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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION (FIRST STREET)

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

Plaintiffs,

v.

ACTING CALIFORNIA ATTORNEY GENERAL KATHLEEN A. KENEALY, 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

REPLY IN SUPPORT OF MOTION TO DISMISS COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Date: February 13, 2017
Time: 8:30 a.m.
Courtroom: 10B
Judge: Hon. John A. Kronstadt
Action Filed: August 17, 2016

Defendant Kathleen A. Kenealy, Acting Attorney General of the State of California (the "Attorney General"),[1] submits this reply in support of the pending

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Acting Attorney General Kathleen A. Kenealy is automatically substituted as a defendant in this matter in place of her predecessor, Kamala D. Harris.

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").

In this case, Plaintiffs invoke the Second Amendment to the U.S. Constitution (made applicable to the states via the Fourteenth Amendment) to try to invalidate all or part of the State of California's statutory scheme regulating the carrying of firearms in public places. Plaintiffs also rely on the Equal Protection Clause of the U.S. Constitution to challenge the same statutory scheme. The Attorney General moved to dismiss portions of Plaintiffs' complaint.

ARGUMENT

I. TO THE EXTENT THAT PLAINTIFFS SEEK TO RELITIGATE THE *PERUTA* CASE, THE COMPLAINT SHOULD BE DISMISSED IN WHOLE OR IN PART.

In *Peruta v. County of San Diego*, the Ninth Circuit held that "the Second Amendment does not preserve or protect a right of a member of the general public to carry concealed firearms in public." 824 F.3d 919, 924 (9th Cir. 2016) (en banc). Plaintiffs' complaint echoes the *Peruta* plaintiffs-appellants in dozens of paragraphs of the Complaint, focusing on the good-cause policy for issuance of concealed-carry permits as applied by the local law enforcement agency. *See* Compl. ¶¶ 1, 5, 8 ("Plaintiffs . . . challenge Defendants' restrictions that bar them from obtaining concealed Carry Licenses"), 9, 11-12, 16-19, 22-34, 41-43, 49-64, 66-68, 73, 76-79, 85. Moreover, as Plaintiffs concede, Co-Defendant Sheriff James McDonnell's policy in the present case and the policies of the other sheriffs challenged in *Peruta* are "similarly restrictive." *Id.* ¶ 7. In short, Plaintiffs' complaint may fairly be read as leveling the same attack on Defendants' concealed-carry restrictions that was resolved by *Peruta*.

Correspondingly, Plaintiffs seek a remedy that the Ninth Circuit decisively rejected in *Peruta*: an order declaring unconstitutional, and enjoining enforcement of, California's concealed-carry restrictions. *Compare* Compl. ¶¶ 7-11, *with Peruta*, 824 F.3d at 942. As in *Peruta*, Plaintiffs' requested relief would invalidate the local policy and thereby permit concealed carry essentially at will for people who are not prohibited by law from possessing firearms. Compl. ¶ 12 and "Prayer" ¶¶ 7-10. In terms of the relief sought with respect to concealed-carry, *Peruta* and the present case are thus indistinguishable from each other. And *Peruta* upheld the local good cause policies at issue there, finding "no Second Amendment right for members of the general public to carry concealed firearms in public." *Peruta*, 824 F.3d at 927. It follows that, under *Peruta*, Sheriff McDonnell's good-cause policy must be upheld.

In other words, Plaintiffs' complaint is improper to the extent that it seeks, at least as an alternative, relief to which they are not entitled under the Second Amendment: declaratory and injunctive relief against enforcement of the concealed-carry laws. *See* Compl. at 19-20. Whatever the California Legislature might choose to do if the courts were to hold that there is some right to public carry, a court may not order concealed-carry relief. By seeking that very relief again here, Plaintiffs appear to ask this Court to reconsider the issue resolved in *Peruta*, and either to overrule or ignore the Ninth Circuit precedent. But, of course, neither option is available to this Court. *See Mohamed v. Uber Tech., Inc.*, No. 15-16178, 2016 WL 7470557, at *6 (9th Cir. Dec. 21, 2016) ("The district court does not have the authority to ignore circuit court precedent . . . . Binding authority must be followed unless and until overruled by a body competent to do so." (internal quotation marks and citation omitted)).

Thus, to the extent that the Complaint seeks any ruling that the Second Amendment requires the State to allow Plaintiffs to carry a concealed weapon in

public, and a corresponding remedy ordering the issuance of concealed-carry permits, that claim is foreclosed by *Peruta*.

In opposing the Attorney General's motion to dismiss, Plaintiffs state that their challenge is "not confined . . . solely to the State's concealed carry restrictions," and that they have also not "confined their challenge to Defendants' open carry restrictions." *See* Plfs.' Omnibus Opp. to Def. Attorney General's Mtn. to Dismiss Compl. and Def. McDonnell's Mtn. to Dismiss Compl. ("Opp.") at 9:2-9:3. They argue that their complaint asserts instead that "Defendants' carry restrictions *as a whole* violate their right to bear arms." *Id*. at 9:5-9:6 (emphasis in original). They seek a judicial declaration as to "whether the Second Amendment protects the right to carry a firearm outside the home in some manner, either openly or concealed." *Id*. at 9:14-9:16. And they concede that—if they are entitled to any remedy—it is the State that must "determine which manner of carry to make available." *Id*. at 10:6-10:7.

A claim recharacterized in this way, with a clear recognition that the specific nature of any ultimate remedy would be the State's to determine, is not foreclosed by *Peruta*. The Ninth Circuit did explicitly leave open the question of whether the Second Amendment "protects some ability to carry firearms in public." *Peruta*, 824 F.3d at 927. To the extent that Plaintiffs seek only to establish "some ability to carry firearms in public" under the Second Amendment and in that sense challenge the State's carry restrictions "as a whole," then, *Peruta* does not bar their suit. Accordingly, with Plaintiffs' clarification and remedial concession in mind, this Court should dismiss the aspects of the complaint specific to concealed-carry (identified in Def. Attorney General's Mtn. to Dismiss Compl. ("Motion to Dismiss") at 6:11-6:13), but may properly allow the litigation to proceed on the clarified basis.

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

This Court should dismiss Plaintiffs' Equal Protection Clause claim for two separate reasons. First, the claim is entirely duplicative of the Second Amendment claim and cannot be used to obtain relief that is not available under the Second Amendment. Second, the claim fails on the merits.

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

Plaintiffs explain in their opposition that their Equal Protection Clause claim challenges "policies that authorize some individuals to exercise the right to bear arms beyond the home, while denying it to others." Opp. at 11:9-11:10. Plaintiffs discuss two such policies:

> (1) "Defendants' restrictions [that] distinguish between individuals who can publicly carry a concealed firearm for self-defense, and those who cannot, based upon their demonstration of 'good cause' interpreted by [Sheriff] McDonnell" (Opp. at 12:26-13:1 (citing Compl. ¶¶ 56-57)); and
>
> (2) the prohibition on issuing open-carry licenses to residents of counties with a population of more than 200,000 persons, which includes Los Angeles County (Opp. at 14:9-14:12 (citing Compl. ¶¶ 4, 53)).

Thus, Plaintiffs contend that their Equal Protection Clause claim challenges Sheriff McDonnell's "good cause" requirement for issuance of a concealed-carry permit in Los Angeles County, and the lack of open carry in Los Angeles County.

These are the same challenges Plaintiffs make in their Second Amendment claim (Compl. ¶¶ 66-69, 77), and the Equal Protection Clause claim should therefore be dismissed as duplicative. As explained in the Attorney General's motion, an Equal Protection Clause claim that is entirely coextensive with a claim under a different constitutional provision cannot be used as an independent basis for

relief, and should not be considered as its own free-standing claim. *See* Motion to Dismiss at 7:3-7:17 (citing *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1085 (9th Cir. 2015); *Orin v. Barclay*, 272 F.3d 1207, 1213 n.3 (9th Cir. 2001); *Albright v. Oliver*, 510 U.S. 266, 273 (1994)).[2]

The Equal Protection Clause here would not provide relief beyond what might be available under the Second Amendment. As the Second Circuit has found, "an Equal Protection claim that is based on the alleged burdening of one's Second Amendment rights should not be reviewed in isolation; whether one's Second Amendment rights are impermissibly 'burdened' is necessarily informed by the underlying Second Amendment analysis." *Kwong v. Bloomberg*, 723 F.3d 160, 170 n.19 (2d Cir. 2013). "Like *every* Circuit to have addressed this issue, we simply conclude that plaintiffs should not be allowed to use the Equal Protection Clause 'to obtain review under a more stringent standard' than the standard applicable to their Second Amendment claim." *Id*. (emphasis in original) (quoting *Woollard v. Gallagher*, 712 F.3d 865, 873 n.4 (4th Cir. 2013)). The Court should reject Plaintiffs' attempt to use the Equal Protection Clause to get a second chance at the Second Amendment allegations, and should thus dismiss the Equal Protection Clause claim as duplicative.

B. The Equal Protection Clause Claim Fails on the Merits

Even if Plaintiffs could properly maintain an Equal Protection Clause claim challenging the same policies at issue in the Second Amendment claim, any Equal

[2] The Ninth Circuit recently ordered rehearing en banc for *Teixeira v. County of Alameda*, 822 F.3d 1047 (9th Cir. 2016), which the opening and opposition briefs discuss. *Teixeira v. Cnty. of Alameda*, No. 13-17132, 2016 WL 7438631, at *1 (9th Cir. Dec. 27, 2016). Although the *Teixiera* panel opinion is no longer Ninth Circuit precedent, the question presented for en banc panel review is not the equal protection portion of the three-judge panel decision, which went against the plaintiffs and for which they did not seek further review. Furthermore, the legal authority cited therein still supports a finding that Plaintiffs' equal protection challenge is "subsumed by, and coextensive with" their Second Amendment claim, *Orin*, 272 F.3d at 1213 n.3 (9th Cir. 2001), and thus not cognizable under the Equal Protection Clause.

Protection Clause claim left to consider after the Second Amendment claim has been resolved nonetheless fails. The Equal Protection Clause claim is premised on alleged violation of rights conferred by the Second Amendment—not on any claim that the challenged laws or policies discriminate on some independently invidious basis such as race or sex. Compl. ¶ 31. Accordingly, the resolution of the Equal Protection Clause claim would be dictated by the Second Amendment result, regardless of what that result may be. That is, if in theory the "good cause" policy or open-carry laws that are the subject of the Equal Protection Clause claim were invalid under the Second Amendment, then the Equal Protection Clause claim would be redundant and unnecessary. But if the laws challenged here were instead to satisfy Second Amendment review, the laws would also necessarily survive the applicable analysis under the Equal Protection Clause claim.

Where a law has survived a Second Amendment challenge and does not involve a suspect classification, rational basis review applies to any related Equal Protection Clause challenge. *See Wilson v. Lynch*, 835 F.3d 1083, 1098 (9th Cir. 2016) (applying rational basis scrutiny to equal protection challenge, after finding that challenged law survived Second Amendment intermediate scrutiny); *Nordyke v. King*, 681 F.3d 1041, 1043 n.2 (9th Cir. 2012) (en banc) ("As to the Nordykes' equal protection claim, because the ordinance does not classify shows or events on the basis of a suspect class, and because we hold that the ordinance does not violate either the First or Second Amendments, rational basis scrutiny applies"). As the Second Circuit has observed, under these circumstances "courts have applied 'rational basis' review to Equal Protection claims on the theory that the Second Amendment analysis sufficiently protects one's rights." *Kwong*, 723 F.3d at 170 n.19 (citing *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 211-12 (5th Cir. 2012); *Hightower v. City of Boston*, 693 F.3d 61, 83 (1st Cir. 2012); *Nordyke*, 681 F.3d at 1043 n.2).

The policies and laws challenged in the Equal Protection Clause claim survive rational basis review, which requires only that the law in question be rationally related to a legitimate governmental interest. *See Honolulu Weekly, Inc. v. Harris*, 298 F.3d 1037, 1047 (9th Cir. 2002).

The "good cause" requirement for the issuance of concealed-carry permits is rationally related to a legitimate government interest of public safety, in that the California Legislature could have reasonably concluded that the carrying of concealed weapons presents a danger to public safety, and should therefore be restricted to persons who can show good cause for doing so.

The open-carry laws, with their population-based distinctions, also survive rational basis review because the California Legislature could have reasonably concluded that the widespread open carry of firearms in populous areas would be a source of public terror and present a danger to public safety generally and to peace officers, but that the circumstances are different in less populous areas. California's policy choice has a legitimate rationale in that there is generally less danger of public terror and violence in places where people are physically farther apart from one another, and more danger where people are packed more closely together. The population of a county is a reasonable proxy for population density. Hence the population requirement regarding open-carry permits passes rational basis review.

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CONCLUSION

The Second Amendment challenge to the concealed-carry laws is squarely foreclosed by the en banc Ninth Circuit decision in *Peruta*, and the Equal Protection Clause challenge is duplicative of the Second Amendment claim, and in any event fails on the merits. The Court should dismiss the Second Amendment concealed-carry claim and the Equal Protection Clause claim with prejudice.

Dated: January 9, 2017

Respectfully submitted,

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