON  
UNITED STATES DISTRICT

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