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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

JEFF SILVESTER, BRANDON COMBS, THE CALGUNS FOUNDATION, INC., a non-profit organization, and THE SECOND AMENDMENT FOUNDATION, INC., a non-profit organization, Plaintiffs, **v.** **KAMALA D. HARRIS, Attorney General of California (in her official capacity),** Defendant.	1:11-cv-02137-AWI-SKO **REPLY IN SUPPORT OF (1) MOTION OF DEFENDANT KAMALA D. HARRIS TO ALTER OR AMEND JUDGMENT AND (2) MOTION OF DEFENDANT KAMALA D. HARRIS FOR STAY PENDING APPEAL** Hearing Date: November 10, 2014 Hearing Time: 1:30 p.m. Judge: Hon. Anthony W. Ishii Judgment Entered: August 25, 2014 Trial Dates: March 25-28, 2014 Action Filed: December 23, 2011

Defendant Kamala D. Harris, Attorney General of California ("Defendant"), submits the following single reply in support of the two pending defense motions herein, one to amend the judgment to enlarge the time period for complying with it, and the other motion to stay the judgment pending the outcome of Defendant's appeal to the U.S. Court of Appeals for the Ninth Circuit. Plaintiffs submitted a single opposition to the two motions. Defendant is following that format for the sake of brevity.

REPLY ARGUMENT

I. PLAINTIFFS FAILED TO COUNTER DEFENDANT'S ARGUMENTS AND EVIDENCE IN FAVOR OF EXTENDING BY SIX MONTHS THE TIME TO COMPLY WITH THE JUDGMENT

A. Plaintiffs' Arguments Do Not Give Proper Weight to the Technical Impediments to Compliance by the Current Deadline

Although Defendant's opening papers in support of the motion to amend the judgment, to allow an extra six months for compliance, provide a detailed explanation of the technical difficulty that the California Bureau of Firearms ("BOF") would face in complying with the judgment by the existing deadline (February 23, 2015), Plaintiffs respond with just a bare assertion that "[the California Department of Justice ("DOJ")] is capable of complying with the order with its current system—a point implicit in the fact that DOJ admits it could comply by manually processing applications—and can continue to do so while upgrading its system to provide for automated review of DROS applications." (Plfs.' Consol. Opp'n to Def.'s Mtn. to Alter or Amend J. and Mtn. for Stay Pending Appeal ("Opp'n Brief"), Dkt. Doc. 120, at 2:19-2:21; *accord id.* at 1:13-1:14, 5:4-5:6). In fact, the undisputed evidence is that BOF does not have enough employees to do manual checking of three extra databases[1] for each Dealer Record of Sale ("DROS") firearm-purchase application that BOF receives. (Decl. of Stephen J. Lindley ("First Lindley Decl."), Dkt. Doc. 110-1, at ¶¶ 11-12.) BOF would have to go through a lengthy process, taking about a year, to obtain funding and to hire and to train personnel to handle that extra work. (*Id.*, at ¶ 13.) It should also be noted that, by definition, there could not be *any* "auto-approved" DROS applications while BOF employees have to check every application manually against names and other listings in three databases. (*Id.*, at ¶ 8.) Plaintiffs' critique is empty and ineffective.

Furthermore, Plaintiffs offer no response at all to Defendant's description of the time and work required to modify DOJ computer systems to automate (to the extent possible) the process of checking the three databases for each DROS application.

[1](1) The Automated Firearms System; (2) the database of holders of carry concealed weapon permits; and (3) the database of holders of certificates of eligibility.

In short, Plaintiffs have not rebutted Defendant's arguments and evidence about the technical impediments to complying with the Court's judgment by the current deadline, and the need to extend that deadline by approximately six months.

B. Plaintiffs Failed to Address the Financial Obstacles to Compliance by the Current Deadline

Plaintiffs make a similarly unsupported objection to Defendant's accurate descriptions of the difficulty in procuring funding to make the needed changes. Plaintiffs assert, "As for money, the DOJ has significant funds appropriated to it that may be used for the purposes of complying with the Order without any legislative or executive involvement" (Opp'n Brief at 2:22-2:23), citing two BOF-related funds for which the California Legislature has appropriated money as reflected in the current California state budget. (*Id.* at 2:24-2:26 & n.1.) The problem with Plaintiffs' argument is the false assumption that the appropriated money is lying unused and thus available to be applied toward the expenses of complying with this Court's remedial order. In fact, all the money appropriated to be used to pay for DROS application processing is already being used for current operations (paying employee salaries, paying rent on the physical facilities, etc.). (Supp. Declaration of Stephen J. Lindley ("Supp. Lindley Decl."), submitted herewith, at ¶ 3.)) Plaintiffs propose another unworkable solution in asserting that BOF should just use money in the Firearms Safety and Enforcement Special Fund. (Opp'n Brief at 2:25-2:26.) The Legislature has designated the specific uses of the money in that fund, and the uses do not relate to BOF's processing of DROS applications. *See* Cal. Pen. Code § 28300 (setting forth authorized uses of that money). As Defendant explained in the opening papers, even with upgraded computer systems, BOF will need to request and to receive additional funding from the California Legislature to pay for the additional personnel necessary to implement the Court's order. (First Lindley Decl., at ¶¶ 13, 16; Supp. Lindley Decl., at ¶ 3, 4.) Obtaining this funding and hiring and training new BOF staff takes time, at least six months beyond the deadline that the Court already set for compliance with the judgment. Plaintiffs have not shown otherwise, or that there is a viable alternative funding process that is quicker.

C. Defendant Has Been Diligent in Taking Steps to Implement the Court's Order

Finally, without any evidentiary support, Plaintiffs accuse Defendant of feeling "a lack of urgency" to comply with the Court's order (Opp'n Brief at 1:21-1:22) and of having not made "any effort at all" at compliance. (*Id.* at 2:15.) To the contrary, by late September 2014, when Defendant filed the motion to amend the judgment, top BOF officials had already convened and carefully assessed what needs to be done to comply with the Court's order, and had created a detailed outline of options and tasks, as reported in the opening motion papers. (First Lindley Decl., at ¶ 4; Decl. of Marc St. Pierre (Dkt. Doc. 110-2), at ¶¶ 5-8.) And Defendant has not sat still since then. BOF has begun the process of procuring vendors to make changes to DOJ's computer systems. (Supp. Lindley Decl., at ¶ 6.) BOF has taken the steps that could be taken before actually making significant changes to the computer systems or expending significant amounts of money not yet available. Any steps beyond what BOF has already taken would be for naught if the Ninth Circuit reverses or modifies this Court's decision. For example, once BOF hires a vendor to implement changes to the computer systems, the payments made to the vendors cannot be later be recovered. (Supp. Lindley Decl., at ¶ 9.) Furthermore, once those changes are made, should they not be necessary later, because of a change in the ruling in the present case, BOF probably will have to pay additional sums for the vendors to undo the changes. (*Ibid.*)

Additionally, after BOF hires more human analysts to perform the extra steps in DROS processing required to implement the Court's order, BOF would be left with excess staffing should those analysts not be needed later. (Supp. Lindley Decl., at ¶ 10.)

In short, Defendant has begun to comply with the Court's order—but also has in good faith determined that it is not reasonably possible to achieve what is required in just six months, and has moved for appropriate relief.

II. PLAINTIFFS DID NOT REBUT DEFENDANT'S ARGUMENTS AND EVIDENCE IN FAVOR OF STAYING THE JUDGMENT PENDING APPEAL

Plaintiffs, in the opposition brief about the stay motion, failed to rebut Defendant's demonstration, in the opening brief in support of the stay motion, that all four factors that courts

consider in evaluating stay requests weigh in favor of a stay here. The Ninth Circuit recently restated the factors, repeated here for ease of reference:

> In ruling on the propriety of a stay, we consider four factors: "(1) whether the stay applicant has made a strong showing that he [or she] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."

Latta v. Otter, ___ F.3d ___, ___, 2014 WL 5151633 at *1 (9th Cir. Oct. 15, 2014), quoting *Nken v. Holder*, 556 U.S. 418, 433–44 (2009).

A. Plaintiffs Essentially Concede that Defendant Satisfies the Requisite Likelihood-of-Success Prong of Stay Analysis

Regarding Defendant's *likelihood of success* on appeal, Plaintiffs do *not* argue that Defendant lacks a likelihood of success; rather, Plaintiffs concede that the present case raises at minimum "serious legal questions." (Opp'n Brief at 4:2-4:8.)

After making that concession, Plaintiffs go on to construe the stay analysis as demanding that Defendant show that the balance of hardships tips sharply in her favor. (*Id.* at 4:8-4:9.) However, Plaintiffs' reliance on part of the decision in *Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2012), for support for that proposition is misplaced, because the highlighted passage in that case concerns stays of deportations specifically. Stays in the civil litigation context are analyzed differently, as follows:

> [T]he standard for granting a stay is a continuum. At one end of the continuum, if there is a "probability" or "strong likelihood" of success on the merits, a relatively low standard of hardship is sufficient. *Golden Gate Restaurant Ass'n*, 512 F.3d at 1119 (citing *Lopez v. Heckler*, 713 F.2d 1432, 1435–36 (9th Cir.1983)). At the other end, if "the balance of hardships tips sharply in . . . favor" of the party seeking the stay, a relatively low standard of likelihood of success on the merits is sufficient. *Id.* (quoting *Lopez*, 713 F.2d at 1435).

United States v. SF Green Clean, LLC, No. C 14–01905 JSW, 2014 WL 4311183 at *1 (N.D. Cal. Aug. 29, 2014). Thus, it is not true that, here, Defendant must show an extreme imbalance of hardships in her favor, in order to merit a stay.

In any event, it cannot reasonably be contested that Defendant satisfies the likelihood-of-success factor under the standard used by the Ninth Circuit. Defendant's argument here, grounded in the non-existence of negative appellate authority, is nothing like the weak position of

Idaho Governor Butch Otter in *Latta*, where the Ninth Circuit found a low likelihood of success because "[w]e have now held that the plaintiffs have in fact succeeded on the merits of the case, agreeing with every court of appeals to address" the same issue. 2014 WL 5151633 at *1. The present case concerns an important issue of first impression, and for that reason alone Defendant passes the likelihood-of-success test. *See Hunt v. Check Recovery Sys.*, Inc., 2008 WL 2468473, at *3 (N.D. Cal. 2008), citing *Pearce v. E.F. Hutton Group, Inc.*, 828 F.2d 826, 829 (D.C. Cir. 1987); *see also Salix v. U.S. Forest Serv.*, 995 F. Supp. 2d 1148, 1154 (D. Mont. 2014) (holding that lack of controlling appellate-court precedent indicates that appellant has likelihood of success on merits, for stay purposes).

B. Plaintiffs Cannot Overcome Defendant's Compelling Claim of Irreparable Injury in the Absence of a Stay

Regarding *irreparable harm to Defendant* in the absence of a stay, Plaintiffs suggest—incorrectly—that Defendant has taken the position that she prevails in the overall stay analysis because the State of California, as a matter of law, is irreparably harmed whenever one of the state's duly enacted laws is (partly) enjoined (*see Coalition for Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997)). (Opp'n Brief at 4:13-4:28.) Defendant has not taken such an absolute position. Defendant acknowledges that—although the two most recent Chief Justices of the United States recognize that irreparable harm befalls a state when one of its laws is upended by a court (*see Latta*, 2014 WL 5151633 at *3 n.1 (citing chambers orders of Roberts, C.J., and Rehnquist, C.J.))—the Court must still consider any substantial injury to Plaintiffs in the presence of a stay, and also balance the harms. *See Latta*, 2014 WL 5151633 at *3.

In any event, Defendant has shown not just an abstract irreparable injury from having a California state law partly invalidated. Defendant also has shown the concrete irreparable injury of having to divert a significant amount of resources and to spend a significant amount of money, to comply with a remedial order that may be overturned or modified on appeal. As discussed above, if BOF alters its computer systems or hires new analysts to comply with the Court's order, then the money and other resources expended to those ends would be wasted if the Ninth Circuit overturns or modifies the trial court judgment on appeal.

Plaintiffs reject the existence of both kinds of injury, and are particularly dismissive of the Attorney General's concrete injury (Opp'n Brief at 5:1-5:8), suggesting that every litigant who is enjoined in some way suffers a similarly concrete injury. (*Id.* at 5:9-5:12.) But Plaintiffs are wrong about that point. Not every litigant has to comply with a mandatory injunction that requires the reconfiguring and reprogramming of complex computer systems and databases and the hiring, training, and deployment of new personnel in a civil-service system—where the resources used could not be recovered in the event of a modification or reversal of the underlying judgment. In the absence of a stay, BOF will have to meet those requirements of the Court's order, and the considerable effort and expense will then have been for naught if the Ninth Circuit dissolves or narrows the injunction.

In conclusion, Plaintiffs' assorted arguments, individually and summed, are unpersuasive against the point that Defendant's injuries are significant and irreparable.

C. Plaintiffs Fail to Establish That They Would Suffer a Substantial Injury to Themselves in the Presence of a Stay

Regarding *substantial injury to Plaintiffs* in the presence of a stay, Defendant objects to the Plaintiffs' characterization of themselves as suffering clear violations of their Second Amendment rights. (Opp'n Brief at 5:17-5:18.) In the absence of any appellate-court authority supporting Plaintiffs' position on the merits, it remains an issue of first impression whether the existing enforcement of California's waiting-period law[2] violates Plaintiffs' constitutional rights—and, thus, Plaintiffs need to point to a more concrete injury to themselves. *Cf. Latta*, 2014 WL 5151633 at *3 (focusing on legal, financial, social and psychic harms to litigants opposing stay).

In this respect, the present case is very different from *Elrod v. Burns*, 427 U.S. 347, 373 (1976), cited by Plaintiffs (Opp'n Brief at 5:18-5:21), which case was about the seriousness of punishing people for exercising their *First* Amendment rights. In *Elrod*, the plaintiffs-respondents were local sheriff's office employees who were discharged or threatened with discharge for nothing other than being Republicans. *Id.* at 350. A long line of appellate-court

[2] Cal. Penal Code, §§ 26815 and 27540.

decisions had already established the freedom of political association. *See id.* at 356-60, citing 14 other U.S. Supreme Court decisions on point. The injury that the *Elrod* employees suffered in having their jobs and livelihood taken away was both well-recognized and concrete, in contrast to the alleged injuries to be suffered by Plaintiffs here.

Likewise inapposite is the decision in *Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012), which Plaintiffs also cite. (Opp'n Brief at 5:21.) *Melendres* concerned the Fourth Amendment constitutionality of a local sheriff office's alleged policy and practice of detaining Latinos out of suspicion that they were present in the United States illegally. 695 F.3d at 994. It was already well-established that it is not a crime to be in the United States illegally (*see id.* at 1000, citing one U.S. Supreme Court case and two Ninth Circuit cases on point), making the detentions obviously unconstitutional and presumptively injurious. The lack of certainty about the constitutional violation in the present case makes it different from *Melendres*.

In reality, a stay here would simply maintain the status quo for Plaintiffs. Plaintiffs have even stated in writing that they "are willing to stipulate to extend the 180-day stay for an additional 90 days if Defendant demonstrates that the DOJ is making a good faith effort to comply with the Court's order" (Opp'n Brief at 2:3-2:5) and "Plaintiffs will stipulate to an additional 90-day extension (bringing the total to full [sic] year Defendant seeks." (*Id.* at 2:8-2:9.)[3] Plaintiffs' willingness to wait a full year before the Court's order becomes manifest reveals the Plaintiffs' own limited view of the seriousness of the harm in the interim.

Plaintiffs, in trying to show harm to themselves, also make the misleading assertion that if the Court's remedial order is upheld on appeal and thus implemented then they will *not* have to make two trips to the firearm store for each extra firearm purchase. (Opp'n Brief at 5:15-5:17.) Whatever the other points of disagreement between the parties in this litigation may be, in the vast majority of cases, the two trips will be needed with or without a stay of the judgment, and, indeed, whether or not the judgment is reversed. Only about 15-to-20 percent of DROS

[3] If the Court grants Defendant's motion to amend the judgment, but rejects the motion seeking a stay, Defendants do not oppose Plaintiffs' suggestion that there be periodic status conferences about Defendants' work toward coming into full compliance with the judgment.

applications are auto-approved. And even the auto-approvals could take up to two hours each, and thus likely could entail more than a single trip to a firearm store. So it is *not* the case that two trips will no longer be necessary. It is just that the two trips might occur some number of days less than 10 days apart, instead of at least 10 days apart under the challenged parts of the waiting-period law.

D. Plaintiffs Fail to Establish a Favorable Balancing of the Equities

Regarding *balancing the equities*, it should be clear that, in the present context, the "injury combination" for Defendant of (1) acknowledged abstract injury from having a state law partly invalidated, and (2) concrete, time-and-expense-consuming injury described above and in the Lindley declarations, greatly outweighs the claimed injury combination for Plaintiffs of (1) abstract—but here not cognizable—injury from having their constitutional rights violated and (2) concrete injury measured in 10 days waiting to obtain a second or subsequent firearm, rather than some smaller number of days waiting. Even if the legal standard was different and the dueling abstract injuries to Defendant and Plaintiffs, respectively, arguably canceled each other out, there could be no real question that the irremediable concrete injury to Defendant (to the BOF division) in having to change major ongoing operations far outweighs the harm to Plaintiffs found in waiting the full 10 days. In other words, the balance of harms tips decidedly in favor of Defendant.

E. Plaintiffs Fail to Establish that the Public Interest Lies in Rejecting the Stay Request

Regarding the *public interest*, the analysis focuses on the same acknowledged if abstract injury to Defendant and the non-cognizable abstract injury to Plaintiffs. *Cf. Nken*, 556 U.S. at 429 (describing the status quo to be analyzed as "the state of affairs before the removal order was entered"). Under extant law, the scale weighs in favor of Defendant on this final factor of the stay analysis.

Furthermore, there is no relevance here in Plaintiffs' multiple citations to cases holding that enforcement of unconstitutional laws is against the public interest. (*See* Opp'n Brief at 5:24-6:9.) In *Scott v. Roberts*, 612 F.3d 1279 (11th Cir. 2010), cited by Plaintiffs (Opp'n Brief at 5:27-5:28),

the appellate court noted that the litigants and multiple other appellate court cases *agreed* that the law in question burdened free-speech rights. 612 F.3d at 1291. In accord is *Klein v. City of San Clemente*, 584 F.3d 1196, 1205-07 (9th Cir. 2009) (citing numerous on-point cases condemning laws similar to anti-leafleting law in question). *Cf. Am. Civ. Liberties Union v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003) (reviewing under strict scrutiny constitutionality of anti-pornography law that U.S. Supreme Court had already analyzed). In stark contrast to all those cases, the constitutionality of the California waiting-period law has not been settled by any appellate court, and there is no line of cases analyzing that law or similar laws and finding any constitutional infirmities.

Finally, *Gordon v. Holder*, 721 F.3d 638 (D.C. Cir. 2013), which Plaintiffs rely on, supports Defendant's position here, because that decision recognizes the gravity of enjoining legislation, even temporarily. *Id.* at 654.

CONCLUSION

Plaintiffs have not effectively countered any of the arguments or evidence that Defendant has presented in moving to postpone for a discrete amount of time the deadline for compliance with, or to stay enforcement pending the outcome of the merits appeal regarding, the Court's judgment partly invalidating the waiting-period law. Given the multiplicative difficulties and the unrecoverable efforts involved in complying with the judgment, Defendants respectfully request that the Court grant both of Defendant's motions.

Dated: November 3, 2014

Respectfully Submitted,

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JEFF SILVESTER, BRANDON COMBS, THE CALGUNS FOUNDATION, INC., a non-profit organization, and THE SECOND AMENDMENT FOUNDATION, INC., a non-profit organization, Plaintiffs, **v.** **KAMALA D. HARRIS, Attorney General of California (in her official capacity),** Defendant.	1:11-cv-02137-AWI-SKO **SUPPLEMENTAL DECLARATION OF STEPHEN J. LINDLEY IN SUPPORT OF DEFENDANT'S MOTION TO ALTER OR AMEND JUDGMENT**

DECLARATION OF STEPHEN J. LINDLEY

I, Stephen J. Lindley, declare:

1. I have personal knowledge of the following facts, and, if I am called as a witness at a relevant proceeding, I could and would testify competently to the following facts.

2. I am the Chief of the California Department of Justice (DOJ)'s Bureau of Firearms (BOF).

3. Funds already appropriated by the Legislature to BOF, including the DROS Special Account and the Firearms Safety and Enforcement Special Fund, are used to pay for current BOF operations. Funds in the DROS Special Account are used to maintain BOF's DROS operations with the current level of staffing. That money is used to pay for salaries and benefits of existing employees, maintenance of facilities, equipment and systems, training costs, and other program costs.

4. In addition to the DROS program, BOF currently administers more than 30 other programs mandated by the California Legislature. These programs include the Armed Prohibited Persons System (APPS), the Automated Firearm System (AFS), Dealer Inspection, and Personal Firearms Eligibility Check. Funds now appropriated to BOF are used to pay for the operations of these programs as well.

5. I am also aware that plaintiffs assert that DOJ has made no material progress toward complying with the Court's order. This is untrue.

6. Since the Court issued its order, the DOJ has taken steps to implement the automated approach that I discussed in my September 24, 2014 declaration (in paragraphs 14 and 15). We have been analyzing the technology changes that must be made to DROS and other DOJ systems to comply with the Court's Order and have taken steps to make those changes. Specifically, we have designed the business rules and processes to implement the Court's order and are finalizing a Request for Proposal to solicit bids from prospective vendors in order to implement the necessary changes to DOJ's systems.

7. On the personnel side, we have identified the equipment needed for new employees and identified trainers for those new employees. We are currently preparing job fliers, identifying

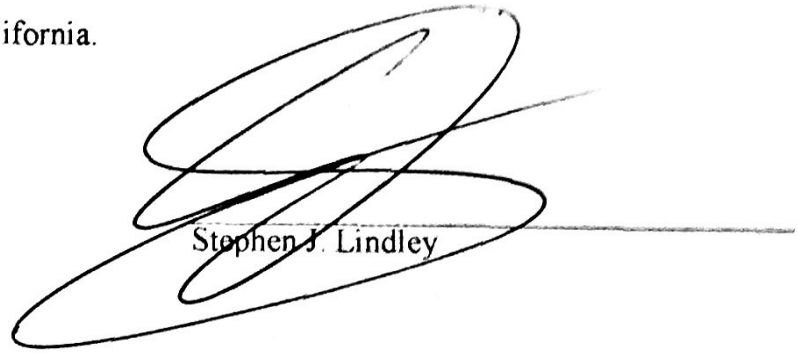
workspace for new employees, preparing written procedures for CIS analysts for the new process necessary to implement the Court's order, and working on a recruitment plan to bring in qualified applicants.

8. Any further steps beyond what we have already taken will require significant expenditures that cannot be recovered if BOF is later relieved from complying with the Court's order.

9. For example, once BOF procures a vendor to make changes to DOJ's systems, the payments made to the vendor cannot be later be recovered. Furthermore, once changes to DOJ's systems are made, should those changes be not necessary later, BOF may have to pay a vendor to undo those changes.

10. Additionally, once BOF hires additional analysts to perform the extra steps in DROS processing required to implement the Court's order, BOF would be left with excess staffing should those analysts not be needed later.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 3, 2014 at Sacramento, California.



Stephen J. Lindley