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10 IN THE UNITED STATES DISTRICT COURT  
 11 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

14 **Kim Rhode et al.,**

15 Plaintiffs,

16 v.

17 **Xavier Becerra, in his official capacity**  
 18 **as Attorney General of the State of**  
 19 **California, et al.,**

20 Defendants.

3:18-cv-00802-BEN-JLB

**DEFENDANT XAVIER  
 BECERRA'S OPPOSITION TO  
 PLAINTIFFS' MOTION FOR  
 PRELIMINARY INJUNCTION**

Date: August 19, 2019  
 Time: 10:30 a.m.  
 Dept: 5A  
 Judge: Hon. Roger T. Benitez  
 Action Filed: 4/27/2018

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## TABLE OF CONTENTS

	<b>Page</b>
Introduction.....	1
Background.....	2
I.    Before July 2019, Violent Criminals and Other Prohibited Persons Could, and Did, Purchase Ammunition from Legal Sources .....	2
II.   Proposition 63 Requires Eligibility Checks for Ammunition Purchases.....	4
III.  The Department of Justice Promulgated Regulations and Upgraded Its Dealer Record of Sale Entry System to Implement Ammunition Eligibility Checks .....	5
IV.  The Department Adopted New Identification Requirements for Purchasing Firearms and Ammunition. ....	7
V.   Ammunition Eligibility Checks Commenced on July 1, 2019.....	10
Legal Standard .....	11
Argument .....	11
I.    Plaintiffs Cannot Establish a Likelihood of Success on the Merits of Their Second Amendment Challenge. ....	11
A.  Intermediate Scrutiny Is the Appropriate Standard.....	12
B.  The Ammunition Eligibility Check Laws Satisfy Intermediate Scrutiny.....	13
1.  The Ammunition Eligibility Check Laws serve California’s substantial interest in public safety and crime prevention.....	14
2.  The Ammunition Eligibility Check Laws reasonably fit the public’s interest in protecting safety and reducing crime associated with unregulated ammunition sales.....	16
II.   Plaintiffs Cannot Establish a Likelihood of Success on the Merits of Their Dormant Commerce Clause Claim. ....	22
III.  Plaintiffs Have Not Shown Irreparable Harm.....	23
IV.  The Balance of Equities and the Public Interest Weigh Against Preliminary Injunctive Relief.....	24
Conclusion .....	25

1  
2  
3  
4  
5  
6  
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14  
15  
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17  
18  
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26  
27  
28

**TABLE OF AUTHORITIES**

**Page**

**CASES**

*Alliance for the Wild Rockies v. Cottrell*  
632 F.3d 1127 (9th Cir. 2011)..... 11

*Bauer v. Becerra*  
858 F.3d 1216 (9th Cir. 2017)..... 12, 13, 14

*Burford v. Sun Oil Co.*  
319 U.S. 315 (1943) ..... 25

*Carrico v. City & County of San Francisco*  
656 F.3d 1002 (9th Cir. 2011)..... 18

*Chem. Specialties Mfrs. Ass’n, Inc. v. Allenby*  
958 F.2d 941 (9th Cir. 1992)..... 17

*Coal. for Econ. Equity v. Wilson*  
122 F.3d 718 (9th Cir. 1997)..... 25

*Constructors Ass’n of W. Penna. v. Kreps*  
573 F.2d 811 (3d Cir. 1978) ..... 23

*District of Columbia v. Heller*  
554 U.S. 570 (2008) ..... 11, 12, 15, 22

*Draper v. Healey*  
98 F. Supp. 3d 77 (D. Mass. 2015)..... 12

*Dymo Indus., Inc. v. Tapeprinter, Inc.*  
326 F.2d 141 (9th Cir. 1964)..... 20

*Heller v. District of Columbia*  
670 F.3d 1244 (D.C. Cir. 2011) (*Heller II*)..... 15

*Heller v. District of Columbia*  
801 F.3d 264 (D.C. Cir. 2015) (*Heller III*)..... 13

*Jackson v. City & County of San Francisco*  
746 F.3d 953 (9th Cir. 2014)..... *passim*

**TABLE OF AUTHORITIES**

**(continued)**

	<b><u>Page</u></b>
1	
2	
3	
4	
5	
6	
7	
8	
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10	
11	
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28

**TABLE OF AUTHORITIES**

(continued)

**Page**

*Silvester v. Harris*  
843 F.3d 816 (9th Cir. 2016) ..... 12, 13, 17, 19

*Spokeo, Inc. v. Robins*  
136 S. Ct. 1540 (2016) ..... 18

*Teixeira v. County of Alameda*  
873 F.3d 670 (9th Cir. 2017) (en banc) ..... 11, 12, 22

*Tracy Rifle & Pistol LLC v. Harris*  
118 F. Supp. 3d 1182 (E.D. Cal. 2015) ..... 24

*United States v. Salerno*  
481 U.S. 739 (1987) ..... 17, 22

*W. Mining Council v. Watt*  
643 F.2d 618 (9th Cir. 1981) ..... 18

*Wash. State Grange v. Wash. State Republican Party*  
552 U.S. 442 (2008) ..... 17

*Winter v. Nat. Res. Def. Council, Inc.*  
555 U.S. 7 (2008) ..... 11

**FEDERAL STATUTES**

18 United States Code  
§ 922 (d)(5)(A) ..... 8  
§ 922 (g)(5)(A) ..... 8

Federal REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231,  
§ 201(c)(1)(B)..... 8  
§ 202(a)(1) ..... 8  
§§ 201-202 ..... 8, 9

**FEDERAL REGULATIONS**

6 Code of Federal Regulations  
§ 37.5(b)..... 21

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
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**TABLE OF AUTHORITIES**  
**(continued)**

**Page**

27 Code of Federal Regulations

§ 478.11 ..... 20, 21

**CALIFORNIA STATUTES**

Penal Code

§ 30000 ..... 6

§ 30312 ..... 22

§ 30312(a)(1) ..... 24

§ 30312(b)..... 22

§ 30352 ..... 1, 5, 15

§ 30352(a)..... 7

§ 30352(a)(2) ..... 8

§ 30355 ..... 15

§ 30370 ..... 1

§ 30370(g)..... 5

Vehicle Code

§ 12801.5(a)..... 8

§ 12801.5(b)..... 8

§ 12801.9 ..... 8

Assembly Bill (AB) 60, Stats. 2013, Ch. 524 ..... 8

Senate Bill 1235 (2016 Cal. Stat., ch. 55) ..... 4

**CALIFORNIA REGULATIONS**

California Code of Regulations Title 11

§ 4045.1 ..... 10, 18, 20, 24

§ 4045.1(b)..... 10

§ 4301(i) ..... 6

§ 4301(m) ..... 6

§ 4302(a)-(b)..... 6

§ 4302(c)..... 6

§ 4303 ..... 7

§ 4305 ..... 7

§ 4308(c)(2) ..... 7

1  
2  
3  
4  
5  
6  
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**TABLE OF AUTHORITIES**

**(continued)**

**Page**

California Code of Regulations Title 13

§ 15.00(a)..... 10, 20

§ 16.04-08..... 20

§ 17.02(b)..... 10, 20

**MUNICIPAL CODES**

L.A., Cal., Mun. Code

§ 55.11 ..... 2

Sacramento City Code

§ 5.66 ..... 2

§ 5.66.040 ..... 3

§ 5.66020 ..... 2, 3

**COURT RULES**

Federal Rules of Civil Procedure, Rule 15(c) ..... 18

**OTHER AUTHORITIES**

11A Charles Alan Wright et al., Federal Practice and Procedure

§ 2948.1 (3d ed.)..... 24

**INTRODUCTION**

1  
2 Proposition 63 enacted ammunition eligibility check laws that work. In the  
3 first month these laws were in effect, they stopped over 100 prohibited persons  
4 from purchasing ammunition in California. And countless other prohibited persons  
5 were likely deterred from even trying to purchase ammunition that they cannot  
6 lawfully possess. These reasonable and effective public safety laws should not be  
7 enjoined while this lawsuit proceeds.

8 Plaintiffs are not entitled to the broad relief they seek here—a court order  
9 enjoining enforcement of the Ammunition Eligibility Check Laws (Cal. Pen. Code  
10 §§ 30352, 30370, and their implementing regulations) in all of their applications.  
11 Plaintiffs do not claim that they have been unable to buy ammunition, or even that  
12 they have experienced substantial delays. Instead, they rely on imprecise estimates  
13 of nonparty ammunition vendors to outline a handful of burdens that no Plaintiff  
14 has experienced. These anecdotal reports, however, do not establish a  
15 constitutional violation. As a matter of law, there is a reasonable fit between the  
16 Ammunition Eligibility Check Laws and California’s compelling public safety  
17 interest: they prevent criminals from buying ammunition at gun shops, sporting  
18 goods stores, and other lawful vendors. And the burden on the average ammunition  
19 purchaser is minimal: about five minutes and a \$1 transaction fee.

20 Plaintiffs also cannot meet their burden to establish the other preliminary  
21 injunction factors. Their claimed irreparable harm relies solely on their arguments  
22 on the merits, and fails for the same reasons—and, as to their dormant Commerce  
23 Clause claim, also fails because they delayed over a year-and-a-half to bring the  
24 motion. The balance of the equities and public interest both weigh against  
25 enjoining enforcement of laws that are actively stopping dangerous people from  
26 purchasing ammunition. The short wait imposed by the eligibility checks does not  
27 offset that public good.

28 This Court should therefore deny Plaintiffs’ motion.



## BACKGROUND

### I. BEFORE JULY 2019, VIOLENT CRIMINALS AND OTHER PROHIBITED PERSONS COULD, AND DID, PURCHASE AMMUNITION FROM LEGAL SOURCES

The evidence shows that, in the absence of eligibility checks like the ones challenged here, prohibited persons regularly purchase ammunition from unwitting vendors.

Los Angeles and Sacramento have both enacted ordinances regulating the sale of ammunition within their borders. Los Angeles adopted its ordinance in 1998. L.A., Cal., Mun. Code, § 55.11 (1998). That ordinance requires purchasers to provide identification, address, birth date, and a thumbprint, and requires vendors to keep logs of purchasers' information, the date of each sale, and the type and quantity of ammunition sold. *Id.* A group of researchers working with the United States Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), studied the data for ammunition sales by vendors in the San Fernando Valley over a two-month period in 2004. Req. for Judicial Notice in Supp. of Def.'s Opp'n to Pls.' Mot. for Prelim. Inj. (Def. RJN), Ex. 1 at 309. The data included "2031 purchasers who made 2540 transactions that resulted in the sale of 4823 boxes of ammunition" totaling over 435,000 rounds. *Id.* Of these transactions, 2.8% were made by prohibited persons accounting for 2.3% of the ammunition sold (or 10,050 rounds). *Id.* at 310. The numbers reflecting sales to prohibited persons may have been low, however, because the businesses studied were not located near the "high crime" area of the city, which had the highest homicide rate. *See id.* at 309. Law enforcement agencies believed that ammunition in that area came largely from the nearly one dozen vendors located just outside the city limits that were not documenting the purchases because they were not subject to the ordinance. *Id.*

In 2007, Sacramento enacted a similar ammunition sales ordinance. Sacramento, Cal., City Code, ch. 5.66. The law requires ammunition vendors to

1 maintain logs that record all ammunition sales. *Id.* § 5.66020. At the time of sale,  
2 purchasers must provide, and vendors must record, information similar to that  
3 required by the Los Angeles ordinance, including the purchaser's name, address,  
4 and ID number, and the brand, type, and quantity of ammunition sold. *Id.*  
5 Purchasers must also submit a thumbprint. *Id.* Vendors must then submit the  
6 information electronically to the Sacramento Police Department. *Id.* § 5.66.040.

7 In August 2008, the Sacramento Police Department prepared a report for the  
8 City Council on the effectiveness of the ordinance. Def. RJN, Ex. 2. The report  
9 explained that the data collected "has allowed the Department to identify and  
10 investigate offenders involved in firearm-related crimes." *Id.* at 4. It noted that the  
11 "rate of detection of criminal violators has proven to be higher than originally  
12 expected." *Id.* It then provided data for 2,250 purchasers over a six month period.  
13 *Id.* at pdf p. 6.

14 Seventy-four purchasers, 3.2% of the total, were prohibited from possessing a  
15 firearm or ammunition. *Id.* at pdf p. 8. Sixty-one of those purchasers had felony  
16 convictions. *Id.* And, of those, 21 had violent felony convictions. *Id.* The data led  
17 state prosecutors to file felony charges against 53 people, and federal prosecutors to  
18 file seven indictments. *Id.* at pdf pp. 13-14. The data also provided probable cause  
19 for 28 search warrants, which uncovered evidence of additional crimes, including  
20 additional unlawfully possessed ammunition, firearms, illegal drugs, and stolen  
21 property. *Id.* at pdf pp. 16-17. Pictures of seized firearms show what appear to be  
22 high-capacity magazines, including two drum magazines, and assault rifles. *Id.* at  
23 pdf p. 19.

24 Evidence from other jurisdictions also shows that unregulated ammunition  
25 sales contribute to crime. In 2007, New Jersey's State Commission on  
26 Investigation issued a report titled *Armed and Dangerous: Guns, Gangs and Easy*  
27 *Access to Firearms Ammunition in New Jersey*. Def. RJN, Ex. 3. The Commission  
28 gathered evidence regarding ammunition and crime and heard testimony from law

1 enforcement experts on the subject. At a 2006 hearing, Chris Christie, then the  
 2 United States Attorney for New Jersey, told the Commission that it was performing  
 3 a “great service” by looking into the problem of ammunition, saying “you’re only  
 4 dealing with half the problem when you’re dealing with the gun issue.” *Id.* at 17.  
 5 State law enforcement officials testified that it was “not unusual to find caches of  
 6 commercially-purchased ammunition during searches of property linked to criminal  
 7 suspects.” *Id.* at 18. They gave an example of a person with an outstanding  
 8 warrant who was stopped with ammunition in a bag “bearing the name of a  
 9 prominent sporting goods store along with what appeared to be a handwritten  
 10 ammunition shopping list.” *Id.* Officials later determined that he was purchasing  
 11 the ammunition at the behest of a high-ranking member of the Bloods, a prominent  
 12 street gang. *Id.*

13 The Commission found evidence that gang members lawfully purchased  
 14 ammunition that was later used in crimes, including homicides. *Id.* at 3. And it  
 15 found that “purchases of ammunition by convicted felons are widespread.” *Id.* As  
 16 an example, it cited one store where “more than 15,000 rounds of handgun  
 17 ammunition were sold to 42 convicted felons over one four-year period.” *Id.* A  
 18 survey of 60 retail outlets spanning 19 of New Jersey’s 21 counties uncovered that  
 19 43 had “sold handgun ammunition to individuals with criminal records.” *Id.* at 2.

## 20 **II. PROPOSITION 63 REQUIRES ELIGIBILITY CHECKS FOR AMMUNITION** 21 **PURCHASES.**

22 Prop. 63 introduced “reasonable and common-sense reforms” to California’s  
 23 gun laws while “safeguarding the Second Amendment rights of all law-abiding,  
 24 responsible Californians.” Prop. 63 § 3.1.<sup>1</sup> The voters found that these reforms  
 25 were necessary because gun violence kills or seriously injures thousands of

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26 <sup>1</sup> Before the November 2016 election, the California Legislature enacted  
 27 Senate Bill 1235 (2016 Cal. Stat., ch. 55). That law prospectively amended aspects  
 28 of Prop. 63. References to Prop. 63 are to the law as amended. This Court has  
 taken judicial notice of the Proposition 63 voter guide in this case. *Rhode v.*  
*Becerra*, 342 F. Supp. 3d 1010, 1012 (S.D. Cal. 2018).

1 Californians each year, “destroy[ing] lives, families and communities.” Prop. 63  
2 §§ 2.1-2.4. Loopholes in the State’s gun safety laws permitted violent felons and  
3 other persons prohibited from possessing firearms and ammunition to perpetuate  
4 gun violence. Prop. 63 §§ 2.5-2.8.

5 One of the most significant of these regulatory gaps allowed people who could  
6 not pass a firearms background check to purchase ammunition from a gun shop,  
7 sporting goods store, or other lawful vendor. Prop. 63 §§ 2.6-2.7. Recognizing that  
8 background checks for firearms blocked 82,000 purchases by felons in 2012 alone,  
9 the voters decided that the law should “require background checks for ammunition  
10 sales just like gun sales[.]” Prop. 63 §§ 2.6-2.7. Prop. 63 amended the California  
11 Penal Code to close the loophole, and regulate the sale or transfer of ammunition.  
12 As of July 1, 2019, licensed ammunition vendors must conduct eligibility checks  
13 before selling or transferring ammunition to a buyer in California. Cal. Pen. Code  
14 §§ 30352, 30370.

15 **III. THE DEPARTMENT OF JUSTICE PROMULGATED REGULATIONS AND**  
16 **UPGRADED ITS DEALER RECORD OF SALE ENTRY SYSTEM TO**  
17 **IMPLEMENT AMMUNITION ELIGIBILITY CHECKS**

18 Prop. 63 authorizes the Department to promulgate regulations to implement  
19 the eligibility check requirement. Cal. Pen. Code § 30370(g). The Department  
20 started the rulemaking process in 2018. The new regulations were outlined in a  
21 Notice of Proposed Rulemaking. Decl. of Mayra G. Morales in Supp. of Def.’s  
22 Opp’n to Pls.’ Mot. for Prelim. Inj. (Morales Decl.) Ex. 1. The notice discussed  
23 four types of eligibility checks: (1) a “Standard Ammunition Eligibility Check” for  
24 people with entries in the State’s Automated Firearms System (AFS); (2) a “Basic  
25 Ammunition Eligibility Check” for people without an entry in AFS or a Certificate  
26 of Eligibility (COE); (3) a “Firearms Eligibility Check” for ammunition purchased  
27 at the same time as a firearm; and (4) a verification process for COE holders to  
28 purchase ammunition (COE Verification Check). *See* Morales Decl. ¶ 14.

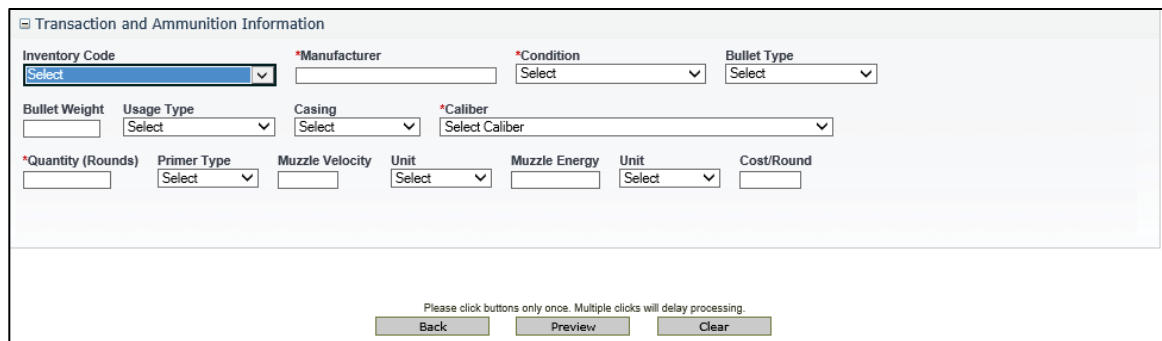
1 The Department invited written comments and held public hearings on the  
 2 proposed regulations in Sacramento and Los Angeles in January 2019. Morales  
 3 Decl. ¶¶ 9-10. In response to the comments it received, the Department revised the  
 4 proposed regulations in April 2019 and re-submitted them for another round of  
 5 public comment. *Id.* ¶ 11. The regulations became final on June 24, 2019. *Id.*  
 6 ¶ 13.

7 The regulations establish the procedures for each type of eligibility check. A  
 8 Standard Ammunition Eligibility Check costs \$1 and allows a person to purchase  
 9 ammunition if their information matches an AFS entry and does not match an entry  
 10 in the Prohibited Armed Persons File established by Penal Code section 30000.  
 11 Cal. Code Regs., tit. 11, §§ 4302(a)-(b), 4301(m). To perform the check, an  
 12 ammunition vendor submits the purchaser’s “name, date of birth, current address,”  
 13 and ID number to the Department electronically via the “Dealer Record of Sale  
 14 Entry System” or “DES” website. *Id.* §§ 4302(c), 4301(i); *see also* Morales Decl.  
 15 ¶¶ 16-24. Submitting a buyer’s information via the DES website involves a series  
 16 of steps that the Department outlined, among other places, in a June 2019 bulletin  
 17 to ammunition vendors. Morales Decl., Ex. 5. After accessing the DES website,  
 18 logging in, and navigating a dropdown menu, the vendor scans the purchaser’s ID  
 19 using a magnetic card swipe reader to populate the majority of the following fields:

1 *Id.* at 3. The vendor then selects the preview button to review the information, and,  
 2 if the information is accurate, submits it to the Department. *Id.* at p. 4. Once the  
 3 information has been submitted, the vendor can review the results of the eligibility  
 4 check. *Id.* at 5. An approval will come with an “Eligibility Check DROS number”  
 5 and remains valid for 18 hours. *Id.* at 8, 13.

6 To complete the transaction, the vendor confirms the purchaser’s identification  
 7 and verifies the approval using the Eligibility Check DROS number. *Id.* at 8. The  
 8 vendor then enters information about the ammunition being sold in the following  
 9 fields:

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16 *Id.*; *see also* Cal. Code Regs., tit. 11, § 4308(c)(2); Cal. Penal Code § 30352(a).  
 17 After completing the mandatory fields marked by red asterisks, the vendor finalizes  
 18 the transaction by printing out the record of sale, signing it, having the purchaser  
 19 sign it, and then storing the hardcopy record. Morales Decl., Ex. 5 at 11.

20 The process for COE Verification Checks is similar. *See* Cal. Code Regs., tit.  
 21 11, § 4305; *see also* Morales Decl. ¶¶ 27-29. The Basic Ammunition Eligibility  
 22 Check for a single transaction or purchase involves a manual review by Department  
 23 staff, costs more (\$19), may take several days, and is valid for 30 days after  
 24 approval. *Id.* § 4303; Morales Decl. ¶ 26.

25 **IV. THE DEPARTMENT ADOPTED NEW IDENTIFICATION REQUIREMENTS**  
 26 **FOR PURCHASING FIREARMS AND AMMUNITION.**

27 Federal law prohibits certain categories of non-citizens from purchasing or  
 28 possessing a firearm or ammunition, including anyone who is “illegally or

1 unlawfully in the United States.” 18 U.S.C. § 922 (d)(5)(A), (g)(5)(A). California  
2 law requires a prospective ammunition purchaser to provide a driver’s license or  
3 identification card (hereafter referred to interchangeably as IDs), as part of the  
4 eligibility check process. Cal. Pen. Code § 30352(a)(2).

5 Proof of lawful presence in the United States is ordinarily required to obtain a  
6 California ID. Cal. Veh. Code §§ 12801.5(a), (b). In 2013, however, the  
7 Legislature enacted Assembly Bill (AB) 60, Stats. 2013, Ch. 524, which permits  
8 persons who cannot provide proof of lawful presence in the United States to obtain  
9 a California ID. Cal. Veh. Code § 12801.9. When the California Department of  
10 Motor Vehicles first began issuing AB 60 IDs in 2015, they were distinguishable  
11 from regular California IDs, by the notation “FEDERAL LIMITS APPLY” (FLA)  
12 imprinted on the front. *See, e.g.*, Morales Decl., Ex. 10 at 1; *id.*, Ex. 12 at 3.

13 After the AB 60 IDs became available, the ATF issued a letter to all federally  
14 licensed firearms dealers stating that because California’s AB 60 IDs are “only  
15 issued to a person who cannot provide proof of lawful presence in the United  
16 States,” there is “reasonable cause to believe a potential transferee in possession of  
17 an AB [60] driver license is illegally or unlawfully in the United States and  
18 prohibited from receiving or possessing firearms or ammunition. As such, you may  
19 not transfer firearms or ammunition to the person . . . .” Morales Decl., Ex. 10.

20 In January 2018, DMV began issuing IDs in compliance with the federal  
21 REAL ID Act of 2005. Pub. L. No. 109-13, 119 Stat. 231, §§ 201-202. That law  
22 sets minimum security standards for the issuance and production of IDs.<sup>2</sup> As part  
23 of its REAL ID implementation, DMV began offering two forms of visually  
24 distinct IDs: a REAL ID compliant version, which has a golden bear and star in the

25 \_\_\_\_\_  
26 <sup>2</sup> The REAL ID Act provides that “[b]eginning 3 years after the date of the  
27 enactment of this division, a Federal agency may not accept, for any official  
28 purpose, a driver’s license or identification card issued by a State to any person  
unless the State is meeting the requirements of this section.” 119 Stat. 231 at  
§ 202(a)(1). The Act sets minimum standards for states issuing compliant IDs,  
including evidence of lawful status. *Id.* at § 201(c)(1)(B).

1 top right corner; and a federal non-compliant version, which has the words  
2 “FEDERAL LIMITS APPLY” in the top right corner. Morales Decl., Ex. 12 at 3.  
3 The federal non-compliant version is issued to both: (1) individuals applying under  
4 AB 60; and (2) individuals who chose not to apply for a REAL ID. *See* Morales  
5 Decl. ¶ 37.

6 Following this change, ATF withdrew its earlier guidance on AB 60 licenses  
7 and identification cards. ATF later provided informal guidance on federal non-  
8 compliant licenses in an e-mail to the law firm representing Plaintiffs in this case.  
9 That e-mail states that firearms dealers ““may consider asking for additional  
10 documentation (e.g., passport) so that the transfer is not further delayed.”” Brady  
11 Decl., Ex. 37 at 4 & n.7 (quoting ATF e-mail), ECF NO. 32-2. The National Rifle  
12 Association (NRA) then issued a March 2018 alert, advising firearms dealers to ask  
13 for “additional documentation” if the dealer has “cause to believe the individual  
14 using one of these licenses may be prohibited from possessing firearms,” and that  
15 “Californians who want to make sure they have zero problems purchasing a firearm  
16 in the future may want to consider applying for and acquiring a REAL ID through  
17 the DMV.” Morales Decl., Ex. 9.

18 In November 2018, the Department issued guidance consistent with the ATF  
19 and NRA’s guidance, suggesting that firearms dealers “may wish to consider asking  
20 for documentation of lawful presence in the United States” from prospective  
21 purchasers presenting an FLA ID. Def. RJN, Ex. 4. The Department  
22 simultaneously issued a consumer alert, advising California residents with FLA IDs  
23 that a firearms dealer may require additional documentation for firearms purchases.  
24 Def. RJN, Ex. 5.

25 The Department concluded that its voluntary guidance (which was not  
26 uniformly observed by vendors) was insufficient to address the threat to public  
27 safety from potential sales of firearms and ammunition to prohibited persons.  
28 Morales Decl., Ex. 8 at 4-5. The Department thus promulgated a new regulation



1 requiring firearms and ammunition purchasers presenting an FLA ID to also present  
2 additional proof of lawful presence. Cal. Code Regs. tit. 11, § 4045.1. That  
3 regulation took effect on July 1, 2019.

4 The new regulation's list of acceptable documents for additional proof of  
5 lawful presence is identical in substance to the list of documents in the voluntary  
6 guidance that preceded it, which in turn was drawn from the list of documents  
7 required when applying for a California ID, other than one issued under AB 60.  
8 *Compare* Cal. Code Regs. tit. 11, § 4045.1(b) *with* Cal. Code Regs. tit. 13,  
9 §§ 15.00(a), 17.02(b).

#### 10 **V. AMMUNITION ELIGIBILITY CHECKS COMMENCED ON JULY 1, 2019.**

11 The Department's DES started processing ammunition eligibility checks on  
12 July 1, 2019. Morales Decl. ¶ 46. During its first month, the system processed  
13 over 62,000 transactions, and denied over 100 ammunition transactions by  
14 prohibited persons. *Id.* ¶¶ 48-49. Of the over 57,000 Standard Ammunition  
15 Eligibility Checks processed, roughly 46,700 were approved. *Id.* ¶ 50. Over 850  
16 COE Verification Checks and over 3,500 Basic Ammunition Eligibility Checks  
17 were processed as well. *Id.* ¶¶ 51-52.

18 The average processing time for a Standard Ammunition Eligibility Check  
19 (measured by the time between when the vendor submits the eligibility check and  
20 when the vendor hits the "Deliver" button in DES) was just under five minutes for  
21 the first month. *Id.* ¶¶ 55, 57. It took the system, on average, less than a second to  
22 determine whether the purchaser was eligible. *Id.* ¶¶ 53-54.

23 During the first week of operation, the Department's Customer Support Center  
24 experienced a spike in calls, which dropped significantly in the following weeks.  
25 *Id.* ¶¶ 70-73. The Department also received notice of some technical issues with  
26 DES. *Id.* ¶ 73. For instance, purchasers who had more than two first names were  
27 experiencing delays. The Department has since resolved this issue, and is in the  
28 process of addressing other issues as well. *Id.* ¶¶ 73-74.

## LEGAL STANDARD

1  
2 “A preliminary injunction is an extraordinary remedy never awarded as of  
3 right.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Plaintiffs  
4 seeking an injunction must establish that: (1) their claims are likely to succeed on  
5 the merits; (2) they will likely suffer irreparable harm in the absence of preliminary  
6 relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the  
7 public interest. *Id.* at 20. Alternatively, “[a] preliminary injunction is appropriate  
8 when a plaintiff demonstrates that serious questions going to the merits were raised  
9 and the balance of hardships tips sharply in the plaintiff’s favor.” *Alliance for the*  
10 *Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (internal citation  
11 omitted). Plaintiffs must make a showing of all four *Winter* factors, even under the  
12 alternative sliding scale test. *Id.* at 1132, 1135.

## ARGUMENT

### I. PLAINTIFFS CANNOT ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR SECOND AMENDMENT CHALLENGE.

13  
14  
15 In *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), the Supreme  
16 Court held that “the Second Amendment protects the right to possess a handgun in  
17 the home for the purpose of self-defense.” *McDonald v. Chicago*, 561 U.S. 742,  
18 791 (2010). “*Heller* indicated that the Second Amendment does not preclude  
19 certain ‘longstanding prohibitions’ and ‘presumptively lawful regulatory measures,’  
20 such as . . . ‘laws imposing conditions and qualifications on the commercial sale of  
21 arms[.]’” *Jackson v. City & County of San Francisco*, 746 F.3d 953, 959 (9th Cir.  
22 2014) (quoting *Heller*, 554 U.S. at 626-27 & n.26). To analyze a Second  
23 Amendment challenge, courts first ask whether a law burdens the Second  
24 Amendment at all; if it does, they will then determine the appropriate level of  
25 scrutiny. *Teixeira v. County of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017) (en  
26 banc).

1 “[C]ourts determine the appropriate level by considering (1) how close the  
 2 challenged law comes to the core of the Second Amendment right, and (2) the  
 3 severity of the law’s burden on that right.” *Bauer v. Becerra*, 858 F.3d 1216, 1221-  
 4 22 (9th Cir. 2017) (quotation marks omitted). This test “amounts to a sliding  
 5 scale.” *Id.* (quotation marks omitted). “A law that imposes such a severe  
 6 restriction on the fundamental right of self defense of the home that it amounts to a  
 7 destruction of the Second Amendment right is unconstitutional under any level of  
 8 scrutiny.” *Id.* (quotation marks omitted). “Further down the scale, a law that  
 9 implicates the core of the Second Amendment right and severely burdens that right  
 10 warrants strict scrutiny.” *Id.* “Otherwise, intermediate scrutiny is appropriate.” *Id.*

11 Prop. 63’s Ammunition Eligibility Check Laws are the kind of presumptively  
 12 lawful regulatory measures that the Supreme Court has said do not implicate the  
 13 Second Amendment. *See Jackson*, 746 F.3d at 959.<sup>3</sup> But even if they did implicate  
 14 the Second Amendment, these laws would be subject to, and satisfy, intermediate  
 15 scrutiny.

#### 16 **A. Intermediate Scrutiny Is the Appropriate Standard.**

17 Intermediate scrutiny applies to the Ammunition Eligibility Check Laws  
 18 because they “regulate only the ‘*manner* in which persons may exercise their  
 19 Second Amendment rights’” and are thus “less burdensome than those which bar  
 20

21 <sup>3</sup> The ammunition eligibility check process constitutes a permissible  
 22 condition or qualification on the commercial sale of arms. *See Heller*, 554 U.S.  
 23 at 626-27 & n. 26. It imposes requirements similar to other laws that judges and  
 24 courts have found do not implicate the Second Amendment, such as firearms  
 25 background checks, zoning ordinances that affect firearms dealers, and consumer  
 26 protection requirements, such as load indicators. *See Silvester v. Harris*, 843 F.3d  
 27 816, 830 (9th Cir. 2016) (Thomas, C.J., concurring) (firearms background check  
 28 and waiting requirements); *Teixeira*, 873 F.3d at 690 (Owens, J., concurring)  
 (zoning restrictions); *Draper v. Healey*, 98 F. Supp. 3d 77, 85 (D. Mass. 2015)  
 (load indicator and magazine safety disconnect requirements in handguns).  
 Because Plaintiffs’ claim fails under the intermediate scrutiny standard, this Court  
 need not reach this question. *See, e.g., Pena v. Lindley*, 898 F.3d 969, 977 (9th Cir.  
 2018) (noting numerous cases where Ninth Circuit had assumed without deciding  
 that a law burdened the Second Amendment and doing the same).

1 firearm possession completely.”<sup>4</sup> *See Silvester*, 843 F.3d at 827 (quoting *United*  
 2 *States v. Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013)). The Ammunition  
 3 Eligibility Check Laws do not prevent law-abiding people who are permitted to  
 4 possess ammunition from purchasing it, and thus does not implicate “the core  
 5 Second Amendment right of ‘self defense of the home.’” *Pena*, 898 F.3d at 977  
 6 (quoting *Silvester*, 843 F.3d at 821). The Ninth Circuit has analyzed similar laws  
 7 under intermediate scrutiny. *See Silvester*, 843 F.3d at 827 (10-day waiting period  
 8 for firearm purchases); *Jackson*, 746 F.3d at 964 (law requiring handguns to be  
 9 stored in a locked safe or with a trigger lock when not carried on the person and law  
 10 banning the sale of hollow-point bullets); *Bauer*, 858 F.3d at 1222 (“[W]e have  
 11 repeatedly applied intermediate scrutiny in cases where we have reached this  
 12 step.”); *see also Heller v. District of Columbia*, 801 F.3d 264, 275 (D.C. Cir. 2015)  
 13 (*Heller III*) (applying intermediate scrutiny to Washington D.C.’s firearms  
 14 registration law, which required an in-person appearance, fingerprinting, and  
 15 photographing).

16 **B. The Ammunition Eligibility Check Laws Satisfy Intermediate**  
 17 **Scrutiny.**

18 The intermediate scrutiny “test is not a strict one.” *Silvester*, 843 F.3d at 827.  
 19 “Intermediate scrutiny requires (1) a significant, substantial, or important  
 20 government objective, and (2) a ‘reasonable fit’ between the challenged law and the  
 21 asserted objective.” *Pena*, 898 F.3d at 979. It does not require the fit between the  
 22 challenged regulation and the stated objective to be perfect, nor does it require that  
 23 the regulation be the least restrictive means of serving the interest. *Jackson*, 746  
 24 F.3d at 969. Rather, the government “must be allowed a reasonable opportunity to  
 25 experiment with solutions to admittedly serious problems.” *Id.* at 969-70 (quoting  
 26 *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986)). Courts do not

27 \_\_\_\_\_  
 28 <sup>4</sup> Despite a perfunctory argument to the contrary, Plaintiffs appear to concede that intermediate scrutiny applies. *See Pls.’ Br.* 13:9-17.

1 look to evidence “in the technical sense” because “legislatures are not obligated,  
2 when enacting their statutes, to make a record of the type that an administrative  
3 agency or court does to accommodate judicial review[.]” *Pena*, 898 F.3d at 979  
4 (quotation marks omitted).

5 California has a substantial interest in increasing public safety and preventing  
6 crime, and the Ammunition Eligibility Check Laws, which prevent convicted felons  
7 and other prohibited persons from purchasing ammunition, is a reasonable fit to  
8 address that interest. *See* Prop. 63 §§ 2.7-2.8, 3.2-3.3.

9 **1. The Ammunition Eligibility Check Laws serve California’s**  
10 **substantial interest in public safety and crime prevention.**

11 Prop. 63 was intended to “keep ammunition out of the hands of convicted  
12 felons, the dangerously mentally ill, and other persons who are prohibited by law  
13 from possessing firearms and ammunition.” Prop. 63 § 3.2. The voters declared  
14 that “[w]e should require background checks for ammunition sales just like gun  
15 sales, and stop both from getting into the hands of dangerous individuals.” Prop. 63  
16 § 2.7. Thus, the purpose of the law was to protect public safety and prevent crime,  
17 which are undeniably substantial government interests. *See, e.g., Pena*, 898 F.3d  
18 at 981-82 (“public safety and crime prevention . . . are substantial government  
19 interests”). As the Ninth Circuit has recognized, “public safety is advanced by  
20 keeping guns out of the hands of people who are most likely to misuse them[.]”  
21 *Bauer*, 858 F.3d at 1223. The same holds true for keeping ammunition out of the  
22 hands of violent felons and other prohibited persons. *Cf. Jackson*, 746 F.3d at  
23 p. 967 (equating ammunition to firearms for Second Amendment analysis).

24 Compelling evidence demonstrates the danger to public safety and criminal  
25 activity associated with unregulated ammunition sales. The experiences of Los  
26 Angeles and Sacramento show that prohibited persons purchase ammunition in gun  
27 stores—and that they constitute about 3% of all purchasers. Def. RJN, Ex. 1 at  
28 310; Def. RJN, Ex. 2 at pdf p. 8. In Sacramento, these prohibited purchasers

1 included violent felons who drew the interest of state and federal prosecutors. *See*  
2 Def. RJN, Ex. 2 at pdf pp. 13-17. California’s experiences are confirmed by the  
3 report of New Jersey’s State Commission on Investigation. Def. RJN, Ex. 3.  
4 Among other things, the Commission found that “purchases of ammunition by  
5 convicted felons are widespread.” *Id.* at 3.

6 Plaintiffs do not dispute the substantial public interest in preventing dangerous  
7 people from purchasing ammunition. *See* Pls.’ Br. 14:3. Instead, they urge this  
8 Court to use a standard that the Ninth Circuit has implicitly rejected. They argue  
9 that California’s interest in ammunition background checks cannot be substantial  
10 because “only one other state in the country has adopted an ammunition scheme  
11 even remotely comparable to California’s[.]” Pls.’ Br. 14:6-11 (citing *Heller v.*  
12 *District of Columbia*, 670 F.3d 1244, 1294 (D.C. Cir. 2011) (*Heller II*)  
13 (Kavanaugh, J., dissenting).) If this were the standard, states would be prevented  
14 from innovating and experimenting with new ways to address, for example, “the  
15 problem of handgun violence in this country[.]” *See Heller I*, 554 U.S. at 636. But  
16 this is not the proper standard, as the Ninth Circuit’s decision in *Pena* shows.  
17 Applying intermediate scrutiny, the court upheld California’s “microstamping  
18 requirement,” a law that was “the first of its kind,” and “an experimental solution to  
19 admittedly serious problems.” *Pena*, 898 F.3d at 984 (“[A] single courageous state  
20 may, if its citizens choose, serve as a laboratory, and try novel legislative  
21 experiments.” (internal alterations and quotation marks omitted)).<sup>5</sup>

22  
23 <sup>5</sup> Plaintiffs also contend that “the State has identified no interest in its  
24 maintaining records about what ammunition people purchase.” *See* Pls.’ Br. 15:82-  
25 16:14. But their motion does not seek to enjoin the data collection requirements in  
26 Penal Code sections 30352 and 30355. This may be because no Plaintiff would  
27 have standing to raise such a claim, because none is a licensed ammunition vendor.  
28 *See* FAC ¶¶ 11-22. The contention is also wrong. The data collection  
requirements advance California’s interest in public safety and crime prevention by  
providing evidence that law enforcement can use to solve crimes, including straw  
purchases. *See, e.g.*, Def. RJN, Ex. 2 at pdf pp. 13-14 (noting that ammunition  
ordinance had led to search warrants that uncovered additional crimes).

1 The remainder of Plaintiffs’ argument on the first prong of the intermediate  
2 scrutiny test mirrors their argument on the second prong, and it fails for the same  
3 reasons.

4 **2. The Ammunition Eligibility Check Laws reasonably fit the**  
5 **public’s interest in protecting safety and reducing crime**  
6 **associated with unregulated ammunition sales.**

7 In the first month of operation, the Ammunition Eligibility Check Laws have  
8 prevented over 100 prohibited persons from purchasing ammunition.<sup>6</sup> Morales  
9 Decl. ¶ 49. This evidence that persons prohibited from possessing firearms try to  
10 purchase ammunition in the commercial market is consistent with the experience of  
11 Sacramento and Los Angeles. Data collected following adoption of these  
12 municipal regulations of ammunition sales showed the frequency with which  
13 prohibited persons purchase ammunition. Def. RJN, Ex. 1 at 310; Def. RJN, Ex. 2  
14 at pdf p. 8. This evidence substantiates the voters’ finding that, before Prop. 63,  
15 “any violent felon or dangerously mentally ill person can walk into a sporting  
16 goods store or gun shop in California and buy ammunition, no questions asked.”  
17 Prop. 63 § 2.7. The number of people stopped from purchasing ammunition  
18 confirms their finding that “[w]e know background checks work,” and that  
19 ammunition background checks would “keep . . . ammunition out of the hands of  
20 convicted felons, the dangerously mentally ill, and other persons who are prohibited  
21 by law from possessing . . . ammunition.” Prop. 63 §§ 2.6, 3.2.

22 This “‘legislative history of the enactment as well as studies in the record’”  
23 demonstrates “a ‘reasonable fit between the government’s stated objective and the  
24 regulation’ considers.” *See Pena*, 898 F.3d 979 (quoting *Fyock v. Sunnyvale*, 779

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25 <sup>6</sup> This number does not include the undoubtedly large number of prohibited  
26 persons who, fearing arrest, avoided purchasing ammunition. Plaintiffs’ own  
27 declarants explain that many people, “after learning of the new requirements to  
28 purchase ammunition, [do] not wish to attempt an ammunition transaction.” Ortiz  
Decl. ¶ 15; Burwell Decl. ¶ 10; Puehse Decl. ¶ 12; Morgan Decl. ¶ 10; Bartel Decl.  
¶ 10; Lowder Decl. ¶ 10; Gray Decl. ¶ 10. This is a predictable and intended side-  
effect of eligibility checks. *See Pena*, 898 F.3d at 984 (recognizing that the  
Legislature may make predictive policy judgments).

1 F.3d 991, 1000 (9th Cir. 2017)). “The State is required to show only that the  
2 regulation ‘promotes a substantial government interest that would be achieved less  
3 effectively absent the regulation.’ *Silvester*, 843 F.3d at 829 (quoting *Fyock*, 779  
4 F.3d at 1000).) Undeniably, California’s efforts to prevent prohibited persons from  
5 purchasing ammunition would be less effective in the absence of the Ammunition  
6 Eligibility Check Laws. This kind of fit is similar to others that the Ninth Circuit  
7 has upheld as reasonable under intermediate scrutiny. It is no different from the fit  
8 between the 10-day waiting period and the cooling-off period in *Silvester*, 843 F.3d  
9 at 827-29. And it is less burdensome than the handgun storage requirement in  
10 *Jackson*, 746 F.3d at 966; *Silvester*, 843 F.3d at 827 (holding that “requiring an  
11 applicant to wait ten days before taking possession of [a] firearm” was less  
12 burdensome than the ordinances in *Jackson*).

13 Plaintiffs’ arguments to the contrary are unavailing. *See* Pls.’ Br. 16:26-20:6.  
14 Because they seek to enjoin enforcement of the Ammunition Eligibility Check  
15 Laws in all their applications, Plaintiffs “must establish that no set of circumstances  
16 exists under which the [regulation or statute] would be valid.” *See United States v.*  
17 *Salerno*, 481 U.S. 739, 745 (1987); *see also Chem. Specialties Mfrs. Ass’n, Inc. v.*  
18 *Allenby*, 958 F.2d 941, 943 (9th Cir. 1992). In other words, a plaintiff must show  
19 that the laws are unconstitutional in *all* of their applications. *See Wash. State*  
20 *Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). Where, as  
21 here, laws have a “plainly legitimate sweep,” a facial challenge must fail. *See id.* at  
22 449 (citation and internal quotations omitted). Given that tens of thousands of  
23 ammunition transactions were processed in July alone, *see* Morales Decl. ¶¶ 48, 50-  
24 52, Plaintiffs cannot satisfy this demanding standard.

25 Plaintiffs rely almost entirely on declarations by nonparty ammunition  
26 vendors. Plaintiffs use these declarations to support four incorrect contentions:  
27 (1) the laws are causing ammunition transactions to take too long; (2) the laws  
28 impose too big a burden on FLA ID holders, by requiring them to bring a second



1 form of identification; (3) the laws are resulting in too many rejections; and (4) the  
 2 laws are threatening the commercial viability of ammunition vendors. *See* Pls.’  
 3 Br. 14:22-19:22. As a preliminary matter, no Plaintiff complains that they have an  
 4 FLA ID, have had an ammunition eligibility transaction rejected, or are a licensed  
 5 ammunition vendor. Plaintiffs lack standing to challenge the purported burdens of  
 6 laws that do not apply to them.<sup>7</sup> *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548  
 7 (2016); *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1154 (9th Cir. 2000) (“When plaintiffs  
 8 seek to establish standing to challenge a law or regulation that is not presently being  
 9 enforced against them, they must demonstrate a realistic danger of sustaining a  
 10 direct injury as a result of the statute’s operation or enforcement.”); *see also*  
 11 *Libertarian Party of Eire Cty. v. Cuomo*, 300 F. Supp. 3d 424, 434 (W.D.N.Y.  
 12 2018) (“No court has held that an individual who applied for and received a  
 13 firearms license has standing to challenge the constitutional validity of the licensing  
 14 laws; indeed, courts have only found standing where the individual applied for a  
 15 license and was denied.”).<sup>8</sup>

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17  
 18 <sup>7</sup> To the extent Plaintiffs intend to argue that CRPA has associational  
 19 standing to bring claims on behalf of its members, *see* Travis Decl. ¶¶ 5-14, they  
 20 should fail for three reasons. First, the facts they rely on are not alleged in any  
 21 pleading. *See W. Mining Council v. Watt*, 643 F.2d 618 (9th Cir. 1981) (“[F]acts  
 22 demonstrating standing must be clearly alleged in the complaint.”). Second, even if  
 23 they had been, the CRPA’s statements are the sort of conclusory statements that the  
 court need not credit. *See, e.g., Carrico v. City & County of San Francisco*, 656  
 F.3d 1002, 1006 (9th Cir. 2011). And third, CRPA cannot meet the test for  
 associational standing, including showing that “neither the claim asserted nor the  
 relief requested requires the participation of individual members in the lawsuit.”  
*See San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1130-31 (9th Cir.  
 1996).

24 <sup>8</sup> Plaintiffs also appear to request that the new ID regulation be enjoined. *See*  
 25 Pls.’ Br. 14:22-15:15. In addition to the standing problem, this is not an  
 26 appropriate request for relief because “there must be a relationship between the  
 27 injury claimed in the motion for injunctive relief and the conduct asserted in the  
 28 underlying complaint.” *Pac. Radiation Oncology, LLC v. Queens Med. Ctr.*, 810  
 F.3d 631, 636 (9th Cir. 2015). Enjoining enforcement of section 4045.1 is not of  
 the same character as the relief requested in the FAC, which seeks an injunction  
 prohibiting the eligibility checks. *See* FAC ¶¶ 104-110 & Prayer for Relief ¶ 5.  
 Plaintiffs could have moved to supplement the FAC, but they did not. *See* Fed. R.  
 Civ. P. 15(c).

1 Beyond the threshold standing problem, Plaintiffs rely on weak evidence. The  
2 testimony of the nonparty declarants is unreliable because it is anecdotal, imprecise,  
3 and at odds with the Department’s program-wide and precise electronic evidence.

4 Most notable among the nonparty ammunition vendors’ claims is the  
5 boilerplate that “it takes on average 15-25 minutes to enter all of the information  
6 required into DES for a transaction involving more than one type of ammunition.”  
7 Burwell Decl. ¶ 8; Puehse Decl. ¶ 10; Morgan Decl. ¶ 8; Bartel Decl. ¶ 8; Lowder  
8 Decl. ¶ 8; Gray Decl. ¶ 8; *see also* Ortiz Decl. ¶¶ 10-11 (stating transactions take 5-  
9 20 minutes); McNab Decl. ¶ 26 (“[I]t now takes at least 20 minutes—often more—  
10 to process an ammunition transaction.”). Even if the average processing time were  
11 15-25 minutes, that would not make the fit unreasonable. Other laws imposing  
12 greater burdens have withstood intermediate scrutiny. *See, e.g., Silvester*, 843 F.3d  
13 at 827-29.

14 But it is unlikely that Plaintiffs’ anecdotal estimates are accurate. The  
15 Department’s electronic records show that across the over 42,000 Standard  
16 Ammunition Eligibility Checks that were approved in July, it took on average just  
17 under five minutes to process a transaction, from the point where the background  
18 check is submitted to the point where the vendor clicks the delivery button.  
19 Morales Decl. ¶¶ 55-58. Data on the nonparty declarants’ transactions shows that  
20 their own transactions take roughly the same amount of time on average. Morales  
21 Decl. ¶¶ 59-67. Many of these declarants averaged around three minutes. Morales  
22 Decl. ¶¶ 62-65. In addition, the one Individual Plaintiff who has offered testimony  
23 about her own experience purchasing ammunition seems to have significantly  
24 overestimated the transaction time.<sup>9</sup> *See* Morales Decl. ¶¶ 67-69.

25 <sup>9</sup> Plaintiff Welvang states that she purchased ammunition on July 13 and that  
26 the process took “nearly 30 minutes.” Welvang Decl. ¶ 4, ECF No. 32-6. But  
27 Department records show that it took about one minute from the time her  
28 background check was submitted to the time the vendor hit the delivery button.  
Morales Decl. ¶¶ 67-68. For her estimate to be correct, the vendor would have had  
to have spent over 25 minutes to pull the ammunition from the shelf, enter her

1 This conflict in the evidence counsels against issuing a preliminary injunction.  
 2 *See Dymo Indus., Inc. v. Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964)  
 3 (“[O]n application for preliminary injunction the court is not bound to decide  
 4 doubtful and difficult questions of law or disputed questions of fact.”).

5 Other deficiencies in Plaintiffs’ evidence of the burdens imposed by the  
 6 eligibility checks also counsel against issuing a preliminary injunction. Plaintiffs  
 7 contend that “countless people” are being prevented from purchasing ammunition  
 8 because they have FLA IDs. Pls.’ Br. 17:13. But they offer no evidence of this,  
 9 likely because presenting an approved form of additional documentation, such as a  
 10 passport, is an easy cure. *See* Cal. Code Regs. tit. 11, § 4045.1.<sup>10</sup> Requiring a  
 11 subset of purchasers to provide a second form of identification hardly makes the  
 12 Ammunition Eligibility Check Laws an unreasonable fit for the goal of keeping  
 13 ammunition out of the hands of prohibited persons.

14 Plaintiffs do not dispute that the purpose and effect of the identification  
 15 requirements is to prevent persons without lawful presence from purchasing  
 16 ammunition (or firearms) in violation of federal law. They nevertheless object that  
 17 the identification requirements are invalid because: (1) California issues the federal  
 18 non-compliant IDs “as a default and thus implicitly deems sufficient for all other  
 19 purposes,” except for “purchasing ammunition,” and (2) “the federal government  
 20 accepts [federal non-compliant] IDs as sufficient for its own purposes—including  
 21 to pass background checks to purchase a firearm.” Pls.’ Br. 15:8-11 (citing 27  
 22 C.F.R. § 478.11 and Plaintiffs’ Ex. 37).<sup>11</sup> Plaintiffs’ assertion that an FLA ID is  
 23 information into the background check fields, and print out the record of sale for  
 24 her signature. In addition, Department records show that Welvang made a second  
 25 purchase on July 13 from a different ammunition vendor. *Id.* ¶ 69. That  
 26 transaction, too, appears to have taken about a minute. Morales Decl. ¶ 69.

26 <sup>10</sup> Section 4045.1 lists the same type of documents that anyone must present  
 27 to get their first California ID. *See* Cal. Code Regs., tit. 13, §§ 15.00(a), 16.04-08,  
 28 17.02(b).

27 <sup>11</sup> The federal regulation Plaintiffs cite simply defines an “identification  
 28 document” as one that contains “the name, residence address, date of birth, and

1 sufficient for all purposes other than purchasing firearms or ammunition is simply  
2 incorrect. Under federal law, a REAL ID will be required to access federal  
3 facilities, including airport security checkpoints, starting on October 1, 2020. 6  
4 C.F.R. § 37.5(b). To avoid the exact problem California is now trying to avoid,  
5 both the ATF and NRA have suggested that firearms vendors request additional  
6 documentation from customers with FLA IDs to avoid selling to prohibited persons.  
7 *See* Morales Decl., Exs. 9-10.

8 Plaintiffs’ attempt to assert the interests of potential ammunition purchasers  
9 whose transactions have been rejected fails no better. *See* Pls.’ Br. 18:5-18. Again,  
10 no party to this lawsuit—or *anyone* who is not a prohibited person—has told this  
11 Court that the law has prevented them from lawfully purchasing ammunition. Even  
12 if they had, resolving the source of the rejection, such as updating an address in the  
13 AFS to match the purchaser’s current address, can be done quickly via the  
14 Department’s website in many cases. *See* Morales Decl. ¶¶ 20-24. Plaintiffs’  
15 nonparty declarants place the number of such rejections between 10% and 60% of  
16 transactions. *See* Pls.’ Br. 18:6; *compare* Bartel Decl. ¶ 9 with Lowder Decl. ¶ 9.  
17 The actual number for July was just over 18%. Morales Decl. ¶ 50. There is no  
18 reliable evidence of an intractable problem preventing law-abiding Californians  
19 from purchasing ammunition.

20 Finally, Plaintiffs’ suggest that the Ammunition Eligibility Check Laws “may”  
21 cause some ammunition vendors to “close their doors.” Pls.’ Br. 19:2:15. This  
22 again arises out of boilerplate assertions by nonparty declarants, based on anecdotal  
23 and apparently unreliable estimates of the time it takes to complete an eligibility  
24 check. *See* Burwell Decl. ¶ 12; Puehse Decl. ¶ 15; Morgan Decl. ¶ 13; Bartel Decl.  
25 ¶ 12; Lowder Decl. ¶ 13; Gray Decl. ¶ 13. None of these vendors has said the  
26 photograph of the holder, is issued by a government, and is “of a type intended or  
27 commonly accepted for the purpose of identification of individuals.” 27 C.F.R.  
28 § 478.11. The regulation does not reflect a determination by the federal  
government that California’s FLA IDs are sufficient to purchase a firearm or  
ammunition.

1 threat to their business is imminent. Nor could they state a Second Amendment  
2 claim if they had. *See Teixeira*, 873 F.3d at 682 (“Nothing in the text of the  
3 Amendment, as interpreted authoritatively in *Heller*, suggests the Second  
4 Amendment confers an independent right to sell or trade weapons.”). As of July  
5 31, 2019, there were over 2,000 licensed ammunition vendors in California.  
6 Morales Decl. ¶ 7. Plaintiffs have not suggested that any have gone out of business,  
7 or that any appreciable number will.

8 Plaintiffs have not shown that they will be able to meet their “heavy burden”  
9 to facially invalidate the law, and thus cannot establish a likelihood of success on  
10 the merits of their claim that the Ammunition Eligibility Check Laws violate the  
11 Second Amendment. *See Salerno*, 481 U.S. at 745.

12 **II. PLAINTIFFS CANNOT ESTABLISH A LIKELIHOOD OF SUCCESS ON THE**  
13 **MERITS OF THEIR DORMANT COMMERCE CLAUSE CLAIM.**

14 Plaintiffs contend that Penal Code section 30312 violates the dormant  
15 Commerce Clause because it “prevents out-of-state vendors . . . from accessing  
16 California customers in a particular manner” and “authorizes . . . in-state Vendors  
17 [to] completely exclude[] them from accessing the California market. Pls.’  
18 Br. 21:23-22:1. To the contrary, Prop. 63 treats California and out-of-state online  
19 sellers the same. A California company that sells ammunition over the internet  
20 must have ammunition delivered to customers in California through a California-  
21 licensed ammunition vendor, just like Plaintiff out-of-state businesses. *See Cal.*  
22 *Pen. Code § 30312(b)*. And an out-of-state ammunition vendor that has a physical  
23 store in California may obtain a license and sell ammunition in California. *See id.*  
24 *§ 30312*. Laws that treat “all private companies exactly the same” do not  
25 discriminate against interstate commerce in violation of the dormant Commerce  
26 Clause. *See Pharm. Research & Mfrs. of Am. v. Alameda*, 768 F.3d 1037, 1042  
27 (9th Cir. 2014) (quotation marks omitted). That is why the Western District of New  
28 York dismissed a dormant Commerce Clause challenge to a similar provision of

1 New York law that effectively bans remote sales by requiring that ammunition  
2 purchases take place in person. *See N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 990  
3 F. Supp. 2d 349, 379-81 (W.D.N.Y. 2013) *aff'd in part and rev'd in part on other*  
4 *grounds*, 804 F.3d 242, 251 n.20 (2d Cir. 2015).

5 Although this Court previously relied on the Ninth Circuit's decision in  
6 *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716 (9th Cir. 2017) in denying  
7 the Attorney General's motion to dismiss, there is reason to reconsider. *See Rhode*,  
8 342 F. Supp. 3d at 1014. In *Nationwide*, the court held that making incorporation  
9 under California law a prerequisite to obtain a state-issued license likely violated  
10 the Dormant Commerce Clause. 873 F.3d at 736. Proposition 63 does not require  
11 businesses to incorporate in California, and is therefore distinguishable.

### 12 **III. PLAINTIFFS HAVE NOT SHOWN IRREPARABLE HARM.**

13 Plaintiffs cannot establish that they will suffer irreparable harm in the absence  
14 of preliminary injunctive relief because they have not shown that they are likely to  
15 succeed on their Second Amendment or dormant Commerce Clause theories. *See*  
16 *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). Moreover, even if there  
17 were a likelihood of success on the merits, the mere assertion of constitutional  
18 claims would not be dispositive on this factor. *See, e.g., Constructors Ass'n of W.*  
19 *Penna. v. Kreps*, 573 F.2d 811, 820 n. 33 (3d Cir. 1978) (“[U]nlike First  
20 Amendment rights whose deprivation even from minimal periods of time  
21 constitutes irreparable injury . . . , a denial of equal protection rights may be more  
22 or less serious depending on the other injuries which accompany such  
23 deprivation.”). Here, the Individual Plaintiffs will still be able to purchase  
24 ammunition, and will be able to do so in about five minutes. *See Morales Decl.*  
25 ¶ 55. The harm they suffer, in the form of the additional minutes it now takes to  
26 complete a purchase of ammunition, is not substantial.

27 Similarly, Plaintiffs cannot establish irreparable harm under a dormant  
28 Commerce Clause theory because the law they are challenging has been in effect

1 for over a year-and-a-half. *See* Cal. Pen. Code, § 30312(a)(1) (“Commencing  
 2 January 1, 2018, the sale of ammunition by any party shall be conducted by or  
 3 processed through a licensed ammunition vendor.”). “A long delay by plaintiff  
 4 after learning of the threatened harm also may be taken as an indication that the  
 5 harm would not be serious enough to justify a preliminary injunction.” 11A  
 6 Charles Alan Wright et al., *Federal Practice and Procedure* § 2948.1 (3d ed.); *Lydo*  
 7 *Enters. v. Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) (“Delay in seeking a  
 8 preliminary injunction is a factor to be considered in weighing the propriety of  
 9 relief.”).

10 **IV. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST WEIGH**  
 11 **AGAINST PRELIMINARY INJUNCTIVE RELIEF.**

12 The balance of the equities and the public interest “merge when the  
 13 Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009).  
 14 Here, these factors tip decidedly against granting Plaintiffs’ motion. In their first  
 15 month, the Ammunition Eligibility Check Laws have stopped over 100 prohibited  
 16 persons from purchasing ammunition. Morales Decl. ¶ 49. And they have likely  
 17 dissuaded many more prohibited persons from attempting to purchase ammunition.  
 18 Even the possibility that those prohibited purchasers may have used the  
 19 ammunition they attempted to purchase in crimes weighs against Plaintiffs’ motion.  
 20 *See, e.g., Tracy Rifle & Pistol LLC v. Harris*, 118 F. Supp. 3d 1182, 1193-94 (E.D.  
 21 Cal. 2015), *aff’d* 637 F. App’x 401 (9th Cir. 2016).

22 There is no substantial impediment to Plaintiffs’ purchase of ammunition.  
 23 What they have shown is that ammunition purchasers must pass an eligibility check  
 24 that, in the vast majority of cases, delays a purchase by a few minutes. *See* Morales  
 25 Decl. ¶¶ 55-56. A subset of purchasers—none of whom are parties—will need to  
 26 provide a second form of identification or correct their AFS records. *See id.* ¶¶ 20-  
 27 24, 36-45; Cal. Code Regs., tit. 11, § 4045.1. Still others—also not parties—may  
 28 have to take other minor steps, such as correcting their address in the AFS. These

1 inconveniences do not outweigh the public safety interests at stake. *See Burford v.*  
2 *Sun Oil Co.*, 319 U.S. 315, 318 (1943) (“[I]t is in the public interest that federal  
3 courts of equity should exercise their discretionary power with proper regard for the  
4 rightful independence of state governments in carrying out their domestic policy.”  
5 (internal quotation marks omitted)); *Maryland v. King*, 133 S. Ct. 1, 2 (2012)  
6 (Roberts, C.J., in chambers) (“Any time a State is enjoined by a court from  
7 effectuating statutes enacted by representatives of its people, it suffers a form of  
8 irreparable injury.” (quotation marks omitted)); *see also Coal. for Econ. Equity v.*  
9 *Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (“[I]t is clear that a state suffers  
10 irreparable injury whenever an enactment of its people or their representatives is  
11 enjoined.”).

## 12 CONCLUSION

13 For the foregoing reasons, this Court should deny Plaintiffs’ motion for  
14 preliminary injunction.

15  
16  
17 Dated: August 5, 2019

Respectfully Submitted,

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20  
21  
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## CERTIFICATE OF SERVICE

Case Name: Rhode v. Becerra No. 3:18-cv-00802-BEN-JLB

I hereby certify that on August 5, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**DEFENDANT XAVIER BECERRA'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 5, 2019, at Sacramento, California.

Tracie L. Campbell  
Declarant

/s/ Tracie Campbell  
Signature