

23-15016

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**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.

On Appeal from the United States District Court
for the District of California

No. 2:19-cv-00617-KJM-AC
Hon. Kimberly J. Mueller, Judge

**ATTORNEY GENERAL'S SUPPLEMENTAL
BRIEF REGARDING EN BANC REVIEW**

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INTRODUCTION

The Attorney General of the State of California respectfully submits this supplemental brief in response to the Court’s order directing the parties to address whether this appeal—which was considered at the preliminary injunction stage—should be reheard en banc.

Although this case concerns important issues, en banc consideration is not warranted at this time. The parties have now completed briefing on cross-motions for summary judgment. After the district court hears argument on November 3, 2023, it is expected to issue a decision and a final judgment, completely resolving Plaintiffs’ claims. In light of these circumstances, the interests of judicial economy are best served through resolution of the summary judgment motions (and any preliminary injunction proceedings once the mandate is issued)—and not through en banc review of the panel’s decision addressing whether the district court abused its discretion in denying a preliminary injunction.

BACKGROUND

Plaintiffs’ operative Second Amended Complaint challenges California’s laws that regulate the open carry of firearms. D. Ct. Dkt. No. 68. Plaintiffs contend that they have a right under the Second Amendment to unlicensed and unregulated public carriage of firearms and seek an order

enjoining California’s laws governing open carriage because of a “preexisting right” to openly carry loaded firearms without “permission from the government, licensing, registration, or any other action.” D. Ct. Dkt. No. 68, ¶ 8. In 2019, Plaintiffs initially moved for a preliminary injunction, and the Attorney General moved for summary judgment. D. Ct. Dkt. Nos. 14, 40, 56. Before the district court ruled on those motions, the parties jointly requested a stay pending the Supreme Court’s decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). D. Ct. Dkt. No. 57, 58.

In June 2022, the Supreme Court issued its decision in *Bruen*, and the parties jointly requested that the district court lift the stay. Plaintiffs then moved for a preliminary injunction, seeking to enjoin enforcement of California’s laws restricting the open carry of firearms. D. Ct. Dkt. No. 65. The district court denied Plaintiffs’ motion, concluding that Plaintiffs had failed to establish that the balance of equities and public interest favored an injunction. D. Ct. Dkt. No. 83 at 1. The district court did not resolve whether Plaintiffs were likely to succeed on the merits, reasoning that that issue would require a “difficult investigation and careful consideration of historical firearm regulations” and that historical experts would be necessary to provide a “thorough, rigorous, and balanced” analysis. *Id.* at 14, 15.

This Court reversed, holding that the district court erred by failing to address Plaintiffs’ likelihood of success on the merits under *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). C.A. Dkt. 31-1 at 8-9. The Court observed that “the likelihood of success on the merits is a particularly important consideration in the preliminary injunction analysis of a constitutional claim,” *id.* at 14; that a court “cannot properly evaluate the other factors” without a merits analysis, *id.* at 15; and that the district court here “employed an incorrect legal standard” when it avoided the merits, *id.* at 15. After concluding that the district court’s error “necessitates reversal and remand,” the Court “set forth” certain “requirements to guide” the district court on remand: the Court directed the district court to examine the merits under the standard established in *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022), directed that the court resolve the motion expeditiously, and stated that the court should apply the *Winter* factors after considering the merits. C.A. Dkt. 31-1 at 19-22.

While this appeal was pending, the parties continued to proceed with litigation in the district court. Under the district court’s scheduling order, the Attorney General timely moved for summary judgment in the district court. D. Ct. Dkt. Nos. 77, 90. The hearing was originally scheduled for September 22, 2023, but by agreement of the parties, it was continued so

that Plaintiffs could file a cross-motion for summary judgment. D. Ct. Dkt. No. 94. Plaintiffs cross-moved for summary judgment on September 29, 2023; the Attorney General opposed on October 13, 2023; and the parties have now completed briefing. D. Ct. Dkt. Nos. 96, 98, 100. The hearing on both motions is scheduled for November 3, 2023.

DISCUSSION

The Attorney General's position is that the case should not be reheard en banc at this time. In light of the proceedings in the district court, en banc review of the decision resolving whether the district court abused its discretion in denying a preliminary injunction would not promote judicial efficiency. *Cf., e.g., SEC v. Mount Vernon Mem. Park*, 664 F.2d 1358, 1361-1362 (9th Cir. 1982) ("Using 'good sense,' it is pointless for us to decide what preliminary relief the Commission should have obtained on the investment company count when that count has been dismissed for failure to state a claim and is before us on appeal."). The briefing on cross-motions for summary judgment is now complete, *supra* p. 4; the hearing on those motions is scheduled soon for November 3, 2023; and the district court is likely to issue a decision on the merits after that hearing and enter a final, appealable judgment. The Attorney General is thus of the view that under the specific circumstances presented in this case, the interests of judicial

economy are better served by continuing to proceed in the district court. After the district court issues a final judgment, the parties will be in a position to evaluate whether further relief from this Court is warranted.

CONCLUSION

The Court should not grant en banc review.

Dated: November 1, 2023

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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ATTORNEY GENERAL'S SUPPLEMENTAL BRIEF REGARDING EN BANC REVIEW

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Lara Haddad

Declarant

Lara Haddad

Signature