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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE KIMBERLY J. MUELLER

MARK BAIRD and RICHARD
GALLARDO,

Plaintiff,

vs.

Sacramento, California
No. 2:19-CV-00617
Wednesday, October 9, 2019
11:02 a.m.

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

Defendant.

_____ /

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REPORTER'S TRANSCRIPT OF PROCEEDINGS
DEFENDANT'S MOTION TO DISMISS, PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION AND STATUS CONFERENCE
--oOo--

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1 SACRAMENTO, CALIFORNIA, WEDNESDAY, OCTOBER 9, 2019, 11:02 AM

2 --oOo--

3 THE CLERK: Calling civil case 19-617, Baird, et al.
4 versus Becerra. This is on for defendant's motion to dismiss,
5 plaintiff's motion for preliminary injunction, and a status
6 conference.

7 THE COURT: All right. Good morning. Appearances,
8 please.

9 MS. BELLANTONI: Good morning, your Honor. Amy
10 Bellantoni for the plaintiffs Mark Baird and Richard
11 Gallardo.

12 THE COURT: Good morning, Ms. Bellantoni.

13 MR. WISE: Good morning, your Honor. Matthew Wise for
14 Attorney General Xavier Becerra.

15 THE COURT: Good morning, Mr. Wise.

16 This is on for preliminary injunction, to dismiss, and
17 for scheduling. And I have several questions regarding each.
18 What I'd like to do is work through my questions. Then I would
19 allow you to make wrap-up argument if you think there's not
20 something fully covered by the briefing or my discussion with
21 you.

22 First, to clarify one threshold question the Court
23 has, Ms. Bellantoni, as the defense points out, the sheriffs
24 are not sued here. Is there anything in the complaint that
25 alleges the attorney general's interference with the sheriffs'

1 carrying out of the state statutes?

2 MS. BELLANTONI: Well, your Honor, the Department of
3 Justice requires the sheriffs to use their specific procedure
4 and their statutory forms which only provide for concealed
5 carry application. There is no provision online or in the hard
6 cover -- the hard copy forms that allows for open carry to be
7 applied for. But notwithstanding that requirement, the statute
8 itself is inadequate and should be enjoined because the
9 language, the may issue language, the requirement of the
10 establishment of good cause for open carry, the geographical
11 restrictions, and the restrictions as to population size in
12 areas where open carry permits are allowed to be issued. So
13 notwithstanding that the forms themselves and the procedures do
14 not allow for the application of open carry, the sheriffs
15 themselves are not mandated to enforce the God given rights
16 that these residents of California have to open carry.

17 THE COURT: God given, not constitutional.

18 MS. BELLANTONI: Well, the constitution and precedent
19 following recognize that the constitution and the government
20 actually give no rights. They restrict the government from
21 infringing on preexisting rights.

22 THE COURT: All right. Well, this Court is
23 determining legal rights and constitutional rights. I just
24 want to make that clear.

25 So on the use of the forms, is there a link there,

1 Mr. Wise? Is it -- I believe it is pled, at least it's argued
2 that the AG requires the use of certain forms by the local
3 sheriffs. That's undisputed or at least that's what the
4 plaintiffs have pled?

5 MR. WISE: May I ask your preference if I stand or
6 sit?

7 THE COURT: It's up to you. This is not a jury
8 proceeding. If you need access to your materials, you may
9 remain seated. The key is that you use a microphone so the
10 court reporter can hear you.

11 MR. WISE: I think I'll sit then. Thank you, your
12 Honor.

13 So yeah. My understanding is that the application
14 is -- at least by appearances, it appears to be geared toward
15 concealed carry. But as we indicate in our briefing, there are
16 statements that make reference to the open carry statute. So
17 those would be the applications presumably that would be used
18 for the counties that do allow open carry.

19 THE COURT: All right. Another threshold question,
20 the plaintiff suggests that the defense is using the terms
21 "open," "concealed," "public" in a confusing way. Is there a
22 stipulated definition of public? Does public just mean outside
23 the home, or how is the defense using public?

24 MR. WISE: Yeah. I mean public would be any manner of
25 carry outside of the home.

1 THE COURT: Agree with that, Ms. Bellantoni? Any
2 reason not to use that definition for public wherever it
3 appears, particularly in the defense briefing?

4 MS. BELLANTONI: Yes, your Honor. Because there is a
5 vast distinction between open carry and concealed carry with
6 respect to how the Ninth Circuit views them.

7 THE COURT: I understand that. But you suggested
8 there was some misleading use of the word public.

9 MS. BELLANTONI: Sure.

10 THE COURT: And I'm trying to -- so open carry and
11 concealed carry could both be public if it's outside the home.

12 MS. BELLANTONI: Yes. But it's -- in reading the
13 documentation, it's my position that the state is creating --
14 when using the word public carry is sliding into areas and
15 arguments that are applicable only to concealed carry which is
16 vastly different under the Ninth Circuit holdings from open
17 carry.

18 THE COURT: So you think when I see "public" in their
19 brief I should assume it's concealed only?

20 MS. BELLANTONI: I think that it's going to depend on
21 the context in which they're arguing. But by using public
22 carry, it certainly allows for arguments to be made that are
23 applicable solely to concealed carry, and it blurs the line.

24 THE COURT: All right. I don't know if it matters,
25 but are there any allegations that either plaintiff has applied

1 for and been denied a concealed carry license, Ms. Bellantoni?

2 MS. BELLANTONI: I believe that it's not relevant to
3 the arguments here.

4 THE COURT: Agree with that, Mr. Wise?

5 MR. WISE: That concealed carry is not relevant to the
6 arguments here, yes, I agree with that.

7 THE COURT: All right. On the preliminary injunction,
8 based only on the Second Amendment claims, correct?

9 MS. BELLANTONI: Yes.

10 THE COURT: So help me understand how I can find a
11 likelihood of success on the merits given the state of the law.
12 I mean, often parties are laying foundation for going to higher
13 courts here, and it's hard not to see this as one of those
14 cases. The Ninth Circuit specifically stayed Young pending
15 resolution of the New York case before the Supreme Court. So I
16 can't rely on Young at this point, right?

17 MS. BELLANTONI: Correct. That's why there's no
18 reference to Young in my papers.

19 THE COURT: So how can I find the likelihood of
20 success given that the question is currently undecided?

21 MS. BELLANTONI: Because the careful reading or plain
22 reading actually of *Heller* as well as the dissent of Justice
23 Thomas and Justice Gorsuch in the *Peruta II* case decided in
24 2017, so the last of the *Peruta* cases, specifically recognizes
25 the right to bear arms in public, you know, putting aside the

1 plain reading of the Second Amendment. So in light of the fact
2 that the Ninth Circuit has deemed concealed carry to be a
3 privilege, not a right, that takes concealed carry out of the
4 scope under their opinion of the Second Amendment leaving only
5 one manner of carry which would be open carry. So if the right
6 to keep has already been decided by the Supreme Court, the
7 right to bear, which is also within the scope of the Second
8 Amendment protections, only leaves open carry, and so it is
9 highly likely that we will succeed on the merits of that claim
10 whether here or in the higher courts.

11 THE COURT: *Heller* didn't say the right was completely
12 unfettered, agreed?

13 MS. BELLANTONI: The right to bear arms in public? I
14 just want to understand.

15 THE COURT: The right to bear arms.

16 MS. BELLANTONI: The right to bear arms, that it was
17 not completely unfettered? Justice Scalia identified narrow
18 instances such as sensitive places like schools or government
19 buildings where that right may be curtailed and/or regulated.
20 But the state has taken the broad-brush approach and has
21 basically relegated -- well, has essentially banned the right
22 to bear arms. The right to bear arms in California today is
23 banned.

24 THE COURT: In effect.

25 MS. BELLANTONI: In fact. In fact. Because the only

1 right --

2 THE COURT: Not by statute.

3 MS. BELLANTONI: By statute because the language of
4 the statute for open carry permits is may issue. It's left in
5 the hands of sheriffs.

6 THE COURT: It may be. I understand that you're
7 saying you can create a factual record. The allegations in the
8 complaint say factually no open carry licenses have been
9 issued. But that's an in effect claim. It's not saying the
10 statute expressly bans, or are you saying the statute expressly
11 bans? Is that how you read the statute?

12 MS. BELLANTONI: I'm saying that the statute is a ban
13 on open carry because it's treating open carry the same way it
14 treats concealed carry, as a privilege. And since 2012, by
15 concession of the attorney general's office, no open carry
16 permits have been issued. The open carry of a firearm is
17 criminalized.

18 THE COURT: I understand those arguments.

19 So Mr. Wise, on *Peruta II*, recognizing the questions
20 that *Peruta II* says it left open, is it possible to read that
21 case as saying that there is no right to carry a weapon
22 concealed unless open carry is unavailable?

23 MR. WISE: That's not our reading of *Peruta*. *Peruta*
24 was dealing specifically with concealed carry. That was the
25 question in that case, and it doesn't, I don't think, purport

1 to represent that it was dealing with anything else. And so
2 that's why we've had a series of cases that have come alongside
3 and after *Peruta*. *Flanagan*, you know, addresses the question
4 of is there some manner of carry that is allowed. This case
5 appears to be focused specifically on open carry I think
6 regardless of whether there's concealed carry. So we've, of
7 course, in our briefing addressed the historical and, you know,
8 tradition as reasons why we believe that open carry
9 restrictions are permitted.

10 THE COURT: So Ms. Bellantoni, if I were to issue a
11 preliminary injunction, are you suggesting that I would limit
12 it to enjoining enforcement of the statutes only against quote,
13 unquote, law-abiding citizens?

14 MS. BELLANTONI: I'm sorry. Can you repeat that. I'm
15 not sure I understand what you're saying.

16 THE COURT: I believe your briefing really emphasizes
17 that the plaintiffs here are law-abiding citizens.

18 MS. BELLANTONI: Correct.

19 THE COURT: I query whether or not any one of us is a
20 one hundred percent law-abiding citizen. So that seems to be a
21 critical part of your argument. I guess my point is some of us
22 jaywalk.

23 MS. BELLANTONI: Yeah. That's not -- so
24 respectfully --

25 THE COURT: It's not a fixed status necessarily, and

1 so how would I craft a preliminary injunction given your
2 apparent acknowledgment that law abiding is an important factor
3 here?

4 MS. BELLANTONI: Yeah. So law abiding, to the extent
5 that there is no statutory prohibitor to the possession or
6 purchase of a firearm by my clients or by other law-abiding
7 individuals, there are statutory enumerations of prohibitors
8 federally that ban certain individuals such as those convicted
9 of a felony offense, those convicted of misdemeanor domestic
10 violence, those who have been dishonorably discharged from the
11 military forces, those who have been involuntarily committed to
12 a mental institution or adjudicated by a court of having a
13 mental disease or defect, those are -- additionally, people who
14 have an active order of protection against them, those are
15 individuals who, unless there was some type of civil relief
16 that has been granted to them, are statutorily prohibited from
17 firearm possession. Anyone else is not.

18 THE COURT: So would the preliminary injunction need
19 to spell out those categories or not?

20 MS. BELLANTONI: I could certainly craft --

21 THE COURT: I'm just asking you in terms of clarity.

22 MS. BELLANTONI: Anyone who is not otherwise
23 statutorily under state or federal law prohibited from
24 possessing firearms. In other words, if someone went to
25 the --

1 THE COURT: I think I understand the point.

2 MS. BELLANTONI: Thank you.

3 THE COURT: So in terms of the defense argument in its
4 opposition that you don't argue how the means and scrutiny
5 analysis works here, what's your -- what's your response to
6 that? I'm looking at page 16, bottom of the page, page 24, the
7 electronic page. How do you apply whatever level of scrutiny
8 the Court should apply to the statutes?

9 MS. BELLANTONI: I would ask the Court to file the
10 reasoning of Justice Scalia and *Heller*. This is a fundamental
11 core right protected by the Second Amendment. There is no
12 balancing. There is no other scrutiny than strict scrutiny.

13 THE COURT: Also in terms of harm, what's the imminent
14 harm to the plaintiffs if a preliminary injunction does not
15 issue?

16 MS. BELLANTONI: It's an existing harm that's been in
17 existence since open carry has been banned in the state as held
18 by the Ninth Circuit and cited in the core papers.

19 THE COURT: But why the timing now? Typically a court
20 looks at the time from when the harm began to the time it's
21 presented with the preliminary injunction in assessing how
22 strong the harm is, and I think you would say the ban went into
23 effect sometime ago, if I accept for sake of argument your
24 characterization of the law as a ban.

25 MS. BELLANTONI: I don't believe there's a prohibitor

1 for my clients to, as far as the timing of when the action was
2 filed. It's an existing harm that needs to be stopped.

3 THE COURT: But they've been experiencing the harm in
4 your view since 2012, 2011?

5 MS. BELLANTONI: Since 1967 when loaded carry in
6 public was outlawed by the Mulford Act.

7 THE COURT: Any response to what you've just heard,
8 Mr. Wise?

9 MR. WISE: Just to echo the point that we made in our
10 brief that there is no urgency in this case. I mean, if it's
11 harm that's existed since 1967, then this wouldn't be an
12 appropriate case for a preliminary injunction. The harm is
13 clearly based on the constitutional injury and not any other
14 sort of irreparable harm that the plaintiffs have suffered.

15 Also on the means and scrutiny, that's, you know,
16 certainly warranted by the Ninth Circuit law, *Chovan* and other
17 cases like it.

18 MS. BELLANTONI: And respectfully, your Honor, the
19 case law is clear, constitutional injury is irreparable harm.

20 THE COURT: I understand the argument.

21 I have no other questions on the preliminary
22 injunction. If there's anything else on the preliminary
23 injunction before I move to the motion to dismiss, I would
24 entertain brief argument. But again, please don't repeat
25 what's in your briefs -- I've read them -- or what we've just

1 discussed.

2 So let me just -- I'll give you the final word,
3 Ms. Bellantoni.

4 But anything further on the preliminary injunction,
5 Mr. Wise?

6 MR. WISE: Your Honor, yes, only because there were
7 quite a few points that were addressed in plaintiff's reply
8 brief that I didn't get a chance to respond to, and I'd just
9 like to address two of the declarations that were submitted
10 with the reply brief because I think it might be helpful to the
11 Court's reading.

12 THE COURT: All right.

13 MR. WISE: So first, plaintiffs' claim on page 4, the
14 declaration they submitted from Clayton Cramer exposes
15 defendant's numerous errors of fact, false descriptions of
16 actual laws and citations to nonexistent laws. And if I were
17 to go through Mr. Cramer's declaration point by point, we would
18 be here a long time, but I want to give one example of the type
19 of misleading statements that are representative of the
20 contents of this declaration. Mr. Cramer claims on pages 4 and
21 5 of his declaration that the old North Carolina case, *State v.*
22 *Huntly*, quote, held that the North Carolina statute modeled
23 after the statute of Northampton was not in effect when that
24 case was decided.

25 And then based on Mr. Cramer's declaration, plaintiffs

1 argued on page 6 of their reply brief that the Statute of
2 Northampton was, quote, rejected by the North Carolina -- by
3 North Carolina in *State v. Huntly*.

4 If you read that case, specifically pages 420 to 421,
5 it's clear that the court states that, quote, the argument is
6 that the Statute of Northampton was not in effect when the case
7 was decided. But the court didn't adopt that argument.

8 Instead the court, in the context of this case and relying on
9 Blackstone and other authorities, concluded that the Statute of
10 Northampton emphasizes the common law understanding that going
11 armed with dangerous or unusual weapons including guns is a
12 crime.

13 And then Mr. Cramer a few pages later continues on
14 this point. He states that the court in *State v. Huntly*,
15 quote, declared that a double-barreled gun or any other gun
16 cannot in this country come under the description of unusual
17 weapons. Then plaintiffs echo this position on page 6 of their
18 reply brief.

19 But again, what the court said was different. On page
20 422 the court said that, quote, it has been remarked that a
21 double-barreled gun or any other gun was not an unusual weapon.
22 In other words, that was the defendant's argument in that case.

23 The court makes its position clear in the very next
24 sentence, quote, but we do not feel the force of this
25 criticism. Then the court goes on, quote: A gun is an unusual

1 weapon; wherewith to be armed and clad. No man amongst us
2 carries it about with him, as one of his every day
3 accoutrements - as part of the dress - and never we trust will
4 the day come when any deadly weapon will be worn or wielded in
5 our peace-loving and law-abiding state, as an appendage of
6 manly equipment.

7 So this is again just one example of how the
8 historical record we provided was mischaracterized by
9 Mr. Cramer and the plaintiffs. And the takeaway message here
10 is that well-researched historical record that we presented in
11 our opposition brief provides an ample basis to find that the
12 laws challenged are constitutional.

13 One additional point, again since we didn't have an
14 opportunity --

15 THE COURT: Which I would not find at this point. The
16 question is is there a likelihood of success.

17 MR. WISE: Right.

18 So one additional point for reference because
19 Mr. Cramer critiques a lot of the, you know, historical record,
20 and, you know, that's based on a lot of historians' work. I
21 would refer the Court to at that time Patrick Charles' 2012
22 article titled "The Faces of the Second Amendment Outside of
23 the Home: History versus Ahistorical Standards of Review."
24 That was an article that was cited by the Piruta en banc panel.
25 It has a lot of the old cases that we relied on. Because of

1 space limitations, we cited Mr. Charles' follow-up to this
2 article but not that article itself. But that initial piece by
3 Mr. Charles directly rebuts much of the plaintiffs' portrayal
4 of the historical record.

5 I want to address the declaration from Chuck Haggard
6 very briefly. He was called by the plaintiffs to rebut the
7 declaration we submitted from former Covina Police Chief
8 Kim Raney. Mr. Haggard suggests on pages 7 and 11 of his
9 declaration that allowing open carry should have no effect on
10 an officer's reaction to a high-stress situation and that good
11 communication and training will prevent unfortunate outcomes.

12 And then on page 8 he alleges that Kim Raney's
13 position is that open carry, quote, will cause panic among
14 police officers and the public, waste police resources, and
15 ultimately lead to police officers shooting civilians carrying
16 exposed.

17 That's of course an exaggeration of Mr. Raney's
18 position. He has a well-founded concern as does the
19 Legislature that open carry would heighten the stress that
20 officers face when they arrive to a tense scene, that it would
21 increase the number of complaints law enforcement would
22 receive.

23 And so the point here is that, notwithstanding
24 Mr. Haggard's view, the Legislature had legitimate reasons to
25 enact the laws contested here, reasons that withstand both

1 intermediate and strict scrutiny.

2 THE COURT: On the record with respect to what the
3 Legislature decided, I think it's only the Raney declaration
4 that references legislative history. How much can I consider
5 legislative history at this stage given the record before me?

6 MR. WISE: That's right. I don't think there's a lot
7 of reference to the legislative history in my brief or in any
8 other briefs that Ms. Bellantoni has provided.

9 THE COURT: All right. Ms. Bellantoni, you get the
10 final word at this point on the preliminary injunction before
11 we move to the motion to dismiss.

12 MS. BELLANTONI: Thank you. With regard to counsel's
13 comments on the declaration of Chuck Haggard, Officer Haggard
14 is an actual law enforcement officer in a jurisdiction that
15 overnight went from no carry to open carry without a license,
16 and Mr. Raney has no experience in jurisdictions with open
17 carry. His declaration is not based on any fact at all and is
18 entirely speculative, akin to a Chicken Little argument, and I
19 would ask the Court to consider that when, you know, deciding
20 the motion for preliminary injunction.

21 Justice Scalia specifically in the *Heller* decision
22 rejected the public safety argument that was put forth by the
23 dissent in saying that constitutional rights cannot be trampled
24 upon because of a concern that individuals are going to either
25 commit crime with firearms or that they may cause public chaos.

1 It's all speculation. Nothing happens. There's no anarchy
2 when the statute in Officer Haggard's jurisdiction in Kansas
3 was changed. And whether it's an individual civilian carrying
4 openly or a police officer off duty or a plainclothes officer
5 or detective, if the training is that poor in one's
6 jurisdiction that seeing someone in plain clothes with an open
7 carry with a firearm exposed on their person is going to
8 trigger them into a panic, then that is a direct reflection on
9 the lack of proper training in their jurisdiction.

10 THE COURT: All right. Anything further on
11 preliminary injunction?

12 MS. BELLANTONI: Just as a reminder, your Honor, and
13 the papers are reflective of this, public area in the statute
14 and in the case law in this jurisdiction is applied to my
15 clients and actually any other resident in the state. It only
16 includes areas -- it includes -- it encompasses areas outside
17 of their front door. So unless my clients lived in a gated
18 property, unless there's a fence around their property, which
19 there is not in Mr. Baird's case. And the fence in
20 Mr. Gallardo's -- on his property does not completely encompass
21 his entire property. As soon as he steps out of his front
22 door, my client's committing a crime if he's carrying exposed
23 on his person. There is no duty of law enforcement to protect.
24 That's been established clearly through the courts. And so
25 really it's up to the individual to be responsible for their

1 own protection, and the only way for them to be able to do that
2 in this jurisdiction is to be able to carry in public openly.
3 Other than that, no, your Honor.

4 THE COURT: I did see that issue briefed.

5 All right. Let's move on to the motion to dismiss.
6 Just so I'm clear on the plaintiffs' argument about factual
7 challenge, I'm not certain I understand that. When I look at
8 the complaint, I look at the briefing, I don't see that the
9 defense is so much challenging the facts as pled. I think
10 they're pointing out what they believe to be in cases
11 threadbare and conclusory allegations. So am I missing
12 something about your factual challenge argument? You come out
13 pretty strongly on that.

14 MS. BELLANTONI: Sure. Well, in looking at the
15 complaint, the standard is whether the allegations in the
16 complaint make out a cause of action.

17 THE COURT: Right, subject to *Twombly* and *Iqbal*.

18 MS. BELLANTONI: Yes, ma'am.

19 THE COURT: Which require plausibility.

20 MS. BELLANTONI: Yes, exactly.

21 THE COURT: And I think I read the defense brief as
22 raising that issue, plausibility.

23 MS. BELLANTONI: Right. And so with the defense
24 argument in their motion is bring in issues of fact that really
25 we haven't even had the opportunity to talk about. They're

1 talking about public safety arguments and other examples of
2 how, you know, it's bad for the public if people are carrying
3 exposed and how there are different areas, you know, in the
4 state where people are able to carry, those are all issues that
5 can be fleshed out during discovery or during the course of the
6 case. But that's -- unless there is absolutely no legal basis
7 for the causes of actions in the complaint, then their motion
8 should be denied.

9 THE COURT: All right. So to the extent it's an
10 argument that I shouldn't consider facts beyond the allegations
11 properly pled, I understand that, and I know how to apply the
12 law related to that argument.

13 On the travel, intrastate travel claim, here are two
14 questions really. Are the plaintiffs ultimately conceding? I
15 see the cases you cite. I see references to *Bell* and *Haig*.
16 The defense points out *Soto-Lopez*. But ultimately I think
17 you're ultimately conceding there's no case on point thus
18 squarely supporting the intrastate travel being burdened. Am I
19 right about that?

20 MS. BELLANTONI: It was difficult to find something.
21 And perhaps, your Honor, I submit that it was difficult to find
22 a case that said you have a right to intrastate travel when
23 there are cases specifically saying you have a right to
24 interstate travel, and arguably why would you have less rights
25 in your own state than you would in another state.

1 THE COURT: Well, they're different. Isn't this
2 question in fact before the Supreme Court along with an
3 interstate travel question? Does the *New York State* case
4 before the Supreme Court raise intrastate travel issues?

5 MS. BELLANTONI: It does raise intrastate travel
6 issues. However, that case -- there is a high probability that
7 that New York case would be decided based on the fact that
8 there are already federal laws permitting firearm owners to
9 travel from one point where they're lawfully in possession of
10 their firearm to a second point where they're lawfully in
11 possession of their firearm as long as the firearm was unloaded
12 and locked and the ammunition was kept separately. But they
13 could raise -- you know, they could decide obviously on a
14 broader issue.

15 THE COURT: So just to test your arguments, I'm pretty
16 certain I understand them, but you're arguing that the statutes
17 penalize the plaintiffs for traveling outside of their counties
18 by denying them the right to continue open carry if they could
19 even contain an open carry license outside of their current
20 counties. But the statutes would allow for concealed carry in
21 all places.

22 MS. BELLANTONI: I would ask that we not even consider
23 concealed carry because it's not recognized as a right. And
24 similar to my arguments in criticizing the state's use and
25 interchanging terms and using open carry, concealed carry,

1 public carry, concealed carry is apparently in the Ninth
2 Circuit not deemed to be a right. So yes, if my clients were
3 even able to obtain an open carry permit, the right to bear
4 arms which attaches to the individual wherever they go would be
5 infringed, terminated because as soon as they left their county
6 they would be committing a crime.

7 THE COURT: This is all theoretical because on the one
8 hand you say there's a ban. So if there's a ban, then the
9 suggestion that someone could obtain an open carry permit in
10 his or her own county is illusory, right? That's essentially
11 your position?

12 MS. BELLANTONI: I'm not sure what you're asking.

13 THE COURT: Because the intrastate claim can only make
14 sense if someone could obtain an open carry license in his or
15 her own county alone, right? That has no effect in a
16 neighboring county.

17 MS. BELLANTONI: So correct. There are layers of
18 arguments to be made here. The first being that there is a ban
19 on open carry, but once that -- once we get beyond that, if
20 there is a shall issue, you know, statute created by a
21 legislature based on the fact that their statute has been
22 enjoined, once it's shall issue, they're still restricted to
23 the county of issuance under the statute. So there are several
24 issues within the language of the statutes that is violative of
25 the Second Amendment. So yes, if they had a shall issue, an

1 open carry, then likewise they should have the no restriction
2 on geography or the population limit which is 200,000 which
3 coincides with the geographical restriction by county.

4 THE COURT: Is there a ripeness problem there on the
5 intrastate claim?

6 MS. BELLANTONI: I'm not sure how there would be a
7 ripeness issue, Judge.

8 THE COURT: Anything on this point, Mr. Wise?

9 MR. WISE: No, your Honor, other than as we said in
10 our briefing we believe that the standards in *Soto-Lopez* would
11 apply, and that under the three ways that interstate travel --
12 it's not even clear that intrastate travel would be recognized
13 here. But under that test, the plaintiffs haven't met it.

14 THE COURT: Is it possible that the Supreme Court is
15 on the verge of addressing an issue such that a claim should be
16 allowed to proceed?

17 MR. WISE: I don't want to misrepresent what the
18 Supreme Court is considering. I don't recall that being the
19 way that the issues are framed in that case.

20 THE COURT: The question presented is whether the
21 city's ban on transporting a licensed locked and unloaded
22 handgun to a home or shooting range outside city limits is
23 consistent with the Second Amendment, the Commerce Clause, and
24 the constitutional right to travel. It's the outside city
25 limits that suggests some intrastate issue there. I don't

1 know. I'm thinking about that.

2 On the Fourth Amendment claim, I don't think you've
3 pointed me to any authority that is on all fours,
4 Ms. Bellantoni, that is addressing whether or not a regulation
5 affecting the precise means or manner of use of property
6 constitutes a seizure, certainly not a handgun or a gun.

7 MS. BELLANTONI: So, you know, there is nothing that
8 is on all fours with our position, your Honor. And it's not
9 the use of the property. It's the manner in which it is worn
10 on the body. So in other words, the plaintiffs have property,
11 and there is an infringement and an interference with their use
12 and possession of that property by the government in dictating
13 and demarcating, separating out the way that they wear and
14 carry their property.

15 THE COURT: Are you saying wearing is not a use?

16 MS. BELLANTONI: Well, when we're talking about, you
17 know, a firearm, it just -- use didn't seem that it would be
18 the most reflective of the argument that we were representing.

19 THE COURT: I was trying to understand if there's some
20 precise -- because at one point you said not use -- precise
21 manner of wearing is possession, use, donning, wearing.

22 MS. BELLANTONI: I see.

23 THE COURT: Right?

24 MS. BELLANTONI: Right.

25 THE COURT: It's all of that.

1 MS. BELLANTONI: So it's really the concealed carry
2 versus the open carry that there really is no rational argument
3 for under the Fourth Amendment for the interference. And the
4 burden is on the government. There is a property interest
5 here.

6 You know, I wanted to point out it was a little
7 confusing in the government's papers where they say that we
8 have not pointed to or that the state statute does not create a
9 property interest. So I wasn't really sure what that meant
10 because there is already a property interest here, personal
11 property, handguns, and that is a recognized property.

12 THE COURT: That's getting into the procedural due
13 process, is it not? I'm going to ask you that question when we
14 get to procedural due process.

15 MS. BELLANTONI: Sure.

16 THE COURT: So hold that, hold that thought.

17 So on Fourth Amendment, it's *Presley* and *Cedar Point*
18 that are the most analogous, and the Court looks at whether or
19 not there's a meaningful interference with possessory interest
20 and whether or not the character of the property is changed; is
21 that the test?

22 MS. BELLANTONI: Yeah. So the meaningful interference
23 with their property is the state's requirement that they wear
24 or carry the property in a specific manner.

25 THE COURT: So Mr. Wise, on the Fourth Amendment

1 claim, how can I decide there's no possibility of
2 unreasonableness as used in that amendment at this stage?
3 Isn't there a factual issue that would need to be resolved
4 through dispositive motion practice or at a bench trial?

5 MR. WISE: So that would only be of course if the
6 Court got through the first prong of finding that there was a
7 meaningful interference. Then we would look at the
8 reasonableness of the seizure, right? But if the Court is just
9 considering whether there was a meaningful interference,
10 *Shiroma* is dispositive here, as long as there's an
11 appropriately tailored law which, as we've said in our
12 briefing, that open carry licensing and prohibitions are
13 specifically tailored to allow for exceptions, then the Court
14 can dispose of the Fourth Amendment claim on that basis.

15 In terms of the reasonableness, the Court can rely on
16 *Heller* itself which indicates that the government has a variety
17 of tools for combating the problem of gun violence so that
18 balancing can be done based on existing case law.

19 MS. BELLANTONI: Respectfully, your Honor --

20 THE COURT: Hold on one second.

21 Here on this claim could the dominoes fall in
22 plaintiffs' favor depending on the New York decision and then
23 whatever the circuit does with the cases it's deferred?

24 MR. WISE: I mean, theoretically there could be either
25 that case or other cases that come out all different sorts of

1 ways and could influence a lot of different cases that have
2 been heard or are being heard. Based on existing case law, you
3 know, what we've cited in our brief, we don't believe that the
4 plaintiffs have stated a plausible claim, and that goes for
5 the, you know, intrastate travel claim as well.

6 THE COURT: All right. Ms. Bellantoni.

7 MS. BELLANTONI: Yes, your Honor. None of the cases
8 that are cited, the *Heller* case, the *New York City* case, those
9 are all cases that are Second Amendment cases under Second
10 Amendment analysis, not a Fourth Amendment analysis. It's a
11 completely different analysis. There is a property interest,
12 and the burden is not on the plaintiff. The burden is on the
13 government to identify whether their interference with the
14 property rights is reasonable.

15 THE COURT: Ultimately the burden -- the question is
16 at this point have plaintiffs pled a claim adequately.

17 MS. BELLANTONI: Right. And the Second Amendment
18 cases cited are not dispositive of that issue.

19 THE COURT: *Shiroma* is a Fourth Amendment case.

20 MS. BELLANTONI: *Heller* is not, and there are
21 fact-based issues here because the government hasn't put forth
22 a Fourth Amendment argument on the firearms issue. We don't
23 know what their reasoning is for demarcating open carry versus
24 concealed carry.

25 THE COURT: Well, they're attacking your pleadings at

1 this point.

2 On procedural due process, the question is what
3 language in the statute creates a liberty or a property
4 interest. And you don't think you need to point to statutory
5 language on the procedural due process claim to satisfy that?

6 MS. BELLANTONI: On procedural due process? On
7 procedural due process, there is a property interest because
8 it's personal property. It's an actual thing. It's not like,
9 for instance, a job where you may not have a possessory
10 interest or property interest in your employment. This is a --
11 this is a piece of property, so there -- procedurally there is
12 no notice before -- the statute is what it is. I mean,
13 everyone has to be subjected to it. And my clients, there's
14 no -- there was no basis for the restriction on my clients and
15 how they can carry their firearms or where they can carry their
16 firearms outside of their county.

17 THE COURT: And that's rooted in the Second Amendment.
18 You say it's completely separate from the Second Amendment,
19 right?

20 MS. BELLANTONI: The 14th Amendment, yes, because the
21 statute itself has been created without an opportunity to be
22 heard.

23 THE COURT: I'm not talking about the statute. The
24 interest, the property interest.

25 MS. BELLANTONI: The property interest in their

1 handguns?

2 THE COURT: Uh-huh.

3 MS. BELLANTONI: Is existing separate and apart from
4 the 14th Amendment or any statute.

5 THE COURT: And it preexists the Second Amendment,
6 that's your argument? Is it preexisting? Is this your
7 preexisting argument?

8 MS. BELLANTONI: For a property interest?

9 THE COURT: Yes.

10 MS. BELLANTONI: Yes. I don't think that the property
11 interest is an argument.

12 THE COURT: On the property interest, just so -- I
13 mean, isn't it the case that there is a pretty good chance that
14 plaintiffs have a protected property interest, Mr. Wise, in the
15 procedural due process context?

16 MR. WISE: Not for purposes of procedural due process.
17 So I guess I'm having trouble understanding what procedure
18 plaintiffs --

19 THE COURT: I'm getting to that next. That's a
20 separate question.

21 MR. WISE: It is a separate question, and I understand
22 we're addressing the threshold issue.

23 THE COURT: It's the first prong.

24 MR. WISE: Yes, exactly. So we're looking at whether
25 there's mandatory or permissive language in the statute

1 providing for a process here, and so, you know, we looked at
2 the statutes. The criminal statutes have penalties. They
3 don't create an interest. The open carry licensing statutes
4 use permissive language that allows the sheriff or police chief
5 the option of issuing an open carry license.

6 THE COURT: So your focus is on the language creating
7 the procedure.

8 MR. WISE: Right.

9 THE COURT: So what is the procedure that's been
10 denied, Ms. Bellantoni?

11 MS. BELLANTONI: The procedure that's been denied is
12 there is no procedure at all for my clients or anyone else to
13 be heard prior to their rights being violated, their Second
14 Amendment right, well, which is not a part of this motion, but
15 their Fourth Amendment right to the enjoyment of their property
16 and how they choose to carry or wear their property. In other
17 words, if --

18 THE COURT: But there's a procedural due process
19 claim, right?

20 MS. BELLANTONI: Correct. And the argument is --

21 THE COURT: So what's the procedure?

22 MS. BELLANTONI: There is no procedure. That's the
23 problem.

24 THE COURT: No procedure?

25 MS. BELLANTONI: Because it's already mandated by the

1 statute. It's already dictated by the government how an
2 individual can wear their property and carry their property.
3 In other words, with an open carry --

4 THE COURT: So what's the best case? What's your best
5 case to support your argument that you have a procedural due
6 process claim when the statutes provide no procedure, if that's
7 the right way to read the statute?

8 MS. BELLANTONI: The statutes provide no procedure
9 which is the violation in and of itself because they, by virtue
10 of their existence, remove from my clients the ability to wear
11 their firearms whether exposed or concealed. They remove the
12 ability of my clients to travel outside of their county and/or
13 travel to an area of more than 200,000 people.

14 THE COURT: All right. I understand the argument. On
15 substantive due process, is it fair to say substantive due
16 process is based on the deprivation of Second Amendment and
17 Fourth Amendment rights, or is there a separate constitutional
18 right on which the substantive due process claim is based?

19 MS. BELLANTONI: The substantive due process claim is
20 primarily based on the Second Amendment but additionally the
21 enforcement amendment as well. That is in the papers. You've
22 read the papers. It's an inherent right of the individual
23 innately from birth to self-protection, and the statutes, the
24 statutory scheme is infringing upon that and violating that and
25 removing any ability of the individual to decide how they can

1 defend their safety and their bodies from confrontation in
2 public.

3 THE COURT: So looking at the ninth and the tenth
4 claims, are you disputing that the Court can dismiss those
5 claims in part to the extent they cite the 14th Amendment, or
6 do you concede that?

7 MS. BELLANTONI: Are you asking me?

8 THE COURT: Yes, Ms. Bellantoni.

9 MS. BELLANTONI: Can you make that a little clearer.
10 I'm not understanding what you're asking me.

11 THE COURT: I just said I'm looking at your claims 9
12 and 10, and they are based -- I just asked you what they were
13 based on, and you just told me they were based on the Second
14 and the Fourth. And I'm looking at the complaint itself, and
15 they say Second, Fourth, and 14th.

16 MS. BELLANTONI: No. You were asking a moment ago --

17 THE COURT: Don't put words in my mouth. Just answer
18 my question.

19 MS. BELLANTONI: Well, on count 10 there are
20 allegations in the cause of action under the Second, Fourth,
21 and 14th Amendment. If the question is substantively under the
22 14th Amendment substantive due process issue, then those issues
23 are also tied into the right of the individual to defend
24 themselves and to determine how they will defend themselves in
25 public in the face of a confrontation and having to protect

1 their lives and their security.

2 THE COURT: All right. Anything in response to what
3 you just heard, Mr. Wise?

4 MR. WISE: No, your Honor. I think our briefing has
5 addressed these issues.

6 THE COURT: All right. I have no other questions on
7 the motion to dismiss. So again, I give the movant the last
8 word. So on the motion to dismiss, anything not covered by the
9 discussion or the briefing, Ms. Bellantoni?

10 MS. BELLANTONI: No, your Honor.

11 THE COURT: Mr. Wise?

12 MR. WISE: No, your Honor. Thank you.

13 THE COURT: All right. On scheduling, I have looked
14 at the joint status report. Here's my main question. I'll
15 issue an order as quickly as I can on the preliminary
16 injunction. What -- I mean, can you tell me now what's the
17 likelihood that regardless of how I order a party is going to
18 appeal? Because it could -- there's a suggestion that -- well,
19 assuming a party appeals my order on preliminary injunction,
20 regardless of which way I go, would the parties then agree that
21 a discovery stay should be put in place, Ms. Bellantoni?

22 MS. BELLANTONI: I would not agree to that, your
23 Honor, no, because the preliminary injunction is based on the
24 Second Amendment issue, and the other causes of action can
25 certainly proceed. There really -- I don't anticipate there

1 being much fact-based discovery. The plan that we put forth is
2 relatively brief and concise, and I don't think that the
3 preliminary injunction determination will affect discovery in
4 that case. And waiting for an appeal on the preliminary
5 injunction will delay justice for my clients in moving forward
6 on the rest of their claims.

7 THE COURT: All right. I think that's a fair point,
8 Mr. Wise. It's probably not too fact intensive, agreed?

9 MR. WISE: I think that's right.

10 THE COURT: I mean, legislative history might be
11 developed and some limited deposition practice.

12 MR. WISE: Right. Our only point is that these issues
13 I think are likely to get fleshed out in the, you know, cases
14 that are up on appeal right now and that there are a number of
15 cases that are addressing similar issues and that when it comes
16 time to -- you know, in our view we think it should be stayed,
17 and when it comes time to litigate these issues, it wouldn't
18 take very long to get through them. So just in the interest of
19 judicial economy, our view is that our case should be stayed
20 pending the outcome of any appeal on the preliminary injunction
21 motion and any of these other cases that are up on appeal right
22 now.

23 THE COURT: Just help me understand, if Young is
24 decided at the Ninth Circuit -- if the New York case is decided
25 and the Young case is decided, do those effectively decide this

1 case or not?

2 MR. WISE: We think that it's very likely they will.

3 THE COURT: Ms. Bellantoni?

4 MS. BELLANTONI: It's really hard to say, but they are
5 not guaranteed to be entirely dispositive of our case. And
6 even if Young -- the en banc court ends up determining that
7 there is a right to open carry, it still doesn't change the
8 fact that there are statutory limitations on the ability to get
9 an open carry permit or the good cause requirement which may or
10 may not be addressed by the Young court and then as well as the
11 geographical population restrictions in the statute.

12 THE COURT: Because that does not involve the
13 California statutes at all.

14 MS. BELLANTONI: Right. And nor does it take care of
15 the Fourth Amendment argument.

16 THE COURT: How could Young resolve the -- would the
17 defense -- if Young were decided in favor of open carry, would
18 the defense end up conceding the statutes here are
19 unconstitutional? There would be a petition for cert filed no
20 doubt in Young.

21 MR. WISE: Yeah. I mean -- right. It's hard to
22 answer that in the abstract.

23 THE COURT: All right. I do understand that
24 plaintiffs are seething the Dormant Commerce Clause claim,
25 correct, Ms. Bellantoni?

1 MS. BELLANTONI: Yes.

2 THE COURT: All right.

3 What I'll do is at the same time that I issue the
4 order, my inclination is not to stay discovery at this point
5 but to indicate initial disclosures within 21 days after I
6 issue my orders on preliminary injunction, motion to dismiss,
7 and I'll issue them at the same time. And then I'll set a
8 schedule for fact discovery and expert discovery that follows.
9 So you'll have specific dates once I issue the order on the
10 pending motions. And I'll set through dispositive motion
11 practice. It's only if the case gets past dispositive motion
12 practice that I would then set a trial date.

13 So anything else on scheduling, Ms. Bellantoni?

14 MS. BELLANTONI: No, your Honor.

15 THE COURT: Mr. Wise?

16 MR. WISE: No, your Honor.

17 THE COURT: All right. I think I have what I need.
18 Thank you very much. The matter is submitted.

19 THE CLERK: Court is in recess.

20 (The proceedings adjourned at 11:55 a.m.)

21 --oOo--

22 I certify that the foregoing is a correct transcript from the
23 record of proceedings in the above-entitled matter.

24 /s/ Kacy Parker Barajas

25

KACY PARKER BARAJAS
CSR No. 10915, RMR, CRR, CRC