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January 25, 2023

Molly Dwyer
Clerk of Court
United States Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, California 94119-3939

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

Dear Ms. Dwyer:

Pursuant to the Court's December 23, 2022 Order, Defendant-Appellee Sheriff Robert Luna[1] ("the Sheriff") submits this letter brief. For the reasons set forth below: 1) this appeal should be dismissed as moot because no "actual controversy" exists; 2) the case is moot even if the Sheriff's legally compelled compliance with *Bruen* is construed as "voluntary cessation;" and 3) the Court should not vacate the judgment of the district court and remand the case for further

[1] Pursuant to Fed. R. App. P. 43(c)(2), Sheriff Robert Luna is automatically substituted as Defendant-Appellee. Sheriff Luna began his term as Sheriff of Los Angeles County on December 5, 2022.

proceedings because the precise issue presented in the case has been resolved by the Supreme Court in *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S.Ct. 2111 (2022) and Plaintiffs-Appellees have already received the exact relief it sought from the Sheriff in district court.

I. This Case is Moot Because No "Actual Controversy" Exists.

The issue presented in this case – whether the Attorney General and Sheriff can constitutionally enforce California Penal Code § 26150(a)(2)'s ("Section 26150(a)(2)") requirement that an applicant for a concealed weapons permit demonstrate that "good cause" exists for the issuance of that permit – was fully resolved by the Supreme Court in *New York State Rifle & Pistol Assn. v. Bruen*, 142 S.Ct. 2111 (June 23, 2022). This decision, which was issued during the pendency of this appeal, held that New York's requirement that an individual show "proper cause" to obtain a license to carry a concealed firearm in public is unconstitutional. *Id.* at 2156. The Court also highlighted California's "analogue[]" statute – Section 26150(a)(2) – requiring a showing of "good cause" for issuance of a concealed weapons permit and made clear that it is also unconstitutional. *Id.* at 2123-24, n.2.

The day after the *Bruen* decision, the California Attorney General issued a Legal Alert to all California county sheriffs, recognizing that Section 26150(a)(2)'s "good cause" requirement was held unconstitutional and therefore invalidated by *Bruen*. Dkt. 64 at 2. In accordance with *Bruen* and the Legal Alert, the Sheriff stopped requiring an applicant for a concealed weapons permit to demonstrate "good cause" for its issuance pursuant to Section 26150(a)(2). Dkt. 65.

Because the Sheriff has stopped enforcing Section 26150(a)(2)'s "good cause" requirement, this case is moot and this Court cannot exercise jurisdiction pursuant to Article III, Section 2 of the U.S. Constitution. "Article III, § 2, of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies,' which restricts the authority of federal courts to resolving 'the legal rights of litigants in actual controversies.'" *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013) (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982), *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885)). "'A case becomes moot – and therefore no longer a 'Case' or 'Controversy' for purposes of Article III – 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Rosebrock v. Mathis*,

745 F.3d 963, 971 (9th Cir. 2014) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90-91 (2013), quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)).

Here, the issue presented in this case is no longer "live" and the parties have no legally cognizable interest in the outcome of this appeal. With respect to the Sheriff, the issue presented in this case is whether the Sheriff can constitutionally enforce Section 26150(a)(2) and require a showing of "good cause" for the issuance of a concealed weapons permit. Because the Supreme Court held in *Bruen* that Section 26150(a)(2) is unconstitutional, the issue has been resolved and is no longer live. The relief sought by Plaintiffs-Appellees is an order permanently enjoining the Sheriff from enforcing Section 26150(a)(2) to require a showing of "good cause" for issuance of a concealed weapons permit. Appellants' Excerpts of Record ("E.R.") X, 2218-20. Because the Sheriff has already stopped doing so pursuant to *Bruen*, Plaintiffs-Appellees have obtained the precise relief sought from the Sheriff and lack any legally cognizable interest in the outcome of this case.

Accordingly, this Court should dismiss this appeal as moot and vacate the district court's judgment. *See Genesis Healthcare Corp.*, 569 U.S. at 72 (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990) ("If an intervening

circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot.").

II. This Case Would Still Be Moot Even If The Sheriff's Legally Compelled Compliance With *Bruen* Is Construed As "Voluntary Cessation."

It cannot be said that the Sheriff's decision to stop enforcing the "good cause" requirement in Section 26150(a)(2) – the precise conduct challenged in this case – was "voluntary." While "'voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed,'" *Rosebrock*, 745 F.3d at 971 (quoting*, inter alia*, *Knox v. Serv. Emps. Int'l Union, Local 1000,* 567 U.S. 298, 307 (2012)), there was no such "voluntary cessation" here. The Sheriff was legally compelled to no longer require applicants to demonstrate "good cause" for the issuance of a concealed weapons permit by the Supreme Court's clear holding in *Bruen* and the Attorney General's explicit instruction that Section 26150(a)(2) is unconstitutional and unenforceable.

"'[L]egally compelled' cessation" of allegedly unlawful conduct "is not 'voluntary' for purposes of [the voluntary cessation exception] to the mootness

doctrine." *Sea-Land Serv., Inc. v. Int'l Longshoremen's & Warehousemen's Union, Locals 13, 63 & 94*, 939 F.2d 866, 870 (9th Cir. 1991) (quoting *Enrico's, Inc. v. Rice*, 730 F.2d 1250, 1253 (9th Cir. 1984.)) Thus, where a change in conduct is legally compelled -- for example, by "relief from another tribunal" – the voluntary cessation doctrine does not apply. *Id.* at 870 (doctrine held not to apply where employer sought judgment requiring union to comply with NLRB ruling and union did so pursuant to order from a different court, as such compliance was "legally compelled" rather than "voluntary"); *see also Enrico's, Inc.*, *supra* (holding that agency's discontinuance of challenged pricing policy after a state court held that policy unlawful in a separate proceeding "was not voluntary, but legally compelled" because agency acted in accordance with its legal obligations in following the state court ruling); *Gabriele v. Serv. Emps. Int'l Union, Local 1000*, 2021 WL 2959427 at *1 (9th Cir. Oct. 26, 2021) (voluntary cessation doctrine did not apply where California state defendants ceased challenged policy after Supreme Court decision held it to be unconstitutional in case involving similar Illinois statute); *Harnett v. Pennsylvania State Education Assn.*, 963 F.3d 301 (3d Cir. 2020) (same with respect to Pennsylvania state defendants).

The *Bruen* decision – which specifically identified Section 26150(a)(2) as an "analogue[]" to the challenged New York statute – has the same practical effect on this case as a final judgment explicitly holding California's "good cause" requirement unconstitutional. *Bruen*, 142 S.Ct. at 2124 and n.2. As set forth in the parties' Rule 28(j) letters, all parties to this case agree that *Bruen* renders Section 26150(a)(2) unconstitutional and unenforceable, and all agree that Defendants-Appellees are bound by that decision. The Sheriff did not make a "voluntary" independent decision to stop enforcing the "good cause" requirement; he was "legally compelled" to do so because of the Supreme Court's ruling.

Even if the Sheriff's legally compelled compliance with *Bruen* is construed as "voluntary cessation," this case would still be moot. Where there is voluntary cessation of challenged conduct, a case may still become moot "'if subsequent events make it absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.'" *Rosebrock*, 745 F.3d at 971 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). The undisputed facts establish that Defendants-Appellees have clearly met this standard. As discussed *supra*, the Attorney General instructed the day after *Bruen* that Section 26150(a)(2)'s "good cause" requirement was unconstitutional and, in

accordance with *Bruen* and the Attorney General's Legal Alert, the Sheriff immediately stopped enforcing the requirement in recognition of a binding Supreme Court ruling. Dkt. 65.

The fact that the California Legislature has not yet had the opportunity to officially repeal Section 26150(a)(2)[2] does not indicate that the Sheriff would re-impose that requirement. In fact, there is no reasonable prospect that he would do so in defiance of the Supreme Court's unequivocal ruling that the "good cause" requirement is unconstitutional and unenforceable. *See Bruen*, 142 S.Ct. at 2124 and n.2 (identifying Section 26150(a)(2) as one of several state laws that violate the Second Amendment). Thus, while "a policy change not reflected in statutory changes or even in changes in ordinances or regulations will not necessarily render a case moot . . . it may do so in certain circumstances." *Rosebrock*, 745 F.3d at 971 (citing *Bell v. City of Boise*, 709 F.3d 890, 899-901 (9th Cir. 2013), *White v. Lee,* 227 F.3d 1214, 1242-44 (9th Cir. 2000)). This case presents the very "certain circumstances" that would render a case moot despite the absence of a statutory

[2] The California Legislature is currently considering SB 2, which seeks to repeal Penal Code § 26150(a)(2) and otherwise update the State's gun regulations. *See* SB 2, 2023-2024 Reg. Sess. (Cal. 2023).

change. The policy change in this case – namely, the Sheriff no longer enforcing Section 26150(a)(2)'s "good cause" requirement – cannot be "'easily abandoned or altered in the future'" as it is due to a binding Supreme Court decision. *Id.* at 972 and n.9 (quoting *Bell v. City of Boise,* 709 F.3d 890, 901) (distinguishing *Bell*, as Chief of Police order in *Bell* prohibiting enforcement of an ordinance in certain cases did not render case moot because the legality of the ordinance itself was at issue and policy change would not completely stop enforcement of ordinance).

Any argument that the Sheriff or his successors could potentially resume enforcement of Penal Code § 26150(a)(2) simply because it is "still on the books," Dkt. 66 at 2, cannot defeat mootness. This Court has held that "neither the existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement," and specifically rejected the argument that "the mere existence of a statute can create a constitutionally sufficient direct injury," as "there must be 'genuine threat of imminent prosecution.'" *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc) (quoting *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996); *see also Gabriele v. Serv. Emps. Int'l Union, Local 1000,* 2021 WL 2958855 at *1 (citing *Thomas*; "That [the statutes] have not been repealed does not

revive Appellants' claims. Unconstitutional statutes, without more, give no one a right to sue.") Given the Sheriff's unequivocal position that he will no longer enforce Section 26150(a)(2), there is simply no "genuine threat of imminent prosecution" or prospect of "constitutionally sufficient direct injury." *Id.*

There is no definitive test for determining whether a voluntary cessation not reflected in statutory changes has rendered a case moot. *See Rosebrock* at 972. However, *Rosebrock* articulated that "mootness is more likely if (1) the policy change is evidenced by language that is 'broad in scope and unequivocal in tone'; (2) the policy change fully 'addresses all of the objectionable measures that [the Government] officials took against the plaintiffs in th[e] case'; (3) 'th[e] case [in question] was the catalyst for the agency's adoption of the new policy'; (4) the policy has been in place for a long time when we consider mootness; and (5) 'since [the policy's] implementation the agency's officials have not engaged in conduct similar to that challenged by the plaintiff[]'. . . Ultimately, the question remains whether the party asserting mootness 'has met its heavy burden of proving that the challenged conduct cannot reasonably be expected to recur.'" *Id.* at 972, quoting *White v. Lee*, 227 F.3d 1214, 1243-44 (9th Cir. 2000).

All of these factors establish that this case is moot. Since immediately after *Bruen,* Defendants-Appellees have broadly and unequivocally renounced and refrained from enforcing the "good cause" requirement, which fully addresses Plaintiffs-Appellants' claims and prayers for relief. And while this particular case was not "the catalyst" for the policy change, *Bruen* resolved the precise issue by expressly indicating that California's "good cause" requirement is unconstitutional. Given the Sheriff's legally compelled compliance with that clear and binding Supreme Court ruling, as well as the Attorney General's explicit instruction not to enforce Section 26150(a)(2), there is simply no reasonable expectation that the challenged conduct in this case could recur. Accordingly, the Sheriff has met its burden to establish the "ultimate" showing that this case is moot.

III. Because This Case Was Directly Resolved By *Bruen*, This Court Should Dismiss the Appeal As Moot and Vacate the District Court's Judgment.

The supplemental briefing order directed the parties to address whether this 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'" *Bruen*, as it has done in several recent Second Amendment cases. Because *Bruen* resolved the exact question presented in this case and Plaintiffs-

Appellants have received the precise relief they requested, this Court should not vacate and remand the case to district court for further proceedings pursuant to *Bruen*. This appeal is moot, and there is no live case or controversy that could be resolved by the district court in "further proceedings."

"When a case becomes moot on appeal, the 'established practice' is to reverse or vacate the decision below with a direction to dismiss." *NASD Dispute Resolution, Inc. v. Judicial Council of State of Cal.*, 488 F.3d 1065, 1068 (9th Cir. 2007) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997), citing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). This is referred to as the "*Munsingwear* rule," under which "vacatur is generally 'automatic' in the Ninth Circuit when a case becomes moot on appeal." *Id.* (quoting *Publ. Util. Comm'n v. FERC*, 100 F.3d 1451, 1461 (9th Cir. 1996). While there are exceptions to the *Munsingwear* rule – for example, where the parties' own action such as settling a case renders the appeal moot – none of those apply here. As in *NASD Dispute Resolution*, it was "happenstance" that rendered this appeal moot, specifically, a Supreme Court decision that resolved the controversy. *Id.* at 1070 ("We therefore hold that the exception [to the *Munsingwear* rule] for

settlements should not apply to judgments mooted by court decisions in other cases.").

Unlike the other Second Amendment cases identified in the supplemental briefing order, this case is directly controlled and mooted by *Bruen* with respect to the unconstitutionality of Section 26150(a)(2). In holding the "good cause" requirement to be unconstitutional, the Supreme Court articulated a new analysis for Second Amendment challenges to gun regulations, whereby "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Bruen*, 142 S.Ct. at 2126 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, n.10 (1961)). The Court applied this analysis to New York's "proper cause" requirement and concluded that it violated the Fourteenth and Second Amendments because it was not consistent with the historical tradition of firearms regulation. *Id.* at 2156. There is no reason to remand this case to the district court for "further proceedings in accordance with *Bruen*" because the *Bruen* Court already articulated and applied its "historical tradition" analysis to a statute clearly identified as an "analogue[]" to

Section 26150(a)(2). *Id*. at 2124 and n.2. Conversely, the cases cited by this Court in its supplemental briefing order all involve different firearms regulations that must now be analyzed under the standard articulated in *Bruen*, and as such, present a live case or controversy for the district court to adjudicate.[3]

For the foregoing reasons, this Court should dismiss this appeal as moot and vacate the district court's judgment.

Respectfully submitted,

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By /s/ *Lana Choi*
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LC:ga

[3] *See Young v. Hawaii*, 45 F.4th 1087 (9th Cir. 2022) (en banc) (open carry of firearms); *Duncan v. Bonta*, 49 F.4th 1128 (9th Cir. 2022) (en banc) (large-capacity magazines); *McDougall v. Cnty. of Ventura*, 38 F.4th 1162 (9th Cir. 2022) (en banc) (COVID-19 closures of gun ranges and gun stores); *Jones v. Bonta*, 47 F.4th 1124 (9th Cir. 2022) (sale of firearms to young adults); *Rupp v. Bonta*, No. 19-56004, 2022 WL 2382319 (9th Cir. June 28, 2022) (assault weapons); *Mitchell v. Atkins*, No. 20-35827, 2022 WL 17420766 (9th Cir. Dec. 2, 2022) (sale of firearms to young adults).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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