

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

No. 3:18-cv-00802 BEN JLB
The Honorable Roger T. Benitez, Judge

**APPELLANT'S OPENING BRIEF
(PRELIMINARY INJUNCTION APPEAL –
NINTH CIRCUIT RULE 3-3)**

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INTRODUCTION

Background checks have long been a fixture of buying a gun. They prevent violent felons, the dangerously mentally ill, and other prohibited people from easily getting dangerous weapons. In 2016, Californians extended this policy to ammunition purchasers by enacting Proposition 63.

The new laws work. Over their first seven months, they stopped more than 750 prohibited people from purchasing ammunition, and likely deterred countless others from even trying. At the same time, any California resident who wants to purchase ammunition can do so using a Basic Ammunition Eligibility Check (Basic Check) that is shorter than a firearms background check. And those who have an up-to-date firearms record with the State can take advantage of a streamlined Standard Ammunition Eligibility Check (Standard Check) that costs \$1 and takes five to ten minutes.

Plaintiffs filed a complaint seeking to invalidate the new ammunition laws in all their applications. Once the background check requirement went into effect, plaintiffs moved for a preliminary injunction. They argued that the ammunition laws violate the Second Amendment because about 16% of Standard Checks were being rejected (i.e., neither approved nor denied, but unable to be processed due to some issue) and some purchasers faced other burdens. The out-of-state ammunition vendors also argued that restrictions

on shipping ammunition directly to customers—which ensure that all residents go through a background check before purchasing ammunition—violated the dormant Commerce Clause.

Plaintiffs submitted no evidence that any of them had a Standard Check rejected or had experienced any of the other alleged burdens created by the law. Nor did they identify a single person who had been prevented from purchasing ammunition. Anyone who had a Standard Check rejected could still use the Basic Check, as well as take steps to use the Standard Check in the future.

Despite the absence of a single person coming forward to say he or she could not get ammunition, and the undisputed evidence that the laws were stopping prohibited people from buying ammunition, the district court took the extraordinary step of issuing a preliminary injunction. The court held that the perceived shortfalls in the implementation of the Standard Check procedure likely meant the statute violates the Second Amendment. In reaching this result, the court made several legal errors in assessing plaintiffs' likelihood of success on the merits. Most notably, it disregarded the standard for facial challenges, considering the implementation of the laws in a minority of circumstances, rather than evaluating the text, or even the evidence that the overwhelming majority of Standard Checks are

approved in a matter of minutes. These mistakes cascaded into the court's analysis of the other preliminary injunction factors.

This Court should reverse the district court's order. And, because plaintiffs' Second Amendment and dormant Commerce Clause claims rest on questions of law, and it is plain that plaintiffs cannot prevail, this Court should resolve these claims on the merits.

JURISDICTIONAL STATEMENT

The district court had federal question subject matter jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction over this interlocutory appeal of the district court's order granting a preliminary injunction. *See* 28 U.S.C. § 1292(a)(1). The district court entered its order on April 23, 2020. Excerpts of Record (ER) 120. The Attorney General timely appealed on April 24, 2020. ER 123-25.

ISSUES PRESENTED

1. Whether the district court erred in holding that plaintiffs had established a likelihood of success on the merits of their claim that California's ammunition background check laws, which, in most cases, require a small fee and short wait to purchase ammunition, violate the Second Amendment.

2. Whether the district court erred in holding that plaintiffs had established a likelihood of success on the merits of their claim that California's laws requiring (A) ammunition transactions to take place in face-to-face transactions and (B) residents bringing ammunition in the State to deliver that ammunition to a licensed vendor for processing in a face-to-face transaction, violate the dormant Commerce Clause.

3. Whether the district court erred in holding that the burden plaintiffs experience—a short wait and a small fee to purchase ammunition—outweighs California's interest in continuing to prevent violent felons, the dangerously mentally ill, and other prohibit people from purchasing ammunition.

CIRCUIT RULE 28-2.7 STATEMENT

The addendum attached to this brief includes the Second Amendment to the United States Constitution and the sections of the California Penal Code preliminarily enjoined by the district court in whole or in part: sections 30312, 30314, 30352, 30365, and 30370. ER 120.

STATEMENT OF THE CASE

I. CALIFORNIANS VOTE FOR AMMUNITION BACKGROUND CHECKS

Federal and state law prohibit certain groups of people from possessing firearms or ammunition, including felons, the dangerously mentally ill, and

those convicted of domestic violence. 18 U.S.C. § 922(g); Cal. Penal Code §§ 29800, 29805; Cal. Welf. & Inst. Code § 8103. In 2016, California voters enacted Proposition 63 to address “loopholes that leave communities throughout the state vulnerable to gun violence and mass shootings.”

ER 1693. Among other things, Proposition 63 sought to close a loophole in ammunition sales. Although at the time California law required background checks for people purchasing firearms, no similar requirement existed for those purchasing ammunition. ER 1693. As a result, “[a]ny violent felon or dangerously mentally ill person” could “walk into a sporting goods store or gun shop in California and buy ammunition, no questions asked.” ER 1693. Recognizing that “background checks work” and stop “roughly 225 felons from buying firearms every day,” the voters decided that the State “should require background checks for ammunition sales just like gun sales,” which would “stop both from getting into the hands of dangerous individuals.”

ER 1693.

A. Face-to-Face Transactions

The Ammunition Laws unfolded in two phases.¹ The first went into effect in January 2018 and requires ammunition vendors to obtain a license. Cal. Penal Code § 30312(a)(1); Cal. Code Regs., tit. 11, §§ 4260-64. As of August 2019, about 2,000 vendors in California may sell ammunition. ER 946. Going forward, a licensed vendor must process all ammunition sales, deliveries, or transfers in face-to-face transactions. Cal. Penal Code §§ 30312, 30352, 30385(d).

Perhaps the biggest change during this phase was to internet and mail order sales. Before 2018, people could purchase ammunition online, by mail order, or through other remote means and have it shipped directly to them. Under the new rules, Californians may still purchase ammunition online or

¹ Proposition 63 contained a provision allowing the Legislature to amend the law. ER 1707; *see also* Cal. Const., art. II, § 10(c). While the initiative was circulating for signatures, the Legislature enacted Senate Bill 1235, 2016 Cal. Stat., ch. 55. Senate Bill 1235 provided for certain amendments to Proposition 63 if voters enacted the initiative statute. *Compare* 2016 Cal. Stat., ch. 55, §§ 15, 16, *with* ER 1701. The Official Voter Information Guide informed voters of the legislation. ER 1688. Proposition 63 has been implemented as amended. *See, e.g.*, Cal. Code Regs., tit. 11, § 4302. References to Proposition 63 in this brief are to the law as amended by Senate Bill 1235. This brief refers to the provisions enacted by Proposition 63 that govern the purchase and sale of ammunition as the “Ammunition Laws.” These include California Penal Code sections 30312, 30314, 30352, 30370, 30385 and their implementing regulations.

from other lawful sources that do not have a physical location in California. Cal. Penal Code § 30312(b). But those purchases must be received and processed by a licensed vendor for delivery in a face-to-face transaction. *Id.* Similarly, residents who want to bring ammunition into California that they obtained outside the State must first deliver it to a licensed ammunition vendor for processing. *Id.* § 30314.

These rules set the stage for the next phase, which introduced background checks and record-keeping requirements. *Id.* §§ 30352, 30370.

B. Background Checks

The second phase took effect on July 1, 2019. Licensed vendors now must record information about the purchase—including the purchaser’s driver’s license number and home address, and the brand, type, and amount of ammunition—and submit that information to the California Department of Justice (the Department). Cal. Penal Code §§ 30352(b)-(d), 30370(a).

Vendors must also conduct background checks before selling or transferring ammunition, to ensure that the purchaser is not a prohibited

person. *Id.* §§ 30352, 30370; Cal. Code Regs., tit. 11, §§ 4300-09. Vendors determine most purchasers' eligibility in one of two ways.²

1. The Basic Check

First, vendors can determine whether any Californian is prohibited from purchasing ammunition by conducting a “Basic Ammunition Eligibility Check,” which costs \$19. Cal. Code Regs., tit. 11, § 4303. These checks authorize a single ammunition purchase, meaning a person who wants to purchase ammunition must go through a check for each separate ammunition transaction (unless that person can use one of the other background checks described below). *See* Cal. Penal Code § 30370(a)(3).

To run a Basic Check, the vendor submits the purchaser's identifying information—including their name, date of birth, current address, and driver's license or “other government identification” number—to the Department through the online Dealer Record of Sale Entry System (DES), which then checks to see whether the purchaser is prohibited. *Id.* § 4303(b)-(c); ER 394-97; *see generally* ER 823-72 (DES vendor user guide). Vendors begin this process by going to the DES website, and, in most cases,

² The law exempts certain groups, such as sworn peace officers, from various requirements. *See* Cal. Penal Code §§ 30312(c), 30352(e). These exemptions are not at issue in this case.

populating the purchaser's information by swiping the purchaser's California driver's license or other government ID card (generally, ID) through a magnetic card reader. Cal. Penal Code § 28180(a); *id.* § 28180(b) (identifying exceptions); *see also* ER 861.

Any ID that meets the requirements of the federal REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, may be used for this purpose. Cal. Code Regs., tit. 11, § 4045.1; *see also* Cal. Penal Code § 30352(a)(2). Vendors can also conduct background checks for purchasers who have IDs that do not comply with the REAL ID Act, so long as those purchasers provide additional supporting documentation showing lawful status in the United States, such as a passport or birth certificate. Cal. Code Regs., tit. 11, § 4045.1. These IDs are visually distinct from REAL ID-compliant ones because they feature the phrase "Federal Limits Apply" in the top right corner. ER 724.³

³ Under California law, any person—including one who cannot provide proof of lawful presence in the United States—can obtain a "Federal Limits Apply" driver's license or identification card. Cal. Veh. Code § 12801.9. Federal law, however, prohibits certain categories of non-citizens from purchasing or possessing a firearm or ammunition, including anyone who is "illegally or unlawfully in the United States." 18 U.S.C. § 922 (d)(5)(A), (g)(5)(A).

Once the vendor enters the required information into DES, the system compares it against four state databases to determine whether the purchaser is a prohibited person: (1) the Automated Criminal History Record System; (2) the Mental Health Firearms Prohibited System; (3) the California Restraining and Protective Order System; and (4) the Wanted Persons System. ER 395. If the database search yields no hits, then the transaction is approved, and the vendor may proceed with the sale. Cal. Penal Code § 30370(a)(3); Cal. Code Regs., tit. 11, § 4303(a); ER 395.

If, however, the purchaser's information results in a hit in one of the databases, a Department analyst will manually review the information submitted by the vendor to check whether the purchaser is in fact a prohibited person. ER 395. Purchasers who are not prohibited are approved and may take possession of the ammunition; but purchasers who are prohibited are denied, and the vendor cannot transfer the ammunition to them. Cal. Penal Code § 30370(d).

From July 1, 2019, when the background checks took effect, through January 2020, the last month for which there is data in the record, Basic Checks took an average of one to three days to complete. *See* ER 252-53; *see also id.* (noting that monthly median processing times from July 2019 through January 2020 ranged between just under 15 hours and just over 27

hours). This means that Basic Checks often require two trips to the vendor, one to have the check run and one to complete the transaction and take possession of the ammunition. *See* ER 237, 252. During this same period, the Department received 19,753 Basic Checks, approving 18,685 (or about 95.3%) of them. ER 251-52 & nn.2-5. It denied 572 (or about 2.9%) because the purchaser was prohibited. ER 251. The remainder were rejected because of other issues. ER 251.

2. The Standard Check

The second way in which Californians may submit to the ammunition background check is through a “Standard Ammunition Eligibility Check,” which costs \$1. Cal. Code Regs., tit. 11, § 4302; Cal. Penal Code § 30370(e). This check streamlines the background check process for purchasers who have up-to-date firearms records in the Department’s Automated Firearms System. Cal. Penal Code § 30370(a)(1). Like the Basic Check, the Standard Check begins when the vendor enters the prospective purchaser’s information, including name, address, date of birth, and ID number, into DES by swiping the person’s ID through a magnetic card reader. Cal. Code Regs., tit. 11, § 4302(a), (c); Cal. Penal Code § 28180(a); ER 948; ER 861. DES then searches for a matching record in the State’s Automated Firearms System. Cal. Code Regs., tit. 11, § 4302. The

Automated Firearms System keeps a record of sales, transfers, and ownership of firearms. Cal. Penal Code § 11106.⁴

What happens next depends on whether the information entered into DES matches a record in the Automated Firearms System. If there is a match, then DES will check the purchaser's information against the Armed Prohibited Persons System. ER 948-49. That system "enforces California's prohibitions on firearm possession by identifying 'persons who have ownership or possession of a firearm' yet who, subsequent to their legal acquisition of the firearm, have later come to 'fall within a class of persons who are prohibited from owning or possessing a firearm' due to a felony or violent misdemeanor conviction, domestic violence restraining order, or mental health-related prohibition." *Bauer v. Becerra*, 858 F.3d 1216, 1219 (9th Cir. 2017) (quoting Cal. Penal Code §§ 30000, 30005).

If the purchaser's identifying information does not appear in the Armed Prohibited Persons System, the transaction is approved, and the purchaser may take possession of the ammunition. *See* Cal. Code Regs., tit. 11, § 4302;

⁴ Records in the Automated Firearms System have been created for handguns purchased from firearms vendors after 1995, and all long guns purchased from firearms vendors after 2013. Cal. Penal Code §§ 11106, 26905, 30000.

ER 948. A hit in the Armed Prohibited Persons System results in a denial, and the purchaser may not take possession of the ammunition. Cal. Penal Code § 30370(b), (d); ER 948; ER 866.

If the information entered into DES does not match a record in the Automated Firearms System, the transaction is rejected. Cal. Penal Code § 30370(d); ER 866. Purchasers who experience a rejection, however, may still seek to purchase ammunition in one of three ways. First, they may utilize the Basic Check. *See* ER 394-95. Second, if they own a firearm that is not in the Automated Firearms System, they can create a new record by submitting a Firearms Ownership Report to the Department. ER 398. Or, they can purchase ammunition as part of a firearms purchase, which will also create a record in the Automated Firearms System that can then be used for Standard Checks in future ammunition transactions. *See* Cal. Code Regs., tit. 11, § 4304. Third, a person who owns a firearm and believes that they have a record in the Automated Firearms System may update their records using the California Firearms Application Reporting System on the Department's website. ER 948-49.

In transactions where the purchaser's information matches a record in the Automated Firearms System, the background check is processed almost

instantaneously, and the entire transaction takes a matter of minutes.

ER 956; Cal. Code Regs., tit. 11, § 4302(b).

People who have a transaction denied because the Department's records show that they are prohibited will receive a letter 30 days after the Standard Check is complete, informing them of that fact and providing them details about how they can contest that designation. ER 136, 140, 142.

People who have a Standard Check rejected, but who are not prohibited persons, may log on to the California Firearms Application Reporting System, where they are told that the information submitted in their background check does not match a record in the Automated Firearms System. ER 171. Those people may update their records, so they can use Standard Checks in the future. *See* ER 948-49.

During the program's first seven months, the Department processed 616,257 Standard Checks and approved 515,022 (or about 83.6%) of them. ER 255. It denied 188 because the Standard Check revealed that the purchaser was a prohibited person. *Id.* The remaining 101,047 Standard Check applications (roughly 16.4%) were rejected because the information entered into DES did not match a record in the Automated Firearms System. *Id.* Those rejections corresponded with roughly 81,112 people (meaning some people had more than one Standard Check rejected). *See* ER 261. Of

those 81,112 people, 35,294 went on to purchase ammunition by the end of January 2020 using one or more of the background-check procedures. *See* ER 261.⁵

II. PROCEDURAL HISTORY

In April 2018, seven California residents, four out-of-state ammunition vendors, and the California Rifle & Pistol Association (CRPA) filed a complaint challenging the Ammunition Laws. ER 1755-85. A few months later, they filed the First Amended Complaint, which remains the operative pleading. ER 1718-49. Plaintiffs allege that the Ammunition Laws violate the Second Amendment, that the face-to-face transaction requirements on purchases and transfers in California Penal Code sections 30312 and 30314 violate the dormant Commerce Clause, and that section 30314 is preempted by 18 U.S.C. § 926A. ER 1742-49.

⁵ One final, albeit less common, way Californians may pass the background check is by obtaining a Certificate of Eligibility (COE). *See* Cal. Code Regs., tit. 11, § 4305. Although any Californian may obtain a COE, most people who obtain them do so because it is a prerequisite to engage in certain other activities, such as selling or manufacturing firearms or ammunition or promoting gun shows. *See* ER 1709; Cal. Code Regs., tit. 11, §§ 4030-4041. An initial COE costs \$71, and holders may renew their certificates annually for \$22. Cal. Code Regs., tit. 11, § 4038. COE background checks cost \$1 and operate in a manner similar to the Standard Check. ER 950-51; Cal. Code Regs., tit. 11, § 4305(b).

A. Plaintiffs Move for a Preliminary Injunction

On July 1, 2019, the background check requirement went into effect. Cal. Pen. Code § 30370. Three weeks later, plaintiffs moved for a preliminary injunction. ER 1635. The motion asked the district court to enjoin the Department from enforcing the face-to-face transaction requirements and the background check requirements in all their applications, arguing that they violate the Second Amendment and the dormant Commerce Clause. ER 1636.

On the Second Amendment claim, plaintiffs did not contend that the requirement that people submit to the background check violates the Second Amendment. *See* ER 1622 (“Even accepting that certain ammunition background check and registration systems may substantially further public safety, the question is whether *this* one does.”). Instead, they contended that three features of California’s background check system showed that it impermissibly burdened prospective purchasers’ Second Amendment rights: (1) that people with Federal Limits Apply IDs must provide additional documentation; (2) that, during the first three weeks in which the background check system was up and running, as many as 60% of Standard Checks had been rejected; and (3) that during that same time period, those

who used the Standard Check had to wait a half-hour, on average, to purchase ammunition. *See* ER 1622-28.

None of the seven individual plaintiffs, however, submitted evidence indicating that they had a Federal Limits Apply ID (and had to provide additional documentation), or that they had a Standard Check rejected. Only one plaintiff, Denise Welvang, submitted a declaration discussing the background check process, which describes how, in one transaction, the “entire process” of submitting information, waiting for approval, and completing the transaction took “nearly 30 minutes” (though other evidence called into question this statement’s accuracy). ER 1547; ER 957.

CRPA’s president also submitted a declaration stating that he was “aware of CRPA members” who had been unable to purchase ammunition for various reasons. ER 1558-59. Some were turned away because they had a Federal Limits Apply ID and lacked the necessary additional documentation. ER 1558-59. Some had been “denied an ammunition transaction” even though they were not prohibited from owning or possessing firearms. ER 1559. Others purchased ammunition, but their transactions took “anywhere from 20-30 minutes” or “longer.” ER 1559.

Plaintiffs also submitted declarations from nonparties. Several ammunition vendors provided estimates about the average time it took them

to process Standard Checks and described turning away customers with Federal Limits Apply IDs and no supporting documentation. *See* ER 1493-1541. Another declarant, George Dodd, described difficulty obtaining a REAL ID because he had been adopted in Missouri more than six decades ago. ER 1489-90. Plaintiffs also submitted an article examining the efficacy of firearms background check laws with respect to homicide and suicide rates and a study examining federal prosecution rates for prohibited people who fail firearms background checks. ER 557.

In response, the Attorney General submitted a declaration by Mayra Morales, a staff services manager in the Department's Bureau of Firearms. ER 945. The declaration discussed how the Department had implemented the law and provided evidence of the law's implementation in its first month. It explained that, during that first month, the law had resulted in over 100 prohibited people being denied ammunition, and that more than 81% of the 57,553 Standard Checks that the Department processed were approved. *See* ER 955. Relying on data from DES on vendor usage, Morales was able to estimate that the average processing time for Standard Checks took about five minutes. ER 956. She also detailed how, for Denise Welvang, the plaintiff who recounted her Standard Check taking 30 minutes, the transaction time in DES for that purchase took less than one minute. ER 957.

Morales provided similar information for each of the vendors who submitted estimates of how long Standard Checks were taking, reporting that their transaction times in DES ranged from three to six minutes. ER 956-57.

The Attorney General also submitted an article and two reports about ammunition sales that predated the Ammunition Laws. ER 612-74. All three addressed prohibited people purchasing ammunition, and two discussed the success Los Angeles and Sacramento ordinances imposing record-keeping requirements for ammunition sales. ER 612-74.

B. The Preliminary Injunction Hearing

On August 19, 2019, the district court held a hearing on plaintiffs' preliminary injunction motion. ER 1795. After three hours of argument spread over two sessions, the district court concluded "This system is so new that it's hard to really make a decision or determination that the system is a de facto ban by virtue of the way it has been structured because it is so new." ER 539. It decided to take the motion under submission for 30 to 60 days. ER 539-40. The district court directed the Attorney General to produce documents to plaintiffs' counsel and to supplement the July data in the Morales declaration with the reasons for the reported Standard Check rejections, as well as any information showing that purchasers who had been

denied as prohibited were, in fact, not prohibited. ER 540. The Attorney General produced the information as directed. ER 392.

Over the nine months following the hearing, the court held two additional hearings, and directed the Attorney General to submit additional evidence and briefing, which the Attorney General did. At the third hearing, held on April 1, 2020, the court directed the Attorney General to produce Morales for questioning, and questioned her directly. *See* ER 164-65. In total, the Attorney General submitted five declarations from Morales, including the first one submitted with the opposition to the preliminary injunction motion. ER 944; ER 392; ER 285; ER 235; ER 134.

C. The District Court Issues a Preliminary Injunction

On April 23, 2020—a few days short of the second anniversary of the filing of the complaint, and more than nine months after the background check requirement took effect—the district court issued a 120-page order enjoining California’s Ammunition Laws while the case proceeded. ER 1-120.

The court began by expressing its opinion that “criminals, tyrants, and terrorists don’t do background checks,” ER 2—despite evidence in the record showing that the Ammunition Laws stopped many prohibited people from purchasing ammunition, *e.g.*, ER 237. Comparing what it called the

“overly relaxed” intermediate scrutiny standard to *Korematsu v. United States*, 323 U.S. 214 (1944) and *Dred Scott v. Sandford*, 60 U.S. 393 (1857), ER 61, the court lamented the Ammunition Laws’ encroachment on “what should be a muscular constitutional right,” ER 95. The court opined that the laws likely violated the Second Amendment because 101,047 Standard Checks had been rejected, and these rejections “effect a complete statutory barrier to the lawful purchase of ammunition.” *See* ER 117; *see generally* ER 37-96. On the dormant Commerce Clause claim, the court reasoned that California Penal Code sections 30312 and 30314, which govern shipment and importation of ammunition, impermissibly favored ammunition vendors in California by requiring all ammunition purchases and transfers to occur in face-to-face transactions. ER 96-109.

Based on its constitutional analysis, the court ruled that plaintiffs had established irreparable harm. ER 109-113. Finally, balancing the hardships and weighing the public interest, the court disregarded the Attorney General’s arguments that enjoining the law would allow prohibited people to obtain easy access to ammunition, harming public safety. ER 113-17.

STANDARD OF REVIEW

This Court reviews an order entering a preliminary injunction for an abuse of discretion. *California v. Azar*, 950 F.3d 1067, 1082 (9th Cir. 2020) (en banc). “But legal issues underlying the injunction are reviewed de novo because a district court would necessarily abuse its discretion if it based its ruling on an erroneous view of law.” *Id.* (quotation marks omitted).

SUMMARY OF ARGUMENT

An overarching problem permeates the plaintiffs’ request for a preliminary injunction and the district court’s order entering the injunction: no identifiable person has said the Ammunition Laws have prevented him or her from purchasing ammunition. Not one. Ammunition remains readily available in California. Most firearms owners, including plaintiffs, can buy ammunition using a Standard Check that imposes a de minimis burden of \$1 and a five-to-ten minute wait. At the same time, the laws are protecting Californians by stopping prohibited people from buying ammunition in stores.

To support their request, plaintiffs relied on indefinite assumptions about the experiences of nonparties who had Federal Limits Apply IDs or Standard Checks rejected. By accepting these arguments, the district court

misapplied the four preliminary injunction factors in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008).

The court ruled that plaintiffs were likely to succeed on their Second Amendment facial challenge to the Ammunition Laws. Plaintiffs who bring a facial challenge must show that there is no set of facts in which the law can be applied constitutionally. The district court did not apply that standard. Instead, it speculated about the experience of a minority of ammunition purchasers, disregarding the text of the Ammunition Laws and the experience of the overwhelming majority of ammunition purchasers.

On the substance of the Second Amendment claim, the district court misapplied the intermediate scrutiny standard. The Ammunition Laws advance California's compelling interest in public safety by preventing prohibited people from buying ammunition in stores. Unrebutted evidence in the record showed that, without these laws, hundreds of prohibited people would have bought ammunition from stores. The Ammunition Laws achieve the same goal as the firearms background check laws, while imposing less of a burden than the 10-day waiting period to purchase a firearm that this Court upheld in *Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016).

The district court also erred in finding that plaintiffs were likely to succeed on their dormant Commerce Clause claim. California Penal Code

sections 30312 and 30314 are not meant to promote California goods—no evidence shows that any ammunition is even manufactured in the State. And the laws treat in-state and out-of-state economic interests identically. Any vendor, regardless of residence or location, can sell ammunition remotely, so long as it is shipped to a licensed ammunition vendor for processing in a face-to-face transaction. And the vendor who processes the transaction may be a California company, like Turner’s Outdoorsman, or an out-of-state company, like Dick’s Sporting Goods or Walmart.

Finally, the district court misapplied the remaining *Winter* factors. It rested its finding of irreparable harm on plaintiffs’ purported constitutional harms, without considering that plaintiffs can purchase ammunition with ease. When balancing the hardships and assessing the public interest, the court again rested its decision on plaintiffs’ purported constitutional harm. But plaintiffs having to pay \$1 and wait five to ten minutes to purchase ammunition cannot justify opening the door to prohibited people purchasing ammunition while the litigation proceeds.

ARGUMENT

The district court erred in issuing a preliminary injunction. Plaintiffs did not satisfy any of the four factors necessary to obtain injunctive relief.

“A preliminary injunction is an extraordinary remedy never awarded of

right.” *Winter*, 555 U.S. at 24. To prevail, a plaintiff “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Id.* at 20.

Alternatively, “[a] preliminary injunction is appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff’s favor.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (quotations omitted). A plaintiff must establish all four *Winter* factors even under the alternative sliding scale test. *Id.* at 1135.

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

The Second Amendment “protects the right to keep and bear arms for the purpose of self-defense.” *See McDonald v. City of Chicago*, 561 U.S. 742, 749-50 (2010). That right “implies a corresponding right to obtain the bullets necessary to use [firearms].” *Jackson v. City & County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (quotation marks omitted). This Court has applied the same Second Amendment standard to laws regulating ammunition as it applies to laws regulating firearms. *See id.* at 968. And California’s Ammunition Laws satisfy this standard.

When analyzing a Second Amendment claim, this Court first asks whether a law burdens the Second Amendment at all; if it does impose a burden on protected activity, then the Court determines the appropriate level of scrutiny. *Teixeira v. County of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017) (en banc). That approach reflects the Supreme Court’s recognition that the Second Amendment right is “not unlimited,” and does not call into question certain “presumptively lawful regulatory measures.” *District of Columbia v. Heller*, 554 U.S. 570, 626-27 & n.26 (2008).

Both steps of the analysis reveal that California’s Ammunition Laws are constitutional. Any Californian may purchase ammunition using a Basic Check, so long as he or she passes. Cal. Code Regs., tit. 11, § 4303. That check costs \$19 and typically takes a day or two. *Id.* § 4303(b), *see* ER 251-52 & nn.2-5. And any Californian with an up-to-date Automated Firearms Systems record can purchase ammunition using the Standard Check, so long as her or she passes. Cal. Code Regs., tit. 11, § 4302. That check costs \$1 and typically takes a matter of minutes. Cal. Code Regs., tit. 11, § 4302(b); ER 956.

These laws do not burden conduct protected by the Second Amendment. On their face, they do not prevent anyone who is legally entitled to purchase ammunition from doing so. Instead, they are the most

direct and effective way to enforce the ban on felons and other prohibited people possessing ammunition. And they are also constitutional because they promote California's compelling interest in reducing gun violence by keeping ammunition out of the hands of violent felons, the dangerously mentally ill, and other prohibited persons.

A. The District Court Did Not Apply the Standard Governing Facial Constitutional Challenges.

Despite correctly identifying plaintiffs' claim as a "facial challenge," the district court nowhere discusses, let alone applies, the controlling legal standard. ER 41-42. That standard requires plaintiffs to show that "no set of circumstances exists under which the [laws] would be valid." *Puente Ariz. v. Arpaio*, 821 F.3d 1098, 1104 (9th Cir. 2016) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).⁶ Even under the more relaxed standard for facial challenges that courts sometimes use when upholding laws, plaintiffs' challenge must fail if California's laws have a "plainly legitimate

⁶ Although the Supreme Court and this Court have "called into question the continuing validity of the *Salerno* rule in the context of First Amendment challenges," *Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571, 579 n.3 (9th Cir. 2008) (en banc), *Salerno* "remains binding law in the Ninth Circuit," *Puente Ariz.*, 821 F.3d at 1104 n.6. Courts have applied that standard when adjudicating Second Amendment challenges. See, e.g., *GeorgiaCarry.org, Inc. v. Georgia*, 687 F.3d 1244, 1260-91 (11th Cir. 2012).

sweep.” *Jackson*, 746 F.3d at 961-62; *see also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (identifying consensus on “plainly legitimate sweep” standard”).

California’s Ammunition Laws easily pass that test. Plaintiffs do not dispute that California may, consistent with the Second Amendment, prohibit felons, domestic violence misdemeanants, those without lawful status, and the dangerously mentally ill from procuring ammunition.⁷ Nor do they dispute that California may require people to submit to a background check to accomplish that goal. Instead, plaintiffs focus on how “*this*” background check system operates. ER 1622. But when considering a facial challenge, courts “consider only the text of the [laws], not [their] application.” *Calvary Chapel Bible Fellowship v. City of Riverside*, 948 F.3d 1172, 1176 (9th Cir. 2020).

On their face, the Ammunition Laws allow residents to purchase ammunition unless they are among the groups that all agree California may

⁷ *See* ER 1622 (plaintiffs’ motion for preliminary injunction, acknowledging that the State has a “valid” public safety interest in “keeping ammunition away from dangerous people”); *see also* ER 3 (district court recognizing that “prevent[ing] gun crime by preventing felons and other prohibited persons from acquiring ammunition is a laudable goal”).

prohibit from obtaining ammunition. *See* Cal. Pen. Code §§ 30352, 30370; Cal. Code Regs., tit. 11, §§ 4302-03.

Even when considering the Ammunition Laws as applied, the record here demonstrates that they have a “plainly legitimate sweep.” *See Jackson*, 746 F.3d at 961-62 (quotation marks omitted). The burdens imposed by the law are well within what the Second Amendment permits. The Basic Check costs \$19, takes a day or two and has a negligible rejection rate. *See* ER 251-52 & nn.2-5. It imposes less of a burden than the 10-day waiting period for firearms that this Court upheld in *Silvester*, 843 F.3d at 827. And the fee associated with the Basic Check is in line with firearms-related fees that this Court and others have upheld. *See Bauer*, 858 F.3d at 1222 (citing *Kwong v. Bloomberg*, 723 F.3d 160, 167 (2d Cir. 2013)). The Basic Check is also less burdensome than the handgun storage rules upheld in *Jackson*, which require compliance every time a handgun is used, rather than at the point of sale. *See* 746 F.3d at 966.

While this Court could uphold the Ammunition Laws solely by considering the Basic Check procedure that anyone can use, the addition of the streamlined Standard Check lessens the already constitutionally permissible burden even further. It costs \$1 takes five to ten minutes—a de minimis burden. *See* ER 241, 255. This procedure had been used hundreds

of thousands of times by the time the district court ruled. *See* ER 255. And those who experienced rejections using this procedure could either address the reasons for their rejection, undergo a Basic Check, or both. *See* ER 242; ER 948-50.

The circumstances of this case also demonstrate why facial challenges are typically “disfavored.” *Jackson*, 746 F.3d at 962. When dealing with ““complex and comprehensive legislation,”” courts may not ““resolve questions of constitutionality with respect to each potential situation that might develop,” especially when the moving party does not demonstrate that the legislation ‘would be unconstitutional in a large fraction of relevant cases.’” *Id.* (quoting *Gonzales v. Carhart*, 550 U.S. 124, 167-68 (2007)). Yet that is precisely what the district court did. Its analysis centered on the roughly 100,000 Standard Checks that were rejected, rather than the more than 500,000 Standard and Basic Checks that were approved. *See, e.g.*, ER 56-58.⁸ In addition to focusing erroneously on Standard Check

⁸ Apparently operating under the incorrect assumption that each Standard Check rejected corresponded to a unique person, the district court repeatedly stated that 101,047 people had Standard Checks rejected. *See, e.g.*, ER 19; ER 35; ER 56; ER 66; ER 112. This overstates the number of people by roughly 20,000. *See* ER 261. Some individual purchasers had multiple Standard Checks rejected. *See, e.g.*, ER 310-11 (describing declarant’s two attempts to submit Standard Check in the 10 days after an

rejections, the district court also mistakenly assumed that all Standard Check rejections involve the same burden.

But a Standard Check rejection can happen for numerous reasons, each resulting in varying burdens on the purchaser. The vendor could incorrectly enter the purchaser's information. *See* ER 959. Or the purchaser may not have a record in the Automated Firearms System. ER 242; *see also* ER 417-18. Or the purchaser's name, address, date of birth, or ID number, or some combination of that information on the his or her ID may be mismatched with the record in the system. *See* ER 246-47.

Each person who has a Standard Check rejected has at least one way, and often more, to address the rejection. Some who own a firearm that is not recorded in the Automated Firearms System may submit a firearms ownership report and create a new record that will allow them to use a Standard Check. ER 397-98. Nonparty declarant William Shepard provides an example of this process working. ER 314-16. Others may correct their records using the Department's California Firearms Application Reporting System. ER 948-49. Depending on the nature of the correction, this may be a

initial rejection but before her Automated Firearms System record was updated).

quick process, but it can take longer. ER 949. For nonparty declarant Nandu Ionescu, it took nine days. ER 310-11. Having either created or updated a record in the Automated Firearms System, Shepard and Ionescu can expect that going forward their ammunition background checks will cost \$1 and take a matter of minutes. *See* ER 956.

These paths to avoiding future Standard Check rejections depend on case-specific facts, including choices made by the specific ammunition purchaser.⁹ And, of course, anyone who has a Standard Check rejected can still seek to buy ammunition using a Basic Check.

The Attorney General recognizes that “‘the right to possess firearms for protection implies a corresponding right’ to obtain the bullets necessary to use them.” *Jackson*, 746 F.3d at 967. In an appropriate case, a plaintiff who

⁹ The district court’s discussion of nonparty declarant George Dodd provides another example of the hazards of assessing the facial validity based on the unique experience of a nonparty. As Dodd recounts in his declaration, he was adopted at a young age under circumstances that prevent him from easily obtaining his birth certificate. ER 18. The district court stated that “[w]ith a certified copy of his birth certificate, he is unable to obtain a U.S. Passport. Without a birth certificate or passport, Dodd cannot obtain a California issued REAL ID card.” ER 18. But the district court is simply wrong. California law allows those who cannot submit documents such as birth certificates to obtain a REAL ID through alternate means. *See* Cal. Code Regs. tit. 13, § 17.06. No plaintiff submitted evidence raising similar concerns, or even showing that he or she had a Federal Limits Apply ID.

is legally entitled to procure ammunition may be able to make out an as-applied constitutional claim, if she can establish that the Ammunition Laws impose a “substantial burden” on her ability to do so. *Id.* at 968. But that determination will necessarily turn on the facts and circumstances of that case, not “speculation” on a “factually barebones record.” *See Wash. State Grange*, 552 U.S. at 450. And the possibility that California’s laws might be applied in a way that violates the Constitution cannot support an injunction that facially enjoins the State from enforcing its Ammunition Laws—especially where, as here, no reasonable debate exists that the application of the law in the vast majority of cases is constitutional. Plaintiffs’ Second Amendment facial challenge thus fails as a matter of law.

“[W]hen an issue of law is key to resolving a motion for injunctive relief, the reviewing court has the power to examine the merits of the case.” *Azar*, 950 F.3d at 1083 (quotation marks omitted). “Adjudication of the merits is most appropriate if the injunction rests on a question of law and it is plain that the plaintiff cannot prevail.” *Id.* (quotation marks omitted). Because that is the case here, this Court should not only reverse the order granting a preliminary injunction, but also resolve the Second Amendment claim on the merits.

B. California’s Ammunition Background Checks Are Presumptively Lawful Regulatory Measures.

In *Heller*, the Supreme Court recognized that the Second Amendment protects an individual right to keep and bear arms for purposes of self-defense—and that public authorities may nonetheless adopt a variety of reasonable gun-related regulations. In particular, *Heller* made clear that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . or laws imposing conditions and qualifications on the commercial sale of arms.” *Heller*, 554 U.S. 626-27. These are, as the Supreme Court said, “presumptively lawful regulatory measures.” *Id.* at 627 n.26.

In holding that the Ammunition Laws are not presumptively lawful, the district court quoted this Court’s decision in *Jackson* for the proposition that “*Heller* does not include ammunition regulations in the list of ‘presumptively lawful’ regulations.” ER 51 (quoting *Jackson*, 746 F.3d at 968). But the district court read this statement too broadly. *Jackson* does not hold that ammunition regulation will never be presumptively lawful, just that bans on certain types of ammunition must be analyzed using means-ends scrutiny. *See Jackson*, 746 F.3d at 967. Here, the laws regulating the purchase and sale of ammunition are essentially the same as those regulating

the purchase and sale of firearms. *Compare, e.g.*, Cal. Penal Code § 30370, *with id.* § 28220, *and* 18 U.S.C. § 922(t). Both sets of rules prevent prohibited people from obtaining dangerous weapons.

Bans on felons, perpetrators of domestic violence, the dangerously mentally ill, and people in the country unlawfully are all permissible under the Second Amendment. *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010) (felons); *United States v. Chovan*, 735 F.3d 1127, 1142 (9th Cir. 2013) (perpetrators of domestic violence); *United States v. Torres*, 911 F.3d 1253, 1264 (9th Cir. 2019) (people who do not have lawful status); *Mai v. United States*, 952 F.3d 1106, 1114-19 (9th Cir. 2020) (dangerously mentally ill). Plaintiffs do not seek to overturn these precedents. Nor do they dispute that California may, consistent with the Second Amendment, prohibit similar groups from purchasing ammunition.

Background checks, whether for firearms or ammunition, are the most direct and efficient way to ensure that these bans have a meaningful effect. *See Pena v. Lindley*, 898 F.3d 969, 1009 n.19 (9th Cir. 2018) (Bybee, J., concurring in part and dissenting in part) (“[B]ackground checks . . . are more easily defended as restrictions on the possession of firearms by felons and the mentally ill.” (quotation marks omitted)). California’s experience with the Ammunition Laws confirms this reasoning. Over their first seven

months, the laws prevented over 750 prohibited people from purchasing ammunition. ER 237, 248-49, 251, 255. Because these laws are direct means of enforcing the “presumptively lawful” bans that a State may adopt under *Heller*, they too are presumptively lawful. *Heller*, 554 U.S. at 627 n.26.

In the alternative, these laws impose presumptively lawful conditions and qualifications on the commercial sale of arms. *Cf. Silvester*, 843 F.3d at 831 (Thomas, C.J., concurring) (10-day waiting period after firearms purchase is a presumptively lawful qualification on the commercial sale of arms); *Teixeira*, 873 F.3d at 690 (Owens, J., concurring) (zoning laws regulating firearms dealers are presumptively lawful qualifications on the commercial sale of arms). They require ammunition vendors to input information into DES at the point of sale. ER 946-49. They do not ban a type of ammunition, limit who can purchase ammunition, or, for the vast majority of transactions completed by a Standard Check, add virtually any cost or delay.

C. California’s Ammunition Background Checks Withstand Intermediate Scrutiny.

Even assuming that the Ammunition Laws impinge upon conduct protected by the Second Amendment, the most demanding level of scrutiny that can be applied here is intermediate scrutiny. Courts decide what level of

scrutiny to apply “by considering (1) how close the challenged law comes to the core of the Second Amendment right, and (2) the severity of the law’s burden on that right.” *Bauer*, 858 F.3d at 1221-22 (quotation marks omitted). This test “amounts to a sliding scale.” *Id.* (quotation marks omitted). “A law that imposes such a severe restriction on the fundamental right of self-defense of the home that it amounts to a destruction of the Second Amendment right is unconstitutional under any level of scrutiny.” *Id.* (quotation marks omitted). “Further down the scale, a law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny.” *Id.* “Otherwise, intermediate scrutiny is appropriate.” *Id.*

Intermediate scrutiny is the proper standard here because the Ammunition Laws regulate only the “manner in which persons may exercise their Second Amendment rights.” *See Chovan*, 735 F.3d at 1138. The Basic Check costs \$19 and takes a day or two; the Standard Check costs \$1 and takes a matter of minutes. Cal. Code Regs., tit. 11, §§ 4302-03; ER 956. In cases involving waiting periods and fees for purchasing firearms, this Court has used intermediate scrutiny. *Silvester*, 843 F.3d at 827; *Bauer*, 858 F.3d at 1222.

1. Ammunition background checks promote California’s compelling goal of reducing gun violence

Intermediate scrutiny requires “(1) the government’s stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective.” *Chovan*, 735 F.3d at 1139. The fit between the challenged regulation and the stated objective need not be perfect, nor must the law be the least restrictive means of serving the interest. *Jackson*, 746 F.3d at 969. Rather, the government “must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.” *Id.* at 969-70.

The voters enacted the Ammunition Laws to promote public safety by preventing violent felons, the dangerously mentally ill, and other prohibited persons from having easy access to ammunition. ER 1693. The California Legislature reaffirmed this purpose when it amended the laws. 2016 Cal. Stat., ch. 55, § 19. This Court has regularly recognized that protecting the public from crime is an important governmental interest. *Mai*, 952 F.3d at 1116; *Bauer*, 858 F.3d at 1223.

There is also a “reasonable fit” between the Ammunition Laws and California’s effort to promote public safety by reducing gun violence. *Chovan*, 735 F.3d at 1139. Even plaintiffs agree that “keeping ammunition

away from dangerous people” is a “valid” way for the State to advance its public safety goals. ER 1622. To have a reasonable fit, “[a] statute need not utilize the least restrictive means of achieving its interest in order to withstand intermediate scrutiny.” *Mai*, 952 F.3d at 1115-16 (quotation marks omitted). “Instead, the statute simply needs to promote a substantial government interest that would be achieved less effectively absent the regulation.” *Id.* at 1116 (quotation marks omitted).

The Ammunition Laws easily satisfy the reasonable fit standard. During the first seven months they were in effect, over 750 prohibited people were prevented from purchasing ammunition. ER 237, 248-49, 251, 255. Those blocked included people with violent felony convictions, domestic violence convictions, and mental health commitments. ER 404. Without a doubt, the Ammunition Laws deterred countless prohibited people from even trying, just as the firearms background check laws deter prohibited people from purchasing firearms.

California’s experience is confirmed by other jurisdictions. One study of a City of Los Angeles ammunition ordinance found that 2.6% of ammunition purchasers were prohibited. ER 612. A report by the Sacramento Police Department looking at enforcement of that city’s similar ordinance found that 3.2% of purchasers were prohibited. ER 624.

Investigations into some of those purchasers led to felony charges being filed against 53 people, and 28 search warrants that uncovered additional criminal activity, from stolen property to what appear to be illegal 100-round drum magazines. *See* ER 628-37. And a report on ammunition and crime by New Jersey’s Commission on Investigation found that “purchases of ammunition by convicted felons are widespread.” ER 647.

In light of these studies and California’s actual experience, there is little question that California’s effort to make its communities safer would be “achieved less effectively absent” the Ammunition Laws. *Mai*, 952 F.3d at 1116 (quotation marks omitted). Because the Ammunition Laws satisfy the intermediate scrutiny standard as a matter of law, this could should both reverse the district court’s decision and resolve the merits of the Second Amendment claim. *See Azar*, 950 F.3d at 1083.

2. The district court incorrectly applied the intermediate scrutiny standard.

In holding that the Ammunition Laws violate the Second Amendment, the district court focused principally on people whose Standard Checks were rejected, concluding that they were “complete[ly] ban[ned]” from purchasing ammunition. *See, e.g.*, ER 56. Because, in its view, these people are “suffering the severest burden” on their Second Amendment right to self-

defense of the home, the court reasoned that the Ammunition Laws must be enjoined in their entirety. *Id.*

That analysis is both factually and legally wrong. As a factual matter, roughly 40% of those whose Standard Checks were rejected went on to purchase ammunition. *See* ER 261. As for the remaining 60%, the record does not reveal why they did not pursue alternative means to submit to a background check. Each one could have submitted to the Basic Check, and purchased ammunition after waiting a day or two and paying \$19. Cal. Code Regs., tit. 11, § 4303; ER 251-52 & nn.2-5. Each of them could also take steps to obtain an up-to-date record in the Automated Firearms System, allowing them to use Standard Checks going forward. ER 948-51.

The district court erred in other ways as well. It questioned the efficacy of the Ammunition Laws based on its “prediction from judicial experience,” ER 29, that “[p]rohibited persons will avoid background checks,” ER 30-32. *See also* ER 69 (“[O]f course, criminals don’t do background checks.”). That cannot be reconciled with the record here, which reveals that more than 750 prohibited persons in fact submitted to background checks and were blocked from purchasing ammunition as a result. ER 237, 248-49, 251, 255. Even if some prohibited people seek to procure ammunition through illegal sources, the Ammunition Laws promote California’s interest in public safety by

ensuring that all are prevented from purchasing ammunition from stores. *Cf. Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015) (“A ban on assault weapons won’t eliminate gun violence . . . but it may reduce the overall dangerousness of crime that does occur.”).

The district court also questioned the constitutionality of the Ammunition Laws because no other State has implemented similar requirements. *See* ER 44; ER 1-3. But in our federal system, “a single courageous state may, if its citizens choose, serve as a laboratory, and try novel legislative experiments.” *Pena*, 898 F.3d at 984 (quotation marks, italics, and brackets omitted) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). And “[p]roviding for the safety of citizens within their borders has long been state government’s most basic task.” *Kolbe v. Hogan*, 849 F.3d 114, 150 (4th Cir. 2017) (en banc) (Wilkinson, J., concurring). Neither the text of the Second Amendment nor *Heller* prevents states from “act[ing] prophylactically”; nor does either require states to bide their time “until another tragedy is inflicted or irretrievable human damage has once more been done.” *Id.*

As a legal matter, nothing supports the district court’s conclusion that, because the Ammunition Laws might be applied in an unconstitutional manner with respect to some people, they can be held facially

unconstitutional. As discussed above, this misapprehends the appropriate legal standard for facial challenges.

3. The district court adjudicated Second Amendment claims that no plaintiff had standing to bring.

Plaintiffs argued that the Ammunition Laws harm them because they “effectively bar[] some [people] from acquiring ammunition.” ER 1621. Yet “conspicuously missing from this lawsuit is any honest-to-God resident of [California] complaining that he or she cannot lawfully buy [ammunition]” because of the Ammunition Laws. *Teixeira*, 873 F.3d at 681 (quotation marks omitted). No individual plaintiff alleged in the operative complaint that the Ammunition Laws prevented him or her from purchasing ammunition. Nor could they—plaintiffs filed that complaint in June 2018, over a year before the background check requirement went into effect. ER 1718-49; *see also* Cal. Penal Code §§ 30352, 30370.

“A person to whom a statute properly applies can’t obtain relief based on arguments that a differently situated person might present.” *United States v. Chovan*, 735 F.3d 1127, 1135 (9th Cir. 2013) (quoting *United States v. Skoien*, 614 F.3d 638, 645 (7th Cir. 2010) (en banc)). “It is a well-established rule that a litigant may assert only his own legal rights and interests and cannot rest a claim to relief on the legal rights or interests of

third parties.” *Coalition of Clergy, Lawyers, & Professors v. Bush*, 310 F.3d 1153, 1163 (9th Cir. 2002). And while there is a narrow exception to this rule when there is some “hindrance to the third party’s ability to protect his or her own interests,” *id.*, nothing in the record here indicates that, if there are people who have been unable to purchase ammunition because of the Ammunition Laws, they cannot file their own lawsuit.

Nor does CRPA have standing. Organizations may “assert standing on behalf of their own members, or in their own right.” *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1265 (9th Cir. 2020)). To sue on its own behalf, an organization must establish that it has suffered “both a diversion of its resources and a frustration of its mission.” *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (quotation marks omitted). But CRPA submitted no evidence suggesting that the Ammunition Laws had required it to divert resources.

Instead, the CRPA focused its arguments on its members’ interests in “exercis[ing] their constitutionally protected right to acquire and otherwise transact in ammunition.” ER 1558. Reliance on this theory, however, required CRPA to establish (among other things) that “neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *San Diego Cty. Gun Rights Comm. v. Reno*, 98

F.3d 1121, 1130-31 (9th Cir. 1996). CRPA cannot meet that requirement here, for the same reason plaintiffs cannot satisfy the standard for facial challenges: determining whether the Ammunition Laws have actually prohibited any of their members from purchasing ammunition requires a case-by-case evaluation of the facts and circumstances of each person's situation.

To be clear, the Attorney General does not dispute that if the Ammunition Laws prevented a person who is legally permitted to buy ammunition from doing so—or “substantial[ly] burden[ed]” that effort—he or she would have standing to challenge the relevant statutes and regulations. *Jackson*, 746 F.3d at 965. Such people may very well exist. But the whole point of Article III standing is to ensure that courts will resolve legal questions “not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.” *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (citations and quotation marks omitted).

The district court's reasoning also rests implicitly on the overbreadth doctrine, which “essentially argues that a statute could not be enforced against a plaintiff, because it could not be enforced against someone else.” *Hightower v. City of Boston*, 693 F.3d 61, 81 (1st Cir. 2012). That doctrine,

however, does not apply outside the First Amendment context. *Salerno*, 481 U.S. at 745 (“[W]e have not recognized an ‘overbreadth’ doctrine outside the limited context of the First Amendment.” (citation omitted)); *Hightower*, 693 F.3d at 82-83 (collecting cases rejecting overbreadth arguments in Second Amendment context); *Wiese v. Becerra*, 306 F. Supp. 3d 1190, 1202 (E.D. Cal. 2018) (refusing to apply overbreadth doctrine in Second Amendment case).

II. THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFFS ESTABLISHED A LIKELIHOOD OF SUCCESS ON THEIR DORMANT COMMERCE CLAUSE CLAIMS

The district court’s order separately enjoined enforcement of California Penal Code sections 30312(a)-(b) and 30314(a). ER 96-109. Sections 30312(a) and (b) require that all ammunition transfers occur in face-to-face transactions. Ammunition may still be purchased over the internet or through other remote means, but it must be shipped to a licensed ammunition vendor for in-person processing and a background check. *See* Cal Penal Code §30312(b). Section 30314(a) requires that California residents bringing ammunition into the State do so through a licensed vendor for the same reasons. The district court reasoned that these laws impose an impermissible residency requirement on ammunition vendors that likely violates the dormant Commerce Clause. *See* ER 96-100. In reaching this result, the

district court relied on a novel definition of residency and misapplied dormant Commerce Clause jurisprudence.

The Commerce Clause authorizes Congress to “regulate Commerce with foreign Nations, and among the several States[.]” U.S. Const., art. I, § 8, cl. 3. It includes an implied limitation on the states’ authority often referred to as the negative or dormant Commerce Clause. *Healy v. Beer Inst.*, 491 U.S. 324, 326 n.1 (1989). “The modern law of what has come to be called the dormant Commerce Clause is driven by concern about economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008) (internal quotation marks omitted). Economic protectionism or discrimination under the dormant Commerce Clause “means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of State of Or.*, 511 U.S. 93, 99 (1994) (internal quotation marks omitted).

A law that directly regulates conduct that occurs wholly outside of a state’s borders is invalid per se under the dormant Commerce Clause. *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1323 (9th Cir. 2015) (en banc). If there is no such per se violation, courts employ a two-tiered

approach to determine whether the law violates the dormant Commerce Clause. *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 948 (9th Cir. 2013). Courts first ask whether the law “discriminates against interstate commerce, or [whether] its effect is to favor in-state economic interests[.]” *Id.* at 948. If it does, they apply a form of strict scrutiny. *Id.* at 948 & n.7. “The party challenging a regulation bears the burden of establishing that a challenged statute has a discriminatory purpose or effect under the Commerce Clause.” *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1097 (9th Cir. 2013).

If the law regulates evenhandedly, courts “examine[] whether the State’s interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.” *Ass'n des Eleveurs*, 729 F.3d at 948; *see also Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The district court misapplied these standards in holding that the laws violate the dormant Commerce Clause. *See* ER 96-100.¹⁰

¹⁰ The district court did not conduct an extraterritoriality analysis. *See* ER 96-104. Sections 30312 and 30314 apply only when the ammunition crosses California’s borders, which is permissible. *See Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1145 (9th Cir. 2015) (“[A] state may regulate commercial relationships in which at least one party is located in California.” (quotation marks omitted)). The district court’s order also mentions sections 30370 and 30385. ER 96. The court’s analysis does

A. Sections 30312 and 30314 Do Not Discriminate Against Interstate Commerce.

“A statute is discriminatory if it imposes commercial barriers or discriminates against an article of commerce by reason of its origin or destination out of State.” *Pharm. Research & Mfrs. of Am. v. County of Alameda*, 768 F.3d 1037, 1041 (9th Cir. 2014) (quotation marks and alterations omitted). “Conversely, a statute that treats all private companies exactly the same does not discriminate against interstate commerce. This is so even when only out-of-state businesses are burdened because there are no comparable in-state businesses.” *Id.* (quotation marks omitted). For purposes of dormant Commerce Clause analysis, a law may discriminate against interstate commerce in its purpose, on its face, or in its effect. *Maine v. Taylor*, 477 U.S. 131, 138 (1986). Discrimination analysis under the dormant Commerce Clause “assumes a comparison of substantially similar entities.” *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997).

Sections 30312 and 30314 do not discriminate in their purpose or on their face. They were not designed to promote the California ammunition industry; they were designed to keep ammunition out of the hands of

not depend on these sections, and they do not impose any freestanding requirements that would be subject to a separate dormant Commerce Clause analysis if sections 30312 and 30314 are upheld.

prohibited people. *See* ER 1693. And the text of neither statute distinguishes between in-state and out-of-state businesses. *See* Cal. Penal Code §§ 30312, 30314. That leaves discriminatory effect, which is a harder standard for plaintiffs to satisfy. *Int’l Franchise Ass’n v. City of Seattle*, 803 F.3d 389, 405 (9th Cir. 2015) (“[A] plaintiff must satisfy a higher evidentiary burden when . . . a statute is neither facially discriminatory nor motivated by an impermissible purpose.”).

Plaintiffs did not establish a likelihood of success on a discriminatory effects theory as a matter of law. Under section 30312, a California company that sells ammunition over the internet must have ammunition delivered to customers through a licensed ammunition vendor, just like plaintiff out-of-state businesses. Likewise, an out-of-state ammunition vendor that has a physical store in California may obtain a license and sell ammunition in California. *See* Cal. Penal Code § 30312. So, for example, Dick’s Sporting Goods, which is owned by a Delaware Corporation with its principal place of business in Pennsylvania, may apply for an ammunition license for one of its brick-and-mortar stores in the State, just like a California company, such as Turner’s Outdoorsman, can. *See id.* In all its applications, section 30312 treats in-state and out-of-state businesses the same. And the district court’s characterization of section 30312 as “prohibit[ing] a seller of ammunition

physically located beyond California from selling directly to customers in California” fails to acknowledge that the statute restricts California companies from shipping ammunition directly to customers too. *See* ER 99.

Similarly, state residents who purchase ammunition while outside of California—either at a physical store, over the internet, or by any other lawful means—must deliver it to a licensed ammunition vendor before taking possession of it in the State. *See* Cal. Penal Code § 30314. The vendor who processes that transaction may be an out-of-state business with a brick-and-mortar location in California, like the Dick’s Sporting Goods in the example above, or a California company, like Turner’s Outdoorsman. *See id.* Nor does the law distinguish between the ownership of the business that sells the ammunition outside of California. *See id.*

The Western District of New York dismissed a dormant Commerce Clause challenge to a similar provision in New York that effectively bans remote sales by requiring that ammunition purchases take place in person. *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 990 F. Supp. 2d 349, 379-81 (W.D.N.Y. 2013) *aff’d in part and rev’d in part on other grounds*, 804 F.3d 242, 251 n.20 (2d Cir. 2015). California’s law is less restrictive because it still allows remote sales, so long as they are processed by a licensed vendor in a face-to-face transaction. *See* Cal. Penal Code § 30312(b).

Ignoring this on-point authority, the district court relied on *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716 (9th Cir. 2017), to hold that sections 30312 and 30314 “require[] any ammunition seller that wants to engage in business with California customers to *become a resident*.” See ER 101-02 (italics in original). But *Nationwide Biweekly* does not support that conclusion. There, this Court upheld a preliminary injunction order enjoining a law that required out-of-state mortgage proraters to incorporate in California if they wanted to do business in the State. *Nationwide Biweekly*, 873 F.3d at 716. Because a “corporation’s state of incorporation is one of its states of residency,” the law mandated California residency to do business. *Id.*

The district court erroneously equated opening a brick-and-mortar store to incorporating in a state for purposes of determining residency. See ER 101-02. Incorporating in a state is a traditional basis for determining residency. Among other things, it affects federal district courts’ diversity jurisdiction over the business. See 28 U.S.C. § 1332(c)(1). It would also subject a business to general personal jurisdiction in California as well as the State’s laws governing corporate internal affairs. See *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) (“With respect to a corporation, the place of incorporation and principal place of business are paradigm bases for

general jurisdiction.” (quotation marks, brackets, and ellipsis omitted)); *Atherton v. FDIC*, 519 U.S. 213, 224 (1997) (“States normally look to the State of a business’ incorporation for the law that provides the relevant corporate governance general standard of care.”). Merely opening a store in a state does not establish residency for these purposes, and the district court did not cite any authority suggesting a different standard for determining a business’s residency applies in the dormant Commerce Clause context.

Next, the district court held that sections 30312 and 30314 are analogous to the New York law that the Supreme Court invalidated in *Granholm v. Heald*, 544 U.S. 460 (2005). ER 102, 108. In that case, New York, like many states, regulated the sale and importation of wine through a three tiered system governed by “a complex set of overlapping state and federal regulations,” including limiting vertical integration between tiers. *Granholm*, 544 U.S. at 466. Wineries making wine exclusively out of grapes grown in New York could obtain a license allowing them to ship directly to customers in state. *Id.* at 470. Out-of-state wineries could obtain a similar license only if they established a “branch factory, office or storeroom within the State of New York.” *Id.* (quotation marks omitted). The law was “an indirect way of subjecting out-of-state wineries, but not local ones, to the three-tier system.” *Id.* at 474. The law was also part of a national

“patchwork” designed to “protect local wineries” as part of “an ongoing, low-level trade war.” *Id.* at 473.

This Court “read[s] *Granholm* to permit States to limit direct shipment from wineries *so long as the limitations treat in-state and out-of-state wineries in the same manner* and do not impose new burdens on out-of-state wineries.” *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1234 (9th Cir. 2010) (italics in original; internal citations omitted). That is what sections 30312 and 30314 do. They require the exact same thing of in-state and out-of-state economic interests: all vendors must open a physical store in California if they want to conduct background checks and sell ammunition directly to customers in the State, and they all must ship ammunition to a vendor if they want to sell to consumers without a physical store. *See* Cal. Penal Code §§ 30312(a)-(b), 30314(a). Other laws requiring in-person commercial requirements have been upheld against dormant Commerce Clause challenges in numerous contexts. *E.g.*, *Churchill Downs, Inc. v. Trout*, 589 F. App’x 233, 237 (5th Cir. 2014) (law requiring that bets on horse races be placed in person); *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 212-13 (2d Cir. 2003) (law requiring cigarette sales to occur in face-to-face transactions); *Consigned Sales Co. v. Sanders*, 543 F. Supp. 230, 232 (W.D. Okla. 1982) (law banning sale of fireworks through

the mail). *Granholm* does not stand for the proposition that laws requiring in-person or in-state conduct automatically have a discriminatory effect, as the district court's decision seems to suggest. *See* ER 102.

Unlike the New York law in *Granholm*, California's laws are a pure exercise of the police power to protect public safety, not a volley in a longstanding interstate trade war over how to favor in-state producers of a good. *See* ER 1693. Nor is there evidence in the record showing that any of the ammunition sold in California is manufactured in the State, unlike in *Granholm*, where rules governing wine sales were based on the state where the grapes used to make the wine were grown. *See* 544 U.S. at 470. Plaintiffs did not meet their burden of showing otherwise. *See Rocky Mountain Farmers Union*, 730 F.3d at 1097.

Sections 30312 and 30314 may have the incidental effect of shifting ammunition sales away from the internet and to brick-and-mortar stores. But “interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another.” *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 117 (1978). The dormant Commerce Clause does not protect “particular structure or methods of operation in a retail market” or “particular interstate firms.” *Id.* at 119-20. That burdens may “fall[] on

some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.” *Id.* at 126. Here, nothing in the record shows that the business purportedly lost by the out-of-state vendor plaintiffs shifted to California ammunition vendors, as opposed to out-of-state companies with brick-and-mortar stores in California, such as Dick’s Sporting Goods or Walmart. *See* ER 1550-51; ER 1552-53.

B. Sections 30312 and 30314 Do Not Significantly Burden Interstate Commerce and Are Valid Under *Pike*.

When a challenged law does not directly regulate interstate commerce, plaintiffs must rely on the *Pike* balancing test. *Chinatown Neighborhood Ass’n*, 794 F.3d at 1146-47. Under this test, plaintiffs have the burden of establishing both that the law places a significant burden on interstate commerce and that the burden “clearly outweigh[s] the local benefits arising from it.” *Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 452 (9th Cir. 2019) (quotation marks omitted).

Plaintiffs neither alleged any facts nor submitted any evidence that would meet their burden of showing that sections 30312 and 30314 impose a significant burden on interstate commerce. “[W]here . . . there is no discrimination and there is no significant burden on interstate commerce, [this Court] need not examine the actual or putative benefits of the

challenged statutes.” *See Nat’l Ass’n of Optometrists*, 682 F.3d at 1155; *Ass’n des Eleveurs*, 729 F.3d at 952 (finding an inquiry into “whether the benefits of the challenged laws are illusory” unwarranted because the regulation of the foie gras market is not inherently national).

The district court nevertheless held that “there are reasonable inferences to be drawn that Proposition 63 significantly burdens interstate commerce in ammunition.” ER 104. The court also speculated, in the absence of any evidence, that a less burdensome alternative to the current law could permit vendors to conduct remote background checks, rather than face-to-face background checks. ER 104. Setting aside that the face-to-face transaction requirement serves a purpose that would not be served as well by the court’s suggestion, drawing “reasonable inferences” against the constitutionality of the law and suggesting alternatives misapplies the legal standard, since legal precedent places the burden of proof on plaintiffs. *See Rosenblatt*, 940 F.3d at 451-52 (“[W]e presume the law serves the [government’s] legitimate interests; it is [plaintiffs’] burden to plausibly allege otherwise.”).

Dormant Commerce Clause analysis focuses “on the interstate *flow of goods*, not on where the retailers were incorporated, what the out-of-state market shares of sales and profits were, or whether competition would be

affected by the statute.” *Nat’l Ass’n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1153 (9th Cir. 2012); *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472-73 (1981) (focusing on movement of milk products across Minnesota’s borders). Yet neither plaintiffs’ arguments nor the district court’s *Pike* analysis even address the flow of ammunition into or out of California.

Sections 30312 and 30314 ensure that all California residents who purchase or bring ammunition into the State will be subject to background checks. As discussed throughout this brief, that promotes public safety by preventing prohibited people from having easy access to ammunition. “[T]he Commerce Clause . . . was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.” *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 306 (1997) (internal quotation marks omitted)); *see also Pharm. Research & Mfrs. of Am.*, 768 F.3d at 1045 (“[R]egulations that touch upon safety are those that the [Supreme] Court has been most reluctant to invalidate.” (ellipsis and quotation marks omitted)).

Because plaintiffs failed to allege or show that sections 30312 and 30314 place any burden on interstate commerce, their claim fails as a matter

of law. *See Rosenblatt*, 940 F.3d at 453 (affirming district court’s dismissal of dormant Commerce Clause claims for failure to state a claim); *Am. Fuel & Petrochemical Mfrs. v. O’Keefe*, 903 F.3d 903, 916 (9th Cir. 2018) (same); *Chinatown Neighborhood Ass’n*, 794 F.3d at 1147 (same). As with plaintiffs’ Second Amendment claims, this Court should not only reverse the district court’s preliminary injunction order, but also resolve the merits of the dormant Commerce Clause claim. *See Azar*, 950 F.3d at 1083.

III. THE HARM TO CALIFORNIANS FLOWING FROM A PRELIMINARY INJUNCTION VASTLY OUTWEIGHS ANY HARM THAT PLAINTIFFS HAVE ALLEGED.

Because plaintiffs cannot establish a likelihood of success on either their Second Amendment or dormant Commerce Clause claims, this Court need not address the remaining preliminary injunction factors. *See Edge v. City of Everett*, 929 F.3d 657, 663 (9th Cir. 2019) (“Likelihood of success on the merits is the most important factor; if a movant fails to meet this threshold inquiry, we need not consider the other factors.”). Nevertheless, the district court erred in analyzing those factors as well.

The district court’s discussion of irreparable harm rested on its holding that the Ammunition Laws likely violate the Second Amendment and dormant Commerce Clause. ER 109-13. The court analogized to the First Amendment context, where the deprivation of a right ““for even minimal

periods of time, unquestionably constitutes irreparable injury.” ER 110 (quoting *Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012)). It is not clear whether that principle extends to Second Amendment and dormant Commerce Clause claims. This Court does not need to reach that issue, however, because even if the principle extends that far, the district court still misapplied it. Despite recognizing the argument that “Plaintiffs will still be able to purchase ammunition and [doing so] will only take five minutes,” the district court found irreparable harm experienced by “[t]housands of law-abiding citizen residents [who] have been completely and unjustifiably rebuffed.” See ER 111. This kind of “[s]peculative injury does not constitute irreparable injury.” See *Goldie’s Bookstore v. Superior Ct.*, 739 F.2d 466, 472 (9th Cir. 1984). Nor can a plaintiff establish irreparable harm by relying on the experience of third parties; *Winter* mandates that “[a] plaintiff seeking a preliminary injunction must establish . . . that *he* is likely to suffer irreparable harm.” *Winter*, 555 U.S. at 20 (emphasis added); see also *id.* at 22 (“Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”).

At the end of the day, the individual plaintiffs can use the Standard Check procedure to purchase ammunition, which will cost \$1 and take five to ten minutes. The Ammunition Laws have not prevented them from getting ammunition, or even caused a meaningful delay.

As for the out-of-state business plaintiffs, they waited over 18 months after the restrictions on direct sales went into effect—and over 16 months after they filed this lawsuit—to seek a preliminary injunction. *See* Cal. Penal Code 30312 (restrictions on direct sales commence January 1, 2018); ER 1755 (action filed April 26, 2018); ER 1635 (preliminary injunction motion filed July 22, 2019). Long delays in seeking injunctive relief weigh against finding any harm. *See, e.g., Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (“Plaintiff’s long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm.”).

The two remaining factors, the balance of the hardships and the public interest, merge in cases like this one where the government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). In addressing these factors, the district court disregarded the undisputed fact that its preliminary injunction would result in violent felons, the dangerously mentally ill, and other prohibited people buying ammunition from gun stores. ER 104.

Californians have a compelling interest in the continued implementation of laws that keep weapons out of the hands of dangerous people likely to misuse them. *See Washington v. U.S. Dep't of State*, 318 F. Supp. 3d 1247, 1261-62 (W.D. Wash. 2018) (finding defendant's actions causing an increase in untraceable 3D-printed firearms would "likely increase the threat of gun violence [state plaintiffs] and their people experience") *appeal filed*, No. 20-35064 (9th Cir. Jan. 27, 2020). Here, hundreds of prohibited people, if not thousands, will purchase ammunition from stores if the district court's order remains in effect. *See* ER 237, 248-49, 251, 255. This serious threat to public safety vastly outweighs plaintiffs' negligible burden of having to pay \$1 and wait five to ten minutes to purchase ammunition. *See Tracy Rifle & Pistol LLC v. Harris*, 118 F. Supp. 3d 1182 (E.D. Cal. 2015) (denying store owner's motion for preliminary injunction in part because California's interest in preventing handgun violence and suicide outweighed plaintiffs' First Amendment interest in posting handgun advertisements on the exterior of their stores), *aff'd*, 637 F. App'x 401 (9th Cir. 2016).

CONCLUSION

This Court should reverse the district court's April 23, 2020 order entering a preliminary injunction and order judgment entered in favor of the Attorney General on the Second Amendment and dormant Commerce Clause claims.

Dated: June 12, 2020

Respectfully submitted,

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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.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: June 12, 2020

Respectfully Submitted,

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**CIRCUIT RULE 28-2.7 ADDENDUM
TO APPELLANT’S OPENING BRIEF**

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Section 8, Clause 3. Regulation of Commerce

[Currentness](#)

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Constitution of the United States
Annotated
Amendment II. Keeping and Bearing Arms

U.S.C.A. Const. Amend. II

Amendment II. Keeping and Bearing Arms

Currentness

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S.C.A. Const. Amend. II, USCA CONST Amend. II
Current through P.L. 116-142.

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West's Annotated California Codes
Penal Code (Refs & Annos)
Part 6. Control of Deadly Weapons (Refs & Annos)
Title 4. Firearms (Refs & Annos)
Division 10. Special Rules Relating to Particular Types of Firearms or Firearm Equipment (Refs & Annos)
Chapter 1. Ammunition (Refs & Annos)
Article 2. Other Restrictions Relating to Ammunition (Refs & Annos)

West's Ann.Cal.Penal Code § 30312

§ 30312. Sale of ammunition through licensed ammunition vendor; requirements; exceptions; violation

Effective: October 14, 2017

[Currentness](#)

(a)(1) Commencing January 1, 2018, the sale of ammunition by any party shall be conducted by or processed through a licensed ammunition vendor.

(2) When neither party to an ammunition sale is a licensed ammunition vendor, the seller shall deliver the ammunition to a vendor to process the transaction. The ammunition vendor shall promptly and properly deliver the ammunition to the purchaser, if the sale is not prohibited, as if the ammunition were the vendor's own merchandise. If the ammunition vendor cannot legally deliver the ammunition to the purchaser, the vendor shall forthwith return the ammunition to the seller. The ammunition vendor may charge the purchaser an administrative fee to process the transaction, in an amount to be set by the Department of Justice, in addition to any applicable fees that may be charged pursuant to the provisions of this title.

(b) Commencing January 1, 2018, the sale, delivery, or transfer of ownership of ammunition by any party may only occur in a face-to-face transaction with the seller, deliverer, or transferor, provided, however, that ammunition may be purchased or acquired over the Internet or through other means of remote ordering if a licensed ammunition vendor initially receives the ammunition and processes the transaction in compliance with this section and Article 3 (commencing with [Section 30342](#)) of Chapter 1 of Division 10 of Title 4 of this part.

(c) Subdivisions (a) and (b) shall not apply to the sale, delivery, or transfer of ammunition to any of the following:

(1) An authorized law enforcement representative of a city, county, city and county, or state or federal government, if the sale, delivery, or transfer is for exclusive use by that government agency and, prior to the sale, delivery, or transfer of the ammunition, written authorization from the head of the agency employing the purchaser or transferee is obtained, identifying the employee as an individual authorized to conduct the transaction, and authorizing the transaction for the exclusive use of the agency employing the individual.

(2) A sworn peace officer, as defined in Chapter 4.5 (commencing with [Section 830](#)) of Title 3 of Part 2, or sworn federal law enforcement officer, who is authorized to carry a firearm in the course and scope of the officer's duties.

(3) An importer or manufacturer of ammunition or firearms who is licensed to engage in business pursuant to Chapter 44 (commencing with [Section 921](#)) of Title 18 of the United States Code and the regulations issued pursuant thereto.

(4) A person who is on the centralized list of exempted federal firearms licensees maintained by the Department of Justice pursuant to Article 6 (commencing with [Section 28450](#)) of Chapter 6 of Division 6 of this title.

(5) A person whose licensed premises are outside this state and who is licensed as a dealer or collector of firearms pursuant to Chapter 44 (commencing with [Section 921](#)) of Title 18 of the United States Code and the regulations issued pursuant thereto.

(6) A person who is licensed as a collector of firearms pursuant to Chapter 44 (commencing with [Section 921](#)) of Title 18 of the United States Code and the regulations issued pursuant thereto, whose licensed premises are within this state, and who has a current certificate of eligibility issued by the Department of Justice pursuant to [Section 26710](#).

(7) An ammunition vendor.

(8) A consultant-evaluator.

(9) A person who purchases or receives ammunition at a target facility holding a business or other regulatory license, provided that the ammunition is at all times kept within the facility's premises.

(10) A person who purchases or receives ammunition from a spouse, registered domestic partner, or immediate family member as defined in [Section 16720](#).

(11) A person enrolled in the basic training academy for peace officers or any other course certified by the Commission on Peace Officer Standards and Training, an instructor of the academy or course, or a staff member of the academy or entity providing the course, who is purchasing the ammunition for the purpose of participation or use in the course.

(d) A violation of this section is a misdemeanor.

Credits

(Added by [Stats.2010, c. 711 \(S.B.1080\)](#), § 6, operative Jan. 1, 2012. Amended by [Initiative Measure \(Prop. 63, § 8.6, approved Nov. 8, 2016, eff. Nov. 9, 2016\)](#); [Stats.2017, c. 783 \(A.B.693\)](#), § 3, eff. Oct. 14, 2017.)

West's Ann. Cal. Penal Code § 30312, CA PENAL § 30312
Current with urgency legislation through Ch. 3 of 2020 Reg.Sess

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Article 2. Other Restrictions Relating to Ammunition (Refs & Annos)

West's Ann.Cal.Penal Code § 30314

§ 30314. Transportation of ammunition into the state by a resident;
delivery to licensed ammunition vendor; exceptions; violation

Effective: November 9, 2016

[Currentness](#)

(a) Commencing January 1, 2018, a resident of this state shall not bring or transport into this state any ammunition that he or she purchased or otherwise obtained from outside of this state unless he or she first has that ammunition delivered to a licensed ammunition vendor for delivery to that resident pursuant to the procedures set forth in [Section 30312](#).

(b) Subdivision (a) does not apply to any of the following:

(1) An ammunition vendor.

(2) A sworn peace officer, as defined in Chapter 4.5 (commencing with [Section 830](#)) of Title 3 of Part 2, or sworn federal law enforcement officer, who is authorized to carry a firearm in the course and scope of the officer's duties.

(3) An importer or manufacturer of ammunition or firearms who is licensed to engage in business pursuant to Chapter 44 (commencing with [Section 921](#)) of Title 18 of the United States Code and the regulations issued pursuant thereto.

(4) A person who is on the centralized list of exempted federal firearms licensees maintained by the Department of Justice pursuant to Article 6 (commencing with [Section 28450](#)) of Chapter 6 of Division 6.

(5) A person who is licensed as a collector of firearms pursuant to Chapter 44 (commencing with [Section 921](#)) of Title 18 of the United States Code and the regulations issued pursuant thereto, whose licensed premises are within this state, and who has a current certificate of eligibility issued by the Department of Justice pursuant to [Section 26710](#).

(6) A person who acquired the ammunition from a spouse, registered domestic partner, or immediate family member as defined in [Section 16720](#).

(c) A violation of this section is an infraction for any first time offense, and either an infraction or a misdemeanor for any subsequent offense.

Credits

(Added by Initiative Measure (Prop. 63, § 8.7, approved Nov. 8, 2016, eff. Nov. 9, 2016).)

West's Ann. Cal. Penal Code § 30314, CA PENAL § 30314

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Chapter 1. Ammunition (Refs & Annos)
Article 3. Ammunition Vendors (Refs & Annos)

West's Ann.Cal.Penal Code § 30352

§ 30352. Information to be recorded upon delivery of ammunition; form;
electronic submission to department; persons authorized to purchase ammunition

Effective: January 1, 2017

[Currentness](#)

(a) Commencing July 1, 2019, an ammunition vendor shall not sell or otherwise transfer ownership of any ammunition without, at the time of delivery, legibly recording the following information on a form to be prescribed by the Department of Justice:

- (1) The date of the sale or other transfer.
- (2) The purchaser's or transferee's driver's license or other identification number and the state in which it was issued.
- (3) The brand, type, and amount of ammunition sold or otherwise transferred.
- (4) The purchaser's or transferee's full name and signature.
- (5) The name of the salesperson who processed the sale or other transaction.
- (6) The purchaser's or transferee's full residential address and telephone number.
- (7) The purchaser's or transferee's date of birth.

(b) Commencing July 1, 2019, an ammunition vendor shall electronically submit to the department the information required by subdivision (a) for all sales and transfers of ownership of ammunition. The department shall retain this information in a database to be known as the Ammunition Purchase Records File. This information shall remain confidential and may be used by the department and those entities specified in, and pursuant to, [subdivision \(b\) or \(c\) of Section 11105](#), through the California Law Enforcement Telecommunications System, only for law enforcement purposes. The ammunition vendor shall not use, sell, disclose, or share the information for any other purpose other than the submission required by this subdivision without the express written consent of the purchaser or transferee.

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(c) Commencing on July 1, 2019, only those persons listed in this subdivision, or those persons or entities listed in subdivision (e), shall be authorized to purchase ammunition. Prior to delivering any ammunition, an ammunition vendor shall require bona fide evidence of identity to verify that the person who is receiving delivery of the ammunition is a person or entity listed in subdivision (e) or one of the following:

(1) A person authorized to purchase ammunition pursuant to [Section 30370](#).

(2) A person who was approved by the department to receive a firearm from the ammunition vendor, pursuant to [Section 28220](#), if that vendor is a licensed firearms dealer, and the ammunition is delivered to the person in the same transaction as the firearm.

(d) Commencing July 1, 2019, the ammunition vendor shall verify with the department, in a manner prescribed by the department, that the person is authorized to purchase ammunition. If the person is not listed as an authorized ammunition purchaser, the vendor shall deny the sale or transfer.

(e) Subdivisions (a) and (d) shall not apply to sales or other transfers of ownership of ammunition by ammunition vendors to any of the following, if properly identified:

(1) An ammunition vendor.

(2) A person who is on the centralized list of exempted federal firearms licensees maintained by the department pursuant to Article 6 (commencing with [Section 28450](#)) of Chapter 6 of Division 6.

(3) A person who purchases or receives ammunition at a target facility holding a business or other regulatory license, provided that the ammunition is at all times kept within the facility's premises.

(4) A gunsmith.

(5) A wholesaler.

(6) A manufacturer or importer of firearms or ammunition licensed pursuant to Chapter 44 (commencing with [Section 921](#)) of Title 18 of the United States Code, and the regulations issued pursuant thereto.

(7) An authorized law enforcement representative of a city, county, city and county, or state or federal government, if the sale or other transfer of ownership is for exclusive use by that government agency, and, prior to the sale, delivery, or transfer of the handgun ammunition, written authorization from the head of the agency authorizing the transaction is presented to the person from whom the purchase, delivery, or transfer is being made. Proper written authorization is defined as verifiable written certification from the head of the agency by which the purchaser, transferee, or person otherwise acquiring ownership is employed, identifying the employee as an individual authorized to conduct the transaction, and authorizing the transaction for the exclusive use of the agency by which that individual is employed.

(8)(A) A properly identified sworn peace officer, as defined in Chapter 4.5 (commencing with [Section 830](#)) of Title 3 of Part 2, or properly identified sworn federal law enforcement officer, who is authorized to carry a firearm in the course and scope of the officer's duties.

(B)(i) Proper identification is defined as verifiable written certification from the head of the agency by which the purchaser or transferee is employed, identifying the purchaser or transferee as a full-time paid peace officer who is authorized to carry a firearm in the course and scope of the officer's duties.

(ii) The certification shall be delivered to the vendor at the time of purchase or transfer and the purchaser or transferee shall provide bona fide evidence of identity to verify that he or she is the person authorized in the certification.

(iii) The vendor shall keep the certification with the record of sale and submit the certification to the department.

(f) The department is authorized to adopt regulations to implement the provisions of this section.

Credits

(Added by [Stats.2010, c. 711 \(S.B.1080\)](#), § 6, operative Jan. 1, 2012. Amended by [Initiative Measure \(Prop. 63, § 8.13, approved Nov. 8, 2016, eff. Nov. 9, 2016\)](#); [Stats.2016, c. 55 \(S.B.1235\)](#), § 12, eff. Jan. 1, 2017.)

West's Ann. Cal. Penal Code § 30352, CA PENAL § 30352
Current with urgency legislation through Ch. 3 of 2020 Reg.Sess

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Chapter 1. Ammunition (Refs & Annos)
Article 3. Ammunition Vendors (Refs & Annos)

West's Ann.Cal.Penal Code § 30365

§ 30365. Penalty for record keeping violations; construction of section in relation to other laws

Effective: January 1, 2012

[Currentness](#)

(a) A violation of [Section 30352](#), [30355](#), [30360](#), or [30362](#) is a misdemeanor.

(b) The provisions of this section are cumulative, and shall not be construed as restricting the application of any other law. However, an act or omission punishable in different ways by different provisions of law shall not be punished under more than one provision.

Credits

(Added by [Stats.2010, c. 711 \(S.B.1080\)](#), § 6, operative Jan. 1, 2012.)

West's Ann. Cal. Penal Code § 30365, CA PENAL § 30365

Current with urgency legislation through Ch. 3 of 2020 Reg.Sess

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Chapter 1. Ammunition (Refs & Annos)

Article 4. Ammunition Purchase Authorizations (Refs & Annos)

West's Ann.Cal.Penal Code § 30370

§ 30370. Electronic approval of purchase or transfer of ammunition by department; determination of eligibility of purchaser or transferee; development of approval procedure for single ammunition transaction or purchase; provision of ammunition by vendor without approval prohibited; transaction fee; Ammunition Safety and Enforcement Special Fund; regulations

Effective: January 1, 2017

[Currentness](#)

(a) Commencing July 1, 2019, the department shall electronically approve the purchase or transfer of ammunition through a vendor, as defined in [Section 16151](#), except as otherwise specified. This approval shall occur at the time of purchase or transfer, prior to the purchaser or transferee taking possession of the ammunition. Pursuant to the authorization specified in [paragraph \(1\) of subdivision \(c\) of Section 30352](#), the following persons are authorized to purchase ammunition:

(1) A purchaser or transferee whose information matches an entry in the Automated Firearms System (AFS) and who is eligible to possess ammunition as specified in subdivision (b).

(2) A purchaser or transferee who has a current certificate of eligibility issued by the department pursuant to [Section 26710](#).

(3) A purchaser or transferee who is not prohibited from purchasing or possessing ammunition in a single ammunition transaction or purchase made pursuant to the procedure developed pursuant to subdivision (c).

(b) To determine if the purchaser or transferee is eligible to purchase or possess ammunition pursuant to paragraph (1) of subdivision (a), the department shall cross-reference the ammunition purchaser's or transferee's name, date of birth, current address, and driver's license or other government identification number, as described in [Section 28180](#), with the information maintained in the AFS. If the purchaser's or transferee's information does not match an AFS entry, the transaction shall be denied. If the purchaser's or transferee's information matches an AFS entry, the department shall determine if the purchaser or transferee falls within a class of persons who are prohibited from owning or possessing ammunition by cross-referencing with the Prohibited Armed Persons File. If the purchaser or transferee is prohibited from owning or possessing a firearm, the transaction shall be denied.

(c) The department shall develop a procedure in which a person who is not prohibited from purchasing or possessing ammunition may be approved for a single ammunition transaction or purchase. The department shall recover the cost of processing and

regulatory and enforcement activities related to this section by charging the ammunition transaction or purchase applicant a fee not to exceed the fee charged for the department's Dealers' Record of Sale (DROS) process, as described in [Section 28225](#) and not to exceed the department's reasonable costs.

(d) A vendor is prohibited from providing a purchaser or transferee ammunition without department approval. If a vendor cannot electronically verify a person's eligibility to purchase or possess ammunition via an Internet connection, the department shall provide a telephone line to verify eligibility. This option is available to ammunition vendors who can demonstrate legitimate geographical and telecommunications limitations in submitting the information electronically and who are approved by the department to use the telephone line verification.

(e) The department shall recover the reasonable cost of regulatory and enforcement activities related to this article by charging ammunition purchasers and transferees a per transaction fee not to exceed one dollar (\$1), provided, however, that the fee may be increased at a rate not to exceed any increases in the California Consumer Price Index as compiled and reported by the Department of Industrial Relations, not to exceed the reasonable regulatory and enforcement costs.

(f) A fund to be known as the "Ammunition Safety and Enforcement Special Fund" is hereby created within the State Treasury. All fees received pursuant to this section shall be deposited into the Ammunition Safety and Enforcement Special Fund and, notwithstanding [Section 13340 of the Government Code](#), are continuously appropriated for purposes of implementing, operating, and enforcing the ammunition authorization program provided for in this section and [Section 30352](#) and for repaying the start-up loan provided for in [Section 30371](#).

(g) The Department of Justice is authorized to adopt regulations to implement this section.

Credits

(Added by [Stats.2016, c. 55 \(S.B.1235\)](#), § 15, eff. Jan. 1, 2017.)

West's Ann. Cal. Penal Code § 30370, CA PENAL § 30370
Current with urgency legislation through Ch. 3 of 2020 Reg.Sess

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

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I hereby certify that on June 12, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

APPELLANT’S OPENING BRIEF (PRELIMINARY INJUNCTION APPEAL – NINTH CIRCUIT RULE 3-3)

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/s/ Eileen A. Ennis
Signature