

To: Paul Valone, President, Grass Roots North Carolina  
From: Ed Green, GRNC Director of Legal Affairs  
Date: May 18, 2012  
Re: Analysis of Proposed Committee Substitute to HB-489

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Mr. Valone,

At your request, I have reviewed the Proposed Committee Substitute (PCS) for House Bill 489, titled Dangerous Weapon Restrictions in Emergencies,<sup>1</sup> and I have compared the PCS to current N.C. law. In my opinion, the PCS makes no substantive changes to current law<sup>2</sup> regarding restrictions on possession of firearms and access to ammunition during a State of Emergency (SOE). As such, the PCS, if enacted into law, would be unconstitutional under *Bateman v. Purdue*.

#### Background: Current Law

Currently, N.C. law makes it a class 1 misdemeanor “for any person to transport or possess off his own premises any dangerous weapon or substance in any area [i]n which a declared state of emergency exists . . .”<sup>3</sup> The law also allows an official of a municipality, county, or the governor (collectively, a “SOE official” herein) to place “prohibitions and restrictions . . . [u]pon the possession, transportation, sale, purchase, storage, and use of dangerous weapons and substances,”<sup>4</sup> during a SOE. Dangerous weapons and substances are statutorily defined to include firearms and ammunition.<sup>5</sup>

#### Background: *Bateman v. Perdue*

On March 29, 2012, the U.S. District Court for the Eastern District of North Carolina declared these statutes unconstitutional as applied to the plaintiffs.<sup>6</sup> In the *Bateman* decision, the court stated, “It cannot be seriously questioned that the emergency declaration laws at issue here burden conduct protected by the Second Amendment. Although considerable uncertainty exists regarding the scope of the Second Amendment right to keep and bear arms, it undoubtedly is not limited to the confines of the home.”<sup>7</sup> The *Bateman* court further stated, “[A]lthough the statutes do not directly regulate the possession of firearms within the home, they effectively prohibit law abiding citizens from purchasing and transporting to their homes firearms and ammunition needed for self-defense. As such, these laws burden conduct protected by the Second Amendment.”<sup>8</sup>

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<sup>1</sup> PCS to Second Edition H489-CSSA-71 [v.4], May 16, 2012.

<sup>2</sup> The PCS would replace one mandatory ban on firearm possession with a discretionary one. It would also reduce the class of misdemeanor for violation of the ban from class 1 to class 2 (governor declared SOE) or class 3 (municipal or county declared SOE).

<sup>3</sup> N.C. Gen. Stats. § 14-288.7 (2012).

<sup>4</sup> N.C. Gen. Stats. § 14-288.12 (2012).

<sup>5</sup> N.C. Gen. Stats. § 14-288.1(2) (2012).

<sup>6</sup> *Bateman v. Perdue*, Case 5:10-cv-00265-H (E.D.N.C. 2012). The statutes found unconstitutional are N.C. Gen. Stats. §§ 14-288.7, 14-288.12(b), 14-288.13(b), 14-288.14(a), and 14-288.15(d).

<sup>7</sup> *Id.*, at 9.

<sup>8</sup> *Id.*, at 10-11.

Because the SOE restrictions on the purchase and transportation of firearms and ammunition burden the core Second Amendment right of self-defense in the home, “the court finds that the statutes at issue here are subject to strict scrutiny.”<sup>9</sup> Strict scrutiny is the most exacting form of judicial review. To pass constitutional muster under strict scrutiny, “a statute must be narrowly tailored to achieve a compelling government interest.”<sup>10</sup> The court found that the SOE statutes are not narrowly tailored – e.g., they do not target only dangerous individuals or conduct, or impose reasonable time, place, and manner restrictions – but “Rather, the statutes here excessively intrude upon plaintiffs’ Second Amendment rights by effectively banning them (and the public at large) from engaging in conduct that is at the very core of the Second Amendment at a time when the need for self-defense may be at its very greatest.”<sup>11</sup>

Exercising judicial restraint, the *Bateman* court declined to consider a facial challenge to the constitutionality of the SOE laws,<sup>12</sup> instead finding them unconstitutional as applied to the plaintiffs.<sup>13</sup> A statute found unconstitutional as applied to a plaintiff is unenforceable against that class of plaintiffs – that is, against all persons similarly situated with respect to the constitutional violation. The individual plaintiffs in the case were three North Carolina residents. The basis of the plaintiffs’ complaint was that “they have been denied their rights to keep and bear arms for the purposes of self-defense and hunting” or have been “forb[idden] the sale or purchase of firearms and ammunition, as well as the possession of firearms and ammunition off [their] premises” as a result of a declared SOE.<sup>14</sup> Accordingly, the class of plaintiffs, against which the challenged SOE laws are unconstitutional and unenforceable, comprises all persons who wish to keep and bear, or purchase, firearms or ammunition off their premises during a SOE, and who may otherwise lawfully do so.

Government officials (including law enforcement officers) enjoy qualified immunity, under which they “generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>15</sup> A class of plaintiffs’ constitutional rights with respect to a state statute cannot be more “clearly established” than by a federal court decision holding the statute unconstitutional as applied to the plaintiffs. Enforcement of the SOE firearms and ammunition restrictions thus exposes the enforcing agents to personal civil liability for money damages under 42 U.S.C. § 1983.

### PCS Proposed Amendments

The PCS changes to the SOE statutes do nothing to alleviate the significant and constitutionally impermissible burdens on the Second Amendment rights of law abiding individuals in North Carolina during a SOE.

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<sup>9</sup> *Id.*, at 13-14.

<sup>10</sup> *Id.*, at 11 (citing *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 576, 898 (2010)).

<sup>11</sup> *Id.*, at 15-16.

<sup>12</sup> *Id.*, at 16.

<sup>13</sup> *Id.*, at 17.

<sup>14</sup> *Id.*, at 5.

<sup>15</sup> *Harlow v. Fitzgerald* 457 U.S. 800 (1982).

Section 1 of the PCS repeals § 14-288.7, the statute banning possession of a firearm outside the home during a declared SOE. However, the same power is preserved in SOE officials' discretion elsewhere. Section 2 of the PCS amends § 14-288.12(4) to authorize "prohibitions and restrictions . . . [u]pon the possession, transportation, sale, purchase, storage, and use of dangerous weapons and substances, and gasoline, when necessary to preserve the public peace where there is an imminent risk of damage, injury, or loss of life or property," with exceptions for weapons and ammunition "in a person's home." This language would authorize any SOE official to declare a ban on possession identical to that of the repealed § 14-288.7. Furthermore, the PCS authorizes SOE officials to impose additional restrictions – such as a ban on the purchase, sale, or transportation of ammunition – which the *Bateman* court expressly found to infringe "the very core of the Second Amendment."<sup>16</sup>

The PCS proposed amendment to § 14-288.12(4) contains language purporting to restrict its applicability – and hence the authority of SOE officials – to times "when necessary to preserve the public peace where there is an imminent risk of damage, injury, or loss of life or property." This is nothing but a restatement of the statutory definition of a state of emergency: "The condition that exists whenever, during times of public crisis . . . public safety authorities are unable to maintain public order or afford adequate protection for lives or property, or whenever the occurrence of any such condition is imminent."<sup>17</sup> I have reviewed 34 Executive Orders declaring states of emergency for part or all of North Carolina since 2002,<sup>18</sup> and not one of them would fall outside of this "restrictive" language. Put another way, if there is not "an imminent risk of damage, injury, or loss of life or property," why declare a state of emergency?

The PCS proposed amendments to § 14-288.12(4) merely make the total ban on possession of firearms outside the home during a SOE, discretionary rather than automatic. They do not change at all the current discretionary power of SOE officials to restrict (including ban) the purchase, sale, and transportation of ammunition – both provisions which the *Bateman* court struck down as unconstitutional.

The PCS proposed amendments to § 14-288.12(4) include two exceptions to this discretionary power to restrict the possession of firearms and ammunition during a SOE.

First, § 14-288.12(4)(a) would not allow any such restriction to "Prohibit the possession, storage, or use of a dangerous weapon for self-defense in a person's home or for other lawful purposes in a person's home . . ."<sup>19</sup> This nod to *Bateman* has no practical impact, since the ban in § 14-288.7 is limited to possession of a dangerous weapon "off [one's] own premises."

Second, § 14-288.12(4)(b) would not allow any restriction to "Prohibit the transportation, possession, sale, purchase, or use of ammunition for self-defense purposes in a

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<sup>16</sup> *Id.*

<sup>17</sup> N.C. Gen. Stats. § 14-288.1(10) (2012).

<sup>18</sup> See Appendix A.

<sup>19</sup> Note that the phrase, "for self-defense in a person's home or for other lawful purposes in a person's home" is logically and legally equivalent to simply, "for any lawful purposes in a person's home."

person's home . . .” Curiously, this section lacks the “or other lawful purpose” language of § 14-288.12(4)(a). Accordingly, the possession of ammunition in one’s home is only protected if (in the opinion of the authorities) it is “for self-defense purposes” – all other purposes may legally be prohibited. One can easily imagine this nuance being exploited, for example, to ration ammunition sales, on the theory that a single box of ammunition is for self-defense purposes, but a large quantity may be for target practice or some other non-self-defense purpose, and hence may be legally restricted under § 14-288.12(4).

Another curiosity of § 14-288.12(4)(b) is just where it is intended to be applied. The plain language of the statute protects “the transportation, possession, sale, purchase, or use of ammunition . . . in a person's home.” For the vast majority of the public, only two of these actions – possession and use – can occur in one’s home. Yet the statute purports to protect also the transportation, sale, and purchase of ammunition. This language makes sense only if the phrase “in a person’s home” is taken to modify not the actions, but the “self-defense purpose.” That is, the transportation, sale, and purchase of ammunition is “for self-defense purposes in a person’s home” – meaning the self-defense is intended to be engaged in in the home, not that the sale or purchase occurs in the home. Of course, the protection of “possession” and “use” of ammunition must be interpreted the same way, which would have the effect of eviscerating SOE officials’ authority under § 14-288.12(4) to restrict such possession or use.<sup>20</sup>

However, before delving too deeply into the mysteries of § 14-288.12(4)(b) (and probably concluding it is unconstitutionally vague), I note that whatever protections are intended for the transportation, sale, and purchase of ammunition are moot, as they are specifically exempt from the power, pursuant to the proposed amendment to § 14-288.12(2), of SOE officials to regulate the operation of businesses during a SOE.

The PCS proposed amendment to § 14-288.12(2) would permit “prohibitions and restrictions . . . of the operation of . . . business establishments . . . including places that sell dangerous weapons, notwithstanding subdivision (4) of this subsection.” Hence, any purported limitation on SOE officials’ power, under § 14-288.12(4)(b), to regulate the transportation, sale, and purchase of ammunition, is moot as § 14-288.12(2) authorizes the regulation “notwithstanding” such protection.

The PCS proposed amendment to § 14-288.12(2) grants SOE officials unfettered power to regulate the operation of business establishments (which expressly includes places that sell dangerous weapons) during a SOE. Authorities may thus regulate what businesses sell, to whom they sell it, and at what times and in what quantities they sell it. A blanket ban on the sale of all ammunition, restrictions on which calibers or what types of bullets may be sold, and the like, are all permissible under PCS proposed amendments to § 14-288.12(2).

This unfettered regulatory power is precisely the type that Bateman found “excessively intrude[s] upon plaintiffs' Second Amendment rights by effectively banning them (and the public at large) from engaging in conduct that is at the very core of the Second Amendment at

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<sup>20</sup> § 14-288.12(4)(a) must be interpreted similarly, meaning the possession, storage, or use of a firearm is valid anywhere, as long as the purpose is self-defense (or other lawful purpose) which is to occur in the home.

a time when the need for self-defense may be at its very greatest”<sup>21</sup> and is hence unconstitutional.

### Conclusion

There is no question that, if the PCS of HB 489 becomes law, it will fail the same constitutional challenge as the statutes in *Bateman*, and for the same reason. The PCS proposed amendments make no substantive change in the law, other than to replace an automatic ban on firearm possession outside the home during a SOE with an identical, but discretionary one. The discretionary restrictions on ammunition sales and transportation during a SOE are effectively unchanged from current law. *Bateman* declared both of these restrictions unconstitutional – and explained that finding in such a clear and compelling opinion that the state chose not to appeal the decision.

Section 14-288.12 operates by authorizing municipalities to enact ordinances, and SOE officials can then act during SOEs to impose and enforce the provisions of the ordinances. Since the PCS changes to § 14-2880.12 do not substantively alter state law, the vast majority of SOE ordinances on the books in NC would not change. For example, nothing in the PCS would prevent King, NC from again banning the possession of firearms off one’s premises the next time it snows.<sup>22</sup>

Respectfully submitted,



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<sup>21</sup> *Bateman*, at 15-16.

<sup>22</sup> See Code of Ordinances, City of King, NC, § 10-37(a) “The [SOE] proclamation imposed in this article may prohibit the transportation or possession off one’s own premises, or the sale or purchase of any dangerous weapon or substance.”

Appendix A

Summary of States of Emergency by Executive Order

Admin.	EO	Date Issued	State(s) Declared	Cause	Statutory Basis	Areas Affected
Hunt	27	8/30/2002	Disaster and Emergency	draught	166A-6 14-288.15	selected cities
Easley	36	11/7/2002	Disaster	draught	166A-6 14-288.15	Statesville
	59	6/1/2004	Disaster	ice	166A-6 14-288.15	selected towns
	65	9/7/2004	Disaster and Emergency	H Francis	166A-6 14-288.15	NC
	66	9/9/2004	Disaster	H Francis	166A-6	NC
	68	9/16/2004	Disaster and Emergency	H Ivan	166A-6 14-288.15	NC
	70	9/27/2004	Emergency	H Jeanne	14-288.15	NC
	71	1/19/2005	Emergency	snow	14-288.15	Wake Co.
	78	7/8/2005	Disaster	H Bonnie, Charlie	?	selected towns
	82	9/3/2005	Emergency	H Katrina	166A-6 14-288.15	NC
	88	9/10/2005	Emergency	H Ophelia	166A-5 14-288.15	NC
	103	7/5/2006	Disaster	ice	166A-6	selected towns
	107	8/31/2006	Emergency	TS Ernesto	166A-5 14-288.15	NC
	109	10/10/2006	Disaster and Emergency	TS Ernesto	166A-6 14-288.15	Jones, Duplin Co.
	111	11/17/2006	Disaster	weather	166A-6 14-288.15	Columbus Co.
	113	11/29/2006	Emergency	Hwy 12	166A-5 14-288.15	Dare Co.
	130	9/25/2007	Disaster	fire	166A-6	Spruce Pine
	131	11/26/2007	Disaster	wind	166A-6	Tryon
	132	11/26/2007	Disaster	wind	166A-6	Taylorsville
	141	5/20/2008	Disaster	tornados	166A-6	Bertie, Onslow Co.

	142	6/6/2008	Emergency	wildfire	166A-6	selected co.
	143	8/29/2008	Disaster	TS Fay	166A-6	Cabarrus, Mecklenburg Co
	144	9/4/2008	Emergency	TS Hanna, H Ike	166A-5	NC
	148	11/19/2008	Disaster	tornados	166A-6	Wilson, Johnston Co.
Perdue	7	1/20/2009	Emergency	Snow/ice	166A-6 14-288.15	NC
	27	10/28/2009	Emergency	I-40 landslide	166A-5 14-288.15	Haywood Co.
	30	11/16/2009	Emergency	TS Ida	166A-5 14-288.15	NC
	44	1/20/2010	Emergency	snow	166A-5 14-288.15	selected co.
	47	1/31/2010	Emergency	winter storm	166A-5 14-288.15	NC
	56	4/8/2010	Disaster	tornados	166A-6	Davidson, Guilford Co.
	59	5/25/2010	Disaster	wind	166A-6	Hoke Co.
	60	5/25/2010	Disaster	winter storm	166A-6	Highlands
	62	9/1/2010	Emergency	H Earl	None Stated	NC