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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION (TEMPLE STREET)

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

Plaintiffs,

v.

CALIFORNIA ATTORNEY GENERAL KAMALA HARRIS, in her 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.

2:16-cv-06164-JAK-AS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Date: February 13, 2017
Time: 8:30 a.m.
Courtroom: 750
Judge: The Honorable John A. Kronstadt
Action Filed: August 17, 2016

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COURT RULES

Defendant Kamala D. Harris, Attorney General of the State of California (the "Attorney General"), submits this memorandum of points and authorities in support of the pending motion under Federal Rule of Civil Procedure 12(b)(6), to dismiss portions of the August 17, 2016, Complaint for Declaratory and Injunctive Relief (the "Complaint" or "Compl.") of Plaintiffs Michelle Flanagan, Samuel Golden, Dominic Nardone, Jacob Perkio, and the California Rifle and Pistol Association ("CRPA"; together with the other Plaintiffs, "Plaintiffs").

INTRODUCTION

In this case, Plaintiffs allege that California's statutory scheme governing the public—open and/or concealed—carrying of firearms violates their constitutional rights. Compl. ¶¶ 7-8. Citing the U.S. Constitution's Second Amendment and the Equal Protection Clause of the Fourteenth Amendment, Plaintiffs attack "those provisions of California law that prohibit them from openly carrying firearms," as well as "restrictions that bar them from obtaining concealed Carry Licenses." *Id.* ¶¶ 8, 71-87.

However, the Complaint should be dismissed, at least in part, because:

1. The decision in *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc), finding no constitutional right to concealed carry, squarely forecloses Plaintiffs' concealed-carry challenge in the Complaint's first claim under the Second Amendment; and

2. the Equal Protection Clause claim, the Complaint's second claim, is a redundant Second Amendment claim, which also fails on the merits.

Accordingly, the Attorney General seeks to have these claims dismissed, the first claim in part, and the second claim in full.

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LEGAL AND FACTUAL BACKGROUND

I. CALIFORNIA'S OPEN-CARRY AND CONCEALED-CARRY LAWS

A. Regulation of Public Carry

California law limits how and where firearms may be publicly carried, but also provides many exceptions and exemptions to those limits. Generally, loaded firearms (both long guns and handguns) and unloaded handguns may not be carried in public places in the State's incorporated cities, and in unincorporated areas where discharging a firearm is prohibited. Cal. Penal Code §§ 17030, 25400, 25850, 26350. California law also generally precludes carrying unloaded long guns in public places in the State's incorporated cities. *Id.* § 26400.

B. Exemptions and Exceptions to the General Limitations on Public Carry

Certain persons have categorical exemptions to these general limitations based on their occupations, such as peace officers, military personnel, and private security officers. Cal. Penal Code §§ 25450, 25620, 25630, 25900, 26030, 26405.

In addition to those categorical exemptions, there are numerous and varied exceptions allowing public carry of firearms in certain specified circumstances. For example, it is lawful to carry a firearm in public for hunting, in places where hunting is permitted. Cal. Penal Code §§ 25640, 26405. Additionally, a loaded firearm may be kept in the home or business, and unloaded handguns may be transported in the locked trunk of a motor vehicle, or in a locked container in the motor vehicle. *Id.* §§ 25605, 25610, 26035, 26389, 26405.

A loaded firearm may be carried in public when a person believes that any person or the property of any person is in immediate, grave danger, and that the carrying of the weapon is necessary for the preservation of that person or property. Cal. Penal Code § 26045.

California law also recognizes that some persons, based on their particular circumstances, may need to carry *concealed* weapons, in particular, for self-defense.

Therefore, any California resident may apply to his or her local law enforcement authority for a permit to carry a concealed weapon, and can obtain the permit for "[g]ood cause," and if he or she has "good moral character," and has completed a prescribed training course. Cal. Penal Code §§ 26150(a), 26155(a). Local law enforcement authorities (county sheriffs or city police chiefs) have authority to make determinations concerning what constitutes "good cause" for obtaining a permit to carry a concealed weapon. *Id.* §§ 26150, 26155.

In California counties with populations of less than 200,000 persons, local law enforcement authorities may also issue open-carry licenses. Cal. Penal Code §§ 26150(b)(2), 26155(b)(2).

II. PLAINTIFFS' ALLEGATIONS

Plaintiffs are four individuals and CRPA, an entity organized under Section 501(c)(4) of the Internal Revenue Code. Compl. ¶¶13-20. Defendants are the Attorney General and Los Angeles County Sheriff James McDonnell. *Id.* ¶¶ 24-25.

The four individual plaintiffs are residents of Los Angeles County who applied for concealed-carry permits with Sheriff McDonnell. Compl. ¶¶ 15-19, 59-60. Those applications were all denied for lack of "good cause." *Id.* The individual plaintiffs allege that they "wish immediately to exercise their constitutional right to carry a firearm in public for self-defense, but they are precluded from doing so because they are unable to obtain a Carry License . . . and because California law prohibits them from carrying a firearm openly." *Id.* ¶ 23. Plaintiffs "refrain" from "lawfully carry[ing] a firearm in non-sensitive, public places for self-defense . . . for fear of liabilities for violating one or more of California's laws that criminalize" this activity. *Id.* ¶ 66. Plaintiffs contend that "[b]ut for Defendants' enforcement of statutes and policies that prohibit [Plaintiffs] from lawfully carrying a firearm in public, [Plaintiffs] would immediately begin carrying a firearm in public for self-defense." *Id.* ¶ 23.

The organization plaintiff, CRPA, seeks to defend the "fundamental right to 'bear' or 'carry' firearms for the core lawful purpose of self-defense." Compl. ¶ 20. CRPA "regularly participates as a party or amicus in litigation" over "the right to keep and bear arms," and also "provides guidance to California gun owners regarding their legal rights and responsibilities." *Id.* ¶ 21. Many of CRPA's members "wish to obtain a Carry License," but have not applied for one "given that such application would be futile in light of" Sheriff McDonnell's "good cause" policy. *Id.* ¶ 22; *see also id.* ¶ 63. Some CRPA members have applied for such licenses, but were denied for lack of "good cause." *Id.* ¶¶ 22, 62.

Plaintiffs request several types of relief, including "[a] declaration that the Second Amendment guarantees the right of responsible, law-abiding citizens to carry a firearm in public for self-defense." Compl. ¶ 19. They also seek declaratory and injunctive relief against enforcement of California's open-carry laws. *Id.* 19-20. As an alternative, Plaintiffs ask for declaratory and injunctive relief against the "good cause" requirement for a concealed-carry permit, particularly as interpreted by Sheriff McDonnell. *Id.*

LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the complaint. *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted). The district court accepts as true all material allegations in the complaint, and construes those allegations in the light most favorable to the plaintiff. *See Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).

ARGUMENT

Plaintiffs' Complaint suffers from two deficiencies that require its dismissal, at least in part. *First*, the challenge to California's concealed-carry laws under the Second Amendment, in the first claim of the Complaint, fails because the Ninth Circuit has already held that there is no Second Amendment right to carry a concealed weapon. *Second*, the Complaint's second claim, the Equal Protection Clause challenge to both the open-carry laws and the concealed-carry laws, should be rejected as duplicative of Plaintiffs' Second Amendment challenge, and in any event fails on the merits.[1]

I. PLAINTIFFS HAVE FAILED TO STATE A VALID SECOND AMENDMENT CLAIM REGARDING CALIFORNIA'S CONCEALED-CARRY STATUTES

Plaintiffs' constitutional attack on California's public-carry statutes takes aim at both open carry and concealed carry. The Ninth Circuit's recent decision in *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc), however, squarely forecloses the Second Amendment attack on the concealed-carry laws.

In upholding California's concealed-carry statutes against a Second Amendment claim very close to Plaintiffs' claims here, the Ninth Circuit, sitting en banc, held unequivocally "that the Second Amendment does not preserve or protect a right of a member of the general public to carry concealed firearms in public." *Peruta*, 824 F.3d at 924. Thus, "any prohibition or restriction a state may choose to impose on concealed carry—including a requirement of 'good cause,' however defined—is necessarily allowed by the [Second] Amendment." *Id.* at 939.

Accordingly, under *Peruta*, any policy of the Los Angeles County Sheriff's Department regarding concealed-carry permits would not run afoul of the Second

[1] The allegations in the Complaint regarding standing to challenge California's open-carry laws are thin, *see, e.g.*, *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc), but because discovery will presumably provide more detail concerning the specific basis for Plaintiffs' claims, the Attorney General does not suggest a jurisdictional lack of standing at this time.

Amendment. The policy is simply not subject to a Second Amendment attack. The California laws at issue here authorize county sheriffs and municipal chiefs of police to establish and to administer policies about concealed carry within their jurisdictions. Cal. Penal Code §§ 26150, 26155. Just as those policies are not subject to attack under the Second Amendment, there can be no successful Second Amendment challenge to California's statewide concealed-carry statutory framework.

In sum, Plaintiffs have not stated—and, per *Peruta*, cannot state—a valid Second Amendment challenge regarding California's concealed-carry statutes, in and of themselves, or as administered in Los Angeles County. This Court should dismiss with prejudice the Second Amendment claim, to the extent that the claim challenges the concealed-carry laws (i.e., paragraphs 73 and 76-80 of the Complaint).

II. PLAINTIFFS HAVE FAILED TO STATE A VALID EQUAL PROTECTION CLAUSE CLAIM

Plaintiffs' Equal Protection Clause claim is an impermissible attempt to restate the Second Amendment claim, and fails on the merits as well.

A. The Equal Protection Clause Claim Is Duplicative of the Second Amendment Claim

"[B]ecause the right to keep and to bear arms for self-defense is not only a fundamental right, but an enumerated one, it is more appropriately analyzed under the Second Amendment than the Equal Protection Clause." *Teixeira v. Cty. of Alameda*, 822 F.3d 1047, 1052 (9th Cir. 2016) (citations omitted) (finding that Equal Protection Clause claim was a Second Amendment claim "dressed in equal protection clothing" and therefore "not cognizable under the Equal Protection Clause"); *see also Woollard v. Gallagher*, 712 F.3d 865, 873 n.4 (4th Cir. 2013) (describing district court determination that Equal Protection Clause claim was "essentially a restatement of [the] Second Amendment claim, and had been asserted

to obtain review under a more stringent standard" than intermediate scrutiny (internal quotation marks and citation omitted)).

An Equal Protection Clause claim that is entirely coextensive with a claim under a different constitutional provision should not be evaluated as an independent, freestanding claim. *See Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1085 (9th Cir. 2015) (where "[p]laintiffs do not advance any equal protection arguments independent of their arguments concerning the Free Exercise Clause," Equal Protection Clause claim fails for same reasons that free exercise claim fails); *see also Orin v. Barclay*, 272 F.3d 1207, 1213 n.3 (9th Cir. 2001) (finding that Equal Protection Clause claim was "no more than a First Amendment claim dressed in equal protection clothing" and was "subsumed by, and co-extensive with" plaintiff's First Amendment claim); *cf. Albright v. Oliver*, 510 U.S. 266, 273 (1994) ("Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." (internal quotation marks and citation omitted)).

Plaintiffs, in support of their Equal Protection Clause claim, allege that Defendants "have created a classification of persons, including Plaintiffs, who are treated unequally through the denial of their Second Amendment rights to publicly bear arms for self-defense." Compl. ¶ 85. Although Plaintiffs use words commonly found in an Equal Protection Clause claim (e.g., "classification," "treated unequally," "similarly situated"), Plaintiffs have not alleged any facts in support of this claim that are independent of the facts alleged in support of the Second Amendment claim. Indeed, the overall summary of the constitutional violations alleged in the Complaint is the "Abrogation of Plaintiffs' Right to Bear Arms." *Id.* ¶¶ 58-66. Plaintiffs attempt to ascribe differential treatment to a Los Angeles County "policy that does not recognize self-defense as 'good cause' for the

issuance of Carry Licenses," which policy supposedly results in Los Angeles County residents being treated differently from similarly situated "law-abiding, competent adults" residing elsewhere. *Id.* ¶¶ 84-85. However, Plaintiffs describe such other persons in only broad, vague terms. Plaintiffs do not state concretely where these other persons reside and what the relevant policies are in those places. Moreover, Plaintiffs' proposed remedy is not to treat similar classes of people similarly, but rather to give Plaintiffs their favored outcome, statewide availability of open carry to everyone. In other words, Plaintiffs are making a repeat Second Amendment claim, no more and no less. Under *Teixiera*, the Equal Protection Clause claim is redundant of the claim under the Second Amendment, and should be dismissed with prejudice.

Additionally, for Second Amendment claims in the Ninth Circuit, as set forth in *U.S. v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013), there is a two-step analysis that normally determines the appropriate level of scrutiny. There is a different analysis used for Equal Protection Clause claims. *See Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1141 (9th Cir. 2011). It would be improper to allow an Equal Protection Clause claim to proceed as such here, when the claim should instead be adjudicated under the analytical framework stated in *Chovan*. This Court should reject Plaintiffs' attempt to advance what they themselves characterize as Second Amendment rights by use of an analytical framework developed for a different constitutional provision.

B. The Equal Protection Clause Claim Fails on the Merits

Even if Plaintiffs could properly assert an Equal Protection Clause claim based on the same underlying conduct as the Second Amendment claim, the Equal Protection Clause claim nonetheless fails on the merits.

Plaintiffs do not plausibly allege that that they have been denied a fundamental right, with no valid justification, while others have been permitted to exercise that right, which is the basis for an Equal Protection Clause claim, as stated in *San*

Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29 (1973). The Ninth Circuit has already determined that there is no Second Amendment right to carry a concealed weapon, *Peruta*, 824 F.3d at 939, and Plaintiffs have not plausibly alleged that the open-carry laws permit only some favored persons to exercise such rights, while denying that opportunity to Plaintiffs without a valid justification. As noted above, the Complaint makes no specific allegations regarding "law-abiding, competent adults" residing outside of Los Angeles County, who are treated differently from Plaintiffs, or the effect of the open-carry (or concealed-carry) laws on those persons. Compl. ¶ 84.

Plaintiffs fail to allege that the open-carry laws implicate a suspect class of persons or infringe on a group's fundamental rights with no valid justification, meaning that the Equal Protection Clause claim should receive rational-basis review. *See Honolulu Weekly, Inc. v. Harris*, 298 F.3d 1037, 1047 (9th Cir. 2002). That kind of scrutiny requires only that the law in question be rationally related to a legitimate governmental interest. *Id.* And the open-carry laws survive rational-basis review, because the California Legislature could reasonably conclude that the unlimited open carry of firearms in populous areas presents a danger to public safety generally and to peace officers. *See Nichols v. Harris*, 17 F. Supp. 3d 989, 1005 (C.D. Cal. 2014) (holding that open-carry laws "are more than merely rationally related to the objective of increasing public safety").

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CONCLUSION

In sum, Plaintiffs' Second Amendment challenge to the concealed-carry laws, in the first claim of the Complaint, is squarely foreclosed by the recent en banc Ninth Circuit decision in *Peruta*; and Plaintiffs' Equal Protection Clause claim, the Complaint's second claim, is an impermissible restatement of the Second Amendment claim, and fails on the merits as well. Therefore, the Court should dismiss the Second Amendment concealed-carry claim and the Equal Protection Clause claim with prejudice.

Dated: October 7, 2016

Respectfully submitted,

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