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9
10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

12
13 **MARK BAIRD and RICHARD**
14 **GALLARDO,**

Plaintiffs,

15
16 **v.**

17 **ROB BONTA, in his official capacity as**
18 **Attorney General of the State of California,**
19 **and DOES 1-10,**

Defendants.

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

**THIRD AMENDED STATUS REPORT
AND RULE 26(f) DISCOVERY PLAN**

Courtroom: 3
Judge: Hon. Kimberly J. Mueller
Action Filed: April 10, 2019

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21 The parties to the above-entitled action jointly submit this THIRD AMENDED STATUS
22 REPORT AND RULE 26(f) DISCOVERY PLAN in consideration of *New York State Rifle & Pistol*
23 *Ass'n, Inc. v. Bruen*, No. 20-843, 2022 WL 2251305 (U.S. June 23, 2022).

1 A. Summary of Claims and Legal Theories

2 *Plaintiffs' Statement:*

3 Plaintiffs continue to seek injunctive and declaratory relief in their challenge to Defendant's
4 enforcement of California's pistol licensing scheme as it relates to the open carriage of handguns,
5 loaded and unloaded, and the criminal penalties associated with the same. The statutes challenged
6 in this action are California Penal Codes §§ 25850, and 26150.

7 The Supreme Court's decision in *Bruen*, reiterated the scope of the Second Amendment as
8 defined through text and history in *Heller* and confirmed in *McDonald*. *New York State Rifle &*
9 *Pistol Ass'n, Inc. v. Bruen*, No. 20-843, 2022 WL 2251305 (U.S. June 23, 2022), abrogating *Young*
10 *v. Hawaii*, 992 F.3d 765; *Gould v. Morgan*, 907 F.3d 659; *Drake v. Filko*, 724 F.3d 426; *Kachalsky*
11 *v. County of Westchester*, 701 F.3d 81; *U.S. v. Masciandaro*, 638 F.3d 458, as well as Cal. Penal
12 Code § 26150; Haw. Rev. Stat. § 134-2; Md.Code Ann., Public Safety § 5-306(a)(6)(ii); Mass. Gen.
13 Laws Ann. ch. 140, § 131(d); N.J. Stat. Ann. § 2C:58-4(c); N.Y. Penal Law § 400.00(2)(f); and
14 D.C. Code §§ 7-2509.11(1), 22-4506(a).

15 Specifically, the Court reaffirmed that the "core" right protected by the Second Amendment
16 is the individual right to "self-defense" [*Bruen*, at *7 ("In *Heller* and *McDonald*, we held that the
17 Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-
18 defense.")] and that "the Second Amendment guarantees 'an individual right to possess and carry
19 weapons in case of confrontation,' *id.*, at 592, 128 S.Ct. 2783, and confrontation can surely take
20 place outside the home." *Bruen*, at *2, citing, *D.C. v. Heller*, 554 U.S. 570, 592 (2008).

21 The Court rejected the analytical framework applied in the Ninth Circuit, among others, to
22 for analyzing Second Amendment challenges. "In keeping with *Heller*, we hold that when the
23 Second Amendment's plain text covers an individual's conduct, the Constitution presumptively
24 protects that conduct. To justify its regulation, the government may not simply posit that the
25 regulation promotes an important interest. Rather, the government must demonstrate that the
26 regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm
27 regulation is consistent with this Nation's historical tradition may a court conclude that the
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1 individual's conduct falls outside the Second Amendment's "unqualified command." *Bruen*, at *7
2 citing, *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n. 10, (1961).

3 The Ninth Circuit has declared that "concealed carry" is not a right protected by the Second
4 Amendment. See, *Peruta v. Becerra*, 824 F.3d 919 (9th Cir. 2016) (Second Amendment right to
5 keep and bear arms does not include, in any degree, right of member of general public to carry
6 concealed firearms in public). Because concealed carry remains a 'privilege' in the Ninth Circuit,
7 the guaranteed right protected by the Second Amendment remains open carry.

8 Viewing the plain text of the Second Amendment, and America's rich history and
9 tradition of the free exercise of the right to open carry, the challenged statutes cannot withstand
10 constitutional muster; there is no historical tradition of requiring a license for, criminalizing,
11 banning, or otherwise requiring individuals to seek any permission from the government to
12 exercise the right to possess and open carry firearms in public, nor was open carry restricted by
13 population size or county.

14 *Defendant's Statement:*

15 Plaintiffs Mark Baird and Richard Gallardo allege in their Second Amended Complaint
16 that California's law "requiring a license or other permission to open carry a handgun outside of
17 one's home for self-defense" violates the Second and Fourteenth Amendments. ECF No. 68 at 6.
18 Specifically, Plaintiffs challenge the constitutionality of California Penal Code sections 26350
19 and 25850. Section 26350 prohibits a person from "openly carrying an unloaded handgun"
20 outside or inside a vehicle in public places. Cal. Penal Code § 26350(a)(1), (a)(2). Section 25850
21 prohibits a person from "carrying a loaded firearm" outside or inside in public places, and, "for
22 purposes of enforcing this section," allows peace officers to examine a firearm "to determine
23 whether or not [the] firearm is loaded." Cal. Penal Code § 25850(a), (b). Plaintiffs acknowledge
24 the existence of California's licensing scheme for public carry. Plaintiffs allege, however, that
25 each of them "has a present intention to carry a handgun open and exposed for self-defense,
26 loaded or unloaded, throughout the State of California, today and every day for the remainder of
27 his natural life," and that each "intends to exercise his rights protected by the Second and
28 Fourteenth Amendments without seeking permission from the government, including applying for

1 and obtaining a license under California’s licensing scheme, Penal Code section 26150 and
2 26155.” ECF No. 68 at 5-6. Accordingly, Plaintiffs do not challenge any particular aspects of
3 California’s licensing scheme.

4 Defendant denies liability on grounds that licensing requirements and regulations on the
5 manner of public carry are “consistent with the Nation’s historical tradition of firearm
6 regulation.” *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111, 2129-
7 2130 (2022).

8 B. Status of Service

9 Service of process has been completed upon the named defendant.

10 C. Joinder of Additional Parties

11 No additional parties are contemplated to be joined at this time.

12 D. Amendments to the Pleadings

13 Plaintiffs filed the Second Amended Complaint on September 27, 2022. ECF No. 68.
14 The parties stipulated to, and have requested a Court order granting, an extension of time from
15 October 11, 2022, to November 1, 2022, for Defendant to answer the Second Amended
16 Complaint. ECF No. 71.

17 Plaintiffs reserve their right to otherwise amend their pleadings as justice so requires.

18 Going forward, Defendant sees no reason to depart from the normal rule prohibiting any
19 joinder of parties or amendments to pleadings without leave of court, good cause having been
20 shown. See Fed. R. Civ. P. 16(b); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604 (9th Cir.
21 1992).

22 E. Statutory Basis for Jurisdiction and Venue

23 Plaintiffs contend that this court has subject matter jurisdiction over Plaintiffs’ claims under
24 28 U.S.C. § 1331 (action arising under the laws of the United States), 28 U.S.C. § 1343 (original
25 jurisdiction over actions seeking the protection of civil rights), 28 U.S.C. § 1361 (action to compel
26 officer or agency to perform duty owed to Plaintiffs), 28 U.S.C. § 2201, §2202 (declaratory
27 judgment remedies), 42 U.S.C. § 1983 (civil action for deprivation of rights) 42 U.S.C. §1988
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1 (attorney's fees).

2 Plaintiffs further contend that venue is proper under 28 U.S.C. § 1391(b)(2) as a substantial
3 portion of the events or omissions giving rise to the plaintiffs' claims occurred in this district, to
4 wit, Shasta County and Siskiyou County.

5 Defendants do not intend to contest Plaintiffs' lawsuit on grounds that the Court lacks
6 jurisdiction or that venue is improper.

7 F. Scheduling of Anticipated Discovery

8 *Plaintiffs' Statement:*

9 Fact and expert discovery are complete. A schedule for summary judgment motions was
10 set by the Court. After Defendant filed a motion for summary judgment, the parties filed a
11 stipulation to stay the action pending the *Bruen* decision, which was So Ordered by the Court, and
12 lifted on July 7, 2022. Plaintiffs filed a Second Amended Complaint, which narrowed their
13 claims.

14 Defendant's request to reopen discovery to 'search' for historical information – further
15 delaying an adjudication of Plaintiffs' claims – should be denied, as it lacks a good faith basis and
16 will substantially prejudice Plaintiffs. The historical traditions of open carry have been at the center
17 of this case since its inception three years ago. Plaintiffs submitted reports and declarations from
18 their historical expert on open carry, Clayton Cramer; Mr. Cramer was deposed, and Defendant had
19 a full and fair opportunity to retain its own historical expert(s) on the subject.

20 Defendant "compiled the historical record" for 3 years, culminating in his motion for
21 summary judgment on 11/19/2021, which contains pages of historical references and arguments
22 against Plaintiffs' open carry claims. [Dkt. 56-1]. Lack of diligence should not cause further delay.

23 The Supreme Court defined the narrowly drawn historical time-period relevant to a court's
24 determination under the *Bruen* test – between 1791 and 1868. *Bruen*, 142 S. Ct. at 2119. ("Historical
25 evidence that long predates or postdates either time may not illuminate the scope of the right.").
26 Defendant's summary judgment motion addresses that very time-period. *Heller* also discussed
27 historical traditions related to open carry and concealed carry. National history notwithstanding, no
28 amount of historical research will alter the fact that California's own traditions and history

1 conclusively demonstrate that open carry was freely exercised until very modern times – 1967
2 (loaded) and 2012 (unloaded).

3 Plaintiffs oppose the request. Further delay will cause them substantial prejudice, there is
4 no good faith justification for Defendant’s request, and reopening discovery will not lead to new
5 and relevant evidence.

6 *Defendant’s Statement:*

7 The parties previously completed a round of fact and expert discovery and Defendant filed
8 a motion for summary judgment on November 19, 2021. ECF No. 56. On December 2, 2021,
9 however, pursuant to a stipulation by the parties, this Court stayed this matter pending the
10 Supreme Court’s decision in *Bruen*. This Court lifted the stay on July 7, 2022.

11 The Court’s decision in *Bruen* fundamentally altered the legal standard for evaluating
12 Second Amendment challenges to firearm regulations. The Court rejected the familiar “two-step
13 test” that the Ninth Circuit and most other federal courts had long applied to Second Amendment
14 challenges to firearm regulations and held that *District of Columbia v. Heller*, 553 U.S. 570
15 (2008), “demands a test rooted in the Second Amendment’s text, as informed by history.” *Bruen*,
16 142 S. Ct. at 2127. Under the “text-and-history standard” announced and applied in *Bruen*, courts
17 must first determine whether “the Second Amendment’s plain text covers an individual’s
18 conduct.” *Id.* at 2130. If it does, courts are then tasked with determining whether the regulation
19 in question “is consistent with the Nation’s historical tradition of firearm regulation.” *Id.* at 2129-
20 2130.

21 Compiling the historical record required by *Bruen* is no easy task. It must be undertaken by
22 trained historians through painstaking efforts just to identify the sources available to answer a
23 particular historical inquiry. *See* Declaration of Zachary Schrag, *Miller v. Becerra*, No. 3:19-cv-
24 1537-BEN-JLB (S.D. Cal. Aug. 29, 2022), ECF No. 129-1 at 2-5. Even identifying which
25 sources are available does not necessarily mean that those sources are available to be accessed,
26 read, and analyzed. *Id.* at 5-10. Once those sources are accessed, the process of putting together
27 findings is also incredibly time consuming, comprising potentially hundreds or even thousands of
28 hours depending on the inquiry. *Id.* at 10-12.

1 Accordingly, in light of the allegations in the Second Amended Complaint, and due to the
2 dramatic change in law effected by *Bruen*, Defendant requires adequate time to consult further
3 with one or more experts. Defendant does not anticipate further fact discovery. Defendant
4 proposes the following discovery schedule:

- 5 • Expert reports due: Five months after the Court issues its pretrial scheduling order in
6 response to this report.
- 7 • Expert rebuttal reports due: Six months after the Court issues its pretrial scheduling
8 order in response to this report.
- 9 • Expert sur-rebuttal reports due: Seven months after the Court issues its pretrial
10 scheduling order in response to this report.
- 11 • Expert discovery cut-off: Eight months after the Court issues its pretrial scheduling
12 order in response to this report.

13 G. Dispositive Motions

14 *Plaintiffs' Proposed Schedule*

15 Plaintiffs request that the Court set a schedule for a motion and cross-motion for summary
16 judgment as follows:

- 17 • Defendant's Motion for Summary Judgment to be filed within 30 days of the filing of
18 Defendant's Answer to the Second Amended Complaint; Plaintiffs' Cross-Motion for
19 Summary Judgment and Opposition within 30 days; Defendant's Reply and Opposition
20 within 14 days; and Plaintiff's Reply 14 days thereafter.

21 *Defendant's Proposed Schedule:*

22 Defendant proposes that a motion for judgment on the pleadings or motion for summary
23 judgment be due ten months after the Court issues its pretrial scheduling order in response to this
24 report.

1 H. Anticipated Limitations on Use of Testimony

2 At this time, the parties have not identified such limitations.

3 I. Final Pre-trial Conference

4 The parties propose scheduling a pre-trial conference two months after the Court issues a
5 ruling on the parties' motions for summary judgment.

6 J. Proposed Date for Trial

7 *Plaintiff's Position:*

8 Plaintiffs contend that the issues to be resolved herein are questions of law.

9 *Defendant's Position:*

10 A date for trial is dependent upon the date by which the Court's decision on the parties'
11 dispositive motions are rendered. Defendant estimates that a bench trial will take approximately
12 three days.

13 K. Special Proceedings

14 The parties have not agreed to proceed before a Magistrate Judge.

15 L. Modification of Pre-Trial Procedures

16 At this time, the parties do not anticipate a modification of the pre-trial procedures.

17 M. Related Cases in the District

18 The parties are not aware of any related cases in this district.

19 N. Settlement Proceedings

20 The parties have met and conferred about their respective positions but do not expect that
21 a settlement will be reached. The parties have no objection to the Court acting as the settlement
22 judge.

1 O. Other Matters Conducive to an Expeditious Disposition of the Case

2 The parties are not aware of any other matters that may be conducive to an expeditious
3 disposition of the case.

4 Dated: October 7, 2022

Respectfully Submitted,

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/s/ Amy L. Bellantoni
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Dated: October 7, 2022

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Respectfully submitted,

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