
APPELLATE COURT
OF THE
STATE OF CONNECTICUT

A.C. 31142

EDWARD A. PERUTA

v.

CONNECTICUT STATE DEPARTMENT OF PUBLIC SAFETY, ET AL.

**BRIEF OF THE PLAINTIFF-APPELLANT
WITH APPENDIX**

*FOR THE PLAINTIFF-APPELLANT
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STATEMENT OF PRINCIPAL ISSUES ON APPEAL

- I. Does the United States Supreme Court case, McDonald v. City of Chicago, Illinois, ___ U.S. ___, 130 S.Ct. 3020 (2010), compel a judicial determination on constitutional grounds of the Action for Declaratory Judgment dismissed below for lack of on subject matter jurisdiction?
Br., Section 1(A)-(D) at 5-18
- II. Did the trial court err by dismissing the complaint for lack of subject matter jurisdiction based on a finding that Plaintiff had failed to exhaust his administrative remedies prior to seeking a Declaratory Judgment from the court?
Br., Section II(A)(B) and (D) at 18-24, 32-34
- III. Does the futility exception to the doctrine of exhaustion of remedies apply so that the trial court had subject matter jurisdiction to consider the Action for Declaratory Judgment?
Br., Section II(C), at 24-32.

STATEMENT OF FACTS AND NATURE OF PROCEEDINGS

I. NATURE OF PROCEEDINGS

The Plaintiff, Edward A. Peruta (“Peruta”), brought this action for declaratory judgment by way of complaint filed December 3, 2007, in the Judicial District of New Britain, seeking a judicial determination of his right to openly carry a pistol or revolver when in possession of a valid state permit and not on premises where carrying a pistol or revolver is lawfully prohibited by the premises owner or by law. (Compl. ¶ 1; R.) The trial court (Pittman, J.) ordered Peruta to provide written notice of the action by sending to all local and state police departments having jurisdiction in Connecticut and employing at least one police officer a copy of the complaint together with a cover letter with the proposed judgment as notice. (Notice, Schedule B Letter, App. at A1; R. ; App. at A2-A3; R.) The cover letter summarized the nature of the declarations sought in the complaint:

- (1) Whether a Connecticut resident has the right in Connecticut to carry a pistol or revolver openly, without concealing the pistol or revolver, in any location where carrying a pistol or revolver is not otherwise prohibited by the premises’ owner or by law.
- (2) Whether the Defendants and municipalities have lawful authority to confiscate pistol permits from Connecticut permit holders upon arrest or otherwise without notice of revocation pursuant to General Statutes § 29-32(b).
- (3) Whether the Defendants and municipalities stand in violation of the Fifth and Fourteenth Amendments to the United States Constitution, or condone such violations, by confiscation of a pistol permit upon the arrest of the Connecticut permit holder; by failing to afford proper return of a pistol permit to the rightful owner when submitted by the arresting agency; by relying solely on arrests of Connecticut pistol permit holders as justification for immediate revocation; and by revocation of a pistol permit without the mandatory investigation or finding of cause required by state statute.

Peruta, by his counsel, filed an affidavit of notice on September 15, 2008, confirming service upon all interested parties. (Notice and Aff., App. at A2-A5, Notice, Schedule A, App at A58-A61; R.)

The Defendants moved to dismiss claiming sovereign immunity, lack of a justiciable claim, and the availability of alternate procedures for redress which Peruta opposed. (R.) After the March 12, 2009, oral argument on the motion to dismiss, the trial court (Cohn, J.)¹ invited Peruta to supplement his opposition with emails, declaratory judgment requests, legislation, and legal argument to address the trial court's concern that Peruta had not exhausted his administrative remedies before the DPS pursuant to Connecticut General Statutes ("General Statutes"), §§ 4-175, 4-176. (03/12/2009 Hr'g Tr., App. at A6-A9) Peruta submitted an affidavit and thirty exhibits in response. (03/31/2009 Peruta Aff., App. at A10-A18) The trial court, finding that Peruta failed to comply with §§ 4-175, 4-176, dismissed the complaint and entered judgment for the Defendants on the grounds of subject matter jurisdiction. (Ruling, App. at A19-A21; R.)

Peruta filed a motion to reargue on the ground that the DPS failure to provide rules of practice for accepting and reviewing declaratory ruling requests constituted a waiver of the agency's jurisdiction to render declaratory rulings. (DPS Hr'g Regulations, A22-A33) The trial court denied Peruta's request for reargument. (Order, App. at A34; R.) Peruta filed a second motion to reargue the adequacy of inquiries submitted by Peruta on July 28, 2007, to the DPS toward exhausting his administrative remedies. (05/14/2009 Peruta Aff. ¶ 1 n.1, App. at A35-A37)² The trial court denied Peruta's second motion for reargument. (Order, App. at A38)

Peruta timely appealed and filed a motion for articulation pursuant to Practice Book § 66-5. (R.) He attached three exhibits to his motion for articulation. (06/28/2006 DPS

¹ References to the trial court hereinafter are to The Honorable Henry S. Cohn.

² Although the inquiries reference the date of July 28, 2006, as the submission date in the upper left corner of the document, the actual date of submission was July 28, 2007. (05/14/2009 Peruta Aff. ¶ 2 n. 1, App. at A35, A39-A40)

Inquiries, Articulation Mot. Ex. 1, App. at A39-A40; 06/02/2009 DPS Inquiries, Articulation Mot. Ex. 2, App. at A41-A42; 06/09/2009 DPS Letter, Articulation Mot. Ex. 3, App. at A43) The trial court ruled on Peruta's motion on July 9, 2009, articulating the case law relied upon in denying the adequacy of the requests submitted by Peruta on July 30, 2007, and finding that Exhibit 5 to Peruta's affidavit submitted to the DPS on July 28, 2007, did not constitute a request to the DPS for declaratory ruling consistent with the declaratory judgment sought. (03/31/2009 Peruta Aff., App. at A10-A18; DPS Inquiries, App. at A39-A40)

II. FACTS

Peruta possesses a permit issued by the state of Connecticut to carry pistols or revolvers ("state permit") pursuant to Chapter 529 of the General Statutes. Conn. Gen. Stat. § 29-28(b) (App. at A44-A45) (Compl. ¶ 3; R.) He travels throughout the state. (Compl. ¶ 4; R.) A person holding a state permit is not prohibited by state statute from carrying a pistol openly. (General Statutes § 29-35, App. at A46; 03/31/2009 Peruta Aff. Ex. 14, OLR Research Report 2008-R-0238, "Gun Permit Issues," A47-A51; 03/31/2009 Peruta Aff. Ex. 13, 02/24/2009 Letter from Comm. Danaher to Public Safety and Security Committee at 2, A52-A53; 03/31/2009 Peruta Aff. Ex. 12, Agency Legislative Proposal, A54-A56) The DPS and municipal law enforcement agencies in Connecticut prohibit, under threat of arrest, state permit holders from openly carrying a pistol. (Compl. ¶ 18; R.) When such an arrest occurs, the DPS revokes the holder's state permit based upon the arrest. (Compl. ¶ 21; R.) The right to keep and bear arms is a fundamental constitutional right. This action seeks a judgment to declare the rights of state permit holders to carry a pistol or revolver openly in Connecticut without threat of arrest.

ARGUMENT

I. INTRODUCTION

While this case was pending on appeal, the United States Supreme Court, in McDonald v. City of Chicago, Illinois, ___ U.S. ___, 130 S.Ct. 3020 (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. More than thirty months prior to McDonald, Peruta asked a state trial court to render a judgment declaring his right to openly carry a pistol in Connecticut. Although no law prohibited a person holding a state permit from openly carrying a pistol in Connecticut, Peruta faced arrest and revocation of his state permit were he to exercise that right.

This appeal asks whether the DPS is accountable for its refusal to adopt rules of practice guiding its acceptance and consideration of declaratory ruling requests as mandated by state statute. It asks why Peruta, who sought only a declaration that he would not be arrested and subjected to the loss of his property interest in holding a state permit for the mere transgression of exercising his right to keep and bear arms, openly, was expected to seek an administrative remedy from an agency that admitted to the state legislature the “ambiguity” of the statute at issue while at the same time acting in a prosecutorial role before the Board of Firearms Permit Examiners to revoke state permits from holders arrested for openly carrying.

The exceptional circumstances articulated by our supreme court in State v. Golding, 213 Conn. 233 (1989), merit this Appellate Court’s determination that McDonald has raised Peruta’s declaratory judgment action to a scale of fundamental constitutional rights. As argued in section II, below, Peruta met the administrative exhaustion requirement to the

extent made possible by an agency that has been allowed to operate above and outside the law without written rules of practice or regulations to hold it accountable. Whether or not the July 28, 2007, inquiries submitted by Peruta were deemed by the trial court to meet the (unwritten) standards of the DPS, seeking a declaration from the DPS was futile.

This appeal incorporates a facial challenge to the suitability requirement set forth in three separate statutes. It argues that General Statutes § 29-35 does not prohibit the open carry of a pistol and so, when an arrest is effected for open carry of a pistol, the only basis for revocation of the person's state permit is an allegation that the person is not suitable. A fundamental constitutional right cannot be conditioned upon the government's determination that a person is not suitable, absent any definition or defining characteristics.

For this reason, a declaratory judgment action that commenced on December 3, 2007, asking why Peruta was subject to arrest and loss of his state permit for openly carrying a pistol in Connecticut, has become, in light of McDonald, an action in which the answers to Peruta's inquiries rest on his claims that a construction of General Statutes § 29-35 or any other statute which assumes a prohibition on open carry and the incorporation of a suitability requirement into any consideration of Peruta's right to keep and bear arms are unconstitutional.

II. THE DECLARATORY JUDGMENT ACTION RAISES FACIAL CHALLENGE TO CONSTITUTIONALITY OF SUITABILITY REQUIREMENT IN STATE FIREARMS STATUTES

A. Standard of Review

1. "Exceptional Circumstances" for Facial Challenge

- i. McDonald v. City of Chicago, Illinois, ___ U.S. ___, 130 S.Ct. 3020 (2010)

The United States Supreme Court had not incorporated a right guaranteed under the first eight amendments to the United States Constitution for more than forty years when a decision issued on June 28, 2010, in McDonald v. City of Chicago, Illinois, 561 U.S. ___, 130 S.Ct. 3020, 2010 WL 2555188, at *2 (2010), holding the Second Amendment right to keep and bear arms “fully applicable to the States.”³ The Court of Appeals for the Second Circuit, as recently as January 29, 2009, denied the applicability of the Second Amendment to the States, despite the U.S. Supreme Court’s June 26, 2008, decision in District of Columbia v. Heller, 554 U.S. ___, 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, 2010 WL 2555188, at *1. 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

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.

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, ___ S.Ct. ___, 2010 WL 2571878 (2010). (App. at A57)

application of the Second Amendment right to keep and bear arms to the States. Id. at *9, *12.

The “right to keep and bear arms” is “among those fundamental rights necessary to our system of ordered liberty.” Id. at *20. 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.” Id. at *15. 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.”” Id. at *24, *27 (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.” Id. at *27.

ii. State v. Golding, 213 Conn. 233 (1989)

“[C]laims not raised in the trial court ‘can and will be considered’ on appeal in two ‘exceptional circumstances.’” State v. Golding, 213 Conn. 233, 238-39 (1989) (quoting State v. Evans, 165 Conn. 61, 70 (1963)). The first exceptional circumstance may arise, as in Golding, ““where the record adequately supports a claim that a litigant has clearly been deprived of a fundamental constitutional right *and* a fair trial.”” Id. at 239 (quoting Evans, 165 Conn. at 70) (original emphasis). The second exceptional circumstance arises ““where

a new constitutional right not readily foreseeable has arisen between the time of trial and appeal.” Id. at 239 n. 8.⁵

In State v. Evans, 165 Conn. 61 (1973), the defendant “raised for the first time two claims that his federal constitutional rights were violated in the proceedings in the trial court.” Id. at 66. The court identified “only two situations that may constitute ‘exceptional circumstances’ such that newly raised claims can and will be considered.” Id. at 70. Appellate consideration is warranted, in the first exceptional circumstance, “where a new constitutional right not readily foreseeable has arisen between the time of trial and appeal.” Id. “This exception is reasonable because a claim not raised is deemed waived, and a litigant should not be held to have waived an unknown right.” Id. (citing O'Connor v. Ohio, 385 U.S. 92, 87 S.Ct. 252, 17 L.Ed.2d 189 (1966)). “The second ‘exceptional circumstance’ may arise where the record adequately supports a claim that a litigant has clearly been deprived of a fundamental constitutional right and a fair trial.” Id.

In Golding, the court “articulate[d] guidelines designed to facilitate a less burdensome, more uniform application of the present Evans standard in future cases involving alleged constitutional violations that are raised for the first time on appeal.” Id. at 239-40. These guidelines condition review and determination of the constitutional claim on four necessary conditions: (1) An adequate record to review the alleged claim of error; (2) a claim of constitutional magnitude alleging the violation of a fundamental right; (3) a clearly

⁵ The second exceptional circumstance was not at issue in Golding. In Golding, the defendant appealed from convictions for larceny in the second degree and general assistance fraud. Our supreme court granted certification to review the claim, not asserted at trial, that the “amount involved in the fraud was an essential element of the offense” implicating the defendant’s right to a jury instruction under the state and federal constitutions. Id. at 235. Relying upon Evans, the court found error in the appellate court’s refusal to “review the defendant’s claim.” Id. at 238.

existing alleged constitutional violation and a defendant clearly deprived of a fair trial; and (4) if subject to harmless error analysis, a failure by the state to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. Golding, 213 Conn. at 239-40.

The two exceptional circumstances in Golding warranting appellate review of claims not raised in the trial court apply to civil actions, Corcoran v. Taylor, 65 Conn.App. 340, 349 (2001), (citing Budlong v. Nadeau, 30 Conn.App. 61, 64, cert. denied, 225 Conn. 909, cert. denied, 510 U.S. 814, 114 S.Ct. 62, 126 L.Ed.2d 31 (1993)), and to appeals from proceedings other than trials. State v. Jacobs, 70 Conn.App. 488, 505 n. 17, rev'd on other grounds, 265 Conn. 396 (2003) (citations omitted).

2. A Facial Challenge is the Duty of the Judiciary to Determine

In State Management Ass'n of Connecticut, Inc. v. O'Neill, 40 Conn.Supp. 381, 384, 512 A.2d 240 (Jud. Dist. of Hartford) (Satter, J.) (May 20, 1986), the state defendants moved to dismiss a declaratory judgment action on the grounds that “the plaintiffs have not exhausted their administrative remedy by first seeking a declaratory ruling from the board under § 4-176 of the Uniform Administrative Procedure Act.”⁶ The trial court recognized an exception to the exhaustion doctrine for claims raising the “the constitutionality of a statute governing agency action.” Id. A facial challenge to the constitutionality of a state statute “is the duty of the judiciary to determine.” Id. at 385 (quoting Caldor, Inc. v. Thornton, 191

⁶ In State Management Ass'n, plaintiff management level state employees challenged the constitutionality of the statutory definition of “managerial employee” as set forth in General Statutes § 5-270(b) and (g). The plaintiffs sought a judgment declaring subsections (b) and (g) unconstitutional and an injunction prohibiting the state from taking any action based on the authority of subsection (g) and subsection (b), to the extent subsection (b) incorporated subsection (g).

Conn. 336, 344, 464 A.2d 785 (1983), aff'd sub nom. Estate of Caldor v. Thornton, 472 U.S. 703, 105 S.Ct. 2914, 86 L.Ed.2d 557 (1985)). “The legislature cannot confer upon an administrative agency the power to adjudicate facial unconstitutionality without doing violence to the separation of powers doctrine.” Id. (quoting Caldor, 191 Conn. at 344). The trial court denied defendants’ motion to dismiss in State Management Ass’n for failure to exhaust administrative remedies as without merit.

The trial court then analyzed General Statutes § 5-270(b) and (g) according to the constitutional doctrines of equal protection and due process under the Fourteenth Amendment. Regarding the Equal Protection Clause, the court found that “the classification of managerial employees under § 5-270(g) and the denial to them of collective bargaining rights under the CBSEA [Collective Bargaining for State Employees Act] bears a rational relationship to a legitimate state end and thus survives challenge on equal protection grounds.” Id. at 390. In addressing the Due Process Clause, the court reviewed whether the statute “violates the due process clause of the fourteenth amendment because it is so vague and ambiguous as to render it unenforceable and grossly susceptible to subjective and inconsistent interpretations and applications.” Id. The court then found that the “statute here under attack successfully repels a vagueness challenge because it distinguishes between supervisory and managerial employees with adequate clarity for the laws to be fairly administered.” Id. at 393. On these bases, the trial court denied the plaintiffs’ claim for a declaratory judgment.

On appeal, our supreme court framed the dispositive issue as:

[W]hether General Statutes § 5-270(b) and (g) are unconstitutional because they deny to those state employees who are designated as “managerial employees” or “managers” the right to union representation and the right to bargain

collectively with the state concerning the terms and conditions of their employment.

State Management Ass'n of Connecticut v. O'Neill, 204 Conn. 746, 747 (1987). The supreme court considered the dispositive issue, affirmed the trial court's opinion, and never addressed or found a lack of subject matter jurisdiction for failure to exhaust administrative remedies.

B. The Right to Carry a Pistol Conditioned upon Suitability is Unconstitutional

1. Suitability Requirement in General Statutes § 29-28(b) Renders the Statute Unconstitutional On its Face

General Statutes § 29-28(b) lists ten factors reviewed by state and local agencies for determination of a person's eligibility to obtain or hold a temporary or state permit to carry pistols or revolvers. 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.

To obtain a state permit, a person must make application for a temporary state permit to the chief of police, warden, or selectman where the person's residence or business is located within Connecticut. More than one-hundred state and local law enforcement agencies have jurisdiction in Connecticut. In providing notice to all interested parties, Peruta sent a copy of the complaint and cover letter to one-hundred and one law enforcement agencies. (Schedule A to Proposed Order, App. at A2-A5, App. at A58-A61) Each of these one-hundred and one authorities considers applications for temporary state

permits in the absence of statutory definition, guidance, or coordination for determining who is a suitable person and who is not.

2. Suitability Requirement Incorporated Into General Statutes § 29-35 Renders the Statute Unconstitutional On its Face

General Statutes § 29-35 provides, in relevant part:

No person shall carry any pistol or revolver upon his or her person, except when such person is within the dwelling house or place of business of such person, without a permit to carry the same issued as provided in section 29-28(b).

A person, otherwise eligible to hold a state permit in Connecticut but having been found not to be a suitable person, is subject to arrest when he or she attempts to exercise the right to bear a pistol or revolver in the same manner and to the same extent as any other eligible person who happened to be found suitable and holds a state permit. In Connecticut, a person's fundamental constitutional right to bear arms in self-defense is contingent upon holding a state permit that requires the person to be found "suitable" by one of the more than one-hundred local authorities exercising unbridled discretion absent any parameters for making such a determination.

3. Suitability Requirement Incorporated into General Statutes § 29-32b Renders the Statute Granting Authority to the Board of Firearms Permit Examiners Unconstitutional On its Face

Any person aggrieved by the local issuing authority's denial of a temporary state permit may pursue a remedy by appeal to the Board of Firearms Permit Examiners ("Board"). Conn. Gen. Stat. § 29-32b(b) (App. at A62-A63). The Board reviews actions taken by local issuing authorities to deny temporary state permits and by the DPS to revoke or deny renewal of state permits. The Board orders the issuance, renewal, or

reinstatement of the state permit unless it finds that the denial or revocation would be “for just and proper cause.” Conn. Gen. Stat. § 29-32b(b).

If a person is ineligible under any one of the ten factors enumerated in section 29-28(b), the Board may not order issuance, renewal, or reinstatement of a state permit to a person because the person is statutorily ineligible. Therefore, the Board only exercises its discretion in appeals from denials and revocations based on a finding by the local issuing authority or the DPS that a person is not suitable. In Connecticut, a person’s fundamental constitutional right to bear arms in self-defense is contingent upon the remedy of appeal to a Board which exercises its discretion absent any parameters for making such a determination. The court then reviews the Board’s determination, if appeal is taken, but “shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.” Conn. Gen. Stat. § 4-183(j). The court must abide by determinations of suitability made by more than one-hundred issuing authorities and a Board which all have complete, unbridled, apparently unreviewable discretion to deny a person the right to keep and bear arms.

C. An Arrest for Open Carry of a Pistol and the Revocation of a State Permit Based Upon Such an Arrest Violate Second Amendment

1. General Statutes § 29-35 does not Prohibit the Open Carry of a Pistol

The plain language of General Statutes § 29-35 does not prohibit the open carry of a pistol or revolver any more than the statute prohibits the concealed carry of a pistol or revolver. Conn. Gen. Stat. §29-35. The issue of open carry versus concealed carry was, prior to McDonald, a matter of legislative choice that could not be presumed from statutory

silence.⁷ In some states, open carry is the sole lawful means of carrying a pistol or revolver; in other states, concealed carry is the sole lawful means of carrying a pistol or revolver. See text at note 2, supra.

When it is not implicit through stare decisis, tradition, or collective understanding of right versus wrong, the argument against presuming that the statutory silence of General Statutes § 29-35 provides notice that carrying a pistol or revolver openly constitutes criminal conduct is even more compelling, if the principle that due process mandates notice of criminal conduct can be made any more compelling than it is already. See McDonald, 130 S.Ct. at 1350 (“Unless considerations of stare decisis counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States.”). When a criminal statute prohibits open carry or concealed carry, it states so. For example:

No person shall within the District of Columbia carry either openly or concealed on his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed.

Tuten v. United States, 460 U.S. 660, 661, 103 S.Ct. 1412, 1413, 75 L.Ed.2d 359 (1983).

The plain language of General Statutes § 29-35⁸ provides notice that carrying a pistol or revolver on one’s person in Connecticut requires a state permit.⁹

⁷ Peruta argues, post-McDonald, that a state legislature no longer has the choice to prohibit open carry. See Heller, 128 S.Ct. at 2808-2809 (In Nunn v. State, 1 Ga. 243, 251 (1846), “the Georgia Supreme Court construed the Second Amendment as protecting the ‘natural right of self-defense’ and therefore struck down a ban on carrying pistols openly” ... “(even though it upheld a prohibition on carrying concealed weapons).”; See Heller, 128 S.Ct. at 2808-2809 (In State v. Chandler, 5 La. Ann. 489, 490 (1850) “the Louisiana Supreme Court held citizens had a right to carry arms openly.”)

In construing a right related to a criminal statute the rule of strict construction applies. General Statutes § 29-35 subjects an offender to Class D felony penalties. Conn. Gen. Stat. § 29-35 (App. at A46) “The requirement that criminal statutes shall be strictly construed is predicated on two fundamental principles. First, the public is entitled to fair notice of what the law forbids. Second, legislatures and not courts are responsible for defining criminal activity.” State v. Cote, 286 Conn. 603, 616 (2008) (quoting State v. Skakel, 276 Conn. 633, 674-75, cert. denied, 549 U.S.1030 (2006)). If the courts are not responsible for defining criminal activity then an agency, such as the DPS, cannot be said to have that responsibility either.

In a letter to Senator Andrea Stillman and Representative Stephen Dargan, Co-Chairmen of the Public Safety and Security Committee, the Commissioner of the Department of Public Safety John A. Danaher III (“Comm. Danaher”) supported the DPS proposal for amendment to General Statutes § 29-35 as follows:

Section 8 of the bill [HB 6457] provides clarification and removes any ambiguity in the statutes regarding the carrying of pistols. It is not currently specifically stated in the statutes that a person carrying a pistol on his person shall conceal it.

(App. at A52-A53) In his affidavit submitted in support of his opposition to dismissal, Peruta represented that local law enforcement and the DPS enforce a *de facto* law against state

⁸ The Office of Legislative Research for the Connecticut General Assembly issued a report dated April 10, 2008, confirming that it is not illegal to openly carry a gun in Connecticut. OLR Research Report, Connecticut General Assembly, April 10, 2008 (App. at A47-A51) The response to the stated inquiry, “Is there any statute prescribing that firearms must be carried concealed?” was “no.” (App. at A47-A51) Specifically, the report answered: “The answer is no. The law does not address this issue. But, with limited exceptions, it is illegal to carry a handgun, whether concealed or openly, without a permit, except in one’s home or place of business (CGS § 29-35(a)).” Gun Related Issues, OLR 2008-R-0238, by Veronica Rose, Principal Analyst. (App. at A47-A51)

⁹ General Statutes § 29-35 provides exceptions for certain law enforcement personnel and under certain conditions unrelated to the issue of whether the statute provides notice that open carry is unlawful. (App. at 46)

permit holders who openly carry a pistol by charging such persons with the crime of breach of peace in the second degree for causing inconvenience, annoyance or alarm, or recklessly creating a risk thereof, for persons who happen to see the pistol. See § II(C)(3)(iii), infra.; see Conn. Gen. Stat. § 53a-181(App. at 75); (03/31/2009 Peruta Aff. ¶¶ 15-22, Ex. 15, App. at A67-A68)

A lawful act cannot become unlawful upon the whim or preference of a person who finds the lawful act inconvenient, annoying, or alarming. When tobacco smoke caused patrons of restaurants and other establishments inconvenience, annoyance, or alarm, law enforcement did not arrest the smokers. The legislature changed the laws. The lawful practice of not wearing a helmet while operating a motorcycle in Connecticut may cause inconvenience, annoyance, or alarm but law enforcement does not arrest the operators. The legislature has not yet changed this law. The practice of arresting a pedestrian who happens to be in a neighborhood comprised of residents not sharing the same skin color as the pedestrian, even though the residents may claim inconvenience, annoyance or alarm at the presence of the pedestrian in their neighborhood, is a violation of the pedestrian's civil rights. Cf. Exhibit 15 to Affidavit of Edward A. Peruta (App. at A67-A68):

There are instances where the open carry of a firearm may lead to others being inconvenienced, annoyed or alarmed by the presence of an openly carried firearm. We believe that the firearm being concealed will allow the permit holder to carry a firearm but still assure the other members of the public from being exposed to the firearm which they may not be comfortable around.

Email Correspondence From DPS Special Licensing and Firearms Unit (SLFU) members Detective Barbara Mattson and Detective Thomas Karanda, dated July 7, 2008 (App. at A67-A68)

2. A Revocation Based upon an Arrest for Open Carry of a Pistol is Premised Upon a Finding that the Person is not Suitable

When a person holding a state permit is arrested for the open carry of a pistol based on a report that the sight of the pistol being openly carried has caused inconvenience, annoyance, or alarm, the arrest is unlawful. A revocation based on such an arrest, must allege unsuitability as grounds for revocation because openly carrying a pistol and arrest for breach of the peace are not included in the list of ten factors that would render a person ineligible for a state permit. Conn. Gen. Stat. § 29-28(b).

D. The Unconstitutionality of General Statutes §§ 29-28, 29-32b, 29-35 is Dispositive of the Declaratory Judgment Action

The unconstitutional construction of General Statutes § 29-35¹⁰ or § 53a-181 or any other state statute that would subject a person holding a state permit to arrest based on a

¹⁰ Peruta has not argued that General Statutes § 29-35 is vague as it pertains to the lawfulness of open carry versus concealed carry. Contrary to the position taken by Comm. Danaher, Peruta contends that the statute is not “ambiguous.” (App. at A52-A53) But, even if it were “ambiguous,” enforcement would be unconstitutional as such an application would be void for vagueness. See State v. DeJesus, 288 Conn. 418 (2008). In DeJesus, our supreme court affirmed the defendant’s entitlement to a new trial to cure an inadequate instruction to the jury on the element of intent. In the trial below, a jury convicted DeJesus of two counts of sexual assault and two counts of kidnapping in the first degree. DeJesus appealed, claiming that the kidnapping statute was “unconstitutionally vague” as applied to his conduct. Conn. Gen. Stat. § 53a-92(a)(2)(A). The supreme court concluded that the principles articulated in State v. Salamon, 287 Conn. 509, 542 (2008), determining that “the crime of kidnapping requires an intent ‘to prevent the victim’s liberation for a longer period of time or to a greater degree than that which is necessary to commit [an underlying] crime’” governed DeJesus’ appeal from his kidnapping conviction and warranted reversal. The Salamon holding reversed a “long-standing interpretation of the kidnapping statutes to encompass even restraints that merely were incidental to the commission of another crime, such as assault or robbery.” In DeJesus, the trial court did not instruct the jury on the necessary element of intent “to prevent the victim’s liberation for a longer period of time or to a greater degree than that which is necessary to commit [the underlying] crime.” Therefore, according to the supreme court, DeJesus may have been convicted of conduct which “does not violate the kidnapping statute.” The rule announced in Salamon on the element of intent in the kidnapping statute applied to DeJesus because DeJesus “was pending” when the court “articulated a new construction of the kidnapping statutes in

report that the sight of the openly carried pistol has caused inconvenience, annoyance, or alarm mandates that a court declare the following:

A Connecticut resident has the right in Connecticut to carry a pistol or revolver openly, without concealing the pistol or revolver, in any location where carrying a pistol or revolver is not otherwise prohibited by the premises' owner or by law.

The vagueness of the suitability requirement mandates that a court declare denial of issuance and renewal or revocation founded in a lack of suitability, whether the lack of suitability is found by the local issuing authority, the DPS, the Board of Firearms Permit Examiners, or a court, unconstitutional as it applies to persons seeking or holding state permits in general, including state permit holders deemed unsuitable based on the open carry of a pistol where carrying a pistol or revolver is not prohibited, whether or not an arrest results.

II. PERUTA MET, TO THE EXTENT POSSIBLE, THE ADMINISTRATIVE EXHAUSTION REQUIREMENT FOR SEEKING A DECLARATORY JUDGMENT

A. Standard of Review

The trial court dismissed the complaint on the basis of subject matter jurisdiction.

(Ruling, App. at A19-A21) The ruling found and then concluded as follows:

Finding #1: "Failure to comply with §§ 4-175 and 4-176 is grounds for dismissal on the basis of subject matter jurisdiction. (App. at 20)

Finding #2: The DPS "has a central role to play in consideration of whether Connecticut permits "open" display of a pistol or revolver." (App. at A20)

Salamon. Id. at 54 n. 9 (citing Marone v. Waterbury, 244 Conn. 1, 10-11 n. 10 (1988) ("Implicit in our decisions that have discussed the retroactive application of judgments is the presumption that retroactivity is limited to pending cases.")). The supreme court decisions in Salamon and DeJesus issued on July 1, 2008, and August 19, 2008, respectively.

Finding #3: Peruta did not “submit any request to the department.” (App. at A20)

Conclusion: “Since the plaintiff has not satisfied §§ 4-175 and 4-176, the declaratory judgment action must be dismissed.” (App. at A20)

The appellate court’s review of the dismissal is plenary. See Pinchbeck v. Department of Public Health, 65 Conn.App. 201, 205 (2001) (citing Lawrence Brunoli, Inc. v. Branford, 247 Conn. 407, 410 (1999)) (“Because a determination regarding a trial court’s subject matter jurisdiction presents a question of law, our review of the plaintiff’s claim is plenary.”).

B. The DPS Waived its Jurisdiction as an Agency to Render Declaratory Rulings

1. First Motion to the Trial Court for Reargument

Following the trial court’s dismissal of the declaratory judgment action, Peruta moved for reargument based on the denial of due process implicit in an expectation that a person submit to the DPS a request for a declaratory ruling when the DPS expressly, by its conduct, refuses to publish rules of practice or procedures, in contravention of the Uniform Administrative Procedures Act (UAPA). Conn. Gen. Stat. §§ 4-166 through 4-189. (General Statutes § 4-167, App. at A64)

2. Statutory Mandate for Agency Adoption of Regulatory Rules of Practice

Section 4-167 of the UAPA mandates that a state agency adopt rules of practice, by regulation, setting forth the nature and requirements of all formal and informal procedures brought before that state agency. A request for a declaratory ruling is a formal procedure. Rules of practice for all formal and informal procedures shall conform to the UAPA. Conn. Gen. Stat. § 4-167(a)(2). The UAPA requires, among other things, public inspection, notice, opportunity for comment, and publication of proposed and final regulations. Conn. Gen. Stat. §§ 4-167 through 4-173. See Cannata v. Department of Environmental

Protection, 239 Conn. 124, 136 (1996) (“We note that under General Statutes § 4-176(b), each agency is directed to adopt regulations providing for ‘the form and content of petitions for declaratory rulings.’”).

The DPS provides for procedures, in sections 29-2-1 through 29-2-10 of the Regulations of Connecticut State Agencies, applicable “to all compliance meetings and contested cases held by the Department of Public Safety, except those hearings held under the provisions of other regulations of the Department of Public Safety.” Conn. Agencies Regs. § 29-2-1(a) (App. at A22-A33) A “contested case” is a proceeding that “does not include proceedings on a petition for a declaratory ruling under section 4-176” Conn. Gen. Stat. § 4-166 (2). A request for declaratory ruling is not a compliance meeting. The DPS does not provide rules of practice for filing requests for declaratory rulings.

In Patten v. Spada, 35 Conn.L.Rptr. 518, 2003 WL 22245469 (Conn.Super. Sept. 22, 2003) (Jud. Dist. of Litchfield) (Pickard, J.) (unpublished case) (App. at A65-A66),¹¹ the court rejected Patten’s argument that the failure of the DPS to issue regulations providing for rules of practice in requesting declaratory rulings foreclosed Patten from seeking a declaratory ruling from the DPS. An affidavit from an attorney in the DPS Legal Affairs Unit persuaded the court that “any interested party may file such a petition and that the defendant [DPS] will consider it.” Id. at *1. The court dismissed the case for failure to exhaust administrative remedies. More than seven years later, the DPS still has not adopted regulations setting forth the rules of practice for filing requests for declaratory rulings. The passage of time, the Patten decision, and the deficiency of action on the part of the DPS in complying with the UAPA condone unwritten rules of practice for considering

¹¹ The Patten decision was not appealed.

requests for declaratory rulings without the safeguards intended by our state legislature that regulatory mandates fulfill.

The unlawfulness of the DPS consideration of requests for declaratory rulings is demonstrated in the evasion of appellate review made possible by the use of unwritten rules of practice rather than written rules of practice subject to notice, opportunity for commentary, and publication envisioned by our state legislature in enacting the UAPA.

For example:

- In reviewing an appeal from an agency, a court considers whether the agency ruling was “made upon unlawful procedure.” Conn. Gen. Stat. § 4-183(j)(3). The DPS rejection of written rules of practice denies an appellant a statutory cause for appeal and forecloses a court from reviewing a DPS ruling for violation of its rules of practice.
- In reviewing an appeal from an agency, a court considers whether the agency ruling was “arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” Conn. Gen. Stat. § 4-183(j)(6). The DPS rejection of written rules of practice allows the agency to treat some applicants differently from other applicants. In the absence of written rules of practice it is impossible for an appellant, however, to prove arbitrariness or capriciousness without a complete review of the facts, circumstances, and rulings in every request for declaratory ruling brought to the DPS. The UAPA’s mandate for the adoption of regulatory rules of practice for each agency rejects placing this burden of proof on an appellant.

3. The Rules of Practice before an Agency

Section 4-176 mandates that each agency:

[S]hall adopt regulations, in accordance with the provisions of this chapter, that provide for (1) the form and content of petitions for declaratory rulings, (2) the filing procedure for such petitions and (3) the procedural rights of persons with respect to the petitions.

Conn. Gen. Stat. § 4-176(b). An agency regulation cannot be enforced against a person or party nor may it be invoked unless it has been made available for notice and publication.

Conn. Gen. Stat. § 4-167(b). The DPS has not made notice or publication of any

regulations regarding its consideration of requests for declaratory rulings. The dependence of an agency's ability to consider requests for declaratory rulings on its promulgation of regulations is illustrated by 4-167(d). If an agency finds:

[A] timely petition to become a party or to intervene has been filed according to the regulations adopted under subsection (b) of this section, the agency: (1) May grant a person status as a party if the agency finds that the petition states facts demonstrating that the petitioner's legal rights, duties or privileges shall be specifically affected by the agency proceeding; and (2) may grant a person status as an intervenor if the agency finds that the petition states facts demonstrating that the petitioner's participation is in the interests of justice and will not impair the orderly conduct of the proceedings. The agency may define an intervenor's participation in the manner set forth in subsection (d) of section 4-177a.

Conn. Gen. Stat. § 4-167(d) (App. at 64) If a person submitted a request for declaratory ruling to the DPS¹² and other persons or parties wished to intervene, according to the UAPA, the DPS would be required to make a finding that a timely petition was filed according to agency regulations. In the absence of regulations, the DPS can never grant a petition to intervene for party or intervenor status because a finding based on the consideration of non-existent regulations is the epitome of arbitrariness. Therefore, if a person is compelled to submit a request for declaratory ruling to the DPS then persons or parties wishing to intervene will be denied that right in contravention of state statute.

By not adopting regulations as mandated by the UAPA, the DPS has denied Peruta a meaningful opportunity to submit requests for declaratory rulings in at least four respects:

First, a person cannot know the form and content required by the DPS for consideration of a request for declaratory ruling. Conn. Gen. Stat. § 4-176(b)(1).

¹² There is no guidance regarding how such a request would be filed and with whom but for the limited purposes of this argument, Peruta assumes that the DPS Commissioner would not reject service although it is clear that he could in the absence of guiding regulations.

Second, a person cannot know the filing procedure required by the DPS for consideration of a request for declaratory ruling. Conn. Gen. Stat. § 4-176(b)(2).

Third, a person cannot know his or her procedural rights in the DPS consideration of a request for declaratory ruling. Conn. Gen. Stat. § 4-176(b)(3).

Finally, even if a request for declaratory ruling could be filed in the absence of knowing the form and content required by the DPS, in the absence of knowing the filing procedure required by the DPS, and in the absence of knowing rights attached to such filing before the DPS, the DPS could not lawfully grant party or intervenor status as the DPS jurisdiction to grant party or intervenor status is dependent on agency regulations.

Peruta could not submit a request for a declaratory ruling to the DPS in the absence of regulations adopting rules of practice. The DPS consideration of a request for declaratory ruling in the absence of rules of practice is the definition of arbitrariness and capriciousness characterized by an abuse of discretion or unwarranted exercise of discretion. An agency cannot circumvent the requirement that its rules of practice be subject to inspection of publication by not adopting regulations.

4. The DPS Unilateral and Unlawful Refutation of the Statutory Mandate “Shall”

The DPS conduct, in ignoring the regulatory mandates of the UAPA, renders its agency above or outside the law without jurisdiction to consider UAPA requests for declaratory rulings. The trial court’s decision in Patten, which was never appealed, condoned the DPS circumvention of the statutory mandate to adopt regulations and the agency’s preference for consideration of requests for declaratory rulings according to unwritten and unpublished rules of practice. Peruta’s motion for reargument asked the trial court to deny the DPS the unilateral authority to reject the mandatory nature of the

legislature's use of the term "shall" in the first sentence of section 4-167 by finding that Peruta had exhausted his administrative remedies before the Board of Firearms Permit Examiners, the sole agency with jurisdiction over all the state permit decisions made by each and every state and local law enforcement agency.

5. The Trial Court's Denial of First Motion for Reargument

The trial court, citing only Patten, denied Peruta's motion for reargument. (Order, App. at A34)

C. The Futility of the July 28, 2007, Request to the DPS for Declaratory Ruling

1. Second Motion to the Trial Court for Reargument

Following the trial court's reliance on Patten in denying the first motion for reargument, Peruta submitted a second request to be heard further on the dismissal and offered in support:

First, Peruta did submit a declaratory judgment request addressing the validity of any regulation, or the applicability to specified circumstances of a provision of the general statutes, a regulation, or a final decision on a matter within the jurisdiction of the DPS on July 28, 2007. See Ex. 5 to the Affidavit of Edward A. Peruta dated March 31, 2009 a/ka Exhibit 1 to Motion for Articulation (App. at A10-A18, A39-A40); Second Affidavit of Edward A. Peruta (App. at A35-37)

Second, since the DPS did not have rules of practice, by regulation, which set forth the nature and requirements for the filing and consideration of requests for declaratory rulings, Peruta's July 28, 2007, request met the administrative exhaustion requirements for purposes of filing the declaratory judgment action.

2. Inquiries to the Board and to the DPS

In Exhibit 5 to his Affidavit submitted in support of his motion in opposition to dismissal, Peruta directed nine inquiries to the Board and to the DPS. (App. at A39-A40) Of these nine inquiries, seven addressed whether the act of openly carrying a pistol or revolver when in possession of a valid state permit, on premises where carrying a pistol or revolver is not otherwise lawfully prohibited by the premises owner or by law, violated any state criminal law. Peruta submitted these same inquiries through a state representative to the Office of Legislative Research which resulted in a report entitled “Gun Permit Issues.” (App. at A47-A51) The report concluded that the concealment of firearms is not required by state statute. During this time period, Peruta obtained an email transmitted by the DPS Special Licensing and Firearms Unit to a private citizen indicating that Connecticut “is not an open carry state.” (03/31/2009 Peruta Aff. Ex. 15, Email Correspondence, A67-A68) In other emails requesting information about the “open carry” status of Connecticut, the DPS referred one requester to a “family lawyer” and another requester was told that the DPS did not release information about statutes relevant to its position on “open carry.” (03/31/2009 Peruta Aff. Ex. 16, Email Correspondence, A69-A70) Finally, the DPS, during the 2009 legislative session, proposed an amendment to General Statutes § 29-35 that would have mandated concealment. (03/31/2009 Peruta Aff. Ex. 12, Agency Proposal, A54-A56) In a letter attached to the proposed amendment, Comm. Danaher represented that an amendment mandating concealed carry would clarify and remove “any ambiguity in the statutes regarding the carrying of pistols.”¹³ (03/31/2009 Peruta Aff. Ex. 13, Letter from Comm. Danaher, A52-A53)

¹³ The amendment was not adopted.

3. Futility Exception to Exhaustion of Administrative Remedies

i. Standard for Application of Futility Exception

“One of the limited exceptions to the exhaustion rule arises when recourse to the administrative remedy would be demonstrably futile or inadequate It is well established that [a]n administrative remedy is futile or inadequate if the agency is without authority to grant the requested relief It is futile to seek a remedy only when such action could not result in a favorable decision and invariably would result in further judicial proceedings.” Gerardi v. City of Bridgeport, 99 Conn.App. 315, 320-321 (2007) (quoting Nieman v. Yale Univ., 270 Conn. 244, 258-59 (2004)). “It is well established that [a]n administrative remedy is futile or inadequate if the agency is without authority to grant the requested relief.” Nieman, 270 Conn. at 259. “An action is futile when such action could not result in a favorable decision and invariably would result in further judicial proceedings. The guiding principle in determining futility is that the law does not require the doing of a useless thing.” Breiner v. State Dental Com'n, 57 Conn.App. 700, 705-706 (2000).

ii. The DPS Lacks the Authority to Grant the Relief Requested

In their motion filed on February 1, 2008, the Defendants moved to strike the complaint, in its entirety, “on the basis that the plaintiff has failed to provide notice of his declaratory judgment to all interested parties.” (R.) The court issued an Order on June 17, 2008, finding that the “other entities entitled to notice of this action are all municipalities in Connecticut that employ one or more police officers.” (R.) These entities are interested parties because they employ sworn peace officers with the power to arrest individuals for violations of state criminal laws. In moving to strike Peruta’s complaint, the Defendants conceded that the DPS is not the sole law enforcement agency in Connecticut having the

authority to arrest individuals for violations of state criminal laws. Peruta alleged that he “travels throughout the state of Connecticut.” (Compl. ¶ 4, R.) These travels include areas within the jurisdiction of the municipalities served by the entities provided notice of the instant action pursuant to the June 17, 2008, Order. (Notice, App. at A2-A5, A58-A61) A declaratory judgment from the DPS would require additional litigation before Peruta was informed of his right to “open carry” while traveling throughout Connecticut.

iii. The DPS Inadequacy and Bias Prevent it from Granting the Relief Requested

The DPS admits its inadequacy to grant Peruta the relief requested in its representations to the state legislature that General Statutes § 29-35 is ambiguous. (A52-A53, A54-A56) The DPS has proposed legislation on at least two occasions to amend General Statutes § 29-35, which failed. (03/31/2009 Peruta Aff. ¶¶ 9, 10, 28, Exs. 12, 13, 28, 29, App. at A10-A18, A52-A53, A54-A56, A71, A72-A74) Despite the state legislature’s rejection of the DPS proposed amendment to General Statutes § 29-35, the DPS SLFU continued to inform the general public that “[t]he issue remains that this is not an open carry state.” (03/31/2009 Peruta Aff. ¶ 12, Ex. 15, A67-A68) In declaring that Connecticut is not an open carry state, the DPS SLFU incorporated the language from the criminal offense of breach of peace in the second degree by stating:

There are instances where the open carry of a firearm may lead to others being inconvenienced, annoyed or alarmed by the presence of an openly carried firearm. We believe that the firearm being concealed will allow the permit holder to carry a firearm but still assure the other members of the public from being exposed to the firearm which they may not be comfortable around.

See Conn. Gen. Stat. § 53a-181(App. at 75); (03/31/2009 Peruta Aff. ¶ 12, Ex. 15, App. at A67-A68)

In Santana v. City of Hartford, 94 Conn.App. 445, 462 (Conn.App. 2006), the plaintiff, a former City of Hartford police officer sought reinstatement following his acquittal of criminal charges. The City of Hartford moved to dismiss for the plaintiff's failure to exhaust his remedies under the collective bargaining agreement (CBA). The CBA provided for a hearing before the State Board of Mediation and Arbitration (SBMA) and limited the jurisdiction of the SBMA to decide the express terms of the CBA. The CBA was silent regarding "whether an administrative proceeding may be completed after the acquittal of criminal charges." Santana, 94 Conn.App. at 320. Therefore, according to the terms of the CBA, "[t]he state board would not have been able to provide the plaintiff the relief sought, namely, interpreting the collective bargaining agreement in the absence of any definitive language." Id. The court found subject matter jurisdiction based on the futility exception to the administrative remedy exhaustion requirement:

There are no express terms in the collective bargaining agreement regarding this issue, and therefore the state board lacked the ability to provide the plaintiff with the relief requested. In other words, the plaintiff could not obtain a favorable decision, and further judicial proceedings were necessary. We conclude, therefore, that it would have been futile for the parties to exhaust the grievance proceedings as set forth in the collective bargaining agreement and that this issue was within the subject matter jurisdiction of the court.

Id. at 320-21. In admitting that General Statutes § 29-35 is ambiguous, the DPS is in no different a position than the SBMA in the Santana case. In Santana, the CBA did not provide "express terms" regarding the issue. According to the DPS, the language of General Statutes § 29-35 is ambiguous. Therefore, it would have been futile for Peruta to request a declaratory judgment from an agency that has declared the statute identified for interpretation as ambiguous.

In addition to admissions of inadequacy to rule on the applicability of the circumstances of “open carry” versus “concealed carry” within the provisions of General Statutes §§ 29-35 and 53a-181, the DPS has admitted that it is a party to firearms issues that are presented to the Board through the appeal process. See Breiner v. State Dental Com'n, 57 Conn.App. 700, 705-706 (2000) (“Agency bias is a ground for meeting the ‘futility requirement.’ Absent countervailing proof, members of administrative bodies acting in an adjudicative capacity are presumed to be unbiased.”) In arguing to a federal court in support of a motion to dismiss on the grounds of absolute immunity and discussing the role of the DPS SLFU before the Board, the DPS represented:

Just as a prosecutor is absolutely immune from § 1983 liability for initiating a prosecution and presenting the State’s case, the various members of the SLFU unit at the DPS, all who initiate and present the State’s case, are also absolutely immune from § 1983 liability.

(03/31/2009 Peruta Aff., Ex. 30 at 2, Defs.’ Mem. of Law in Goldberg v. Danaher, 2008 WL 2813094 (unpublished case) (App. at 76-77), vacated and remanded Goldberg v. Danaher, 599 F.3d 181 (2d Cir. 2010) (App. at A78-A80) The DPS position that it fills a prosecutorial role before the Board in defending appeals is “countervailing proof” that the DPS cannot act in an unbiased adjudicative capacity on the same issues on which it takes a position in a prosecutorial role.¹⁴ The complaint alleges that a state permit holder’s arrest by a law enforcement agency and the revocation of his or her state permit by the DPS SLFU based

¹⁴ See also (03/31/2009 Peruta Aff. ¶ 14, Letter from Board Chairman Adams to Comm. Danaher, Ex. 17 (App. at A81-A82), Letter from Comm. Danaher to Board Chairman Adams, Ex.18 (App. at A83-A84)) (In response to a request from the Board by letter dated May 14, 2007, for the DPS position regarding renewal of state permits and the required identification, Comm. Danaher informed the Board by letter dated September 14, 2007, that stating a position to the Board on an issue that could be the subject matter of an appeal brought to the Board may render the response an impermissible *ex parte* communication.”)

solely on that arrest for “open carry” are joined when the DPS SLFU defends the revocation based solely on the arrest to the Board. (Compl. ¶¶ 18, 21, R.) The DPS SLFU in defending these revocations, and in condoning the confiscation of the state permits prior to revocation, cannot remain unbiased in determining the applicability of General Statutes §§ 29-35 and 53a-181 to the circumstances of “open carry” versus “concealed carry.”

In Wallingford Center Associates v. Board of Tax Review of the Town of Wallingford, 68 Conn.App. 803, 804 (2002), a taxpayer appealed to the trial court from a property revaluation. The plaintiff taxpayer, Wallingford Center Associates, after appealing the decision of the defendant Board of Tax review to the trial court, sold its property to Captiva Realty Company (“Captiva”) while the appeal to the trial court was pending. Captiva moved to intervene as the party plaintiff and the defendant moved to dismiss for failure to exhaust administrative remedies. Captiva’s allegation of futility was “much more than conclusory.” Id. at 810. The court “believe[d] that had Captiva appealed to the board seeking a lower valuation, it would have been a futile act.” Id. The futility of an appeal was demonstrated, according to the court, by the Board of Tax Review’s expressed position on the matter:

At the time that the board claims that Captiva should have filed an appeal with the board, the board was engaged in vigorously defending, in Wallingford Center’s appeal, the very same valuation that Captiva would have been attacking. It simply is unrealistic for the town to maintain that Captiva could have obtained relief from the board under those circumstances. The board could not have given Captiva relief without backing away from the position it was taking in Wallingford Center’s appeal.

Id. The DPS cannot declare that Connecticut state statutes do not criminalize “open carry” without “backing away” from the positions it takes on a daily basis in revoking state permits and defending appeals to the Board based on the alleged unsuitability of state permit holders.

4. The Trial Court's Denial of Second Motion For Reargument

The trial court denied Peruta the opportunity for reargument, citing Manchester Health v. Department of Public Health, 2000 WL 350470 (Conn.Super., Mar. 28, 2000) (Satter, J.) (unpublished case) (App. at A85) and SNET v. DPUC, 64 Conn.App. 134 (2001). The denial referenced the language in Manchester Health finding the “overall thrust” of question to agency not sufficient for requisite section 4-176 exhaustion. (App. at A38)

In Manchester Health, the plaintiff health care center appealed from a finding by the defendant state agency that the plaintiff had not complied with “certain federal requirements for skilled nursing facilities participating in Medicare and Medicaid programs.” Manchester Health at *1 (App. at A85) The state agency moved to dismiss on the “grounds that the finding was not a ‘final decision’ in a ‘contested case’ within the meaning of Connecticut General Statutes § 4-166(2) and (3).” Id. The plaintiff conceded the finding of non-compliance was not a final decision but argued, in the alternative, the finding constituted a “declaratory ruling within the meaning of § 4-176.” Id. There had been no formal petition for a declaratory ruling submitted to the agency and no notice as required by General Statutes §§ 4-176a and 4-176(c), respectively.

The plaintiff in Manchester Health relied on Cannata v. Department of Environmental Protection, 239 Conn. 124 (1996), to argue that “such requirements are not necessary where the overall thrust of the proceeding before the department is for a declaratory ruling.” Id. According to the Manchester Health court, Cannata was “clearly distinguishable from the instant case [Manchester Health] because there [in Cannata] the court found that the plaintiff was seeking a declaratory ruling that a permit for wood cutting

was not required under a particular statute [§ 22a-342] and that notice to interested parties was given by publication in the *Hartford Courant*.” Id. (brackets added) The Manchester Health court then concluded that the exceptions created in Cannata to the formality of petition and notice requirements found in the statutes had not been met by the Manchester Health plaintiff.

D. The DPS June 9, 2009, Concession that July 28, 2007, Inquiries Submitted by Peruta Constituted Requests to the Agency for Declaratory Rulings

The trial court, though citing Manchester Health as grounds for its denial of Peruta’s second motion for reargument, never made the requisite finding as the trial court made in Cannata whether the inquiries submitted by Peruta met the “overall thrust” of a declaratory ruling request. (Order, App. at A38) The trial court did not reference the July 28, 2007, inquiries submitted to the DPS in its May 12, 2009, Order. (App. at A38, A39-A40) To clarify the matter for appeal, Peruta filed a motion for articulation pursuant to Practice Book § 66-5. Peruta asked the trial court to articulate “why the court did not consider the letter (App. at 39-40) submitted by the plaintiff to the defendant department of public safety (DPS) on or about July 28, 2006 to be a request for a declaratory ruling.” See text at note 2, supra.

Peruta attached three exhibits to his motion for articulation. Exhibit 1 is the document submitted on July 28, 2007. See text at note 2, supra. (App. at A39-A40) This exhibit was presented as Exhibit 5 to Peruta’s affidavit in support of the opposition to Defendants’ motion to dismiss. (03/31/2009 Peruta Aff., App. at A10-A18) Exhibit 2 to the motion for articulation is a list of six inquiries similar to the inquiries submitted by Peruta on July 28, 2007, and Exhibit 3 is a June 9, 2009, response by a DPS Legal Affairs Unit staff attorney recognizing the six inquiries as requests for declaratory judgments: “While it is not

explicitly stated in your correspondence, it appears that your questions present a request or requests for a declaratory ruling in accordance with Connecticut General Statutes sections 4-175 and 4-176.” (App. at 43) The DPS Legal Affairs Unit, as the agency’s legal counsel, is in the best position to know whether the DPS considered Peruta’s July 28, 2007, inquiries (which are the same as the inquiries he submitted again on June 2, 2009) as requests for declaratory rulings. In a June 9, 2009, letter to Peruta, the agency attorney states that the inquiries do meet the DPS (unwritten) standards for acceptance and consideration as requests for declaratory rulings. (App. at A43)

In Patten, a case the trial court cited in denying Peruta’s first motion for reargument, the court considered an affidavit from an attorney in the DPS Legal Affairs Unit stating that “despite the absence of such regulations, the defendant [DPS] has in the past accepted and considered petitions ... for the issuance of a declaratory ruling.” Patten at *1 (A-66) Peruta submitted a letter from an attorney in the Legal Affairs Unit supporting his position that his July 28, 2007, submission met the DPS declaratory ruling request standard. The trial court, without explanation, explicitly disregarded the expert opinion of the DPS Legal Affairs Unit staff attorney in a footnote: “Apparently, according to the plaintiff, after the May 12, 2009 ruling of this court, the DPS has considered the July 28, 2006 letter to be a declaratory ruling request. The DPS action has not been considered by this court.” (Ruling on Mot. for Articulation at 2 n.1, App. at 87)

CONCLUSION AND STATEMENT OF RELIEF REQUESTED

The April 22, 2009, Ruling of the trial court finding that Peruta failed to exhaust his administrative remedies should be vacated for one or more of the following reasons:

1. Peruta exhausted his administrative remedies;
2. Exhaustion of administrative remedies was futile;
3. The unconstitutionality of the suitability requirement in General Statutes §§ 29-28, 29-32b, 29-35 places the determination of the declaratory judgment action solely within the authority and jurisdiction of the courts.

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CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed first-class, postage-paid, on July 29, 2010, to:

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The Honorable Henry S. Cohn
Superior Court Judge, Judicial District of New Britain
20 Franklin Sq
New Britain CT 06051-2653

Rachel M. Baird
Commissioner of the Superior Court

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Respondent-Appellant's Brief is in compliance with the provisions of Connecticut Practice Book, § 67-2.

Rachel M. Baird
Commissioner of the Superior Court

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