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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

Lana Rae Renna, et al.,
Plaintiffs,

v.

Robert Bonta, Attorney General of
California, et al.,
Defendants.

Case No.: 20-cv-2190-DMS-DEB

**PLAINTIFFS' REPLY TO
DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR A
TEMPORARY RESTRAINING
ORDER AND A PRELIMINARY
INJUNCTION**

Date: October 7, 2022
Time: 1:30 p.m.
Department: 13A
Hon.: Dana M. Sabraw

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I. Introduction

Defendants have not only failed to carry their burden to demonstrate that the CNC Ban is consistent with this Nation’s historical tradition of firearm regulation in any way, but they have actively *refused* to do anything of the sort. Instead, they have spent their time attempting to develop a litigation strategy that purportedly shifts the burden onto Plaintiffs and allows them to do nothing absent an order from this Court directing them to undertake the historical analysis required under *Bruen*. Defendants’ pursuit of a tortured analysis disingenuously alleviating them of any obligation to justify the CNC Ban underscores the need for the immediate relief Plaintiffs seek here.

II. The Plain Text Unquestionably Covers the Conduct at Issue

Again, the test is a simple one: “when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct.” *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2111, 2126 (2022). Then, the government must “justify its regulation” of the conduct. *Id.* To carry this burden, it is not enough to “simply posit that the regulation promotes an important interest.” *Id.* “Rather, the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation.” *Id.* The Supreme Court’s opinions in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010) held that “the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense.” *Bruen* at 2126. And *Bruen* held, “consistent with *Heller* and *McDonald*, that the Second and Fourteenth Amendments protect an individual’s right to carry a handgun for self-defense outside the home.” *Id.* at 2122. These cases also all make clear that “the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” *Id.* 2132 (quoting *Heller* at 582).

And, well before *Bruen*, the federal courts, including the Ninth Circuit, recognized that “the Second Amendment protects ancillary rights necessary to the realization of the core right to possess a firearm for self-defense.” *Teixeira v. County*

1 of *Alameda*, 873 F.3d 670, 677 (9th Cir. 2017). Constitutional rights “implicitly protect
2 those closely related acts necessary to their exercise.” *Luis v. United States*, 136 S.Ct.
3 1083, 1097 (2016) (Thomas, J., concurring). Thus, the right to keep and bear arms
4 “‘implies a corresponding right to obtain the bullets necessary to use them,’” *id.*
5 (quoting *Jackson v. City and County of San Francisco*, 746 F.3d 953, 967 (9th Cir.
6 2014)), as well as the ability to engage in “the training and practice that make it
7 effective,” *Ezell v. City of Chicago*, 651 F.3d 684, 704 (9th Cir. 2011). And, even more
8 fundamentally, the Second Amendment necessarily must secure the right to *acquire*
9 constitutionally protected arms in the first instance: “The core Second Amendment
10 right to keep and bear arms for self-defense wouldn’t mean much without the ability to
11 acquire arms.” *Teixeira* at 677; accord *Illinois Association of Firearm Retailers v. City*
12 *of Chicago*, 961 F. Supp.2d 928, 930 (N.D. Ill. 2014) (“This right must also include the
13 right to *acquire* a firearm.”); *Drummond v. Robinson Township*, 9 F.4th 217, 227 (3d
14 Cir. 2021) (the right ‘implies a corresponding right to acquire and maintain proficiency’
15 with common weapons”) (quoting *Ezell* at 704). Logically, there are two ways to
16 *acquire* a firearm—to obtain one (by purchase or other transfer) or to make one through
17 self-manufacture or self-assembly. Just as the “right to acquire and maintain
18 proficiency” in the use of protected arms is implied, “the right to keep and bear arms
19 implies a corresponding right to manufacture arms.” *Rigby v. Jennings*, __ F.Supp.3d
20 __, 2022 WL 4448220, *7 (D. Del. Sept. 23, 2022). “Indeed, the right to keep and bear
21 arms would be meaningless if no individual or entity could manufacture a firearm.” *Id.*

22 Defendants devise a tortured textual analysis here, arguing “the plain text of the
23 Second Amendment *does not address* the ownership of CNC milling machines at all”
24 and “*says nothing* about self-manufacture or assembly of one’s own firearms.” Opp. 8,
25 9 (italics added). Absent *literal* inclusion of the conduct, so the argument goes, the
26 government is free to regulate it unchecked. Opp. 1-2, 8-9. The United States
27 government recently tried a similar ploy in *U.S. v. Quiroz*, __ F.Supp.3d __, 2022 WL
28 4352482 at *3 (W.D. Texas 2022) (appealed filed September 21, 2022), arguing that

1 the prohibition under 18 U.S.C § 922(n)—barring anyone under a felony indictment
2 from “receiv[ing]” firearm or ammunition shipped or transported in commerce—fell
3 outside the scope of the Second Amendment’s protection because the text doesn’t
4 *expressly* include “buying a gun *while under felony indictment.*” *Id.* *3. But, as the
5 court observed, *Bruen*’s test “requires only that ‘the Second Amendment’s plain text
6 cover the conduct.’” *Id.* “And the prohibited conduct under § 922(n) is ‘receipt’ of a
7 firearm—nothing more,” which *is* covered. *Id.* at *4. Similarly, Defendants cannot
8 demand that the Second Amendment *expressly* declare a right to “self-manufacture or
9 assemble one’s own firearms,” a right to “the ownership of CNC milling machines,”
10 or a right to the ownership or use of precursor parts and tools commonly needed and
11 used in the process of constructing protected arms. The conduct at issue is the ability
12 of law-abiding citizens to *self-manufacture or assemble constitutionally protected*
13 *arms*. The plain text covers this conduct, just as the right to keep and bear arms “*covers*
14 modern instruments that *facilitate* armed self-defense,” *Bruen*, 142 S.Ct. at 2132
15 (italics added), and ““the right to possess and carry weapons in case of confrontation,””
16 *id.* at 2134 (quoting *Heller*, 554 U.S. at 2134), without *literally* saying so.

17 When it comes to the First Amendment right of “free speech,” to which the
18 Supreme Court has “repeatedly compared the right to keep and bear arms,” *Bruen*, 142
19 S.Ct. at 2130, we would never require as a condition to protection that the First
20 Amendment *expressly* enumerate each of the numerous forms of media and platforms
21 through which people commonly exercise their expressive rights; nor would we ever
22 say the government may regulate unchecked any device or implement necessary or
23 commonly used in facilitating such speech—press machines, printers, paper, ink, etc.—
24 unless the text *expressly* declares that item “covered” under the “free speech”
25 protections. *See Minneapolis Star & Tribune Co. v. Minnesota Com’r of Revenue*, 460
26 U.S. 575, 592-93 (1983) (holding that a tax on paper and ink used by newspapers
27 violated the First Amendment). Generally, to “cover” means “to have sufficient scope
28 to include or take into account” or “to afford protection or security to.”

1 <https://www.merriam-webster.com/dictionary/cover>. Thus, the First Amendment’s
 2 text has been interpreted to *cover* numerous forms of expressions not literally spelled
 3 out in the text. See *Thunder Studios v. Kazal*, 13 F.4th 736, 745 (9th Cir. 2021) (“emails
 4 and tweets”); *Citizens United v. Federal Election Com’n*, 558 U.S. 310, 393 (2010)
 5 (“core political speech”); *Moran v. State of Wash.*, 147 F.3d 839, 848 (9th Cir. 1998)
 6 (speech “related to a matter of public concern”); *Teixeira*, 873 F.3d at 688-69
 7 (expression of views “through the distribution of written material”); *Packingham v.*
 8 *North Carolina*, ___ U.S. ___, 137 S. Ct. 1730, 1735 (2017) (the “exchange of views” in
 9 “cyberspace” and “the vast democratic forums of the Internet”). So it is with the Second
 10 Amendment and the many sticks within the bundle of rights necessarily implicit and
 11 ancillary to the express right to “keep and bear arms,” which *plainly* include the right
 12 to self-manufacture or assemble protected arms.

13 **III. Defendants Could Not Carry Their Burden Even If They Tried**

14 Because Defendants’ “textual analysis” purports to find the “plain text” does not
 15 cover the conduct at issue, they conclude that neither AB 1621 generally nor the CNC
 16 Ban itself “implicate[s] Plaintiffs’ Second Amendment rights under *Bruen*.” Opp. at 2.
 17 Thus, Defendants say, “if the Court were to determine that AB 1621 does implicate the
 18 text of the Second Amendment,” then they would be required to undertake “the
 19 historical analysis that *Bruen* contemplates,” but it “would require time for Defendants
 20 to develop the record to establish that AB 1621 is ‘consistent with the Nation’s
 21 historical tradition of firearm regulation.’” *Id.* at 2 (quoting *Bruen*, 142 S. Ct. at 2133).

22 So, Defendants have done nothing to date in terms of developing such a record
 23 in support of the regulation they wish to defend and, again, they are wrong that they
 24 can avoid the work by claiming the Second Amendment isn’t implicated here. While
 25 Plaintiffs certainly bear no burden to “justify” the regulation by “demonstrat[ing] that
 26 the regulation is consistent with this Nation’s historical tradition of firearm regulation,”
 27 *Bruen*, 142 S.Ct. at 2126, the evidence that they have proffered illustrates that
 28 Defendants could not carry this burden even if they tried, because it shows no

1 “relevantly similar” regulation, i.e., “well-established and representative historical
 2 *analogue*” exists, *id.* at 2132-33.¹ To the contrary, “[t]he influence of the gunsmith and
 3 the production of firearms on nearly every aspect of colonial endeavor in North
 4 America cannot be overstated, and that pervasive influence continuously escalated
 5 following the colonial era.” *M. L. Brown, Firearms in Colonial America: The Impact*
 6 *on History and Technology 1492-1792*, at 149 (1980), see
 7 <https://www.jstor.org/stable/3104465>. In March 1776, a committee of New York’s
 8 Provincial Congress actively sought to enlist and reward all those “willing to engage
 9 in *manufacturing* good Muskets, or the Locks, Barrels, or any necessary parts thereof.”
 10 *5 American Archives, Fourth Series*, 1418 (Peter Force ed. 1844) (italics added), see
 11 <https://onlinebooks.library.upenn.edu/webbin/book/lookupid?key=olbp70176>.
 12 Around the same time, the North Carolina Provincial Congress called for “all
 13 Gunsmiths, and other mechanicks, who have been accustomed to make, or assist in
 14 *making* Muskets.” *Id.* at 1338. Thomas Jefferson summed it up in 1793 saying, “Our
 15 citizens have always been free to *make*, vend, and export arms. It is the constant
 16 occupation and livelihood of some of them.” Secretary of State Thomas Jefferson, letter
 17 to George Hammond, British Ambassador to the U.S., May 15, 1793, in *7 The Writings*
 18 *of Thomas Jefferson* at 325, 326 (Paul Ford ed., 1904) (italics added), see
 19 <https://oll.libertyfund.org/title/ford-the-works-of-thomas-jefferson-12-vols>.

20 Again, this is consistent with the plain text of the Second Amendment under
 21 which the “general definition” of the “arms” protected under the Amendment “covers
 22

23 ¹ In a footnote, Defendants complain that “most” of this evidence is “not readily
 24 accessible,” it is “hearsay,” and that “Plaintiffs have provided no evidence, such as
 25 expert testimony, to assist the court’s determination of how much weight [it] should be
 26 given.” *Opp.* 13, n. 6. Again, Plaintiffs have *no* burden to provide *any* evidence.
 27 Further, each of the cited sources is readily available online, and, at any rate, it’s settled
 28 that this Court may properly consider any “hearsay” evidence at this preliminary stage.
 See *Herb Reed Enterprises, LLC v. Florida Entertainment Management, Inc.*, 736 F.3d
 1239, 1250, n. 5 (9th Cir. 2013) (it is “within the discretion of the district court to accept
 ... hearsay for purposes of deciding whether to issue the preliminary injunction”). What
 is more, the demand for experts and the like is refuted by *Bruen* itself, which was
 decided by the U.S. Supreme Court on a *motion-to-dismiss* record.

1 modern instruments that facilitate armed self-defense,” as *Bruen* just reaffirmed.
2 *Bruen*, 142 S.Ct. at 2132. In fact, there were no restrictions *at all* on the ability of
3 individuals to manufacture or assembly of arms for personal use in America until just
4 the *last decade*. See Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*,
5 at 37 (published Nov. 10, 2021; last edited April 11, 2022), available online at
6 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3960566). Such regulations are
7 distinctly of the modern age, well beyond the relevant historical period, the scope of
8 which the Supreme Court has “generally assumed” is pegged to the time period of the
9 Bill of Rights’ adoption in 1791. *Bruen* at 2137. Indeed, even historical evidence from
10 the late 19th and 20th centuries is of little to no relevance when it contradicts either the
11 plain text of the Second Amendment or any earlier evidence, *id.* at 2135, n. 28, 2137—
12 to say nothing of the 21st century, when the sort of regulations at issue here first
13 surfaced. Moreover, *Bruen* made clear that regardless of its provenance along the
14 historical timeline, even if a regulation may otherwise be “relevantly similar” for all
15 intents and purposes, it cannot justify the challenged regulation when it is an “outlier”
16 or an exception to the contemporaneously prevailing traditions, *see Bruen*, 142 S.Ct. at
17 2142, 2144, 2147, n. 22, 2153, 2154, 2155 (disregarding regulations from various
18 periods based on their “outlier” status in contravening the prevailing traditions), like
19 the modern-day CNC Ban and related prohibitions against self-manufacturing and self-
20 assembly under AB 1621, which find counterparts in only a miniscule number of states.

21 **IV. Defendants’ Fundamentally Misguided Litigation Strategy Underscores**
22 **the Need for Immediate Relief to Arrest the Ongoing Irreparable Harm**

23 Not only do Defendants present no evidence and make no effort to address, much
24 less counter, any of the historical evidence that Plaintiffs have proffered, but they claim
25 they have no burden to present any such evidence *even if* the conduct at issue is
26 protected. They declare *Plaintiffs* must “demonstrate[] that AB 1621 is not consistent
27 with historical tradition” Opp. 11, in direct contravention of *Bruen’s* repeated
28 instruction that “the government must demonstrate that the regulation is consistent with

1 this Nation’s historical tradition of firearm regulation,” *Bruen*, 142 S.Ct. at 2126, 2135.
2 Beyond this, as noted, Defendants simply say that *if* they have such a burden here, they
3 could *possibly* develop evidence of a relevantly similar analogue, but they must be
4 afforded “additional time to conduct the research and briefing necessary to perform the
5 historical analysis called for by *Bruen*.” Opp. at 12. In fact, it appears that Defendants
6 hope to just sit idly by while *Plaintiffs* gather historical evidence unless and until the
7 Court *directs* them to take action here. But they can’t have their cake and eat it too—
8 *refusing* to “perform the historical analysis called for by *Bruen*” and then expecting the
9 Court to find in their favor by denying this motion or holding the matter open for some
10 indefinite period of time while Defendants *then* do their work. Having elected to
11 *abandon* this duty in pursuit of the disingenuous litigation strategy that the Second
12 Amendment isn’t even “implicated,” Defendants should be precluded from conducting
13 any further “research and briefing” that delays adjudication of this motion.

14 Indeed, as no party disputes, the CNC Ban is *already* in place, having become
15 effective on September 28, 2022. As is also undisputed, the effect of the Ban is to force
16 all ordinary, law-abiding citizens with CNC milling machines to dispossess themselves
17 of the machines that they lawfully acquired for lawful purposes, like Plaintiffs Ruebe,
18 who was just required to do so within the last few days. *See* Exh. A (Dec. of Plaintiff
19 Ruebe). Drawing again from the First Amendment context to which the Supreme Court
20 has “repeatedly compared the right to keep and bear arms,” 142 S.Ct. at 2130, the “loss
21 of [constitutional] freedoms, for even minimal periods of time, unquestionably
22 constitutes irreparable injury,” *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S.Ct.
23 64, 67 (2020) (per curiam); *see also Ezell*, 651 F.3d at 699-700 (applying this principle
24 in Second Amendment context); 11A Charles Alan Wright, et al., *Federal Practice &*
25 *Procedure* § 2948.1 (3d ed. 2013) (“When an alleged deprivation of a constitutional
26 right is involved, . . . most courts hold that no further showing of irreparable injury is
27 necessary.”). “The same is true for Second Amendment rights.” *Rhode v. Becerra*, 445
28 F.Supp.3d 902, 953 (S.D. Cal. 2020). The forced dispossession and prohibition against

1 the use of such devices for the constitutionally protected conduct of self-manufacturing
2 or assembling firearms in common use for lawful purposes should not be allowed to
3 persist another moment.

4 Defendants' contradictory and misdirected arguments for keeping the Ban in
5 place pending the litigation underscore the need for immediate relief. Defendants claim
6 on the one hand there's no possibility of irreparable harm because nothing about AB
7 1621 could violate any rights secured under the Second Amendment, Opp. at 13, only
8 to then turn around and say there's no irreparable harm because people could "obtain
9 a replacement machine if the prohibition is ultimately deemed unconstitutional," *id.*
10 It's either unconstitutional or it's not. Defendants' ambivalence tellingly suggests that
11 they themselves have doubts about the Ban's legitimacy. *See Rhode*, 445 F.Supp.3d at
12 953 (quoting *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 664-65 (2004) ("[i]f
13 the underlying constitutional question is close... we should uphold the injunction and
14 remand for trial on the merits"). And the rest of their arguments seek to justify keeping
15 the law in force based on the *legislature's* judgments about the potential dangers of
16 "ghost guns" in the hands of *murderers and criminals* bent on evading detection with
17 "untraceable guns." *Id.* at 1, 3, 14. That focus is entirely wrong and thus carries no
18 weight. This case is about the right of *law-abiding* citizens to exercise conduct *covered*
19 under the Second Amendment according to "the balance struck by the founding
20 generation," which "demands our unqualified deference" unless the government
21 *justifies* the restriction as "consistent with the Nation's historical tradition of firearm
22 regulation." *Bruen*, 142 S.Ct. at 2126, 2133, n. 7.

23 Similarly, Defendants cannot sweep aside the concerns of irreparable harm by
24 claiming the Ban imposes only a "small" burden on Plaintiffs because they may have
25 *other* means to acquire and/or construct firearms. Opp. at 14. As the Third Circuit
26 recently put it in *Frein v. Penn. State Police*, 47 F.4th 247 (3d Cir. 2022), "[w]ith other
27 constitutional rights, we scrutinize not only total bans but also lesser restrictions and
28 burdens." *Id.* at 254. "Even if the government has not entirely prevented citizens from

1 speaking or worshipping, its burdens on speech and worship may violate the First
2 Amendment.” *Id.* “Thus, we may be skeptical of public-health rules that cap how many
3 people may physically attend church, even if the rules do not ban them from
4 worshipping.” *Id.* The government cannot defend a restriction on the exercise of
5 constitutional rights by pointing to the existence of *other* channels through which the
6 same rights might be exercised. It must *justify* cutting off the channel it has foreclosed.
7 *Bruen*, 142 S.Ct. 2130 (“[w]hen the Government restricts speech, the Government
8 bears the burden of proving the constitutionality of its actions”); *Frein* at 256 (rejecting
9 the argument that “seizures do not burden Second Amendment rights as long as citizens
10 can ‘retain[] or acquir[e] other firearms’”); *id.* (“We would never say the police may
11 seize and keep printing presses so long as newspapers may replace them, or that they
12 may seize and keep synagogues so long as worshippers may pray elsewhere.”).

13 Finally, Defendants cannot tip back the scales by claiming Plaintiffs haven’t
14 adequately *proved* the existence of irreparable harm with declarations or expert reports.
15 *Opp.* at 13. The relevant facts are undisputed, leaving purely legal questions about the
16 constitutionality of the law. *Rodriguez v. Robbins*, 715 F.3d 1127, 1133, n. 6 (9th Cir.
17 2013) (finding “the relevant facts [we]re inherently undisputed” where the “case
18 present[ed], at its core, a question of statutory and constitutional interpretation that
19 d[id] not turn on the facts of any individual Petitioner”). Anyway, “the rules of
20 evidence do not apply strictly to preliminary injunction proceedings.” *Herb Reed*, 736
21 F.3d at 1250, n. 5. The movant is not “required to prove his case in full at a preliminary-
22 injunction hearing,” *University of Texas v. Camenish*, 451 U.S. 390, 395 (1981); nor is
23 the court limited to “rely[ing] only on admissible evidence to support its finding of
24 irreparable harm,” as it may consider other materials, *Herb Reed* at 1250, n. 5.

25 With Defendants having elected a litigation strategy based on a tortured reading
26 of the Second Amendment’s plain text that enables them to avoid to “perform[ing] the
27 historical analysis called for by *Bruen*,” and with the law and relevant factors so heavily
28 on Plaintiffs’ side, this motion should be granted without further delay. Moreover, any

1 further delay in its adjudication occasioned by additional research or briefing should
2 be strictly limited in mitigating against the irreparable harm. *See Rhode*, 445 F.Supp.3d
3 at 954 (“The right to keep and bear arms protects both tangible and intangible interests
4 which cannot be compensated by damages.”).

5 Dated: October 3, 2022

The DiGuiseppe Law Firm, P.C.

6 By /s/ Raymond M. DiGuiseppe

7 Raymond M. DiGuiseppe

8 Attorneys for Plaintiffs

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