UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

M. PETER KUCK, individually and on behalf of others similarly situated,	:	
Plaintiffs,	:	**CASE NO.: 3:07-CV-1390-VLB**
v.	:	
JOHN A. DANAHER III, ET AL.,	:	
Defendants.	:	**MARCH 10, 2011**

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS THE AMENDED COMPLAINT

The Plaintiff M. Peter Kuck ("Kuck"), by and through his undersigned counsel, hereby opposes in its entirety the Defendants' Motion to Dismiss the Amended Complaint. In accordance with Local Civil Rule 7(a)(1), Kuck asserts that each of the three (3) counts in his two-hundred-forty-five (245) paragraph Amended Complaint is sufficiently pleaded for the Court to deny the motion. The memorandum of law that follows supplements but does not diminish this sufficiency.

I. THE DEFENDANTS' MOTION TO DISMISS

A. Procedural Background

Kuck filed his original Complaint on September 17, 2007, alleging in three (3) counts denials of procedural and substantive due process in violation of the Second, Fifth, and Fourteenth Amendments and retaliation in violation of the First and Fourteenth Amendments to the U.S. Constitution. The district court dismissed Kuck's Complaint in its entirety. Kuck appealed and oral argument was held on September 17, 2009, at the U.S. Court of Appeals for the Second

Circuit before The Honorable Chester J. Straub, The Honorable Barrington D. Parker, and The Honorable Debra Ann Livingston. The Second Circuit remanded Kuck's procedural due process claim for further proceedings. Kuck v. Danaher, 600 F.3d 159, 167 (2d Cir. 2010) ("For the purposes of the present motion to dismiss, we find that Kuck has stated a procedural due process claim. Whether discovery will bear out his claim is a matter for the district court to determine on remand.").

The district court granted Kuck leave and Kuck filed an Amended Complaint on September 3, 2010, adding Defendants, alleging violations of the Second Amendment and a new substantive due process claim based on the Second Amendment in addition to the procedural due process claim remaining from the original Complaint following remand. The Defendants moved to dismiss on two grounds: (1) Lack of Standing, Fed. R. Civ. P. 12(b)(1);[1] and (2) Failure to State a Claim, Fed. R. Civ. P. 12(b)(6). The Defendants also assert entitlement to qualified and absolute immunity.

B. Inaccurate Statements in Defendants' Motion and Memorandum of Law

First, the initial sentence of the Defendants' memorandum asserts that Kuck is a "former member of the State Board of Firearms Permit Examiners." (Defs' Mem. at 2) Kuck has remained a member of the Board continuously since

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[1] The Defendants pursue dismissal based on a lack of standing by arguing that "the defendants he [Kuck] has named in each count are in most cases not the cause of the injuries." (Defs' Mem. at 11) The Defendants concede, by using the phrase "in most cases," that in the remaining cases not within the set of "most" cases," Kuck has named the Defendants liable for the alleged injuries. See Defs' Mem at 11 ("Plaintiff lacks standing because the defendants he has named in each count are in most cases not the cause of the alleged injuries.").

1988. (Compl. ¶ 89) As a member of the Board, Kuck is represented by the Office of the Attorney General whenever the Board is sued or an appeal is filed from a Board decision. See also Kuck v. Danaher, 600 F.3d at 166 ("Kuck, we also recognize, is in an unusual position to describe the process by which appeals are resolved. Because he sits on the Board itself, his allegations have some additional plausibility at this early stage of the proceedings.").

Second, in the Motion to Dismiss, the Defendants move only on behalf of Defendants John A. Danaher III and Albert J. Masek, Jr. (Mot. to Dismiss at 2)

Third, in the Motion to Dismiss, the Defendants move to dismiss a First Amendment claim that is not alleged in the Amended Complaint. (Mot. to Dismiss at 2)

Fourth, in the Memorandum of Law, the Defendants assert that Kuck has alleged violations of the "First or Second Amendments." (Defs' Mem. at 10) The Amended Complaint does not allege a First Amendment violation.

Fifth, in the Memorandum of Law, the Defendants assert that Kuck has alleged violations of the "First or Second Amendments." (Defs' Mem. at 14) The Amended Complaint does not allege a First Amendment violation.

Sixth, in the Memorandum of Law, the Defendants state that Kuck has "sued both the opposing party and the adjudicatory board in his administrative appeal regarding the merits and process of his administrative appeal." (Defs' Mem. at 24) Kuck has not sued the Board. Cf. Defs' Mem. at 13 ("Plaintiff did not sue the Board, Board members, or the Chair of the Board in his official capacity

(which would have served as a suit against the Board)." The Defendants' memorandum is internally contradictory.

II. LEGAL STANDARD

A. Grounds for Dismissal Under Rule 12(b)(1) and 12(b)(6)

"As a matter of substance, '[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face."'" Kuck, 600 F.3d at 162-63 (citing Ashcroft v. Iqbal, __ U.S. __, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009)); (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

> **"A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." Id. (citations omitted). "A plaintiff generally has the burden of proving by a preponderance of the evidence that jurisdiction exists." Id.**
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> **"A motion to dismiss for failure to state a claim, pursuant to Rule 12(b)(6), tests only the adequacy of the complaint." Id. (citations omitted). "A Rule 12(b)(6) motion can be granted only if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Id. (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99 (1957)). This principle is applied with particular strictness when the plaintiff complains of a civil rights violation. "An action, especially under the Civil Rights Act, should not be dismissed at the pleadings stage unless it appears to a certainty that plaintiffs are entitled to no relief under any state of the facts, which could be proved in support of their claims." Escalera v. New York City Housing**

Authority, 425 F.2d 853, 857 (2d Cir. 1970) (citations omitted).

In deciding a motion to dismiss under Rule 12 of the Federal Rules of Civil Procedure, the district court must undertake an analysis of the pleadings or the claims raised in the complaint. Goldberg v. Danaher, 599 F.3d 181, 183 (2d Cir. 2010) (citing Maggette v. Dalsheim, 709 F.2d 800, 802 (2d Cir. 1983) ("'Where ... the pleadings are themselves sufficient to withstand dismissal, a failure to respond to a 12(c) motion cannot constitute a "default" justifying dismissal of the complaint.'"); McCall v. Pataki, 232 F.3d 321, 322-323 (2d Cir. 2000) (extending the holding in Maggette to 12(b)(6) motions).[2]

B. The Incorporation of the Second Amendment Right to the States

Subsequent to the Second Circuit's remand of the procedural due process claim in the instant case, the U.S. States Supreme Court, in McDonald v. City of Chicago, Illinois, 561 U.S. __, 130 S.Ct. 3020, 3023, 177 L.Ed.2d 894 (2010), incorporated the Second Amendment individual right to keep and bear arms through the Due Process Clause of the Fourteenth Amendment as fully applicable to the States. The U.S. Supreme Court had not incorporated a right guaranteed under the first eight amendments to the U.S. Constitution for more than forty years when the McDonald decision issued on June 28, 2010.[3] The Second Circuit, as recently as January 29, 2009, had denied the applicability of the Second

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[2] In Goldberg, contrary to settled case law and the clear language of Local Civil Rule 7(a)(1), the Office of the Attorney General as counsel for the Defendants Danaher and Masek argued in this Court that a decision not to respond to a motion to dismiss constituted default by waiver.

[3] The last such case preceding McDonald was Benton v. Maryland, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), incorporating the Fifth Amendment bar against double jeopardy to the States through the Fourteenth Amendment.

Amendment to the States, despite the U.S. Supreme Court's June 26, 2008, decision in District of Columbia v. Heller, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), finding that a ban on handgun possession in the District of Columbia violated the amendment's right to keep and bear arms. See Maloney v. Cuomo, 554 F.3d 56, 58 (2d Cir. 2009) ("[T]he Second Amendment applies only to limitations the federal government seeks to impose on this right.").[4]

In McDonald, municipal residents sought a declaration that local laws "effectively banning handgun possession by almost all private citizens" violated the Second and Fourteenth Amendments." McDonald, 130 S.Ct. at 3026. The federal district court dismissed the complaint and the Court of Appeals for the Seventh Circuit affirmed. Noting its decision two years prior, in Heller, "striking down a District of Columbia law that banned the possession of handguns in the home" on Second Amendment grounds, the McDonald court considered whether the Due Process Clause of the Fourteenth Amendment required application of the Second Amendment right to keep and bear arms to the States. McDonald, 130 S.Ct. at 3022, 3023. The "right to keep and bear arms" is "among those fundamental rights necessary to our system of ordered liberty." McDonald, 130 S.Ct. at 3043. A fundamental right, such as the right to keep and bear arms, is "enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." McDonald, 130 S.Ct. at 3035.

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[4] The U.S. Supreme Court granted certification, vacated judgment, and remanded Maloney v. Cuomo sub nom. Maloney v. Rice, on June 29, 2010, to the court of appeals "for further consideration in light of McDonald v. Chicago, 561 U.S. __ (2010)." Maloney v. Rice, __ U.S. __, 130 S.Ct. 3541, 177 L.Ed.2d 1119 (2010).

While "'longstanding regulatory measures'" such as "'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, or laws imposing conditions and qualifications on the commercial sale of arms'" are not imperiled by incorporation, limitations on the legislative freedom and policy choices of the States and restrictions on "'experimentation and local variations'" are necessary consequences of the "'enshrinement of constitutional rights.'" McDonald, 130 S.Ct. at 3050 (quoting Heller, 128 S.Ct. at 2816-2817). "This conclusion is no more remarkable with respect to the Second Amendment than it is with respect to all the other limitations on state power found in the Constitution." McDonald, 130 S.Ct. at 3050.

III. ARGUMENTS OF LAW

A. The Amended Complaint

Count One: The "Suitability" Standard for Issuance of a Permit to Carry is Unconstitutional

1. The "Suitability" Standard is Vague, Subject to Unchecked Discretion By Law Enforcement, the Board, and the Courts

The DPS basis for not renewing Kuck's state permit was lack of suitability. (Am. Compl. ¶¶ 61, 62(c), 206, 218, 239)[5] State statutes list ten factors reviewed

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[5]The Defendants' assert that the denial was not based on lack of suitability. However, the Amended Complaint alleges plausibly that lack of suitability was the basis for the denial of the application for renewal. Defendant DPS Detective Barbara Mattson never alleged that Kuck was an alien illegally or unlawfully in the United States. She informed the Board that the reason for the denial was the failure to provide paperwork. See Am. Compl. ¶ 61 ("Detective Mattson informed the Board of the SLFU's cause for refusal to renew Kuck's state permit as: "App refused to produce to Connecticut State Police his birth certificate, United States

by state and local agencies in Connecticut for determination of a person's eligibility to obtain or hold a temporary or state permit to carry pistols or revolvers. Conn. Gen. Stat. § 29-28(b). The statute also requires "suitability." Conn. Gen. Stat. § 29-28(b). A person is disqualified from holding a state permit even if he or she meets all ten of the eligibility factors but is not deemed suitable. A person is disqualified from holding a state permit if he or she is suitable but does not meet one or more of the eligibility factors. Only a suitable person who meets all ten eligibility factors may hold a state permit. The DPS considers applications for renewal of state permits in the absence of statutory definition, guidance, or coordination for determining who is a suitable person and who is not.

2. The "Suitability" Standard in General Statutes § 29-28(b) Implicates a Core Second Amendment Right

The core Second Amendment right to self-defense by law-abiding citizens is implicated in the statutory "suitability" standard. The ten specific eligibility factors ensure that non-law-abiding citizens will not be issued permits to carry. If the ten factors do not include categories of individuals whom through democratically-elected representatives it is agreed should not be eligible to hold a state permit then the statute is subject to amendment by adding more specific, defined eligibility factors.

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passport or voters [sic] registration card upon renewal of his permit." This is confirmed by the Board's decision. See Am. Compl. ¶ 62(c) ("'The issuing authority knew of no other evidence of the appellant's unsuitability other than his failure to furnish proof of citizenship at the time of renewal.'") At the least, there is a genuine issue of fact at this stage of the proceedings regarding the reason for the denial of the renewal application.

In Connecticut, under current law, an individual's right to exercise the core Second Amendment right to bear arms in self-defense is based upon an entirely discretionary determination of "suitability" by law enforcement, the Board, and the state courts. If an individual does not meet all ten eligibility factors the prohibition on the right to carry a pistol or revolver is mandatory. If an individual does meet all ten eligibility factors whether or not he or she may lawfully carry a pistol or revolver is entirely discretionary.

3. The "Suitability" Standard is Constitutionally Invalid

In Count One, Kuck asserts a Second Amendment constitutional challenge to the "suitability" standard in General Statutes § 29-28(b) as applied to him in the DPS's determination not to renew his state permit based on "suitability" grounds. The Third and Fourth Circuits Court of Appeals have adopted a two-part approach for determining the level of constitutional scrutiny to be afforded Second Amendment challenges. See U.S.A. v. Marzzarella, 614 F.3d 85 (3d Cir. 2010); U.S.A. v. Chester, 367 Fed.Appx. 392 (4th Cir. 2010). The first part of the inquiry asks whether the challenged law burdens or regulates conduct within the scope of the Second Amendment. In Heller the U.S. Supreme Court "concluded that the Second Amendment codified a pre-existing 'individual right to possess and carry weapons in case of confrontation.'" Heller, 128 S.Ct. at 2797. The denial of a state permit in Connecticut deprives an individual of this pre-existing right codified in the Second Amendment to carry weapons in case of confrontation.

When Kuck's application for renewal of his state permit was denied based on "suitability" he was deprived of his right to carry a pistol or revolver in case of

confrontation. The right is not unlimited. It does not extend to "all types of weapons, only to those typically possessed by law-abiding citizens for lawful purposes." Marzzarella, 614 F.3d at 90 (citing Heller, 128 S.Ct. at 2815-16). The Third Circuit specifically recognized "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." Id. at 91. These limitations are exceptions to the Second Amendment right to bear arms. Id. They had to be carved out of the Second Amendment's codification of a pre-existing individual right to possess and carry weapons in case of confrontation. An undefined, vague standard of "suitability" does not constitute an exception to the Second Amendment able to withstand constitutional scrutiny.

The second part of the inquiry then determines the particular standard of scrutiny to be applied to the challenged statute or regulation. The burden of meeting an undefined, entirely discretionary standard of "suitability" imposed upon law-abiding, eligible individuals to hold state permits requires strict scrutiny. Strict scrutiny asks whether the law is narrowly tailored to serve a compelling government interest. Playboy Entm't Group, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000). An undefined, entirely discretionary standard is opposite to a narrowly tailored law. The "suitability" standard cannot survive this Court's application of the strict scrutiny standard.

Count Two:
The Denial of a Pre-Deprivation Hearing or a Timely Post-Deprivation Hearing After the Denial of a Second Amendment Right is Unconstitutional

1. The Second Circuit Decision

In Count Two, "Kuck's main contention is that the eighteen-month period he waited to receive an appeal hearing before the Board was, in light of the liberty interest at stake, excessive and unwarranted, and thus violated due process." Kuck v. Danaher, 600 F.3d at 163. The Second Circuit held:

> **For the purposes of the present motion to dismiss, we find that Kuck has stated a procedural due process claim. Whether discovery will bear out his claim is a matter for the district court to determine on remand.**

Kuck, 600 F.3d at 167. Despite being "often solicitous of governmental interests, particularly those related to the public's safety," the Second Circuit could not "accept, at least without additional factual support, the months-long delay that Connecticut attempts to justify in this [Kuck's] case. Kuck, 600 F.3d at 167 (citing Spinelli v. City of New York, 579 F.3d 160, 173 (2d Cir. 2009)). The Second Circuit held: (a) Kuck stated a due process violation claim; (b) the district court upon remand would address whether discovery supports the claim after discovery upon summary judgment; and (c) the Defendants would need to provide factual support to justify the delay in Board appeal hearings. For all these reasons, Count Two of the Amended Complaint withstands the Defendants' Motion to Dismiss.

2. The Due Process Violation Claim was Established by the Second Circuit

"Due process is inevitably a fact-intensive inquiry." Krimstock v. Kelly, 306 F.3d 40, 51 (2d Cir. 2002) (citing Connecticut v. Doehr, 501 U.S. 1, 10 (1991) ("[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."). "The "'timing and nature of the required hearing will depend on appropriate accommodation of the competing interests involved.'" Id. (quoting Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982)). Whether a nineteen (19) to twenty (20) month delay is warranted is dependent on the facts and the law. The Amended Complaint plausibly alleges that a delay of fourteen (14) to twenty (20) months is not an adequate opportunity for hearing of state or federal constitutional claims.

In Krimstock, the plaintiffs challenged the due process afforded them in the seizure of their motor vehicles post-arrest. The vehicles had been seized by the defendant city between March and May of 1999. According to the Second Circuit, the city defendant's administrative code operated as follows:

> **If a claimant makes a formal demand for the return of the vehicle, the City has twenty-five days in which either to initiate a civil forfeiture proceeding under the City's Administrative Code or to release the vehicle. Even if the City chooses to commence a civil forfeiture proceeding within the twenty-five day period, however, the proceeding is commonly stayed until the criminal proceeding concludes.**

Id. at 45 (internal citations omitted). One of the seven plaintiffs in Krimstock waited twenty-three (23) months for the return of his vehicle with no opportunity to challenge the city defendant's continued retention. Id. at 46. A second plaintiff

waited thirteen (13) months. Id. In the case of a third plaintiff whose vehicle was seized in April, 1999, the Court found that by December, 1999, he "still had received no hearing in the forfeiture action and his car remained in police custody." Id. This plaintiff, as a result of the delay, "had not been given an opportunity to present evidence that a prescription anti-depressant medication he was taking at the time of the arrest caused the Breathalyzer test to exaggerate the percentage of alcohol in his bloodstream." Id. The plaintiffs alleged violations of the Due Process Clause of the Fourteenth Amendment and sought "a prompt hearing following the seizure of vehicles, at which the City must demonstrate probable cause that the car was used in furtherance of a crime and that it is necessary that the vehicle remain in the City's custody until the conclusion of the forfeiture proceeding." Id. (internal quotations omitted).

The district court dismissed the Krimstock complaint finding that the plaintiffs' interests were adequately protected, after applying the Mathews factors, by the "probable cause arrest" and the forfeiture proceedings. Id. The Second Circuit vacated the district court's dismissal of the complaint and remanded the case.

In vacating the district court's decision and remanding the case, Krimstock applied the three factors set forth in Mathews v. Eldridge, 424 U.S. 319, 335:

> **[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved**

> **and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.**

In Kuck, the Second Circuit similarly applied the Mathews factors:

i. First Mathews Factor

"The first factor to be considered in the Mathews inquiry is 'the private interest affected by the official action.'" Krimstock, 306 F.3d at 60 (quoting Mathews, 424 U.S. at 335).

Even in the absence of the ruling in McDonald, the Second Circuit found the private interest at stake in holding a state permit "significant." Kuck, 600 F.3d at 165. The "Connecticut Constitution establishes a clear liberty interest in a permit to carry a firearm - an interest that is highly valued by many of the state's citizens." Id. (citing Conn. Const. art. I, § 15) ("Every citizen has a right to bear arms in defense of himself and the state."). The incorporation of the Second Amendment right to bear arms establishes a significant private interest in the exercise of a fundamental constitutional guarantee.

ii. Second Mathews Factor

"The second factor to be considered under the Mathews test is 'the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.'" Krimstock, 306 F.3d at 62 (quoting Mathews, 424 U.S. at 335).

"The viability of Kuck's due process claim does not turn on the merits of his initial challenge; rather, it concerns whether he received the process he was due." Kuck, 600 F.3d at 165. "Thus, the focus of this second prong remains on

(1) the overall risk of erroneous deprivation for permit applicants, and (2) the time-period required to correct such deprivations." Id. The Second Circuit concluded that Kuck's due process violation allegations plausibly alleged "a state practice of delaying appeals, only to moot them at the very last minute, after the applicant has waited more than one year for a hearing." Id. (citing Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-50, 173 L.Ed.2d 868 (2009)). "Because this practice appears to have affected a significant number of applicants, and the delay is considerable, the second Mathews factor weighs in favor of Kuck at this stage of the proceedings." Id.

iii. Third* Mathews *Factor

"The third Mathews factor examines 'the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'" Krimstock, 306 F.3d at 64 (quoting Mathews, 424 U.S. at 335).

In assessing the government's interest in the delay of hearings before the Board, the Second Circuit found the Defendants' public safety argument unsupported:

> **All in all, the State's argument boils down to an assertion that public safety is important and appeals have gotten backed up. But the delay has little apparent connection to the public interest invoked by defendants. The State gives no account of how or why public safety requires unsuccessful applicants to wait a year-and-a-half for an appeal hearing.**

Id. at 167.

Count Three:
Barriers to the Exercise of the Second Amendment Right to Bear Arms not Specified Under the Law are Unconstitutional

Paragraphs 105 through 109 of the Amended Complaint allege that the DPS Defendants, knowing that they revoke state permits without evidence or basis in law, withhold case statements and positions from the Board until just prior to the scheduled hearing and then settle cases on the day of hearing because the DPS Defendants know that the cases are without evidence or basis in law. By the time the DPS Defendants settle cases on the day of hearing before the Board, the aggrieved person has been denied the state permit without evidence or basis in law for a fourteen (14) to twenty-two (22) month time period. The ability of the DPS Defendants to revoke state permits and then return them to their holders without review by the Board constitutes a pattern and practice of allowing law enforcement agencies and the DPS Defendants to revoke state permits without concern for the law or the intent of the legislative bodies that represent the people.

In denying Kuck the renewal of his state permit, the DPS Defendants asserted that he had "failed to present a birth certificate, United States passport or voters [sic] registration card upon renewal of his permit." (Am. Compl. ¶ 61) The DPS Defendants, by statute, are mandated to investigate each applicant for renewal of a state permit. Conn. Gen. Stat. § 29-29(d) ("The commissioner may investigate any applicant for a state permit and shall investigate each applicant for renewal of a state permit to ensure that such applicant is eligible under state law for such permit or for renewal of such permit.") Either the DPS failed to

investigate Kuck when he submitted his renewal application or the DPS is incapable of determining independently whether Kuck is a United States citizen. One method of such a determination, if the DPS wishes to rely on voter registration records instead of more accurate information it may have access to as a state law enforcement agency, is the list of registered voters in each municipality. These lists are public records so any individual including a sworn DPS law enforcement officer is capable of determining whether a particular individual is registered to vote in a particular municipality. Presumably, sworn DPS law enforcement officers are trained to investigate to the extent of making a phone call to a town clerk to determine if an individual is registered to vote. General Statutes § 29-29(d) does not require the applicant to perform the investigation that the DPS is mandated to do upon its receipt of the application. Prior to denying Kuck's application for renewal, the DPS needed only to contact the Town of West Hartford if the DPS truly had just cause to believe that a member of the Board appointed by the Governor and holding a state permit for decades was an alien illegally or unlawfully in the United States.

In the Amended Complaint, Kuck asserts in Count Three that the DPS demand for a United States passport, voter registration card, or birth certificate is an arbitrary barrier to the renewal of a state permit not required by any state regulation or statute. In failing to investigate Kuck's renewal application as required by state statute and creating a requirement not authorized under the law, the DPS created an arbitrary barrier to Kuck's state permit renewal and imposed that barrier in an egregious and shocking manner when it failed to conduct an

investigation that would have resolved any questions that the DPS sincerely had regarding Kuck's United States citizenship.

B. Kuck has Standing Against Each of the Named Defendants

"Standing is a federal jurisdictional question 'determining the power of the court to entertain the suit.'" Carver v. City of New York, 621 F.3d 221, 225 (2d Cir. 2010) (quoting Warth v. Seldin, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). When standing is challenged based on the pleadings, a court accepts "as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." Carver, 621 F.3d at 225 (quoting W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche, LLP, 549 F.3d 100, 206 (2d Cir. 2008) (internal quotations omitted). In Carver, the district court dismissed the complaint for lack of standing finding that the state agency responsible for taking the plaintiff's lottery winnings and then turning the winnings over to the City of New York to be credited against public assistance the plaintiff had collected from the City had not been sued. "The court explicitly declined to reach the merits of Carver's claims, premising its decision to dismiss entirely on standing grounds." Id.

The Second Circuit vacated the district court's dismissal based on lack of standing because the City's conduct in accepting the lottery winnings seized by the state agency indirectly caused the plaintiff's injury. "Thus, causation turns on the degree to which the defendant's actions constrained or influenced the decision of the final actor in the chain of causation." Id. at 226. As set forth in the chart appended to this memorandum, the Amended Complaint alleges

conduct on the part of each of the Defendants that influenced the ultimate conduct alleged in paragraphs 105 through 109 and 140 of the Amended Complaint underlying the violations set forth in Counts One, Two, and Three.

C. The Defendants are not Entitled to Qualified Immunity or Absolute Immunity

1. The Defendants are not Entitled to Qualified Immunity

"Government actors have qualified immunity to § 1983 claims insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Bolmer v. Oliveira, 594 F.3d 134, 141 (2d Cir. 2010) (internal quotations and citations omitted).

The Defendants are entitled to qualified immunity in Count One only if (a) the Amended Complaint does not plausibly allege Kuck's right to bear arms under the Second and Fourteenth Amendments or (b) the right to bear arms under the Second and Fourteenth Amendments was not clearly established at the time of the alleged violations. Id. (Defendant immune to § 1983 claim if (1) the reviewable facts do not make out a violation of right or (2) the right was not clearly established at the time.).

The Defendants are entitled to qualified immunity in Count Two only if (a) the Amended Complaint does not plausibly allege Kuck's right to procedural due process under the Second, Fifth, and/or Fourteenth Amendments and/or Article 15 of the Connecticut Constitution or (b) the right to procedural due process under the Second, Fifth, and/or Fourteenth Amendments and/or Article 15 of the Connecticut Constitution was not clearly established at the time of the alleged violations.

The Defendants are entitled to qualified immunity in Count Three only if (a) the Amended Complaint does not plausibly allege Kuck's right to bear arms under the Second, Fifth, and Fourteenth Amendments was impermissibly burdened by imposition of arbitrary barriers to the exercise of the right to bear arms which deprived individuals of their permits and created a backlog in the appeals arising from such impermissible deprivations or (b) the right to bear arms under the Second, Fifth, and Fourteenth Amendments was not clearly established at the time of the alleged violations.

Kuck possessed a liberty interest created by the Connecticut Constitution in his right to carry a firearm at the times alleged in the Amended Complaint. Kuck, 600 F.3d at 163 (citing Conn. Const. art. I, § 15; Benjamin v. Bailey, 234 Conn. 455 (1995)). A violation of the right to due process occurs when a liberty interest is established and the due process afforded the individual is inadequate to protect that interest. The Second Circuit found that the DPS interest in public safety is not "a license for indefinitely denying permit applicants a post-deprivation opportunity to contest an adverse finding by DPS." Kuck, 600 F.3d at 167. The court relied on Storace v. Mariano, 35 Conn.Supp. 28, A.2d 1347, 1348 (1978) for it construction of General Statutes § 29-32b(c) clearly establishing that time is of the essence in the Board's hearing of appeals. Id.

In addition to that liberty interest arising from the state constitution, Kuck possessed a fundamental constitutional right to bear arms because in Heller the U.S. Supreme Court "concluded that the Second Amendment codified a pre-existing 'individual right to possess and carry weapons in case of

confrontation.'" Heller, 128 S.Ct. at 2797. The Second Amendment right to bear arms was clearly established at the times alleged in the Amended Complaint.

At oral argument before the Second Circuit on Kuck's appeal from the district court's July 25, 2008, dismissal of Kuck's September 17, 2007, Complaint, Judge Straub asked the Assistant Attorney General (A.A.G.) what justified the delay. (Audio of September 17, 2009, Joint Oral Argument in Kuck v. Danaher, 600 F.3d 159 and Goldberg v. Danaher, 599 F.3d 181 (2d Cir. 2010)) When the A.A.G. provided no reason for the backlog, Judge Straub indicated that it would have to be resolved on remand. He then said: "If her complaint says anything it says that there is a lot more going on here than … than simply backlog … " Judge Livingston commented: "But doesn't she allege more than just the mere fact of delay in the second factor she's alleging intentionally … intentionally prolonging the delay and then avoiding board review by ah making last minute determinations."[6]

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[6] See Am. Compl. at ¶¶ 105-109: "The DPS Defendants, knowing that they revoke state permits without evidence or basis in law, withhold case statements and positions from the Board until just prior to the scheduled hearing and then settle cases on the day of hearing because the DPS Defendants know that the cases are without evidence or basis in law. By the time the DPS Defendants settle cases on the day of hearing before the Board, the aggrieved person has been denied the state permit without evidence or basis in law for a fourteen to twenty-two month time period. The Board Secretary's authority to review the facts and schedule appeals operates as a check and balance on the DPS Defendants' revocation authority. The ability of the DPS Defendants to revoke state permits and then return them to their holders without review by the Board of the facts has resulted in a pattern and practice of allowing law enforcement agencies and the DPS Defendants to revoke state permits without concern for the law or the intent of the legislative bodies that represent the people. The SLFU has operated as a rogue unit within the DPS without oversight or regard for the law or the individual rights of state permit holders." According to the Second Circuit: "Kuck, we also recognize, is in an unusual position to describe the process by which appeals are

The Defendants are not entitled to qualified immunity from the claims set forth in Counts One, Two, and Three of the Amended Complaint.[7]

2. The Defendants are not Entitled to Absolute Immunity

The Amended Complaint does not allege any conduct related to the administrative hearing process before the Board nor do the facts include allegations related to any of the DPS Defendants' appearances before the Board in the capacity of an advocate or attorney. The Amended Complaint alleges conduct related to the processing of firearms permits and the investigation of state permit applications. By definition these are investigatory and administrative functions.

"[P]rosecutors are absolutely immune from liability under § 1983 for their conduct in 'initiating a prosecution and in presenting the State's case' insofar as that conduct is 'intimately associated with the judicial phase of the criminal process.'" Burns v. Reed, 500 U.S. 478, 486, 111 S.Ct. 1934, 1939, 114 L.Ed.2d 547 (1991) (quoting Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 928 (1976)) (internal citations omitted). "By contrast, a government attorney is

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resolved. Because he sits on the Board itself, his allegations have some additional plausibility at this early stage of the proceedings." Kuck, 600 F.3d at 166.

[7] The Defendants argue it is "worth noting that the delays in this case were directly related to the fact that the *plaintiff* deliberately refused to provide citizenship documentation needed to complete the DPS's review." (Defs' Mem. at 22) Setting aside the DPS' mandatory obligation to conduct an investigation and its seeming incapability of determining on its own whether a member of the Board of Firearms Permit Examiners is a United States citizen, the Second Circuit stated on appeal that the basis of Kuck's challenge was not relevant so therefore it is not "worth noting." See Kuck, 600 F.3d at 165 ("The viability of Kuck's due process claim does not turn on the merits of his initial challenge; rather, it concerns whether he received the process he was due.").

entitled only to qualified immunity when functioning in an administrative or investigative capacity." Mangiafico v. Blumenthal, 471 F.3d 391, 396 (2d. Cir. 2006) (citations omitted). The Amended Complaint addresses the administrative and investigatory functions of the DPS, not proceedings before the Board. The DPS Defendants are no more entitled to absolute immunity than law enforcement officers performing their investigatory and administration functions outside of the courtroom.

IV. CONCLUSION

Based on the pleadings, the Plaintiff opposes the Defendants' motion to dismiss because the named parties are within the chain of causation that allowed the development of a backlog of individuals seeking appeal hearings before the Board. This backlog ultimately resulted in the fifteen (15) month wait period for Kuck to obtain his hearing. The denial of the due process right to a timely hearing (Count Two) cannot be separated from the denial of the right to bear arms (Count One) and the imposition of arbitrary barriers to the right to carry (Count Three). The DPS Defendants' application of an unconstitutional "suitability" standard and the arbitrary imposition of administrative barriers placed upon the exercise of the Second Amendment right to bear arms increase the numbers of those individuals seeking hearings which creates a backlog. The DPS Defendants' conduct was influenced and condoned by the conduct of the Board Defendants.

For all these reasons, the Plaintiff is entitled to proceed in discovery.

PLAINTIFFS
M. PETER KUCK, individually and on behalf of others similarly situated

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CERTIFICATION OF SERVICE

I HEREBY CERTIFY THAT on March 10, 2011, a copy of the foregoing Memorandum of Law in Opposition to Motion to Dismiss the Amended Complaint was filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Rachel M. Baird
Rachel M. Baird
Commissioner of the Superior Court

Kuck v. Danaher
Amended Complaint Analysis

		State/Thomas	DPS Defendants[1]	Danaher	Fox	Masek	Mattson	Karanda	Bastura	Mazzoccoli	Adams	Rell
Count One	2nd, 14th Suitability; Denial of Right to Bear Arms (¶¶205-221) Against DPS Defendants	¶¶108, 110	¶¶62(c),70, 104-106, 108,140	¶¶49,74, 78,113, 115	¶¶113, 114, 117	¶¶53-55	¶¶61, 62(c), 70,128, 188,194	¶¶188,194	¶¶40-42,50	¶¶95-96, 124,131,133, 136, 140,148,155, 160, 163-164, 176-177,194, 196-198	¶¶95-96,125, 131, 136, 140, 148, 153, 156, 160, 163-164, 176-177, 196-198	¶¶81-82
Count Two	2nd, 5th, 14th PDP; Denial of Timely Hearing (¶¶222-235) Against All Defendants	¶¶108, 110	¶¶62(c),70, 83-88, 104-106, 108, 140	¶¶49,74, 78,113, 115	¶¶113, 114, 117	¶¶53-55	¶¶61, 62(c), 70,128, 188,194	¶¶188,194	¶¶40-42,50	¶¶95-96, 124,131,133, 136, 140,148,155, 160, 163-164, 176-177,194, 196-198	¶¶95-96,125, 131, 136, 140, 148, 153, 156, 160, 163-164, 176-177, 196-198	¶¶81-82
Count Three	2nd, 5th, 14th SDP; Arbitrary Barriers to Right to Carry (¶¶236-245) Against All Defendants)	¶¶108, 110	¶¶62(c),70, 104-106, 108, 140	¶¶49,74, 78,113, 115	¶¶113, 114, 117	¶¶53-55	¶¶61, 62(c), 70,128, 188,194	¶¶188,194	¶¶40-42,50	¶¶95-96, 124,131,133, 136, 140,148,155, 160, 163-164, 176-177,194, 196-198	¶¶95-96,125, 131, 136, 140, 148, 153, 156, 160, 163-164, 176-177, 196-198	¶¶81-82
General		¶¶11	¶¶24	¶¶10,18	¶¶19	¶¶20	¶¶21	¶¶22	¶¶23,	¶¶33,35	¶¶25,	¶¶12-

[1] Includes the state of Connecticut (Commissioner Thomas), Danaher, Fox, Masek, Mattson, Karanda, and Bastura.

Appendix