Case No. 20-55437

In the United States Court of Appeals
for the Ninth Circuit

KIM RHODE, et al.
*Plaintiffs-Appellees*,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California,
*Defendant-Appellant*.

On Appeal from the United States District Court
for the Southern District of California
(18-cv-00802-BEN-JLB)

# APPELLEES' OPPOSITION TO APPELLANT'S EMERGENCY MOTION TO STAY ORDER GRANTING PRELIMINARY INJUNCTION PENDING APPEAL; MOTION TO VACATE ADMINISTRATIVE STAY

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April 30, 2020

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Appellee the California Rifle & Pistol Association, Inc., certifies that it is a nonprofit organization and thus has no parent corporation and no stock; Appellee Able's Sporting, Inc. certifies that no parent company or publicly held corporation owns more than ten percent of its stock; Appellee R & S Firearms, Inc. certifies that its parent company AIMS, Inc. owns at least ten percent of its stock; and Appellee AMDEP Holdings, LLC certifies that it is not a corporation.

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## INTRODUCTION

On April 23, 2020, the district court preliminarily enjoined enforcement of California Penal Code sections 30312(a)-(b), 30314(a), 30352, and 30370(a)-(d), and the criminal enforcement of California Penal Code sections 30365, 30312(d), and 30314(c) (the "Challenged Provisions"), as violative of the Second Amendment or the Commerce Clause of the United States Constitution. Basically, those provisions require anyone seeking to purchase ammunition to do so in-person through a licensed ammunition vendor located in California and pass a background check before taking receipt. Failure to comply is subject to criminal prosecution.

The next day, Defendant California Attorney General Xavier Becerra ("the State") filed an ex parte application requesting that the district court stay its preliminary injunction order while the parties litigate the State's anticipated appeal. The district court denied the State's request. The State has now filed an emergency request for a stay of the preliminary injunction with this Court.

This Court may stay an injunction pending appeal where the moving party establishes that the factors typically applied to the issuance of a preliminary injunction motion warrant a stay. The State has failed to meet its burden to establish that such extraordinary relief is warranted here. It has not—and cannot—establish that it will suffer any real harm absent a stay. The Challenged Provisions are objectively offensive, making Plaintiffs-Appellees ("Plaintiffs") likely to succeed on the merits of their claims. And the impact on the State caused by *temporarily* enjoining them is de

minimis. On the other hand, a stay will cause Plaintiffs and millions of California residents to endure continued violations of their constitutional rights.

The State's motion should be denied. Should this Court deny the State's emergency stay request, Plaintiffs move this Court, under 9th Cir. R. 27-1, to vacate the administrative stay it currently has in place on the preliminary injunction. Order, ECF No. 4, Apr. 24, 2020.

## LEGAL STANDARD

Federal Rules of Appellate Procedure Rule 8 allows this Court to suspend, modify, restore, or grant an injunction while an appeal in pending. Fed. R. App. P. 8(a). "A stay is not a matter of right, even if irreparable injury might otherwise result," rather, a stay is "an exercise of judicial discretion" and the "propriety of its issue is dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433-34. This standard holds regardless of how the applicant styles the stay application. *See Benham v. Namba* (*In re Maria Vista Estates*), No. LA CV 13-cv-05286, 2014 U.S. Dist. LEXIS 188139 (C.D. Cal. Sept. 30, 2014) (discussing the denial of a both a request for a stay pending appeal and administrative appeal).

In determining whether to issue a stay pending appeal, courts consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a

stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 434. The first two factors "are the most critical." *Id.* As for the first factor, this Court has characterized a "strong showing" in various ways, including "reasonable probability," "fair prospect," "substantial case on the merits," and "serious legal questions . . . raised." *Leiva-Perez v. Holder*, 640 F.3d 962, 967-68 (9th Cir. 2011). When an applicant relies on "serious legal questions," as the State has done here, it must establish irreparable harm and that the balance of harms tips *sharply* in his favor. *See id.* at 966; *Tribal Village of Akutan v. Hodel*, 859 F.2d 662, 663 (9th Cir. 1988).

## ARGUMENT

### I. THE STATE HAS NOT SHOWN A STRONG LIKELIHOOD OF SUCCESS

The State cannot establish that it is likely to succeed in its attempt to overturn the district court's order granting Plaintiffs' Motion for Preliminary Injunction. Simply put, the district court correctly concluded that the Challenged Provisions are likely unconstitutional. It certainly did not abuse its discretion, which is the standard for this Court when evaluating a preliminary injunction, in applying the applicable rules of law to the factual findings that were based on extensive briefing from both parties and multiple hearings, which the court spent months considering. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011).

Plaintiffs will not rehash all of their arguments for why the Challenged Provisions fail constitutional scrutiny here. With its 120-page opinion and its

subsequent order denying the State's motion for an emergency stay, the district court sufficiently acquits itself in justifying its ruling to issue a preliminary injunction. Emergency Mot. Under C.R. 27-3 Stay Prelim. Inj. Pending App. ("Emergency Mot.") Exs. 10, 12. Plaintiffs, however, highlight a few features of the Challenged Provisions that may go unnoticed due to the enormity of the record below. These features help objectively show the Challenged Provisions' patent unconstitutionality.

### A. The State's Background Check System Violates the Second Amendment

As the district court explained, "[the State] has conceded that the right to purchase and acquire ammunition is a right protected by the Second Amendment." Emergency Mot. Ex. 12 at 1. Of course, the State must make that concession. *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (holding that "the right to possess firearms for protection implies a corresponding right to obtain the bullets necessary to use them"). Thus, the only constitutional question to be decided is whether the burdens the Challenged Provisions place on the exercise of that right meet constitutional scrutiny. They do not.

To be clear, this preliminary injunction does not raise the question of whether ammunition background check systems are unconstitutional per se. Rather it only asks whether *this* ammunition background check system is unconstitutional. While Plaintiffs' briefing and the district court's orders provide many reasons why the answer to that question is "yes," the following encapsulates the undeniably fatal flaws

with the State's ammunition background check scheme.

Generally, it is impossible for the average Californian to purchase ammunition without acquiring it in-person from a licensed ammunition vendor and undergoing the State's background check. Cal. Pen. Code §§ 30312-330314, 30370. In just seven months, the State's most popular background check option has rejected 101,047 purchasers from receiving ammunition, not because the State confirmed that those people are legally ineligible to acquire ammunition, but because the State could not confirm that they were eligible. Emergency Mot. Ex. 9 at 6, Ex. 10 at 56. That is about 16.4% of attempted purchasers. *Id.*

Still worse than the initial rejection of the right, is the State's lack of care for it. Purchasers who are rejected ammunition are "not informed of the reason for rejection," at least not specifically *Id.* at 20, *see also Id.* at 21-26. Nor is official guidance on what steps they can take to remedy their situation provided; they are left to their own devices to figure it out. *Id.* Unlikely a coincidental result, *more than half* of purchasers rejected ammunition solely because the State could not confirm they are legally eligible have still not acquired ammunition since July 2019, and every month thereafter. Emergency Mot. Ex. 9 at 21. This is simply not the way fundamental rights work. If burdens imposed by a state's regulatory scheme resulted in this rate of attrition for voting, there would not even be a discussion; such a scheme would be dispensed with automatically.

### B. The State's Requirement that All Ammunition Transfers Occur "Face-to-Face" Violates the Dormant Commerce Clause

While there are various reasons the State's "face-to-face" requirement violates the dormant Commerce Clause, Plaintiffs want to make sure that this Court understands that businesses physically located in California that sell ammunition have complete discretion over whether or at what price businesses not physically located in California can sell to people in California. This is because ammunition vendors that are not physically located in California can only sell to California purchasers by sending the ammunition to a vendor that is physically located in California. Cal. Penal Code §§ 30312(b). It is undisputed that ammunition vendors physically located in California may legally refuse to process third-party ammunition transfers from out-of-state ammunition vendors, or that they are, in fact, doing just that. Plaintiffs' Reply to Defendant's Opposition to Motion for Preliminary Injunction, *Rhode v. Becerra*, No. 3:18-cv-00802-BEN-JLB (Aug. 12, 2019), ECF No. 37 at 8 (attached hereto as Exhibit A); Emergency Mot. Ex. 10, at 3 n.2. Nor is it disputed that an in-state vendor willing to process such a transaction may charge the purchaser any fee amount it wishes. Ex. "A" at 8. "If the purchaser will not be present for immediate delivery of the ammunition, the vendor may charge an additional storage fee as agreed upon with the purchaser prior to the vendor receiving the ammunition Cal. Code Regs. tit. 11 § 4263(b). As a practical matter, this includes all transactions originating from out-of-state. In other words, ammunition vendors located in other states, like Plaintiffs

Able's Ammo, AMDEP Holdings, and R&S Firearms, are at the complete mercy of businesses located in California in accessing the California consumer.

The only way for ammunition vendors located in other states to avoid control of in-state vendors is to have a physical presence in California. This Court has made clear that a statute requiring a business to have a physical presence in a state to do business there violates the Commerce Clause. *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 736-37 (9th Cir. 2017), *cert. denied sub nom* (finding a statute violated the Commerce Clause because it "requires any corporation that wants to engage in a certain kind of business within the state to become a resident"); *see also Granholm v. Heald*, 544 U.S. 460, 472 (2005) ("The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States.") The State's attempt to confuse the issue by arguing that the Challenged Provisions do not discriminate because in-state vendors are also prohibited from shipping ammunition, misses the point. Emergency Mot. 17-18. "What is important is that California's resident businesses are the only businesses that may sell directly to ammunition consumers." *Id.* Ex. 10 at 103. Because they can, the State violates the dormant Commerce Clause.

### C. Plaintiffs Have Standing to Assert a Facial Challenge Here

The State argues that Plaintiffs lack standing to assert a facial challenge here. Plaintiffs have already extensively briefed why that is incorrect. Ex. A, at 1-2. And the district court has thoroughly corroborated Plaintiffs' position. Emergency Mot. Ex. 10, at 42-44. Rather than rehash those arguments, Plaintiffs merely wish to point out

that the notion that an organization like Plaintiff CRPA, which is dedicated to defending the Second Amendment rights of Californians, lacks standing to challenge a legal scheme that results in well over ten percent of Californians being rejected ammunition without an adequate official explanation of why they were rejected or how to remedy their rejection, and over half of whom have not acquired ammunition months after being rejected, is not only unsupported by any authority but is unconvincing—to be charitable. In any event, the State's arguments do not apply to Plaintiffs Able's, AMDEP, and R&S Firearms, who challenge the State's "face-to-face" requirement for violating the dormant Commerce Clause.

### D. A Serious Legal Question Alone Does Not Justify Staying an Injunction

Finally, the State argues that a stay may be warranted because this case raises "serious legal questions." Emergency Mot. 10. "Serious questions are substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991). Surely, the legal questions at the heart of this matter are "serious." *Silvester v. Harris*, No. 11-cv-2137, 2014 WL 661592, at *3 (Nov. 20, 2014) (recognizing that a case challenging California's 10-day waiting period for gun purchases raised serious questions because "Second Amendment law is evolving"). But this is true of many appeals, especially those involving constitutional challenges like this one. Thus, cases that raise important questions rarely warrant a stay of injunctive relief *unless the moving*

*party also establishes that the remaining factors all counsel in favor of a stay*. In such cases, the State must prove that it "will suffer irreparable harm" without the stay *and* that the balance of the hardships "tips *sharply* in their favor." *Se. Alaska Conserv. Council v. U.S. Army Corps of Eng'rs.*, 472 F.3d 1097, 1100 (9th Cir. 2006) (emphasis added). As explained below, and in more detail by the district court in its order granting the preliminary injunction, Emergency Mot. Ex. 10 at 109-114, and its order denying an emergency stay, *id.* Ex, 12 at 2, the State has failed to meet this burden.

## II. THE STATE HAS NOT SHOWN THAT IT WILL SUFFER IRREPARABLE HARM

As the State recognizes, "[t]he factor of irreparable harms is a 'bedrock requirement' for issuance of a stay." *Id.* at 18 (quoting *Leiva-Perez*, 640 F.3d at 965). Indeed, because the State must rely on the "serious legal questions" this case presents to satisfy the first factor for a stay, the State bears a heavy burden to show that it "will suffer irreparable" harm if a stay does not issue. *Se. Alaska*, 472 F.3d at 1100. Here, the State argues that it is necessarily harmed because the preliminary injunction prevents it from enforcing " 'an enactment of its people or representatives.' " *Id.* (quoting *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997)). It also argues that irreparable harm will befall the state if Californians are able to purchase ammunition unrestricted by the Challenge Provisions, while this case is on appeal because persons prohibited from ammunition possession might acquire it, implying they will commit crimes with it. Emergency Mot. 18-19. Neither of these purported harms justify a stay of the Court's well-reasoned judgment.

A party "cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013); *see Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) ("[I]t is clear that it would not be equitable . . . to allow the state . . . to violate the requirements of federal law.") (citations omitted). Even so, the State relies on a passage from *Coalition for Economic Equity v. Wilson*, which in turn relied on a chambers order from former Justice Rehnquist, to argue that the government necessarily suffers irreparable injury anytime its laws are enjoined. Emergency Mot. 18-19 (quoting *Coal. for Econ. Equity*, 122 F.3d at 719). But the "the Supreme Court has never adopted Justice Rehnquist's opinion that this form of harm is an irreparable injury" sufficient to justify a stay. *Silvester*, 2014 WL 661592, at *3 (citing *Latta v. Otter,* __ F.3d __, No. __, 2014 U.S.App. LEXIS 19828, *19 n.1 (9th Cir. 2014)).[1] As a result, this Court has held that "to the extent a state suffers an abstract form of harm whenever one of its acts is enjoined, that harm is *not dispositive* because such a rule would eviscerate the balancing of competing claims of injury." *Id.* (discussing *Indep. Living Ctr.*, 572 F.3d 644) (emphasis added). An "abstract harm" can be "outweighed by other factors." *Id.* (discussing *Latta*, 2014 U.S.App. LEXIS 19828).

The State also claims that it will be irreparably harmed if Californians are allowed to purchase ammunition unburdened by the Challenged Provisions because

[1] This Court has also held the cited language from *Coalition for Economic Equity* is "dicta." *Indep. Living Ctr. of S. Cal. v. Maxwell-Jolly,* 572 F.3d 644, 658 (9th Cir. 2009).

"violent felons and others who have had a significant impediment to their access to ammunition removed" might also acquire ammunition. *Id.* at 18-19. This speculative harm that prohibited persons might acquire ammunition and inflict harm with it does not constitute irreparable injury. *See, e.g.*, *Pac. Merchant Shipping Ass'n v. Cackette*, 2007 WL 2914961 (E.D. Cal. 2007) (holding that the defendant's claim that enjoined regulations would prevent 31 deaths and 830 asthma attacks is "nebulous at best" and insufficient to establish irreparable harm). The State's purported harm is at least not "probable," as it must be to justify a stay. *See Leiva-Perez*, 640 F.3d at 968.

Because a specific showing of irreparable injury to the applicant is a threshold requirement for every stay application, the State's failure to demonstrate that it will experience irreparable harm means that "a stay may not issue, regardless of the petitioner's proof regarding the other stay factors." *Leiva-Perez*, 640 F.3d at 965.

## III. THE STATE HAS NOT SHOWN THAT THE BALANCE OF HARMS TIPS IN ITS FAVOR

The State has failed to establish that it will suffer any irreparable harm absent a stay. And any abstract and speculative harms it might suffer do not outweigh the constitutional and practical harms that befall Plaintiffs. Each day the injunction is delayed is another day Californians are denied the exercise of their right to acquire ammunition free from the Challenged Provision's unlawful burdens. Denial of a fundamental right is irreparable injury—even if for a moment. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding that deprivation of constitutional rights, "for even minimal

periods of time, unquestionably constitutes irreparable injury"). This ongoing constitutional harm is no less severe simply because, as the State argues, the exercise of that right has already been prohibited for several months. Emergency Mot. 19-20. In fact, it perhaps makes the continued denial of the right *worse*.

To the extent this Court considers relevant the State's complaint that the Challenged Provisions have been in place months before being preliminarily enjoined, Plaintiffs point to the district court's charitable explanation for why that happened:

> That the laws have been in effect for 10 months reflects this Court's patient consideration, not its constitutional approval. Any delay was occasioned by judicial optimism that the high erroneous denial rate of early Standard background checks might significantly improve. It did not. Instead, the constitutional impingements on Second Amendment rights that began immediately, will continue if a stay is granted.

*Id.* at Ex. 12, at 2.

The Court afforded the State several opportunities to provide evidence defending its objectively burdensome ammunition scheme and held various hearings to afford the State the opportunity to explain itself. *See* Docket, *Rhode v. Becerra*, No. 3:18-cv-00802-BEN-JLB (S.D. Cal. Apr. 23, 2020), ECF Nos. 40, 42, 48, 52, 53, 54, 56, 58, and 59. That the State failed to take advantage of those opportunities to makes its case should not now save its system from being enjoined.

What's more, the State cannot credibly argue that it will suffer any real harm by the issuance of this preliminary injunction. California is only *temporarily* having to return to how it has always regulated ammunition transactions. That is, it will be put

in essentially the same place as every other state in the country, none of which have ammunition background checks or, with the exception of New York, have restrictions on shipping ammunition directly to consumers. Emergency Mot. Ex. 10, at 2-3, fn. 2. The notion that *temporarily* enjoining such anomalous, short-lived laws causes the State harm sufficient to satisfy its extraordinarily high burden is dubious, at best.

Because the State cannot identify any concrete irreparable harm and given that a stay would allow the State to resume violating the fundamental rights of millions of Californians, the balance of equities does not tip sharply in the State's favor—it does not tip in its favor at all. The State's motion should be denied on this basis alone.

## CONCLUSION

For these reasons, the Court should deny the State's motion for an emergency stay and immediately vacate the emergency administrative stay currently in place.

Date: April 30, 2020

**MICHEL & ASSOCIATES, P.C.**

s/ Sean A. Brady
Sean A. Brady
*Counsel for Plaintiffs-Appellees*

## CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2020, an electronic PDF of APPELLEES' OPPOSITION TO APPELLANT'S EMERGENCY MOTION TO STAY ORDER GRANTING PRELIMINARY INJUNCTION PENDING APPEAL; MOTION TO VACATE ADMINISTRATIVE STAY was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

Date: April 30, 2020

**MICHEL & ASSOCIATES, P.C.**

s/ Sean A. Brady
Sean A. Brady
*Counsel for Plaintiffs-Appellees*

Case No. 20-55437

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On Appeal from the United States District Court
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# DECLARATION OF SEAN A. BRADY IN SUPPORT OF APPELLEES' OPPOSITION TO APPELLANT'S EMERGENCY MOTION TO STAY ORDER GRANTING PRELIMINARY INJUNCTION PENDING APPEAL; MOTION TO VACATE ADMINISTRATIVE STAY

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April 30, 2020

**DECLARATION OF SEAN A. BRADY**

I, Sean A. Brady, declare as follows:

I am an attorney at the law firm of Michel & Associates, P.C., attorneys of record for plaintiffs-appellees in this action. I am licensed to practice law before the Ninth Circuit Court of Appeals. I have personal knowledge of the facts set forth herein and, if called and sworn as a witness, could and would testify competently thereto.

On August 12, 2019, plaintiffs filed Plaintiffs' Reply to Defendant's Opposition to Motion for Preliminary Injunction, ECF No. 37. A true and correct copy of that document is attached to this declaration as **Exhibit A**.

I declare under penalty of perjury that the foregoing is true and correct. Executed within the United States on April 30, 2020.

s/ Sean A. Brady
Sean A. Brady
Declarant

# EXHIBIT A

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**UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF CALIFORNIA**

KIM RHODE, et al.,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California,

Defendant.

Case No.: 3:18-cv-00802-BEN-JLB

**PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

Hearing Date: August 19, 2019
Hearing Time: 10:30 a.m.
Courtroom: 5A
Judge: Hon. Roger T. Benitez

[Filed concurrently with Declaration of Matthew D. Cubeiro]

## ARGUMENT

### I. Plaintiffs Have Standing to Challenge the System on Its Face

The State argues that the Individual Plaintiffs lack standing to challenge the System's "purported burdens" because none of them has alleged to have experienced those burdens. Opp'n 17-18. The State is wrong. An individual whose right to acquire ammunition is affected by burdens imposed on vendors has standing to challenge those burdens. *See Jackson v. City & Cty. of San Francisco*, 829 F. Supp. 2d 867, 872 n. 3; *Doe v. Bolton*, 410 U.S. 179, 186 (1973) (holding that a woman had standing to challenge abortion statute because it "deterred hospitals and doctors from performing abortions," limiting access to the right). In any event, CRPA has standing to sue on its members' behalf, and that is enough. *See, e.g.*, *Arlington Heights v. Metro. Housing Devel. Corp.*, 429 U.S. 252, 264 & n. 9. As alleged in the FAC, "CRPA represents the interests of those who are affected by the" scheme, and California's "purchaser authorizations requirements severely burden the purchase, sale, and transfer of ammunition by overburdening consumers." FAC ¶¶ 22, 75. CRPA's declaration explains how those burdens have affected its members in practice. Travis Decl. ¶¶ 4-14.

The State is also wrong that Plaintiffs' facial challenge fails because they cannot establish that " 'no set of circumstances exists under which [the regulation or statute] would be valid' " because "tens of thousands of ammunition transactions were processed in July alone." Opp'n 17 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Setting aside that the *Salerno* standard has long been hotly debated and rarely applied,[1] the State's application of it here is misplaced. Following the State's logic, even a flat ban on firearms could not be struck on its face because there will always be a class of persons who cannot legally possess firearms to whom the law would be validly applied. So the

[1] *Chicago v. Morales*, 527 U.S. 41, 55 n. 22 (1999) (rejecting view that "plaintiff must establish that no set of circumstances exists under which the Act would be valid"); *Washington v. Glucksberg*, 521 U.S. 702, 739-40 (1997) (Stevens, J., conc.) ("I do not believe the Court has ever actually applied such a strict standard, even in *Salerno* itself.")

question is not whether anyone can clear the many hurdles the System places in the way of the right to obtain ammunition. Instead, it is whether the State can demand that purchasers submit to a system that undisputedly (1) wrongfully denies nearly 18% of all purchasers, (2) rejects the State's standard-issued ID, and (3) causes undue delays that may put vendors out of business, eliminating the source of ammunition necessary to exercise the right to armed self-defense. *See* Mot. 8-10; Opp'n 16, 21. Under "no set of circumstances" could such a scheme be valid. *Salerno*, 481 U.S. at 745. What's more, in other rights contexts, a facial challenge will stand regardless of a law's "plainly legitimate sweep," if a "substantial number" of the law's applications are invalid. *Wash. State Grange v. Wash. State Repub. Party*, 552 U.S. 442, 449 n.6 (2008).

## II. Plaintiffs Are Likely to Succeed on the Merits of Their Claims that California's Ammunition Scheme Violates the Second Amendment

### A. California's Ammunition Scheme Implicates the Second Amendment

According to the State, its scheme is immune from Second Amendment scrutiny because it is one of those "laws imposing conditions or qualifications on the commercial sale of arms" that the Supreme Court described as "presumptively lawful." Opp'n 12. But the Ninth Circuit has already said not only that the Second Amendment protects the acquisition of ammunition, but also that "*Heller* does not include ammunition regulations in the list of 'presumptively lawful' regulations." *Jackson v. City and Cty. of San Francisco*, 746 F.3d 953, 967-68 (9th Cir. 2014). In all events, whatever the Supreme Court intended to be a "presumptively lawful" commercial sales regulation, it certainly did not have in mind a law that could deny substantial numbers of people their rights.

### B. California's Ammunition Scheme Fails Heightened Scrutiny

First, contrary to the State's claim, Plaintiffs do not concede that intermediate scrutiny applies. Opp'n 13, n.4. Instead, Plaintiffs expressly state that strict scrutiny should apply because the System imposes the severe burden of denying many non-prohibited-persons access to ammunition, without which they cannot exercise their core right to armed self-defense at all, even within their homes. Mot. 13. Plaintiffs focus on the

intermediate scrutiny analysis in greater depth because the State cannot meet its burden even under that lower standard. Mot. 13.

In describing its burden under intermediate scrutiny, the State relies almost exclusively on Second Amendment cases from the Ninth Circuit. It does not address the Supreme Court's articulation of intermediate scrutiny that Plaintiffs lay out in their motion—that the State bears the burden of proving *both* that the System is "substantially related" to an important interest and "closely drawn" to achieve that end. Mot. 13 (quoting *Edenfield v.* Fane, 507 U.S. 761, 770-71 (1993); *McCutcheon v. FEC*, 134 S. Ct. 1434, 1456-57 (204)). When the State is held to these burdens, it cannot meet either.

**1. California's ammunition scheme is not "substantially related" to any public safety interest.**

For a law to be substantially related to the government's interests, the government must prove that its "restriction will in fact alleviate" its concerns. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001). It is not enough for the government to rely on "mere speculation or conjecture." *Id*. Plaintiffs do not dispute that keeping weapons away from dangerous people is a substantial public safety interest. Opp'n 15. They do, however, dispute that California's scheme substantially furthers that interest.

First, the State touts the experiences of Los Angeles and Sacramento in monitoring ammunition purchases as evidence that its system works. Opp'n 15. But neither of those systems rejects FLA IDs or requires a background check to purchase ammunition—let alone one that denies about one of every six eligible purchasers. L.A., Cal., Mun. Code § 55.11; Sacramento, Cal., City Code §§ 5.66, 5.66.020, 5.66.040. So neither supports the State's claim that it has a substantial interest in rejecting an FLA ID or requiring a background check so susceptible to improperly rejecting lawful purchasers.

In evaluating whether the State's System "will in fact alleviate" its concerns, a more apt comparison is to *the State's* firearm background check system. A study funded by the University of California Firearm Violence Research Center—created by the California Legislature—determined that comprehensive background check requirements were "not

associated with significant and specific changes in rates of fatal firearm violence." Cubeiro Decl., Ex. 40 at 53. Specifically, the study concluded that implementation of these requirements "did not result in population-level changes in the rates of firearm-related homicides and suicides in California." *Id*., Ex. 40 at 55. The State offers only speculation that its ammunition background check system would fare any better.

Contrary to the state-funded study, the State claims that it knows background checks work because background checks stopped 82,000 prohibited persons from making firearm purchases in 2012 alone. Opp'n 5, 16 (citing Prop. 63 §§ 2.6-2.7). The State cites no evidence for this claim. It is nothing more than a talking point. Evidence does show, however, that while the federal check resulted in 76,152 *initial* denials in 2010, about 94% were dropped at the first stage of review by BATF. Cubeiro Decl., Ex. 41 at 6, tbl. 2 (93.8% of denials did not meet referral guidelines, were overturned or cancelled).

Finally, the State relies on a report from New Jersey about the problems of criminal ammunition acquisition. Opp'n 15. But New Jersey never implemented an ammunition scheme even remotely similar to California's in response to that report. Indeed, no other state has. The State argues that the lack of similar laws is not the standard for proving that a law is substantially related to a government interest. Opp'n 15. But Plaintiffs never claim that it is. Instead, they argue that the dearth of such laws reveals their lack of utility or, at least, infeasibility.[2] Mot. 14 (quoting *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1294 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)).

In sum, while some ammunition laws may be substantially related to the government's interest in public safety, *this* scheme is not.

**2. California's ammunition scheme lacks a reasonable "fit" with the State's interest in preventing criminal misuse.**

In arguing that its scheme meets the "fit" requirement, the State boasts that the System prevented 106 prohibited persons from obtaining ammunition—of the *62,083*

[2] The State ignores that New York scrapped its almost identical background check system, Mot. 14 & n.9.

people who tried to purchase ammunition in July—as well as the "large number" of prohibited persons who the State contends were likely dissuaded from even attempting purchase. Opp'n 16. But in assessing the proper "fit" under intermediate scrutiny, courts are not concerned with the purported benefits of a law. Instead, the concern is whether a law's encroachment on constitutional rights is "not more extensive than necessary" to serve the government's interest. *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 816 (9th Cir. 2013). Thus, the inquiry is only whether the government can meet its burden of proving that its law does not burden "substantially more" constitutionally protected conduct than "necessary to further [its important] interest." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 214 (1997). That is a burden the State cannot meet, based on its own evidence.

According to the State, over 18% of ammunition purchases were rejected in July. Opp'n 21. Among those rejections were about *11,000 non-prohibited persons*—nearly 100 times the number of prohibited persons the State claims the System ferreted out. Morales Decl. ¶¶ 49-52. Also included were about 1 of every 8 COE holders who attempted purchase, Morales Dec. ¶ 51, even though these people have taken extra steps with the State, including an extensive background check and fingerprinting, to establish that they are eligible to purchase *firearms*, Req. Jud. Notice, Ex. 32. While the State speculates that these people "may" be able to "quickly" remedy any issue that impedes their ability to purchase, it provides no specifics. Opp'n 21. Likely because it could not. Indeed, for many, the fix is not at all quick. Brady Decl., Ex. 35 at 5, n.10 (noting waiting times of 3-4 months to fix AFS records).[3] In short, the System wrongly and indefinitely denied *at least 10,000 legitimate purchasers* of their constitutional right to acquire ammunition. The "fit" could hardly be looser.

And this does not even account for the untold numbers of people who could not

[3] The State argues that Plaintiffs have not shown that these people were unable to eventually acquire ammunition. Opp'n 21. But Plaintiffs do not have access to the System, the State does! Yet it does not say whether any of those rejected could fix the issue and obtain ammunition, let alone that many did. *See* Opp'n 21; Morales Decl.

undergo a background check because they lacked the required documentation or would not submit to one for other reasons. *See* Bartel Decl. ¶¶ 10-11; Burwell Decl. ¶ 10; Dodd Decl. ¶ 12; Gray Decl. ¶¶ 10-11; Lowder Decl. ¶¶ 10-11; McNab Decl. ¶¶ 27- 30; Morgan Decl. ¶¶ 10-11; Ortiz Decl. ¶¶ 15-16; Puehse Decl. ¶¶ 12-13. The State does not dispute that it requires documentation beyond its standard-issued ID to purchase ammunition. Instead, it argues that Plaintiffs provide no evidence that the additional ID requirement has prevented anyone from acquiring ammunition and that the claim that it did is dubious because presenting acceptable identification is an "easy cure." Opp'n 21.[4] While it may be an "easy cure" for someone who has the required records, the State ignores the burden that acquiring the documentation places on someone who does not. Mot. 10-11 (citing Dodd Decl. ¶¶ 7-12; Ortiz Decl. ¶ 17; Exs. 30-31).

In any event, the State simply cannot show that its additional ID requirement does not burden more constitutionally protected conduct than necessary. It bars anyone lacking ID beyond what the State issues as a default. Mot. 7 (citing Cal. Code Regs. tit. 11, § 4045.1). The State claims the requirement precludes "persons without lawful presence" in the country from acquiring ammunition. Opp'n 20. The irony that FLA IDs were created to accommodate those very people speaks volumes. Assemb. B. 60, 2013-2014 Reg. Sess. (Cal. 2013). But more telling is that the *only* thing *California* will not accept its standard-issued (FLA) ID for is purchasing firearms and ammunition. What's more, the State does not (and cannot) dispute that the federal government accepts that same ID for *firearm* background checks, it merely quibbles about Plaintiffs' citation. Opp'n 20-21, n.11; Cubeiro Decl., Exs. 38-39.[5] Finally, the State ignores the problem that non-residents cannot purchase ammunition without a COE, which takes weeks and more than $71 in

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[4] The State finds it sound to assume that the System dissuaded countless prohibited persons from undergoing the background check but demands evidence that some non-prohibited persons refused to proceed for other reasons. Opp'n 21, 24.

[5] The State also suggests that its ID requirement is reasonable because NRA advised firearm vendors to request additional documentation for purchasers with FLA licenses. Opp'n 9. But NRA was doing so only to protect those vendors from legal trouble because the State was wrongfully citing those vendors who did not do so. Cubeiro Decl. ¶¶ 2-9.

fees to obtain. Mot. 6-7.

As for the longer processing time for ammunition transactions, the State misses the point. While the extra wait itself may be constitutionally problematic—given all the other hurdles firearm owners must overcome merely to exercise their rights—that is not Plaintiffs' main concern. Instead, they argue that the delays are completely (or mostly) avoidable and that the System unreasonably causes these delays. What's more, the State understates the wait by focusing only on the time between when the vendor "clicks the delivery button" and when DOJ processes a background check request. Opp'n 19. There is additional time both preceding that process (helping customers locate ammunition, explaining background check options, uploading personal information) and following it (print and sign copies of transaction). This extra time could be easily avoided. As could the extra time and cost of collecting records about the type and amount of ammunition sold, which have been found to lack any law enforcement value, Mot. 16; particularly for vendors to print and store them.

Finally, stating that there is no Second Amendment right to sell arms, the State discounts Vendors' complaints that the requirements are so burdensome that they could mean closing shop. Opp'n 22. But the State misses the point. It is not the Vendors who are asserting a right here. Instead, Plaintiffs are sharing these stories because the burdens on Vendors, as the purveyors of Second Amendment rights, affect Plaintiffs' ability to exercise their rights. *See Jackson*, 829 F. Supp. 2d at 872 n.3; *Doe*, 410 U.S. at 186.

## III. Plaintiffs Are Likely to Succeed on Their Dormant Commerce Clause Claim

The State ignores Plaintiffs' argument that the ammunition scheme regulates extraterritorially and is invalid per se. Mot. 21-22. Plaintiffs should thus prevail on this claim. In any event, because California's scheme "directly discriminate[s] against out-of-state entities," it "can survive only if the state demonstrates both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means." *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 736 (9th Cir. 2017), *cert. denied sub nom., Nationwide Biweekly Admin., Inc. v. Hubanks*, 138

S. Ct. 1698 (2018) (citing *Maine v. Taylor*, 477 U.S. 131, 138 (1986)). The State does not even attempt to make that showing. Instead, it argues that its scheme is not discriminatory because Vendors cannot *ship* ammunition directly to consumers either. Opp'n 22. But that is not the relevant inquiry.

The State does not dispute Plaintiffs' claims that Vendors may legally refuse to process third-party ammunition transfers, or that Vendors are, in fact, doing just that. Mot. 21 (citing Brady Decl. ¶¶ 8-9; Gilhousen Decl. ¶¶ 3-4; Wolgin Decl. ¶ 9). Nor does the State deny Plaintiffs' claim that a Vendor willing to process such a transaction may charge the purchaser any fee amount it wishes to do so. *Id*. In sum, in-state vendors have direct access to California consumers while out-of-state vendors do not. As this Court has already held "[w]hat is important is that California's resident businesses are the only businesses that may sell directly to ammunition consumers." Order Re: Defs.' Mot. Dismiss 6 (citing *Nationwide*, 873 F.3d at 737). The State urges this Court to reconsider its reading of *Nationwide*, arguing that it only "held that making incorporation under California law a prerequisite to obtain a state-issued license likely violated the Dormant Commerce Clause," and because California's scheme does not, the case is inapt. Opp'n 23. The Court should reject the State's reading. *Nationwide* held that a statute requiring a business to incorporate in California violates the Commerce Clause because it "requires any corporation that wants to engage in a certain kind of business within the state to become a resident." 873 F.3d at 736-37. The court was not concerned with the incorporation requirement per se, but that it required in-state residence. *Id.*, *see also Granholm v. Heald*, 544 U.S. 460, 472 (2005) ("The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States.")

## IV. Plaintiffs Are Irreparably Harmed by the Violation of Their Rights

Again, "the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.' " *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). So if the Court agrees that Plaintiffs are likely to succeed on the merits, preliminary relief is proper. The State's rebuttal is unpersuasive.

First, the State argues that Plaintiffs have not established irreparable harm because, unlike in the First Amendment context where "deprivation even from [sic] minimal periods of time constitutes irreparable injury," the deprivation of other fundamental rights apparently requires more. Opp'n at 23 (citing *Constructors Ass'n of W. Penn. v. Kreps*, 573 F.2d 811, 820 n.33 (3d Cir. 1978)). Because, according to the State, the Individual Plaintiffs can eventually purchase ammunition, there is no harm. But the State cites no Second Amendment case in which the court chose to treat the right differently from the First for purposes of finding irreparable harm. And it ignores those cases in which courts, including this one, have treated the deprivation of Second Amendment rights as irreparable. *See, e.g.*, *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1135 (S.D. Cal. 2017).[6]

The State's citation of *Constructors Association* hardly helps its cause. As the State itself quotes, the court there recognized that the denial of "equal protections rights may be more less serious depending on the other injuries which accompany such deprivation." Opp'n at 23 (quoting *Constructors*, 573 F.2d at 820 n.33). Here, the "other injuries" are no doubt severe—indeed, deprivation of access to ammunition could be deadly. As this Court held when it granted a preliminary injunction in *Duncan*, " '[t]he right to bear arms enables one to possess not only the means to defend oneself but also the self-confidence—and psychic comfort—that comes with knowing one could protect oneself if necessary.' . . . Loss of that peace of mind, the physical magazines, and the enjoyment of Second Amendment rights constitutes irreparable injury." 265 F. Supp. 3d at 1135 (quoting *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 150 (D.D.C. 2016)).

Second, the State claims that "Plaintiffs cannot establish irreparable harm under a dormant Commerce Clause theory because the law . . . has been in effect for over a year-and-a-half." Opp'n at 23-24. But, as the State obliquely admits, Opp'n at 24, "delay" in bringing a motion for preliminary injunction is merely "a factor to be considered," *Lydo*

[6] The State chooses to focus on the mere "minutes" it claims have been added to ammunition transactions. Opp'n 23. But it ignores the scenarios in which non-prohibited persons are being wrongly denied access to ammunition indefinitely. Mot. 9-10.

*Enterps., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984). Indeed, the Ninth Circuit held that it "would be loath to withhold relief solely on that ground." *Id.* at 1214 (noting that a five-year delay weakened claim of irreparable harm but was not dispositive). Here, the laws' effects changed dramatically when the State implemented its regulations last month, and the violation of Plaintiffs' constitutional rights worsened. The Court should not treat Plaintiffs' purported delay, alone, as reason to deny preliminary relief.

## V. The Balance of Harms and the Public Interest Tip in Plaintiffs' Favor

As for the balance of harms and public interest factors, the State complains that it "suffers irreparable injury whenever an enactment of its people or their representatives is enjoined." Opp'n 25 (quoting *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997)). That purported harm, however, cannot overcome the severe harm that the State's likely unconstitutional ammunition scheme imposes. To be sure, the Court should not exercise its authority to enjoin a "duly enacted" law lightly, but if a law violates the constitutional rights of the People, the Court properly enjoins it. *Ashcroft v. ACLU*, 542 U.S. 656, 664-65 (2004); *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014).

In their facial challenge, Plaintiffs object to a scheme that improperly denies thousands of people their right to acquire ammunition necessary for armed self-defense. The State speculates, but has not proved, that those thousands of people can take "minor steps" to overcome this violation of their rights. Opp'n 24. While preventing 106 prohibited persons from acquiring ammunition is a public good, Opp'n 24, when weighed against the (potentially deadly) harm of indefinitely denying access to thousands of *non*-prohibited persons, the balance of harms tips sharply in Plaintiffs' favor.

## CONCLUSION

For these reasons, Plaintiffs ask the Court to issue a preliminary injunction.

Dated: August 12, 2019

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**CERTIFICATE OF SERVICE**
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case Name: *Rhode, et al. v. Becerra*
Case No.: 3:18-cv-00802-JM-JMA

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, declare under penalty of perjury that I am a citizen of the United States over 18 years of age. My business address is 180 East Ocean Boulevard, Suite 200 Long Beach, CA 90802. I am not a party to the above-entitled action.

I have caused service of the following documents, described as:

**PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

on the following parties by electronically filing the foregoing on August 12, 2019, with the Clerk of the District Court using its ECF System, which electronically notifies them.

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I declare under penalty of perjury that the foregoing is true and correct. Executed August 12, 2019, at Long Beach, CA.

*s/ Laura Palmerin*
Laura Palmerin

**CERTIFICATE OF SERVICE**

I hereby certify that on April 30, 2020, an electronic PDF of DECLARATION OF SEAN A. BRADY IN SUPPORT OF APPELLEES' OPPOSITION TO APPELLANT'S EMERGENCY MOTION TO STAY ORDER GRANTING PRELIMINARY INJUNCTION PENDING APPEAL; MOTION TO VACATE ADMINISTRATIVE STAY was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

Date: April 30, 2020

**MICHEL & ASSOCIATES, P.C.**

s/ Sean A. Brady
Sean A. Brady
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