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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

ASHLEYMARIE BARBA, et al., Plaintiffs, **v.** **ROB BONTA, in his official capacity as Attorney General of California,** Defendant.	Case No. 37-2022-00003676-CU-CR-CTL **MEMORANDUM OF POINTS AND AUTHORITIES REGARDING SUPPLEMENTAL AUTHORITY[1]** Hearing Date: July 29, 2022 Dept: C-69 Judge: The Hon. Katherine A. Bacal Action Filed: January 28, 2022

[1] On July 6, 2022, the parties filed a stipulation and proposed order in which they alerted the Court to the Supreme Court's decision in *New York State Rifle & Pistol Association v. Bruen* (June 23, 2022) 142 S. Ct. 2111, 2022 WL 2251305 (*Bruen*), and requested an opportunity to file five-page supplemental briefs addressing *Bruen*. As of the filing of this supplemental brief, an order approving the stipulation does not appear on the case docket.

INTRODUCTION

In the First Amended Complaint, Plaintiffs challenge Assembly Bill 173 (2021-2022 Reg. Sess.; 2021 Cal. Stat., ch. 253) (AB 173) with allegations that AB 173 (1) violates their right to privacy under the California Constitution; (2) amounts to an invalid amendment to a voter initiative; and (3) violates their right to keep and bear arms under the Second Amendment to the United States Constitution. In *New York State Rifle & Pistol Association v. Bruen* (June 23, 2022) 142 S. Ct. 2111 (*Bruen*), the Supreme Court set forth a new framework for analyzing Second Amendment claims. Due to its potential relevance to Plaintiffs' third cause of action, and pursuant to the stipulation entered by the parties on July 6, 2022, Defendant submits this supplemental brief to describe the Supreme Court's decision in *Bruen* and explain how (or whether) it bears on the issues raised in Defendant's Demurrer and Plaintiffs' Motion for Preliminary Injunction, both of which this Court is scheduled to hear on July 29, 2022.

I. THE SUPREME COURT'S DECISION IN *BRUEN*

In *Bruen*, the Supreme Court "decline[d] to adopt" the "'two-step' framework" for analyzing Second Amendment claims that the Ninth Circuit and most other federal courts of appeals had "coalesced around" after the Court's decisions in *District of Columbia v. Heller* (2008) 554 U.S. 570 (*Heller*), and *McDonald v. City of Chicago* (2010) 561 U.S. 742. (*Bruen*, *supra*, 142 S. Ct. at pp. 2125-2126.) The first step under that approach required courts to discern the "historical scope of the Second Amendment" by asking whether the regulation was "one of the 'presumptively lawful regulatory measures' identified in" the Supreme Court's decision in *Heller*, *supra*, 554 U.S. 570, or "whether the record includes persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment." (*Jackson v. City & Cty. of San Francisco* (9th Cir. 2014) 746 F.3d 953, 960.) If the law fell within the scope of the Second Amendment, courts proceeded to the second step of the inquiry, in which they determined the appropriate level of scrutiny by evaluating "(1) how close the law c[ame] to the core of the Second Amendment right and (2) the severity of the law's burden on the right." (*Jackson*, 746 F.3d at pp. 960-961, quotation marks omitted.) If the law severely burdened the "core" Second Amendment right of "law-abiding,

responsible citizens to use arms in defense of hearth and home," then strict scrutiny applied. (*Id.* at p. 961, quotation marks omitted.) For all other cases, intermediate scrutiny applied, which meant the government needed to show that its law served a "significant, substantial, or important" interest, and that there was a "reasonable fit between the challenged regulation and the asserted objective." (*United States v. Chovan* (9th Cir. 2013) 735 F.3d 1127, 1139.)

In rejecting the two-step framework, the Supreme Court directed courts to scrutinize Second Amendment claims by applying a "methodology centered on constitutional text and history." (*Bruen*, *supra*, 142 S. Ct. at pp. 2128-2129.) Under the new approach, courts must initially assess whether the "Second Amendment's plain text covers" the regulated conduct. (*Id.* at p. 2129.) If the answer is no, there is no violation of the Second Amendment. If the answer is yes, the government can still justify its regulation—and overcome a constitutional challenge—not by showing that the law overcomes intermediate scrutiny but by showing that the challenged law is "consistent with the Nation's historical tradition of firearm regulation." (*Id.* at p. 2130.) In some cases, that historical inquiry will be "fairly straightforward," such as when a challenged law addresses a "general societal problem that has persisted since the 18th century." (*Id.* at p. 2131.) But in others—particularly those where the challenged laws address "unprecedented societal concerns or dramatic technological changes"—this historical analysis requires a "more nuanced approach." (*Id.* at p. 2132.) Governments can justify regulations of the latter sort by "reasoning by analogy," a process that requires the government to show that its regulation is "'relevantly similar'" to a "well-established and representative historical analogue." (*Id.* at p. 2132, emphasis omitted.)

II. *BRUEN*'S LACK OF RELEVANCE TO DEFENDANT'S DEMURRER

As stated in Defendant's Demurrer, Plaintiffs' third cause of action—its claim that AB 173 violates the Second Amendment—fails as a matter of law. Because Plaintiffs allege that AB 173 requires people to sacrifice their constitutional right to privacy in order to exercise their right to keep and bear arms, Plaintiffs' third claim is entirely "coextensive" with their first and thus fails to state a distinct cause of action. (See Demurrer, at p. 24, citing, e.g., *Midway Venture LLC v. Cty. of San Diego* (2021) 60 Cal.App.5th 58, 91, fn. 9.) The third claim therefore fails along with

the first for the same reasons: because Plaintiffs do not have a reasonable expectation of privacy, because there is no serious invasion of privacy here, and because any invasion of privacy is justified by California's interest in reducing firearms violence. (See Demurrer at pp. 15-21.) Given that the Second Amendment does not factor into Plaintiffs' first cause of action, neither does *Bruen*.

Plaintiffs' third cause of action also fails because AB 173 does not burden anyone's Second Amendment rights. (See Demurrer, at p. 24.) The Supreme Court's decision in *Bruen*, with its special emphasis on the *plain text* of the Second Amendment, only supports Defendant's position. As noted above, under the new approach, courts must first assess whether the "Second Amendment's plain text covers" the regulated conduct (*Bruen*, *supra*, 142 S. Ct. at p. 2126)—in other words, whether the regulation at issue prevents any "people" from "keep[ing]" or "bear[ing]" "Arms." (U.S. Const. amend. II.) Although *Bruen* does not indicate who bears the burden of demonstrating that a law implicates conduct protected by the Second Amendment text—it only specifies that the government has the burden to justify a regulation that *does* implicate the Second Amendment—caselaw from similar contexts clearly suggests it belongs to Plaintiffs. (See, e.g., *Kennedy v. Bremerton School Dist.* (June 27, 2022, No. 21-418) slip opn. 11 ["Under this Court's precedents, a plaintiff bears certain burdens to demonstrate an infringement of his rights under the Free Exercise and Free Speech Clause."].) Plaintiffs cannot possibly show that AB 173—which concerns data provided to firearms violence researchers under strict confidentiality protocols—does anything to prevent anyone from keeping or bearing arms of any sort. (Cf. *Bauer v. Becerra* (9th Cir. 2017) 858 F.3d 1216, 1222 [a $19 fee on firearms transfers does not "ha[ve] any impact on the plaintiffs' actual ability to obtain and possess a firearm"].) And as noted in the Demurrer, AB 173 imposes, at most, "a de minimis burden" on the right to keep and bear arms. (Demurrer, at p. 24 [quoting *Heller v. District of Columbia* (D.C. Cir. 2011) 670 F.3d 1244, 1254-1255].) Indeed, AB 173 imposes *no* burden on the right to keep and bear arms. Stated differently, with the benefit of *Bruen*, the Second Amendment's plain text does not "cover[]" (*Bruen*, *supra*, 142 S. Ct. at p. 2126) the collection or sharing of information permitted

by AB 173. Accordingly, under *Bruen*, the third claim in the First Amended Complaint fails to state a cause of action.[2]

Even if the Court disagrees with both of the above arguments, by concluding that Plaintiffs' third claim is distinct from their first and that the text of the Second Amendment covers the sharing of information with researchers, California can still defend its law by showing that AB 173 is "consistent with the Nation's historical tradition of firearm regulation," by showing that the law imposes a "comparable burden on the right of armed self-defense" to the relevant historical analogues and is "comparably justified." (*Bruen*, *supra*, 142 S. Ct. at p. 2133.) That analysis would require further research and briefing.

II. *BRUEN*'S LACK OF RELEVANCE TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

In Plaintiffs' Motion for a Preliminary Injunction, Plaintiffs argue that injunctive relief is appropriate because they are likely to prevail on their constitutional privacy claim and because an injunction is necessary to avoid supposed harms associated with the disclosure of personal information. Plaintiffs do not argue that they are likely to prevail on any claim under the Second Amendment and do not attempt to argue that an injunction is necessary to allow them to continue to keep and bear arms. Accordingly, *Bruen* has no apparent relevance to their motion.

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[2] There is one argument in the Demurrer that Defendant only presents in the alternative that is no longer apt in light of *Bruen*: Defendant had argued in the Demurrer, at page 25, that "[e]ven assuming that AB 173 places more than a de minimis burden on Second Amendment rights, the highest level of scrutiny that could apply is intermediate scrutiny," which AB 173 would easily satisfy.

CONCLUSION

This Court should sustain Defendant's Demurrer and deny Plaintiffs' Motion for a Preliminary Injunction.

Dated: July 18, 2022

Respectfully submitted,

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DECLARATION OF SERVICE BY E-MAIL and U.S. Mail

Case Name: **Brandeis, Doe, et al. v. Rob Bonta**
No.: **37-2022-00003676**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On July 18, 2022, I served the attached **MEMORANDUM OF POINTS AND AUTHORITIES REGARDING SUPPLEMENTAL AUTHORITY** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on July 18, 2022, at Sacramento, California.

Ritta Mashriqi	***/s/Ritta Mashriqi***
Declarant	Signature

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