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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

ASHLEYMARIE BARBA; FIREARMS POLICY COALITION, INC.; SECOND AMENDMENT FOUNDATION; CALIFORNIA GUN RIGHTS FOUNDATION; SAN DIEGO COUNTY GUN OWNERS PAC; ORANGE COUNTY GUN OWNERS PAC; and INLAND EMPIRE GUN OWNERS PAC,

Plaintiffs,

v.

ROB BONTA, in his official capacity as Attorney General of California,

Defendant.

Case No.: 37-2022-00003676-CU-CR-CTL

SUPPLEMENTAL BRIEF RE: *NEW YORK STATE RIFLE & PISTOL ASS'N. V. BRUEN*

Hearing: July 29, 2022
Time: 1:30 p.m.
Judge: Hon. Katherine A. Bacal
Department: C-69

Pursuant to the parties' July 6, 2022 stipulation, Plaintiffs submit the following supplemental brief addressing the significance of *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), and its relevance to the demurrer and preliminary injunction now pending before the Court.

A. *Bruen* Reaffirmed The Historical Test For Considering Second Amendment Claims.

The United States Supreme Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), reaffirmed the test set out in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U.S. 742 (2010), and and expressly rejected interest-balancing in evaluating Second Amendment claims. Under *Bruen*, the government bears the burden of "affirmatively prov[ing] that its firearm regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." 142 S. Ct. at 2127; *id*. at 2129–30 (reiterating that government must "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation"). The Court summarized its core holding as follows:

> [W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, 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."

Id. at 2126 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)); *see id.* at 2129–30 (restating the same standard). This test "requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *Id.* at 2131. When it comes to evaluating such regulations, "this historical inquiry that courts must conduct will often involve reasoning by analogy." *Id.* at 2132. And when engaging in analogical reasoning, courts are directed to consider "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in an analogical inquiry." *Id.* at 2133 (citing

Heller and *McDonald*). As set forth further below, DOJ has made no effort to meet its burden, so its demurrer to Plaintiffs' Second Amendment claim cannot be sustained.

B. Plaintiffs' Course Of Conduct – Engaging In Firearm And Ammunition Transactions – Is Presumptively Protected By The Second Amendment.

At the outset, *Bruen* directs courts to decide whether an individual's "conduct" falls within the scope of the Second Amendment. 142 S. Ct. at 2127, 2129–30; *see also id.* at 2134 & 2135 (looking to whether petitioners' "proposed course of conduct" is protected by the plain text of the Second Amendment). Plaintiffs' conduct here – engaging in firearm and ammunition transactions so that they can possess firearms – is obviously within the Second Amendment's scope. This fact is confirmed by pre-*Bruen* courts routinely holding that the acquisition of firearms and ammunition in constitutionally protected. In order to secure "the core right to possess a firearm for self-defense," the Second Amendment's protections extend to "necessary," "ancillary rights," including the right to acquire firearms. *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 677–78 (9th Cir. 2017). After all, "the core Second Amendment right to keep and bear arms for self-defense 'wouldn't mean much' without the ability to acquire arms." *Id.* at 677 (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011)); *see also Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 704 (9th Cir. 2014) ("'the right to possess firearms for protection implies a corresponding right' to obtain the bullets necessary to use them") (citation omitted).

DOJ is simply wrong to say that "AB 173 does not burden anyone's Second Amendment rights." DOJ Suppl. Br. at 4:6–7. AB 173's information-sharing requirements impose a direct condition on Plaintiffs' exercise of the Second-Amendment-protected right to acquire arms and ammunition: Every Californian who wishes to engage in a firearm or ammunition transaction is subject to AB 173. If you don't want your PII shared with researchers, you can't have a gun or ammunition. And for existing gun owners who bought their firearms years ago and provided their PII to DOJ at the time, AB 173 means that their PII is shared with private researchers, despite never being told that would happen when the PII was collected, and never being given an opportunity to opt out. In short, any Californian who ever exercises the Second Amendment right to keep and bear arms is subject to AB 173's information-sharing regime.

This case is thus distinguishable from *Bauer v. Becerra*, 858 F.3d 1216, 1222 (9th Cir. 2017), where the Ninth Circuit held that a $19 DROS processing fee did not "even meaningfully impact the core of the Second Amendment right." *See* DOJ Suppl. Br. at 4:21–22. By contrast, AB 173 forces citizens to sacrifice one constitutional right (privacy) in order to exercise another (the right to keep and bear arms). For this same reason, DOJ's reliance on the D.C. Circuit's opinion in *Heller II* is misplaced. DOJ Suppl. Br. at 4:24–25 (citing *Heller v. District of Columbia*, 670 F.3d 1244, 1254–55 (D.C. Cir. 2011)). There, the Court held that a basic handgun registration requirement imposed a "de minimis" burden on the Second Amendment right and was sufficiently "longstanding" to surive constitutional scrutiny.[1] *Id.* Conspicuously absent from the registration requirement in *Heller II* was AB 1793's radically unusual step of *sharing information provided during the registration with third-party researchers*.

The constitutional magnitude of the regulation here further demonstrates that the burden on Second Amendment-protected conduct is substantial, and DOJ cannot simply dismiss it by saying otherwise – especially at the demurrer stage. Even if Plaintiffs do not ultimately prevail on their constitutional privacy claim, however, that would not mean that their Second Amendment claim would fail. The claims are not "coextensive," as DOJ argues. DOJ Suppl. Br. at 3:24–4:3. As the demurrer briefing reveals, even "serious" privacy violations are subject to judicial balancing over the government's policy arguments in favor of the violation. *Pioneer Elecs. (USA), Inc. v. Super. Ct.*, 40 Cal.4th 360, 371 (2007) ("Assuming that a claimant has met the . . . *Hill* criteria for invasion of a privacy interest, that interest must be measured against other competing or countervailing interests in a 'balancing test.'"). If the Court concludes that the serious privacy violation here doesn't outweigh the government's policy interests for purposes of deciding the privacy claim, *Bruen* confirms that those same present-day policy justifications for the burden on

[1] The D.C. Circuit's conclusion in this regard cannot withstand scrutiny under *Bruen*'s test since it was based on a review of firearm registration requirements dating back only to the early 1900s. *Heller II*, 670 F.3d at 1254–55. *Bruen* emphasized that Second Amendment analysis should focus on 1791 (when the Second Amendment was adopted) and perhaps 1868 (when the Fourteenth Amendment was adopted), although the Court did not resolve the issue whether the analysis should focus exclusively on 1791 or also extend to 1868. 142 S. Ct. at 2136; *see generally id.* at 2134–56. And the Court expressed skepticism about the potential relevance of late-19th and early-20th century evidence. *Id.* at 2154 & n.28.

firearm possession have nothing to do with a Second Amendment claim. The Supreme Court hammered this point home in rejecting the prevailing two-step means-end balancing test that prevailed before *Bruen*:

> [C]ourts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of "intermediate scrutiny" often defer to the determinations of legislatures. But while that judicial deference to legislative interest balancing is understandable – and, elsewhere, appropriate – it is not deference that the Constitution demands here. The Second Amendment "is the very *product* of an interest balancing by the people" and it "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms" for self-defense. *Heller*, 554 U.S. at 635. It is this balance – struck by the traditions of the American people – that demands our unqualified deference.

142 S. Ct. at 2131 (emphasis in *Heller*).

Rather, *Bruen* confirms that in order for a regulation to escape the "Second Amendment's 'unqualified command'" the State "must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." 142 S. Ct. at 2126. In sum, DOJ cannot possibly defeat Plaintiffs' Second Amendment claim (on demurrer or otherwise) by demonstrating that AB 173 does not also violate the right to privacy (though of course it does); the State must affirmatively prove that this information-sharing regime is justified by a historical tradition.

C. Plaintiffs Have Adequately Pleaded A Second Amendment Claim.

Plaintiffs have adequately alleged a Second Amendment claim. Given *Bruen*'s clarification of the governing legal standard, the demurrer must be overruled, since the government bears the burden of "affirmatively prov[ing] that its firearm regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms," 142 S. Ct. at 2127, but no such showing has been attempted here. DOJ's demurrer, filed months before *Bruen*, made no such attempt. Nor does DOJ's supplemental brief try to make any such showing – because no such showing can possibly be made. AB 173 has no historical analogue, so DOJ cannot meet its affirmative burden.

Given that AB 173 plainly regulates activity at the core of the Second Amendment (purchasing and possessing firearms) and given DOJ's total failure to engage in the historical inquiry *Bruen* requires, the Court cannot conclude that Plaintiffs have failed to state a Second Amendment claim.

D. *Bruen* Does Not Impact The Court's Analysis of The Preliminary Injunction Motion.

Plaintiffs agree that *Bruen* does not impact the Court's analysis of their pending motion for preliminary injunction, which seeks relief only based on the right to privacy secured by Article I, § 1 of the California Constitution.

Dated: July 22, 2022

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By _____
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