Cody Jay Brownstein
Email: me@brownstein.co
1117 City Lights Dr
Aliso Viejo CA 92656
Phone: 310-874-8743

Plaintiff, pro se

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CODY JAY BROWNSTEIN, Plaintiff, vs. ORANGE COUNTY SHERIFF'S DEPARTMENT *et al.*, Defendants.	Case No. 8:24-cv-00970-SSS-AS MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION Hearing date and time: January 7, 2025 10:00 AM Judge: Hon. Alka Sagar

Introduction

Plaintiff's constitutional rights guaranteed under the Second and Fourteenth Amendments continue to be violated by Defendants by their refusal to issue him a CCW license, that is, a license to carry a concealed handgun outside of his home for the purpose of self-defense. Their refusal is based on California Penal Code section 26202 (referred to below as "Penal Code § 26202"), which disqualifies an individual from being issued a CCW license if they had a restraining order issued against them in the 5 years preceding their application for a CCW license, regardless of whether or not they had notice and an opportunity to be heard before the issuance of the restraining

order, and regardless of whether or not the restraining order expired. There's no "historical tradition" of disqualifying an individual from carrying a handgun outside of their home on this basis or on any "well-established and representative historical analogue."

In the absence of a preliminary injunction, Plaintiff will continue to suffer irreparable harm in the form of Defendants' violation of his constitutional right to carry a handgun outside of his home, a right which concerns the public interest.

In light of the above, the Court should issue a preliminary injunction prohibiting Defendants from enforcing Penal Code § 26202 against Plaintiff. In other words, the Court should prohibit Defendants from denying Plaintiff a CCW license based on an expired temporary restraining order, discussed below, that was issued without notice and without an opportunity for Plaintiff to be heard.

Since Plaintiff's application for a CCW license was denied solely because of an expired temporary restraining order, and since he's satisfied all requirements for issuance of a CCW license, *see* Cal. Pen. C §§ 26150(a), 26185, the Court should further order Defendants to issue him the CCW license he applied for.

Relevant Facts

The facts relevant to Plaintiff's motion for a preliminary injunction are simple and largely undisputed: Plaintiff applied to the Orange County Sheriff's Department for a CCW license. (Brownstein Decl. ¶ 2; OCSD Answer ¶ 3.) The Orange County Sheriff's Department denied Plaintiff's application on the sole basis that a temporary restraining order was issued against him. (Brownstein Decl. ¶ 3; OCSD Answer ¶ 20.) The temporary restraining order was issued based on an ex parte application of which Plaintiff was given no

notice and had no opportunity to be heard. (Brownstein Decl. ¶ 4.) The temporary restraining order expired and after a hearing, the court found that "there is insufficient evidence to substantiate by a preponderance of the evidence that domestic violence has occurred," and no further restraining order was issued. (Brownstein Decl. ¶ 5.)

Since applying to the Orange County Sheriff's Department for a CCW license, Plaintiff satisfied all requirements for issuance of a CCW license, including completing the prescribed 16-hour course of training and submitting his fingerprint images, via Live Scan. (Brownstein Decl. ¶ 6. *See also* Bonta Answer ¶ 5 ("The Attorney General admits that Plaintiff submitted his fingerprints to the Department of Justice via Live Scan on February 5, 2024.")).

Argument

The facts of this case satisfy the requirements for the issuance of a preliminary injunction.

The guiding principles for deciding Plaintiff's motion for a preliminary injunction are set forth well in *Baird v. Bonta* (*Baird*), 81 F.4th 1036 (2023). In *Baird*, the plaintiff-appellants applied for and were denied licenses permitting them to openly carry handguns. They filed suit in the district court and unsuccessfully moved for a preliminary injunction. The Ninth Circuit reversed the denial of a preliminary injunction, holding that the district court abused its discretion by declining to assess plaintiff-appellants' likelihood of success on the merits of their Second Amendment claim. *Baird*, 81 F.4th at 1048.

The appropriate legal standard to analyze a preliminary injunction motion requires a district court to determine whether

a movant has established that (1) he is likely to succeed on the merits of his claim, (2) he is likely to suffer irreparable harm absent the preliminary injunction, (3) the balance of equities tips in his favor, and (4) a preliminary injunction is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008); *accord Chamber of Com. of the U.S. v. Bonta*, 62 F.4th 473, 481 (9th Cir. 2023). As a general matter, district courts "*must* consider" all four *Winter* factors. *Vivid Ent., LLC v. Fielding*, 774 F.3d 566, 577 (9th Cir. 2014) (emphasis added). The first factor "is a threshold inquiry and is the most important factor." *Env't Prot. Info. Ctr. v. Carlson*, 968 F.3d 985, 989 (9th Cir. 2020). Thus, a "court need not consider the other factors" if a movant fails to show a likelihood of success on the merits. *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017). When, like here, the nonmovant is the government, the last two *Winter* factors "merge." *Nken v. Holder*, 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009); *Roman v. Wolf*, 977 F.3d 935, 940-41 (9th Cir. 2020) (per curiam).

It is well-established that the first factor is especially important when a plaintiff alleges a constitutional violation and injury. If a plaintiff in such a case shows he is likely to prevail on the merits, that showing usually demonstrates he is suffering irreparable harm no matter how brief the violation. *See Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 911 (9th Cir. 2014), *abrogated on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 142 S. Ct. 2228, 213 L.Ed.2d 545

> (2022). And his likelihood of succeeding on the merits also tips the public interest sharply in his favor because it is "always in the public interest to prevent the violation of a party's constitutional rights." *Riley's Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 731 (9th Cir. 2022) (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)).
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> [¶]
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> If a movant makes a sufficient demonstration on all four *Winter* factors (three when as here the third and fourth factors are merged), a court "must not shrink from [its] obligation to enforce [his] constitutional rights," regardless of the constitutional right at issue. *Porretti v. Dzurenda*, 11 F.4th 1037, 1047 (9th Cir. 2021) (quoting *Brown v. Plata*, 563 U.S. 493, 511, 131 S.Ct. 1910, 179 L.Ed.2d 969 (2011)). It may not deny a preliminary injunction motion and thereby "allow constitutional violations to continue simply because a remedy would involve intrusion into" an agency's administration of state law. *Id.* (quoting *Brown*, 563 U.S. at 511, 131 S.Ct. 1910).

Baird, 81 F.4th at 1040-41.

Satisfaction of each of the *Winter* factors is shown below.

Plaintiff is likely to succeed on the merits of his claim because there's no historical tradition of barring an individual from carrying a handgun outside of their home based on an expired restraining order that was issued without notice and where there was no opportunity to be heard.

> [...] The first *Winter* factor, likelihood of success, "is a threshold inquiry and is the most important factor" in any motion for a preliminary injunction. *Env't Prot. Info. Ctr.*, 968 F.3d at 989. That holds especially true for cases where a plaintiff seeks a preliminary injunction because of an alleged constitutional violation. If a plaintiff bringing such a claim shows he is likely to prevail on the merits, that showing will almost always demonstrate he is suffering irreparable harm as well. *See Humble*, 753 F.3d at 911; *Melendres*, 695 F.3d at 1002 ("[T]he deprivation of constitutional rights `unquestionably constitutes irreparable injury.'" (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality opinion))); *Hernandez v. Sessions*, 872 F.3d 976, 995 (9th Cir. 2017) (holding that a finding of irreparable harm "follows inexorably" from a "conclusion that the government's current policies are likely unconstitutional"). Accordingly, "[w]hen an alleged deprivation of a constitutional right is involved, ... most courts hold that no further showing of irreparable injury is necessary." 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948.1 (3d ed. 1998).

Baird, 81 F.4th at 1042.

> The Second Amendment guarantees the right to keep and bear arms, *see District of Columbia v. Heller*, 554 U.S. 570, 592, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), including "an individual's right to carry a handgun for self-defense outside the home,"

Bruen, 142 S. Ct. at 2122. The Due Process Clause of the Fourteenth Amendment incorporated the Second Amendment against the states. *See McDonald*, 561 U.S. at 791, 130 S.Ct. 3020. Following *Heller* and *McDonald*, we applied "a two-step inquiry in deciding Second Amendment cases." *Silvester v. Harris*, 843 F.3d 816, 820-21 (9th Cir. 2016). First, we looked to history to determine "whether the challenged law burden[ed] conduct protected by the Second Amendment," and, if so, we then applied "the appropriate level of scrutiny," *id.* at 821, depending on "the extent to which the law burden[ed] the core of the Second Amendment right" of self-defense and the severity of that burden, *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 960-61 (9th Cir. 2014).

In *Bruen*, the Supreme Court expressly rejected the use of such "means-end scrutiny in the Second Amendment context" and described the two-step approach as "one step too many." 142 S. Ct. at 2127. Following *Bruen*, "text and history, not a means-end analysis, now define the controlling Second Amendment inquiry." *Atkinson v. Garland*, 70 F.4th 1018, 1020 (7th Cir. 2023); *see Bruen*, 142 S. Ct. at 2131 (stating that, although "judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate —it is not deference that the Constitution demands" under the Second Amendment).

Thus, if the Second Amendment's plain text covers the regulated conduct, the regulation will stand only if the government can "affirmatively prove that its firearms regulation is part of the

> historical tradition that delimits the outer bounds of the right to keep and bear arms" in the United States. *Bruen*, 142 S. Ct. at 2127. While the government need not identify a "dead ringer" for its modern regulation, it must locate a "well-established and representative historical analogue" that was in effect when the Second or Fourteenth Amendment was ratified. *Id.* at 2132-33. To qualify, the analogue must be close: the historical regulation must have been "relevantly similar" to the challenged regulation in "how and why" it "burden[ed] a law-abiding citizen's right to armed self-defense." *Id.* As the Supreme Court has cautioned, upholding a modern regulation that only "remotely resembles a historical analogue" would entail "endorsing outliers that our ancestors would never have accepted" and thus be inconsistent with the historical inquiry required by *Bruen*. *Id.* at 2133 (quoting *Drummond v. Robinson Twp.*, 9 F.4th 217, 226 (3d Cir. 2021)).

Baird, 81 F.4th at 1043.

> [...] *Bruen* clarified the appropriate legal framework to apply when a plaintiff challenges a statute under the Second Amendment. *Bruen* expressly rejected the use of "means-end scrutiny," 142 S. Ct. at 2127, and any "interest-balancing inquiry," *id.* at 2129 (quoting *Heller*, 554 U.S. at 634, 128 S.Ct. 2783), when assessing a plaintiff's likelihood of success on the merits of a Second Amendment challenge. Thus, *Bruen* obviously affects the first *Winter* factor—the likelihood of success on the merits inquiry in a motion for a preliminary injunction. *See*

> *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006) (holding that the "burdens at the preliminary injunction stage track the burdens at trial"); *see also Ashcroft v. ACLU*, 542 U.S. 656, 666, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004). And under *Winter*'s well-settled standards—which apply to Second Amendment claims like any other constitutional claim—courts consider all of the *Winter* factors and assess irreparable harm and the public interest through the prism of whether or not the plaintiff has shown a likelihood of success on the merits.

Baird, 81 F.4th at 1043-44.

Under Penal Code § 26202, an individual is disqualified from being issued a CCW license if a restraining order was issued against them in the 5 years preceding their application for a CCW license. By Penal Code § 26202's express terms, it encompasses expired restraining orders. Further, Penal Code § 26202 doesn't distinguish between a temporary restraining order obtained without notice and without a hearing, and a permanent restraining order issued after a hearing.

The unconstitutionality of Penal Code § 26202 is highlighted when it's compared with 18 U.S.C. § 922(g)(8), which prohibits an individual from possessing a firearm while subject to a restraining order. While Penal Code § 26202 encompasses both temporary restraining orders applied for without notice and without a hearing, and permanent restraining orders issued after a hearing, 18 U.S.C. § 922(g)(8) encompasses only those restraining orders where, "[...] the defendant [...] received actual notice and an opportunity to be heard

before the order was entered. § 922(g)(8)(A)." *United States v. Rahimi* (*Rahimi*), 144 S. Ct. 1889, 1895-96 (2024). Moreover, while Penal Code § 26202 expressly encompasses expired restraining orders, 18 U.S.C. § 922(g)(8) applies only while a restraining order is in effect. "Section 922(g)(8) only prohibits firearm possession so long as the defendant 'is' subject to a restraining order. § 922(g)(8)." *Rahimi*, 144 S. Ct. at 1902.

In the present case, Defendants are infringing on Plaintiff's clearly established constitutional right to carry a handgun outside of his home by refusing to issue him a CCW license, on the basis of an expired temporary restraining order that was issued without notice to him, without a hearing, and where the court later found "there is insufficient evidence to substantiate by a preponderance of the evidence that domestic violence has occurred." Defendants will be unable to "affirmatively prove that [barring an individual from carrying a handgun outside of their home based on an expired temporary restraining order] is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms in the United States." *Baird*, 81 F.4th at 1043 (quoting *Bruen*, 142 S. Ct. at 2127) (internal quotation marks omitted). There's no historical tradition of denying individuals their constitutional rights for prolonged periods of time where no notice was given and no opportunity to be heard was afforded.

Plaintiff is likely to suffer irreparable harm if a preliminary injunction isn't issued because he has a constitutional right to carry handgun outside his home and he's being denied that right.

The authorities cited above establish that even the briefest violation of a constitutional right by the government constitutes irreparable harm.

Defendants have been violating Plaintiff's constitutional right to carry a handgun outside of his home for months now and there's no indication that they'll stop in the absence of a preliminary injunction.

Plaintiff's constitutional right to carry a handgun outside his home concerns the public interest.

> A plaintiff's likelihood of success on the merits of a constitutional claim also tips the merged third and fourth factors decisively in his favor. Because "public interest concerns are implicated when a constitutional right has been violated, ... all citizens have a stake in upholding the Constitution," *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005), meaning "it is always in the public interest to prevent the violation of a party's constitutional rights," *Elsasser*, 32 F.4th at 731 (quoting *Melendres*, 695 F.3d at 1002); *see also Cal. Chamber of Com.*, 29 F.4th at 482 ("[T]his court has `consistently recognized the significant public interest in upholding [constitutional] principles.'" (quoting *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014))). The government also "cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations." *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983); *see also Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013) (holding that the government "cannot suffer harm from an injunction that merely ends an unlawful practice" implicating "constitutional concerns"). Accordingly, we have held that

> plaintiffs who are able to "establish[] a likelihood that [a] policy violates the U.S. Constitution ... have also established that both the public interest and the balance of the equities favor a preliminary injunction." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014); *see also Hernandez*, 872 F.3d at 996.

Baird, 81 F.4th at 1042.

The authorities cited immediately above make it abundantly clear that the public always has an interest in preventing the violation of constitutional rights, such as Plaintiff's right to carry a handgun outside of his home.

Conclusion

Plaintiff has a constitutional right to carry a handgun outside of his home, and Defendants continue to violate that right. They have no intention of stopping unless the Court orders them to. Plaintiff has shown that he is likely to succeed on the merits of his claim, that he's presently suffering and will continue to suffer irreparable harm, and that the violation of his constitutional right concerns the public interest. Accordingly, the Court should enjoin Defendants' refusal to issue him a CCW license.

Dated this 30th day of November, 2024

/s/ Cody Jay Brownstein

Cody Jay Brownstein, Plaintiff, pro se