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9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
11 CIVIL DIVISION  
12

13 **VIRGINIA DUNCAN, RICHARD**  
14 **LEWIS, PATRICK LOVETTE,**  
15 **DAVID MARGUGLIO,**  
16 **CHRISTOPHER WADDELL, and**  
**CALIFORNIA RIFLE & PISTOL**  
**ASSOCIATION, INC., a California**  
**corporation,**

17 Plaintiffs,  
18  
19 v.

20 **ROB BONTA, in his official capacity**  
21 **as Attorney General of the State of**  
**California; and DOES 1-10,**

22 Defendants.  
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3:19-cv-1017-BEN-JLB

**DECLARATION OF ZACHARY  
SCHRAG IN SUPPORT OF  
DEFENDANT'S MOTION FOR  
RECONSIDERATION OF  
BRIEFING SCHEDULE SET  
FORTH IN ORDER SPREADING  
THE MANDATE AND  
CONTINUING THE  
PRELIMINARY INJUNCTION**

Date: November 9, 2022  
Time: 10:30 a.m.  
Courtroom: 5A  
Judge: Hon. Roger T. Benitez  
Action Filed: May 17, 2017

## DECLARATION OF ZACHARY SCHRAG

Pursuant to 28 U.S.C. § 1746, I, Zachary Schrag, declare under penalty of perjury that the following is true and correct:

1. I am a professor of history at George Mason University. I have personal knowledge of the facts set forth in this declaration, and if called upon as a witness, I could and would testify competently as to those facts.

2. I have been retained by the California Department of Justice to render expert opinions in this case. I completed most of my work on this declaration without charge, and beginning on August 21, 2022, I have been compensated for my additional work on this declaration at a rate of \$75 per hour.

### Background and Qualifications

3. In 2002 I earned my PhD in history at Columbia University. Since then I have been employed full-time as a history professor. In 2004 I joined the history faculty at George Mason University, where I now serve as a professor of history and as the director of the MA program in history. A true and correct copy of my curriculum vitae is attached as **Exhibit A** to this declaration.

4. I am the author of three books on the history of the United States: *The Great Society Subway: A History of the Washington Metro* (The Johns Hopkins University Press, 2006), *Ethical Imperialism: Institutional Review Boards and the Social Sciences, 1965-2009* (The Johns Hopkins University Press, 2010), and *The Fires of Philadelphia: Citizen-Soldiers, Nativists, and the 1844 Riots over the Soul of a Nation* (Pegasus Books, 2021), as well as multiple journal articles, book chapters, essays, and other publications on history.

5. I am also the author of *The Princeton Guide to Historical Research* (Princeton University Press, 2021), a peer-reviewed work that explains the methods used by historians to understand the past. To write that book, I examined other historians' practices, as well as drawing on my decades of experience conducting

1 my own research, teaching undergraduate and graduate courses on research  
2 methods, and supervising doctoral dissertations.

### 3 **The Historian's Role**

4 6. I have read the Supreme Court's decision in *New York State Rifle &*  
5 *Pistol Association, Inc. v. Bruen*.<sup>1</sup>

6 7. As one who has taught and written about the process of historical  
7 research, I have been asked by the California Department of Justice to explain the  
8 work required to answer the difficult historical questions posed in *Bruen*. It is not  
9 my purpose in this declaration to determine the "Nation's historical tradition" of  
10 firearms regulation or to detail the tasks that might be required to fairly describe  
11 that tradition. Rather, I seek to explain in general the process of historical research,  
12 and the reasons that it is unpredictable, labor-intensive, and time-consuming.

### 13 **Questions**

14 8. The *Bruen* opinion presents us with a general topic: the "Nation's  
15 historical tradition" of firearms regulation, including "historical analogies."  
16 Translating such a *topic* into a research *question* is the historian's most  
17 consequential task, and one of the most difficult.

18 9. A first task is to determine the geographical scope of a historical  
19 question. Any plan for historical research in response to post-*Bruen* litigation will  
20 need to determine the relevance of events outside of North America. Even within  
21 one continent, historians must make choices about geographical scope, for firearms  
22 have been at times regulated by local, colonial, state, federal, and Tribal bodies, and  
23 they have been controlled by non-state actors as well.

24 10. A second major task is to determine the chronological scope of an  
25 investigation. As part of any historical investigation of California's current laws,  
26 historians and lawyers would need to decide what periods of history they would  
27 like to explore.

28 <sup>1</sup> 597 U.S. \_\_\_, 142 S. Ct. 2111, 2126 (2022).

11. The third and most important scoping choice concerns people. For centuries, most historical research posed questions about powerful men with official positions: monarchs, generals, and cabinet ministers. But generations of historians have worked to expand our understanding of the past by including other groups: artists and intellectuals, business leaders and engineers, women, workers, members of minority groups, and so forth. Conceivably, a history of firearms regulation could embrace not only the stories of legislators and jurists, but also firearms manufacturers, users, victims, advocates, and opponents.

### Sources

12. Once historians have defined the questions they wish to answer, they must identify the sources they will use to do so.

13. The first step is to read existing scholarship, also known as secondary sources. Historians use a range of tools to determine what others have written. Bibliographic databases, published book reviews, and databases with the full text of journal articles are good places to start. Historians will often seek help at this stage from other scholars, including librarians. They will also read the footnotes of any scholarship they consult, leading to a lengthening chain of citation.<sup>2</sup> Existing scholarship will answer many questions, refine others, and pose new ones. In order to expand our understanding of the past, historians go beyond that scholarship and explore primary sources: documents or other material created by participants in or witnesses to the events one wishes to study.

14. Legal historians and courts are appropriately interested in statutory and case law. An act of legislation or a court order records a decision, but not necessarily the reasoning behind that decision. To be sure, legislative debates, accompanying reports, and court opinions sometimes help us understand the reason for a decision, but we often must look to unofficial sources as well. For example, to

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<sup>2</sup> Alexandra Chassanoff, "Historians and the Use of Primary Source Materials in the Digital Age," *American Archivist* 76 (September 2013): 460.

1 understand how New York and Massachusetts developed their immigration policy  
 2 in the 1850s (then mostly a state, rather than federal, responsibility), Hidetaka  
 3 Hirota considers not only the actions of courts and legislatures, but also the actions  
 4 of immigration officials, shipmasters, immigration officials, guardians of the poor,  
 5 foreign consuls and immigrants themselves. To do so, he consulted many published  
 6 statutes and court opinions from various years and states, which he then  
 7 contextualized using official reports, newspapers, and some archival papers, such as  
 8 the records of the mayor of New York City.<sup>3</sup> All of this helps us understand why  
 9 the legislatures passed the statutes they did.

10 15. Even then, we must do more to understand the effect of those statutes  
 11 on the lives of Americans, and their enforcement not only by agents of the state but  
 12 also by community norms. Historians have demonstrated that both state and federal  
 13 governments have relied on voluntary compliance or coercion, and the aid of non-  
 14 state actors, to achieve their ends. To understand how, for example, conscription  
 15 functioned in the world wars, we must look beyond the statute books and published  
 16 regulations to newspapers, journals, institutional histories, soldiers' letters, and  
 17 even the lyrics of popular songs.<sup>4</sup> In my own work, I cite two examples of firearms  
 18 regulation that took place not in the statehouse, but on the street. On May 7, 1844,  
 19 the day after a lethal riot, the mayor of Philadelphia noticed a man at a rally sitting  
 20 on a double-barreled gun and ordered a police officer to confiscate it, though it was  
 21 later returned. Two months later, the sheriff of Philadelphia County led a search of  
 22 a Catholic church, during which he confiscated a great many more arms of various

23  
 24  
 25 <sup>3</sup> Hidetaka Hirota, *Expelling the Poor: Atlantic Seaboard States and the  
 Nineteenth-Century Origins of American Immigration Policy* (Oxford University  
 Press, 2017), chapter 3.

26 <sup>4</sup> Christopher Capozzola, *Uncle Sam Wants You: World War I and the  
 Making of the Modern American Citizen*, 1 edition (New York; Oxford: Oxford  
 University Press, 2010), chapter 4; James T. Sparrow, *Warfare State: World War II  
 Americans and the Age of Big Government* (New York: Oxford University Press,  
 2011), chapter 6.

1 types.<sup>5</sup> These events eventually featured in criminal cases that were reported in  
 2 newspapers, months after the confiscations, suggesting the need to look beyond the  
 3 statutes to understand how Americans understood state police power.<sup>6</sup>

4 16. In *The Princeton Guide to Historical Research*, I take two chapters,  
 5 totaling fifty pages, to simply list the many types of sources commonly used by  
 6 historians, so I will not try to repeat that here. Briefly put, historians rely primarily  
 7 on textual sources, which may exist as books, serials, government documents,  
 8 unpublished manuscripts, or other formats. In addition, they sweep in non-textual  
 9 sources, such as quantitative data, maps, photographs, images, and physical  
 10 artifacts. These non-textual sources could be of interest in exploring the differences  
 11 among various kinds of urban spaces or the physical attributes of firearms and the  
 12 wounds they inflict, both of which may be significant to firearms regulation.

13 17. Because the sources a historian consults depends on the questions they  
 14 seek to answer, I cannot say in advance what kinds of sources a government might  
 15 explore to determine whether its laws conform to “this Nation’s historical  
 16 tradition.” What I can say is that choosing those sources will be a weighty and time-  
 17 consuming task.

#### 18 Access

19 18. Having identified the kinds of sources they are seeking, historians  
 20 must figure out how to access them. The digitization of primary sources has sped  
 21 up research a good deal, but the process is still time-consuming. The electronic  
 22 databases developed in the past quarter century are amazing but also seductively  
 23 easy. In recent years, journalists have made embarrassing missteps by failing to  
 24

25 <sup>5</sup> Zachary M. Schrag, *The Fires of Philadelphia: Citizen-Soldiers, Nativists,*  
 26 *and the 1844 Riots over the Soul of a Nation* (New York: Pegasus, 2021), 114, 207.

27 <sup>6</sup> Alexander Elkins, “‘At Once Judge, Jury, and Executioner’: Rioting and  
 28 Policing in Philadelphia, 1838-1964,” *Bulletin of the German Historical Institute* 54  
 (Spring 2014): 67–90; Gary Gerstle, *Liberty and Coercion: The Paradox of*  
*American Government from the Founding to the Present* (Princeton University  
 Press, 2017), chapter 2.

1 consider the ways that a simple text search can yield profoundly misleading results,  
2 if one fails to consider the ways that terminology shifts over time.<sup>7</sup>

3 19. Moreover, to thoroughly understand an event or debate, one may need  
4 to run the same search across numerous sources in parallel, including newspaper  
5 databases, digitized books, laws, and other documents.

6 20. To explore nineteenth-century newspapers from a single state, one  
7 may need to consult multiple commercial databases, each of which offers different  
8 holdings, and requires different query formats for a search. For example, to study  
9 antebellum Pennsylvania, I consulted digitized Pennsylvania newspapers in at least  
10 seven databases.<sup>8</sup> For each, one may need to enter multiple, related terms. For  
11 instance, a search for “shotguns” in one decade might not turn up any, if people of  
12 that period referred to such weapons as “fowling pieces.” Having found that term in  
13 one database, one might return to search for it in all the others.

14 21. These digital databases rely on computerized, optical character  
15 recognition, usually performed not on original print copies but rather on often  
16 blotchy microfilm. Because of the small typefaces and cramped layouts of  
17 eighteenth- and nineteenth-century texts, this is a highly unreliable process; a  
18 historian searching for a particular keyword may get fewer than half of the relevant  
19 results. As Tim Hitchcock has written of one digitized collection of eighteenth-  
20 century newspapers, “52 per cent of the Burney Collection and a similar proportion  
21 of other resources are entirely unfindable, and as importantly it will always be the  
22 same 52 per cent, determined by typeface, layout, bleed through and a host of other  
23 factors no one has thoroughly investigated. If you want to use these materials to

24 <sup>7</sup> Karin Wulf, “What Naomi Wolf and Cokie Roberts Teach Us about the  
25 Need for Historians,” *Washington Post*, June 11, 2019; Lauren MacIvor Thompson,  
“Women Have Always Had Abortions,” *New York Times*, December 13, 2019.

26 <sup>8</sup> This includes America’s Historical Newspapers, Chronicling America,  
27 GenealogyBank.com, Newspapers.com, Nineteenth Century U.S. Newspapers,  
28 Pennsylvania Historic Newspapers, and the Villanova Digital Library. Additional  
titles do not existing in digital form, so I consulted them on microfilm or in the  
original print. And titles from other states and countries required additional  
database searches.



1 trace tabular data, or advertisements that include graphical elements, or any text  
 2 normally represented in italics, you are largely out of luck.” A historian must spend  
 3 time comparing results to page images in order to understand what results are and  
 4 are not showing up, and to devise search strategies to compensate.

5 22. And digitized sources represent only a small fraction of the available  
 6 evidence. While digitization projects, such as Google Books and HathiTrust, have  
 7 made it easier than ever to access texts published before 1923, they do not cover all  
 8 publications, and they typically offer only glimpses of works that may still be  
 9 protected by copyright. And they do not sweep in the bulk of non-textual sources,  
 10 such as maps, artworks, and photographs, though other databases may reproduce  
 11 these.

12 23. The most time-consuming form of historical research is archival  
 13 research, which refers to the examination of original documents preserved by  
 14 specialized institutions. As noted above, Hirota explored city, state, and federal  
 15 archives (as well as some in the United Kingdom) to document official actions and  
 16 deliberations not recorded in published sources. Other historians use official  
 17 archives to demonstrate how a law operated in practice. To show how white  
 18 assailants of Black victims “could act beyond the law,” Adam Malka cites a pardon  
 19 record in the Maryland State Archives.<sup>9</sup> On a larger scale, our current  
 20 understanding of Reconstruction depends in part on the letters to Southern  
 21 governors that Eric Foner first read in the 1970s. As he has explained, those letters  
 22 had been stuffed in boxes for a century, and many of them were “total junk.” But  
 23 scattered among the total junk were accounts of the actual operations of  
 24 Reconstruction governments.<sup>10</sup>

26 <sup>9</sup> Adam Malka, *The Men of Mobtown: Policing Baltimore in the Age of*  
 27 *Slavery and Emancipation*, Illustrated edition (University of North Carolina Press,  
 2018), 170.

28 <sup>10</sup> Eric Foner, “Black History and the Reconstruction Era,” *Souls* 8 (2006):  
 198.



24. Unpublished unofficial sources also show us how previous generations of Americans, including those without official positions, understood the rules—official or not—that governed their lives. For example, Rosemarie Zagarri combines both unpublished and published personal letters to understand women’s roles in the politics of the early republic.<sup>11</sup> Lisa Tolbert relies on letters and diaries—as well as the testimony given in a murder trial—to understand how white women, white men, and enslaved Black men navigated similar urban spaces very differently, and gives us a far more complete understanding than would print sources created by and for white men alone.<sup>12</sup> My own understanding of the antebellum militia benefited greatly from reading the unpublished diary of Colonel Augustus Pleasonton, preserved by the Historical Society of Pennsylvania. Elizabeth Kelly Gray recently described how she and her students are transcribing *Memoirs of a Thief*, a manuscript written about 1800, which could give new insight to the working of criminal justice in the years after the passage of the Bill of Rights.<sup>13</sup>

25. Just locating archival sources is a task in itself, for archival sources often reside in unexpected places. For example, one might expect the work of a federal body to be preserved in the U.S. National Archives, an institution specifically created to preserve materials created by the federal government. In fact, as the Archives explains, it only preserves between 1 and 3 percent of those materials, so historians must often look elsewhere to trace even a federal story.<sup>14</sup> To understand the work of the National Commission for the Protection of Human

<sup>11</sup> Rosemarie Zagarri, *Revolutionary Backlash: Women and Politics in the Early American Republic* (University of Pennsylvania Press, 2011).

<sup>12</sup> Lisa C. Tolbert, *Constructing Townscapes: Space and Society in Antebellum Tennessee* (Chapel Hill: The University of North Carolina Press, 1999), chapters 4-6.

<sup>13</sup> “Lesson Plan: Primary Documents as Material Culture: Encouraging Students to See a Source from All Sides,” *The Panorama* (blog), August 17, 2022, <http://thepanorama.shear.org/2022/08/17/lesson-plan-primary-documents-as-material-culture-encouraging-students-to-see-a-source-from-all-sides/>.

<sup>14</sup> “What Is the National Archives and Records Administration?,” National Archives, August 15, 2016, <https://www.archives.gov/about>.

1 Subjects of Biomedical and Behavioral Research, for example, I had to spend long  
2 hours at the Bioethics Research Library at Georgetown University, which preserves  
3 materials prepared for the commission's meetings. I also traveled to the Graduate  
4 Theological Union in California to review additional materials deposited there by  
5 one of the commission members. In both cases, private institutions are preserving  
6 public records. While this example concerns a federal body, I have faced the same  
7 challenges at the state and local level.

8         26. As the above example suggests, relevant materials on a single topic  
9 may be scattered from coast to coast. Thanks to the work of countless archivists and  
10 networks, such as OCLC, Inc., identifying relevant collections may now be easier  
11 than ever before, though finding the right search terms remains an iterative process.  
12 But accessing archival materials is not simple. These materials do not circulate, so a  
13 researcher must travel to the archive, or hire a local assistant. Many reading rooms  
14 are open for limited hours. The Library of Virginia, for example, which holds the  
15 official records of the Commonwealth has an Archives Research Room that is open  
16 only twenty-six hours most weeks.<sup>15</sup>

17         27. Most significantly, archival research often resembles panning for  
18 gold—seeking the glint of treasure amid much larger volumes of worthless dirt. A  
19 box of documents may have a single page of relevant material, or none at all, or  
20 duplicates of material one has already seen, which can be even worse than finding  
21 nothing since they consume the time needed to check that they are, in fact,  
22 duplicates. Handwriting may be hard to decipher. Bound volumes may be missing  
23 pages, or runs of serials may be missing issues. Historians try work around such  
24 gaps by finding comparable information elsewhere, but this takes additional time.

25         28. In some cases, historians make copies of the materials they find—  
26 downloading electronic versions, or scanning or photographing printed materials.

27  
28 <sup>15</sup> “Library of Virginia Visitors Guide,” accessed August 3, 2022,  
<https://www.lva.virginia.gov/about/visit.asp>.

1 For collaborative work, citation-management systems such as Zotero can help  
 2 groups share resources. But this is still preliminary to the more important work of  
 3 reading and analyzing the material they have gathered.

#### 4 Findings

5 29. Having gained access to the sources one will consult, the next step is  
 6 to read them (or, in the case of non-textual sources, to view, listen to, or otherwise  
 7 extract information from them). And while historians are experimenting with  
 8 computer-aided methods of analysis, to a large extent they still rely on the time-  
 9 consuming work of thorough reading.<sup>16</sup> This takes time.

10 30. A major challenge in this process is to identify patterns that emerge  
 11 from the evidence, and to devise interpretations that best fit the available facts.  
 12 Historians seek to understand complexity, considering both the major trends of a  
 13 period and important exceptions.

14 31. Another key task is to read evidence critically, rather than taking  
 15 sources at face value. Historians understand that people create sources with an  
 16 agenda, whether they are trying to win votes, sell a product or service, persuade  
 17 loved ones to act in a certain way, gather information, or to craft an artistic  
 18 rendering of the world around them. To divine such agendas, historians consider the  
 19 intended audience, and the explicit or implicit messages a source conveys. They  
 20 consider a source's credibility, its stylistic nuances, and the context in which it was  
 21 created. And they compare sources to one another, especially looking for evidence  
 22 of change or continuity over time.

23 32. All of this takes time, and collaborative work only adds to the burden,  
 24 since it requires the coordination of efforts, the sharing of drafts, and eventually the  
 25 compilation of multiple documents into a single, coherent format. Since an  
 26 investigation of the relevant historical traditions of firearms regulation will likely

27 <sup>16</sup> Mats Fridlund, Mila Oiva, and Petri Paju, eds., *Digital Histories: Emergent*  
 28 *Approaches within the New Digital History* (Helsinki University Press, 2020);  
 Robert A. Caro, *Working* (Knopf Doubleday Publishing Group, 2019), 11.

1 require collaboration of multiple scholars with distinct approaches and expertise,  
 2 we can expect any report to go through multiple iterations before it is ready to be  
 3 shared with a court.

#### 4 **Timing**

5 33. As Justice Breyer's dissent in *Bruen* notes, historians have worked  
 6 hard to provide amicus briefs for cases headed to the Supreme Court, but the *Bruen*  
 7 majority imposes novel tasks on lower courts and litigants and, by extension, the  
 8 historians who might assist them.

9 34. To answer the questions raised by *Bruen* will require attention to a  
 10 wider range of sources than those typically found in legal databases. Again, a  
 11 historian would start with the existing scholarship, to learn what other historians  
 12 have already found about a given topic and what sources they used to develop those  
 13 findings. To build on that work, they would dive into primary sources, including  
 14 print and digital sources, and perhaps archival manuscript sources as well. And the  
 15 entire process is iterative. Just as a footnote in a scholarly source can lead one to a  
 16 primary source, so might reading a primary source spark questions—Who is this  
 17 person? What is the event being referred to here?—that are best answered by a  
 18 return to published scholarship.

19 35. I estimate that I write roughly 100 - 125 words of finished product per  
 20 hour of research and writing, so that each thousand words of finished research (not  
 21 including footnotes) would require between eight and ten hours. Thus, a 7,500-  
 22 word essay might be expected to take about 75 hours to write, possibly parceled out  
 23 among a team of historians. That estimate (which does not include preliminary  
 24 work to identify source materials), is complicated by the possible need to conduct  
 25 different kinds of historical research to meet the new approach suggested by *Bruen*,  
 26 which could require more primary-source research than is typical, which generally  
 27 takes longer to complete than research using secondary sources.  
 28

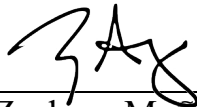
36. On top of this, most historians with PhDs work as professors, whose schedules are determined by their teaching duties.<sup>17</sup> The best time for them to be able to contribute their expertise would be between semesters: December, January, and the summer months. A deadline in the middle of a fall or spring semester risks depriving the court of their best work.

### Conclusion

37. History is for everyone. Asking what choices in the past led to our present circumstances is a basic human characteristic, and we all share stories of ourselves, our families, our communities, and our countries. At the same time, the most reliable histories require methodical investigation of the sort taught most frequently in graduate programs in history. Historians must craft worthy research questions that they will refine as they proceed, assess existing scholarship on a subject, identify and access primary sources that can help answer their questions, read those sources with care and curiosity, and report their findings in clear prose. Each step takes patience, deliberation, and a willingness to go down paths that may turn out to be dead ends. To do their best work, historians cannot be rushed.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on October 6, 2022, at Fairfax, Virginia.

  
Zachary M. Schrag

<sup>17</sup> Emily Swafford and Dylan Ruediger, “Every Historian Counts,” *Perspectives on History*, September 2019.

## CERTIFICATE OF SERVICE

Case Name: Duncan, et al. v. Bonta

No. 3:17-cv-01017-BEN-JLB

I hereby certify that on October 12, 2022, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**DECLARATION OF ZACHARY SCHRAG IN SUPPORT OF MOTION FOR  
RECONSIDERATION OF BRIEFING SCHEDULE SET FORTH IN ORDER  
SPREADING THE MANDATE AND CONTINUING THE PRELIMINARY  
INJUNCTION**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on October 12, 2022, at Los Angeles, California.

Robert Leslie Meyerhoff

Declarant

Robert M

Signature