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January 25, 2023

VIA ECF
Molly C. Dwyer
Clerk of Court
United States Court of Appeals for the Ninth Circuit
James R. Browning Courthouse
95 7th Street
San Francisco, CA 94103

Re: *Michelle Flanagan, et al. v. Rob Bonta, et al.*, Case No. 18-55717
Court-ordered Supplemental Letter Brief

Dear Ms. Dwyer:

Per the Court's December 23, 2022 order, Appellants respectfully submit this letter brief analyzing "(1) whether the appellees' voluntary cessation renders this case moot under *Rosebrock v. Mathis*, 745 F.3d 963, 972 (9th Cir. 2014) and (2) whether [the Court] should depart from [its] prior practice of 'vacat[ing] the judgment of the district court and remand[ing] [the] case to the district court for further proceedings pursuant to' the Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2111 (2022)." Order, ECF No. 72 (citing *Young v. Hawaii*, 45 F.4th 1087, 1089 (9th Cir. 2022) (en banc); *see also Duncan v. Bonta*, 49 F.4th 1228, 1231 (9th Cir. 2022) (en banc); *McDougall v. Cnty. of Ventura*, 38 F.4th 1162 (9th Cir. 2022) (en banc); *Jones v. Bonta*, 47 F.4th 1124, 1125 (9th Cir. 2022); *Rupp v. Bonta*, No. 19-56004, 2022 WL 2382319, at *1 (9th Cir. June 28, 2022); *Mitchell v. Atkins*, No. 20-35827, 2022 WL 17420766, at *1 (9th Cir. Dec. 2, 2022)).

First, this case is not moot. California's "good cause" requirement remains on the books and California law affords local concealed-carry-license issuing authorities, like Appellee Los Angeles County Sheriff, sole discretion in deciding to enforce it in their respective jurisdictions, regardless of their predecessors' or the California

Attorney General's opinion on the matter. To be sure, California has made obvious that it will try to repeal the "good cause" requirement from statute this year—a feat its legislature failed to achieve last session. But it has also made obvious that it intends to simultaneously adopt measures that will make concealed carry licenses effectively worthless. Repealing the "good cause" requirement alone would, therefore, not necessarily give Appellants the relief they seek in bringing this action, which is the ability to exercise their Second Amendment right to publicly bear arms in *some* meaningful way, whether openly or concealed. Appellants are entitled to that relief and this Court can still grant it.

Second, there is no need to vacate and remand this case, as the Court has done with the other cases mentioned in its order because here, unlike in any of those cases, the Appellees have admitted that they lose under *Bruen*. There is nothing further for a trial court to do other than enter judgment based on this Court's ruling reversing the trial court's previous order.

I. BACKGROUND

Following an en banc panel of this Court rejecting a challenge to a California Sheriff's "good cause" policy on the basis that the Second Amendment does not protect the right to carry a *concealed* firearm in *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc), Appellants filed a Second Amendment challenge to virtually all of California's restrictions on publicly carrying firearms by law-abiding citizens, both open and concealed carry restrictions. X-ER-2195. The relief that they sought was not the enjoining of any particular restriction, but rather an injunction that would allow them to carry in some meaningful manner.

On June 30, 2022, Appellants submitted a Rule 28(j) letter informing this Court of the Supreme Court's June 23, 2022 decision in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S.__, 142 S.Ct. 2111 (2022) ("*Bruen*"), and requesting that this Court remand this matter with instructions to enter judgment in their favor because the binding *Bruen* decision compels that outcome. ECF No. 63. In response, on July 8, 2022, Appellee the California Attorney General submitted a letter arguing that this Court should instead dismiss this matter as moot. According to the California Attorney General, *Bruen* gives Appellants "the 'precise relief that [they] requested in the prayer for relief in their compliant,'" and "there is no reasonable expectation that defendants will require them to show good cause to secure a license to carry in the future" because he has "issued a legal alert recognizing that California's good cause requirement is no longer constitutional in light of *Bruen*." ECF No. 64. On July 29,

2022, Appellee Los Angeles County Sheriff Alex Villanueva[1] also submitted a letter likewise arguing that this matter is moot because he is no longer enforcing the "good cause" requirement in light of *Bruen*. ECF No. 65.

Despite California's legislature proposing legislation to repeal the "good cause" requirement last session, it did not pass. S.B. 918, 2021-2022 Reg. Sess. (Cal. 2022), https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=202120220SB918. ("SB 819"). So the requirement remains statutory law in California. New legislation has been proposed but the details have not been established yet; the proposed legislation instead states only that "[i]t is the intent of the Legislature to enact legislation to address the United States Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen* (2022)." S.B. 2, 2023-2024 Reg. Sess. (Cal. 2023), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB2. If the legislature intends to "address" *Bruen* similar to how its failed SB 918 purported to, that will mean severe restrictions on concealed carry licenses so that their holders can carry practically nowhere in public.

II. ARGUMENT

A. Appellants' Claims Are Not Moot Under the Voluntary Cessation Doctrine or Any Other Theory

A case becomes moot if "interim relief or events have deprived the court of the ability to redress the party's injuries." *United States v. Alder Creek Water Co.*, 823 F.2d 343, 345 (9th Cir. 1987). The relevant question is "whether there exists a present controversy as to which effective relief can be granted." *Village of Gambell v. Babbitt*, 999 F.2d 403, 406 (9th Cir. 1993) (internal quotation omitted). If the court can grant "*some* form of meaningful relief," the case is *not* moot. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992) (italics added). Even the possibility of a "partial remedy" eliminates concerns that the case has become moot. *Id.* Because this Court can still grant meaningful relief here, this case is not moot.

At the outset, the "good cause" requirement still remains on the books. Although *Bruen* held that a similar requirement is unconstitutional, creating binding precedent under which California's requirement could not survive appropriate judicial review, the Supreme Court did not expressly overturn California's law. The only law actually before the Court was New York's. California's unconstitutional requirement therefore remains in effect, because (1) it was not before the *Bruen* Court, and (2) the

[1] Robert Luna is the new duly elected Los Angeles County Sheriff and is now the properly named Defendant-Appellee.

California Legislature has not repealed it. This case is thus far afield from cases in which *the actual statute being challenged* was invalidated by a separate court of last resort. *See, e.g.*, *Aikens v. California*, 406 U.S. 813 (1972). Unlike *Aikens*, where the statute challenged in federal court had already been declared unconstitutional in state court, California's "good cause" requirement has been neither expressly declared unconstitutional nor repealed. *Bruen*—which Appellees claim gives Appellants the relief they seek—invalidated a different law from a different state. To be sure, *Bruen* clearly confirms that Appellants are entitled to a judgment that the "good cause" requirement is unconstitutional. But, for purposes of mootness, there is a meaningful difference between a case that is mooted because one set of litigants beat another to the punch in having the very same law declared invalid and enjoined (as in *Aikens*), and a case where one set of litigants achieves precedent-setting change that another set of litigants can rely on to vindicate their challenge to a *different* law in a *different* jurisdiction (as is the case here).

In short, Appellants' challenge to California's "good cause" requirement is not moot because an active controversy remains and relief is available that could resolve that controversy—namely, declaring the "good cause" requirement unconstitutional and permanently enjoining its enforcement. *Bruen* does not make it impossible to grant this relief. In fact, it does the opposite: It compels the courts to grant that relief. Had the Supreme Court resolved *Bruen* the other way, finding there is no Second Amendment right to be armed in public, Appellees would not claim mootness here. They would instead be requesting that judgment be entered in their favor. Appellants are entitled to no less.

Appellees claim this case is moot because they will no longer be enforcing the "good cause" requirement. ECF Nos. 64, 65. But such "voluntary cessation of challenged conduct does not ordinarily render a case moot." *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014). To the contrary, voluntary cessation only renders a case moot "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 538 U.S. 167, 189 (2000). The burden is a heavy one, and it rests squarely with the party advocating mootness. *Id.* In short, Appellees must make "absolutely clear" that the constitutional violation plaintiffs sued to enjoin will not be repeated. Neither Appellee can make that showing here.

Repealing the "good cause" requirement would not necessarily mean otherwise. While this litigation has been refocused on the "good cause" requirement in light of *Bruen*'s holding a similar provision unconstitutional, the *constitutional right* that Appellants sued to vindicate is their right to bear arms publicly in *some* manner. That is why Appellants did not limit their challenge to the "good cause" requirement but also

challenged the state's *open* carry regime. X ER at 218. While repeal of the "good cause" requirement would grant Appellants the relief they seek if the rest of California law remains static, the legislature has made clear that that is not what is going to happen. Indeed, the reason the legislature has not yet repealed the "good cause" requirement is because it fully intends to replace it with something that will make it just as difficult for law-abiding citizens to exercise the constitutional right that *Bruen* recognized. The Court should not allow Appellees to give Appellants an apparent victory with one hand (while trying to deprive them of attorneys' fees) when the state is promising to snatch away any real benefit of a concealed carry license with the other hand. At the very least, any claim to mootness should not be assessed unless and until the legislature actually repeals the "good cause" requirement and replaces it with something else, as there is simply no guarantee that Appellants will be able to meaningfully exercise the rights that they sued to vindicate in that anticipated post-"good cause" world.

In the meantime, the best course of action is to grant Appellants the relief to which they are entitled *now*—i.e., a judgment declaring California's "good cause" requirement unconstitutional and enjoining its enforcement. Without that, there is really nothing preventing Appellees or their successors from resuming the previous application of that law—a law the legislature has *not* repealed—as soon as this case is dismissed. To be sure, courts often give government actors considerable deference with respect to claims that they have made policy changes and will not resume the actionable conduct, even absent the law's repeal. *See Rosebrock*, 745 F.3d at 971. But "when the [g]overnment asserts mootness based on such a change it still must bear the heavy burden of showing that the challenged conduct cannot reasonably be expected to start up again." *Id.* (citing *White v. Lee*, 227 F.3d 1214, 1243-44 (9th Cir. 2000); *Bell v. City of Boise*, 709 F.3d 890, 898-99 & n.13 (9th Cir. 2013)).

In *Rosebrock*, this Court considered whether a "voluntary" policy change not reflected in any statutory change mooted the plaintiff's claims and held that the following factors make mootness "more likely":

> (1) the policy change is evidenced by language that is "broad in scope and unequivocal in tone," [*White*, 227 F.3d at 1243]; (2) the policy change fully "addresses all of the objectionable measures that [the Government] officials took against the plaintiffs in th[e] case," *id.*; (3) "th[e] case [in question] was the catalyst for the agency's adoption of the new policy," *id.*; (4) the policy has been in place for a long time when we consider mootness, *see id.* at 1243-44 & nn. 25, 27; and (5) "since [the policy's] implementation the

> agency's officials have not engaged in conduct similar to that challenged by the plaintiff[ ]," *id.* at 1243.

Rosebrock, 745 F.3d at 972. On the other hand, this Court explained that mootness is less likely "where the "new policy . . . could be easily abandoned or altered in the future.' " *Id.* (quoting *Bell*, 709 F.3d at 901). Few, if any, of the *Rosebrock* factors that support mootness are present here. To the contrary, because Appellees' new policy "*could be* easily abandoned or altered in the future" and the State has announced plans to effectively legislate that change to Appellants' detriment, this matter is not moot.

Factor 1: Whether the policy change is evidenced by language that is "broad in scope and unequivocal in tone: While both Appellees' statements about their policy change use language that may be "broad" and "unequivocal," those statements are not reasonable guarantees that the offending conduct will not resume. Indeed, they cannot be. That is because the Attorney General has no authority over enforcement of the "good cause" requirement. California law makes it exclusively the domain of local issuing authorities, as the Attorney General's Office has steadfastly maintained over the years. Even if the Attorney General does not believe that the requirement is constitutional in light of *Bruen*, his opinion has no binding effect on its enforcement by locally-elected sheriffs or locally-appointed chiefs of police.

While Appellee Los Angeles County Sheriff Luna (or any other local issuing authority) may voluntarily agree not to enforce the "good cause" requirement, nothing precludes him from changing his mind. Nor do his current policies bind any future holder of the office from disagreeing with that policy or with the Attorney General's opinion that the requirement is unconstitutional. California case law is unequivocal that carry-license issuing authorities (i.e., local sheriffs and chiefs of police) have vast discretion in determining what constitutes "good cause" under California law. *Nichols v. Cty. of Santa Clara*, 223 Cal. App. 3d 1236, 1241 (1990) ("Section 12050 [predecessor to Section 26150] gives extremely broad discretion to the sheriff concerning the issuance of such licenses. (*Salute v. Pitchess* (1976) 61 Cal. App.3d 557, 560, 132 Cal. Rptr. 345.) In *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 655…, that discretion was described as 'unfettered.' ") This Court has confirmed that reading of California law. *Erdelyi v. O'Brien*, 680 F.2d 61, 63 (9th Cir. 1982). So has the Attorney General. Indeed, the Attorney General's Office has repeatedly argued over the years that it is not a proper defendant in legal challenges to the "good cause" requirement, and has uniformly moved to be dismissed from challenges to that requirement precisely because the Attorney General has no control over local officials' application of the "good cause" standard.

For example, in a Second Amendment challenge to the San Francisco County Sheriff's Carry "good cause" policy, then Attorney General Kamala Harris sought to be dismissed as a named party on the grounds that:

> the Attorney General has no authority to grant, deny, or revoke CCW licenses, and had no involvement whatsoever in processing plaintiff's alleged application. Thus plaintiff's claims against the Attorney General are barred by the Eleventh Amendment, and plaintiff lacks standing to make those claims as to the Attorney General.

Defendants' Cross-Motion for Summary Judgment 11-12, *Pizzo v. San Francisco*, No. 09-04493 (N.D. Cal. July 2, 2012), ECF No. 81. In at least two other cases involving essentially identical issues, different Attorneys General sought to be dismissed on the same grounds. *See* Defendants' Motion to Dismiss, *Mehl v. Blanas*, No. 2:03-cv-2682 (E.D. Cal. 2004), ECF No. 9; Defendants' Motion to Dismiss 2, *Rothery v. Blanas*, No. 2:08-cv-2064 (E.D. Cal. 2009), ECF No. 32 ("Applicants cannot allege or prove any set of facts that would entitle them to the requested relief against the Attorney General because the Statute does not confer upon him authority to grant or deny CCW or to control County defendants' authority in that regard. Applicants neither have standing to pursue their asserted claims against the Attorney General nor can overcome his immunity from suit under the Eleventh Amendment.").[2]

Considering the Attorney General's longstanding, repeatedly asserted argument to courts—including this one—that it should not be a party to actions challenging "good cause" policies, he cannot now ask this Court to treat his determination that the "good cause" requirement is unconstitutional as sufficient to compel issuing authorities like Appellee Los Angeles County Sheriff (or any other) to agree. Without an injunction against its enforcement, therefore, local issuing authorities like Appellee

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[2] While the respective district courts disposed of two of those three matters on other grounds, at least one court accepted the Attorney General's position that it should not be a party in matters concerning discretion to issue a carry license. *See* Order. Mot. Dismiss 4-5, *Mehl v. Blanas*, No. 03-2682 (C.D. Cal. 2004), ECF No. 17. On appeal, former Attorney General Edmund Brown asserted essentially identical arguments before this Court. Brief of Appellee 47, *Mehl v. Blanas*, No. 08-15773 (9th Cir. Sept. 26, 2008) ("[T]he Attorney General has no involvement in decisions to grant, deny or revoke CCW licenses. It is the Sheriff who has the enforcement role here . . ..")

Sheriff Luna remain free under California law to disregard the Attorney General's conclusion that *Bruen* renders the "good cause" requirement unconstitutional. [3]

At bottom, Appellees' statements that they have changed their policies and have ceased enforcement of the "good cause" requirement, regardless of how broad and unequivocal, cannot be construed as supporting mootness here because those policy changes "*could be*" easily changed. But more importantly, as explained above, the state legislature is poised to adopt Senate Bill 2 ("SB 2"), which is expected to provide local issuing authorities, like the Los Angeles County Sheriff, the tools to inflict on Appellants effectively the same injury as the current "good cause" requirement. Indeed, California is already scheming to diminish *Bruen*'s impact through SB 2. Sen. B. 2, 2023-2024 Reg. Sess. (Cal. 2023)("It is the intent of the Legislature to enact legislation to address the United States Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen* (2022)"). The effect of the language in Appellees' policy changes must be viewed in the context of this anticipated legislation, which is to say the language is irrelevant and cannot support mootness.

Factor 2: Whether the policy change fully addresses all of the objectionable measures that Appellants challenge: For the same reasons, it can hardly be argued that the purported policy change "fully address[es] *all* of the objectionable measures that [the Government] officials took . . .." *Rosebrock*, 745 F.3d at 972. Indeed, because Appellees' new policies "*could be*" easily changed at the whim of a local official, by definition their policy changes did not resolve all of Appellants' concerns. And California's legislature threatening to resurrect Appellants' injuries with SB 2 makes Appellees' new policies of no help and thus no comfort to Appellants.

Factor 3: Whether the case was the catalyst for the agency's adoption of the new policy: Unlike the policy change in *Rosebrock*, Appellants' lawsuit is not the catalyst for Appellees' change of heart on the "good cause" requirement. Each Appellee vigorously defended California's "good-cause" regime for over six years, including one as an amicus before the Supreme Court in *Bruen*. Brief for the California Attorney General as Amicus Curiae Supporting Respondents, *New York State Rifle &*

[3] Public officials disagreeing with the legal opinion of the California Attorney General is not some unlikely fantasy. Attorney General Bonta recently refused to enforce a law that would shift the burden on recovering fees to plaintiffs challenging gun control statutes unless they prevail on all of their claims. He conceded that the law was unconstitutional. Governor Newsom nevertheless moved to intervene to defend the law. Governor Newsom's Mtn. to Intervene, *South Bay Rod & Gun Club, Inc., v. Bonta*, No. 3:22-cv-1461-BEN-JLB, (S.D. Cal. Dec. 9, 2022), ECF No. 29-1.

Pistol Assn v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843). Every statement that each Appellee has made about their respective changes has been linked to the *Bruen* decision, not this case. ECF Nos. 64, 65. Indeed, all Appellees have done with respect to this case is try to end it without actually giving plaintiffs any relief.

Factor 4: Whether the policy has been in place for a long time when we consider mootness: Appellees have only harbored their new view of the "good cause" requirement for several months now. It has not been several years like the agency in *Rosebrock*. *Rosebrock*, 745 F.3d at 974. And, as explained, California is scheming to allow Appellees to engage in conduct that, if adopted, will cause Appellants effectively the same injury as if Appellees resumed enforcement of the "good cause" requirement.

Factor 5: Whether the agency's officials have not engaged in conduct similar to that challenged since the policy's implementation: Since Appellees adopted their new views of the "good cause" requirement months ago, neither has returned to his former view as a matter of policy. Of course, as explained above, upon passage of SB 2, Appellants expect Appellees to engage in conduct that would cause Appellants effectively the same injury as if Appellees resumed enforcement of the "good cause" requirement. This factor thus does not support mootness either.

* * * *

In sum, the *Rosebrock* factors counsel against mootness here. Indeed, this case resembles *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982), where "the Supreme Court refused to dismiss an appeal as moot where a city had revised a challenged ordinance but was reasonably expected to reenact offending provisions because it had announced its intention to do so." *Bd. of Trs. of the Glazing Health & Welfare Trust v. Chambers*, 941 F.3d 1195, 1198 (9th Cir. 2019) (discussing *Mesquite*). But this case is even worse. Not only has California *not* repealed its offending law, but its legislature is also actively scheming to circumvent the precedent it is supposed to heed. Based on its openly hostile response to *Bruen*, there is no guarantee that California will not implement restrictions that have the same, or worse, effect on Appellants as the "good cause" requirement. To the contrary, it is reasonably likely that California *will* inflict such offending conduct. This case is not moot.

B. This Court Should Not Simply Vacate and Remand

This Court has requested the parties' position on whether it should vacate the judgment of the district court and remand for further proceedings in light of *Bruen*, as it has done with several other Second Amendment cases. It should not. The reason is

simple. *Bruen* is a clear directive to all jurisdictions that currently impose "good cause" requirements on carry license applicants that such requirements are unconstitutional. 142 S. Ct. at 2122; *see also id.* at 2162 (Kavanaugh, J., concurring). Appellees do not dispute that this is *Bruen*'s effect.

Unlike all of those other cases, Appellees' position on the impact of *Bruen* in this case is, therefore, already known. Appellees' have announced to this Court that, under *Bruen*, they lose. ECF Nos. 64, 65. In none of the other Second Amendment cases mentioned in this Court's order that were vacated and remanded did an Appellee concede defeat under *Bruen*. To the contrary, all Appellees in those other cases either remained silent on the impact of *Bruen* or argued to this Court that they prevail under *Bruen*. *See* Def's. Supp. Brief, at 14, *Duncan v. Bonta*, No. 17-cv-1017-BEN-JLB, (S.D. Cal. Nov 10, 2022), ECF No. 118; Appellant's. Supp. Brief, at 2, *Rhode v. Bonta*, No. 20-55437 (9 th Cir. Oct. 13, 2022), ECF No. 105. With both Appellees' concession of defeat under *Bruen*, there is nothing for the district court to do on remand, other than enter judgment in Appellants' favor.

III. CONCLUSION

Bruen did not moot this matter because there is still meaningful relief that this Court can grant; namely, a reversal of the trial court's order and a remand with instructions to enter judgment in Appellants' favor permanently enjoining California sheriffs from enforcing the "good cause" requirement. *See United States v. Nevarez-Castro*, 120 F.3d 190 (9th Cir. 1997). Because this case is not moot and the parties agree that *Bruen* dooms California's "good cause" requirement, this Court should summarily reverse the judgment below and remand with instructions that the district court (1) enter judgment for Appellants declaring California's "good cause" requirement unconstitutional and (2) permanently enjoin its enforcement. To the extent the Court is considering mooting this matter, it should await resolution of SB 2 in the California legislature.

Sincerely,

s/ Sean A. Brady

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