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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

10
11 JONATHAN BIRDT,) CASE NO. 2:10-CV-08377-RGK (JEM)
12)
13 Plaintiff,) **PLAINTIFF’S REPLY BRIEF IN**
14 vs.) **SUPPORT OF MOTION FOR**
15) **SUMMARY JUDGMENT;**
16 CHARLIE BECK, LEE BACA, THE) **DECLARATIONS OF LAWRENCE**
17 LOS ANGELES POLICE) **MUDGETT AND JONATHAN W.**
18 DEPARTMENT and THE LOS) **BIRDT IN SUPPORT THEREOF**
19 ANGELES COUNTY SHERIFFS)
20 DEPARTMENT, DOES 1 to 50,) Date: May 16, 2011
21) Time: 9:00 a.m.
22) Department: 850
23) Before: Hon. R. Gary Klausner
24) Location: Roybal Courthouse,
25) 255 East Temple Street
26) Los Angeles, CA 90012
27)
28)

23 **I. INTRODUCTION**

24 Defendants carry the burden of establishing the nexus between their need and
25 their infringement upon a Fundamental Right. Under *Cantwell v. Connecticut* (1940)
26 310 U.S. 296, and progeny, States and localities may not condition a license that is
27 necessary to engage in constitutionally protected conduct on the grant of a license
28 that officials have *discretion to withhold*. Further, a host of prior restraint cases

1 establish that “the peaceful enjoyment of freedoms *which the Constitution*
2 *guarantees*” may not be made “contingent upon the uncontrolled will of an official.”
3 *Staub v. Baxley* (1958) 355 U.S. 313, 322 (emphasis added).

4
5 **II. CONCEALED CARRY IS THE ONLY METHOD OF CARRY**
6 **PERMITTED BY CALIFORNIA LAW AND DOES NOT POSE ANY**
7 **RISK TO PUBLIC SAFETY**

8 The need to carry concealed is due only to the decision of the California
9 legislature to make that the only method of permissible carry. The legislature has
10 otherwise banned the possession of a loaded firearm by law abiding citizens. Even
11 further, the legislature has banned even the possession of an unloaded weapon within
12 1,000 feet of a school, which in Southern California would make travel nearly
13 impossible task. As such, being left with the only legally viable option of concealed
14 carry, defendants cannot premise the exercise of this Right upon first being the victim
15 of a crime.

16 Plaintiff will not now repeat all of the evidence and law offered in opposition
17 to defendants Motions for Summary Judgment set to be heard concurrently herewith,
18 but does incorporate those documents herein by reference; however, it is important to
19 note that there is no dispute that some regulation is permitted, but the right to carry
20 cannot be completely forbidden with no rational basis:

21 Although we do not undertake an exhaustive historical analysis today of the
22 full scope of the Second Amendment, nothing in our opinion should be taken to
23 cast doubt on longstanding prohibitions on the possession of firearms by felons
24 and the mentally ill, or laws forbidding the carrying of firearms in sensitive
25 places such as schools and government buildings, or laws imposing conditions
and qualifications on the commercial sale of arms.

26 *Heller*, 554 U.S. at 626-27. Certainly, the basic contours of these restrictions reflect
27 an understanding that permissible regulations will not simply preclude objectively
28

1 qualified private citizens from possessing and carrying guns. The Court explained it
2 supplied its “presumptively lawful” restrictions “as examples.” Id. 627 n.26.

3
4 **III. DEFENDANTS HAVE NOT MET THEIR BURDEN WITH ANY**
5 **EVIDENCE**

6 Defendants admit they have no evidence to support their theories and instead
7 offer the ramblings of Mr. Franklin Zimring. Should the Court not simply exclude
8 the Zimring Declaration based on the objections filed, Plaintiff offers in rebuttal the
9 declaration of Lawrence Mudgett, an expert qualified to opine about issues of
10 concealed weapons, public safety and risks of concealed carry.

11 That defendant bears the burden under any level of scrutiny is clear:

12 Thus, a two-part approach to Second Amendment claims seems appropriate
13 under *Heller*, as explained by the Third Circuit Court of Appeals, see
14 *Marzzarella*, 614 F.3d at 89, and Judge Sykes in the now-vacated *Skoien*
15 panel opinion, see 587 F.3d at 808-09. The first question is “whether the
16 challenged law imposes a burden on conduct falling within the scope of the
17 Second Amendment's guarantee.” Id. This historical inquiry seeks to
18 determine whether the conduct at issue was understood to be within the
19 scope of the right at the time of ratification. See *Heller*, 128 S.Ct. at 2816. If
20 it was not, then the challenged law is valid. See *Marzzarella*, 614 F.3d at
21 89. If the challenged regulation burdens conduct that was within the scope
22 of the Second Amendment as historically understood, then we move to the
23 second step of applying an appropriate form of means-end scrutiny. See id.
24 *Heller* left open the issue of the standard of review, rejecting only rational-
25 basis review. Accordingly, unless the conduct at issue is not protected by
26 the Second Amendment at all, the Government bears the burden of
27 justifying the constitutional validity of the law.

28 *United States v. Chester* (2010) 628 F.3d 673

26 Plaintiff is submitting the declaration of Officer Lawrence Mudgett. This is a
27 detailed declaration indicating he has reviewed available reports and statistics which
28 confirm that with the rise in CCW issuance, there has been a drop in overall crime.
The declaration also states that it is the generally held opinion outside of California

1 that issuing CCW's has not created the circumstances defendants contend they seek
2 to protect against:

3 • **The Lott-Mustard Report**

4 John Lott and David Mustard, in connection with the University of Chicago
5 Law School, examining crime statistics from 1977 to 1992 for all U.S.
6 counties, concluded that the thirty-one states allowing their residents to carry
7 concealed, had significant reductions in violent crime. Lott writes, "Our most
8 conservative estimates show that by adopting shall-issue laws, states reduced
9 murders by 8.5%, rapes by 5%, aggravated assaults by 7% and robbery by 3%.
10 If those states that did not permit concealed handguns in 1992 had permitted
11 them back then, citizens might have been spared approximately 1,570 murders,
12 4,177 rapes, 60,000 aggravated assaults and 12,000 robberies. To put it even
13 more simply criminals, we found, respond rationally to deterrence threats...
14 While support for strict gun-control laws usually has been strongest in large
15 cities, where crime rates are highest, that's precisely where right-to-carry laws
16 have produced the largest drops in violent crimes."

17 (Source: ["More Guns, Less Violent Crime"](#), Professor John R. Lott, Jr., *The*
18 *Wall Street Journal*, August 28, 1996, (The Rule of Law column).

- 19
- 20 • "Crimes are stopped with guns about five times as frequently as crimes are
21 committed with guns." John Lott "Gun Laws Can Be Dangerous, Too" *Wall*
22 *Street Journal*, May 12, 1999 <http://www.tsra.com/Lott22.htm>
- 23 • "In Florida, where 315,000 permits have been issued, there are only five known
24 instances of violent gun crime by a person with a permit. This makes a permit-
25 holding Floridian the cream of the crop of law-abiding citizens, 840 times less
26 likely to commit a violent firearm crime than a randomly selected Floridian
27 without a permit." (David Kopel – "More Permits Mean Less Crime..." *Los*
28

1 Angeles Times, Feb. 19, 1996, Monday, p. B-5
2 http://www.i2i.org/SuptDocs/Crime/More_Permits_Means_Less_Crime.htm)

- 3
4 • “Dade County, Florida, kept meticulous records for six years, and of 21,000
5 permit holders, there was no known incident of a permit holder injuring an
6 innocent person. In addition, since Virginia passed a right-to-carry law more
7 than 50,000 permits have been issued, but not one permit holder has been
8 convicted of a crime and violent crime has dropped.” H. Sterling Burnett, No
9 Smoking Guns <http://www.ncpa.org/oped/sterling/mar899.html>

10 Plaintiff also offers his own declaration in response to that of Professor
11 Zimring, offering peer reviewed and authoritative support instead of unfounded
12 political opinions, reflecting:

- 13 a. Analyzing county-level data for the entire United States from 1977 to
14 2000, we find annual reductions in murder rates between 1.5% and 2.3%
15 for each additional year that a right-to-carry law is in effect.
16
17 b. For the first five years that such a law is in effect, the total benefit from
18 reduced crimes usually ranges between approximately \$2 billion and \$3
19 billion per year.
20
21 c. Robbery rates in right-to carry states were rising until the laws were
22 passed and then fell continually after that point. The pattern is very
23 similar to that shown earlier by Lott in examining county-level data from
24 1977 to 1996.
25
26 d. By the time the law has been in effect for six years, the county and state-
27 level data imply a drop in robbery rates of eight and twelve percent
28 respectively.

1 e. By the time the law has been in effect for six years, Ayres and Donohues
2 very own county and state estimates imply that murder rates had fallen
3 by at least ten percent.

4 f. On the risks to police, David Mustard finds that police officers are
5 murdered at a lower rate after concealed handgun laws are passed, and
6 that the longer the laws are in effect, the greater the decline.
7

8 "Confirming More Guns, Less Crime", Stanford Law Review, Florenz Plassmann
9 and John Whitley, 2003, p. 1361.

10 As such, whatever the motivation or animus behind defendants actions, they
11 have not offered a scintilla of evidence to carry their burden, for the sole reason that
12 none exists. One must ask, if not for political reasons, why would the LA politic
13 oppose something shown to save officers lives?
14

15 **IV. THE SECOND AMENDMENT DOES NOT SAY "IN THE HOME"**

16 Defendants would have the Court believe that because the declaration of a
17 fundamental right declared applicable to the States occurred in a case involving the
18 home, that it is somehow limited to the home. This is almost as preposterous as
19 limiting the shouting of the word "fire" just to crowded theaters. Few would dispute
20 that a (substantially Jewish) community would have compelling public safety reasons
21 for stopping a neo-Nazi group from parading, displaying swastikas, and distributing
22 literature, but these safety reasons were insufficient to override the enumerated rights
23 of speech and assembly. See *Skokie v. Nat'l Socialist Party* (1978) 373 N.E.2d 21.

24 As previously noted, the Court expressly ruled that the Second Amendment
25 protects the right "to possess and carry weapons in case of confrontation." *Heller*,
26 554 U.S. at 592. If the Supreme Court had intended to limit its broad holding to the
27 home, then it would have been pointless for the Court to identify laws prohibiting
28 guns from specified, sensitive public places as an "example" of a "presumptively
lawful" restriction. The Court could have stated simply that "laws forbidding the

1 carrying of firearms in public” were “presumptively valid.” (For that matter, it could
2 have said, “we limit our holding to the home.”)

3 In *Heller*, the Supreme Court held the Second Amendment protects an
4 individual right “to possess **and carry** weapons in case of confrontation,”
5 unconnected with service in a militia.... the court held the Second Amendment
6 right recognized in *Heller* is “fully applicable to the States.”...A plurality of
7 the *McDonald* court concluded the Second Amendment right applies to the
8 states because it is “fundamental” to the American “scheme of ordered liberty”
9 *People v. Delacy* (2011) 192 Cal.App.4th 1481. (emphasis added)

10 The United States Supreme Court has clearly stated, with regard to the Second
11 Amendment, that: “Putting all of these textual elements together, we find that they
12 guarantee the individual right to possess **and carry weapons in case of**
13 **confrontation.**” *District of Columbia v. Heller* (2008) 128 S. Ct. 2783, 2798.
14 (emphasis added) The state may have an interest in reducing gun violence and
15 accidents, but it cannot presume that the exercise of a constitutional right will cause
16 the sort of harm it is allowed to curtail. Defendants cannot point to the impact of their
17 practice – the deprivation of constitutional rights – as their interest. *Simon &*
18 *Schuster, Inc. v. N.Y. State Crime Victims Bd.* (1991) 502 U.S. 105, 120. If anything,
19 logically, requiring additional training will reduce gun violence and accidents
20 involving firearms.

21 Q. Okay. Can you point to any study or correlation between increased
22 issuance of CCW permit and gun violence?

23 A No.

24 Waldie deposition at page 25 line 4-12.

25 To “bear arms,” as used in the Second Amendment, is to “wear, bear, or carry .
26 . . upon the person or in the clothing or in a pocket, for the purpose . . . of being
27 armed and ready for offensive or defensive action in a case of conflict with another
28 person.” *District of Columbia v. Heller* (2008) 128 S. Ct. 2783, 2793 . “[T]he core

1 right identified in *Heller* [is] the right of a *law-abiding, responsible* citizen to possess
2 *and carry* a weapon for self-defense.” *United States v. Chester* (2010) 628 F.3d 673.

3 “But uncontrolled official suppression of the privilege cannot be made a
4 substitute for the duty to maintain order in connection with the exercise of the right.”
5 *Hague v. Committee for Indus. Org.* (1937) 307 U.S. 496, 516. Accordingly, the
6 Ninth Circuit rejects alleged public health and safety concerns as a substitute for
7 objective standards and due process. *Desert Outdoor Advertising v. City of Moreno*
8 *Valley* (1996) 103 F.3d 814, 819.

9 **V. CONCLUSION**

10 While commonly used in the singular, the Second Amendment contains several
11 fundamental rights, including: the right to keep arms, the right to bear arms, the right
12 to carry arms, and the Right of self-defense. The Second Amendment was
13 incorporated against the states only months ago. The volume of on-point, post-Heller
14 decisions owes to the emergent nature of Second Amendment jurisprudence and the
15 basic fact that – unlike Los Angeles – the vast majority of States and California
16 Counties already allow their citizens to carry handguns on reasonable and non-
17 discretionary terms.

18 Defendants have admitted that Plaintiff has satisfied all training and
19 background requirements. It is also clear the Second Amendment protects the right to
20 bear arms for the purpose of self-defense. As such it is respectfully submitted that
21 this Court declare Defendants Policies unlawful and order Defendants to adopt a good
22 cause policy consistent with the constitution by accepting, self-defense, and other
23 articulable need as good cause for the purposes of enforcing the current statutory
24 scheme for the regulation of firearms in Los Angeles.

25 April 27, 2011

26 _____/s/_____
Jonathan W. Birdt, Plaintiff