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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

MARK BAIRD and  
RICHARD GALLARDO,  
Plaintiffs,

v.

ROB BONTA, 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 SUPPORT OF  
SECOND MOTION FOR  
PRELIMINARY INJUNCTION**

Date: July 19, 2021  
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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1 **I. THIS COURT IS BOUND TO FOLLOW SUPREME COURT PRECEDENT**

2 *Heller* confirmed the right to carry firearms in public for self-defense.

3 Several months prior to the Ninth Circuit’s en banc decision in *Young v. Hawaii*<sup>1</sup>, Justice  
4 Thomas (in the majority in *Heller*) noted, “In short, it would take serious linguistic gymnastics -  
5 and a repudiation of this Court’s decision in *Heller* - to claim that the phrase “bear Arms” does  
6 not extend the Second Amendment beyond the home.<sup>2</sup> Well, the Ninth Circuit did just that.

7 *Heller* expressly recognized the right to carry weapons in public:

8 ***“Putting all of these textual elements together, we find that they***  
9 ***guarantee the individual right to possess and carry weapons in***  
10 ***case of confrontation.”***

11 *D.C. v. Heller*, 554 U.S. 570, 592 (2008).

12 Federal district courts and circuit courts are bound to adhere to the controlling decisions of  
13 the Supreme Court.<sup>3</sup> Justice Rehnquist emphasized the importance of precedent when he observed  
14 that “unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court  
15 must be followed by the lower federal courts no matter how misguided the judges of those courts  
16 may think it to be.” *Hutto v. Davis*, 454 U.S. 370, 375 (1984); *Thurston Motor Lines, Inc. v. Jordan*  
17 *K. Rand, Ltd.*, 460 U.S. 533, 103 S.Ct. 1343, 75 L.Ed.2d 260 (1983) (the Supreme Court, in a per  
18 curiam decision, stated: “Needless to say, only this Court may overrule one of its precedents.”).

19 Notwithstanding the Ninth Circuit’s rogue repudiation of *Heller* in *Young*, this Court is  
20 bound to adhere to Supreme Court precedent, which confirms that the Second Amendment  
21 **“guarantee[s] the individual right to possess and carry weapons in case of confrontation.”** *Heller*,  
22 554 U.S. at 592 (emphasis added).

23  
24  
25  
26 <sup>1</sup> *Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021).

27 <sup>2</sup> *Rogers v. Grewal*, 140 S. Ct. 1865, 1869 (2020) (Thomas, J. dissenting from denial of cert.) (emphasis added).

28 <sup>3</sup> *Jaffree v. Wallace*, 705 F.2d 1526, 1533 (11th Cir. 1983), aff’d in part, 466 U.S. 924, 104 S. Ct. 1704, 80 L. Ed. 2d 178 (1984), and aff’d, 472 U.S. 38, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985) citing, *Hutto v. Davis*, 454 U.S. 370, 375 (1982); *Stell v. Savannah-Chatham County Board of Education*, 333 F.2d 55, 61 (5th Cir.), cert. denied, 379 U.S. 933 (1964); *Booster Lodge No. 405, Int. Ass’n of M. & A.W. v. NLRB*, 459 F.2d 1143, 1150 n. 7 (D.C.Cir.1972).

1 **II. CRIMINALIZING THE ‘MERE POSSESSION’ OF A HANDGUN FOR**  
2 **SELF-DEFENSE VIOLATES THE SECOND AMENDMENT**

3 **A. The ‘Core Right’ is Self-Defense**

4 Imposing criminal sanctions for the mere exercise of a fundamental runs completely afoul  
5 of the Constitution. The Supreme Court in *Heller* held the Second Amendment’s “core lawful  
6 purpose of self-defense”. *Heller*, 554 U.S. at 630.

7 *“Self-defense is not “merely a ‘subsidiary interest’ of the right*  
8 *to keep and bear arms...self-defense...was the central*  
9 *component of the right itself.”*

10 *Id. at 599 (emphasis supplied).*

11 That the “core right” is self-defense was reaffirmed by the Supreme Court two years  
12 later in *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767 (2010) (“Two years ago, in  
13 *District of Columbia v. Heller*, 554 U.S. 570 [ ] (2008), this Court held that the Second  
14 Amendment protects the right to keep and bear arms for the purpose of self-defense.”).

15 **B. The Free Exercise of Self-Defense - Wherever You Are**

16 The plaintiffs in *Heller* and *McDonald* challenged laws that criminalized the possession of  
17 a handgun without a license. While those plaintiffs only sought to legally possess handguns in  
18 their homes, nothing in any Supreme Court decisions limits the free exercise of the core right to  
19 self-defense to a particular building. To the contrary, the right to self-defense attaches to the  
20 individual – to possess and to carry arms for self-defense - wherever they are.

21 In *Caetano v. Massachusetts*, 577 U.S. 411 (2016), the plaintiff - a homeless woman –  
22 challenged her conviction under a Massachusetts law criminalizing the possession of stun guns.<sup>4</sup>  
23 The stun gun was found in Ms. Caetano’s purse when she was detained in a store for shoplifting.  
24 Confirming that the Second Amendment protects all weapons in “common use for self-defense”,  
25 including stun guns, nowhere did the Supreme Court so much as hint that carrying a weapon for  
26 self-defense was limited to a house. Ms. Caetano did not have a house – she was homeless.  
27 *Everywhere* Ms. Caetano went, she was carrying a weapon in common use for self-defense.

28 <sup>4</sup> Striking the Massachusetts criminal statute as violating the Second Amendment, the Court declared, “The Court has held that the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding...and that this Second Amendment right is fully applicable to the States.” *Caetano*, 577 U.S. at 411 citing, *Heller*, 554 U.S. at 582 and *McDonald v. Chicago*, 561 U.S. 742, 750 (2010).

1 “Under Massachusetts law, however, Caetano’s mere possession of the stun gun that may have  
2 saved her life made her a criminal.” *Caetano*, 577 U.S. 413.

3 Under California law, Plaintiffs do not require a license to possess handguns at home.  
4 Plaintiffs require a license to carry in “in public”, which means everywhere outside of their front  
5 door. ‘Public place’ includes any area in which a stranger can walk without challenge. *People v.*  
6 *Strider* (2009) 177 Cal.App.4th 1393 (and cases cited); *People v. Yarbrough* (2008) 169  
7 Cal.App.3d 886 (unenclosed residential driveway); *People v. Overturf*, (1976) 64 Cal.App.3rd  
8 Supp. 2 (unfenced business driveway is a public place). One’s driveway, lawn, porch, sidewalk –  
9 all ‘public places.’ *Id.* citing, *People v. Olson* (1971) 18 Cal.App.3d 592. One’s house is arguably  
10 a ‘public place’ when the front or back door is unlocked.

11 California law does not simply “generally prohibit” the public carrying of a handgun “in  
12 any public place or on any public street” [Def. Memo of P&A at p. 2] it outright prohibits any  
13 possession of a handgun under threat of criminal prosecution. California recognizes no  
14 constitutional right to carry a handgun, as discussed below. A license is merely a defense.

15 Defendant’s position that the scope of the Second Amendment is limited to a house, an  
16 office, or a campground is nonsensical and must be rejected. [Def. Memo of Law at pp. 16-17].  
17 Ms. Caetano possessed an illegal stun gun; Plaintiffs possess legally owned handguns. Like Ms.  
18 Caetano, however, Plaintiffs’ mere possession of a legally owned handgun<sup>5</sup> in public for self-  
19 defense makes them criminals. As with the Massachusetts criminal statutes, Penal Codes  
20 § 25850 and § 26350 violate the Second Amendment and must be stricken.

### 21 **C. History Confirms the Right to Bear Arms for Self-Defense in Public**

22 In *McDonald*, the Supreme Court reaffirmed, in *Heller* “we concluded, citizens must be  
23 permitted “to use [handguns] for the core lawful purpose of self-defense.” *McDonald*, 561 U.S. at  
24 767 (internal citation omitted). “*Heller* makes it clear that this right is deeply rooted in this  
25 Nation’s history and tradition. *Heller* explored the right’s origins, noting that the 1689 English  
26 Bill of Rights explicitly protected a right to keep arms for self-defense and that by 1765,

27 <sup>5</sup> It is beyond cavil that the handgun is a weapon in common use for self-defense. *Heller*, 554 U.S. at 629 (“It is  
28 enough to note, as we have observed, that the American people have considered the handgun to be the quintessential  
self-defense weapon.”).

1 Blackstone was able to assert that the right to keep and bear arms was one of the fundamental  
2 rights of Englishmen. Blackstone’s assessment was shared by the American colonists. As we  
3 noted in *Heller*, King George III’s attempt to disarm the colonists in the 1760’s and 1770’s  
4 provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms.  
5 The right to keep and bear arms was considered no less fundamental by those who drafted and  
6 ratified the Bill of Rights.” *McDonald*, 561 U.S. at 767 (internal citations and quotations omitted).

### 7 **III. CALIFORNIA DOES NOT “REGULATE” OPEN CARRY, IT BANNED IT**

#### 8 **A. Banning All Manner of Public Carry Violates the Second Amendment**

9 As the right to carry weapons in common use for self-defense is protected by the Second  
10 Amendment [Points I, II, *supra*], banning all forms of public carry – open and concealed - violates  
11 the Second Amendment. American jurisprudence so demonstrates. [See, Declaration of Clayton  
12 Cramer at p. 22-73] (“Precedents from other states and California have either explicitly or  
13 implicitly held that concealed carry could be banned as long as open carry remained lawful.”)  
14 citing *State v. Reid*, 1 Ala. 612, 614 (1840); *Nunn v. State*, 1 Ga. 243, 125-51 (1846); *Hill v. State*,  
15 53 Ga. 472, 481 (1874); *In re Brickey*, 8 Ida. 597 (1902); *State v. Huntley*, 25 N.C. 418, 422  
16 (1843) (“for any lawful purpose – either of business or amusement – the citizen is at perfect  
17 liberty to carry his gun. It is the wicked purpose – and the mischievous result – which essentially  
18 constitute the crime.”); citing, *inter alia*, Bishop, Commentaries on the Criminal Law § 980, §981  
19 (3d ed. 1865); Statutes of the Territory of Wisconsin 381 (1838); Revised Statutes of the State of  
20 Michigan 692, ch. 162 (1846); Acts and Resolves, Passed by the Twenty-First Legislature of the  
21 State of Maine 532 (1841); 1851 Minn. Laws 526-528; 1861 Pa. Laws 248, 250.

22 A complete ban on public carry is also directly contrary to Supreme Court precedent  
23 confirming that the Second Amendment protects individual right possess and carry weapons for  
24 self-defense. [Points I and II, *supra*].

#### 25 **B. Subjecting Carry Licenses to Discretionary Laws Violates the Second Amendment**

26 “It is settled by a long line of recent decisions of this Court that an ordinance which, like  
27 this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent  
28



1 upon the uncontrolled will of an official—as by requiring a permit or license which may be  
2 granted or withheld in the discretion of such official—is an unconstitutional censorship or prior  
3 restraint upon the enjoyment of those freedoms.” *Shuttlesworth v. City of Birmingham, Ala.*, 394  
4 U.S. 147, 151, 89 S. Ct. 935, 938–39, 22 L. Ed. 2d 162 (1969) citing, *Staub v. City of Baxley*, 355  
5 U.S. 313, 322, 78 S.Ct. 277, 282, 2 L.Ed.2d 302.

6 “And our decisions have made clear that a person faced with such an unconstitutional  
7 licensing law may ignore it and engage with impunity in the exercise of the right of free  
8 expression for which the law purports to require a license. The Constitution can hardly be thought  
9 to deny to one subjected to the restraints of such an ordinance the right to attack its  
10 constitutionality, because he has not yielded to its demands.” *Id.*

11 Under §§ 26150 and 26155, the right to self-defense in public is subject to the discretion  
12 of licensing officers under the “may issue” language, which violates the Second Amendment.

### 13 **C. In California, Concealed Carry is a Mere Privilege**

14 Concealed carry in California is deemed a mere privilege, unprotected by the Second  
15 Amendment. *Peruta v. Cty. of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (“We therefore  
16 conclude that the Second Amendment right to keep and bear arms does not include, in any  
17 degree, the right of a member of the general public to carry concealed firearms in public.”).

### 18 **D. Open Carry is Banned in California**

19 Defendant ignores Penal Code § 26175, which requires licensing authorities to only use  
20 the application forms issued by Defendant.<sup>6</sup> The only application forms issued by Defendant are  
21 for concealed carry licenses. [See, Exhibit 4]. It is uncontested that Defendant does not issue any  
22 open carry application forms. Because § 26175 prohibits licensing authorities from using any  
23 other form, no open carry license can be either applied for or issued.<sup>7</sup>

24  
25  
26 <sup>6</sup> Under Penal Code § 26175, every sheriff’s office in the state is required to use only those forms approved by the  
Attorney General for firearm licenses and applications for amendments to licenses, which shall be “uniform  
throughout the state”.

27 <sup>7</sup> Penal Code § 26225 requires that a copy of all firearms licenses issued in each county (open carry and concealed  
28 carry) be “filed immediately” with the Attorney General’s Office DOJ. Since 2012, no open carry licenses have been  
issued. Penal Code § 26350. [See, FOIL request response from Department of Justice as Exhibit 3].

1 **IV. BANNING OPEN CARRY IS NO CALIFORNIAN ‘TRADITION’**

2 **A. California’s Tradition – Over 162 Years of the Free Exercise of Open Carry**

3 Defendant’s claimed ‘tradition’ of regulating the open carry of firearms is a fallacy, as he  
4 turns a blind eye to the preceding 162+ years of actual tradition of California residents enjoying  
5 the free exercise of open carry for self-defense.

6 Even before California became a state in 1850, open carry was a legal and integral part of  
7 the longstanding history and tradition in California. Since the Mexican-American War in 1848,  
8 California had a tradition of unregulated open carry and its effects on society were largely  
9 unremarkable. People exercised their right to open carry; criminal conduct was punished  
10 accordingly. In 1856 a ban on concealed carry was debated in the legislature, intended apply only  
11 to Mexicans. [Cramer Dec. at 14]. In 1863, California banned concealed carry due to the high rate  
12 of crime during the Gold Rush<sup>8</sup>; but repealed the ban 7 years later.<sup>9</sup> In 1917, after Pancho Villa’s  
13 cross-border raid in New Mexico, California made it a crime to carry a concealed handgun in  
14 cities and required handgun sales to be registered. [Clayton Cramer at 14]. In 1923, concealed  
15 carry without a license anywhere in California became a crime. *Id.* at 16.

16 Not until 1967, when inner-city black residents exercised the right to be armed in response  
17 to police brutality in their neighborhoods, was the carrying a loaded firearm criminalized. See,  
18 Cal. A.B. 1591 (April 5, 1967) (amending Cal. Penal Code § 12031 to repealing law that allowed  
19 for open carry of loaded firearms). Open carry was eliminated altogether in 2012 with the passage  
20 of § 26350 banning open carry of an unloaded handgun.

21 Unregulated open carry was California’s history and tradition for 164 years - substantially  
22 longer than it has been banned.

23 **B. This Case is Distinguishable From *Young***

24 California’s longstanding history and tradition of open carry vastly distinguishes this case  
25 from *Young*. The State of Hawaii is an ‘extreme outlier’, with weapons bans rooted in a  
26

27 <sup>8</sup> NRA Institute for Legislative Action, Tuesday January 1, 2013, citing, “Three Years in California”, Borthwick, J.D.  
28 (1857); Gunfighters, Highwaymen, & Vigilantes”, McGrath, Roger (1984).

<sup>9</sup> NRA Institute for Legislative Action, Tuesday January 1, 2013.

1 monarchial history long pre-dating its annexation as a territory 1989.<sup>10</sup> Applying the reasoning  
2 in *Young* to the challenged California statutes yields an opposite result. Under *Young*, California’s  
3 longstanding tradition of the free exercise of open carry throughout the State requires not only  
4 granting the requested relief, it supports summary judgment in Plaintiffs’ favor.

5 The fact that California has been violating the Second Amendment right to open carry for  
6 years does not negate a present finding of actual, ongoing, and irreparable harm warranting  
7 granting the requested relief. See, e.g., *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690, 49  
8 L.Ed.2d 547 (1976) (“[t]he loss of First Amendment freedoms, for even minimal periods of time,  
9 unquestionably constitutes irreparable injury”); 11A Charles A. Wright, Arthur R. Miller and  
10 Mary Kane, *Federal Practice and Procedure*, § 2948.1 at 161 (2d ed. 1995) (“[w]hen an alleged  
11 deprivation of a constitutional right is involved, most courts hold that no further showing of  
12 irreparable injury is necessary”).

13 By the very nature of their allegations, Plaintiffs have met the first prong of the test.

#### 14 **V. HELLER FLATLY REJECTED ‘INTEREST BALANCING’**

15 Defendant’s public safety arguments fail. The Supreme Court long ago rejected the idea  
16 that constitutional rights are subject to “interest balancing”. Rejecting Justice Breyer’s balancing  
17 of individual rights against “public safety”, *Heller* declared, “A constitutional guarantee subject  
18 to future judges’ assessments of its usefulness is no constitutional guarantee at all...Like the First  
19 [Amendment], it is the very product of an interest balancing by the people - which Justice Breyer  
20 would now conduct for them anew.” *Heller*, 554 U.S. at 635.

21 *McDonald* also declared that public safety interests may not eviscerate the Second  
22 Amendment: “The right to keep and bear arms [ ] is not the only constitutional right that has  
23 controversial public safety implications. All of the constitutional provisions that impose  
24 restrictions on law enforcement and on the prosecution of crimes fall into the same category.”

25 \_\_\_\_\_  
26 <sup>10</sup> Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.* in Support of Petitioner’s Petition for a Writ of  
27 Certioari, *Young v Hawaii*, 20-1639 at p. 10-12. (“The Hawaii stranglehold on arms was easy to accomplish, since  
28 native Hawaiians had no experience with firearms prior to the arrival of Europeans in the late 1700s... It was (i) not  
until 1898 that the United States annexed Hawaii as a territory, (ii) not until 1950 that the current state constitution  
was adopted (including language mirroring the Second Amendment), and (iii) not until 1959 that Hawaii was granted  
statehood — more than a century after California, whose laws the Court examined in *Peruta v. Cnty. of San Diego*,  
824 F.3d 919 (9th Cir. 2016).”).

1 *McDonald*, 561 U.S. at 783 (collecting cases where those likely guilty of a crime are set free  
2 because of constitutional rights).

3 Indeed, “violent gun use is a constitutionally-protected means for law-abiding citizens to  
4 protect themselves from criminals. The phrase ‘gun violence’ may not be invoked as a talismanic  
5 incantation to justify any exercise of state power. Implicit in the concept of public safety is the  
6 right of law-abiding people to use firearms” for self-defense. *Duncan*, 265 F. Supp. 3d at 1135.

7 Both generally and “as applied” to Plaintiffs, Defendant’s “public safety studies” and  
8 “peer-reviews” are irrelevant to the protected Second Amendment rights of the individual. That  
9 said, it is the lack of proper police training – not open carry itself – that poses a public safety  
10 danger. “Banning open carry does not greatly enhance public safety, nor does it cure deficiencies  
11 in departmental training of police officers. Police shootings of innocent civilians – whether  
12 unarmed, carrying concealed, or carrying exposed – will continue to occur absent proper training  
13 or in those situations where the armed person is willfully forcing a confrontation with officers.  
14 This can and will happen regardless of the legalities of open or concealed carry.” [See,  
15 Declaration of Chuck Haggard at ¶ 23].

## 16 **VI. BALANCE OF THE HARDSHIPS FAVORS PLAINTIFFS**

17 Where an individual faces criminal sanctions, yet only an affirmative defense is available,  
18 there is a potential for extraordinary harm; thus, the balance of hardships favors the plaintiffs.  
19 *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1136 (S.D. Cal. 2017), *aff’d*, 742 F. App’x 218 (9th  
20 Cir. 2018) (“because § 32310 (c) & (d) impose criminal sanctions for a failure to act it poses the  
21 potential for extraordinary harm on Plaintiffs, while discounting their Second Amendment rights.  
22 The balance of hardships favors Plaintiffs”).

23 Plaintiffs face criminal sanctions for exercising their Second Amendment rights; as such  
24 the balance of hardships tips in their favor. Defendant failed to identify any factual basis for  
25 claiming the State would suffer a hardship.

1 **VII. PUBLIC INTEREST FAVORS GRANTING THE REQUESTED RELIEF**

2 “The public interest favors the exercise of Second Amendment rights by law-abiding  
3 responsible citizens. And it is always in the public interest to prevent the violation of a person’s  
4 constitutional rights.” *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1136 (S.D. Cal. 2017), aff’d, 742  
5 F. App’x 218 (9th Cir. 2018). As such, the public interest also favors granting the requested relief.

6 **CONCLUSION**

7 Plaintiffs’ motion for a preliminary injunction should be granted.

8  
9 Dated: July 9, 2021

Respectfully submitted,

10 THE BELLANTONI LAW FIRM, PLLC

11 /s/ Amy L. Bellantoni, Esq.

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15 *Pro Hac Vice*