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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARK BAIRD and
RICHARD GALLARDO,

Plaintiffs,

v.

XAVIER BECERRA, in his official
capacity as Attorney General of the State of
California, and DOES 1-10,

Defendants.

Case No. 2:19-CV-00617-KJM-AC

**PLAINTIFFS' REPLY MEMORANDUM
OF POINTS AND AUTHORITIES IN
FURTHER SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

Date: October 8, 2019
Time: 10:00 a.m.
Courtroom: 3
Judge: Hon. Kimberly J. Mueller
Trial Date: None set
Action Filed: April 9, 2019

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 21 *on the Constitution, September 23, 1998* 5, 6

1 **I. DEFENDANT CONCEDES OPEN CARRY IS BANNED**

2 Defendant readily admits, “California’s open carry laws restrict most individuals from
3 engaging in specific conduct - openly carrying firearms in public.” [Def. Memo of P&A at p. 6].
4 The only people not restricted are law enforcement and security guards. Defendant fails to
5 respond to Plaintiffs’ assertion that no open carry permits have been issued in the State since
6 2012¹ and offers no reason for the absence of a procedure to apply for an “open carry” permit.²

8 **II. HELLER SPECIFICALLY RECOGNIZED THE RIGHT TO PUBLIC CARRY**

9 Plaintiffs have a high likelihood of success on the merits. “We should have granted
10 certiorari in this case. The approach taken by the en banc court is indefensible, and the petition
11 raises important questions that this Court should address.” *Peruta v California*, ___ US ___, 137 S
12 Ct 1995, 1996 (2017) (cert. den.) (Thomas, J. dissenting). Justices Thomas and Gorsuch in *Peruta*
13 reaffirmed that “the Second Amendment’s core purpose further supports this conclusion that the
14 right to bear arms extends to public carry. The Court in *Heller* emphasized that ‘self-defense’ is
15 ‘the central component of the [Second Amendment] right itself.’” Indeed, *Heller*’s endorsement
16 of laws forbidding carrying firearms in sensitive places [schools and government buildings]
17 confirms that there are non-sensitive places where the right to public carry cannot be suppressed.
18 *District of Columbia v Heller*, 554 US 570, 626 (2008).

20 This case does not involve ‘less restrictive regulations’ than *Heller* [Def. Memo of P&A at
21 p. 6]. As with D.C.’s ban of handgun possession in the home, California’s ban on open carry in
22 public violates a core Second Amendment right, requiring strict scrutiny analysis.

24
25
26 _____
27 ¹ California Penal Code §26225 requires a copy of all firearms licenses issued in each county (open carry and
28 concealed carry) be “filed immediately” with the Attorney General’s Office DOJ. DOJ has no record of any open
carry licenses having been issued in the State since California enacted Penal Code §26350 criminalizing the open
carriage of an unloaded firearm in January 2012. (Dec. of Mark Baird at ¶45 submitted ISO motion).

² *Id.* at ¶42-¶43.

1 A Constitutional originalist, Justice Scalia’s thorough and learned interpretation of the
 2 Second Amendment in *Heller* was guided by ‘textualism’. “[The] Constitution is not a living
 3 document. It’s like having a mini-Constitutional Convention every time you appoint someone to
 4 the Supreme Court. The result is a Constitution whose meaning is determined by the majority of
 5 the people, but the Constitution is supposed to protect us from the majority...[t]he Constitution is
 6 not an empty bottle to be filled up by each generation.”³ “It’s the job of the judge to give the text
 7 - whether it’s the Constitution or a statute - it’s fair meaning...the meaning that the people to
 8 whom it was prescribed, who ratified the Constitution or the people to whom the statutes were
 9 promulgated, would understand them to mean.”⁴

11 Justice Scalia confirmed the right of the individual to carry firearms in public for self-
 12 protection, determining that ‘keep arms’ means to ‘possess weapons’ and ‘bear’ means to ‘carry
 13 in case of confrontation’. *Heller*, 554 US at 579, 582-584. “When used with ‘arms,’...the term
 14 [‘bear’] has a meaning that refers to carrying for a particular purpose - confrontation.” *Heller*, 554
 15 US at 584 (citation omitted). To interpret the phrase ‘bear arms’ to mean carrying a firearm
 16 around inside of your house in case of confrontation is not only redundant of the right to ‘keep
 17 arms’, it is a definition ‘worthy of the Mad Hatter’. *Heller*, 554 US at 589.

19 **III. STATUTORY EXEMPTIONS DO NOT SHIELD CRIMINAL PROSECUTION**

20 Defendant’s referenced ‘exemptions’ do not grant permission for open carry in public.
 21 The exemptions are affirmative defenses to criminal charges – not immunity from prosecution.
 22 Open carry in a ‘public place’ is a crime⁵. ‘Public place’ includes any area in which a stranger can
 23 walk without challenge. *People v. Strider* (2009) 177 Cal.App.4th 1393 (and cases cited); *People*
 24 *v. Yarbrough* (2008) 169 Cal.App.3d 886 (unenclosed residential driveway); *People v. Overturf*,

27 ³ <https://www.archbalt.org/scalia-constitution-is-not-a-living-document/>

28 ⁴ Justice Antonin Scalia, *Scalia: How to Interpret the Constitution*, <https://www.baxterbulletin.com/story/news/local/2015/04/17/constitution-interpreted/25961537/>.

⁵ Penal Code §26055, §26035, §25850, §26350.

1 (1976) 64 Cal.App.3rd Supp. 2 (unfenced business driveway is a public place). One’s driveway,
2 lawn, porch, sidewalk – all ‘public places.’ *Id.* citing, *People v. Olson* (1971) 18 Cal.App.3d 592.
3 One’s house is arguably a ‘public place’ when the front or back door is unlocked.

4 Mr. Baird’s property is not enclosed. Mr. Gallardo’s properties are not enclosed, and the
5 existing border is easily overcome by animals or human predators. Plaintiffs are subject to
6 criminal prosecution the moment they step outside of their house with an exposed handgun.
7 (Reply Declarations of Mark Baird and Richard Gallardo).

8 Defendant’s ‘focused self-defense exception’ is a façade. (§26045, §26050). One may
9 carry a loaded firearm under a reasonable belief that it is necessary to protect one’s person or
10 property from ‘immediate, grave danger’ or when making a lawful arrest. But, if open carry
11 outside of one’s house is a crime, when faced with immediate confrontation and grave danger in
12 public, where would one access a handgun?

13 Adhering to the ‘exemption’ language does not confer immunity from prosecution; the
14 law-abiding must still prove their innocence. Believing he and his property were in ‘immediate,
15 grave danger’, the defendant in *People v Overturf* called the police and went outside armed with
16 his firearm. His *conviction* for firearm possession was affirmed because two purported
17 exemptions *failed*. Having a firearm in a place of business (§26035) failed because his private
18 property was not fenced, thus he was carrying in a ‘public place’. The ‘focused self-defense
19 exception’ in a public place (§26045) failed, despite his adherence to the language of the statute.

20 Exposure to criminal prosecution is not a free exercise of one’s core Second Amendment
21 rights.

22 **IV. CALIFORNIA’S 164-YEAR TRADITION OF UNREGULATED OPEN CARRY**

23 Defendant’s claimed ‘tradition’ of regulating the open carry of firearms is a fallacy. Since
24 the Mexican-American War in 1848, California had a tradition of unregulated open carry and its
25

1 effects on society were largely unremarkable. People exercised their right to open carry; criminal
2 conduct was punished accordingly. The Mulford Act (1967) regulated open carry, criminalizing
3 public carry of loaded firearms, spurred by black residents patrolling their communities in the
4 face of ongoing police brutality⁶. (§25850). In 2012, California criminalized public carry of
5 unloaded firearms. (§26350). Unregulated open carry was an integral part of California’s history
6 for 164 years - substantially longer than it has been regulated.
7

8 **V. CONSTITUTIONAL DEPRIVATIONS CONSTITUTE IRREPARABLE INJURY**

9 This Circuit has repeatedly held that the deprivation of constitutional rights
10 ‘unquestionably constitutes irreparable injury’. *County of Santa Clara v Trump*, 250 F.Supp 3d
11 497, 537-538 (ND Cal 2017) (citations omitted). The violation of Plaintiffs’ Second Amendment
12 rights constitutes irreparable injury. *Duncan v Becerra*, 265 F Supp 3d 1106, 1135 (SD Cal 2017).
13 “The right to keep and bear arms protects tangible and intangible interests which cannot be
14 compensated by damages...The right to bear arms enables one to possess not only the means to
15 defend oneself but also the self-confidence — and psychic comfort — that comes with knowing
16 one could protect oneself if necessary...” *Duncan*, 265 F Supp 3d at 1135.
17

18 **VI. DEFENDANT MISREPRESENTS HISTORY, CASELAW, AND STATUTES**

19 The Declaration of Second Amendment historian Clayton Cramer exposes Defendant’s
20 numerous errors of fact, false descriptions of actual laws, and citations to non-existent laws. (Dec.
21 of Clayton Cramer at ¶11; Points 2 and 4). Defendant’s references to public carry restrictions in
22 England are irrelevant. English history is replete with the governmental oppression of its subjects
23 – banning hunting, banning firearms⁷, and monopolizing gun powder to keep the citizens
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26 ⁶ https://www.huffpost.com/entry/black-panthers-california-1967_n_568accfce4b014efe0db2f40;
https://en.wikipedia.org/wiki/Mulford_Act;

27 ⁷ Except when the King required an armed civilian force to save money instead of funding a conscripted army.
28 Citizens were required to purchase and maintain guns, but the King forbid firearms from any other use for fear of
rebellion and loss of hunting game for the wealthy. Joyce Lee Malcolm, *To Keep And Bear Arms: The Origins of an
Anglo-American Right*, p. 1-53.

1 unarmed and submissive to classist oppression.⁸ By 1780, London’s Chief Legal Officer
2 confirmed that the English Declaration of Rights protected the right of the subjects “to have arms
3 for their own defence, and to **use** them for lawful purposes...[which is] not only as a right, but as
4 a duty; for all the subjects of the realm, who are able to **bear arms**, are bound to be ready, at all
5 times, to assist the sheriff, and other civil magistrates, in the execution of the laws and the
6 preservation of the public peace.” (Cramer Dec. at Section 2) [emphasis supplied].⁹

8 The Bill of Rights was created to restrict government conduct as a ‘protest against
9 arbitrary action of the overturned dynasty in disarming the people...a pledge of the new rulers
10 that this tyrannical action should cease.¹⁰ The Second Amendment was penned to prevent the
11 government from disarming its citizens – exactly what the English soldiers attempted to do and
12 what California is doing now. The Bill of Rights does not *grant* rights, it prohibits the
13 government from violating pre-existing rights – a necessary safeguard of individual liberty.
14 Indeed, unlike the Fourth Amendment prohibitions on “*unreasonable*” conduct, the Second
15 Amendment prohibits the mere *infringement* of the right to possess and carry weapons. “[H]istory
16 showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not
17 by banning the militia but simply by taking away the people’s arms, enabling a select militia or
18 standing army to suppress political opponents.” *Heller*, 554 US at 598.

21 The Colonial Period (1607-1776) **required** free men to carry firearms. (Cramer Dec. at
22 Point 3). State laws limiting carry rights during the Antebellum Period (1812-1861) arose from
23 the misconception that the Constitution only applied to the federal government. (Cramer Dec. at
24 Point 3-5). *McDonald v City of Chicago*, 561 US 743 (2010) has revolved that misconception.

25
26 ⁸ Malcolm, p. 1-53.

27 ⁹ Despite England’s ban on handgun possession in 1996 by civilians and the general police force, the rate of gun
28 violence rose 42% in 2017-2018 along with a rise in knife-related crimes. <https://www.bbc.com/news/uk-england-london-39578500>; <https://www.theguardian.com/uk-news/2018/apr/26/surge-in-knife-offences-fuels-rise-in-violent>

¹⁰ *Testimony of Eugene Volokh on the Second Amendment*, Senate Subcommittee on the Constitution, September 23, 1998.

1 Even state constitutions recognized the right to bear arms for self-defense. *Volokh*, supra.

2 Defendant misrepresents the Statutes of Northampton, which forbade the wearing of
3 *armor* in public, *not firearms*, because the sight of armor caused panic and fear in those not
4 wearing armor. (Cramer Dec. at Point 2). The Statutes of Northampton were specifically *rejected*,
5 not adopted, by North Carolina in *State v Huntly*, 25 N.C. 418 (1843), as Defendant claims. *Id.*
6 *Huntley* also did not declare guns ‘unusual weapons’. Just the opposite: “a double-barrelled gun
7 (sic), or any other gun, cannot in this country come under the description of ‘unusual weapons,’
8 for there is scarcely a man in the community who does not own and occasionally use a gun of
9 some sort.” *Id.*

11 The statutes cited by Defendant¹¹ only regulated disruptive, terrifying conduct, not the
12 public carriage of firearms as he claims. (Cramer Dec. at Point 2). The act of carrying a firearm,
13 without more, was insufficient to face punishment under a state-enacted Northampton analogue.
14 It was the terrorizing conduct by the carrier that was unlawful. *Id.* Regulations on public carry
15 were narrow and conduct-driven, revealing the fundamental right of ordinary citizens under
16 ordinary circumstances to carry guns in public. Plaintiffs relied upon the very cases cited by
17 Justice Scalia in *Heller: Nunn v State*, 1 Ga. 243 (striking ban on open carry), *State v Chandler*, 5
18 La. Ann. 489 (1850) (citizens have a constitutional right to carry arms openly), *Andrews v. State*,
19 50 Tenn. 165 (1871) (statute banning open carry violated the constitution).

22 **VII. DEFENDANT’S RESEARCH ARTICLES DO NOT MENTION OPEN CARRY**

23 Defendant freely interchanges the terms ‘open’ carry, ‘concealed’ carry, and ‘public’
24 carry, in manipulative fashion. Adding to the confusion, all three (3) of Defendant’s articles deal

26 ¹¹ Defendant also misrepresents ‘surety’ requirements of the time. (See, Def. Memo of P&A at p. 11). There was no
27 requirement that a surety be posted simply for carrying a firearm in public. A surety was only required when a
28 complaint was filed alleging that the carrier “threatened injury or a breach of the peace”; but, if the carrier showed
‘good cause’ for the need to continue carrying his firearm, he was exempted from having to pay the surety. *Wrenn v.*
District of Columbia, 864 F.3d 650, 661 (DC Cir 2017). Thus, the ‘good cause’ requirement did not apply to public
carry for the responsible; it shrank the penalty to the reckless carrier. (Cramer Dec. at Point 2).

1 solely with concealed carry, with no mention of open carry. Exhibit 1 “estimate[s] the impact on
 2 violent crime when states adopt right-to-carry (RTC) *concealed handgun* laws” (emphasis
 3 added), Exhibit 3 only discussed concealed carry, and Exhibit 2, an attempt to disprove a prior
 4 study on concealed carry, concedes it “does not prove that RTC (right-to-carry) laws increase
 5 crime simply because RTC states experience a worse post-passage crime pattern.” (Wise Dec. at
 6 p. 214, or ECF p. 20 of 80). Contrary studies abound.¹² The Articles are irrelevant, immaterial,
 7 and lack probative value. As such, they should be disregarded.
 8

9 **VIII. PUBLIC SAFETY ARGUMENTS WERE REJECTED BY JUSTICE SCALIA**

10 Justice Scalia rejected the dissent’s ‘interest-balancing’ test, yet Defendant relies on the
 11 same failed arguments offered in Justice Stevens’ dissent in *Heller* – rewritten history and public
 12 safety claims. The government cannot have it both ways. “The very enumeration of the right takes
 13 out of the hands of government - even the Third Branch of Government - the power to decide on a
 14 case-by-case basis whether the right is really worth insisting upon.” *Heller*, at 634. If the Ninth
 15 Circuit deems concealed carry a ‘privilege’ subject to governmental whims¹³, then open carry is a
 16 core right protected by the Second Amendment subject to strict scrutiny. A contrary finding
 17 would render the phrase ‘bear arms’ meaningless.
 18

19 No matter how well-intentioned, judges are without the power to limit rights guaranteed
 20 by the Constitution. “Personal fears and opinions do not trump, and cannot negate, constitutional
 21 guarantees... Courts must give more than lip service to the rule of law; they must insist upon its
 22 lawful application. Judges cannot allow their sense of superior knowledge, perceptions, or
 23

24
 25 ¹² Lott and Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, University of Chicago Law
 26 School (1996); [https://www.nraila.org/articles/20181206/surprise-study-finds-no-rise-in-violent-crime-attributable-](https://www.nraila.org/articles/20181206/surprise-study-finds-no-rise-in-violent-crime-attributable-to-adopting-right-to-carry-laws)
 27 [to-adopting-right-to-carry-laws](https://www.nraila.org/articles/20181206/surprise-study-finds-no-rise-in-violent-crime-attributable-to-adopting-right-to-carry-laws); *The Myth That Australia’s Gun Laws Reduced Gun Homicides*,
 28 <https://fee.org/articles/the-myth-that-australias-gun-laws-reduced-gun-homicides/>; Pomeroy, Ross, *Review:*
‘Strongest’ Research Shows No Link Between Gun Ownership Rates and Higher Crime, RealClear Science (March
 10, 2015) [https://www.realclearscience.com/blog/2015/03/review-strongest-research-shows-no-link-between-gun-](https://www.realclearscience.com/blog/2015/03/review-strongest-research-shows-no-link-between-gun-ownership-rates-and-higher-crime.html)
[ownership-rates-and-higher-crime.html](https://www.realclearscience.com/blog/2015/03/review-strongest-research-shows-no-link-between-gun-ownership-rates-and-higher-crime.html)

¹³ *Peruta v County of San Diego*, 824 F3d 919, 924 (9th Cir 2016) (en banc).

1 understandings to justify open defiance of the very laws that they are called upon to uphold [as]
2 courts are guardians of the Constitution...” *Ward v. Colom*, 2016-M-01072 (Miss. May. 4, 2017)
3 (vacating judicial orders prohibiting firearm possession by CCW licensees in court buildings).

4 Defense witness Kim Raney offers no facts, evidence, or law enforcement experience with
5 open carry - only speculation and fearmongering and hypothetical scenarios arising from poorly
6 trained officers, not lawful people exercising their civil rights. Plaintiffs’ expert, Charles “Chuck”
7 Haggard offers actual law enforcement experience in a jurisdiction that transitioned to open carry
8 overnight. “The implementation of laws that allow open carry in public do not have a negative
9 impact on public safety...a lawful person openly carrying a firearm in public [] does not have a
10 negative or detrimental effect on public safety, does not itself create a ‘safety hazard’, and is not
11 the cause of accidental or mistake of fact shootings of civilians by police officers. The lack of
12 proper police training creates or can lead to a public safety hazard and the accidental shooting of
13 civilians – whether unarmed, carrying concealed, or carrying exposed (open carry).” (Dec. of
14 Charles “Chuck” Haggard).

15
16
17 “Banning open carry does not greatly enhance public safety, nor does it cure deficiencies
18 in departmental training of police officers. Police shootings of innocent civilians – whether
19 unarmed, carrying concealed, or carrying exposed – will continue to occur absent proper training
20 or in those situations where the armed person is willfully forcing a confrontation with officers.
21 This can and will happen regardless of the legalities of open or concealed carry.” (*Id.*). When
22 Kansas went from being a state with no legal method of concealed or open carry... to a state
23 where open and concealed carry was allowed with no license...no ‘instant mayhem’ was created.
24 Police officers were not spontaneously shooting members of the public they observed carrying a
25 firearm exposed on their body in public...” (*Id.*)

26
27 The Second Amendment’s answer to criminal use of firearms “is to support such laws as
28

1 are directed to those who threaten or demonstrate such abuse and to no one else...those who
2 neither commit crimes nor threaten such crimes are entitled to be left alone.”¹⁴

3 Defendant claims that crime increases when the government removes bars to public carry.
4 On its face, this claim is illogical. It requires believing that people with a history of lawful
5 behavior suddenly abandoned their moral compass upon the enactment of open carry laws.
6

7 The theory that right-to-carry laws cause an increase in crime is defeated by real-life facts,
8 not studies that employ synthetic data controls [Def. Articles 1 and 2] or speculation [Dec. of Kim
9 Raney]. Four years after Maine allowed open carry without a license, its crime rate is the lowest
10 in the nation.¹⁵ The second-safest state is Vermont and the third safest, New Hampshire - each
11 allow open carry without a license.¹⁶ 46 out of 50 states recognize the right to open carry¹⁷ and 32
12 of our 50 states [over half of the country] do not require a permit.¹⁸

13
14 There are “a range of factors...related to high levels of gun use...includ[ing] high rates of
15 poverty, illicit drug trafficking, and substance use. For example, increased firearm violence has
16 been associated with drug markets. A number of situational level factors are also associated with
17 increased risk of violence in general and firearm violence in particular. For example, the presence
18 of drugs or alcohol increases the risk of firearm violence.”¹⁹ “Unauthorized gun possession or use
19 is associated with higher rates of firearm violence than legal possession of guns.” (*Id.* at p. 6).
20 “Studies that directly assessed the effect of actual defensive uses of guns (i.e., incidents in which
21 a gun was “used” by the crime victim in the sense of attacking or threatening an offender) have
22

23
24 ¹⁴ William R. and Thomas L. Perkins, *The Second Amendment and the Personal Right to Arms*, Duke University
School of Law, p. 1250.

25 ¹⁵ Open Carry States Population. (2019-08-27), retrieved 2019-09-09 from <http://worldpopulationreview.com/open-carry-states/>

26 ¹⁶ <https://www.usnews.com/news/best-states/rankings/crime-and-corrections/public-safety>

27 ¹⁷ Oklahoma’s Constitutional Carry laws go into effect on November 1, 2019.

28 ¹⁸ Open Carry States Population. (2019-08-27). Retrieved 2019-09-09, from <http://worldpopulationreview.com/open-carry-states/>

¹⁹ *Priorities for Research to Reduce the Threat of Firearm-Related Violence*, National Academies Press (2013) at p. 4-5.

1 found consistently *lower injury rates among gun-using crime victims* compared with victims
2 who used other self-protective strategies. *Id.* at p. 16. (emphasis added).

3 Law-abiding individuals, like Plaintiffs, play no part in crime statistics. Banning open
4 carry because criminals use guns to commit crime makes as much sense as banning alcoholic
5 beverages because people drive drunk. The *relevant* statistics to consider are those where law-
6 abiding gun owners defended themselves and/or others from violent criminals.²⁰

7
8 WHEREFORE, it is respectfully requested that Plaintiffs' motion for a preliminary
9 injunction be granted in its entirety.

10 Dated: October 1, 2019

Respectfully submitted,

11 THE BELLANTONI LAW FIRM, PLLC
12 /s/ Amy L. Bellantoni, Esq.
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²⁰ One website alone provided 2270 incidents of self-defense by law-abiding people against violent criminal
28 attacker(s) using a lawfully owned firearm. <https://foac-pac.org/index.php?pageName=Defense-Stories>