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17 IN THE UNITED STATES DISTRICT COURT  
 18 FOR THE EASTERN DISTRICT OF CALIFORNIA  
 19 SACRAMENTO DIVISION

21 **WILLIAM WIESE, et al.,**  
 22  
 Plaintiff,  
 23  
 v.  
 24  
 25 **XAVIER BECERRA, et al.,**  
 26  
 Defendant.

2:17-cv-00903-WBS-KJN

**JOINT STATUS REPORT  
 FOLLOWING *DUNCAN v. BONTA***

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 28 //

1 Pursuant to this Court’s Order of May 8, 2019 [Dkt. 110], in which this Court ordered the  
2 parties to submit a joint status report within fourteen (14) days after the Ninth Circuit issues its  
3 decision in *Duncan v. Bonta*, No. 19-55376, and this Court’s Order of August 28, 2020 [Dkt.  
4 113], in which this Court declined to lift the stay following that decision in light of further  
5 proceedings, the parties to the above-entitled action now and hereby submit this Joint Status  
6 Report following the Ninth Circuit’s order remanding the matter of *Duncan v. Bonta* to the  
7 district court for further proceedings. See *Duncan v. Bonta*, \_\_\_ F.4th \_\_\_, 2022 WL 4393577  
8 (9th Cir. Sept. 23, 2022).

9 **DUNCAN V. BONTA**

10 On August 14, 2020, the Ninth Circuit issued its first opinion, sub nom. *Duncan v. Becerra*,  
11 in which a divided panel affirmed the district court’s grant of summary judgment for the plaintiffs  
12 in that action. *Duncan v. Becerra*, 970 F.3d 1133 (9th Cir. 2020).

13 On November 30, 2021, the Ninth Circuit issued its *en banc* opinion, reversing the trial  
14 court. *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021). Plaintiffs in *Duncan* filed a petition for a  
15 writ of certiorari to the United States Supreme Court.

16 On June 30, 2022, the Supreme Court granted certiorari, vacated the judgment, and  
17 remanded to the Ninth Circuit for further consideration in light of the Court’s decision in *New*  
18 *York State Rifle & Pistol Ass’n, Inc. v Bruen*, 597 U.S \_\_\_, 142 S.Ct. 2111 (2022). *Duncan v.*  
19 *Bonta*, 142 S.Ct. 2895 (June 30, 2022).

20 On September 23, 2022, the Ninth Circuit vacated the judgment, and remanded to the  
21 district court for further proceedings consistent with *Bruen*. *Duncan v. Bonta*, \_\_\_ F.4th \_\_\_,  
22 2022 WL 4393577 (Sept. 23, 2022).

23 **PLAINTIFFS’ POSITION RE LIFTING THE STAY, AND MOTION FOR SUMMARY JUDGMENT**

24 As plaintiffs in this case have been insisting throughout, and most recently in their JOINT  
25 STATUS REPORT FOLLOWING DUNCAN V. BECERRA filed on August 26, 2020 [Dkt. 112], plaintiffs  
26 reiterate their longstanding request to file a motion for summary judgment as to all claims in this  
27 matter.  
28

1 In *Bruen*, the Supreme Court expressly rejected interest-balancing tests to be applied in  
2 Second Amendment challenges to firearm laws, and held that the government has the clear  
3 burden in any such challenge to justify the firearm prohibition under the following standards:

4 In keeping with *Heller*, we hold that when the Second Amendment’s plain text  
5 covers an individual’s conduct, the Constitution presumptively protects that  
6 conduct. To justify its regulation, the government may not simply posit that the  
7 regulation promotes an important interest. Rather, the government must  
8 demonstrate that the regulation is consistent with this Nation's historical tradition  
9 of firearm regulation. Only if a firearm regulation is consistent with this Nation’s  
10 historical tradition may a court conclude that the individual’s conduct falls  
11 outside the Second Amendment’s “unqualified command.”

12 *Bruen*, 142 S.Ct. at 2126 (citing *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n.10 (1961)).

13 In light of *Bruen*, and the State’s clear burden in this case, plaintiffs are prepared to file  
14 their motion for summary judgment which challenges the State to meet that burden, and will  
15 argue that the State cannot do so.

16 Counsel for defendants have indicated that the State will request the ability to undertake  
17 discovery in this matter. Plaintiffs oppose discovery in this case. The only “facts” relevant to  
18 resolution of this case are “legislative facts” regarding the history of magazine usage and  
19 regulation in this country, and as such all facts can be developed in briefing and argument without  
20 the need for expert or other evidence adduced through traditional party discovery methods. *See*  
21 *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) (ordering entry of judgment for plaintiffs on  
22 review of order granting motion to dismiss because “[t]he constitutionality of the challenged  
23 statutory provisions does not present factual questions for determination in a trial . . . . Only  
24 adjudicative facts are determined in trials, and only legislative facts are relevant to the  
25 constitutionality of the Illinois gun law.”)

26 The Supreme Court’s decision in *Bruen* provides further support for dispensing with  
27 discovery in this case. In *Bruen*, no factual development occurred in the district court because  
28 plaintiffs’ claims were foreclosed by circuit precedent at the time the complaint was filed, and the  
district court accordingly entered judgment against the plaintiffs on the pleadings. *See, New York  
State Rifle & Pistol Ass’n, Inc. v. Beach*, 354 F. Supp.3d 143 (N.D.N.Y. 2018). In holding New

1 York’s may-issue licensing scheme violated the Second Amendment, the Supreme Court  
2 expressly rejected the argument that it could not “answer the question presented without giving  
3 respondents the opportunity to develop an evidentiary record,” 142 S. Ct. at 2135 n.8, because “in  
4 light of the text of the Second Amendment, along with the Nation’s history of firearm regulation,”  
5 the conclusion “that a State may not prevent law-abiding citizens from publicly carrying  
6 handguns because they have not demonstrated a special need for self-defense” did not turn on  
7 disputed factual questions.” *Id.* The same is true here. Application of *Bruen*’s text-and-history test  
8 does not involve any analysis of adjudicative facts of the kind that are disclosed through  
9 discovery. See *id.* And while the State may point to the historical analysis *Bruen* conducted as a  
10 reason to permit expert discovery in this case, it is noteworthy that *Bruen* itself did not have  
11 expert witnesses. Indeed, the Supreme Court decided the case based on a motion-to-dismiss  
12 record in the district court. This case turns on entirely legal issues that can and should be fully  
13 resolved by this Court on evidence presented by the parties in briefing.

14 If this Court determines that some discovery should be permitted, Plaintiffs reserve the  
15 right to take both fact and expert discovery from Defendants.

16 Therefore, and in light of the very long stay that they have endured while awaiting the  
17 *Duncan* case to be decided,<sup>1</sup> plaintiffs in the instant case request that this Court now lift its stay  
18 ordered on May 8, 2019 [ECF No. 110], and would further request that the Court order a briefing  
19 and hearing schedule on plaintiffs’ anticipated motion for summary judgment as to all claims.

20 Plaintiffs propose to file their motion for summary judgment and supporting papers within  
21 thirty (30) days from a scheduling conference or other order allowing such briefing, with a  
22 briefing schedule for an opposition and reply to be set by the Court. Plaintiffs would be willing to  
23 submit said motion to be decided on the papers, without necessity of a hearing, unless the Court  
24 would find a hearing to be necessary or helpful.

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28 <sup>1</sup> Plaintiffs would note that the instant case was filed on April 28, 2017, several weeks  
before the *Duncan* case was filed in the Southern District of California.

**DEFENDANTS' POSITION**

1  
2 The Court should enter a scheduling order that allows for fact and expert discovery and thus  
3 comports with (a) the Supreme Court's decision in *New York State Rifle & Pistol Association v.*  
4 *Bruen*, 142 S. Ct. 2211 (2022), and (b) the regular practice of permitting discovery before  
5 motions for summary judgment.

6 The Supreme Court's decision in *Bruen* fundamentally altered the legal standard for  
7 evaluating Second Amendment challenges to firearms regulations. Instead of the two-step  
8 framework that the Ninth Circuit and most other federal courts of appeals had adopted for  
9 resolving those claims, *Bruen* held that courts must apply a standard "rooted in the Second  
10 Amendment's text, as informed by history." *Id.* at 2116–17. Under this new "text-and-history"  
11 standard, courts must determine whether "the Second Amendment's plain text" protects the  
12 conduct in which the plaintiff wishes to engage, and if it does, then decide whether the regulation  
13 "is consistent with this Nation's historical tradition of firearm regulation." *Id.* at  
14 2126. *Bruen* directs district courts (and then, later, courts of appeals) resolving these questions to  
15 follow "various evidentiary principles and default rules," including "the principle of party  
16 presentation." *Id.* at 2130 n.6.

17 In light of this standard, the Court should enter a scheduling order directing the parties to  
18 prepare cross-motions for summary judgment, allowing the Court to evaluate Plaintiffs' claims  
19 under the text-and-history standard articulated in *Bruen*. Before filing of cross-motions for  
20 summary judgment, the parties should be permitted to conduct both fact and expert discovery to  
21 develop a factual, legal, and historical record in support of this analysis. This approach would  
22 serve the interests of the parties, allowing them a full and fair opportunity to address the new  
23 emphasis on historical analogues and to prepare a record responsive to the text-and-history  
24 standard. It would also allow this Court to address important questions about how *Bruen* applies  
25 in the first instance.

26 Such a scheduling order would also comport with ordinary practice of allowing parties  
27 discovery before permitting motions for summary judgment to be filed. Litigants "should be  
28 afforded reasonable access to potentially favorable information prior to the granting of summary

1 judgment, because on summary judgment all inferences to be drawn from the underlying facts  
2 must be viewed in the light most favorable to the party opposing the summary judgment motion.”  
3 *Texas Partners v. Conrock Co.*, 685 F.2d 1116, 1119 (9th Cir. 1982) (finding that the “district  
4 court erred in granting summary judgment for appellees without affording plaintiffs-appellants  
5 the opportunity to proceed with discovery”); *Inspection Mgmt. Sys., Inc. v. Open Door*  
6 *Inspections, Inc.*, No. 209-CV-00023-MCE-GGH, 2009 WL 2030937, at \*4 (E.D. Cal. July 9,  
7 2009) (denying partial motion for summary judgment brought “without the benefit of any  
8 discovery” because “even if no disputed facts were before this Court, the Court is simply not  
9 willing to grant summary judgment at such an early juncture and on such an undeveloped  
10 record”); *Ahl-E-Bait Media, Inc. v. Jadoo TV, Inc.*, No. CV1205307MMMPJWX, 2013 WL  
11 11324312, at \*5 (C.D. Cal. Apr. 16, 2013) (holding that, and collecting cases for the proposition  
12 that, “Rule 56 contemplates a sufficient time for discovery before a summary judgment motion is  
13 considered”). Plaintiffs have indicated that they will request that this Court enter a schedule  
14 providing for the filing of dispositive motions with the benefit of any discovery. Particularly  
15 given *Bruen*’s admonition that lower courts are to follow “evidentiary principles,” “default rules,”  
16 and the “principle of party presentation,” Plaintiffs’ request to file cross-motions for summary  
17 judgment without any discovery should be rejected.

18 Instead, Defendant proposes the following schedule:

- 19 • Last Day to Serve Opening Expert Reports – 2/3/23
  - 20 • Last Day to Serve Rebuttal Expert Reports – 3/3/23
  - 21 • Last Day to Serve Sur-Rebuttal Expert Reports – 3/27/23
  - 22 • Fact and Expert Discovery Cut Off – 3/27/23
  - 23 • Last Day to File Daubert Motions – 4/4/23
  - 24 • Last Day to File Cross-Motions for Summary Judgment and All Other Motions (except  
25 *Daubert* and all other Motions in Limine) – 4/25/23
  - 26 • Last Day to File Oppositions to Motions for Summary Judgment and All Other Motions  
27 (except *Daubert* and all other Motions in Limine) – 5/23/23
- 28

- Last Day to File Replies in Support of Motions for Summary Judgment and All Other Motions (except *Daubert* and all other Motions in Limine) – 6/13/23

■ ■ ■

The parties are available to attend a scheduling conference to discuss these matters, should it please the Court.

Respectfully submitted,

Dated: October 7, 2022

SEILER EPSTEIN LLP

*/s/ George M. Lee*

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Dated: October 7, 2022

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