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IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

MICHELLE FLANAGAN, et al.,

Plaintiffs,

v.

CALIFORNIA ATTORNEY GENERAL XAVIER BECERRA, in his official capacity as Attorney General of the State of California, et al.,

Defendants.

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

PLAINTIFFS' SUPPLEMENTAL BRIEF RE SUMMARY JUDGMENT STANDARD FOR COMPETING EXPERT EVIDENCE ON CONSTITUTIONAL QUESTION

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

BACKGROUND

Plaintiffs and Defendant filed cross motions for summary judgment. At the November 6, 2017, hearing on those motions, the Court ordered supplemental briefs explaining each party's view on whether summary judgment can be granted where, as here, there are conflicting expert opinions about the efficacy of the challenged law in furthering the State's interests, *i.e.*, whether such constitutes a disputed material fact. The Court identified three cases for the parties to address: *Kachalsky v. County of Westchester* (2d Cir. 2012) 701 F.3d 81, 97; *Woollard v. Gallagher* (4th Cir. 2013) 712 F.3d 865; and *Jackson v. City and County of San Francisco* (9th Cir. 2014) 746 F.3d 953.

SUMMARY OF CONCLUSION

While the precedent is not entirely clear on the question, the Court *might* be able to grant the State's summary judgment motion, but *only* if it finds that the evidence before it would suffice to satisfy the State's burden under applicable heightened scrutiny, notwithstanding Plaintiffs' contrary evidence. It is clear, however, that the Court can grant Plaintiffs' summary judgment motion, despite the conflicting expert opinions, even if such conflict were resolved in favor of the State.

RELEVANT CASE LAW

"In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function." *Crowell v. Benson*, 285 U.S. 22, 60 (1932); *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) ("The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake."). The "deference afforded to legislative findings does 'not foreclose [the court's] independent judgment of the facts bearing on an issue of constitutional law.' " *Turner Broadcasting System, Inc. v. F.C.C.* (1994) 512 U.S. 622, 666. (citations omitted).

In evaluating a Second Amendment challenge under intermediate scrutiny,

the *Kachalsky* court held that its "role is only 'to assure that, in formulating its judgments, [a state] has drawn reasonable inferences based on substantial evidence.' " 701 F.3d at 97, quoting *Turner Broad Sys.* at 666. Applying that standard, it granted New York summary judgment, despite acknowledging that plaintiffs provided evidence purporting to controvert the law's rationale. *Id*. at 99. "It is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments" was its reasoning for so holding. Expressly following the *Kachalsky* court's lead, the Fourth Circuit, evaluating an almost identical Second Amendment challenge under intermediate scrutiny, held the same, in the face of the plaintiffs' competing evidence. *Woollard*, 712 F.3d at 881 ("we cannot substitute [plaintiffs'] views for the considered judgment of the General Assembly . . .."). *Id*. [1]

ANALYSIS

Plaintiffs have located no binding authority holding that "legislative facts" cannot be controverted by plaintiffs to avoid summary judgement, but have found some suggesting the opposite. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 445-46, 122 S. Ct. 1728, 1739-40, 152 L. Ed. 2d 670 (2002) at 438-39, 122 S.Ct. 1728 (recognizing plaintiffs may "cast direct doubt on [a municipality's] rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings.") That being said, nor have Plaintiffs seen any authority that precludes a court per se from granting summary judgment in favor of the government where the parties dispute whether a challenged law actually furthers the government's interest. To the contrary, even the Supreme Court has resolved constitutional questions before it on summary judgment. *See e.g., Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, (1986). Accordingly, there does not seem to be a definitive standard for when

[1] The Ninth Circuit discusses evidence government can rely on to meet its burden when defending laws, *see Jackson*, 746 F.3d at 969-70, but it involved a preliminary injunction motion, and is, thus, likely unhelpful here.

it is appropriate for courts to grant summary judgement in favor of the government where there is competing evidence from expert witnesses on the efficacy of a challenged law. But it appears it can be done.

What is clear, however, is that the State "bears the burden of justifying its restrictions" under intermediate scrutiny and must actually *prove* both that they (1) meaningfully further the State's interests; *and* (2) do so in a manner that does not burden the Second Amendment "substantially more" than "necessary to further [its important] interest." *Jackson*, 746 F.3d at 965; *see Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 214 (1997). Should the Court find the State has met its burden to prove that both of these questions are answered in its favor, notwithstanding Plaintiffs' contrary evidence, it *may* have discretion to grant it summary judgment.

A court cannot, however, sidestep resolving those questions by deferring to the legislature. Yet, that is exactly what the courts in *Kachalsky* and *Woollard* did. The value of those opinions in resolving this case is, therefore, dubious. That they involve Second Amendment challenges does not excuse them from shoddy application of Supreme Court precedent regarding constitutional scrutiny. *See McDonald v. City of Chicago*, 561 U.S. 742, 785-86 (2010) ("[The Supreme Court] expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing, and . . . abandoned 'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights.'").

In sum, regardless of what the Court thinks of Plaintiffs' expert evidence, the State can *potentially* prevail on summary judgment only if the Court finds that the State's evidence, if proven, would actually satisfy its burden on furthering its purported interests. But, what exactly the standard is for a court to demonstrate that its finding on that score is sufficient to grant summary judgement remains unclear.

There is no doubt, however, that the Court could grant Plaintiffs' motion. Even if the State were able to unequivocally prove its carry ban works, it must still

additionally show that it does so via "a means narrowly tailored to achieve the desired objective" that "avoid[s] unnecessary abridgement" of constitutionally protected activity. *McCutcheon v. FEC*, __U.S.__, 134 S. Ct. 1434, 1456-57, 188 L. Ed. 2d 468 (2014) (plurality opinion). *See Ward v. Rock Against Racism*, 491 U.S. 781, 782-83 (1989). In *McCutcheon*, after finding limits on campaign finance contributions unconstitutional under the First Amendment because they failed to meaningfully promote the government's objective of preventing corruption, the Supreme Court went on to hold that "[q]uite apart from the foregoing" the restrictions separately violated the First Amendment because they were not "narrowly tailored to achieve the desired objective." *Id*. at 1456-57. In other words, it is an additional showing under intermediate scrutiny.

Because it is the State's burden to make this additional showing, if it cannot—and it, indeed, cannot—Plaintiffs prevail, regardless of whose evidence is ultimately vindicated. And the State is not entitled to *any* deference when assessing the "fit" between its important interest and the means selected to advance it. *Wrenn v. District of Columbia*, 107 F. Supp. 3d 1, 9-10 (D.D.C. 2015), *vacated on other grounds* 808 F.3d 81 (D.C. Cir. 2015) (*citing Turner Broad. Sys., Inc. v. FCC (Turner II), 520 U.S. 180* (1997). Plaintiffs have shown that the State's law amounts to a practical ban on their ability to publicly carry firearms for self-defense. This Court can and should, therefore, grant Plaintiffs' summary judgment motion, on the sole basis that the State burdens more constitutionally protected activity than needed to advance its goals—i.e., there is not a sufficient "fit."

Dated: November 13, 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' SUPPLEMENTAL BRIEF RE SUMMARY JUDGMENT STANDARD FOR COMPETING EXPERT EVIDENCE ON CONSTITUTIONAL QUESTION

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

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

Executed November 13, 2017

/s/ Laura Palmerin
Laura Palmerin