FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT MAHONEY, Officer; SJON C. STEVENS, Officer; CLIFF BORJESON, Officer; CHRISTOPHER MYERS, Officer; BRIDGET HILLAN, Officer; LANCE BASNEY, Officer; SALVATORE DITUSA, Officer; CLARKE D. CHASE, Officer; JOSEPH STANKOVICH, Officer; WELDON C. BOYLAND, Officer; JOHN L. FARRAR, Officer; DALE W. UMPLEBY, Officer; RICHARD A. MCAULIFFE, Officer; GEORGE BASELEY, Officer; DAVID M. HARRINGTON, Officer; HENRY FELDMAN, Officer; TERRY WHALEN, Officer; GILLES MONTARON, Officer; ROBERT STEVENSON, Officer #5859; JOSHUA GOODWIN, Officer; RYAN KANNARD, Officer; NATHAN LEMBERG, Officer; JEFF MITCHELL, Officer; ROBERT B. BROWN, Officer; ERNEST T. HALL, Officer; ROBERT BURK, Officer; ROBERT BEATTY, Officer; TOMAS TRYKAR, Officer; BRIEN ESCALANTE, Officer; KAREN G. PIO, Officer; MICHAEL GONZALEZ, Officer; STEVE KIM, Officer; ENNIS ROBERSON, Officer; LEROY

No. 14-35970

D.C. No.
2:14-cv-00794-MJP

OPINION

OUTLAW, Officer; KIERAN BARTON, Officer; JONATHAN REESE, Officer; EUGENE SCHUBECK, Officer #6696; SEAN HAMLIN, Officer; SHANNON WALDORF, Officer; JEFFREY SWENSON, Officer; TABITHA SEXTON, Officer #7430; MICHAEL SPAULDING, Officer #7491; STEVEN STONE, Officer #7540; LILIYA A. NESTERUK, Officer; TODD M. NELSON, Officer; TIMOTHY JONES, Officer; TIMOTHY J. WEAR, Officer; THERESA EMERICK, Officer #5002; ARIEL VELA, Sergeant; MICHAEL A. LARNED, Officer #6955; DEREK B. NORTON, Officer; JASON DEWEY, Officer; DAVID WHITE, Officer; TRENT SCHROEDER, Officer; AUDI A. ACUESTA; STEVE CLARK, Officer; STEVEN L. BERG, Officer; ERIK JOHNSON, Officer; VERNON KELLEY, Officer; SHELLY SAN MIGUEL, Officer; CHRISTOPHER J. ANDERSON, Officer; SUZANNE M. PARTON, Officer; ERIC F. WHITEHEAD, Officer; ALAN RICHARDS, Officer; RON WILLIS, Officer; A. SHEHEEN, Officer; RANDALL HIGA, Officer; TIM OWENS, Officer; TYLER GETTS, Officer #7537; ADAM ELIAS, Officer; JON EMERICK, Officer

#4326; LOUIS CHAN, Officer; PAUL PENDERGRASS, Sergeant; AJ MARKS, Officer; RON MARTIN, Sergeant; RUSTY L. LESLIE, Officer; TJ SAN MIGUEL, Officer; JEFFREY C. PAGE, Officer; RYAN ELLIS, Officer; JACK BAILEY, Officer; ALFRED RI WARNER, Officer #6162; MICHAEL R. WASHINGTON, Officer; NINA M. JONES, Officer #7567; ANTHONY JONES REYNOLDS, Officer; RICHARD HEINTZ, Officer; CURTIS GERRY, Officer; ADOLPH TORRESCANO, Officer; CURT E. WILSON, Officer; JAMES G. THOMSEN, Officer; RICHARD W. PRUITT, Officer #5346; DONALD L. WATERS, Detective #6287; ANTHONY J. REYNOLDS, Officer; JONARD A. LEGASPI, Officer #6231,

Plaintiffs-Appellants,

v.

JEFFERSON B. SESSIONS III, Attorney General,

Defendant,

and

CITY OF SEATTLE, including the Seattle Police Department, the Seattle Police Monitor Team, and the Seattle Attorney's

Office; ED MURRAY, individually and in his official capacity, Mayor, City of Seattle; PETER HOLMES, individually and in his official capacity, Seattle's City Attorney; MERRICK BOBB, individually and in his offical capacity, Seattle Police Monitor,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Washington
Marsha J. Pechman, District Judge, Presiding

Argued and Submitted May 8, 2017
Seattle, Washington

Filed September 19, 2017

Before: Carlos T. Bea and N. Randy Smith, Circuit Judges, and William Q. Hayes,* District Judge.

Opinion by Judge Hayes

COUNSEL

Athan E. Tramountanas (argued), Short Cressman & Burgess PLLC, Seattle, Washington; Lisa Ann Battalia, Law Office of Lisa Ann Battalia, Bethesda, Maryland; for Plaintiffs-Appellants.

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* The Honorable William Q. Hayes, United States District Judge for the Southern District of California, sitting by designation.

Gregory Colin Narver (argued), Assistant City Attorney; Peter S. Holmes, City Attorney; City Attorney's Office, Seattle, Washington; for Defendants-Appellees.

OPINION

HAYES, District Judge.

We must decide whether the use of force policy adopted by the City of Seattle violates the Second Amendment right of police officers to use firearms for the core lawful purpose of self-defense. We conclude that the policy survives intermediate scrutiny and is, therefore, constitutional. We affirm the judgment of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

In 2012, the United States brought a civil action in the United States District Court for the Western District of Washington against the City of Seattle, alleging that the Seattle Police Department ("SPD") engaged in a pattern or practice of excessive use of force. *United States v. City of Seattle*, Case No. 2:12-cv-01282-JLR (W.D. Wash.). Pursuant to a settlement agreement between the parties, the United States and the City of Seattle worked with a court-appointed monitor to produce a Use of Force Policy ("UF Policy") that would apply to SPD officers' use of approved department firearms while on duty.

On December 17, 2013, United States District Judge James L. Robart issued an order approving the

policy agreed to by the parties.[1] The UF Policy[2] states, in part, that "[o]fficers shall only use objectively reasonable force, proportional to the threat or urgency of the situation, when necessary, to achieve a law-enforcement objective." The UF Policy provides a set of factors that officers must consider to determine whether a proposed use of force is objectively reasonable, necessary, and proportional to the threat at issue. Although the UF Policy requires officers to consider those factors before using a firearm, the UF Policy also states that officers must consider those factors only "[w]hen safe under the totality of circumstances and time and circumstances permit[.]" The UF Policy also requires officers to use de-escalation tactics to reduce the need for force only "[w]hen safe and feasible under the totality of circumstances[.]"

Appellants, a group of approximately 125 SPD officers, subsequently brought this action pursuant to 42 U.S.C. § 1983 against the City of Seattle, including SPD and other related entities, to challenge the constitutionality of the UF Policy. Appellants brought claims

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[1] The order is styled as an "Order Approving Consensus Use of Force Policies" submitted by the court-appointed monitor.

[2] We take judicial notice of and reference the revised UF Policy in Appellees' request for judicial notice (Dkt. No. 30-2 at 28-85), as well as the docket sheet from *United States v. City of Seattle*, Case No. 12-cv-01282-JLR (W.D. Wash.). *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) ("We may take judicial notice of court filings and other matters of public record."). We deny the City of Seattle's second request for judicial notice of a subsequent revised UF Policy on the grounds that the document remains pending court approval.

under the Second, Fourth, Fifth, and Fourteenth Amendments, alleging that the UF Policy unreasonably restricts their right to use department-issued firearms for self-defense. On October 17, 2014, the district court granted the motion to dismiss filed by the City of Seattle, concluding that the UF Policy did not burden conduct protected by the Second Amendment. *Mahoney v. Holder*, 62 F. Supp. 3d 1215, 1222 (W.D. Wash. 2014). Appellants timely appealed.

STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291. We review *de novo* the district court's dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See N.M. State Inv. Council v. Ernst & Young LLP*, 641 F.3d 1089, 1094 (9th Cir. 2011). We review *de novo* all constitutional rulings. *See Wilson v. Lynch*, 835 F.3d 1083, 1090 (9th Cir. 2016). We may affirm on any basis supported by the record below. *See Bill v. Brewer*, 799 F.3d 1295, 1299 (9th Cir. 2015).

When evaluating a motion to dismiss under Rule 12(b)(6), we accept the well-pleaded factual allegations of a complaint as true and construe all inferences in favor of the nonmoving party. *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016). Dismissal under Rule 12(b)(6) is warranted if a complaint fails "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Conclusory allegations of law . . . are

insufficient to defeat a motion to dismiss." *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).

DISCUSSION

I. Second Amendment Precedent and Two-Step Inquiry

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *District of Columbia v. Heller*, the Supreme Court concluded that District of Columbia statutes that required residents to keep firearms in the home unloaded and disassembled and prohibited the possession of handguns in the home violated the Second Amendment. 554 U.S. 570, 574-75, 635 (2008). The Court recognized that "the inherent right of self-defense has been central to the Second Amendment right." *Id.* at 628. The Court concluded that the statutes at issue "ma[de] it impossible for citizens to use [firearms] for the core lawful purpose of self-defense and [were] hence unconstitutional." *Id.* at 630. The Court subsequently applied the right to keep and bear arms for self-defense under the Second Amendment against the States through the Fourteenth Amendment in *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

Following *Heller* and *McDonald*, we "adopt[ed a] twostep . . . inquiry" to determine whether a challenged law or regulation violates the Second Amendment. *United States v. Chovan*, 735 F.3d 1127, 1136

(9th Cir. 2013). The two-step inquiry "reflects the Supreme Court's holding in *Heller* that, while the Second Amendment protects an individual right to keep and bear arms, the scope of that right is not unlimited." *Id.* A majority of our sister circuits have adopted this twostep inquiry to analyze Second Amendment claims. *See Silvester v. Harris*, 843 F.3d 816, 820-21 (9th Cir. 2016).

At the first step, courts ask whether "the challenged law burdens conduct protected by the Second Amendment[.]" *Chovan*, 735 F.3d at 1136. If a court answers this question in the affirmative, "the regulation is subject to Second Amendment protection (i.e., the regulation is neither outside the historical scope of the Second Amendment, nor presumptively lawful), [and] the court then proceeds to the second step of the inquiry to determine the appropriate level of scrutiny to apply." *Silvester*, 843 F.3d at 821 (citing *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014)).

II. Step One: Whether the UF Policy Burdens Conduct Protected by the Second Amendment

To determine whether the UF Policy burdens conduct protected by the Second Amendment, we ask whether the UF Policy "is one of the 'presumptively lawful regulatory measures' identified in *Heller*, or whether the record includes persuasive historical evidence establishing that the regulation at issue imposes

prohibitions that fall outside the historical scope of the Second Amendment[.]"[3] *Jackson*, 746 F.3d at 960 (quoting *Heller*, 554 U.S. at 627 n.26).

"*Heller* indicated that the Second Amendment does not preclude certain 'longstanding prohibitions' and 'presumptively lawful regulatory measures,' such as 'prohibitions on carrying concealed weapons,' 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings,' 'laws imposing conditions and qualifications on the commercial sale of arms,' and prohibitions on 'the carrying of "dangerous and unusual weapons, referring to weapons that were not 'in common use at the time' of the enactment of the Second Amendment." *Id.* at 959 (quoting *Heller*, 554 U.S. at 626-27, 627 n.26). In this case, the UF Policy – an employer policy that regulates a police officer's use of a department-issued firearm while on duty – does not resemble any of the "presumptively lawful" regulations recognized in *Heller.* 554 U.S. at 627 n.26.

Next, we examine the record to determine "whether there is persuasive historical evidence showing that the regulation does not impinge on the Second

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[3] Appellants assert that the UF Policy infringes on their Second Amendment right to self-defense and then frame the historical inquiry around this right. The scope of Appellants' inquiry is too broad. Instead, we must examine whether restrictions on a government employee's use of a government-issued firearm in the line of duty fall outside the historical scope of the Second Amendment.

Amendment right as it was historically understood." *Silvester*, 843 F.3d at 821. In this case, the parties have not provided any "persuasive historical evidence" demonstrating that regulating police officers' use of department-issued firearms is historically longstanding or falls outside the historical scope of the Second Amendment. *Jackson*, 746 F.3d at 960, 963. We do not purport to rule definitively on whether, historically, officers have been restricted in the use of their government-issued firearms while acting within the scope of their employment. However, "[b]ecause of the lack of historical evidence in the record before us," *see Chovan*, 735 F.3d at 1137 (internal quotation mark and citation omitted), "we assume, without deciding, that the [UF Policy] burdens conduct falling within the scope of the Second Amendment." *Bauer v. Becerra*, 858 F.3d 1216, 1221 (9th Cir. 2017).

Because the UF Policy resembles none of the presumptively lawful measures identified in *Heller*, and the parties have adduced no evidence that the UF Policy imposes a restriction on conduct that falls outside the historical scope of the Second Amendment right to use a firearm for self-defense, we assume the UF Policy "is subject to Second Amendment protection" and we proceed to the second step of the inquiry.[4] *Silvester*, 843 F.3d at 821.

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[4] The district court concluded that the UF Policy did not burden conduct protected by the Second Amendment, and therefore did not proceed to the second step of the inquiry. *See Mahoney*, 62 F. Supp. 3d at 1221-22.

III. Step Two: Applying Constitutional Scrutiny to the UF Policy

A. Determining the Level of Scrutiny

To ascertain the proper level of constitutional scrutiny to apply to the UF Policy at the second step, we must consider: "(1) how close the challenged law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on that right." *Silvester*, 843 F.3d at 821 (citing *Jackson*, 746 F.3d at 960-61). A restriction "that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny[,]" while a restriction that "'does not implicate a core Second Amendment right, or does not place a substantial burden on the Second Amendment right'" warrants intermediate scrutiny. *Id.* (quoting *Jackson*, 746 F.3d at 961).

In addressing the extent to which the UF Policy burdens Appellants' constitutional right under the Second Amendment, we begin with *Heller*'s holding that the Second Amendment protects the right of citizens to use a firearm "for the core lawful purpose of self-defense[.]" *Heller*, 554 U.S. at 630. When evaluating the constitutional claim of a government employee, however, the Supreme Court instructs us to balance the rights of the employee "against the realities of the employment context." *Engquist v. Or. Dep't of Agr.*, 553 U.S. 591, 600 (2008).

In *Engquist*, the Supreme Court affirmed the dismissal of an equal protection challenge to the decision of the Oregon Department of Agriculture to terminate

an employee "in a seemingly arbitrary or irrational manner." *Id.* at 605. The Court stated, "We have long held the view that there is a crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.' " *Id.* at 598 (quoting *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 896 (1961)). "[I]n striking the appropriate balance, we consider whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer." *Id.* at 600. The Court concluded that the "government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Id.* at 598-99 (quoting *Waters v. Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion)); *see also Nordyke v. King*, 681 F.3d 1041, 1044-45 (9th Cir. 2012) (en banc) (concluding that an ordinance regulating "the sale of firearms . . . only minimally, and only on County property" was constitutional under the Second Amendment, while citing with approval the *Engquist* lawmaker/proprietor distinction); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126-27 (10th Cir. 2015) (concluding that a regulation prohibiting the possession of firearms on Postal Service property was constitutional under the Second Amendment, recognizing that "[t]he government often has more flexibility to regulate when it is acting as a proprietor (such as when it manages a

post office) than when it is acting as a sovereign (such as when it regulates private activity unconnected to a government service)").

In this case, the UF Policy regulates Appellants' use of department-issued firearms while acting in the course and scope of their official duties as police officers. The firearms regulated by the UF Policy are issued to Appellants by the City of Seattle in its capacity as proprietor. The UF Policy was adopted by the City of Seattle as an employer to regulate the conduct of its police officers. Because the City of Seattle has a significant interest in regulating the use of department-issued firearms by its employees, we conclude that the application of intermediate scrutiny to the UF Policy appropriately places the burden on the City of Seattle to justify placing restrictions on any Second Amendment right of its employees, while also giving the City the flexibility to act as an employer.

The second factor in determining what level of constitutional scrutiny to apply to the UF Policy requires us to consider the severity of the UF Policy's burden on the right of citizens to use a firearm for the core lawful purpose of self-defense. *See Chovan*, 735 F.3d at 1138. "This court has explained that laws which regulate only the '*manner* in which persons may exercise their Second Amendment rights' are less burdensome than those which bar firearm possession completely." *Silvester*, 843 F.3d at 827 (quoting *Chovan*, 735 F.3d at 1138). However, to determine the severity of the burden on the Second Amendment right, we look closely at the restriction on the manner of

firearm possession to ensure it is not "such a severe restriction on the core right of self-defense that it 'amounts to a destruction of the [Second Amendment] right[.]'" *Jackson*, 746 F.3d at 961 (quoting *Heller*, 554 U.S. at 629); *see also Peruta v. Cty. of San Diego*, 824 F.3d 919, 950 (9th Cir. 2016) (en banc) (Callahan, J., dissenting) (courts should consider Second Amendment challenges to firearm restrictions in "context" to ensure the restrictions are not "tantamount to complete bans on the Second Amendment right to bear arms outside the home for self-defense"), *cert. denied*, ___ U.S. ___, 137 S. Ct. 1995 (June 26, 2017).

In this case, the UF Policy applies to Appellants' use of department-issued firearms in the course and scope of their official duties. The UF Policy states that a police officer "may draw or exhibit a firearm in the line of duty when the officer has reasonable cause to believe it may be necessary for his or her own safety or for the safety of others[.]" The UF Policy states that prior to using physical force during an incident with a subject, Appellants "shall consider whether a subject's lack of compliance is a deliberate attempt to resist or an inability to comply based on" a variety of factors, including the subject's possible medical conditions, mental impairment, developmental disability, drug interaction, and behavioral crisis. The UF Policy requires that "when safe under the totality of the circumstances and time and circumstances permit, officers shall use de-escalation tactics in order to reduce the need for force[.]"

The UF Policy explicitly recognizes that Appellants may use their department-issued firearms in self-defense in an encounter with a suspect – including the use of deadly force with a firearm. The UF Policy states that "[d]eadly force may only be used in circumstances where threat of death or serious physical injury to the officer or others is imminent[,]" and recognizes that "sometimes the use-of-force is unavoidable[.]" As a result, the UF Policy does not impose a substantial burden on Appellants' right to use a firearm for the purpose of lawful self-defense. *See Jackson*, 746 F.3d at 968 (concluding that a statute prohibiting the sale of hollow-point bullets did not "place a substantial burden on the Second Amendment right" because the statute "limits only the manner in which a person may exercise Second Amendment rights by making it more difficult to purchase certain types of ammunition."). Thus, the nature of the burden imposed by the UF Policy on Appellants' Second Amendment right to use a firearm for the lawful purpose of self-defense favors the application of intermediate scrutiny.

Accordingly, we conclude that the UF Policy does not impose a substantial burden on the Second Amendment right to use a firearm for the core lawful purpose of self-defense. We also conclude that the UF Policy is not "such a severe restriction on the core right of self-defense that it 'amounts to a destruction of the [Second Amendment] right[.]'" *Jackson*, 746 F.3d at 961 (quoting *Heller*, 554 U.S. at 629). Therefore, we apply intermediate scrutiny to determine whether the UF Policy

violates the Second Amendment. *See Silvester*, 843 F.3d at 823 ("There is accordingly near unanimity in the post-*Heller* case law that when considering regulations that fall within the scope of the Second Amendment, intermediate scrutiny is appropriate.").

B. Application of Intermediate Scrutiny

"In the context of Second Amendment challenges, intermediate scrutiny requires: '(1) the government's stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective.'" *Fyock v. Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015) (quoting *Chovan*, 735 F.3d at 1139).

At the first step, in order to determine whether the government's interest is significant, substantial, or important, we first define the government's objective. *Jackson*, 746 F.3d at 965. In *Jackson*, we explained that "[i]n considering a city's justifications for its ordinance, we do not impose 'an unnecessarily rigid burden of proof . . . so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.'" *Id.* (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50-52 (1986)).

In this case, the joint findings of fact and conclusions of law approved by the district judge in the *United States v. City of Seattle* litigation states that the City of Seattle's goal in joining the settlement agreement was to "ensure[] that SPD's policies [and]

procedures . . . are sufficient to prevent . . . a pattern or practice of constitutional violations." The section of the UF Policy titled "Core Principles" states that Appellants must "use only the force necessary to perform their duties[,]" and explains that "[a]n officer's commitment to public safety includes the welfare of members of the public, the officer, and fellow officers[.]"

The City of Seattle has the important government interest of ensuring the safety of both the public and its police officers. *See United States v. Salerno*, 481 U.S. 739, 748 (1987) ("[T]he Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."); *Jackson*, 746 F.3d at 965 (quoting *Chovan*, 735 F.3d at 1139) ("'It is self-evident,' . . . that public safety is an important government interest."). The record establishes that the City of Seattle enacted the UF Policy to address the important government objective of ensuring public safety and police officer safety. *See Chovan*, 735 F.3d at 1140 ("We hold that the government has met its burden to show that reducing domestic gun violence is an important government objective.").

At the second step, we consider whether there is a reasonable fit between the UF Policy and the City of Seattle's asserted objective of ensuring the safety of the public and its police officers. In determining the degree of fit between the challenged regulation and its asserted objective, the City of Seattle is "not required to show that [the UF Policy] is the least restrictive means of achieving its interest." *Fyock*, 779 F.3d at 1000 (citing *Jackson*, 746 F.3d at 966). To survive

intermediate scrutiny, we must determine whether the record shows that the UF Policy "promotes a 'substantial government interest that would be achieved less effectively absent the regulation.'" *Id.* (quoting *Colacurcio v. City of Kent*, 163 F.3d 545, 553 (9th Cir. 1998)).

In this case, the UF Policy states that "[o]fficers shall only use objectively reasonable force, proportional to the threat or urgency of the situation, when necessary, to achieve a law-enforcement objective." The UF Policy also requires that Appellants use "[d]e-escalation tactics and techniques . . . when safe and without compromising law enforcement priorities," and states that Appellants "shall consider whether a subject's lack of compliance is a deliberate attempt to resist or an inability to comply based on" a variety of factors. Those provisions advance the City of Seattle's important government interest of ensuring the safety of the public by mandating de-escalation techniques and reducing the likelihood that a firearm will be drawn or used where such force is not "objectively reasonable," "proportional to the threat or urgency of the situation," or "necessary to achieve a law-enforcement objective."

The UF Policy also advances the City of Seattle's important government interest of ensuring the safety of its police officers. The UF Policy requires Appellants to employ de-escalation techniques only "[w]hen safe under the totality of the circumstances and time and circumstances permit." Thus, the UF Policy expressly contemplates that de-escalation techniques will not be

feasible in every situation, and even states that "sometimes, the use of force is unavoidable." The UF Policy also provides that Appellants may use deadly force where an objectively reasonable officer would conclude that the "threat of death or serious physical injury to the officer or others is imminent." These provisions ensure that Appellants may use their department-issued firearms to defend themselves and the public.

In adopting the UF Policy, the City of Seattle drew "reasonable inference[s]" that the UF Policy would assist in ensuring the safety of both the public and its police officers. *Jackson*, 746 F.3d at 966. The UF Policy advances an important government interest that would be achieved less effectively in its absence. *See Silvester*, 843 F.3d at 829 (concluding that a statute imposing a ten-day waiting period to purchase firearms on certain individuals was reasonably fit to state's public safety objective). Given the City of Seattle's important interest in promoting the safety of the public and its police officers, we determine there is a reasonable fit between the UF Policy and this significant goal. We conclude that the UF Policy survives intermediate scrutiny and is, therefore, constitutional under the Second Amendment. Because we find the UF Policy is constitutional, we affirm the district court's dismissal of the Second Amendment claim.

IV. The Substantive Due Process and Equal Protection Claims

We also affirm the district court's dismissal of the remaining claims. First, we agree with the district court that current case law does not support the existence of a freestanding fundamental right to self-defense outside of the "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635. Because precedent does not support recognizing the fundamental right Appellants' assert, Appellants' substantive due process claim is not a cognizable claim upon which relief can be granted.

Second, the district court properly concluded that Appellants failed to state a cognizable equal protection claim. Appellants failed to allege facts to support the claim that they are being denied a fundamental right while others are permitted to exercise such right, and that there is no valid justification for the distinction. Further, this claim is not cognizable under the Equal Protection Clause because it is "no more than a [Second] Amendment claim dressed in equal protection clothing[.]" *Orin v. Barclay*, 272 F.3d 1207, 1213 n.3 (9th Cir. 2001).

CONCLUSION

The City of Seattle has a significant interest in regulating the use of department-issued firearms by its police officers, and the UF Policy does not impose a substantial burden on the Second Amendment right to

use a firearm for the core lawful purpose of self-defense. Therefore, we apply intermediate scrutiny to determine whether the UF Policy violates the Second Amendment right of its police officers. We conclude that the UF Policy is constitutional under the Second Amendment because there is a reasonable fit between the UF Policy and the City of Seattle's important government interest in ensuring the safety of both the public and its police officers. We affirm the district court's dismissal of Appellants' Second Amendment claim.

We affirm the ruling of the district court on all other grounds.

AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT MAHONEY et al., Plaintiffs, v. ERIC HOLDER et al., Defendants.	CASE NO. C14-794 MJP ORDER ON MOTIONS TO DISMISS (Filed Oct. 17, 2014)

THIS MATTER comes before the Court on Defendant Merrick Bobb's Motion to Dismiss on quasi-judicial immunity grounds (Dkt. No. 19) and Defendants City of Seattle, Mayor Ed Murray, and City Attorney Peter Holmes's Motion to Dismiss for failure to state a claim (Dkt. No. 25). Certain represented Plaintiffs responded to the Motions, while the remaining pro se Plaintiffs failed to respond. Having reviewed the motions, the Represented Plaintiffs' Responses (Dkt. Nos. 36, 59), Defendant Bobb's Reply (Dkt. No. 54), the City Defendants' Reply (Dkt. No. 62), and all related papers, the Court hereby GRANTS both Motions and DISMISSES the case with prejudice.

Summary

In this case, certain officers with the Seattle Police Department are challenging a Use of Force Policy adopted in response to an earlier lawsuit filed against the City of Seattle by the United States Department of Justice. In the earlier lawsuit, the Department of

Justice claimed that the Seattle Police Department engaged in a pattern or practice of excessive use of force. As a condition of settlement, the City of Seattle agreed to create new policies aimed at preventing this pattern from repeating. One of the key players in creating the Use of Force Policy was Merrick Bobb, a "Monitor" appointed as an agent of the court to assist in the policy-drafting process, among other tasks. Although many groups gave feedback as the Use of Force Policy was being developed, individual officers of the Seattle Police Department were not a party to the lawsuit or the ensuing negotiations.

The officers now argue the new Use of Force Policy violates their constitutional rights by constraining their options in defending themselves against potentially dangerous suspects. They also argue that the way the Use of Force Policy was drafted violates the Constitution. They ask the Court to stop the implementation of the Use of Force Policy, to declare the Use of Force Policy unconstitutional, and to award them money damages.

As the Court explains in greater detail below, the officers' constitutional arguments are not supported by the text of the Constitution or case law interpreting the Constitution. In addition, the officers cannot sue the court-appointed Monitor Merrick Bobb because he has "absolute immunity" from lawsuits relating to his actions assisting in the resolution of the earlier lawsuit. This immunity is known as "quasi-judicial" because it is derived from the immunity given to judges, and Merrick Bobb is entitled to it both because he was

appointed as an agent of a judge and because he was engaged in activities that parallel those of a judge. Because the officers' case is not supported by the Constitution or case law, the Court dismisses the lawsuit.

Background

The Represented Plaintiffs and Plaintiffs representing themselves are police officers employed by the Seattle Police Department ("SPD") who have filed suit to challenge the Use of Force Policy ("Policy") adopted by the City of Seattle ("City") pursuant to a consent decree and settlement with the United States Department of Justice ("DOJ"). (Dkt. No. 13 at 3-4; *see* Case No. C12-1282-JLR, *United States v. City of Seattle.*) In the first lawsuit, the Department of Justice claimed that after "an extensive investigation of the Seattle Police Department [. . .], the United States [] determined that SPD engages in patterns or practices of using unlawful force that systematically deny the people of Seattle their constitutional rights." (Case No. C12-1282-JLR, Compl. & DOJ Report, Dkt. No. 1 at 2, cited in Am. Compl., Dkt. No. 13 at 3.) The settlement agreement and its central components, including the use of force policy it pledged to produce, had the "goal of addressing the policies, procedures, training, and oversight that the United States alleges contributed to a pattern or practice of constitutional violations." (*See* Case No. C12-1282-JLR, Joint Motion and Proposed Order for Approval of Settlement Agreement, Dkt. No. 3 at 2-3, cited in Am. Compl., Dkt. No. 13 at 3-4; *see also* Settlement Agreement, Ryan-Lang Decl., Dkt. No. 12-1

at 17-18, cited in Am. Compl. Dkt. No. 13 at 3-4; *id*., Memorandum Submitting Use of Force Policy, Dkt. No. 12-2 at 57-58, cited in Am. Compl., Dkt. No. 13 at 4.) The agreement included a plan for a court-appointed Monitor. (Dkt. No. 12-1 at 52-70; Dkt. No. 12-2 at 5-6.) According to the court-appointed Monitor when he submitted the Policy to the court, the Policy was "calibrated to bring about Constitutional policing without sacrificing the safety and well-being of police officers or the general public." (Dkt. No. 12-2 at 58.)

Plaintiffs now allege the Policy is too solicitous of the rights of those being policed and insufficiently concerned with the rights of those employed as police officers. (*See* Am. Compl., Dkt. No. 13 at 2.) Plaintiffs bring their claims under § 1983 and *Bivens*, alleging the creation and implementation of the Policy violates their own Second and Fourth Amendment rights, their "right of self-defense as embedded in the Fourth Amendment," the Equal Protection Clause, and substantive and procedural due process. (*Id.* at 22-28.) They seek a declaration that the Policy infringes on their constitutional rights as well as injunctive relief and damages. (*Id.* at 28-29.)

In addition to the City, Mayor Ed Murray, and City Attorney Peter Holmes, Plaintiffs filed suit against federal actors involved in the settlement agreement and formulation of the Policy. One of those Defendants is Merrick Bobb, the court-appointed Monitor in the underlying litigation. Plaintiffs allege that Mr. Bobb is liable for the constitutional errors they identify in the Policy because he allegedly seized control over the

drafting process and refused input from the Seattle Police Department and its officers. (*See* Dkt. No. 13 at 5.)

The City Defendants now move to dismiss the Amended Complaint, arguing Plaintiffs' allegations fail to state a claim under Federal Rule of Civil Procedure 12(b)(6). (Dkt. No. 25.) Defendant Bobb also moves to dismiss on the grounds of quasi-judicial immunity. (Dkt. No. 19.)

Analysis

I. Legal Standards

A. Motion to Dismiss

To survive a motion to dismiss, a complaint must state a claim for relief that is plausible on its face. Fed. R. Civ. P. 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. 662,678 (2009). Courts follow a two-step approach when deciding whether a complaint survives a 12(b)(6) motion. *Id.* at 678-79. First, "a court must accept as true all of the allegations contained in a complaint" unless the allegations are legal conclusions. *Id.* Second, the Court must decide whether the claim for relief is plausible – a context-specific task. *Id.*

B. Evidence and Related Proceedings at the Motion to Dismiss Stage

Federal Rule of Evidence 201(b) provides that the Court "may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy

cannot reasonably be questioned." Thus, the Court may take notice of "documents [that] are not physically attached to the complaint . . . if the documents' authenticity . . . is not contested' and 'the plaintiffs complaint necessarily relies' on them." *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (citations omitted) (overruled on other grounds by *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125-26 (9th Cir. 2002)). The Court may take judicial notice of "proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007). However, judicial notice may not extend to *disputed* facts stated within public records. Lee, 307 F.3d at 690.

II. The Monitor and Quasi-Judicial Function

Defendant Bobb argues the claims against him must be dismissed because he has absolute quasi-judicial immunity from suit in his role as Monitor. (Dkt. No. 19.) "Absolute judicial immunity insulates judges from charges of erroneous acts or irregular action." *Burton v. Infinity Capital Management*, 753 F.3d 954, 959 (9th Cir. 2014) (quotation marks and citations omitted). It "is not reserved solely for judges, but extends to nonjudicial officers for all claims relating to the exercise of judicial functions." *Id.* (quotation marks and citations omitted). "The proponent of a claim to absolute immunity bears the burden of establishing the justification for such immunity," *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432 (1993). "To qualify for

absolute immunity, the function performed must be a judicial act with 'a sufficiently close nexus to the adjudicative process.' However, 'it is only when the judgment of an official other than a judge involves the exercise of discretionary judgment that judicial immunity may be extended to that nonjudicial officer." *Burton*, 753 F.3d at 960 (citations omitted). "To be protected, the function performed must 'involve the exercise of discretion in resolving disputes.' " *Id.* Among the nonjudicial officers that have been extended quasi-judicial immunity are bankruptcy trustees, *id.*, and court-appointed special masters. *Atkinson-Baker & Assocs., Inc. v. Kolts*, 7 F.3d 1452, 1455 (9th Cir. 1993).

Plaintiffs acknowledge Mr. Bobb was appointed by the Court in the underlying litigation to "oversee implementation of the Consent Agreement." (Dkt. No. 13 at 4.) According to the Order Approving Consensus Use of Force Policies, a document cited by Plaintiffs (Dkt. No. 13 at 3), "[t]he role of the court, and the Monitor who serves as an agent of the court, [was] not to dictate policies to the SPD, but rather to insure that the Proposed Policies conform to the requirements of the Consent Decree, the United States Constitution, and judicial decisions interpreting the City's constitutional obligations." (Dkt. No. 12-2 at Ex. 8, p. 65.) Plaintiffs allege that while Mr. Bobb agreed it was not his role to write the Policy (Dkt. No. 13 at 4, citing the Memorandum, Dkt. No. 12-2 at Ex. 7), the Policy was "altered almost in its entirety and replaced with specific language provided, and required, by the Monitor." (Dkt. No. 13 at 5.) According to Plaintiffs, this "language"

was the outcome preferred by the DOJ as opposed to the City. (*See id.* at 5, 27.) The Court must accept for the purpose of this motion that Mr. Bobb seized control over the drafting process, implemented the DOD's preferred solutions, and refused input from other stakeholders such as officers of the Seattle Police Department. The question remains whether these alleged acts deprived him of quasi-judicial immunity for his role in the process.

Plaintiffs argue that because the Consent Decree did not grant the Monitor the power to draft the Policy unilaterally, his actions were not "judicial." (*See* Dkt. No. 36 at 6.) Plaintiffs concede "judicial" acts have been defined by the Supreme Court to encompass "the function of resolving disputes between parties, or of authoritatively adjudicating private rights." (*Id.* at 5, citing *Antoine*, 508 U.S. at 435-36.) It is clear that Mr. Bobb was appointed by the district court to oversee formulation of a Policy which was both the product and the subject of an ongoing "dispute between parties" namely, the City of Seattle and the United States Department of Justice. According to Plaintiffs, Mr. Bobb agreed with the DOJ's preferred solutions and disagreed with the outcome preferred by Plaintiffs (who were not formal parties to the litigation). Still, this alleged course of action does not deprive his conduct of judicial character. Far from it: judges are usually persuaded by one side as opposed to another as they adjudicate disputes in our adversarial system. An outcome that favors one party is no less a "resolution" because it does not please all stakeholders. Here, the Court

agrees with Defendant Bobb that even if Mr. Bobb engaged in the conduct Plaintiffs assign to him, he was engaged in an essential judicial function: that of resolving a dispute between the parties to the *City of Seattle* litigation at the request of a federal district court judge.

Furthermore, that function involved discretion. *See Burton*, 753 F.3d at 960. Plaintiffs do not argue Mr. Bobb was constrained to take a single course of action with respect to the drafting of the policy, in the manner that a court reporter must produce a verbatim transcript of court proceedings. *Cf. Antoine*, 508 U.S. at 436-37 (holding that court reporters are not entitled to quasi-judicial immunity because they are afforded no discretion in carrying out their duties). Rather, Plaintiffs argue that he formulated a policy that contained terms that favored one side in the dispute (Dkt. No. 36 at 4) – in other words, that he used his court-endowed discretion to reach a result Plaintiffs do not agree with.

Because Defendant Bobb exercised discretion in resolving a dispute at the request of a district judge, he is entitled to absolute quasi-judicial immunity from suit and the charges against him must be dismissed.

III. City's Substantive Motion to Dismiss

The City Defendants move to dismiss on the basis that Plaintiffs' allegations fail to state a claim under the Second or Fourth Amendments, the Equal Protection Clause, or the Due Process Clause. (Dkt. No. 25.)

A. Second Amendment

The City Defendants argue the Policy does not violate Plaintiffs' Second Amendment rights because while the Second Amendment protects an individual's right to bear arms, the Second Amendment does not provide that individuals have a right to use a firearm in any particular way. (Dkt. No. 25 at 7.) Plaintiffs contend that the Second Amendment codified a preexisting right to self-defense, and the Policy burdens that right. (Dkt. No. 59 at 4.)

The Ninth Circuit has adopted a two-step test for analysis of Second Amendment claims: (1) the court asks whether the challenged law burdens conduct protected by the Second Amendment, and (2) if so, the court determines whether the law meets the appropriate level of scrutiny. *See Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014); *see also Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1175 (9th Cir. 2014) (declining to apply a particular level of scrutiny in light of the type of Second Amendment burden imposed).

Plaintiffs can point to no case establishing that the Second Amendment codified a freestanding right to self-defense, as opposed to case law interpreting the textual Second Amendment rights to "keep and bear arms" in light of their purposes (which the Supreme Court has held include the facilitation of self-defense). *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 62S (2008) ("As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has

been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose."). In the criminal context, the Ninth Circuit rejected the idea that recent Supreme Court cases confirmed a Second Amendment right to use a weapon in any particular way: "[N]either [*Heller* nor *McDonald*] concerned the use of a weapon, as distinct from mere possession. . . ." *United States v. Morsette*, 622 F.3d 1200, 1202 (9th Cir. 2010). Similarly, nothing in the Supreme Court's recent Second Amendment jurisprudence lends support to Plaintiffs' novel theory that a police department policy outlining expectations for an officer's use of force can burden conduct protected by the Second Amendment.

Instead, the Supreme Court has been clear that "the right secured by the Second Amendment is not unlimited" and is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. Plaintiffs selectively quote historical sources cited in *Heller* to suggest that so long as self-defense is a purpose for the individual claiming a Second Amendment right, the Second Amendment forbids "unreasonable" restrictions on the manner a weapon is used. (Dkt. No. 59 at 4.) In fact, contemporaneous sources relied on by the Supreme Court and the Ninth Circuit show that restrictions on the manner in which a weapon is used fall outside the scope of the Second Amendment. For example, the Ninth Circuit quoted and the Supreme Court cited the following nineteenth-century footnote:

"[I]t is generally held that statutes prohibiting the carrying of concealed weapons are not in conflict with these constitutional provisions, since they merely forbid the carrying of arms *in a particular manner*, which is likely to lead to breaches of the peace and provoke to the commission of crime, rather than contribute to public or personal defence." *The American Students' Blackstone: Commentaries on the Laws of England* 84 n.11 (George Chase ed., 3d ed. 1890) (emphasis supplied) (cited in *Peruta v. County of San Diego*, 742 F.3d 1144, 1165 (9th Cir. 2014) and *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)). Similarly, the Ninth Circuit relied on nineteenth-century legal commentator John Ordronaux for the proposition that "the [Second] Amendment has never prevented 'a State from enacting laws regulating the manner in which arms may be carried.'" *Peruta*, 742 F.3d at 1165. According to the Ninth Circuit, these sources and case law demonstrate that "*regulation* of the right to bear aims is not only legitimate but quite appropriate." *Id.* at 1178 (emphasis in original). In addition to the categories of regulation specifically described in *Heller*, the Ninth Circuit stated, "Nor should anything in this opinion be taken to cast doubt on the validity of measures designed to make the carrying of firearms for self-defense as safe as possible, both to the carrier and the community." *Id.* at 1178.

Here, the Policy represents an effort by an employer, the Seattle Police Department, to regulate the use not only of (employer-issued) weapons but of the force its employees are specially sanctioned to wield on

behalf of the city government. This scenario has no relation to the Second Amendment guarantees for individuals recognized in *Heller, McDonald*, and *Peruta.*

Because the Policy does not burden conduct protected by the Second Amendment, the Court need not proceed to the second step of the analysis. Plaintiffs fail to state a plausible Second Amendment claim.

B. Fourth Amendment

Plaintiff's' Fourth Amendment argument rests on two grounds: the notion that the Policy itself effects a metaphorical "seizure" (Dkt. No. 59 at 9-11) and the notion that the case law analyzing the limits of citizens' Fourth Amendment rights against the government can be flipped inside out to describe the positive rights of government actors (such as police officers) against citizens (*id.* at 11-12). Both grounds grossly misconstrue Fourth Amendment law.

Fourth Amendment seizures of persons are neither figurative nor hypothetical. The definition requires that a government actor "by means of physical force or show of authority, terminates or restrains [a person's] freedom of movement [] through means intentionally applied." *Brendlin v. California*, 551 U.S. 249, 254 (2007). The Policy does not affect officers' freedom of movement, so it does not "seize" Plaintiffs, even if, as Plaintiffs allege, the Policy places them at increased risk of injury. (*See* Dkt. No. 59 at 9.)

Plaintiffs further argue that cases analyzing the Fourth Amendment rights of citizens have recognized a "countervailing governmental interest[]" – thus purportedly endowing police officers with a Fourth Amendment right to use force. (*See* Dkt. No. 59 at 11, citing *Graham v. Conner*, 490 U.S. 386, 396 (1989)). This argument misses the mark entirely. A balancing test establishing the boundary where government action infringes on a citizen's Fourth Amendment rights cannot be reinterpreted as a positive Fourth Amendment right for government actors to inflict force up to that boundary.

Plaintiffs fail to state a claim under the Fourth Amendment.

C. Equal Protection Clause

Plaintiffs base their Equal Protection Clause claim on the idea that the Policy burdens "fundamental rights" embedded in the Second and Fourth Amendments. (*See* Dkt. No. 59 at 12-13 (citing *Tucson Woman's Clinic v. Eden*, 371 F.3d 1173, 1185 (9th Cir. 2004).) The Court has already analyzed Plaintiffs' Second and Fourth Amendment arguments and found them wanting. No Supreme Court case identifies self-defense as a "fundamental right" on par with the right to marry or to vote.

Plaintiffs also fail to make even the most rudimentary showing in an equal protection claim: they fail to describe themselves as members of an affected class similarly situated to those outside the class. *See City of*

Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike."). Plaintiffs, like all officers with the Seattle Police Department, are subject to the Policy; they have identified no group that is similarly situated yet not subject to the Policy.

Plaintiffs fail to state a claim under the Equal Protection Clause.

D. Substantive Due Process

Plaintiffs allege substantive due process claims "for both their rights enumerated in the Second Amendment, Fourth Amendment, and Equal Protection Clause" and "for their independent constitutional right to self-defense." (Dkt. No. 59 at 13-14.) As Plaintiffs acknowledge, substantive due process claims that relate to other constitutional provisions must be analyzed under the legal standards established for those provisions. *See Graham v. Connor*, 490 U.S. 386, 394 (1989). As the Court has already explained, Plaintiffs fail to state a claim under the Second or Fourth Amendment or the Equal Protection Clause.

As for the "independent constitutional right to self-defense," Plaintiffs concede that "no case has expressly considered whether a police officer's right to self-defense is protected by the Constitution" but ask

the Court to locate it in the penumbrae of other constitutional provisions. (Dkt. No. 59 at 14-17.) Courts are "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). Executive action such as the Policy violates substantive due process only when it is arbitrary, that is, when it "shocks the conscience." *See County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

Plaintiffs characterize the Policy as excessively rigid and complicated. (Dkt. No. 59 at 17.) They assert that delay and injury will result from the Policy's checks on officers' responses to violent suspects. (*Id.*) But substantive due process does not guarantee a reasonably safe workplace. *Collins*, 503 U.S. at 126. It does not shock the conscience to see certain de-escalation procedures imposed on police officers in an effort by their Department to avoid a pattern or practice of excessive use of force. (*See generally* Policy, Case No. C12-1282JLR, Dkt. No. 107 exhibits.) It would be at least surprising if allegations of such a pattern or practice did not lead to the adoption of stricter standards for use of force by officers. Furthermore, the Policy contains a number of concessions to the exigencies of the circumstances. (*See, e.g.*, *id*. at Ex. 1, p. 3 ("An Officer Shall Use Only the Degree of Force That Is Objectively Reasonable, Necessary Under the Circumstances, and Proportional to the Threat or Resistance of a Subject [. . .] The reasonableness of a particular use of force is

based on the totality of circumstances known by the officer at the time of the use of force and weighs the actions of the officer against the rights of the subject, in light of the circumstances surrounding the event. It must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight[.] The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second decisions – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.").) It must also be acknowledged that the Policy provides officers with a wide range of tools to gain control over situations and to protect themselves, from use of verbal commands to physical restraint, TASERS, pepper spray, and batons, in addition to firearms. (*See id.* at Ex. 1, pp. 8-10.) The Policy is not so inflexible and arbitrary as to shock the conscience, even if it slows or even forestalls the application of force in police interactions with resisting subjects.

E. Procedural Due Process

Plaintiffs complain that they were not included in the process by which the Policies were adopted, but they cite to no case imposing such a requirement on government employers. (*See* Dkt. No. 59 at 20.) Furthermore, Plaintiffs locate the liberty interests of which Plaintiffs were allegedly deprived in the Second and Fourth Amendments, and the Court has already held that Plaintiffs' rights in these areas were not violated. (*See id*.) Plaintiffs were not due any particular

process in the adoption of use-of-force standards by their employer; to the extent they were invited to participate, that participation was a privilege rather than a right.

F. City's Other Arguments

The City also argues that Plaintiffs lack standing, fail to state a claim against the Seattle mayor and city attorney, and do not merit injunctive relief. (Dkt. No. 25 at 20-23.) Because the Court concludes Plaintiffs fail to state plausible claims for relief with respect to any defendant, the Court does not reach these questions.

Conclusion

Because Defendant Bobb is an agent of the court entitled to quasi-judicial immunity, the Court GRANTS his Motion to Dismiss. (Dkt. No. 19.) In addition, because Plaintiffs' Complaint fails to state a claim for relief under § 1983 or *Bivens* for violation of their Second or Fourth Amendment rights, the Equal Protection Clause, or substantive or procedural due process, the Court GRANTS the City Defendants' Motion to Dismiss. (Dkt. No. 25.) The case is therefore DISMISSED for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Because the Complaint has already been amended once and further amendment would be futile, the dismissal is with prejudice.

The clerk is ordered to provide copies of this order to all counsel.

Dated this 17th day of October, 2014.

/s/ Marsha J. Pechman
Marsha J. Pechman
Chief United States
District Judge