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8

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

12 **VIRGINIA DUNCAN ET AL.,**

13 Plaintiffs,

14 **v.**

15 **ROB BONTA, IN HIS OFFICIAL**  
16 **CAPACITY AS ATTORNEY GENERAL**  
17 **OF THE STATE OF CALIFORNIA,**

18 Defendant.  
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3:17-cv-1017-BEN-JLB

**DEFENDANT'S OPPOSITION TO  
PLAINTIFFS' MOTION TO STRIKE  
DEFENDANTS' SUPPLEMENTAL  
BRIEF**

Hearing Date: January 9, 2023  
Hearing Time: 10:30 a.m.  
Courtroom: 5A  
Judge: Hon. Roger T. Benitez  
Action Filed: May 17, 2017

## INTRODUCTION

This Court should deny Plaintiffs’ motion to strike pages 26 through 63 of Defendant’s briefing submitted in response to this Court’s order dated September 26, 2022 (Dkt. No. 111) (the “Order”) for being submitted in purported violation of Local Civil Rule 7.1(h). By its own terms, that rule applies only to briefs submitted “in support of or in opposition to all motions noticed for the same motion day,” and there was no motion pending before the Court at the time the Order was issued. But even if this Court were to conclude that Local Civil Rule 7.1(h) does apply to the briefing at issue, the Court should still deny the instant motion and accept Defendant’s full briefing in the interests of fairness to the parties. The Order itself did not provide notice that the briefing related to any prior motion in this case and did not include any specific page limit, and the filing of the instant motion without advance notice to Defendant operated to deny Defendant a full and fair opportunity to determine his position on Plaintiffs’ concurrent ex parte application to file a brief in excess of 25 pages. Moreover, for the Court to simultaneously grant Plaintiffs’ ex parte application (which Defendant continues to not oppose) as well as the instant motion would produce an absurd and inequitable result. Finally, the significant issues framed in the Order warrant the length of the submitted briefing, and Defendant’s brief—as well as Plaintiffs’ brief—should be accepted as filed. For these reasons and others set forth more fully below, the Court should deny the instant motion.

## BACKGROUND AND RELEVANT PROCEDURAL HISTORY

As this Court is aware, following the Supreme Court’s vacatur of the judgment in this matter, the Ninth Circuit remanded the matter to this Court “for further proceedings consistent with *New York State Rifle & Pistol Ass’n v. Bruen*,” 597 U.S. \_\_\_, 142 S. Ct. 2895 (2022). *See Duncan v. Bonta*, 49 F.4th 1228, 1231 (9th Cir. 2022). This Court then issued the Order, which in relevant part directed the following: “Defendant shall file any additional briefing that is necessary to decide this case in light of *Bruen* within 45 days of this Order. Plaintiffs shall file any responsive briefing within 21 days thereafter. This Court will then decide the case on the briefs and the prior record or schedule additional hearings.” No motion was filed by any of the parties

1 during the timeframe between the Supreme Court’s vacatur of the judgment and this Court’s  
2 issuance of the Order.

3 On November 10, 2022, Defendant submitted his additional briefing in response to the  
4 Order. *See* Dkt. No. 118. On November 30, 2022, counsel for Plaintiffs contacted counsel for  
5 Defendant and stated that it was Plaintiffs’ position that the supplemental briefing ordered by the  
6 Court in this matter was bound by the 25-page limitation set by Local Civil Rule 7.1(h). *See*  
7 Declaration of Kevin J. Kelly in Support of Defendant’s Response to Plaintiffs’ Ex Parte  
8 Application for Order Extending Page Limitation (“Kelly Decl.”) (Dkt. No. 133-1) ¶ 2 & Exhibit  
9 A. Plaintiffs’ counsel further inquired as to whether Defendant would oppose Plaintiffs’ ex parte  
10 application to file a brief in excess of that limitation. *See id.* Defendants’ counsel stated that while  
11 it was Defendant’s position that Local Civil Rule 7.1(h) did not apply to limit the length of that  
12 briefing, since that rule pertains to briefs “in support of or in opposition to motions” and there  
13 was no pertinent motion currently pending before the Court, Defendant would not oppose  
14 Plaintiffs’ ex parte application. *See id.* ¶ 4 & Exhibit A.

15 The following day, Plaintiffs concurrently filed their 50-page supplemental brief (*see* Dkt.  
16 No 132), an Ex Parte Application for Order Extending Page Limitation (*see* Dkt. No. 130), and  
17 the instant motion (*see* Dkt. No. 131). At no point prior to filing the instant motion had Plaintiffs  
18 informed Defendant that the instant motion would be filed. *See* Kelly Decl. ¶ 6. Nevertheless, in  
19 good faith and consistent with Defendant’s counsel’s earlier representations to Plaintiffs’ counsel,  
20 Defendant did not oppose Plaintiffs’ ex parte application. *See* Defendant’s Response to Plaintiffs’  
21 Ex Parte Application for Order Extending Page Limitation (Dkt. No. 133) at 2.

## 22 ARGUMENT

### 23 I. DEFENDANT’S BRIEF DID NOT CONSTITUTE A BRIEF “IN SUPPORT OF 24 OR IN OPPOSITION TO” ANY MOTION, AND THUS LOCAL CIVIL RULE 25 7.1(H) SHOULD NOT BE HELD TO APPLY.

26 Local Civil Rule 7.1(h) states:

27 **Length of Brief in Support of or in Opposition to Motions.** Briefs or  
28 memoranda in support of or in opposition to all motions noticed for the  
same motion day must not exceed a total of twenty-five (25) pages in  
length, per party, for all such motions without leave of the judge who will

1 hear the motion. No reply memorandum will exceed ten (10) pages  
 2 without leave of the judge. Briefs and memoranda exceeding ten (10)  
 3 pages in length must have a table of contents and a table of authorities  
 cited.

4 This rule does not, by its own terms, apply to the briefing at issue in the instant motion.  
 5 There was no motion pending before the Court at the time it issued the Order, and thus  
 6 Defendant's briefing was not submitted "in support of or in opposition to" any motion. Nor had  
 7 the Ninth Circuit remanded this matter to this Court for any explicit motion-related purpose, such  
 8 as reconsideration of Plaintiffs' earlier summary judgment motion, as it instead remanded "for  
 9 further proceedings consistent with [*Bruen*]." See *Duncan*, 49 F.4th at 1231

10 Plaintiffs for their part have pointed to nothing in the record suggesting that Local Civil  
 11 Rule 7.1(h) applies to the relevant Court-ordered briefing. Plaintiffs' assertions that "the  
 12 supplemental briefing at issue here is supplemental to the state's motion for summary judgment  
 13 briefing" and "the supplemental brief here is within 7.1(h)'s reach because it is filed in support of  
 14 the Court's *Bruen* focused reevaluation of Plaintiffs' motion for summary judgment" (see  
 15 Plaintiffs' Memo at 3) are not supported by any references to the record in this case and are thus  
 16 speculative. Their motion should be denied.

17 **II. EVEN IF LOCAL CIVIL RULE 7.1(H) DOES APPLY TO THE BRIEFING AT**  
 18 **ISSUE, THIS COURT SHOULD DENY PLAINTIFFS' MOTION IN THE**  
 19 **INTEREST OF FAIRNESS TO THE PARTIES.**

20 To the extent the Order was intended as a *sua sponte* order requiring the parties to  
 21 supplement briefing submitted in relation to any prior motion, the Court should nonetheless deny  
 22 Plaintiffs' motion to strike as a matter of fundamental fairness to the parties. The Order did not so  
 23 indicate that the briefing should be understood to relate to any earlier motion in this case, and thus  
 24 Defendant could not have had sufficient notice that Local Civil Rule 7.1(h) may apply. Moreover,  
 25 the Order directed Defendant to submit "any additional briefing that is necessary to decide this  
 case in light of *Bruen*" (see Order at 2) without imposing any specific page limit.

26 Furthermore, fundamental fairness dictates that Plaintiffs' motion should be denied insofar  
 27 as Defendant was not given a full and fair opportunity to consider his position on the ex parte  
 28 application with the knowledge that Plaintiffs would be filing the instant motion. Had Defendant

1 been aware of the planned motion to strike, Defendant would have informed Plaintiffs that he  
 2 would consent to Plaintiffs' application provided that the Court does not strike any pages of  
 3 Defendant's supplemental brief; otherwise Defendant would be severely prejudiced by limiting  
 4 his brief to 25 pages while permitting Plaintiffs' supplemental brief to exceed 25 pages. Moreover,  
 5 granting both Plaintiffs' application and motion would result in a plainly inequitable and absurd  
 6 result—Defendant's supplemental briefing would be restricted to 25 pages, while Plaintiffs'  
 7 briefing would extend to some 50 pages, much of it submitted in response to argument set forth in  
 8 the full version of Defendant's briefing.

9 If the Court does determine that Rule 7.1(h) applies, the parties should each be granted  
 10 leave to proceed with their respective briefs. Briefing the significance of *Bruen* in the context of  
 11 the issues framed in this litigation warrants the length of the briefing that both parties have  
 12 submitted. Indeed, Plaintiffs' claim that "[i]f the State had evidence of a well-subscribed  
 13 historical tradition of restrictions analogous to the magazine laws at issue here, the State would  
 14 not even need 25 pages, let alone 63, to discuss them" (*see* Plaintiffs' Memo at 3) is belied by the  
 15 complexity and length of their own responsive briefing, which comprises some 50 pages (*see*  
 16 Plaintiffs' Supplemental Brief, Dkt. No. 132). And while Plaintiffs claim in their accompanying  
 17 ex parte application that they "did not create the circumstance that necessitated" their request for  
 18 leave to file a brief of more than 25 pages (*see* Plaintiffs' Memorandum of Points and Authorities  
 19 in Support of Plaintiffs' Ex Parte Application for Order Extending Page Limitation at 2), they do  
 20 not explain why they did not immediately request that the Court limit the length of Defendant's  
 21 brief after it was filed, instead waiting to file their own 50-page responsive brief along with the  
 22 instant motion and accompanying ex parte application on the day their brief was due.<sup>1</sup>

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 26 <sup>1</sup> To the extent Plaintiffs argue that the length of Defendant's briefing is "not warranted"  
 27 because "[t]he State knows that its magazine laws cannot survive the *Bruen* standard" (*see*  
 28 Plaintiffs' Memo at 2-3), the Court should disregard that argument as well as any other arguments  
 going to the merits of this case as outside the scope of the instant motion.

1 **CONCLUSION**

2 For the foregoing reasons, this Court should deny Plaintiffs' motion to strike.

3 Dated: December 27, 2022

Respectfully submitted,

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5 MARK R. BECKINGTON  
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7 /s/ Kevin J. Kelly  
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9 *Attorneys for Defendant Rob Bonta, in his*  
10 *Official Capacity as Attorney General of the*  
*State of California*

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