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IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

MICHELLE FLANAGAN, SAMUEL GOLDEN, DOMINIC NARDONE, JACOB PERKIO, and THE CALIFORNIA RIFLE & PISTOL ASSOCIATION,

Plaintiffs,

v.

CALIFORNIA ATTORNEY GENERAL XAVIER BECERRA, in his official capacity as Attorney General of the State of California, SHERIFF JAMES McDONNELL, in his official capacity as Sheriff of Los Angeles County, California, and DOES 1-10,

Defendants.

Case No.: 2:16-cv-06164-JAK-AS

PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Judge: John A. Kronstadt
Hearing Date: November 6, 2017
Hearing Time: 8:30 a.m.
Courtroom: 10B

Action Filed: August 17, 2016
Trial Date: February 6, 2018

INTRODUCTION

While the State has much to say about its narrow (and profoundly mistaken) view of the scope of the Second Amendment, it ultimately does not dispute that the Second Amendment protects at least some right to armed self-defense in public places. That should be the end of the matter, as California has flatly denied Plaintiffs any channel for exercising that right. The State resists that conclusion, but, at most, succeeds only in establishing that Plaintiffs have a purely hypothetical right to use the firearms that they are prohibited from carrying should "immediate, grave danger" present itself, and that Plaintiffs may perhaps (but perhaps not) carry firearms in a few more unincorporated and largely deserted areas than California case law suggests. But none of that changes the fact that Plaintiffs cannot carry firearms for self-defense in any practical way without risking criminal prosecution.

Unable to demonstrate otherwise, the State retreats to trying to cabin the scope of the right. It first claims that the right to "bear arms" was enshrined in the Second Amendment only to make clear that individuals could take their firearms outside of homes, but not past their property lines. But the State offers not a shred of textual, historical, or even present-day authority for that novel theory—because there is none. It next invokes the ancient Statute of Northampton and its early analogues as purported evidence that there never was a right to carry in public places. But a wealth of historical authority (not to mention *Heller* itself) confirms that neither that law nor any of the other early laws the State cites imposed the kind of broad carry prohibition it suggests. Indeed, the D.C. Circuit's recent detailed exposition of the history flatly refutes the State's arguments—as evidence by the fact that the State's only response to that case is to urge this Court to ignore it.

Ultimately, then, the State is left with nothing but scare tactics, insisting that if this Court recognizes that Plaintiffs may not be flatly banned from carrying firearms, then the State will not be able to regulate or restrict public carry at all. But Plaintiffs have never suggesting that they may carry firearms anywhere and

everywhere, and the State cannot point to where Plaintiffs have claimed otherwise. After all, *Heller* itself makes perfectly clear that carry restrictions are "presumptively lawful" in *some* public places. The question here is whether the State may prohibit Plaintiffs from carrying in *all* (or nearly all) public places. It may not. Indeed, a functional ban on public carry is the epitome of the kind of wildly overbroad law that burdens far more constitutionally protected conduct than is necessary to achieve any public safety ends it may further. Accordingly, no amount of evidence can change the reality that California's de facto carry ban violates Plaintiffs' Second Amendment rights.

ARGUMENT

I. THE STATE'S LIMITED VIEW OF THE RIGHT TO BEAR ARMS HAS NO BASIS IN TEXT, HISTORY, OR CASE LAW

The State's analysis of the Second Amendment bears no resemblance to reality. It begins by suggesting that the textual right to "bear arms" exists only to confirm that, in addition to keeping arms in the house, individuals may carry them around their own property. *See* Def.'s Opp'n., Dkt. 55, at 14-15. The State supplies zero evidence for this novel theory in the text itself, which notably contains no such constraint. Instead, it attempts to infer that limitation from rank speculation that most land at the founding was privately owned, such that individuals who bore arms simply carried them from one person's private property to another, never having any need to go elsewhere. *Id.* That contention is refuted by, among other things, the State's acknowledgement in the very same breath that there was so much *non*-private property at the founding that "people could readily find land to claim, and upon which to build homes and to establish farms, and therefore lived much more spread out." *Id.* at 14. Even setting aside the millions of early Americans who did *not* live in rural areas, moreover, how exactly the nation's rural residents traveled between these admittedly "much more spread out" private properties without traversing any public property is a question the State does not answer.

The State next suggests that Blackstone did not really recognize the Second Amendment as a true individual right because he "greatly qualifie[d] the right" with the caveat that it is enjoyed " 'unle[ss] where the laws of our country have laid them under nece[ss]ary re[s]traints.' " Def.'s Opp'n, Dkt. 55, at 15 (quoting 1 William Blackstone, *Commentaries on the Laws of England* 140 (1765). But the State neglects to mention that this "qualification" is not specific to the right to keep and bear arms, but rather is set forth in a section of Blackstone's *Commentaries* setting forth *all* of the rights enjoyed by subjects of England, including such rights as "the free enjoyment of personal security, of personal liberty, and of private property"; "the regular administration and free course of justice in the courts of law"; and "petitioning the king and parliament for redress of grievances." *Id.* Surely the State does not mean to suggest that all of these rights are just as "greatly qualifie[d]" as it seems to think the right protected by the Second Amendment is.

The State next trots out the ancient Statute of Northampton, which it continues to wrongly suggest made carrying firearms unlawful at common law. But as Plaintiffs have explained elsewhere, Pls.' Opp'n Mot. Summ. J., Dkt. 57, at 9, both British and early American courts (not to mention the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570, 623 (2008)) recognized that the Statute and its early American analogues barred only "the offence of riding or going about armed with unusual and dangerous weapons, to the terror of the people," *not* the general carrying of weapons. *State v. Huntly*, 25 N.C. 418, 421 (1843); *see also Rex v. Knight*, 87 Eng. Rep. 75 & 90 Eng. Rep. 330 (K.B. 1686) ("[T]he meaning of the statute of [Northampton] was to punish people who go armed *to terrify the King's subjects*." (emphasis added)). Indeed, that narrower understanding is reflected in every single historical source the State cites.

Finally, with no answer to the D.C. Circuit's detailed historical analysis in *Wrenn v. District of Columbia*, 864 F.3d 650 (2017), the State instead suggests this Court should ignore *Wrenn* because the opinion cites "judicial opinions from the

South in the era of slavery" and declined to give weight to 19th century decisions that were premised on the mistaken view that there is no individual right to keep and bear arms. Def.'s Opp'n, Dkt. 55, at 18. But setting aside the fact that southern states were not alone in their view that the right to bear arms was not confined to the home, *see, e.g.*, *Johnson v. Tompkins*, 13 F. Cas. 840, 852 (C.C.E.D. Pa. 1833), *Heller* itself relied extensively on those very same "opinions from the South," *see* 554 U.S. at 612-15, 627, which suffices to defeat the State's own effort "erase[] from U.S. history," Def.'s Opp'n, Dkt. 55, at 19, the many cases that do not support its position.

In all events, the State's contention that "*Wrenn* gives short shrift" to a host of early statutes that purportedly restricted open carry is mistaken. *Id.* at 20. What *Wrenn* in fact did is explain why those statutes did *not* actually restrict open carry in the manner the State suggests, either because they were Northampton-style statutes that prohibited only carrying dangerous and unusual weapons to the terror of the people, or because they were "surety" laws that simply required people to post a bond to continue exercising their right to carry in certain circumstances. *See Wrenn*, 864 F.3d at 661; *see also* Pls.' Opp'n Mot. Summ. J., Dkt. 57, at 10. As *Wrenn* thus correctly recognized, text, history, and precedent confirm that "the individual right to carry common firearms beyond the home for self-defense—even in densely populated areas, even for those lacking special self-defense needs—falls within the core of the Second Amendment's protections." *Wrenn*, 864 F.3d at 661.

II. CALIFORNIA'S CARRY SCHEME VIOLATES THE SECOND AMENDMENT UNDER ANY APPLICABLE TEST

Concluding that the right to bear arms extends beyond the home—a notion the State does not dispute, Def.'s Opp'n, Dkt., 55, 18 n.18—all but resolves this case. Because the total denial of a right protected by the Second Amendment "fail[s] constitutional muster" under "any of the standards of scrutiny," *Heller*, 554 U.S. at 628-29, no matter which test the Court ultimately selects, the result must be

the same. California's refusal to allow ordinary law-abiding, citizens any meaningful capacity to bear arms in public for self-defense is unconstitutional.

A. California's Carry Scheme Categorically Forecloses Plaintiffs from Exercising Their Constitutional Right to Public Carry

The State does not and cannot dispute that a law that denies a constitutionally protected right to those entitled to exercise it must "fail constitutional muster" under "any of the standards of scrutiny." *Heller*, 554 U.S. at 628-29; *see also Jackson v. City and Cnty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014). Instead, it merely resists the premise that California law categorically denies Plaintiffs their right to bear arms. The State is wrong as a matter of law and fact.

The State begins by suggesting that it is not actually "impossible" to obtain a Carry License in California. True or not, that is irrelevant, as there is no dispute that *Plaintiffs* were each denied one—and had been denied because, in the eyes of the official to whom the State gives "unfettered discretion" to decide such matters, *Nichols v. Cnty. of Santa Clara*, 223 Cal. App. 3d 1236, 1243 (1990), a generalized need for self-defense is not a sufficient reason for an ordinary, law-abiding citizen to carry a handgun. That is relevant not because it necessarily means that the Sheriff's Carry License policy is unconstitutional, but because it confirms that, to the extent concealed carry might provide an alternative channel for exercising the right to bear arms, such channel has been foreclosed to Plaintiffs.

The relevant question, then, is whether California law leaves Plaintiffs with some *other* outlet for carrying firearms in public. It does not. The State tries to demonstrate otherwise by pointing to the "Exigent-Circumstances Exception," Def.'s Opp'n, Dkt. 55, at 5, but that affirmative defense to a prosecution for unlawful carry may be asserted only in the narrowest of circumstances—i.e., during "the brief interval" between when law enforcement officials are notified of an "immediate, grave danger" (when reasonably possible) and when law enforcement arrives on scene. Cal. Penal Code §§ 26045(a)-(c). While the State spends pages

trying to explain why that extremely circumscribed defense purportedly protects Plaintiffs' right to bear arms, Def.'s Opp'n, Dkt. 55, at 5-6, it never answers the most critical question: Where does the firearm used to defend oneself should "immediate, grave danger" arise come from if an individual is generally prohibited from having an unloaded firearm on or near his person while in public? Cal. Penal Code §§ 26350, 25400. If people cannot lawfully possess a firearm *before* "immediate, grave danger" arises, an affirmative defense for possessing one during such an event is of little use to them, as "where the fleeing victim would obtain a gun during that interval is apparently left to Providence." *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1147 n.1 (9th Cir. 2014) (*Peruta II*). The right to be "armed and ready" in case of confrontation, *id.* at 1152, is hardly secured by an exception that simply allows one to seek forgiveness from a prosecutor or a jury for being armed and ready when it counted.

The State next quibbles with Plaintiffs' interpretation of the extent to which firearms may be carried in "unincorporated areas." Def.'s Opp'n, Dkt. 55, at 10. The first and fatal problem with its argument is that the Second Amendment is not confined to "unincorporated areas," rendering this debate largely beside the point. But even setting that problem aside, the State's arguments on this score amount to much ado about nothing.

The State first disputes Plaintiffs' assertion that it is illegal to carry within 150 yards of any building, arguing that the restriction applies only to an "*occupied* building that is within a 'public place.' " *Id.* But, the State is wrong. Open carry is prohibited in any "public place," which could be private property,[1] that is within 150 yards of an occupied building—not just buildings that are within a "public place"—*or* "of a barn or other outbuilding used in connection with an occupied

[1] "When construing statutes forbidding certain behavior in a 'public place' or 'public area,' California courts have routinely held that privately-owned property can constitute a public place." *People v. Tapia*, 129 Cal.App.4th 1153, 1161 (2005); *People v. Yarbrough*, 169 Cal.App.4th 303, 317-319 (2008).

building." Cal. Fish & Game Code § 3004. Just as it fails to explain how people facing "immediate, grave danger" would get ahold of some magically appearing firearm to load, the State fails to explain how they would go about assessing which buildings are occupied or used in connection with an occupied building (let alone why an individual would want to carry a firearm for self-defense only near *unoccupied* buildings)—hence, Plaintiffs' description that the restriction applies to all buildings.

The State next claims that roads and highways are not actually "prohibited areas" where carry restrictions apply. Def.'s Opp'n, Dkt. 55, at 10. That is far from clear under applicable law. While California Attorney General Opinion No. 68-175 supports that view, *id.* (citing 51 Ops. Cal. Atty. Gen. 197), and Plaintiffs unintentionally and regrettably misstated its conclusion in their brief, that opinion is not binding, *see, e.g.*, *Moore v. Panish* (1982) 32 Cal.3d 535, and the case law tells a different story. Open carry is prohibited in any "public place" within an unincorporated area where it is illegal to discharge a firearm. Cal. Penal Code § 25850(a). "A public place has been defined to be a place where the public has a right to go and to be, and includes public streets, ***roads***, ***highways***, and sidewalks." *People v. Belanger*, 243 Cal. App. 2d 654, 657 (1966) **(**interpreting the open carry statute) (emphasis added); *see also People v. Strider*, 177 Cal. App. 4th 1393, 1401-02 (2009). And because it is illegal to discharge a firearm from a "road or highway," Cal Penal Code § 374(c), case law suggests it is illegal to carry on them.

Further, the State does not dispute that there are various statutes prohibiting carry in certain rural areas, *but see* Pls.' Mem. Supp. Mot. Summ. J., Dkt. 48-1, at 3 n.1, or that California allows municipalities to further restrict carry.[2] Its only

[2] The State also contends that Plaintiffs ignore state law authorizing the carry of unloaded long guns in unincorporated areas. Def.'s Opp'n, Dkt. 55, at 2-3 n.3 (citing Cal. Penal Code § 26400(a)). To the extent that exception was ever relevant, that conduct is no longer legal in California. *See* Pls.' Req. Jud. Notice, Dkt. 64, Exs. 11-12 (attaching Letter from Edmund G. Brown, Jr., Governor of California, to Members of the California State Assembly (Oct. 13, 2017), *available at* https://www.gov.ca.gov/docs/AB_7_Signing_Message_2017.pdf; Assemb. Bill 7,

response is to analyze in detail the specific local ordinances that Plaintiffs provided as mere examples to prove they are not as bad. Def.'s Opp'n, Dkt. 55, at 11-12. But the State's dissection of the technical particulars of these specific restrictions entirely misses, but lends credence to, Plaintiffs' point that whatever the State's lengthy diversion into the nuances of the narrow exceptions to California's broad carry restrictions may establish, they do not and cannot change the fact that Plaintiffs have no practical way to carry a firearm for self-defense. Thus, as a practical matter, Plaintiffs have been categorically prohibited from exercising their fundamental right to carry firearms in public for self-defense.

B. California's Carry Ban Cannot Survive Any Level of Means-end Review

As already explained, the right to public carry is a core Second Amendment. To be sure, *Heller* notes, as has the Ninth Circuit, that "the Second Amendment elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635. But that passing observation, which has not been essential to any case in which this Court invoked it, is muffled by *Heller*'s more boisterous explication of the text and historical understanding of the Second Amendment—an analysis that gives "independent and seemingly equal treatments" to the separate rights to "keep" arms and to "bear" them. *Wrenn*, 864 F.3d at 657 (citing *Heller*, 554 U.S. at 570-628). Accordingly, it is "more natural to view the Amendment's core as including a law-abiding citizen's right to carry common firearms for self-defense beyond the home." *Id.*

Contrary to the State's contentions, Def.'s Opp'n, Dkt. 55, at 20, that does not necessarily mean that every law that burdens the right to carry outside the home is subject to strict scrutiny or could not satisfy it. *Heller* itself recognized that restrictions on carrying in "sensitive places such as schools and government buildings" are "presumptively lawful," 554 U.S. at 626, which suggests either that

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2017-2018 Reg. Sess. (Cal. 2017), *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB7).

the right does not extend to such places or that such restrictions survive strict scrutiny (and also refutes the State's suggestion that the right to carry is confined to "private land" Def.'s Opp'n, Dkt. 55, at 15). Moreover, under this circuit's precedent, the level of scrutiny turns on the severity of the burden on the right, and the burden would not be as severe with a law limited to sensitive places as it is with the kind of categorical ban on public carry at issue here, which so "severely burdens" the right as to demand strict scrutiny. *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016). *Mahoney v. Sessions*, No. 14-35970, 2017 WL 4126943, *4 (9th Cir. Sept. 19, 2017), certainly does not suggest otherwise; the restriction there dealt with when a firearm may be *discharged*, not when it may be carried.

But in all events, California's carry ban plainly violates Plaintiffs' Second Amendment rights regardless of which standard of scrutiny applies, as the State cannot begin to show that denying law-abiding citizens any outlet to carry for self-defense furthers its concededly compelling public safety interest in a manner that "avoid[s] unnecessary abridgement" of Second Amendment rights. *McCutcheon v. Fed. Election Comm'n*, __ U.S. __, 134 S. Ct. 1434, 1456-57 (2014).

At the outset, even assuming a public carry ban may further public safety ends, it does so only in the way a ban on possessing a handgun in the home does—namely, by just making it harder to exercise the right to keep and bear arms. That, of course, is precisely the kind of wildly overbroad approach that the Second Amendment declares off limits, as the Framers already drew the public safety balance in favor of *protecting* the right to keep and bear arms. And just as "protected speech may [not] be banned as a means to ban unprotected speech," *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002), banning the protected carrying of firearms by the many to get at their unprotected use by the few is an option that the Second Amendment takes "off the table." *Heller*, 554 U.S. at 636.

That said, Plaintiffs certainly do not agree that a public carry ban furthers the interests the State has identified in any meaningful way. Contrary to the State's

claim, Plaintiffs have pointed to evidence they believe counters the State's position. Pls.' Mem. Supp. Mot. Summ. J., Dkt. 48-1, at 24. And, the fact that the State primarily relies on its supposed "expert witness," John Donohue, as evidence that its ban reduces violent crime, only bolsters Plaintiffs' belief that the State cannot meet its burden here. Surely, the State would be able to come up with better evidence that its *open* carry ban works, if there were any, than an unpublished paper of dubious scientific pedigree that only analyzes *concealed* carry. Pls.' Opp'n Mot. Summ. J., Dkt. 57, at 21-23. And, while the State's other expert witness, Chief Kim Raney, is credible in opining on most law enforcement issues, his utter lack of experience with open carry makes it one topic for which his opinion is irrelevant. *Id.* In sum, even if there were some evidentiary showing the State could make to justify its ban, if has failed to do so.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully urge this Court to grant their Motion for Summary Judgment as to the remaining claims.

Dated: October 16, 2017

MICHEL & ASSOCIATES, P.C.

/s/ Sean A. Brady
Sean A. Brady
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

Case Name: *Flanagan, et al. v. California Attorney General Xavier Becerra, et al.*
Case No.: 2:16-cv-06164-JAK-AS

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

I am not a party to the above-entitled action. I have caused service of:

PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Xavier Becerra, Attorney General of California P. Patty Li, Deputy Attorney General E-mail: Patty.Li@doj.ca.gov Jonathan M. Eisenberg, Deputy Attorney General E-mail: Jonathan.Eisenberg@doj.ca.gov 300 South Spring Street, Suite 1702 Los Angeles, CA 90013	*Attorneys for Attorney General of the State of California*

I declare under penalty of perjury that the foregoing is true and correct.

Executed October 16, 2017

/s/ Laura Palmerin
Laura Palmerin